

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE JANIS L. SAMMARTINO  
UNITED STATES DISTRICT JUDGE PRESIDING

-----

IN RE: PACKAGED SEAFOOD ) NO. 15-MD-2670-JLS  
ANTITRUST LITIGATION )  
) JANUARY 16, 2019  
)  
) VOLUME 3 OF 3

-----

APPEARANCES:

FOR THE PLAINTIFFS: CUNEO GILBERT & LADUCA LLP  
BY: JONATHAN W. CUNEO

WOLF HALDENSTEIN  
BY: BETSY MANIFOLD

HAUSFELD  
BY: BONNY SWEENEY

FOR THE DEFENDANTS: LATHAM & WATKINS LLP  
BY: BELINDA S. LEE

ALLEN & OVERY  
BY: JOHN ROBERTI

THE COURT REPORTERS: FRANK J. RANGUS, OCR  
GAYLE WAKEFIELD, RPR, CRR

I-N-D-E-X

WITNESSES:

	<u>DR</u>	<u>CR</u>	<u>RD</u>	<u>RC</u>
MICHAEL WILLIAMS	474/611	520/620	569	
LAILA HAIDER	575	606		

CLOSING ARGUMENTS:

MS. LEE	628
MR. CUNEO	645
MS. MANIFOLD	647
MS. SWEENEY	657

THE COURT REPORTER: GAYLE WAKEFIELD, RPR, CRR

1 JANUARY 16, 2019

2 MORNING SESSION

3 THE CLERK: NUMBER ONE ON THE CALENDAR, 15-MD-2670,  
4 REGARDING PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION FOR  
5 THIRD DAY MOTION HEARING.

6 THE COURT: GOOD MORNING.

7 MR. CUNEO: GOOD MORNING.

8 THE COURT: ARE WE PREPARED TO PROCEED?

9 MR. CUNEO: WAITING FOR THE PLAINTIFF.

10 THE COURT: THANK YOU.

11 MS. LEE: READY HERE, YOUR HONOR.

12 THE COURT: VERY WELL. SO WE'RE GOING TO START WITH  
13 SOME OPENING COMMENTS. YOU HAVE BEEN WITH US THE ENTIRE TIME,  
14 CORRECT, COUNSEL?

15 MR. CUNEO: I EXPECT TO BE DOING 100 PERCENT OF THIS --  
16 I EXPECT I WILL BE SPEAKING FOR THE CFP'S ALL DAY.

17 THE COURT: SO YOU'VE BEEN WITH US THE WHOLE TIME AND  
18 YOU UNDERSTAND THAT WE'VE BEEN RUNNING LATE INTO THE AFTERNOON,  
19 AND RUNNING A LITTLE BIT SHORT ON TIME WITH REGARD TO THE  
20 EXPERTS, SO I'VE KIND OF EXPRESSED A CONCERN THAT WE JUST CUT  
21 TO THE CHASE, CUT TO THE DIFFERENCES, AND I KNOW YOU'VE HEARD  
22 ME SAY THAT BEFORE, COUNSEL. WE CAN GET STARTED BECAUSE WE  
23 WILL CONCLUDE THIS THREE-DAY SESSION TODAY AT 4:30 OR BEFORE,  
24 AND YOU WERE HERE PROBABLY YESTERDAY.

25 YOU HEARD MS. LEE ASKING FOR A LITTLE BIT OF TIME,

1           WHATEVER TIME IS LEFT OVER, FOR SOME CONCLUDING COMMENTS IN A  
2           MORE GENERALIZED WAY, AND I THINK THAT'S APPROPRIATE, AND I  
3           HOPE WE CAN DO THAT.

4                         WITH THAT, ENTER YOUR APPEARANCE, SIR, AND WE CAN GET  
5           STARTED.

6                         MR. CUNEO:   JONATHAN CUNEO, CUNEO GILBERT & LADUCA, ON  
7           BEHALF OF THE CFP'S.   AND CONSISTENT WITH YOUR HONOR'S  
8           STATEMENT, WE PLAN, AND I HEREBY DISPENSE OF AN OPENING  
9           STATEMENT, EXCEPT TO SAY THAT THIS IS A LARGE CAN OF TUNA FISH  
10          AND THAT WILL BE THE SUBJECT OT TODAY'S HEARING.   THANK YOU,  
11          YOUR HONOR.

12                        THE COURT:   I NOTICED THAT CAN UP ON THE BENCH.   IF YOU  
13          NOTICED, IT BROUGHT A BIG SMILE TO THE COURT'S FACE THAT I HAD  
14          THIS LARGE CAN OF TUNA HERE.   HOW APPROPRIATE, SIR.

15                        MR. CUNEO:   THANK YOU.

16                        THE COURT:   LET'S SEE WHAT MS. LEE WOULD LIKE TO DO  
17          THIS MORNING.   GOOD MORNING, MS. LEE.

18                        MS. LEE:   GOOD MORNING, YOUR HONOR.   I HAVE SOME  
19          SLIDES.   I PROMISE I WILL BE BRIEF.   IF MY COLLEAGUE MEHGAN  
20          THOMAS KENNEDY CAN APPROACH AND HAND THE COURT MY SLIDES.   I'M  
21          ACTUALLY NOT GOING TO PUT THEM UP -- I'M NOT EVEN GOING TO PUT  
22          THEM UP ON THE SCREEN BECAUSE I'M HOPING TO GO THROUGH THEM AS  
23          QUICKLY AS I CAN.

24                        YOUR HONOR, ON SLIDE 4, JUST TO ORIENT US, AS MR. CUNEO  
25          HAS KINDLY ILLUSTRATED, WE'RE TALKING ABOUT FOOD SERVICE SIZED

1 PRODUCTS TODAY, 40 OUNCE OR ABOVE. THE CLASS IS MADE UP OF  
2 PURCHASERS WHO HAVE PURCHASED THESE 40 OUNCE OR LARGER PRODUCTS  
3 THROUGH SIX SPECIFICALLY IDENTIFIED INTERMEDIARIES: DOT FOODS,  
4 SYSCO, U.S. FOODS, SAM'S CLUB, WALMART OR COSTCO. CFP'S WANT  
5 YOU TO BELIEVE THAT THE MARKET FOR SUPPLIERS OF FOOD SERVICE  
6 PACKAGED TUNA IS JUST THE THREE DEFENDANTS. AS YOU'LL HEAR  
7 TODAY THOUGH, YOUR HONOR, THERE IS SUBSTANTIAL NON-DEFENDANTS'  
8 SUPPLY IN THE MARKET.

9 ON SLIDE A YOU'LL SEE SOME OF THE LOGOS AND THE NAMES  
10 OF THE NON-DEFENDANT SUPPLIERS IN THIS MARKET. IN FACT, THE  
11 NON-DEFENDANT VENDORS ACCOUNT FOR THE MAJORITY OF SALES OF FOOD  
12 SERVICE SIZED PACKAGED TUNA.

13 AS I SAID, I'LL JUST PREVIEW FOR YOU DEFENDANTS' FOUR  
14 MAIN CRITICISMS OF CFP'S PROPOSED METHODOLOGY FOR PROVING  
15 CLASS-WIDE IMPACT.

16 IF YOU CAN TURN WITH ME TO SLIDE 10, THERE'S A NICE  
17 SUMMARY HERE SO I'LL KEEP IT AS BRIEF AS I CAN. FIRST, CFPS'  
18 MODEL IGNORES THE SUBSTANTIAL ROLE OF NON-DEFENDANT SUPPLIERS  
19 IN THE MARKET FOR FOOD SERVICE SIZED PACKAGED TUNA.

20 SECOND, THE MODEL IGNORES THE SIGNIFICANCE OF INCLUDING  
21 DISTRIBUTORS, SPECIFICALLY DOT FOODS, IN THIS CLASS.

22 THIRD, THE MODEL LEADS TO -- THEIR MODEL LEADS TO FALSE  
23 POSITIVES AND AS SUCH IS INCAPABLE OF DISTINGUISHING AN ALLEGED  
24 CONSPIRATORIAL OVERCHARGE FROM OTHER PRICE EFFECTS.

25 AND FOURTH, THEIR MODEL ASSUMES, BUT DOES NOT TEST,

1 THAT AN OVERCHARGE WAS ACTUALLY PASSED THROUGH ONTO THEIR CLASS  
2 MEMBERS.

3 IF YOUR HONOR COULD TURN WITH ME TO SLIDE 12, THIS  
4 ILLUSTRATES THE FIRST ISSUE OF CFP'S FAILURE TO ACCOUNT FOR  
5 NON-DEFENDANT VENDORS. WE SEE THAT BY IGNORING THE  
6 AVAILABILITY OF NON-DEFENDANT SUPPLIERS OF FOOD SERVICE  
7 PACKAGED TUNA, CFP'S EXPERT DR. WILLIAMS FUNDAMENTALLY  
8 MISUNDERSTANDS THIS MARKET. TO ASSESS SELLER CONCENTRATION,  
9 DR. WILLIAMS INEXPLICABLY RELIED ON RETAIL SCANNER DATA.  
10 THAT'S DATA THAT'S COLLECTED FROM GROCERY STORES AND GROCERY  
11 STORE CHECKOUT LINES. HE USED THAT TO MEASURE MARKET SHARE FOR  
12 FOOD SERVICE SIZED PRODUCTS. THAT MAKES NO SENSE. IN FACT,  
13 EVEN DR. WILLIAMS UNDERSTANDS THAT.

14 ON SLIDE 13 YOU'LL SEE THAT IN DEPOSITION DR. WILLIAMS  
15 ACKNOWLEDGED THAT IN ORDER TO ACCURATELY MEASURE SELLER  
16 CONCENTRATION, YOU HAVE TO LOOK AT THE RELEVANT SUPPLIERS, BUT  
17 HE DIDN'T DO THAT.

18 NOW, ON THE SECOND ISSUE, THE CFP MODEL AND ITS FAILURE  
19 TO -- AND ITS FAILURE TO ACCOUNT FOR THE EXISTENCE OR THE  
20 PRESENCE OF DISTRIBUTORS IN THE PROPOSED CLASS. IF YOUR HONOR  
21 COULD TURN TO SLIDE 15 WITH ME, CFP'S WANT THE COURT TO BELIEVE  
22 THAT THE MARKET IS AS SIMPLE AS WHAT IS DEPICTED ON SLIDE 15,  
23 THAT YOU HAVE DEFENDANTS, YOU HAVE THE SELECTED INTERMEDIARIES,  
24 AND THEN YOU HAVE CLASS MEMBERS, BUT IT'S NOT THAT SIMPLE.

25 IF YOU TURN WITH ME TO SLIDE 16, THERE'S A SLIDE ON DOT

1 FOODS, AND IT'S DISTRIBUTORS LIKE DOT FOODS THAT CAUSE -- AND  
2 THE WAY THAT THE CFP'S HAVE DEFINED THEIR CLASS THAT CAUSED THE  
3 TROUBLE HERE. DOT FOODS IS ONE OF CFP'S SELECTED  
4 INTERMEDIARIES, BUT THEY DON'T SELL DIRECTLY TO END USERS. DOT  
5 FOODS BUYS LARGE QUANTITIES OF FOOD SERVICE PACKAGED TUNA IN  
6 ORDER TO RESELL THAT FOOD SERVICE SIZED TUNA TO OTHER  
7 DISTRIBUTORS, AND THOSE DISTRIBUTORS -- THOSE CUSTOMERS OF DOT  
8 FOODS ARE CLASS MEMBERS IN THE CFP CASE. AND SO THOSE  
9 DISTRIBUTOR CLASS MEMBERS, UNLIKE ALL OTHER MEMBERS OF THE  
10 CLASS, ARE NOT END USERS. THEY'RE RESELLERS WHO ACCOUNT FOR  
11 ALMOST -- NO, I'M SORRY, AT LEAST 13 PERCENT OF THE CLASS  
12 COMMERCE.

13 ON SLIDE 17, WE HAVE A DEPICTION OF WHAT THE MARKET  
14 REALLY LOOKS LIKE. A CLASS MEMBER, SAY A NURSING HOME, THAT  
15 PURCHASED FOOD SERVICE SIZED PRODUCTS FROM SYSCO, WOULD BE  
16 INCLUDED IN THE CLASS, BUT THAT VERY SAME NURSING HOME WOULD  
17 NOT RECOVER AT ALL FOR THE VERY SAME FOOD SERVICE PRODUCT IF  
18 THAT NURSING HOME HAD PURCHASED IT FROM A DISTRIBUTOR CLASS  
19 MEMBER OR FROM A DISTRIBUTOR THAT CFP'S DIDN'T PICK AS ONE OF  
20 THEIR SELECTED INTERMEDIARIES.

21 THE GRAPH ON SLIDE 20 ILLUSTRATES THIS PROBLEM. BY DR.  
22 WILLIAMS' LOGIC, THERE ARE SOME PROPOSED MEMBERS OF THE CLASS  
23 WHO PAID AN OVERCHARGE, AND THEN THERE ARE OTHER PROPOSED  
24 MEMBERS OF THE CLASS, DISTRIBUTOR CUSTOMERS OF DOT FOODS, WHO  
25 PASSED ON ANY OVERCHARGE. CFP'S ARE PROPOSING TO CERTIFY A

1 CLASS WITH A SUBSTANTIAL NUMBER OF UNINJURED MEMBERS.

2 THE LAST TWO ISSUES I WILL JUST PREVIEW FOR THEM --  
3 THEM FOR YOU BECAUSE I AM RUNNING OUT OF TIME. I PROMISED MY  
4 COLLEAGUES I WOULD TURN THIS OVER TO THEM QUICKLY. FALSE  
5 POSITIVES -- WE TALKED A LOT ABOUT FALSE POSITIVES IN THE LAST  
6 FEW DAYS. SUFFICE IT TO SAY THAT DR. WILLIAMS' MODEL FOR  
7 IDENTIFYING OVERCHARGES IN DEFENDANTS' SALES TO SYSCO AND U.S.  
8 FOODS ALSO YIELDS SUBSTANTIAL OVERCHARGES WHEN IT IS APPLIED TO  
9 NON-DEFENDANT VENDOR SALES TO SYSCO AND U.S. FOODS. DR.  
10 WILLIAMS OFFERS TWO EXCUSES, NEITHER OF WHICH HE TESTED.

11 FINALLY, DR. WILLIAMS ASSUMES, RATHER THAN TESTS,  
12 WHETHER AN OVERCHARGE WAS PASSED THROUGH FROM DEFENDANTS TO THE  
13 SELECT -- SIX SELECTED MEDIARIES, AND THEN FROM THE SIX  
14 SELECTED MEDIARIES ON TO THE CLASS MEMBERS. DR. HAIDER DID THE  
15 APPROPRIATE TESTING AND THE DATA REFUTES DR. WILLIAMS'  
16 ASSUMPTIONS ON PASS-THROUGH.

17 SO WITH THAT I WILL -- I'VE RUN TWO MINUTES OVER AND I  
18 WILL TURN THE MICROPHONE BACK OVER.

19 THE COURT: THANK YOU VERY MUCH, MS. LEE, I APPRECIATE  
20 YOUR COMMENTS.

21 MR. CUNEO.

22 MR. GALLO: YOUR HONOR, THERE'S AN EVIDENTIARY ISSUE  
23 WITH RESPECT TO THE WITNESS. I THOUGHT MAYBE I WOULD RAISE IT  
24 IN HOPES I DON'T HAVE TO INTERJECT DURING THE EXAMINATION.

25 THE COURT: HAVE YOU TALKED TO MR. CUNEO ABOUT THIS?



1 MR. GALLO: WE DID. UNLESS MR. CUNEO IS NOT GOING TO  
2 USE THE MATERIALS, THEN I THINK WE HAVE AN ISSUE. I TOLD HIM  
3 WE WOULD OBJECT TO THE USE OF THESE MATERIALS.

4 MR. CUNEO: THE MATERIALS ARE NOT PARTICULARLY  
5 IMPORTANT. WE DON'T HAVE A FINAL DETERMINATION OF WHETHER WE  
6 WANT TO USE THEM OR NOT. I SAY LET'S JUMP OFF THAT BRIDGE WHEN  
7 WE GET THERE.

8 THE COURT: I TEND TO AGREE WITH THAT. IT MAY NOT BE  
9 AN ISSUE. LET'S SEE WHERE THEY GO.

10 MR. GALLO: THAT'S FINE. TO BE CLEAR, MR. CUNEO, IF  
11 YOU WOULDN'T MIND GIVING ME A HEAD'S UP THAT YOU'RE GOING TO  
12 ELICIT TESTIMONY ON THESE OPINIONS, I WOULD APPRECIATE THAT  
13 BECAUSE I THINK THE OPINIONS WOULD BE BEYOND THE SCOPE OF WHAT  
14 HAS PREVIOUSLY BEEN DISCLOSED. IT'S NOT JUST THE MATERIALS,  
15 IT'S THAT THEY REFLECT NEW OPINIONS.

16 THE COURT: UNDERSTOOD, BUT YOU'VE DISCUSSED IT AND MR.  
17 CUNEO IS AWARE OF THAT, AND SO GIVE US A HEAD'S UP IF YOU'RE  
18 GOING TO APPROACH THAT.

19 MR. GALLO: THANK YOU, YOUR HONOR, I APPRECIATE IT.

20 THE COURT: OF COURSE.

21 YOU MAY CALL YOUR WITNESS, SIR.

22 MR. CUNEO: I WOULD LIKE TO CALL DR. MICHAEL WILLIAMS  
23 TO THE STAND.

24 (WITNESS SWORN ON OATH.)

25 THE CLERK: PLEASE STATE YOUR FULL NAME AND SPELL YOUR

1 LAST NAME FOR THE RECORD.

2 THE WITNESS: MICHAEL ALLEN WILLIAMS. MY LAST NAME IS  
3 SPELLED W-I-L-L-I-A-M-S.

4 DIRECT EXAMINATION

5 BY MR. CUNEO:

6 Q. DR. WILLIAMS, COULD YOU DESCRIBE FOR THE COURT BRIEFLY  
7 YOUR EDUCATIONAL BACKGROUND.

8 A. SURE. I HAVE A BACHELOR'S DEGREE IN ECONOMICS FROM THE  
9 UNIVERSITY OF CALIFORNIA AT SANTA BARBARA, AND I HAVE A  
10 MASTER'S DEGREE AND A PH.D. IN ECONOMICS FROM THE UNIVERSITY OF  
11 CHICAGO.

12 Q. WHAT YEAR DID YOU EARN YOUR PH.D.?

13 A. 1982.

14 Q. AND COULD YOU BRIEFLY DESCRIBE FOR THE COURT YOUR  
15 PROFESSIONAL EXPERIENCE IN THE 36 SHORT YEARS SINCE 1982.

16 A. THANK YOU FOR THAT. SURE. SO MY FIRST JOB WAS AT THE  
17 U.S. DEPARTMENT OF JUSTICE IN THE ANTITRUST DIVISION. I WORKED  
18 THERE FOR ABOUT FIVE YEARS ON A WIDE VARIETY OF ANTITRUST  
19 ISSUES, INCLUDING MERGERS AND PRICE-FIXING AGREEMENTS. I'VE  
20 BEEN A CONSULTING ECONOMIST FOR THE PAST 30 YEARS. I HAVE  
21 PUBLISHED MORE THAN 50 PEER-REVIEWED ARTICLES IN JOURNALS SUCH  
22 AS THE *PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES*, THE  
23 *AMERICAN ECONOMIC REVIEW*, *JOURNAL OF INDUSTRIAL ORGANIZATION*,  
24 *JOURNAL OF INDUSTRIAL ECONOMICS*, *INTERNATIONAL JOURNAL OF*  
25 *INDUSTRIAL ORGANIZATION*.

1 I HAVE TESTIFIED IN FRONT OF 19 DIFFERENT FEDERAL  
2 COURTS. SINCE I LEFT THE DOJ, I'VE BEEN RETAINED BY THE DOJ AS  
3 AN EXPERT. I'VE ALSO BEEN RETAINED BY THE FTC, FEDERAL TRADE  
4 COMMISSION. I'VE ALSO BEEN RETAINED BY THE CANADIAN  
5 COMPETITION BUREAU AS AN EXPERT.

6 Q. THANK YOU. CAN YOU DESCRIBE FOR THE COURT YOUR ASSIGNMENT  
7 IN THIS CASE --

8 A. YES.

9 YOUR HONOR, I'M ON SLIDE 2 IF IT HELPS.

10 Q. -- AS IT RELATES TO THE ISSUES OF CLASS CERTIFICATION.

11 MR. CUNEO: IT'S BOOK 1, AND IT'S TAB 1.

12 THE COURT: I'M THERE. THANK YOU.

13 THE WITNESS: I'M ON SLIDE 2, YOUR HONOR.

14 A. I WAS -- SO I WAS ASKED TO DETERMINE WHETHER WELL-ACCEPTED  
15 ECONOMETRIC ANALYSES AND COMMON EVIDENCE CAN BE USED TO  
16 ESTABLISH WHETHER THE ANTICOMPETITIVE EFFECTS OF DEFENDANTS'  
17 AGREEMENT CAUSED WIDESPREAD EFFECTS TO MEMBERS OF THE PROPOSED  
18 CLASS, CAUSING HARM TO ALL OR VIRTUALLY ALL OF THEM.

19 I ALSO WAS ASKED TO DETERMINE WHETHER WELL-ACCEPTED  
20 ECONOMIC METHODOLOGIES UTILIZING COMMON EVIDENCE CAN BE USED  
21 RELIABLY TO QUANTIFY CLASS-WIDE DAMAGES.

22 Q. CAN YOU BRIEFLY DESCRIBE FOR THE COURT THE MATERIALS THAT  
23 YOU REVIEWED IN PREPARING YOUR CONCLUSIONS.

24 A. SURE. SO I REVIEWED A VERY LARGE NUMBER OF CONFIDENTIAL  
25 DOCUMENTS FROM THE DEFENDANTS, A NUMBER OF PUBLICLY-AVAILABLE

1 DOCUMENTS, MANY DEPOSITIONS, AND PERHAPS MOST IMPORTANTLY THREE  
2 -- I SHOULD SAY NINE LARGE DATA SETS, THREE FROM THE DEFENDANT  
3 MANUFACTURERS AND SIX FROM THE SIX LARGE DISTRIBUTORS, THAT'S  
4 COSTCO, WALMART, SAM'S CLUB, DOT, SYSCO, AND U.S. FOODS.

5 Q. AND CAN YOU BRIEFLY ADVISE THE COURT OF THE METHODOLOGY  
6 THAT YOU EMPLOYED.

7 A. YES.

8 THE WITNESS: SO, YOUR HONOR, I'M ON SLIDE THREE NOW.

9 A. SO I USED WHAT HAS BEEN REFERRED TO IN ANTITRUST CASES AS  
10 THE WELL-KNOWN TWO-STEP METHODOLOGY. SO IN THE FIRST STEP I  
11 ASKED WHETHER OR NOT COMMON EVIDENCE AND ANALYSES CAN BE USED  
12 TO DETERMINE WHETHER THE AGREEMENT GENERALLY INFLATED PRICES TO  
13 CLASS MEMBERS ABOVE COMPETITIVE LEVELS, SO THAT'S THE FIRST  
14 STEP.

15 THE SECOND STEP IS TO DETERMINE WHETHER OR NOT, IF THAT  
16 GENERAL PRICE INCREASE EXISTS, IF IT WAS THERE, DID IT AFFECT  
17 ALL OR NEARLY ALL PROPOSED CLASS MEMBERS? SO THAT'S STEP 2.

18 AND JUST TO MOVE THE BALL ALONG, MY FUNDAMENTAL  
19 CONCLUSIONS ARE THAT THE ANSWER TO BOTH OF THOSE INQUIRIES IS  
20 YES.

21 Q. JUST TO PREVIEW THINGS A LITTLE BIT FOR THE COURT, THERE'S  
22 STEP 1, AND THEN ISN'T IT TRUE THAT THERE ARE REALLY TWO  
23 DIFFERENT ANALYSIS IN STEP 2?

24 A. THAT'S CORRECT. YOUR HONOR, JUST TO -- WHEN WE GET TO IT,  
25 THE SECOND PIECE, THIS IMPORTANT PIECE ABOUT IS THE EFFECT

1 WIDESPREAD? DID THE GENERALIZED PRICE INCREASE AFFECT ALL OR  
2 NEARLY ALL PROPOSED CLASS MEMBERS? I WILL DISCUSS FOR YOU TWO  
3 DIFFERENT WAYS THAT I PERFORMED THAT, TWO INDEPENDENT WAYS  
4 WHICH BOTH LEAD ME TO THE SAME CONCLUSION.

5 Q. STEP ONE WAS TO DETERMINE WHETHER THE AGREEMENT CAUSED  
6 CLASS MEMBERS IN GENERAL TO PAY SUPER-COMPETITIVE PRICES; IS  
7 THAT CORRECT?

8 A. THAT'S CORRECT.

9 Q. AND COULD YOU EXPLAIN TO THE COURT HOW YOU MADE THAT  
10 DETERMINATION.

11 A. SURE.

12 THE WITNESS: SO, YOUR HONOR, I'M ON PAGE 4 NOW.

13 Q. SO AS THE -- YOU HEARD FROM DR. MANGUM AND DR. SUNDING, I  
14 USE A DUMMY VARIABLE REGRESSION METHODOLOGY. IT'S THE STANDARD  
15 APPROACH. THE BASIC IDEA IS, AS YOUR HONOR IS NOW AWARE,  
16 HAVING HEARD FROM ECONOMISTS THE PAST TWO DAYS, IS THAT WE WANT  
17 TO COMPARE PRICES IN A BENCHMARK PERIOD TO PRICES IN THE DAMAGE  
18 PERIOD, CONTROLLING FOR THE SUPPLY AND DEMAND VARIABLES THAT  
19 CAN AFFECT PRICE, SO THAT ONCE WE ACCOUNT FOR THOSE, ANY  
20 ADDITIONAL PRICE IS CAUSED BY THE CARTEL, BY THE CONSPIRACY.

21 SO IF WE COULD TAKE A LOOK AT PAGE 5. I KNOW DR.  
22 MANGUM SHOWED YOU A SIMILAR KIND OF GRAPH. LET ME JUST WALK  
23 THROUGH THIS. IN MY ANALYSIS, THERE ARE TWO BENCHMARK PERIODS.  
24 I TALKED A LITTLE BIT MORE ABOUT THAT BEFORE. YOUR HONOR, THAT  
25 FIRST BENCHMARK PERIOD BEGINS IN ROUGHLY 2001/2002, EXTENDS TO

1 MID-2008. I WILL THEN DESCRIBE THE CONTAMINATED PERIOD, WHICH  
2 BEGINS MID-2008, EXTENDS TO LATE-2010. THERE'S A BENCHMARK  
3 PERIOD HERE AT THE START OF 2011, THEN THE DAMAGES PERIOD  
4 MID-2011 THROUGH THE END OF 2016, AND THEN A COOL-DOWN PERIOD  
5 WHEN THE PRICES ARE STILL AFFECTED BY THE CARTEL -- BUT I'M NOT  
6 CERTAIN, IT'S JUST AFTER 2016.

7 AGAIN, THE BASIC IDEA IS WE WANT TO ESTIMATE  
8 OVERCHARGES -- AS IT STATES IN THE SLIDE, ESTIMATE OVERCHARGES  
9 BY COMPARING PRICES IN THE BENCHMARK PERIODS TO PRICES IN THE  
10 DAMAGE PERIODS, CONTROLLING FOR THE SUPPLY AND DEMAND FACTORS.

11 AND THE GOAL IS, AS I'VE SHOWN IN THE PORTION OF THE  
12 GRAPH THAT'S LABELED "DAMAGES PERIOD," YOU SEE THE RED LINE, SO  
13 THAT'S REALLY WHAT WE'RE TRYING TO DO, WE'RE TRYING TO ESTIMATE  
14 WHAT WOULD THE PRICES HAVE BEEN IN THE ABSENCE OF THE  
15 CONSPIRACY, AND THOSE ARE CALLED THE "BUT FOR" PRICES.

16 Q. NOW, I THINK THERE'S BEEN QUITE A BIT OF TESTIMONY IN THE  
17 LAST COUPLE OF DAYS ABOUT BENCHMARK PERIODS AND A DAMAGE  
18 PERIOD. IN GENERAL, IF A BENCHMARK PERIOD IS CONTAMINATED,  
19 WHAT AFFECT WOULD THAT HAVE ON THE DAMAGES COMPUTATION?

20 THE WITNESS: SO, YOUR HONOR, I'M ON SLIDE 6 NOW.

21 A. SO AS YOUR HONOR HAS HEARD, THERE'S BEEN A NUMBER OF  
22 QUESTIONS POSED ABOUT, IS THE BENCHMARK PERIOD REALLY CLEAN?  
23 IS THERE ANTICOMPETITIVE EFFECTS IN THE BENCHMARK PERIOD? YOU  
24 KNOW, WE WOULD PREFER TO HAVE A CLEAN BENCHMARK PERIOD, AND  
25 I'LL EXPLAIN WHY I THINK THE BENCHMARK PERIOD IS CLEAN --

1           THERE'S STRONG EVIDENCE OF THAT -- BUT THE IMPORTANT THING TO  
2           UNDERSTAND IS WHAT HAPPENS AT THE BENCHMARK PERIOD DOES HAVE  
3           ANTICOMPETITIVE EFFECTS.

4                        SO, YOUR HONOR, IN THE DASH LINE, IN THE BENCHMARK  
5           PERIOD, AND THEN EXTENDING INTO THE DAMAGES PERIOD, THE DASH  
6           LINE SHOWS, AS IT STATES AT THE RIGHT, WHAT WOULD THE "BUT FOR"  
7           PRICES BE WHEN THE BENCHMARK PERIOD DOES NOT HAVE  
8           ANTICOMPETITIVE EFFECTS?

9                        GOING BACK TO THE LEFT-HAND SIDE OF THE GRAPH, THE  
10          SOLID BLUE LINE SHOWS THAT THERE IS ANTICOMPETITIVE EFFECTS IN  
11          THE BENCHMARK PERIOD. AND WHAT THAT CAUSES, YOUR HONOR, IF WE  
12          GO OVER TO THE DAMAGES PERIOD IS -- YOU SEE THE SOLID RED  
13          LINE -- ALL THINGS EQUAL, AS MR. CUNEO CORRECTLY STATED, ALL OF  
14          THE THINGS EQUAL, THAT ANTICOMPETITIVE EFFECT IN THE BENCHMARK  
15          PERIOD CAUSES HIGHER PREDICTED "BUT FOR" PRICES IN THE DAMAGES  
16          PERIOD.

17                       SO WHAT AFFECT DOES THAT HAVE ON ESTIMATED OVERCHARGES?  
18          THE OVERCHARGES ARE SMALLER WHEN THE ANTICOMPETITIVE EFFECT IS  
19          PRESENT IN THE BENCHMARK PERIOD. YOUR HONOR, THE  
20          ANTICOMPETITIVE EFFECT, WHEN THE -- I'M SORRY, THE OVERCHARGE,  
21          WHEN THE ANTICOMPETITIVE FACT EXISTS, IS INDICATED BY THAT  
22          YELLOW AREA, THE DIFFERENCE BETWEEN THE SOLID BLUE LINE AND THE  
23          SOLID RED LINE.

24                       BUT IF WE HAD A BENCHMARK PERIOD THAT WAS NOT AFFECTED  
25          BY ANTICOMPETITIVE CONDUCT, THE OVERCHARGES WOULD HAVE BEEN THE

1 DIFFERENCE BETWEEN THE SOLID BLUE LINE AND THE DASHED RED LINE  
2 BECAUSE THAT WOULD HAVE BEEN THE DIFFERENCE BETWEEN THE ACTUAL  
3 PRICE AND THE PREDICTED "BUT FOR" PRICE, BUT THAT PREDICTED  
4 "BUT FOR" PRICE HAS BEEN PUSHED UP BECAUSE THERE WAS AN  
5 ANTICOMPETITIVE EFFECT IN THE BENCHMARK PERIOD.

6 JUST TO SUMMARIZE THEN, ALL OTHER THINGS EQUAL, THE  
7 PRESENCE OF ANTICOMPETITIVE EFFECTS IN A BENCHMARK PERIOD  
8 LOWERS THE ESTIMATED OVERCHARGES.

9 Q. NOW, IN YOUR PROFESSION, YOU USED AND MEASURED THINGS,  
10 WITH RESPECT, BY USING VARIABLES; IS THAT CORRECT?

11 A. YES, SIR.

12 Q. AND CAN YOU EXPLAIN TO THE COURT WHAT VARIABLES YOU USED,  
13 JUST IN BASIC TERMS, AND HOW YOU MADE YOUR COMPUTATIONS.

14 A. SURE.

15 THE WITNESS: SO, YOUR HONOR, I'M ON PAGE 7 NOW.

16 A. SO AS I SAID EARLIER, IT'S IMPORTANT WHEN WE CALCULATE  
17 THOSE "BUT FOR" PRICES THAT WE CONTROL FOR, ACCOUNT FOR, IN  
18 OTHER WORDS, IMPORTANT SUPPLY AND DEMAND VARIABLES THAT AFFECT  
19 THE PRICES. SO WHEN WE'RE DONE, AND WE HAVE THIS "BUT FOR"  
20 PRICE, WE KNOW THAT IF THE ACTUAL PRICE OF -- DIESEL FUEL  
21 PRICE, WE CAN CONCLUDE -- I CAN CONCLUDE THAT THE DIFFERENCE IS  
22 CAUSED BY THE CONSPIRACY. IT CAN'T BE ACCOUNTED FOR BY SUPPLY  
23 AND DEMAND FACTORS.

24 SO IF WE JUST QUICKLY LOOK AT PAGE 7, YOU CAN SEE THAT  
25 THERE ARE WHAT ARE CALLED INDICATOR VARIABLES. YOUR HONOR,



1 THAT'S THE SAME AS A DUMMY VARIABLE. I KNOW YOU'RE AN EXPERT  
2 ON THAT BY NOW. THERE ARE -- UNDER THE CATEGORY "CONTROL  
3 VARIABLES," THE FIRST SUB-BULLET, THESE ARE THE COST SIDE  
4 VARIABLES, SO RAW FISH -- I USED EXACTLY THE SAME RAW FISH  
5 PRICES THAT DR. MANGUM AND DR. SUNDING USED, AND WE'LL TALK  
6 ABOUT WHY I THINK THAT'S THE RIGHT THING TO DO. THERE'S A  
7 VARIETY OF OTHER COST SIDE VARIABLES HERE. THEY'RE ALL  
8 INDEPENDENT. THEY'RE NOT THINGS THAT CAN BE DIRECTLY AFFECTED  
9 BY THE CONSPIRACY.

10 WE DON'T WANT THE RIGHT-HAND SIDE VARIABLES, THESE  
11 INDEPENDENT -- WE DON'T WANT THEM TO BE AFFECTED BY THE  
12 CONSPIRACY. I'LL TALK LATER ABOUT HOW THE COST VARIABLE IS  
13 AFFECTED BY THE CONSPIRACY.

14 THEN ON THE DEMAND SIDE, AGAIN, WE HAVE TO ACCOUNT FOR  
15 CHANGES IN DEMAND. SO WE HAVE UNEMPLOYMENT RATES, DISPOSABLE  
16 INCOME, AND CONSUMPTION OF OTHER CANNED FRUITS AND VEGETABLES.

17 AND THEN FINALLY, AND THIS IS IMPORTANT, YOUR HONOR,  
18 DOWN AT THE BOTTOM WE'VE HEARD THE PHRASE "FIXED EFFECTS" BY  
19 NOW. SO A FIXED EFFECT JUST MEANS THAT WE PUT A VARIABLE ON,  
20 FOR EXAMPLE, INDIVIDUAL CUSTOMERS, INDIVIDUAL PRODUCTS,  
21 INDIVIDUAL STATES, MONTHS IN A YEAR, AND WE DO THAT AGAIN TO  
22 CONTROL FOR VARIATIONS IN PRICES THAT WERE NOT CAUSED BY THE  
23 CONSPIRACY. SO THAT WHEN WE'RE THROUGH, IF THE ACTUAL PRICE IS  
24 ABOVE THE "BUT FOR" PRICE, WE KNOW WE'VE ACCOUNTED FOR THE  
25 FACTORS THAT DO DRIVE PRICE, DO AFFECT PRICES, SO THAT

1 DIFFERENCE WOULD BE CAUSALLY CONNECTED TO THE EFFECTS OF THE  
2 CONSPIRACY.

3 Q. I WANT TO GO BACK FOR A SECOND AND ASK YOU WHETHER AT THE  
4 TIME THAT YOU SERVED AS A PROFESSIONAL ECONOMIST AT THE  
5 ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE,  
6 YOU USED SIMILAR CALCULATION TECHNIQUES, SUCH AS REGRESSION  
7 MODELS AND SO FORTH?

8 A. SURE. CERTAINLY REGRESSION ANALYSIS WAS WIDELY USED WHEN  
9 I WAS AT THE DEPARTMENT OF JUSTICE. IT'S ACTUALLY MUCH MORE  
10 WIDELY USED EVEN TODAY. IF YOUR HONOR IS CURIOUS, REGRESSION  
11 -- THE METHODOLOGY OF REGRESSION WAS ACTUALLY INVENTED ABOUT  
12 200 YEARS AGO BY A FRENCH MATHEMATICIAN NAMED LEGENDRE, BUT  
13 IT'S BEEN USED IN, AND I'M NOT EXAGGERATING, LITERALLY TENS OF  
14 THOUSANDS, PROBABLY HUNDREDS OF THOUSANDS OF PEER-REVIEWED  
15 PAPERS.

16 Q. WHAT CONCLUSIONS DID YOU REACH BY USING THESE VARIABLES  
17 AND DOING YOUR CALCULATIONS?

18 THE WITNESS: SO, YOUR HONOR, I'M ON PAGE 8 NOW.

19 A. SURE. SO I USED THIS BASIC DUMMY VARIABLES REGRESSION  
20 METHODOLOGY USING THIS BEFORE AND DURING APPROACH. I HAVE A  
21 BEFORE PERIOD OF THE BENCHMARK. I HAVE A DURING THE PERIOD OF  
22 DAMAGES PERIOD, WHEN THE CARTEL WAS ACTIVE. AND THE QUESTION  
23 IS, AFTER ACCOUNTING FOR ALL OF THE VARIABLES THAT WE JUST WENT  
24 OVER ON PAGE 7, WHAT WERE THE PRICE INCREASES CAUSED BY THE  
25 CONSPIRACY? AND THE ANSWER IS, AS SHOWN ON PAGE 8, THE PRICING

1 IS FOR LARGE-SIZED PACKAGED PRODUCTS ONLY -- AND I THINK THAT'S  
2 CLEAR -- THAT COSI CAUSED A 16.6 PERCENT INCREASE IN PRICES,  
3 STARKIST CAUSED AN 18.2 PERCENT INCREASE IN PRICES, BUMBLEBEE  
4 CAUSED A 15.3 PERCENT INCREASE IN PRICES, AND ALL OF THOSE  
5 OVERCHARGES ARE STATISTICALLY SIGNIFICANT AT THE 0.1 PERCENT  
6 LEVEL.

7 YOUR HONOR, IF I COULD JUST TAKE A MOMENT, BECAUSE I  
8 KNOW THAT YOU'VE HEARD THIS EXPRESSION STATISTICALLY  
9 SIGNIFICANT A COUPLE OF TIMES, BUT IT'S BEEN USED A LITTLE  
10 IMPRECISELY. I THINK PEOPLE HAVE JUST KIND OF TRIED TO SAY,  
11 "WELL, HERE'S WHAT IT IS." I THOUGHT YOUR HONOR WOULD  
12 APPRECIATE -- I'M GOING TO GIVE YOU THE EXACT TECHNICAL  
13 DEFINITION OF WHAT STATISTICAL SIGNIFICANCE REALLY MEANS.

14 SO WHEN WE RUN A REGRESSION LIKE THIS, WE HAVE WHAT IS  
15 CALLED A NULL HYPOTHESIS. THE KNOWN HYPOTHESIS IN THIS CASE IS  
16 THAT THE CARTEL HAD NO EFFECT AT ALL ON PRICES, THAT'S OUR BASE  
17 ASSUMPTION, THAT'S OUR NULL HYPOTHESIS. NOW WE COLLECT THE  
18 DATA, WE RUN THE REGRESSIONS, AND WE LOOK AT THE RESULTS. WHAT  
19 THE 0.1 PERCENT LEVEL MEANS IS THAT IF THE NULL HYPOTHESIS WERE  
20 REALLY THE TRUTH, IF IT REALLY WAS TRUE THAT THE CARTEL HAD NO  
21 AFFECT ON PRICES AT ALL, WHAT'S THE LIKELIHOOD THAT WE WOULD  
22 GET THESE RESULTS? AND THE ANSWER IS 0.1 PERCENT OR, IN OTHER  
23 WORDS, ONE OUT OF A THOUSAND.

24 LET ME STAY THAT AGAIN. SO WHAT STATISTICAL  
25 SIGNIFICANCE MEANS IS THAT IF THE NULL HYPOTHESIS WERE REALLY

1 THE TRUTH, THAT IS, IF THE CARTEL HAD NO AFFECT AT ALL ON  
2 PRICES, THEN THE LIKELIHOOD THAT WE WOULD GET -- THAT I WOULD  
3 GET THESE RESULTS IS ACTUALLY LESS THAN 1 OUT OF A THOUSAND, SO  
4 THAT'S WHAT STATISTICAL SIGNIFICANCE MEANS, IT MEANS AT THE  
5 0.1 PERCENT LEVEL.

6 YOU HEARD DR. MANGUM SAY THAT THIS IS ACTUALLY MUCH  
7 LOWER THAN THE NORMAL CUTOFF. THE NORMAL CUTOFF IS -- INSTEAD  
8 OF 0.1, IT WOULD BE 5.0. SO THE NORMAL CUTOFF IS THAT WE SAY  
9 IF THE NULL HYPOTHESIS WERE REALLY THE TRUTH, AS LONG AS  
10 THERE'S LESS THAN A 5 OUT OF 100 CHANCE OR A 5 PERCENT CHANCE  
11 THAT I'M WRONG, I'M GOING TO REJECT THE NULL HYPOTHESIS, OKAY?

12 LET ME, IF I COULD, JUST ADD ONE OTHER THING BECAUSE I  
13 THINK THERE'S PERHAPS BEEN A LITTLE CONFUSION ABOUT THIS, WHEN  
14 IT COMES TO NULL HYPOTHESIS, THERE'S ONLY TWO THINGS THAT CAN  
15 HAPPEN, YOU EITHER REJECT OR YOU DON'T REJECT. DON'T REJECT IS  
16 NOT THE SAME AS THE NULL HYPOTHESIS IS TRUE. THOSE ARE NOT THE  
17 SAME THINGS. IT JUST MEANS I DON'T HAVE ENOUGH DATA OR FOR  
18 WHATEVER REASON I CAN'T REJECT THE NULL HYPOTHESIS. THAT DOES  
19 NOT MEAN THAT THE NULL HYPOTHESIS IS TRUE. ANYWAY, I THOUGHT  
20 YOUR HONOR MIGHT APPRECIATE THAT.

21 THE COURT: I APPRECIATE THAT, THANK YOU.

22 Q. NOW, DR. WILLIAMS, I WANT TO CAUTION YOU ABOUT SOMETHING  
23 HERE. THERE'S A BLINKING YELLOW LIGHT AS WE GO DOWN THIS ROAD,  
24 AND THAT IS THAT WE ARE ABOUT TO TALK ABOUT PASS-THROUGH RATES  
25 OF SIX RETAILERS. I'M GIVEN TO UNDERSTAND IN REGARD THAT IS

1 PROPRIETARY AND CONFIDENTIAL, AND SO WHAT I WOULD ASK YOU TO  
2 DO, IN CHART 9, IS TO REFER TO THEM BY NUMBER, STARTING ON THE  
3 LEFT, OKAY? SO WE HAVE A WAY THAT WE CAN DISCUSS THESE WITHOUT  
4 NAMES.

5 A. I UNDERSTAND.

6 MR. CUNEO: IS THAT SUITABLE WITH THE COURT?

7 THE COURT: YES. THANK YOU.

8 Q. NOW, IF -- FIRST OF ALL, WHAT SIX RETAILERS -- WHAT SIX  
9 DISTRIBUTORS, EXCUSE ME, DID YOU STUDY?

10 A. SO I STUDIED SYSCO, COSTCO, WALMART, SAM'S CLUB, U.S.  
11 FOODS, AND DOT FOODS.

12 Q. NOW, YOU MADE A STUDY OF PASS-ON RATES FOR THOSE  
13 DISTRIBUTORS, CORRECT?

14 A. THAT'S CORRECT.

15 Q. AND IS IT FAIR TO SAY THAT A VERY LARGE PORTION OF FOOD  
16 SERVICE TUNA IS DISTRIBUTED THROUGH THOSE DISTRIBUTORS?

17 A. YES. THESE ARE THE BIGGEST SIX DISTRIBUTORS.

18 Q. IF I SAY THE BIG SIX, WE CAN AGREE THAT'S WHAT IT REFERS  
19 TO?

20 A. YES.

21 Q. NOW, GOING FROM LEFT TO RIGHT, CAN YOU PLEASE TELL THE  
22 COURT WHAT PASS-ON RATES YOU FOUND, WITHOUT IDENTIFYING THE  
23 COMPANY.

24 A. SURE. LET ME JUST PREFACE MY ANSWER, YOUR HONOR, BY JUST  
25 SAYING, JUST SO WE'RE ALL ON THE SAME PAGE HERE, WHAT'S A

1 PASS-THROUGH RATE? SO PASS-THROUGH RATE MEANS THESE SIX  
2 DISTRIBUTORS BUY LARGE-SIZED CANS OF PACKAGED TUNA, LIKE YOU  
3 SEE ON THE TABLE OVER THERE. THEY DON'T DO ANYTHING TO IT.  
4 THEY DON'T MODIFY IT. THEY DON'T OPEN IT UP USE IT AS AN  
5 INGREDIENT TO MAKE SOMETHING ELSE. THEY BUY IT AND THEY  
6 DISTRIBUTE IT.

7 THE PASS-THROUGH RATE IS -- IT'S ANOTHER REGRESSION.  
8 SO THE DEPENDENT VARIABLE, THE VARIABLE THAT WE'RE TRYING TO  
9 EXPLAIN, IS WHAT'S THE DISTRIBUTORS' RETAIL PRICE? WHAT'S THE  
10 PRICE THEY CHARGE TO PROPOSED CLASS MEMBERS? AND THE  
11 INDEPENDENT VARIABLE, THE ONE YOU USE TO EXPLAIN THE VARIATION  
12 IN THE RETAIL PRICE, IS THE PRICE THAT THEY PAID TO THE THREE  
13 DEFENDANT MANUFACTURERS.

14 SO ON THE RIGHT-HAND SIDE WE HAVE THE WHOLESALE PRICE,  
15 IF YOU WILL, THE PRICE THAT THE BIG SIX DISTRIBUTORS ARE PAYING  
16 THE THREE DEFENDANTS, AND THEN ON THE LEFT-HAND SIDE OF THE  
17 EQUATION WE HAVE THE RETAIL PRICE, THE PRICE THAT THESE SIX  
18 DISTRIBUTORS ARE CHARGING THEIR CUSTOMERS. WHAT WE WANT TO  
19 KNOW IS WHEN THIS WHOLESALE PRICE GOES UP OR DOWN, DO THEY  
20 PASS-THROUGH SOME OR ALL OF IT? THAT'S WHAT WE'RE ASKING.  
21 IT'S ACTUALLY A VERY STRAIGHTFORWARD REGRESSION.

22 TO SPECIFICALLY ANSWER MR. CUNEO'S QUESTIONS, I'LL JUST  
23 READ -- I'LL JUST READ ACROSS FROM LEFT TO RIGHT. SO THE  
24 DISTRIBUTOR, NUMBER ONE, HAD A PASS-THROUGH RATE OF 92 PERCENT.  
25 AGAIN, YOUR HONOR, JUST THE INTUITION IS IF THE WHOLESALE PRICE

1 THAT THAT DISTRIBUTOR WAS PAYING THE THREE MANUFACTURES WENT UP  
2 A BUCK, A DOLLAR, THEY RAISED THEIR RETAIL PRICE BY \$0.92.

3 THE NEXT DISTRIBUTOR HAD A PASS-THROUGH RATE OF 101, SO  
4 THAT MEANS IF THE WHOLESALE PRICE WENT UP BY A DOLLAR, THEY  
5 RAISED THEIR RETAIL PRICE BY A \$1.20.

6 THE NEXT OVERCHARGE -- I APOLOGIZE. THE NEXT  
7 PASS-THROUGH RATE IS 113 PERCENT. SO AGAIN IF THE PRICE WENT  
8 UP BY A DOLLAR, WHOLESALE PRICE WENT UP BY A DOLLAR, THEY  
9 RAISED THEIR RETAILER PRICE BY \$1.13.

10 THE NEXT ONE IS 103 PERCENT, THE FIFTH ONE IS  
11 92 PERCENT, AND THE FINAL ONE IS 94 PERCENT.

12 Q. SO IF A PERSON WANTED TO -- IF YOU GO BACK, PLEASE, TO  
13 SLIDE 8, AND NOW WHAT YOU HAVE ARE THE -- YOU SET FORTH ARE THE  
14 OVERCHARGE CALCULATIONS A RESULT BY DEFENDANT FAMILY, CORRECT?

15 A. YES, SIR.

16 Q. AND THOSE WOULD BE 16.6, 18.2, 15.3. SO IF A PERSON  
17 WANTED TO CALCULATE THE OVERCHARGE PERCENTAGE THAT A CLASS  
18 MEMBER OF, SAY, WHO PURCHASED AT -- THROUGH DISTRIBUTOR NUMBER  
19 FOUR, WHAT THAT PERSON WOULD DO, AND IT WAS COSI, FOR EXAMPLE,  
20 IS MULTIPLY 16.6 PERCENT TIMES 103 PERCENT?

21 A. THAT'S CORRECT.

22 Q. IS THAT CORRECT?

23 A. THAT'S THE -- THAT'S CORRECT. THAT'S THE EFFECT OF THE  
24 CONSPIRACY ON THE PRICE ACTUALLY PAID BY THE PROPOSED CLASS  
25 MEMBER.

1 Q. SO CAN YOU EXPLAIN TO THE COURT HOW A PASS-ON RATE CAN  
2 EXCEED 100 PERCENT. THE MERCHANT RULE, CAN YOU EXPLAIN HOW  
3 THAT WORKS, PLEASE.

4 A. SURE. THIS ACTUALLY IS NOT SURPRISING, YOUR HONOR, THIS  
5 HAPPENS ALL THE TIME. IN FACT, OUR FRIENDS IN THE OIL INDUSTRY  
6 ARE THE GOLD CARD CARRYING MEMBERS OF THIS CLUB, THAT WHEN THEY  
7 GET AN INCREASE IN OIL PRICES FROM OPEC, THEY'RE NOT GOING TO  
8 PASS THROUGH MORE THAN A HUNDRED PERCENT OF IT.

9 JUST SO YOUR HONOR KNOWS, THERE'S A LARGE PEER-REVIEWED  
10 LITERATURE ON THIS SUBJECT. IN FACT, I HAVE A PEER-REVIEWED  
11 ARTICLE IN THE *JOURNAL OF INDUSTRIAL ORGANIZATION* ON THIS  
12 SUBJECT. IT'S WELL ESTABLISHED AS ECONOMIC THEORY THAT  
13 PASS-THROUGH RATES IN EXCESS OF 100 PERCENT CAN HAPPEN, AND  
14 THERE'S ALSO A LARGE NUMBER OF EMPIRICAL STUDIES THAT HAVE  
15 FOUND THIS EXACT FINDING, INCLUDING IN THE OIL INDUSTRY, BUT  
16 ALSO IN OTHER INDUSTRIES, ALCOHOL -- THERE'S A BUNCH OF THEM --  
17 WHERE THE RETAILERS TAKE AN INCREASE IN THEIR WHOLESALE PRICE  
18 AND RAISE -- IN THIS CASE DISTRIBUTORS, AND THEY RAISE THEIR  
19 RETAIL PRICES BY ACTUALLY MORE THAN THE SIZE OF THE INCREASE IN  
20 WHOLESALE PRICES. IT HAPPENS ALL THE TIME.

21 Q. NOW, DID YOU THEN REACH THE CONCLUSION THAT THERE WAS AN  
22 OVERCHARGE THAT THE CONSPIRACY PRODUCED THAT FOUND ITS WAY TO  
23 CLASS MEMBERS?

24 A. THAT'S CORRECT.

25 THE WITNESS: AND, YOUR HONOR, JUST TO ORIENT OURSELVES



1 WHERE WE ARE RIGHT NOW IN MY PRESENTATION, REMEMBER -- I'M  
2 LOOKING BRIEFLY AT SIDE NUMBER 3.

3 A. REMEMBER THAT I SAID I WAS USING THIS WELL-ACCEPTED  
4 TWO-STEP METHODOLOGY, AND THE FIRST STEP IS TO DETERMINE  
5 WHETHER OR NOT THE AGREEMENT GENERALLY INFLATED PRICES. I'M  
6 LOOKING AT THE FIRST BULLET ON PAGE 3. I'M NOW THROUGH WITH  
7 THAT PIECE OF THE ANALYSIS. I HAVE CONCLUDED, BASED ON ALL MY  
8 STUDIES, WHICH ARE OF COURSE DOCUMENTED IN MY REPORTS IN EVEN  
9 MORE DETAIL, BUT I HAVE CONCLUDED THAT, YES, IN FACT, THERE IS  
10 COMMON EVIDENCE AND ANALYSES THAT IN FACT DO DETERMINE THAT,  
11 YES, INDEED, THE AGREEMENT DID GENERALLY INFLATE PRICES TO THE  
12 CLASS ABOVE THE COMPETITIVE AVERAGE. SO I'M NOW THROUGH WITH  
13 THAT PART OF THE ANALYSIS.

14 Q. THE SECOND PART REALLY WOULD -- DEALS WITH WHAT A  
15 LAYPERSON MIGHT CALL THE DISPERSION OF THOSE OVERCHARGES  
16 THROUGH THE PURCHASES OF THE PROSPECTIVE CLASS MEMBERS; IS THAT  
17 CORRECT?

18 A. RIGHT. SO, YOUR HONOR, AGAIN JUST LOOKING BRIEFLY AT PAGE  
19 3, WE'RE NOW GOING TO GO INTO THE SECOND PART, THAT IS, NOW  
20 THAT I'VE CONCLUDED THAT THERE WAS IN FACT A GENERAL INFLATION  
21 IN THESE PRICES, DID IT AFFECT ALL OR NEARLY ALL OF THE  
22 PROPOSED CLASS MEMBERS, YES OR NO? AND I'M GOING TO CONDUCT --  
23 I DID CONDUCT TWO INDEPENDENT STUDIES.

24 THE WITNESS: SO, YOUR HONOR, I'M ON PAGE 10 NOW.

25 A. SO I'M NOW ASKING, DID THIS GENERALIZED PRICE INCREASE

1           AFFECT ALL OR VIRTUALLY ALL CLASS MEMBERS? AND YOU'LL SEE THIS  
2           IN THAT SECOND BULLET ON PAGE 10 I CONDUCT TWO INDEPENDENT  
3           ANALYSES OF THIS ISSUE.

4                   THE FIRST ONE THAT I'LL DESCRIBE IN A MOMENT IS A  
5           SENSITIVITY ANALYSIS OF THE OVERCHARGES; IN OTHER WORDS, I'M  
6           GOING TO LOOK AT THOSE -- THAT OVERCHARGE REGRESSION IN A  
7           VARIETY OF DIFFERENT WAYS, AND INFORM YOU HOW I DID THAT, AND  
8           WHAT THE FINDINGS WERE.

9                   I ALSO DID THE SAME THING WITH THE PASS-THROUGH RATE  
10          REGRESSIONS. I PERFORMED A VARIETY OF DIFFERENT PASS-THROUGH  
11          REGRESSIONS TO MAKE SURE MY RESULTS WERE ROBUST AND TO  
12          DETERMINE WHETHER OR NOT ALL OR VIRTUALLY ALL OF THE CLASS  
13          MEMBERS WERE, IN MY OPINION, AFFECTED. I'LL ALSO CITE A NUMBER  
14          OF OTHER PIECES OF COMMON EVIDENCE IN THAT REGARD. THAT'S THE  
15          FIRST INDEPENDENT WAY.

16                   THE SECOND INDEPENDENT WAY IS WHAT'S BEEN REFERRED TO  
17          IN ANTITRUST PARLANCE AS CLASS MEMBER SPECIFIC OVERCHARGES, SO  
18          THAT WILL BE THE SECOND INDEPENDENT WAY THAT I WILL USE TO  
19          DETERMINE WHETHER OR NOT ALL OR ALMOST ALL PROPOSED CLASS  
20          MEMBERS WERE INJURED.

21          Q.     ON PAGE 11, CAN YOU PLEASE DESCRIBE FOR THE COURT WHAT  
22          THAT MEANS.

23          A.     SURE. YOUR HONOR, THIS IS A TABLE THAT APPEARS IN MY  
24          FIRST REPORT -- OR CHART I SHOULD SAY.

25                   SO, YOUR HONOR WILL RECALL THAT I ESTIMATED

1 OVERCHARGES, ONE FOR COSI, ONE FOR STARKIST, ONE FOR BUMBLEBEE.  
2 SO NOW WHAT I'M GOING TO DO IN THAT FIRST BAR, THE BAR AT THE  
3 LEFT, IN OTHER WORDS, ON SLIDE 11, IS INSTEAD OF CALCULATING  
4 OVERCHARGES FOR THOSE THREE DEFENDANT MANUFACTURERS, I WENT  
5 THROUGH ALL OF THE UNIQUE PRODUCTS THAT THEY SELL. THERE'S  
6 APPROXIMATELY 50 OF THEM. BETWEEN THE THREE COMPANIES, THEY  
7 SELL ABOUT 50 UNIQUE PRODUCTS THAT ARE 40 OUNCES OR MORE.

8 SO A UNIQUE PRODUCT COULD BE -- FOR EXAMPLE, THAT CAN  
9 ON THE TABLE IS ONE OF THEM. A DIFFERENT ONE WOULD BE A  
10 43-OUNCE POUCH, AND SO ON. THERE'S ABOUT 50 OF THOSE  
11 ALTOGETHER.

12 WHAT I DID WAS INSTEAD OF CALCULATING THE OVERCHARGES  
13 BY DEFENDANT MANUFACTURERS, THREE OF THEM, I CALCULATED  
14 OVERCHARGES FOR EVERY ONE OF THE 50 UNIQUE PRODUCTS. NOW, IT  
15 COMES OUT, TO BE CLEAR, SOME OF THE PRODUCTS DON'T HAVE ENOUGH  
16 DATA, AND YOU JUST CAN'T DO IT, BUT THIS REGRESSION CALCULATES  
17 THE OVERCHARGES FOR EVERY PRODUCT THAT THE REGRESSION CAN  
18 ACTUALLY CALCULATE AN OVERCHARGE. WHAT I FOUND WAS THAT I  
19 OBTAINED STAT -- POSITIVE AND STATISTICALLY SIGNIFICANT  
20 OVERCHARGES FOR THOSE PRODUCTS THAT COLLECTIVELY ACCOUNTED FOR  
21 95.7 PERCENT OF ALL THE SALES OF ALL THE DEFENDANTS. SO THAT'S  
22 THE FIRST PART. THAT'S ONE REGRESSION WHERE I ALLOWED THE  
23 EARLY CHARTS TO VARY BY PRODUCT.

24 THE SECOND BAR, AGAIN INSTEAD OF HAVING JUST THREE  
25 OVERCHARGES, ONE FOR EACH OF THE THREE DEFENDANT MANUFACTURERS,

1 I NOW HAVE SIX OVERCHARGES, ONE FOR EACH OF THE LARGE  
2 DISTRIBUTORS. I FOUND ALL SIX OF THEM WERE POSITIVE AND  
3 STATISTICALLY SIGNIFICANT. SO WHAT THAT MEANS -- BECAUSE ALL  
4 SIX OF THEM WERE POSITIVE AND STATISTICALLY SIGNIFICANT, THAT  
5 MEANS THAT 100 PERCENT OF THE SALES OF THE DEFENDANTS WERE  
6 COVERED BY THOSE SIX REGRESSIONS, ALL SIX HAD POSITIVE AND  
7 STATISTICALLY SIGNIFICANT RESULTS WHERE THE SIX COEFFICIENTS  
8 NOW ARE ON THE LARGE DISTRIBUTORS, NOT ON THE THREE  
9 MANUFACTURERS.

10 THE THIRD BAR I EXAMINED -- I BROKE DOWN THE RESULTS BY  
11 STATE. NOW, THERE ARE 27 *ILLINOIS BRICK* REPEALER STATES AND  
12 THE DISTRICT OF COLUMBIA. YOUR HONOR KNOWS IT BETTER THAN I  
13 DO. I HAVE BEEN TOLD WHAT THE HECK THEY WERE. I DID THIS BY  
14 STATE, AND I SAID I'M GOING TO LET THE OVERCHARGES VARY ACROSS  
15 EVERY SINGLE ONE OF THESE 27 STATES, AND WHAT I FOUND WAS THAT,  
16 WHEN I CUMULATED ALL OF THE STATE OVERCHARGES, THEY WERE  
17 POSITIVE AND STATISTICALLY SIGNIFICANT. THOSE STATES ACCOUNTED  
18 FOR 99.5 PERCENT OF ALL THE SALES OF ALL THE DEFENDANTS.

19 IN THE LAST BAR I BREAK IT DOWN EVEN MORE. SO  
20 REMEMBER, THERE'S THREE DEFENDANTS AND SIX LARGE DISTRIBUTORS.  
21 SO THE LAST BAR I LOOK AT PAIRS. SO IT SAYS BY DEFENDANT, BY  
22 LARGE DISTRIBUTOR. SO THERE'S A MAXIMUM OF 18 OF THOSE, RIGHT,  
23 BECAUSE THERE'S THREE DEFENDANTS, SIX DISTRIBUTORS.

24 NOW, AGAIN THERE'S NOT ENOUGH DATA -- THE REGRESSION  
25 CAN'T ACTUALLY CALCULATE THE OVERCHARGE FOR ALL 18 BECAUSE

1           SOMETIMES THERE JUST ISN'T ENOUGH DATA. BUT FOR ALL OF THE  
2           OVERCHARGES THAT CAN BE CALCULATED FOR A PAIR OF A DEFENDANT  
3           AND A DISTRIBUTOR, IF YOU CUMULATE ALL THE POSITIVE AND  
4           STATISTICALLY SIGNIFICANT OVERCHARGES, IT ACCOUNTS FOR  
5           98.4 PERCENT OF ALL OF THE SALES OF ALL OF THE DEFENDANTS.

6           SO THIS WAS -- JUST TO SUMMARIZE THEN, THIS IS MY  
7           SENSITIVITY ANALYSIS OR MY ROBUSTNESS ANALYSIS OF THE  
8           OVERCHARGE REGRESSION TO DETERMINE WHETHER OR NOT I THINK ALL  
9           OR ALMOST ALL OF THE PROPOSED CLASS MEMBERS HAVE BEEN IMPACTED,  
10          AND I THINK THE EVIDENCE HERE IS VERY STRONG. I BROKE IT DOWN  
11          BY PRODUCT, BY DISTRIBUTOR, BY STATE, BY COMBINATIONS OF  
12          DISTRIBUTORS -- I'M SORRY, BY COMBINATIONS OF DEFENDANT AND  
13          LARGE DISTRIBUTORS. I THINK, IN MY OPINION, THE RESULTS ARE  
14          VERY CLEAR.

15          I THEN, IN SLIDE NUMBER 12, DID A SIMILAR THING BUT NOW  
16          WITH THE PASS-THROUGH REGRESSIONS, YOUR HONOR. SO THESE TWO  
17          BARS, AND I'LL EXPLAIN THEM IN MORE DETAIL IN JUST A MINUTE,  
18          THESE TWO BARS ARE VERY SENSITIVE -- SENSITIVITY ANALYSES,  
19          AGAIN, DIFFERENT WAYS OF RUNNING THE PASS-THROUGH REGRESSIONS.

20          SO JUST TO BE CLEAR, THE FIRST BAR, YOU SEE IT SAYS  
21          "LARGE DISTRIBUTOR PRODUCT," SO THIS BAR ACTUALLY IS --  
22          CUMULATES THE RESULTS OF SIX DIFFERENT REGRESSIONS, ONE FOR  
23          EACH DISTRIBUTOR, WHERE I DO IT BY DISTRIBUTOR AND THE UNIQUE  
24          PRODUCTS THEY SOLD.

25          AND SO IF I LOOK ACROSS ALL SIX OF THOSE REGRESSIONS,

1 WHICH WERE AGAIN THE OVERCHARGES -- I'M SORRY, I MISSPOKE. THE  
2 PASS-THROUGH RATES, THE PASS-THROUGH RATES ARE POSITIVE AND  
3 STATISTICALLY SIGNIFICANT. WHEN I BROKE IT DOWN BY  
4 DISTRIBUTOR, BY PRODUCT, IF I NOW CUMULATE ALL OF THE  
5 OVERCHARGES THAT ARE -- I SAID IT AGAIN, SORRY. PASS-THROUGH  
6 RATES, I APOLOGIZE, ALL OF THE PASS-THROUGH RATES THAT ARE  
7 POSITIVE AND STATISTICALLY SIGNIFICANT, THEY ADD UP TO  
8 96.5 PERCENT OF ALL OF THE SALES OF THE LARGE DISTRIBUTORS. SO  
9 96.5 PERCENT OF ALL OF THE SALES OF LARGE DISTRIBUTORS HAD  
10 THESE POSITIVE AND STATISTICALLY SIGNIFICANT PASS-THROUGH  
11 RATES. WHEN IT'S BROKEN DOWN BY DISTRIBUTOR, BY PRODUCT,  
12 THAT'S THE FIRST BAR.

13 THE SECOND BAR IS -- AGAIN, THIS IS CUMULATED RESULTS  
14 OF SIX DIFFERENT REGRESSIONS BECAUSE IT'S BY DISTRIBUTOR, BY  
15 STATE NOW. AGAIN, THERE'S SIX REGRESSIONS. EACH REGRESSION  
16 LOOKS AT THE PASS-THROUGH RATE FOR A GIVEN DISTRIBUTOR IN ALL  
17 27 STATES. SO IT'S -- EACH DISTRIBUTOR IS GOING TO GET 27  
18 DIFFERENT PASS-THROUGH RATES. AGAIN, THERE'S NOT ENOUGH DATA  
19 HERE TO DO THEM ALL BECAUSE THE DISTRIBUTORS MAY NOT SELL IN  
20 EVERY SINGLE ONE OF THESE 27 STATES. BUT FOR ALL THE RESULTS  
21 THAT CAN BE CALCULATED, AGAIN BY DISTRIBUTOR, BY THE SIX  
22 DISTRIBUTORS, BY ALL OF THE STATES THEY SERVE, ALL OF THEM HAD  
23 POSITIVE AND STATISTICALLY SIGNIFICANT PASS-THROUGH RATES.  
24 Q. NOW, DID YOU DO OTHER ANALYSIS THAT RELIES ON COMMON  
25 EVIDENCE?

1 A. YES. YOUR HONOR, JUST AGAIN SO WE CAN ORIENT OURSELVES,  
2 I'M STILL IN THAT FIRST APPROACH TO THE ALL OR ALMOST ALL.

3 SO NOW I'M GOING TO CITE IN THE NEXT COUPLE OF SLIDES  
4 SOME OTHER EVIDENCE THAT'S COMMON EVIDENCE, SO THEY'RE NOT  
5 GOING TO BE REGRESSIONS NOW. THIS IS GOING TO BE COMMON  
6 EVIDENCE, SO LET ME JUST QUICKLY RUN THROUGH THESE.

7 SO THE FIRST BULLET ON PAGE 13 I NOTE THAT, JUST AS A  
8 FUNDAMENTAL MATTER, THESE OVERCHARGES ARE SUBSTANTIAL, RIGHT?  
9 IF YOU FLIP BACK JUST FOR A MOMENT TO PAGE NUMBER 8, REMEMBER  
10 THAT WE'RE TALKING ABOUT OVERCHARGES OF -- SORRY, THAT WAS PAGE  
11 8, WHERE I SHOWED THE OVERCHARGES BY DEFENDANT. SO THESE ARE  
12 SUBSTANTIAL OVERCHARGES. ALL IN EXCESS OF 15 PERCENT. SO WHEN  
13 YOU HAVE SUBSTANTIAL OVERCHARGES LIKE THAT, AND THEY'RE HIGHLY  
14 STATISTICALLY SIGNIFICANT, THAT'S ONE PIECE OF EVIDENCE THAT IS  
15 PROBABLY AFFECTING ALL OR VIRTUALLY ALL CUSTOMERS.

16 AGAIN, THAT'S NOT THE ONLY THING I'M RELYING ON, I JUST  
17 WENT THROUGH IN DETAIL THE SENSITIVITY ANALYSES, OR SOMETIMES  
18 PEOPLE CALL THEM THE SUB-REGRESSIONS, IN SLIDES 11 AND 12.

19 LET'S GO TO THE SECOND BULLET POINT ON SLIDE 13. AS  
20 YOUR HONOR UNDERSTANDS I'M SURE BY NOW, THAT THE DISTRIBUTORS  
21 DON'T DO ANYTHING TO THE PRODUCT. IT'S NOT AN -- THEY DON'T  
22 BUY A WIDGET AND THEN BUILD AN AIRPLANE WITH IT. THEY GET THE  
23 FINISHED PRODUCT, THEY PUT IT ON PALLETS, OR HOWEVER THEY'RE  
24 GOING TO DISTRIBUTE IT, AND THEY SELL IT. THEY DON'T MODIFY  
25 IT. THEY DON'T OPEN UP THE CANS AND POUCHES. THEY JUST

1           DISTRIBUTE IT.   IN THAT CONTEXT, I THINK IT'S MUCH MORE LIKELY  
2           THAT THE OVERCHARGES ARE GOING TO BE PASSED THROUGH.

3                   IF WE COULD TAKE A LOOK AT PAGE 14, YOUR HONOR, A  
4           REALLY BASIC PROPOSITION IN ECONOMICS, THAT YOU FIND IN A LOT  
5           OF TEXTBOOKS, IS THAT IN HIGHLY COMPETITIVE INDUSTRIES THE  
6           PASS-THROUGH RATES ARE HIGH AND THE REASON IS VERY SIMPLE.  IF  
7           YOU AND I WERE COMPETING WITH EACH OTHER IN A HIGHLY  
8           COMPETITIVE WIDGET INDUSTRY, AND THEN THERE'S A COST INCREASE,  
9           MAYBE THEY USE OIL, FOR EXAMPLE, TO PRODUCE OUR WIDGETS, WE  
10          DON'T EVEN HAVE A CHOICE WHETHER OR NOT WE'RE GOING TO  
11          PASS-THROUGH THAT BECAUSE IF WE DON'T PASS IT THROUGH WE'RE  
12          GOING TO GO BROKE.

13                   SO IN HIGHLY COMPETITIVE INDUSTRIES, THE FIRMS ARE WHAT  
14          ARE CALLED PRICE TAKERS.  THEY DON'T HAVE A CHOICE.  THEY CAN'T  
15          SET THEIR OWN PRICES.  WHEN THEY'RE FACED WITH A COST INCREASE,  
16          THEY EITHER PASS IT THROUGH OR THEY GO BROKE.  SO HIGHLY  
17          COMPETITIVE INDUSTRIES HAVE HIGH PASS-THROUGH RATES.

18                   AND AS I DISCUSSED IN MORE DETAIL IN MY REPORTS, I WENT  
19          THROUGH THE 10K'S OF THESE COMPANIES AND ALL OF THEM, WHEN  
20          THEY'RE DISCLOSING TO THEIR SHAREHOLDERS, TO THE SEC, WHAT KIND  
21          OF MARKETS DO WE COMPETE IN, THEY ALL EMPHASIZE, "WE'RE IN  
22          COMPETITIVE MARKETS," WHICH MAKES SENSE.

23                   NOT ANY DISRESPECT TO THESE FANTASTIC COMPANIES, BUT  
24          THEY DON'T ACTUALLY DO A WHOLE LOT TO THE PRODUCT.  THEY GET IT  
25          AND THEY DISTRIBUTE IT.  THAT'S IT.  SO THEY'RE OPERATING ON



1 THIN MARGINS. THEY'RE IN VERY COMPETITIVE INDUSTRIES. SO OF  
2 COURSE WE WOULD EXPECT THAT THEY WOULD HAVE HIGH PASS-THROUGH  
3 RATES.

4 SO THAT'S -- I SHOULD -- LET ME STOP THERE. I'M NOW  
5 THROUGH WITH THE FIRST INDEPENDENT ANALYSIS AS TO WHETHER OR  
6 NOT I THINK THAT GENERALIZED PRICE INCREASE WAS IN FACT -- DID  
7 IN FACT INJURE ALL OR NEARLY ALL OF THE PROPOSED CLASS MEMBERS.

8 I'M NOW -- WITH MR. CUNEO'S PERMISSION, I'M ABOUT TO  
9 TURN TO THE SECOND INDEPENDENT METHOD.

10 Q. AND THAT INVOLVES AN ANALYSIS OF CLASS MEMBER SPECIFIC  
11 OVERCHARGES; IS THAT CORRECT?

12 A. THAT'S CORRECT.

13 Q. AND BASED ON THE DATA SETS THAT YOU RECEIVED, WAS IT  
14 POSSIBLE FOR YOU TO DO THAT WITH RESPECT TO ALL SIX  
15 DISTRIBUTORS?

16 A. NO, IT'S NOT. YOUR HONOR CAN -- PROBABLY ALREADY GUESSED  
17 THAT OUTCOME HERE. I THINK IT'S OKAY IF I SAY THAT WALMART,  
18 COSTCO, SAM'S CLUB, THEY DON'T TELL US WHO THEY SOLD TO, RIGHT?  
19 THEY DON'T -- WHEN YOU WALK INTO A WALMART, THEY DON'T SAY,  
20 "WE'RE GOING TO COLLECT YOUR NAME. WE'RE GOING TO TELL THE  
21 REST OF THE WORLD YOU JUST BOUGHT A CAN OF TUNA." THEY DON'T  
22 DO THAT.

23 ON THE OTHER HAND, SYSCO AND U.S. FOODS DO KEEP TRACK  
24 OF THEIR CUSTOMERS, AND SO WHAT I HAD WAS -- NOT THE NAMES. I  
25 DIDN'T SEE THE NAMES. I JUST SAW THE NUMBERS, BUT THERE'S

1           UNIQUE CUSTOMER IDENTIFYING NUMBERS IN THE SYSCO AND U.S. FOODS  
2           DATA. JUST TO BE -- TO COMPLETE HERE, A SIMILAR KIND OF  
3           CUSTOMER ID NUMBER WAS ALSO IN THE DOT FOODS DATA, BUT DOT  
4           DIDN'T PROVIDE ANY DATA IN THE BENCHMARK PERIOD, SO YOU JUST  
5           CAN'T DO THIS CLASS MEMBER SPECIFIC OVERCHARGE REGRESSION FOR  
6           DOT. I CAN ONLY DO IT FOR SYSCO AND U.S. FOODS.

7                       NOW, I WILL SAY THAT THAT'S THE BULK OF THE STUDY  
8           BECAUSE SYSCO AND U.S. FOODS ACCOUNT FOR ABOUT 62 PERCENT OF  
9           ALL THE COMMERCE FOR THESE LARGE-SIZED CANS AND POUCHES OF THE  
10          PROPOSED CLASS. THEY ARE BY FAR THE TWO BIGGEST, AND SO FOR  
11          THOSE TWO I WAS ABLE TO ASCERTAIN AT THIS INDIVIDUAL CUSTOMER  
12          -- I'M SORRY, CLASS SPECIFIC MEMBER LEVEL WHETHER OR NOT THESE  
13          INDIVIDUAL CUSTOMERS WERE INJURED, AND I'LL DESCRIBE IN A  
14          MOMENT HOW I DID THAT.

15          Q.     THE NUMBER OF CUSTOMERS I THINK SHOULD BE SOMETHING THAT  
16          WE SHOULDN'T SAY OUT LOUD.

17          A.     SURE.

18          Q.     BUT IT IS ON SLIDE 15, AND IT IS IN THE TENS OF THOUSANDS  
19          IN EACH CASE; ISN'T THAT CORRECT?

20          A.     YEAH. YOU CAN SEE, YOUR HONOR, WHAT MR. CUNEO IS POINTING  
21          TO. I WON'T SAY WHAT THE NUMBERS ARE, BUT THERE ARE TENS OF  
22          THOUSANDS.

23          Q.     NOW, HOW DO YOU DETERMINE IF A CLASS MEMBER IS INJURED?

24          A.     SO THIS IS -- YOUR HONOR, I'M LOOKING AT THE SECOND BULLET  
25          ON PAGE 15.

1           IT'S VERY SIMPLE, IS DID THE ACTUAL PRICE EXCEED THE  
2           PREDICTED "BUT FOR" PRICE, YES OR NO? IF THE CUSTOMER ACTUALLY  
3           PAID A PRICE HIGHER THAN THAT PREDICTED "BUT FOR" PRICE, FOR AT  
4           LEAST ONE TRANSACTION, THEN I CHARACTERIZE THEM AS INJURED.

5           LET ME JUST -- AGAIN, JUST TO MOVE THE BALL ALONG HERE,  
6           I WANT TO EMPHASIZE THAT THIRD BULLET ON PAGE 15 BECAUSE THIS  
7           ALSO RELATES TO SOME COMMENTS THAT MS. LEE -- I THINK IS HER  
8           NAME, SORRY -- SAID IN HER OPENING. I WANT TO MAKE CLEAR HERE,  
9           YOUR HONOR, THAT IN THIS CLASS MEMBER SPECIFIC REGRESSION, ONE  
10          FOR SYSCO AND ONE FOR U.S. FOODS, THESE PREDICTED "BUT FOR"  
11          PRICES ARE EXTREMELY FLEXIBLE. THERE IS A DIFFERENT PREDICTED  
12          "BUT FOR" PRICE FOR EVERY CUSTOMER, FOR EVERY PRODUCT, FOR  
13          EVERY STATE, AND EVERY MONTH.

14          SO IN OTHER WORDS, IF YOU ASK ME, "WELL, UNDER WHAT  
15          CIRCUMSTANCES WOULD A CUSTOMER HAVE THE SAME PREDICTED "BUT  
16          FOR" PRICE?" THE ANSWER IS IT WOULD HAVE TO BE THE SAME  
17          CUSTOMER, BUYING EXACTLY THE SAME PRODUCT, IN EXACTLY THE SAME  
18          STATE, IN EXACTLY THE SAME MONTH. IF ANY OF THOSE THINGS ARE  
19          DIFFERENT, THEN THERE'S A DIFFERENT PREDICTED "BUT FOR" PRICE.  
20          SO THERE ARE HUNDREDS OF THOUSANDS OF DIFFERENT PREDICTED "BUT  
21          FOR" PRICES HERE, AND EACH OF THEM I THEN COMPARED TO THE  
22          ACTUAL PRICE.

23          Q.     AND WHAT CONCLUSIONS DID YOU REACH?

24          A.     SURE.

25          SO, YOUR HONOR, I'M ON PAGE 16 NOW.

1 SO IF WE GO THROUGH THE -- IF WE USE THE SYSCO DATA --  
2 BY THE WAY, THE SYSCO DATA HAD ABOUT 2 MILLION OBSERVATIONS.  
3 AND AS YOU CAN SEE -- I WON'T READ THE NUMBER, BUT IT HAD TENS  
4 OF THOUSANDS OF UNIQUE CUSTOMERS. AND WHAT I FOUND WAS THAT  
5 WHEN I RUN THIS REGRESSION, 99.3 PERCENT OF THOSE UNIQUE  
6 CUSTOMERS HAD AT LEAST ONE TRANSACTION WHERE THE ACTUAL PRICE  
7 WAS HIGHER THAN THE PREDICTED "BUT FOR" PRICE.

8 AND SIMILARLY FOR U.S. FOODS, WHICH HAD ABOUT  
9 1.5 MILLION OBSERVATIONS, I FOUND THAT FOR THOSE TENS OF  
10 THOUSANDS OF UNIQUE CUSTOMERS, 99.5 PERCENT OF THEM HAD AT  
11 LEAST ONE TRANSACTION WHERE THE ACTUAL PRICE WAS GREATER THAN  
12 THE PREDICTED "BUT FOR" PRICE.

13 Q. DR. WILLIAMS, IN THE INTERESTS OF TIME, I'M GOING TO SKIP  
14 SLIDE 17, WHICH IS A LIST OF CASES WHICH I THINK THE COURT IS  
15 CAPABLE OF READING FOR ITSELF, OKAY? I DON'T WANT TO WASTE OUR  
16 PRECIOUS TIME IN YOUR TELLING THE COURT ABOUT OTHER CASES,  
17 OKAY?

18 NOW, DID YOU REACH A CONCLUSION -- WAS THE DATA SET  
19 RICH ENOUGH AT THIS STAGE THAT FOR THIS CABINED CLASS YOU COULD  
20 REACH A CONCLUSION ABOUT WHAT -- JUST A BALLPARK -- THE  
21 AGGREGATE DAMAGES MIGHT BE?

22 A. YES.

23 YOUR HONOR, I'M ON PAGE 18, AND IN THE LOWER RIGHT-HAND  
24 SIDE YOU CAN SEE THAT THE AGGREGATE DAMAGES ARE ABOUT  
25 \$37.5 MILLION.

1 Q. NOW, LET ME ASK YOU A QUESTION, DID YOU EVER DO A BALLPARK  
2 ABOUT WHAT THAT WOULD MEAN FOR EACH CLASS MEMBER IF WE RANG THE  
3 BELL AND WERE SUCCESSFUL?

4 A. YES. I WANTED TO GET A FEEL FOR HOW MUCH MONEY IS A CLASS  
5 MEMBER LOOKING AT HERE, I MEAN, IS THIS WORTH THE EFFORT? AND  
6 THE ANSWER IS, IT IS. IT'S ABOUT -- THE AVERAGE WOULD BE A  
7 LITTLE UNDER \$1,400, WHICH I THINK TO A SMALL BUSINESS PERSON,  
8 GOING RIGHT TO THE BOTTOM LINE, I THINK THAT'S REAL MONEY.

9 Q. I NOW WANT TO TURN -- THAT BASICALLY COMPLETES OUR  
10 DISCUSSION OF WHAT YOU DID, CORRECT?

11 A. THAT'S CORRECT.

12 Q. NOW, WHAT I WOULD LIKE TO DO IS TO BRIEFLY TURN TO WHAT  
13 DR. HAIDER SAID ABOUT YOUR REPORT AND THE THINGS AND THE ITEMS  
14 THAT SHE TOOK ISSUE WITH.

15 A. SURE.

16 Q. NOW, WHY DON'T WE START ON PAGE 19.

17 A. YES.

18 Q. AND YOU HAVE LISTED SIX ARGUMENTS THAT DR. HAIDER MADE.  
19 LET'S TAKE THEM ONE AT A TIME.

20 A. YES.

21 Q. WHAT'S THE FIRST ONE?

22 A. SO JUST TO BE CLEAR, ALL SIX ARE NOT ON SLIDE 19. THIS IS  
23 JUST NUMBER ONE.

24 SO YOU HEARD MS. LEE SAY THAT MY STUDIES WERE AFFECTED  
25 BY FALSE POSITIVES. OKAY, THAT IS FALSE. IT IS NOT AFFECTED

1 BY ANY FALSE POSITIVES, I GUARANTEE YOU.

2 SO LET'S JUST START WITH WHAT DR. HAIDER SAID. DR.  
3 HAIDER'S LOOKING AT SALES MADE BY NON-DEFENDANT VENDORS. SHE  
4 HAS A HYPOTHESIS THAT SHE THINKS WHEN THE CONSPIRACY BEGAN  
5 THOSE NON-DEFENDANT VENDORS SHOULD NOT HAVE RAISED THEIR  
6 PRICES, OKAY? AND WHEN YOU ASK, IN HER REPORT, WHAT'S THE  
7 BASIS FOR THAT," I'LL JUST READ IT. AND I WANT TO EMPHASIZE TO  
8 YOUR HONOR, THIS IS THE ONLY RATIONALE SHE OFFERS, "NO  
9 OVERCHARGES ARE EXPECTED TO EXIST BECAUSE THERE ARE NO  
10 ALLEGATIONS FROM PLAINTIFFS RELATED TO NON-DEFENDANT PACKAGED  
11 TUNA." TO ME THAT -- I DON'T EVEN KNOW WHAT THAT MEANS. THAT  
12 IS JUST ECONOMICALLY VACUOUS. WHO CARES WHETHER OR NOT MR.  
13 CUNEO HAD SERVED AND SUED THE NON-DEFENDANTS? THAT'S TOTALLY  
14 UNRELATED TO WHETHER OR NOT THEY DID OR DID NOT RAISE THEIR  
15 PRICES FOLLOWING -- AS A CONSEQUENCE OF THIS CONSPIRACY. SO  
16 THAT'S WHY I THINK I'M BEING FAIR WHEN I CALLED IT A STRAW MAN  
17 ARGUMENT. THERE'S NO ECONOMICS HERE AT ALL.

18 SO NOW IN THE SECOND BULLET, DR. HAIDER RUNS THIS  
19 REGRESSION USING DATA THAT SHE SAYS SHE CHARACTERIZES AS  
20 NON-DEFENDANT. I'LL COMMENT ON THAT LATER, YOUR HONOR. AS DR.  
21 MANGUM POINTED OUT, IT'S NOT ACCURATE, BUT SHE RUNS THIS  
22 REGRESSION AND SHE SAYS, "AH-HA, THE NON-DEFENDANT VENDORS IN  
23 FACT RAISED THEIR PRICES IN THE DAMAGE PERIOD," BUT THAT CAN'T  
24 BE -- THAT MUST BE A FALSE POSITIVE. WHY? BECAUSE MR. CUNEO  
25 DIDN'T SUE THE NON-DEFENDANTS.

1                   SO SHE CONCLUDES, IN THE LAST BULLET, THAT THIS IMPLIES  
2                   THAT MY FINDINGS MUST BE CAUSED BY SOMETHING ELSE, SOME  
3                   NON-CARTEL FACTOR. SHE DOESN'T IDENTIFY WHAT THE HECK IT IS,  
4                   AND I WOULD SAY THERE IS NO SUCH THING.

5                   SO ON SLIDE 20 I SAY, AT THE TOP, SUPPOSE SHE'S RIGHT,  
6                   SUPPOSE THAT IT IS TRUE THAT THIS -- THAT THE NON-DEFENDANTS IN  
7                   FACT DID RAISE THEIR PRICES, WOULD THAT BE SURPRISING AT ALL?  
8                   AND THE ANSWER, OF COURSE, IS, NO, IT'S NOT SURPRISING AT ALL.  
9                   IT'S EXACTLY WHAT YOU WOULD EXPECT. WHY? BECAUSE WHEN BUYERS  
10                  LOOK AT THE DEFENDANTS RAISING THEIR PRICES, WHAT DO THEY DO?  
11                  THEY THINK ABOUT THEIR OPTIONS, AND THEY THINK, MAYBE I'LL BUY  
12                  A NON-DEFENDANT TUNA BECAUSE THIS PRODUCT IS BECOMING QUITE  
13                  EXPENSIVE. THEY DIDN'T KNOW THERE WAS A CONSPIRACY. WE KNOW  
14                  NOW THERE WAS.

15                  AND BY THE WAY, THIS ALSO BEARS ON SOMETHING MS. LEE  
16                  SAID, SHE SAID THAT I IGNORED THE ROLE OF NON-DEFENDANT TUNA.  
17                  THAT IS COMPLETELY FALSE, AND THE REASON IT'S FALSE IS -- THINK  
18                  ABOUT THE PRICES, WHEN THE BUYERS, EITHER THE SIX LARGE  
19                  DISTRIBUTORS OR THE CLASS MEMBERS, THEY SEE THE PRICES OF THE  
20                  DEFENDANTS -- I'M SORRY, THEY SEE THE PRICES OF THE LARGE-SIZED  
21                  TUNA GOING UP, THAT'S THE INFORMATION THEY NEED TO THINK ABOUT  
22                  WHETHER OR NOT THEY'RE GOING TO SUBSTITUTE TO NON-DEFENDANT  
23                  TUNA.

24                  SO THE ROLE OF NON-DEFENDANT TUNA IS COMPLETELY  
25                  REFLECTED -- I'LL GET TO THIS IN A LITTLE MORE DETAIL, IN A BIT

1 MORE DETAIL IN A SECOND. IT'S COMPLETELY REFLECTED IN THE  
2 PRICES I EXAMINED. WHATEVER ABILITY THE SIX DISTRIBUTORS OR  
3 THEIR CUSTOMERS HAD TO SUBSTITUTE AWAY FROM THE DEFENDANTS'  
4 PRODUCTS, THEY DID, THEY ACTUALLY DID, AND SO THAT'S REFLECTED  
5 IN THE PRICES THAT I USED IN THE OVERCHARGE REGRESSION. SO OF  
6 COURSE I TOOK INTO ACCOUNT THE ROLE OF -- THE ROLE AND  
7 COMMERCIAL SIGNIFICANCE OF THE NON-DEFENDANT MANUFACTURERS.

8 I JUST CONTINUE OVER ONTO PAGE 21. THIS ACTUALLY IS A  
9 SLIDE, YOUR HONOR, THAT YOU SAW FROM DR. MANGUM. I THINK IT'S  
10 ACTUALLY WORTH BRIEFLY LOOKING AT AGAIN. THERE'S -- AS YOUR  
11 HONOR IS NO DOUBT AWARE, THERE'S A LARGE PEER-REVIEWED  
12 LITERATURE ON THE UMBRELLA EFFECT, AND WHAT IT FINDS OVER AND  
13 OVER AGAIN IS THAT, "THE EXISTENCE OF UMBRELLA VICTIMS PERVADES  
14 NEARLY EVERY SECTION ONE CASE, AS NEARLY ALL CONSPIRACIES ARE  
15 PARTIAL CONSPIRACIES." IT GOES ON TO LIST A WHOLE SERIES OF  
16 NOTEWORTHY ANTITRUST CASES WHERE THIS EXACT PHENOMENA HAS BEEN  
17 FOUND.

18 THAT'S A LONG WAY OF SAYING, YOUR HONOR, THAT YOUR  
19 PRESUMPTION -- MY PRESUMPTION AT LEAST, SHOULD BE THAT UMBRELLA  
20 EFFECTS ARE PRESENT HERE. THAT'S ACTUALLY WHAT DR. HAIDER'S  
21 REGRESSION SHOWED, THAT THERE WERE UMBRELLA EFFECTS. IT'S NOT  
22 SURPRISING, AND THERE'S NO -- SHE'S OFFERED NO BASIS, LITERALLY  
23 NO BASIS IN ECONOMICS FOR HER CLAIM THAT THEY WOULD NOT BE  
24 EXPECTED BECAUSE -- AGAIN, BECAUSE MR. CUNEO FAILED TO SUE  
25 THEM.



1                   LET ME TURN TO SLIDE 22. AS DR. MANGUM TOLD YOU OR  
2 TESTIFIED THERE ARE SUBSTANTIAL DATA PROBLEMS WITH HER  
3 REGRESSION. SHE CALLS IT NON-DEFENDANT TUNA. IT'S NOT  
4 NON-DEFENDANT TUNA. WE KNOW THAT THAI UNION GROUP MANUFACTURED  
5 AND SOLD MORE THAN \$150 MILLION OF LARGE-SIZED PACKAGED TUNA TO  
6 THE SAME VENDORS THAT DR. HAIDER'S LOOKING AT.

7                   GOING OVER TO PAGE 23, YOUR HONOR, WE KNOW THAT THE  
8 SINGLE BIGGEST NON-DEFENDANT VENDOR IS THIS COMPANY CALLED REMA  
9 FOODS. THEY SOLD \$171 MILLION OF LARGE-SIZED PACKAGE TUNA TO  
10 SYSCO AND U.S. FOODS IN THE PERIOD OF JUNE 2011 TO  
11 DECEMBER 2015.

12 Q. IT'S THE CLASS PERIOD, CORRECT?

13 A. IT'S MOST OF THE CLASS PERIOD.

14 Q. RIGHT. MOST, THANK YOU.

15 A. AND IN THAT PERIOD, YOUR HONOR, WHERE -- I SHOULD SAY,  
16 JUST SO YOUR HONOR UNDERSTANDS, WHAT'S THE SIGNIFICANCE OF THE  
17 171 MILLION? THAT'S ABOUT A QUARTER OF ALL OF THE LARGE-SIZED  
18 PACKAGE TUNA THAT SYSCO AND U.S. FOODS BOUGHT IN THAT PERIOD,  
19 JUNE 2011 TO DECEMBER 2015, SO THAT'S A LOT OF THEIR TUNA,  
20 LARGE-SIZED PACKAGE TUNA. AND IN THAT SAME PERIOD, REMA BOUGHT  
21 \$115 MILLION WORTH OF LARGE-SIZED PACKAGE TUNA FROM THAI UNION  
22 GROUP. THAT'S THE COMPANY THAT ACTUALLY MANUFACTURED THE TUNA.  
23 SO CALLING IT -- CALLING SALES FROM REMA NON-DEFENDANT IS JUST  
24 INACCURATE.

25                   AND FINALLY, I JUST NOTE AT THE BOTTOM THAT DR. HAIDER

1 DOESN'T ACTUALLY KNOW THAT ANY OF THE NON-DEFENDANT TUNA THAT  
2 WAS SOLD WAS ACTUALLY MANUFACTURED BY SOMEBODY OTHER THAN THE  
3 THREE DEFENDANTS. WE DON'T KNOW BECAUSE THE DATA AREN'T  
4 AVAILABLE. WE DON'T KNOW THE EXTENT TO WHICH STARKIST, DONGWON  
5 AND OTHER DEFENDANTS MAY ALSO HAVE MANUFACTURED LARGE-SIZED  
6 PACKAGE TUNA THAT WAS THEN SOLD THROUGH COMPANIES LIKE REMA.  
7 SO THAT'S THE FIRST OF DR. HAIDER'S SIX CLAIMS, HER FALSE CLAIM  
8 THAT I HAD FALSE POSITIVES.

9 Q. THE SECOND ONE IS RELATED, ISN'T IT, YOU'VE COVERED SOME  
10 OF IT?

11 A. YEAH. I CAN GO, FRANKLY, YOUR HONOR, VERY QUICKLY OVER  
12 THIS ONE.

13 THIS IS AS -- MS. LEE SAID IN HER OPENING THAT SOMEHOW  
14 I HAVE IGNORED THE COMMERCIAL IMPORTANCE OF SALES BY  
15 NON-DEFENDANTS, WHICH IS COMPLETELY FALSE FOR THE REASONS I  
16 ALREADY EXPLAINED, BUT I'LL QUICKLY GO OVER SLIDE 24.

17 PRICE IS JUST A FUNDAMENTAL PROPOSITION IN ECONOMICS,  
18 PRICES CONVEY INFORMATION. WHEN -- THE BUYERS AT EITHER THE  
19 DISTRIBUTOR LEVEL OR THE CLASS MEMBERS HERE, THEY SAW THE  
20 PRICES THAT THE DEFENDANTS WERE CHARGING. THAT CONVEYS  
21 INFORMATION TO THEM. DO THEY WANT TO BUY IT? DO THEY NOT WANT  
22 TO BUY IT? THEY CAN SEE THE PRICES FROM THE NON-DEFENDANTS.  
23 DO THEY WANT TO WANT TO SUBSTITUTE? DO THEY NOT WANT TO  
24 SUBSTITUTE? THE COMMERCIAL SIGNIFICANCE OF THE MONOTONES  
25 AFFECTS THE DEFENDANTS' PRICES. IT'S CAPTURED -- WHATEVER IS

1 THE COMMERCIAL IMPORTANCE OF THE NON-DEFENDANTS IS CAPTURED IN  
2 THE DEFENDANTS' PRICES BECAUSE THE MORE WILLING BUYERS ARE TO  
3 SWITCH TO NON-DEFENDANTS, THEN ALL OTHER THINGS EQUAL, THAT'S  
4 GOING TO FORCE DOWN THAT CARTEL PRICE A LITTLE BIT.

5 I WAS GOING TO TURN TO PAGE 25. THIS IS DR. HAIDER'S  
6 THIRD COMMENT ON MY STUDY. SHE COMMENTS ON HOW I DEFINE THE  
7 BENCHMARK CONTAMINATED AND DAMAGES PERIODS.

8 I JUST WANT TO MAKE TWO QUICK COMMENTS BEFORE I GO  
9 THROUGH THIS, YOUR HONOR, NUMBER ONE, THIS IS NOT A CLASS  
10 ISSUE. THIS HAS NOTHING TO DO WITH WHETHER OR NOT THERE IS IN  
11 FACT A RELIABLE, WELL-ACCEPTED, PEER-REVIEWED METHODOLOGY FOR  
12 ASCERTAINING GENERALIZED PRICE INCREASES AND WHETHER OR NOT  
13 THOSE PRICE INCREASES AFFECTED ALL OR NEARLY ALL PROPOSED CLASS  
14 MEMBERS. WHAT WE'RE TALKING ABOUT NOW IS WE'RE MOVING AROUND  
15 BY A FEW MONTHS HERE OR THERE, THAT'S NOT -- THAT DOESN'T  
16 RELATE TO -- THAT'S NOT A METHODOLOGICAL ISSUE. THAT'S JUST  
17 HOW YOU IMPLEMENT THE REGRESSION.

18 THE SECOND THING IS DR. HAIDER RUNS A SERIES OF  
19 REGRESSIONS WHERE SHE MOVES AROUND THESE PERIODS. SOMETIMES  
20 SHE TAKES THE CONTAMINATED PERIOD, FROM MID-2008 TO LATE-2010.  
21 SOMETIMES SHE SAYS, "WELL, I DON'T THINK IT'S CONTAMINATED.  
22 I'LL CALL IT A BENCHMARK PERIOD."

23 SO WHAT DOES THAT DO TO THE RESULTS? AGAIN, WHAT DO  
24 YOU THINK IT DOES? THE OVERCHARGE FALLS. WHY? BECAUSE SHE'S  
25 JUST INCLUDED A BUNCH OF HIGH PRICES THAT WERE CAUSED BY THE

1 CONSPIRACY BETWEEN COSI AND BUMBLEBEE, AS COSI RECENTLY  
2 ADMITTED IN ITS INTERROGATORIES.

3 SHE ALSO AT ONE POINT SAYS THAT I SHOULD HAVE TAKEN MY  
4 DAMAGE PERIOD, MY CLASS PERIOD, ALL THE WAY BACK TO 2004. WHY?  
5 BECAUSE IN AN EARLIER COMPLAINT, MR. CUNEO, BEFORE HE KNEW ALL  
6 THE FACTS, SAID, "WELL, WE THINK THAT DAMAGES MIGHT HAVE BEGUN  
7 IN 2004," AND SO SHE RUNS MY REGRESSION, MOVING THE START OF  
8 THE DAMAGE PERIOD FROM MID-2011 ALL THE WAY BACK TO 2004, AND  
9 SAYS, "AH-HA, YOUR OVERCHARGES SHOULD GO DOWN." WHAT DOES THAT  
10 TELL YOU? THINK ABOUT WHAT'S GOING ON THERE.

11 IF THE PERIOD 2004 TO 2008 REALLY WAS ANTICOMPETITIVE,  
12 AND I CALLED IT PART OF THE BENCHMARK, WE KNOW FROM SLIDE 6  
13 THAT WOULD HAVE PUSHED DOWN THE OVERCHARGES. AND SO WHEN SHE  
14 RECATEGORIZED IT FROM A BENCHMARK PERIOD, AGAIN, I'M TALKING  
15 ABOUT 2004 TO 2008, WHEN SHE RECATEGORIZED THAT AS PART OF THE  
16 DAMAGES PERIOD, THE OVERCHARGES SHOULD GO UP. BUT THAT'S NOT  
17 WHAT SHE FOUND, THE OVERCHARGES WENT DOWN, WHICH IS EXACTLY  
18 WHAT YOU WOULD HAVE EXPECTED IF THAT WAS ACTUALLY A PERIOD  
19 RELATIVELY FREE OF ANY ANTICOMPETITIVE EFFECTS.

20 SO AGAIN, JUST TO QUICKLY REVIEW, THIS ISSUE ABOUT THE  
21 DEFINITION OF BENCHMARK PERIODS, CONTAMINATED PERIODS, DAMAGES  
22 PERIODS, IT'S NOT A METHODOLOGICAL ISSUE. HER RESULTS SHOW  
23 THAT THE RESULTS ARE ROBUST. DR. MANGUM TESTIFIED TO YOU THAT  
24 HE MOVED AROUND THE END OF THE CONTAMINATED PERIOD BY  
25 SIX MONTHS EITHER WAY, A YEAR EITHER WAY. IT DOESN'T AFFECT

1 THE RESULTS. IN FACT, IN DR. -- I TALK TOO FAST, SORRY.

2 DR. HAIDER'S OWN REPORT HAS A CHART YOU CAN LOOK AT  
3 WHERE SHE MOVES THE END OF THE CONTAMINATED PERIOD FROM  
4 DECEMBER 2010 TO NOVEMBER, OCTOBER, SEPTEMBER. SHE MOVES IT  
5 ALL THE WAY BACK TO THE START OF 2009, SO ONLY A SIX-MONTH  
6 CONTAMINATED PERIOD. WHEN SHE MOVED IT ALL THE WAY BACK, THE  
7 OVERCHARGE IS STILL OVER 10 PERCENT. SO THESE RESULTS -- THIS  
8 MOVING THESE PERIODS AROUND DOESN'T AFFECT ANY OF MY  
9 CONCLUSIONS.

10 I WOULD JUST ADD, YOUR HONOR, THAT I DID, YOU KNOW, AN  
11 EXTENSIVE AMOUNT OF STUDY OF WHAT I REGARD TO BE THE CORRECT  
12 DEFINITION OF THESE PERIODS, AND IF I COULD JUST TAKE A LOOK AT  
13 THE FIRST BULLET ON PAGE 26, AFTER MY FIRST REPORT WAS FILED,  
14 WHEN I DEFINED THIS CONTAMINATED PERIOD AS MID-2008 TO  
15 LATE-2010, IN MY OPINION, COSI'S RECENT SECOND SUPPLEMENTAL  
16 RESPONSE, WHICH AGAIN THAT CAME OUT AFTER MY FIRST REPORT, BUT  
17 IT DOVETAILS, IN MY OPINION, VERY CLOSELY TO WHAT I HAVE  
18 CHARACTERIZED AS THE CONTAMINATED PERIOD.

19 I'LL JUST READ A LITTLE BIT OF IT HERE, "COSI ADMITTED  
20 THAT BUMBLEBEE -- I'M SORRY, "COSI ADMITTED THAT BUMBLEBEE AND  
21 COSI HAD AGREEMENTS TO REDUCE THE SIZE OF CANS FROM 6 OUNCES TO  
22 5 OUNCES FOR BRANDED TUNA PRODUCTS AS EARLY AS MARCH 2008." I  
23 BEGAN THE CONTAMINATED PERIOD IN MID-2008. NOW WE KNOW THAT  
24 COSI'S ADMITTING THAT THEY COLLUDED WITH BUMBLEBEE IN MARCH  
25 2008.

1 COSI ALSO SAYS, "THAT -- I'M SORRY, "THAT BUMBLEBEE AND  
2 COSI HAD AN AGREEMENT -- I'M NOT AN ATTORNEY, BUT AN ILLEGAL  
3 AGREEMENT "ON THE TIMING OF LIST PRICE INCREASES FOR BRANDED  
4 TUNA PRODUCTS AS EARLY AS JUNE 2008." AGAIN THAT'S WHEN I  
5 STARTED THE CONTAMINATED PERIOD.

6 FINALLY, "THAT COSI AND BUMBLEBEE HAD AN ILLEGAL  
7 AGREEMENT ON THE TIMING OF NET PRICE INCREASES FOR BRANDED TUNA  
8 PRODUCTS AS EARLY AS MAY 2010." THAT'S MY CONTAMINATED PERIOD.  
9 SO IN MY OPINION, COSI'S RECENT STATEMENT IN THEIR  
10 INTERROGATORY IS CONFIRMATORY EVIDENCE, I THINK, THAT I WAS  
11 RIGHT WHEN I DEFINED THE CONTAMINATED PERIOD.

12 AND THEN I JUST NOTE THAT LAST BULLET WHERE I SAID  
13 EARLIER TO YOU THAT -- THE RESULTS ARE VERY ROBUST. YOU CAN  
14 MOVE THESE PERIODS AROUND, YOU'RE STILL GOING TO GET POSITIVE  
15 AND STATISTICALLY AND SIGNIFICANT OVERCHARGES.

16 Q. I WANT TO TALK QUICKLY ABOUT THE ARGUMENT THAT YOU SHOULD  
17 HAVE USED COST OF GOODS SOLD AS A MEASURE. OKAY. NOW THERE --  
18 IS THERE SOMETHING INTRINSICALLY WITHIN THE FORMULA OF COST OF  
19 GOODS SOLD THAT INTRODUCES AN ELEMENT OF SOMETHING THAT IS --  
20 THAT CHANGES THE STANDARDS IF YOU HAVE A CARTEL PRICE?

21 A. YES.

22 Q. THAT WAS A VERY POORLY-ASKED QUESTION.

23 A. I THINK I KNOW WHAT YOU'RE ASKING.

24 Q. OKAY.

25 A. WE DIDN'T PRACTICE THAT PART.

1 SO THERE'S A WHOLE HOST OF PROBLEMS WHEN TRYING TO USE  
2 THIS COSTS OF GOODS SOLD. LET ME JUST RUN THROUGH WHAT THE  
3 BASIC ONES ARE. REMEMBER, THAT THE COST CONTROLS THAT I  
4 DISCUSSED, THOSE ARE ALL MARKET PRICES. THEY CAN'T BE AFFECTED  
5 BY THE CONDUCT OF THE CARTEL.

6 THINK ABOUT THE COST OF GOODS SOLD FOR A SECOND. SO  
7 WHAT DID THE CARTEL DO? THEY RAISED PRICE. WAS THAT DUE TO  
8 THE VOLUME THAT THEY SELL? IT GOES DOWN SOMEWHAT RELATIVE TO  
9 IF THEY HAD NOT RAISED PRICE. THINK ABOUT WHAT COGS IS. COGS  
10 IS -- THE ACTUAL FORMULA I GIVE IN MY REPORT -- THE VALUE OF  
11 BEGINNING INVENTORY, MINUS THE COST OF THE RESOURCES THEY  
12 ACQUIRE DURING THE COURSE OF THE YEAR, MINUS THE VALUE OF THE  
13 INVENTORY AT THE END OF THE YEAR. WELL, WHEN THEY RAISE PRICE  
14 AND REDUCE OUTPUT, A LOT OF THOSE THINGS ARE AFFECTED BY THE  
15 CONDUCT OF THE CARTEL ITSELF.

16 SO, FOR EXAMPLE, THEY RAISE PRICES, THEY'RE GOING TO  
17 SELL LESS. WELL, THEY HAVE -- AT LEAST IN THE SHORT RUN THEY  
18 HAVE LABOR COSTS. NOW THEY HAVE TO ALLOCATE THESE LABOR COSTS  
19 OVER A SMALLER QUANTITY OF GOODS, SO THEIR COSTS GO UP. THINK  
20 ABOUT IT, WHEN THEIR COSTS ARE GOING UP, AND YOU PUT THAT IN  
21 THE REGRESSION, WHAT HAPPENS TO THE OVERCHARGE? IT GOES DOWN  
22 BECAUSE NOW THE COST INCREASES IS EXPLAINING PART OF THE PRICE  
23 INCREASE, BUT THE COST INCREASE IS AN ARTIFACT OF HOW  
24 ACCOUNTANTS KEEP TRACK OF COSTS. ACCOUNTANTS HAVE ALL KINDS OF  
25 WAYS THAT ECONOMISTS CRITIQUE. DR. MANGUM'S REPORTS GOES

1 THROUGH THIS IN GREAT DETAIL.

2 THE WAY ACCOUNTANTS KEEP COSTS IS NOT WHAT ECONOMISTS  
3 CALL MARGINAL COSTS. THEY HAVE ALL KINDS OF WHAT WE WOULD  
4 REGARD AS AD HOC RULES, THINGS LIKE LAST IN, FIRST OUT, FIRST  
5 IN, LAST OUT, THESE ARE ALL JUST -- AGAIN, I'M NOT CRITICIZING,  
6 I LOVE ACCOUNTANTS, BUT THE WAY THEY KEEP TRACK OF COSTS IS NOT  
7 THE WAY ECONOMISTS KEEP TRACK OF COSTS.

8 HERE WE KNOW THAT THE CARTEL CONDUCT ITSELF AFFECTED  
9 THESE COST OF GOODS SOLD, SO YOU CAN'T USE IT IN THE  
10 REGRESSION. IT'S WHAT'S CALLED AN ENDOGENOUS VARIABLE. THE  
11 VARIABLE ITSELF IS AFFECTED BY THE CARTEL, AS OPPOSED TO THE  
12 INDEPENDENT PRICES THAT DR. MANGUM, DR. SUNDING, AND I USED,  
13 PRICES OF ELECTRICITY, PRICES OF DIESEL FUEL, PRICES OF FISH IN  
14 BANGKOK. THE CARTEL IS NOT AFFECTING THOSE THINGS, AND THAT'S  
15 WHAT YOU HAVE TO HAVE IN THE REGRESSION.

16 Q. WE HAVE A COUPLE --

17 A. JUST ONE OTHER QUICK COMMENT. AGAIN, YOUR HONOR, THIS IS  
18 NOT A METHODOLOGICAL ISSUE. THIS DOESN'T GO TO WHETHER OR NOT  
19 THE BASIC DUMMY VARIABLE REGRESSION METHODOLOGY IS WELL  
20 ACCEPTED AND CAN BE USED HERE. NOW THE ONLY THING WE'RE  
21 DISCUSSING IS WHAT'S THE PROPER COST VARIABLE? YOU CAN USE  
22 EITHER ONE OF THESE COST VARIABLES. IT DOESN'T CHANGE THE  
23 METHODOLOGY.

24 AND IN FACT, WHEN YOU LOOK IN DR. HAIDER'S REPORT, AND  
25 YOU LOOK AT WHAT HAPPENS WHEN SHE PUTS THIS IMPROPER COGS, COST



1 VARIABLE IN AND TAKES OUT THE COST INDEX THAT I USED, THERE ARE  
2 STILL POSITIVE AND STATISTICALLY SIGNIFICANT OVERCHARGES.

3 Q. DR. WILLIAMS, DR. HAIDER SAYS THAT -- CLAIMS THAT YOU HAVE  
4 NO RELIABLE BASIS TO PROJECT, EXTRAPOLATE FROM THE TWO FOOD  
5 DISTRIBUTORS TO THE OTHER FOUR INTERMEDIARIES. WHAT IS YOUR  
6 RESPONSE?

7 A. SO WE'RE ON SLIDE 29. I WANT TO COME BACK TO THAT IN A  
8 SECOND, AND JUST BRIEFLY COMMENT ABOUT SLIDE 28.

9 IN SLIDE 29, AT THE TOP THERE YOU SEE DR. HAIDER SAYS  
10 THAT I HAVE "NO RELIABLE BASIS TO EXTRAPOLATE MY RESULTS FROM  
11 THE TWO FOOD DISTRIBUTORS," REMEMBER, WE DID IT FOR SYSCO AND  
12 U.S. FOODS, YOUR HONOR, "TO THE OTHER FOUR INTERMEDIARIES."  
13 SHE'S JUST WRONG. MY OPENING REPORT HAD A DETAILED DISCUSSION  
14 ABOUT WHY IT WAS IMPORTANT TO EXTRAPOLATE THE RESULTS FOR SYSCO  
15 AND U.S. FOODS. AND IN HER REBUTTAL REPORT SHE NEVER EVEN  
16 MENTIONED IT. I WROTE ABOUT THREE OR FOUR PARAGRAPHS ABOUT  
17 THIS IN DETAILED DISCUSSION. SHE DIDN'T EVEN MENTION IT, MUCH  
18 LESS REBUT IT.

19 I JUST BRIEFLY WANTED TO GO BACK TO SLIDE 28. IN HER  
20 REPORT, AS IT PERTAINS TO THESE CLASS MEMBERS' SPECIFIC  
21 OVERCHARGE REGRESSIONS FOR SYSCO AND U.S. FOODS, DR. HAIDER  
22 STATED -- LET ME TRY THAT AGAIN. SHE CLAIMED THAT THE  
23 METHODOLOGY I'D USED "DOES NOT ALLOW FOR THE POSSIBILITY OF NO  
24 OVERCHARGE FOR SOME MEMBERS," THAT'S HER ITALICS, BY THE WAY,  
25 "FOR SOME MEMBERS OF THE PROPOSED CLASS." THAT'S JUST WRONG.

1 IF IT WAS RIGHT, THEN I WOULDN'T HAVE FOUND 99.3 AND 99.5. IT  
2 WOULD HAVE BEEN 100 BY DEFINITION, SO IT'S JUST NOT TRUE THAT  
3 THE METHOD DOESN'T ALLOW FOR THE POSSIBILITY OF NO OVERCHARGE  
4 FOR SOME MEMBERS. OF COURSE IT DOES.

5 Q. DOES DR. HAIDER MAKE THE CLAIM THAT CARTEL OVERCHARGES  
6 THAT GO TO A DISTRIBUTOR ARE SOMEHOW TREATED DIFFERENTLY THAN  
7 DISTRIBUTED IN OTHER COST INCREASES?

8 A. YES. YOUR HONOR, I'M ON PAGE 30 HERE.

9 AGAIN, I THINK THIS IS SOMETHING THAT MS. LEE SAID IN  
10 HER OPENING THAT ALSO WAS COMPLETELY WRONG. SHE SAYS THAT --  
11 I'LL JUST READ WHAT DR. HAIDER CLAIMS, "THAT THE PASS-THROUGH  
12 REGRESSION MODELS DO NOT ACTUALLY TEST WHETHER AN ALLEGED  
13 OVERCHARGE WAS PASSED THROUGH TO CFP PURCHASERS. INSTEAD, I  
14 TEST THE MORE GENERAL PROPOSITION THAT ANY COSTS CHANGE  
15 OCCURRED BY THE SELECTED INTERMEDIARIES, REGARDLESS OF WHETHER  
16 IT INCLUDED THE ALLEGED OVERCHARGE, WAS ON AVERAGE PASSED  
17 THROUGH DOWNSTREAM." THAT IS JUST FUNDAMENTALLY WRONG, OKAY.

18 SUPPOSE YOU'RE THE CEO OF SYSCO AND YOU SEE AN INCREASE  
19 IN THE WHOLESALE PRICE, YOU HAVE THREE GOALS AS THE CEO OF  
20 SYSCO, MAXIMIZE PROFITS, MAXIMIZE PROFITS, MAXIMIZE PROFITS,  
21 THAT'S YOUR JOB, OKAY. DOES IT MATTER TO YOU IF SYSCO -- I'M  
22 SORRY, IF COSI, FOR EXAMPLE, SENT YOU A MEMO AND SAID, "THE  
23 PRICE WENT UP BECAUSE ELECTRICITY PRICES WENT UP" OR "THE PRICE  
24 OF THE TUNA WENT UP" OR "IT'S WEDNESDAY," WHATEVER THE HECK IT  
25 WAS, IT DOESN'T AFFECT YOUR PROFIT MAXIMIZING DECISION. YOU

1 JUST TAKE THE WHOLESALE PRICE INCREASE, IF YOU DECIDE TO BUY  
2 THE PRODUCT, AND NOW YOU HAVE TO OPTIMIZE, YOU HAVE TO MAXIMIZE  
3 YOUR PROFITS. IT DOESN'T MATTER WHY THE WHOLESALE PRICE WENT  
4 UP.

5 IN FACT, AS I SAY ON PAGE 31, I CAN'T FIND ANY TEXTBOOK  
6 OR PEER-REVIEWED ARTICLE THAT SUPPORTS WHAT DR. HAIDER IS  
7 SAYING HERE. IT JUST DOESN'T MATTER WHY THE WHOLESALE PRICE  
8 WENT UP TO YOU AS THE CEO OF SYSCO. YOU JUST OPTIMIZE, GIVEN  
9 THIS INCREASE IN THE WHOLESALE PRICE. ASSUMING YOU DECIDED TO  
10 BUY THE PRODUCT, IT DOESN'T MATTER WHY IT WENT UP.

11 Q. DO YOUR CONCLUSIONS USE STANDARD METHODOLOGY IN ANTITRUST  
12 LITERATURE?

13 A. YES. AS I BRIEFLY REVIEW ON PAGE 32, THE PASS-THROUGH  
14 REGRESSION METHODOLOGY THAT I'M USING IS THE TRIED AND TRUE ONE  
15 THAT'S USED IN MANY, MANY ANTITRUST CASES.

16 IN FACT, I DIDN'T PUT THESE HERE, YOUR HONOR, BUT  
17 THERE'S A FOOTNOTE IN MY REBUTTAL REPORT -- PRETTY SURE IT'S  
18 THE REBUTTAL REPORT -- WHERE I LIST A WHOLE BUNCH OF CLASSES  
19 THAT HAVE BEEN CERTIFIED IN PART USING EXACTLY THE SAME  
20 PASS-THROUGH REGRESSIONS THAT I USED.

21 Q. NOW, I WANT TO GIVE YOU ANOTHER YELLOW LIGHT HERE, AND  
22 THAT IS THAT NUMBER 33 IS THE LAST PAGE THAT I THINK MR. GALLO  
23 DOES NOT OBJECT TO. SO RIGHT NOW, IN ANSWERING THESE  
24 QUESTIONS, I DON'T WANT YOU TO GO BEYOND PAGE 33, THEREBY, FOR  
25 THE MOMENT, PUTTING IT AT THE SIDE OF THE ROAD, THE ISSUE THAT

1 MR. GALLO RAISED THIS MORNING, OKAY?

2 A. YES, SIR.

3 Q. NOW, CAN YOU TELL ME WHAT SLIDE 33 REPRESENTS.

4 A. SURE. SO, YOUR HONOR, DR. HAIDER RAN ONE OF THESE CHOW  
5 TESTS THAT YOU'VE HEARD ABOUT, OKAY, AND SHE CONCLUDED  
6 IMPROPERLY, IN MY OPINION, AS I'LL EXPLAIN, THAT I SHOULD NOT  
7 USE ALL OF THE DATA IN CALCULATING THE PASS-THROUGH RATE. SO  
8 IF YOU LOOK AT THAT FAR RIGHT-HAND COLUMN -- I WON'T READ THE  
9 NUMBERS, AGAIN -- BUT I USED ALL OF THE AVAILABLE DATA. SHE  
10 ONLY USED THE DATA IN THE CLASS PERIOD.

11 JUST TO ORIENT YOURSELF, YOUR HONOR, WHAT YOU'RE  
12 LOOKING AT ARE THESE ARE PAIRS, RIGHT? SO THE FIRST COLUMN IS  
13 DEFENDANT, SECOND COLUMN IS DISTRIBUTOR, SO THESE ARE THE  
14 PASS-THROUGH RATES FOR A GIVEN DEFENDANT TO A GIVEN  
15 DISTRIBUTOR. YOU CAN SEE THE RESULTS THAT I GOT ON THE RIGHT  
16 AND THE RESULTS THAT DR. HAIDER GOT IN THE MIDDLE THERE.

17 ACTUALLY, LET ME MAKE A COUPLE OF POINTS HERE. ONE IS  
18 ALL OF HER PASS-THROUGH RATES ARE POSITIVE AND STATISTICALLY  
19 SIGNIFICANT, SO SOME OF THE OVERCHARGES ARE GOING TO GET PASSED  
20 THROUGH, EVEN ACCORDING TO HER.

21 YOU SEE THE THREE BOLDED NUMBERS AT THE BOTTOM, LET ME  
22 BE CLEAR HERE, THESE ARE THE ONLY NUMBERS SHE PUT IN HER  
23 REPORT. SO SHE CHERRY PICKED THE THREE LOWEST ONES, OKAY? BUT  
24 LET'S JUST THINK ABOUT IT FOR A SECOND, LOOK AT THAT BOTTOM  
25 NUMBER, I WON'T READ IT OUT LOUD, SO LOOK AT THE MANUFACTURER

1 DEFENDANT, THE DISTRIBUTOR, AND LOOK AT THAT PASS-THROUGH RATE.  
2 DOES IT MAKE ECONOMIC SENSE THAT THAT DISTRIBUTOR, VERY  
3 POWERFUL COMPANY, WOULD EAT MORE THAN HALF OF THE INCREASE IN  
4 THE WHOLESALE PRICE? IT DOESN'T MAKE ANY SENSE. THEY WOULDN'T  
5 DO THAT. OF COURSE, THEY WOULDN'T DO THAT.

6 NOW LOOK AT THE NUMBER I GOT, THAT'S AN ENTIRELY  
7 PLAUSIBLE NUMBER. WHAT'S HAPPENED HERE, YOUR HONOR, IS THAT --  
8 AND IF I COULD JUST TAKE ONE SECOND, I JUST WANT TO GET MY  
9 REBUTTAL REPORT IN FRONT OF ME. WHAT'S HAPPENED HERE IS IT'S  
10 ANOTHER EXAMPLE OF A MISUSE OF A CHOW TEST LEADING TO EXCESSIVE  
11 SLICING AND DICING.

12 IF I COULD HAVE JUST ONE MINUTE HERE, I WANT TO GET TO  
13 MY REBUTTAL REPORT. OKAY.

14 SO AGAIN, DR. HAIDER'S RUN THIS CHOW TEST. SHE'S  
15 DECIDED THAT ON THE BASIS OF THIS CHOW TEST I SHOULD THROW AWAY  
16 ALL THE DATA OUTSIDE THE CLASS PERIOD IN CALCULATING THESE  
17 PASS-THROUGH RATES. AGAIN, AT ONE LEVEL IT'S IMMATERIAL  
18 BECAUSE SHE STILL FINDS POSITIVE AND STATISTICALLY SIGNIFICANT  
19 OVERCHARGES, BUT THEY DON'T MAKE ANY ECONOMIC SENSE, AT LEAST  
20 THESE LOWEST ONES SURE DON'T.

21 I WANT TO HIGHLIGHT, YOUR HONOR, SOMETHING ELSE. SO  
22 SHE'S REPORTED THE PASS-THROUGH RATES FOR THE DATA SHE KEPT IN  
23 THE DAMAGE GROUP. WHAT HAPPENED TO THE PASS-THROUGH RATES THAT  
24 SHE THREW AWAY? YOU CAN CALCULATE THE PASS-THROUGH RATES FOR  
25 THE DATA OUTSIDE THE CLASS PERIOD, AND WHEN YOU DO THAT --

1 THE WITNESS: I WON'T READ BUT, YOUR HONOR, JUST TO BE  
2 CLEAR, I DON'T KNOW IF YOU WANT TO LOOK WITH ME, I AM IN I  
3 THINK THE FIRST BINDER, AND IF YOU COULD PLEASE GO --

4 THE COURT: WHICH TAB?

5 THE WITNESS: TAB NUMBER 4, PLEASE. IF YOU COULD  
6 PLEASE GO TO PAGE 41 IN TAB 4.

7 THE COURT: OKAY, I'M THERE.

8 THE WITNESS: SO YOU SEE PARAGRAPH 92?

9 THE COURT: YES.

10 THE WITNESS: LET'S SCOOT DOWN TO THE BOTTOM THERE.  
11 I'LL READ, BUT I WON'T SAY ANYTHING THAT I UNDERSTAND TO BE  
12 CONFIDENTIAL.

13 A. FOR THE PERIOD OUTSIDE THE CLASS PERIOD, DR. HAIDER'S  
14 MODEL ESTIMATES A 208 PERCENT PASS-THROUGH RATE FOR ONE OF THE  
15 DISTRIBUTORS BECAUSE SHE'S ONLY GOT 11 MONTHS OF DATA, BECAUSE  
16 IT'S NOW BEEN CHOPPED TOO FINELY.

17 LET'S KEEP READING. USING THESE SAME 11 MONTHS FOR ONE  
18 -- YOU CAN SEE FOR ONE OF THE DEFENDANTS, AND THEN ANOTHER  
19 DEFENDANT ON THE NEXT PAGE, LOOK AT THE ESTIMATED PASS-THROUGH  
20 RATES. 272 PERCENT AND MINUS 2.9? THAT DOESN'T MAKE ANY  
21 ECONOMIC SENSE. AND SO WHAT'S HAPPENED HERE IS THAT SHE'S RUN  
22 A CHOW TEST, AND SHE'S CHOPPED THE DATA TOO FINELY, AND SHE'S  
23 GETTING PASS-THROUGH RATES THAT DON'T MAKE ANY ECONOMIC SENSE.  
24 AND SHE'S DONE PRECISELY --

25 IF YOUR HONOR IS STILL ON PAGE 41 -- THIS -- LOOK AT

1 PARAGRAPH 91 FOR JUST A MOMENT, THIS IS A QUOTE FROM THAT ABA  
2 MONOGRAPH THAT'S BEEN CITED SEVERAL TIMES OVER THE LAST COUPLE  
3 DAYS CALLED *ECONOMETRICS: LEGAL, PRACTICAL TECHNICAL ISSUES*.  
4 THE WHOLE POINT TO THIS QUOTE IS THAT WHEN YOU START APPLYING  
5 REGRESSION MODELS TO THEY CALL IT SUBGROUPS OF DATA -- JUST TO  
6 MOVE THINGS ALONG, JUST LOOK AT THE LAST SENTENCE, "ESTIMATED  
7 COEFFICIENT MAY MAKE LITTLE ECONOMIC SENSE EVEN IF THEY HAVE  
8 BEEN ESTIMATED PRECISELY," IN OTHER WORDS, THE WORD "PRECISELY"  
9 MEANS STATISTICALLY SIGNIFICANT, AND THAT'S EXACTLY WHAT'S  
10 HAPPENED HERE.

11 SO WHEN MS. LEE IN HER OPENING SAID THAT I HAD SOMEHOW  
12 MADE AN ASSUMPTION ABOUT I THINK SHE USED THE WORD AVERAGE, BUT  
13 THEY ALWAYS MISUSE THE WORD AVERAGE, BUT ANYWAY, THAT I HAD  
14 MADE SOME AVERAGE PASS-THROUGH RATE, MY PASS-THROUGH RATES ARE  
15 THE CORRECT ONES, IN MY OPINION. WHEN YOU DO THIS CHOW TEST,  
16 AND YOU START SLICING AND DICING THE DATA, YOU JUST GET  
17 NONSENSICAL RESULTS.

18 JUST TO FINISH IT, EVEN IF YOU BELIEVED DR. HAIDER'S  
19 PASS-THROUGH RATES, THEY'RE STILL POSITIVE AND STATISTICALLY  
20 SIGNIFICANT, SO THEY STILL WOULD BE PASSED THROUGH TO THE  
21 OVERCHARGES TO THE PROPOSED CLASS MEMBERS.

22 Q. NOW, I'VE TRIED TO MOVE YOU THROUGH SOME VERY COMPLICATED  
23 MATERIAL, SOME OF WHICH IS REPETITIVE, SOME OF WHICH IS NEW,  
24 AND I'VE BEEN TRYING TO KEEP THINGS MOVING. BEFORE THE DRUM  
25 ROLL NOW, AND BEFORE I TURN OVER THE MICROPHONE TO THE

1 DEFENDANTS, IS THERE ANYTHING FROM MY EXAMINATION THAT YOU  
2 WOULD LIKE TO ADD?

3 A. NO.

4 MR. CUNEO: THANK YOU.

5 THE COURT: I WOULD LIKE TO TAKE A SHORT TEN-MINUTE  
6 BREAK AT THIS POINT. WE'RE AT A NATURAL BREAKING POINT, SO  
7 LET'S DO THAT, COUNSEL.

8 MR. CUNEO: THANK YOU, YOUR HONOR.

9 THE COURT: THANK YOU VERY MUCH, SIR.

10 THE WITNESS: THANK YOU.

11 (COURT WAS AT RECESS.)

12 THE COURT: WHILE EVERYTHING IS GETTING PASSED OUT, AND  
13 WE'RE GETTING READY TO START, A COUPLE OF THINGS. SIR, YOU ARE  
14 A VERY FAST TALKER, SO YOU'VE GOT TO SLOW DOWN A LITTLE BIT.

15 MR. GALLO, SO ARE YOU. AND IF HISTORY IS ANY  
16 INDICATOR, YOU GET TO STATE THE WHOLE QUESTION, LET HIM FINISH  
17 HIS ANSWERS, AND VICE VERSA.

18 MR. GALLO: THANK YOU, YOUR HONOR.

19 THE COURT: SO THAT WE HAVE A PRODUCTIVE AND  
20 WELL-REPORTED MORNING.

21 MR. GALLO: MESSAGE RECEIVED.

22 THE COURT: SO I'M READY TO BEGIN WHENEVER YOU ARE.

23 CROSS-EXAMINATION

24 BY MR. GALLO:

25 Q. GOOD MORNING, DR. WILLIAMS. DR. WILLIAMS, WE JUST HANDED



1 YOU OUR BINDERS, BUT I ACTUALLY WANT YOU TO LOOK AT FIRST, IF  
2 YOU STILL HAVE IT UP THERE, IN YOUR BINDER, YOUR SLIDE NUMBER  
3 7, WHICH WAS IN YOUR PRESENTATION THAT YOU WENT THROUGH WITH  
4 THE COURT.

5 A. YES, SIR.

6 Q. THIS IS THE EXPLANATORY VARIABLES, AND YOU WERE EXPLAINING  
7 TO THE COURT HOW THE REGRESSION IS CONSTRUCTED, IF YOU WILL,  
8 HOW IT WORKS, RIGHT?

9 A. YES, SIR.

10 Q. SO I WANTED TO ASK YOU A COUPLE OF QUESTIONS ABOUT THAT.  
11 THE CONTROL VARIABLES, THOSE ARE SOMETIMES ALSO REFERRED TO AS  
12 EXPLANATORY VARIABLES; AM I CORRECT ABOUT THAT?

13 A. YES, SIR.

14 Q. AND YOU PUT A COEFFICIENT INTO THE REGRESSION THAT -- FOR  
15 EACH OF THOSE CONTROL VARIABLES OR EXPLANATORY VARIABLES; IS  
16 THAT RIGHT?

17 A. NO.

18 Q. IS THERE A VALUE ASSOCIATED WITH IT OF SOME KIND?

19 A. THEY HAVE VALUES. THE WAY YOU STATED THE QUESTION WASN'T  
20 CORRECT BECAUSE, AS I'M SURE YOU'RE AWARE, THE COST VARIABLES  
21 THEY ARE COMBINED INTO A SINGLE INDEX SO THERE'S ONE  
22 COEFFICIENT.

23 Q. I'M JUST TRYING TO GET AT THE POINT THAT, FOR EXAMPLE,  
24 IT'S ONE COST COEFFICIENT FOR ALL -- ONE COEFFICIENT FOR  
25 EVERYTHING THAT'S A COST VARIABLE; IS THAT WHAT YOU'RE SAYING?

1 A. THAT'S CORRECT, BECAUSE IT'S AN INDEX.

2 Q. THERE'S ONE VALUE FOR THAT?

3 A. RIGHT.

4 Q. GOT IT. WOULD THERE BE ONE VALUE FOR THE WAGES THEN ALSO  
5 OR THAT'S PART OF THE COST?

6 A. NO, THEY'RE COMBINED INTO THE INDEX.

7 Q. OKAY. SO HERE'S WHAT I'M JUST TRYING TO UNDERSTAND, IF  
8 YOU CHANGE ONE OF THOSE INPUTS, THAT POTENTIALLY CHANGES THE  
9 OUTPUT, THE OTHER SIDE OF THE EQUATION, CORRECT?

10 A. I THINK I KNOW WHAT YOU MEAN. I THINK WHAT YOU'RE ASKING  
11 IS IF WE WERE TO CHANGE ONE OF THESE INPUTS THAT WENT INTO THE  
12 COST INDEX, YOU'RE ASKING WOULD THAT CHANGE, FOR EXAMPLE, THE  
13 COEFFICIENT ON THE COST INDEX?

14 Q. I'M TRYING TO SPEAK IN GENERAL TERMS, NOT ABOUT YOUR  
15 SPECIFIC REGRESSION. LET'S BE CLEAR ABOUT THAT, I'M NOT TRYING  
16 TO SUGGEST ANYTHING ABOUT YOUR WORK.

17 BUT IN GENERAL TERMS, THE INPUTS THEN PRODUCE THE OTHER  
18 SIDE OF THE EQUATION, THE LEFT SIDE OF THE EQUATION, THE  
19 OUTCOME OF THE REGRESSION, DOESN'T IT? DON'T THE INPUTS  
20 CONTRIBUTE TO THAT OUTPUT?

21 A. I THINK -- LET ME TRY TO ANSWER YOUR QUESTION.

22 Q. OKAY.

23 A. IF YOU CHANGE THE EXPLANATORY -- IF YOU CHANGE ONE OF THE  
24 EXPLANATORY VARIABLES IN JUST SOME REGRESSION, NOT MINE, IT  
25 DOESN'T CHANGE THE ACTUAL VALUES OF THE DEPENDENT VARIABLE, BUT

1 IT COULD CHANGE THE PREDICTED VALUES.

2 Q. OKAY. SO LET ME BE A LITTLE MORE SPECIFIC THEN. MAYBE IF  
3 I MAKE IT MORE CONCRETE IT WOULD BE BETTER.

4 AT THE END OF YOUR TESTIMONY YOU WERE TALKING ABOUT WHY  
5 YOU USED AN INDEX FOR COSTS AND WHY YOU THOUGHT IT WAS IMPROPER  
6 FOR DR. HAIDER TO USE THE COST OF GOODS SOLD, RIGHT? REMEMBER  
7 THAT TESTIMONY?

8 A. YES, I DO.

9 Q. AND I THOUGHT I HEARD YOU SAY THAT BY USING COSTS OF GOODS  
10 SOLD, YOU BELIEVED IT POTENTIALLY CAUSED THE "BUT FOR" PRICE TO  
11 BE HIGHER, RIGHT, THE PREDICTED PRICE? ISN'T THAT WHAT YOUR  
12 TESTIMONY WAS?

13 A. YEAH. AGAIN, I HAVEN'T RUN ANY REGRESSIONS WITH A COST OF  
14 GOODS SOLD VARIABLE, DR. HAIDER DID THAT. I THINK THAT'S ONE  
15 POSSIBLE OUTCOME.

16 Q. RIGHT. WELL, THAT'S WHAT I WAS GETTING AT, THESE INPUT  
17 VARIABLES ARE IMPORTANT, RIGHT, THAT THEY BE ACCURATE, AS  
18 ACCURATE AS YOU CAN MAKE THEM?

19 A. SURE.

20 Q. AND CHANGING THEM CAN MAKE A MATERIAL DIFFERENCE DEPENDING  
21 ON WHAT THE CHANGE IS IN THE OUTCOME, IT MAY OR MAY NOT  
22 DEPENDING ON WHAT THE CHANGE IS.

23 A. YOU CAN CHANGE RIGHT-HAND SIDE VARIABLES IN A REGRESSION  
24 AND IT CERTAINLY IS PROBABLY GOING TO HAVE SOME EFFECT ON THE  
25 REGRESSION.

1 Q. RIGHT. AND IT MIGHT, IN SOME CASES, BE IF YOU CHANGE THE  
2 VARIABLE IT MIGHT BE SIGNIFICANT ENOUGH TO CHANGE THE OUTPUT  
3 FROM A POSITIVE COEFFICIENT TO A NEGATIVE COEFFICIENT OR THE  
4 OTHER WAY AROUND.

5 A. THAT'S CONCEIVABLE. YOU DO NEED TO BE CAREFUL IN THE KIND  
6 -- WHEN YOU MAKE A STATEMENT LIKE THAT, IN THE PARTICULAR  
7 REGRESSIONS WE'RE RUNNING HERE -- YOUR HONOR, JUST A LITTLE BIT  
8 MORE TERMINOLOGY FOR YOU. THESE KINDS OF REGRESSIONS ARE  
9 CALLED REDUCED FORM REGRESSIONS. A REDUCED FORM REGRESSION IS  
10 A REGRESSION WITH A PRICE ON THE LEFT AND SUPPLY AND DEMAND  
11 FACTORS ARE ON THE RIGHT, SO IT'S ALL COMBINED TOGETHER.  
12 THAT'S CALLED A REDUCED FORM REGRESSION.

13 AS OPPOSED TO, JUST TO BE CLEAR, IS THAT -- DR. MANGUM  
14 BRIEFLY MENTIONED THIS IN HIS TESTIMONY. THERE'S A COMPLETELY  
15 DIFFERENT KIND OF REGRESSION MODEL. IT'S NOT REALLY USED IN  
16 ANTITRUST. IT'S CALLED A STRUCTURAL REGRESSION, SO YOU WOULD  
17 HAVE ONE REGRESSION, FOR EXAMPLE, FOR THE SUPPLY SIDE OF THE  
18 MARKET AND A DIFFERENT ONE FOR THE DEMAND SIDE OF THE MARKET.

19 THE REASON I'M MENTIONING THIS IS THAT MR. GALLO JUST  
20 SAID THAT IT COULD CHANGE THE SIGN IF WE SWAPPED OUT RIGHT-HAND  
21 SIDE VARIABLES IN A REDUCED FORM REGRESSION. THE REASON THAT  
22 I'M TALKING TO YOU RIGHT NOW ABOUT THIS REDUCED FORM VERSUS  
23 STRUCTURAL IS THAT WHEN YOU HAVE, AS WE DO HERE, INDEPENDENT  
24 RIGHT-HAND SIDE VARIABLES THAT MOVE TOGETHER, THAT ARE  
25 CORRELATED, FOR EXAMPLE, THE COST VARIABLE RISES OVER TIME IN

1 THE DATA, AND SO DOES INCOME, AND WHEN THAT HAPPENS, WHEN THIS  
2 -- THIS IS CALLED MULTICOLLINEARITY. IT'S A STANDARD THING YOU  
3 LEARN IN ECONOMETRICS 101. WHEN THAT HAPPENS, THE MAGNITUDE  
4 AND EVEN THE SIGNS OF RIGHT-HAND SIDE VARIABLES CAN BE  
5 EFFECTED. IT'S NOT A PROBLEM BECAUSE IT DOESN'T AFFECT THE  
6 ACCURACY OF THE PREDICTED "BUT FOR" PRICES, WHICH IS ALL WE  
7 CARE ABOUT.

8 Q. THANKS. LET ME GO TO YOUR REPORT.

9 A. SURE.

10 Q. YOU DIDN'T MENTION IT TODAY, BUT ONE OF THE THINGS YOU  
11 SAID IN YOUR REPORT, IN THE BEGINNING OF YOUR REPORT, ON PAGE  
12 12 THROUGH 16, YOU SPENT A FAIR AMOUNT OF TIME ESTABLISHING  
13 THAT YOU BELIEVE THE DEFENDANTS BETWEEN 2008 AND 2016 ACCOUNTED  
14 FOR 80 TO 84 PERCENT OF THE RELEVANT TUNA SALES. THAT'S AT  
15 PARAGRAPH 22 OF YOUR REPORT, WHICH SHOULD BE IN TAB 1 OF THE  
16 SMALL BINDER.

17 THE COURT: WHAT WAS THE PARAGRAPH?

18 MR. GALLO: PARAGRAPH 22, PAGE 12.

19 Q. I THINK IT'S THE FIRST SENTENCE THERE.

20 A. YES, I SEE THAT.

21 Q. AND YOU REFER TO THE DEFENDANTS ACCOUNTING FOR 80 TO  
22 84 PERCENT OF THE SALES BECAUSE THAT'S RELEVANT TO YOUR COMMON  
23 IMPACT CONCLUSION, ISN'T IT?

24 A. I NEVER MENTIONED THE COMMON IMPACT CONCLUSIONS.

25 Q. OH, IT'S NOT RELEVANT TO THAT?

1 A. IN THIS PORTION OF MY REPORT, I'M SIMPLY TALKING ABOUT  
2 INDUSTRY CHARACTERISTICS. I NOTE HERE THAT ACROSS ALL SIZED --  
3 ALL TUNA SIZES THAT ACCOUNTED FOR THAT 80 TO 84 PERCENT. AS I  
4 DISCUSSED IN MY REBUTTAL REPORT, THERE AREN'T SPECIFIC MARKET  
5 SHARE DATA THAT ARE AVAILABLE. IF YOU THOUGHT THAT LARGE-SIZED  
6 PACKAGED TUNA WAS AVAILABLE IN A --

7 THE COURT REPORTER: PLEASE SLOW DOWN.

8 A. -- MARKET, AND I HAVE NOT OFFERED THAT OPINION, NEITHER  
9 HAS DR. HAIDER, BUT THERE ARE NOT AVAILABLE DATA IN THIS CASE  
10 WITH WHICH ONE COULD ACTUALLY CALCULATE MARKET SHARES ONLY FOR  
11 LARGE-SIZED PACKAGED TUNA BECAUSE THE DATA WASN'T PROVIDED BY  
12 ALL THE NON-DEFENDANTS, SO MY REPORT DOESN'T DOESN'T RELY --  
13 DOESN'T SAY ANYTHING ABOUT MARKET SHARE.

14 Q. OKAY. FAIR ENOUGH. DR. WILLIAMS, I'M GOING TO JUST ASK  
15 YOU, IF YOU DON'T MIND, TRY TO STAY WITH MY QUESTIONS. YOU  
16 HAVE HAD PLENTY OF OPPORTUNITY TO GIVE YOUR OPINION, AND YOUR  
17 LAWYER'S GOING TO BE ABLE TO ASK YOU SOME MORE QUESTIONS.

18 OKAY. WELL, I GUESS I'M SURPRISED AT THAT. WOULD YOU  
19 LOOK AT TAB 15, WHICH IS DR. MANGUM'S EXPERT REPORT IN THIS  
20 CASE?

21 A. I'M SORRY, WHICH BINDER?

22 Q. THE BIG BINDER THAT WE JUST HANDED TO YOU. TAB 15 IS DR.  
23 MANGUM'S EXPERT REPORT.

24 A. YES, I'M THERE.

25 Q. AT PARAGRAPH 102, WHICH IS PAGE 63.

1 A. YES, I'M THERE.

2 Q. DR. MANGUM HAS -- THE FIRST THREE SENTENCES OF THAT  
3 PARAGRAPH SAY, "DEFENDANTS' CONTROL OF THE PACKAGED TUNA  
4 INDUSTRY HAS SERIOUS IMPLICATIONS FOR COMMON IMPACT AND THE  
5 SUCCESS OF THE CARTEL. POSSESSION OF A DOMINANT MARKET SHARE  
6 DOES NOT MEAN SIMPLY THAT THE DEFENDANTS EARN MORE REVENUE THAN  
7 THOSE ON THE COMPETITIVE FRINGE, RATHER IT MEANS THAT THE  
8 DEFENDANTS' PRODUCTS ARE WIDELY DISTRIBUTED, OCCUPYING SCARCE  
9 SHELF SPACE THAT WOULD-BE COMPETITORS CANNOT EASILY OR  
10 CONSISTENTLY OBTAIN." SO DR. MANGUM, AND HE TESTIFIED HERE,  
11 AND I THINK YOU WERE IN THE COURTROOM --

12 A. YES, SIR.

13 Q. HE OPINED THAT HAVING A SIGNIFICANT PERCENTAGE OF THE  
14 MARKET OF THE SALES AT ISSUE BE CONTROLLED BY THE DEFENDANTS  
15 WAS IMPORTANT TO HIS OPINION ON COMMON IMPACT. YOU DON'T AGREE  
16 WITH THAT?

17 A. NO, I DON'T DISAGREE WITH THAT. THIS IS DR. MANGUM'S  
18 OPINION ABOUT HIS REPORT. MY REPORT -- YOU HEARD -- WELL, I  
19 WON'T GO ON LONGER. YOU WANT ME TO GIVE SHORTER ANSWERS.

20 I JUST TESTIFIED EXTENSIVELY ABOUT THE TWO INDEPENDENT  
21 ANALYSES I DID TO DETERMINE THAT ALL OR ALMOST ALL PROPOSED  
22 CLASS MEMBERS WERE INJURED, AND I NEVER SAID A WORD ABOUT  
23 MARKET CONCENTRATION.

24 Q. I KNOW YOU DIDN'T SAY IT TODAY, I UNDERSTAND THAT, BUT AT  
25 PARAGRAPH 23 OF YOUR REPORT, WHICH IS AGAIN PARAGRAPH 1 IN THE

1 SMALL BINDER, DOCUMENT 1, YOU CONCLUDED THAT "THE U.S. PACKAGED  
2 TUNA INDUSTRY WAS HIGHLY CONCENTRATED DURING THE ALLEGED  
3 DAMAGES PERIOD." I ASSUME YOU WEREN'T SAYING THAT BECAUSE IT  
4 WAS IRRELEVANT TO YOUR OPINION.

5 A. I'M SORRY, WHICH BINDER?

6 Q. SMALL BINDER, TAB NUMBER 1, THAT'S WHERE YOUR REPORT IS.

7 THE COURT: HE'S BACK TO YOUR REPORT.

8 A. WHICH PARAGRAPH?

9 Q. PARAGRAPH 23, IT'S ON PAGE --

10 THE COURT: 16 OF YOUR REPORT.

11 A. YES, I SEE IT.

12 Q. YOU DID SAY IT WAS A HIGHLY CONCENTRATED INDUSTRY.

13 A. IT IS A HIGHLY CONCENTRATED INDUSTRY.

14 Q. OKAY. AND THERE YOU'RE TALKING ABOUT PACKAGED TUNA SALES  
15 GENERALLY, RIGHT?

16 A. THAT'S CORRECT, ALL SIZES.

17 Q. YOU'RE NOT -- AND THE CLASS DEFINITION IN THIS CASE IS  
18 LIMITED TO SALES OF 40-OUNCE PACKAGES OR LARGER, RIGHT?

19 A. THAT'S CORRECT.

20 Q. AND YOU DIDN'T OFFER ANY OPINION, AND YOU HAVEN'T TODAY,  
21 ABOUT WHAT PERCENTAGE OF THE SALES THE DEFENDANTS HAVE IN  
22 40-OUNCE CANS OR LARGER, RIGHT?

23 A. ACTUALLY, AS I JUST TOLD HER HONOR, THE DATA DOESN'T EXIST  
24 TO ACTUALLY CALCULATE THAT STATISTIC.

25 Q. RIGHT. BUT YOU DIDN'T EVEN TRY TO GIVE ANY KIND OF



1 ESTIMATE OF IT, DID YOU?

2 A. THE DATA DOESN'T EXIST TO CALCULATE.

3 Q. WELL, LET'S LOOK AT THAT FOR A MOMENT. LET'S BE CLEAR.  
4 AGAIN, WHAT WE'RE TALKING ABOUT ARE THE DEFENDANTS' SALES TO  
5 THESE SIX DISTRIBUTORS OF 40 OUNCE OR LARGER, RIGHT?

6 A. THAT'S CORRECT.

7 MR. GALLO: WOULD YOU PUT UP NUMBER 7, THE FIRST  
8 DEMONSTRATIVE, AND DO THE NEXT ITERATION OF 7.

9 Q. THIS TO ME -- I HAVE A HARD TIME FOLLOWING THIS SO IT  
10 HELPS ME TO HAVE A VERY SIMPLE GRAPH. WE'RE TALKING ABOUT  
11 SALES. THE MANUFACTURERS HERE ARE ON THE LEFT-HAND SIDE,  
12 THAT'S WHERE THE DEFENDANTS ARE. WE'RE TALKING ABOUT THEM  
13 SELLING TO THESE SIX LARGE DISTRIBUTORS, RIGHT? THAT'S THE SIX  
14 LARGE DISTRIBUTORS THAT YOU IDENTIFIED IN YOUR DIRECT  
15 TESTIMONY, CORRECT? SYSCO, DOT FOODS, U.S. FOODS, SAM'S CLUB,  
16 WALMART, RIGHT?

17 A. THAT'S CORRECT.

18 Q. AND THEN FOR YOUR PASS-THROUGH, WE'RE TALKING ABOUT THEM  
19 SELLING DOWNSTREAM, AND WE'LL GET TO THE PASS-THROUGH IN A  
20 MOMENT. I DON'T WANT TO TALK ABOUT THE PASS-THROUGH NOW.  
21 WE'RE FOCUSED ON THE SALES FROM THE DEFENDANTS TO THE LARGE  
22 DISTRIBUTORS, RIGHT?

23 A. YES, SIR.

24 Q. FOR 40-OUNCE CANS. ARE YOU TELLING THE COURT THAT YOU  
25 HAVE NO IDEA WHAT PERCENTAGE OF THE SALES OF LARGE CANS OF TUNA

1            THAT THOSE DISTRIBUTORS BUY COME FROM THE DEFENDANTS? YOU  
2            DON'T KNOW THAT?

3            A.     I CAN'T GIVE YOU A PRECISE ESTIMATE, NO. AS I SAID, THE  
4            DATA DON'T EXIST.

5            Q.     YOU DIDN'T TRY TO CALCULATE THAT BECAUSE YOU THINK THE  
6            DATA DON'T EXIST.

7            A.     THAT'S CORRECT.

8            Q.     DID YOU ASSUME THAT IT'S THE SAME AS THE 80 TO 84 PERCENT  
9            FIGURE?

10          A.     NO.

11          Q.     OKAY. THAT'S FINE. THEN LET ME JUST SEE IF I CAN HELP  
12          YOU A LITTLE BIT WITH THAT. YOU DO SAY THAT THE CONCENTRATION  
13          OF THE INDUSTRY IS HIGH, AND YOU RELY ON HHI, IF YOU REFER TO  
14          THE HERFINDAHL INDEX WHICH IS USED AT THE JUSTICE DEPARTMENT IN  
15          THE MERGER GUIDELINES, RIGHT, AMONG OTHER REASONS -- FOR OTHER  
16          PURPOSES, RIGHT?

17          A.     THAT'S CORRECT.

18          Q.     YOU RELY ON THE HHI INDEX AND SAY THAT CONCENTRATION IS  
19          HIGH?

20          A.     ECONOMISTS DO THAT.

21          Q.     AGAIN, THAT'S USING ALL TUNA SALES, NOT TUNA SALES TO  
22          THESE SIX DISTRIBUTORS.

23          A.     THAT IS CORRECT.

24          Q.     GOOD ENOUGH. SO FOR PURPOSES OF COMING UP WITH THIS  
25          NUMBER OF WHAT THE SALES ARE, LET ME ASK YOU TO LOOK AT YOUR

1 REPORT, SPECIFICALLY PAGE 15, TABLE 2 OF YOUR REPORT. AGAIN,  
2 IT'S THE FIRST ONE IN THE SMALL BINDER, YOUR REPORT. WE'RE  
3 GOING TO LOOK AT IT MULTIPLE TIMES.

4 A. YES, I'M THERE.

5 Q. WHAT YOU REFER TO HERE, YOU'VE GOT MARKET SHARE AND MARKET  
6 CONCENTRATION FOR PACKAGED TUNA, AND YOU DO IT BY YEAR FOR EACH  
7 OF THE DEFENDANTS IN THE CASE. AM I READING THAT CORRECTLY?

8 A. YES, SIR.

9 Q. AND WHAT YOU REFER TO THERE ARE SOME COSI DOCUMENTS,  
10 RIGHT, DOCUMENTS PRESENTED BY CHICKEN OF THE SEA?

11 A. YES, SIR.

12 Q. I CAN SHOW YOU THOSE, BUT IN THE INTERESTS OF SAVING TIME,  
13 I WONDER IF YOU REMEMBER THAT THOSE COSI DOCUMENTS ARE  
14 REPORTING NIELSEN RESULTS, RETAIL SALES, NIELSEN RESULTS. AM I  
15 RIGHT ABOUT THAT?

16 A. I BELIEVE SO.

17 Q. YEAH, OKAY. AND SO WHAT THAT -- WHAT NIELSEN IS SHOWING  
18 IS SALES FROM RETAILERS, RIGHT, TO CONSUMERS, THAT'S WHAT THESE  
19 NUMBERS ARE MEASURING.

20 A. YES, SIR.

21 Q. SO THAT'S NOT THE FOOD SERVICE CHANNEL AT ALL, THAT'S  
22 RETAIL SALES.

23 A. I BELIEVE THAT'S CORRECT, YES.

24 Q. I DON'T EVEN KNOW, IS THIS EVEN IN A RETAIL STORE OR IS  
25 THIS ONLY IN THE FOOD SERVICE?

1 A. IT'S CERTAINLY AT WALMART, COSTCO AND SAM'S CLUB.

2 Q. IT IS?

3 A. OTHERWISE THEY WOULDN'T BE IN THE CLASS.

4 Q. BUT YOU'RE MAKE -- WHAT YOU'RE MEASURING HERE IS WHAT'S  
5 SOLD FROM THE RETAILER TO THE CONSUMER. YOU'RE NOT MEASURING  
6 WHAT'S SOLD FROM BUMBLEBEE, FOR EXAMPLE, TO SYSCO OR -- RIGHT?

7 A. JUST TO BE CLEAR, I THINK WHAT YOU SAID IS THAT'S WHAT THE  
8 COSI DOCUMENTS ARE MEASURING, BUT I BELIEVE THAT'S CORRECT.

9 Q. WELL, THAT'S WHAT YOU'RE RELYING ON FOR YOUR SHARES,  
10 CORRECT?

11 A. IN TABLE 2, THAT'S CORRECT.

12 Q. OKAY, GOT IT. AND IT DOESN'T REPORT ON SALES --

13 MR. GALLO: COULD YOU PUT BACK UP 7 ON THAT. THANK  
14 YOU.

15 Q. IT DOESN'T REPORT ON THE SALES FROM THE DISTRIBUTOR TO A  
16 RESTAURANT OR DELI, DOES IT?

17 A. THE NIELSEN DOESN'T?

18 Q. RIGHT.

19 A. I'M NOT SURE. I DON'T THINK IT DOES.

20 Q. RIGHT. OR FROM THE LARGE DISTRIBUTOR TO THE SMALL  
21 DISTRIBUTOR.

22 A. AGAIN, I DON'T THINK IT DOES.

23 Q. ALL RIGHT. SO IT'S NOT MEASURING ANY OF THESE THINGS THAT  
24 WE'RE TALKING ABOUT HERE. IT'S MEASURING RETAIL SALES TO  
25 CONSUMERS.

1 A. I BELIEVE THAT'S CORRECT. AGAIN, I THINK THAT WOULD  
2 INCLUDE -- THE DATA I THINK WOULD INCLUDE SALES MADE BY COSTCO,  
3 WALMART AND SAM'S CLUB.

4 Q. I'M SORRY, I DIDN'T HEAR THAT, SIR.

5 A. I WAS JUST SAYING THAT I THINK THE NIELSEN DATA INCLUDE  
6 DATA FROM WALMART, SAM'S CLUB -- WALMART, SAM'S CLUB AND  
7 COSTCO.

8 Q. TO CONSUMERS?

9 A. SURE.

10 Q. RIGHT. BUT WHAT WE'RE TALKING ABOUT IS SALES FROM LARGE  
11 DISTRIBUTORS TO PEOPLE LIKE COSTCO OR SAM'S CLUB. WE'RE NOT  
12 TALKING ABOUT SALES OUT OF THERE, RIGHT?

13 A. I THINK YOU MISSPOKE. YOU SAID WE'RE LOOKING AT SALES  
14 FROM DISTRIBUTORS TO SAM'S CLUB, BUT --

15 Q. I'M SORRY. I MEANT -- LET'S USE THE SAME WORDS. IN 7-A,  
16 WE'RE FOCUSED ON FIRST THE SALE FROM THE MANUFACTURER TO THE  
17 DISTRIBUTOR AND THEN THE DISTRIBUTOR TO THE FOLKS IN GREEN,  
18 RIGHT?

19 A. YES, SIR.

20 Q. WE'RE NOT LOOKING AT RETAIL SALES, WHICH IS WHAT NIELSEN  
21 IS MEASURING.

22 A. I DON'T THINK THAT'S QUITE RIGHT. IF A RESTAURANT BOUGHT  
23 THE LARGE-SIZED PACKAGED TUNA FROM A WALMART, A COSTCO OR SAM'S  
24 CLUB, IT WOULD BE --

25 Q. I'M SORRY, YOU'RE RIGHT. I OVERSTATED IT. I SHOULD HAVE

1 LIMITED MY QUESTION TO SYSCO, U.S. FOODS AND DOT WHO DON'T HAVE  
2 A RETAIL CHANNEL.

3 A. THEN YOU WOULD BE CORRECT.

4 Q. TO BE CLEAR FOR THE COURT, IT WOULDN'T PICK UP SALES TO  
5 SYSCO, U.S. FOODS OR DOT, AND IT WOULDN'T PICK UP SALES FROM  
6 THEM AS A LARGE DISTRIBUTOR TO THESE OTHER ENTITIES.

7 A. THAT'S MY UNDERSTANDING.

8 Q. I'M SORRY, YOU'RE CORRECT. I APPRECIATE THE CORRECTION.  
9 I SPOKE TOO BROADLY.

10 AND IN YOUR -- IN THE CLASS ACTION THAT YOU'RE  
11 TESTIFYING ABOUT, DOT, SYSCO AND U.S. FOODS ACCOUNT FOR  
12 75 PERCENT OF THE SALES AT ISSUE HERE.

13 A. I BELIEVE THAT'S CORRECT. THERE'S A PARAGRAPH IN MY FIRST  
14 REPORT THAT HAS THOSE --

15 Q. THANK YOU. IT'S PARAGRAPH 14, AND IT HAS THOSE  
16 STATISTICS. THAT'S WHERE I GOT IT FROM.

17 SO THE NIELSEN DATA THAT YOU'RE REPORTING ON DOESN'T  
18 RELATE TO 75 PERCENT OF THE SALES WE'RE TALKING ABOUT HERE.

19 A. I BELIEVE THAT'S CORRECT.

20 Q. OKAY. THANK YOU. SO THAT NIELSEN DATA -- WELL, STRIKE  
21 THAT.

22 YOU DIDN'T RELY ON ANY OTHER SOURCE OF INFORMATION TO  
23 COME UP WITH THESE MARKET SHARE CONCLUSIONS THAT YOU CAME UP  
24 WITH, 80 TO 84 PERCENT, YOU JUST RELIED ON THAT NIELSEN DATA,  
25 RIGHT?

1 A. THAT'S CORRECT.

2 Q. AND YOUR REPORT DOESN'T SAY THAT, WHEN YOU WERE INFORMING  
3 THE COURT THAT THERE WAS AN 80 TO 84 PERCENT SHARE, THAT THE  
4 DATA YOU WERE WORKING WITH ACTUALLY HAD NOTHING TO DO WITH  
5 75 PERCENT OF THE SALES IN THE CLASS.

6 A. I DON'T AGREE WITH THAT. I THINK I WAS VERY CLEAR. I'M  
7 GOING TO READ THE FIRST SENTENCE IN PARAGRAPH 22, "TOTAL AMOUNT  
8 OF SALES OF PACKAGED TUNA IN THE U.S." I DIDN'T PURPORT TO SAY  
9 THAT THAT WAS LARGE-SIZED PACKAGED TUNA. I THINK IT'S VERY  
10 CLEAR.

11 Q. OKAY. WELL, I GUESS YOU SAID IT WAS PACKAGED TUNA SALES,  
12 YOU DIDN'T DESCRIBE IT AS RETAIL SALES, I GUESS, IS WHAT I WAS  
13 TRYING TO SAY, BUT THAT'S OKAY. I THINK WE UNDERSTAND IT.

14 LET'S TALK ABOUT YOUR CONCERN THAT SOME OF THE  
15 SO-CALLED NON-DEFENDANT TUNA THAT DR. HAIDER SPEAKS ABOUT  
16 ACTUALLY WAS MANUFACTURED BY THE DEFENDANTS. THAT'S ONE OF THE  
17 POINTS THAT YOU MADE THIS MORNING, RIGHT?

18 A. YES, SIR.

19 Q. NOW, YOU HAD PURCHASE DATA AVAILABLE TO YOU FROM SYSCO AND  
20 U.S. FOODS, DIDN'T YOU?

21 A. THAT'S CORRECT.

22 Q. YOU COULD SEE FROM WHOM SYSCO WAS BUYING TUNA, RIGHT?

23 A. THAT'S CORRECT.

24 Q. AND YOU COULD SEE FROM WHOM U.S. FOODS WAS BUYING TUNA.

25 A. THAT'S CORRECT.

1 Q. OKAY. AND YOU KNEW THAT THE OVERWHELMING MAJORITY OF  
2 THOSE PURCHASES ARE NOT FROM THE DEFENDANTS IN THIS CASE.

3 A. THAT'S CORRECT. AGAIN, THE ISSUE IS WHO ACTUALLY PRODUCED  
4 THE TUNA.

5 Q. OKAY. YOU DIDN'T MENTION THAT THIS MORNING WHEN YOU WERE  
6 TESTIFYING THAT YOU KNOW THAT THE OVERWHELMING MAJORITY OF  
7 THEIR PURCHASES DID NOT COME FROM THE DEFENDANTS, RIGHT?

8 A. I'M SORRY, YOUR QUESTION --

9 Q. NEVER MIND, WE'LL GET TO IT.

10 CAN I ASK YOU TO REFER TO PAGE 2, WHICH IS DR. HAIDER'S  
11 REPORT. IT'S IN YOUR SMALL BINDER. I'M GOING TO ASK YOU TO GO  
12 TO PAGES 74 AND 75. AND I'M GOING TO ASK IF THIS IS ANOTHER  
13 AREA WHERE WE COULD BE CAREFUL ABOUT WHAT WE SAY IN OPEN COURT,  
14 OKAY?

15 A. YES, SIR.

16 Q. I'M GOING TO ASK YOU NOT TO TALK ABOUT SPECIFIC NUMBERS OR  
17 SPECIFIC ENTITIES UNLESS I ASK YOU TO DO SO, OKAY?

18 A. YES, I UNDERSTAND.

19 Q. YEAH, GOOD. I THINK WHAT -- DO YOU SEE THAT ON PAGE 75,  
20 WHICH IS FIGURE 4, THERE'S PURCHASES BY VENDOR FOR ONE OF THE  
21 MEMBERS OF THE -- ONE OF THE DISTRIBUTORS WE'RE TALKING ABOUT?

22 MR. GALLO: IT'S TOWARD THE BACK, YOUR HONOR, PAGE 75,  
23 IT'S CALLED FIGURE 4, TAB 2.

24 A. YES, I'M THERE.

25 Q. I JUST WANT TO GIVE THE COURT A CHANCE.



1 THE COURT: PAGE 75?

2 MR. GALLO: YES.

3 THE COURT: I'M THERE.

4 Q. WE'VE INUNDATED THE JUDGE WITH PAPER. I WANTED TO GIVE  
5 HER A CHANCE TO --

6 SO PAGE 75, DO YOU SEE THAT'S ONE OF THE PURCHASES BY  
7 VENDOR JUNE 2011 TO DECEMBER 2016?

8 A. YES.

9 Q. AND ON THE LEFT-HAND COLUMN IT SHOWS THE SUPPLIES FROM THE  
10 DEFENDANTS FIRST, RIGHT?

11 A. YES.

12 Q. AND OVER ON THE RIGHT-HAND SIDE, IT'S GOT AN ABSOLUTE  
13 NUMBER THERE, THE TOTAL AMOUNT FROM THE DEFENDANTS, AND THEN  
14 IT'S GOT A PERCENTAGE THAT THAT VENDOR BOUGHT FROM THE  
15 DEFENDANTS OVER IN THE FAR RIGHT-HAND CORNER.

16 I THINK IT'S OKAY IF WE SAY THAT NUMBER, 36 PERCENT. I  
17 DON'T THINK ANYBODY HAS A PROBLEM WITH THAT. I THINK IT'S THE  
18 INDIVIDUAL'S DATA THAT PEOPLE ARE WORRIED ABOUT.

19 A. I SEE THAT IT'S 36 PERCENT.

20 Q. AND THEN DOWN BELOW FROM THAT VENDOR, FOR ALL THE  
21 NON-DEFENDANT, WHAT ARE CALLED HERE NON-DEFENDANT PRODUCTS,  
22 THAT VENDOR BOUGHT 63 PERCENT OF THEM FROM NON-DEFENDANT  
23 PROVIDERS. DO YOU SEE THAT?

24 A. YES. YOU MISSPOKE SLIGHTLY.

25 Q. FIVE --

1 A. YOU SAID THE VENDOR BOUGHT FROM THE VENDOR. I THINK YOU  
2 MEANT THE DISTRIBUTOR BOUGHT FROM THESE VENDORS.

3 Q. RIGHT. YOU GOT ME TWICE. THANK YOU. I NEED ALL THE HELP  
4 I CAN GET. THAT'S GOOD. THAT'S FINE. OKAY, 63.5.

5 NOW, I KNOW YOU WANT TO TALK ABOUT TUG, AND WE'RE GOING  
6 TO TALK ABOUT TUG IN A MOMENT, AND I'M NOT TRYING TO STOP YOU  
7 FROM TALKING ABOUT THAT.

8 A. SURE.

9 Q. BUT JUST ON THE FACE OF THIS, YOU AGREE -- I ACTUALLY HAVE  
10 SCoured YOUR REPLY REPORT, AND I KNOW YOU WANT TO TALK ABOUT  
11 THE TUG ISSUE, BUT THESE NUMBERS WITHIN THE FOUR CORNERS OF  
12 THIS DOCUMENT, YOU DON'T CHALLENGE THESE NUMBERS, RIGHT? I  
13 DON'T SEE YOU CHALLENGING THIS DATA AS INACCURATE.

14 A. THAT'S CORRECT.

15 Q. SO NOW LET'S TALK ABOUT TUG. IF I UNDERSTAND YOUR POINT,  
16 YOU'RE SAYING THAT YOU CAN'T REALLY RELY ON THAT 63.5 PERCENT  
17 NUMBER BECAUSE THAI UNION SOLD TO SOME OF THESE NON-DEFENDANT  
18 PRODUCERS.

19 A. THAT'S CORRECT.

20 Q. AND THEY MIGHT HAVE THEN -- IT MIGHT BE THAI UNION TUNA  
21 THAT'S GOING THROUGH ONE OF THESE NON-DEFENDANT PRODUCERS AND  
22 GETTING TO THE DISTRIBUTOR WHO WE'RE TALKING ABOUT ON THIS  
23 PAGE, RIGHT?

24 A. THAT'S CORRECT.

25 Q. BUT YOU KNOW, AND YOU JUST TOLD THE COURT, THAT THAI UNION

1 SOLD A TOTAL OF \$150 MILLION IN THE RELEVANT PERIOD.

2 A. THAT'S CORRECT.

3 Q. SO EVEN IF EVERY SINGLE DOLLAR THAT THAI UNION SOLD WENT  
4 TO ONE OF THESE NON-DEFENDANTS, AND IN TURN WAS SOLD TO -- ONLY  
5 TO THIS VENDOR ON PAGE FIGURE 4, EVERY DOLLAR ENDED UP IN THIS  
6 VENDOR, THERE WOULD STILL BE A LOT OF TUNA COMING FROM  
7 NON-DEFENDANTS, CORRECT?

8 A. WELL, I DON'T KNOW IF I CAN READ THE NUMBER.

9 Q. DON'T READ THE NUMBER. THE COURT CAN SEE THE NUMBER, SO I  
10 THINK WE'RE ALL COMMUNICATING.

11 THE WITNESS: JUST SO YOUR HONOR'S CLEAR, SO WHAT'S  
12 BEING SUGGESTED IS YOU SEE THE -- IN COLUMN B, AS IN BOY, AND  
13 THEN SCOOT DOWN, YOU SEE WHERE IT SAYS SUBTOTAL.

14 THE COURT: YES.

15 THE WITNESS: WHAT IS BEING CONTEMPLATED HERE IS WE  
16 WOULD REDUCE THAT SUBTOTAL BY 150 MILLION.

17 Q. THAT'S ON THE ASSUMPTION THAT EVERY SINGLE DOLLAR THAT  
18 THAI UNION SOLD WENT TO ONE OF THESE PEOPLE, AND IN TURN WAS  
19 SOLD ONLY TO THIS PARTICULAR DISTRIBUTOR.

20 A. YES, THAT'S HOW --

21 Q. YOU DON'T HAVE PROOF OF THE FIRST PART OF THAT ASSUMPTION  
22 THAT THAI UNION SOLD IT TO THESE PEOPLE.

23 A. THAT'S CORRECT. AS I SAID, THE DATA DON'T EXIST.

24 Q. AND YOU DON'T HAVE PROOF OF THE SECOND PART THAT EVERY  
25 DOLLAR OF IT WENT TO THIS DISTRIBUTOR.

1 A. THAT'S ABSOLUTELY TRUE.

2 Q. NOW --

3 A. I'M SORRY, REALLY WHAT --

4 Q. I DIDN'T MEAN TO CUT YOU OFF.

5 A. I JUST HAD ONE SENTENCE, WHICH IS, AS I SAID ON SLIDE 22,  
6 YOUR HONOR, I'LL JUST REFER TO THE SECOND SENTENCE IN THE FIRST  
7 BULLET, "DR. HAIDER OFFERS NO EVIDENCE THAT ANY OF THESE  
8 VENDORS ACTUALLY MANUFACTURED ANY OF THE LARGE-SIZED PACKAGED  
9 TUNA THEY SOLD TO SYSCO AND U.S. FOODS," THAT'S A FACT.

10 Q. I'M SORRY, SIR, I COULD BARELY HEAR YOU, YOU SAID DR.  
11 HAIDER OFFERS NO PROOF OF WHAT?

12 A. I'M LOOKING AT THE SECOND SENTENCE ON SLIDE 22. I'LL JUST  
13 READ IT AGAIN, "DR. HAIDER OFFERS NO EVIDENCE THAT ANY OF THESE  
14 VENDORS," THESE NON-DEFENDANT MEMBERS, "ACTUALLY MANUFACTURED  
15 ANY OF THE LARGE-SIZED PACKAGED TUNA THEY SOLD TO SYSCO AND  
16 U.S. FOODS."

17 Q. OKAY. SO YOU'RE SAYING THAT SHE DOESN'T PROVE -- LET'S  
18 JUST TAKE IT ONE STEP AT A TIME. YOU KNOW THE TUG NUMBER IS  
19 150, RIGHT?

20 A. RIGHT.

21 Q. AND YOU HAVE ACCESS TO CHICKEN OF THE SEA'S DATA.

22 A. YES.

23 Q. AND STARKIST'S DATA.

24 A. YES, SIR.

25 Q. AND BUMBLEBEE'S DATA.

1 A. YES.

2 Q. AND THE KRAFT HEINZ DATA THAT IS THE PREDECESSOR COMPANY,  
3 RIGHT?

4 A. YES, SIR.

5 Q. AND YOU HAVEN'T TOLD THE COURT THAT ANY OF THOSE PEOPLE  
6 ABOVE THE LINE SOLD TO ANY OF THE VENDORS BELOW THE LINE.  
7 THERE'S NO EVIDENCE WHATSOEVER THAT THAT HAPPENED, RIGHT?

8 A. I'M NOT AWARE OF ANY.

9 Q. RIGHT. SO THERE'S NO INDICATION THAT THE BRAND NAMES,  
10 CHICKEN OF THE SEA, STARKIST, BUMBLEBEE, SOLD. THE ONLY OTHER  
11 PERSON YOU'VE IDENTIFIED ASSOCIATED WITH THE DEFENDANTS IS TUG,  
12 RIGHT?

13 A. THAT'S RIGHT.

14 Q. AND TUG IS LIMITED TO 150 MILLION.

15 A. THAT'S CORRECT.

16 Q. NOW, LET'S JUST ASSUME THAT HAPPENED, ALL THE TUG SALES  
17 WENT TO THIS DISTRIBUTOR ON FIGURE 4. LET'S LOOK AT FIGURE 3,  
18 WHICH IS ANOTHER OF THE BIG DISTRIBUTORS, AND YOU LOOK AT THE  
19 PERCENTAGE THAT'S SOLD BY THE DEFENDANTS, AND YOU SEE IT'S  
20 ABOUT 25 PERCENT, AND THE PERCENTAGE YOU SEE SOLD BY  
21 NON-DEFENDANTS IS 74 PERCENT, RIGHT?

22 A. YES, SIR.

23 Q. AND AGAIN YOU DON'T CONTEST THESE NUMBERS WITHIN THE FOUR  
24 CORNERS OF THIS CHART.

25 A. THAT'S CORRECT.

1 Q. AND IF TUG'S ALL WENT TO THE FIGURE 4 DISTRIBUTOR, THEN  
2 NONE OF IT WENT TO THE FIGURE 3 DISTRIBUTOR.

3 A. THAT WOULD BE DIRECT.

4 Q. OR MAYBE IT'S SPLIT, RIGHT?

5 A. YES, SIR.

6 Q. OR MAYBE TUG DIDN'T SELL ANY TO THESE PEOPLE. YOU HAVEN'T  
7 PROVEN THEY SOLD ANY TO ANY OF THESE NON-DEFENDANT PRODUCERS,  
8 HAVE YOU?

9 A. THAT'S CORRECT, NEITHER HAS DR. HAIDER SHOWN THAT ANY  
10 NON-DEFENDANT MANUFACTURED ANY OF THE TUNA SOLD BY THESE  
11 NON-DEFENDANT MEMBERS.

12 Q. OKAY. SO WHEN YOU SAID IN YOUR REPORT THAT THE  
13 NON-DEFENDANT -- THAT THE REGRESSION ANALYSES THAT DR. HAIDER  
14 RAN MIGHT CONTAIN A LARGE AMOUNT OF PACKAGED -- TUNA SOLD BY  
15 THE DEFENDANTS, YOU ACTUALLY HAD THE DATA TO FIGURE OUT WHETHER  
16 THE -- BUMBLEBEE, STARKIST AND CHICKEN OF THE SEA SOLD IT, AND  
17 YOU KNOW THEY DIDN'T, SO ALL WE'RE TALKING ABOUT IS 150  
18 MILLION.

19 A. I DON'T ACTUALLY THINK THAT'S CORRECT. IN FACT, IN MY  
20 REPORT I MENTIONED THAT DONGWON, THE PARENT OF STARKIST, DID  
21 NOT PROVIDE SUFFICIENT DATA.

22 Q. THANKS. I WAS ABOUT TO GET TO THAT.

23 DONGWON -- YOU'RE REFERRING TO DONGWON, A COMPANY  
24 THAT'S IDENTIFIED IN THE COMPLAINT, RIGHT, DONGWON INDUSTRIES.  
25 YOU IN FOOTNOTE 2 -- THAT'S WHO YOU REFER TO, DONGWON

1 INDUSTRIES, FOOTNOTE 1, PAGE 2 OF YOUR REPORT.

2 A. I BELIEVE THAT'S CORRECT. YES.

3 Q. HAVE YOU INVESTIGATED WHAT THAT COMPANY DOES?

4 A. IT'S THE PARENT OF STARKIST.

5 Q. DO YOU KNOW IT'S A FISHING COMPANY?

6 A. THAT'S MY UNDERSTANDING.

7 Q. IT DOESN'T MANUFACTURE PACKAGED TUNA AT ALL; DO YOU KNOW  
8 THAT?

9 A. THAT'S MY UNDERSTANDING.

10 Q. THAT'S YOUR UNDERSTANDING, AND YOU JUST SAID TO THE COURT  
11 WE NEEDED TO PROVE THEY DIDN'T SELL IT, AND YOU KNEW THEY  
12 DIDN'T MANUFACTURE TUNA, AND YOU SAID THAT.

13 A. NO, I DON'T KNOW THE FULL EXTENT OF THEIR OPERATIONS. I  
14 DON'T KNOW WHETHER OR NOT THEY -- THEY MANUFACTURED TUNA THAT  
15 END UP IN THESE NON-VENDORS, I'M NOT SURE.

16 Q. YOU DON'T KNOW WHAT THE RECORD SAYS ABOUT THAT.

17 A. I DON'T, NOT THAT I RECALL RIGHT NOW.

18 Q. IF I REPRESENT TO YOU THAT THE RECORD SAYS THEY'RE A  
19 FISHING COMPANY AND THEY DON'T MANUFACTURE PACKAGED TUNA, WILL  
20 YOU WITHDRAW THAT ARGUMENT?

21 A. IF YOU'RE REPRESENTING THAT THAT'S TRUE, THEN DONGWON DID  
22 NOT SELL PACKAGED TUNA TO THESE NON-DEFENDANT MEMBERS.

23 Q. THANK YOU.

24 LET ME CHANGE SUBJECTS. YOU TALKED ABOUT IF THERE WERE  
25 ANTICOMPETITIVE CONDUCT IN THE BENCHMARK PERIOD -- YOU WERE

1 CAREFUL. I APPRECIATED THE PRECISION WITH WHICH YOU SAID THIS.  
2 YOU SAID ALL THINGS EQUAL -- IF THERE WERE ANTICOMPETITIVE  
3 CONDUCT IN THE TAINTED PERIOD, IN THE BENCHMARK PERIOD, ALL  
4 THINGS EQUAL, THEN THE REGRESSION WOULD PRODUCE A MORE  
5 CONSERVATIVE OUTCOME, RIGHT?

6 A. WELL, I DIDN'T USE THE WORD "CONSERVATIVE." WHAT I SAID  
7 IN SLIDE 6 WAS THAT ALL OTHER THINGS EQUAL, THAT WOULD YIELD  
8 LOWER OVERCHARGES.

9 Q. YEAH. SIR, YOU HAVEN'T OPINED IN ANY REPORT, AND YOU  
10 DIDN'T OPINE HERE THIS MORNING THAT ALL THINGS WERE EQUAL  
11 BETWEEN 2001 AND 2016, THAT WOULD GO INTO YOUR REGRESSION,  
12 RIGHT?

13 A. I'M SORRY, I REALLY DON'T EVEN KNOW WHAT THAT MEANS.

14 Q. WELL, YOU SAID "ALL THINGS EQUAL, "WHAT THINGS WERE YOU  
15 THINKING OF THAT WOULD NEED TO REMAIN EQUAL?

16 A. IN SLIDE 6, WHAT I MEANT WAS THE STRUCTURE OF THE  
17 MARKETPLACE -- BY THE WAY, YOU JUST CONFUSED ME WHEN YOU  
18 EXTENDED OVER TO 2016. I'M TALKING ABOUT THE BENCHMARK PERIOD  
19 2001 TO 2002. DEPENDS ON THE DATA SET UP TO MID-2008.

20 Q. THAT'S FAIR ENOUGH. LET'S TALK ABOUT THAT PERIOD. YOU  
21 WERE CAREFUL TO TELL THE COURT THE BENCHMARK WOULD BE THAT IT  
22 WOULD ACTUALLY -- IF THERE WERE SOME TAINTED CONDUCT IN THE  
23 BENCHMARK PERIOD, IT WOULD TEND TO REDUCE THE OVERCHARGE, ALL  
24 THINGS EQUAL, SO WHAT ARE THE THINGS THAT WOULD HAVE TO REMAIN  
25 THE SAME IN THE BENCHMARK PERIOD?



1 A. THE STRUCTURE OF THE MARKETPLACE, THE COST SIDE, THE  
2 DEMAND SIDE.

3 Q. AND YOU HAVEN'T DONE A STUDY TO INDICATE THAT THE DEMAND  
4 VARIABLES WOULD HAVE OR DID REMAIN THE SAME DURING THAT PERIOD,  
5 RIGHT?

6 A. YOU MISUNDERSTOOD ME. I DIDN'T SAY THEY WOULD REMAIN  
7 CONSTANT THROUGHOUT THAT PERIOD. I SAID THEY WOULD BE THE SAME  
8 WITH OR WITHOUT THE ANTICOMPETITIVE CONDUCT.

9 Q. THAT'S WHAT YOU MEANT BY "ALL THINGS EQUAL."

10 A. SURE.

11 Q. SO IF THERE WERE ANTICOMPETITIVE CONDUCT IN THE TAINTED  
12 PERIOD VERSUS NO ANTICOMPETITIVE CONDUCT IN THE TAINTED PERIOD,  
13 WOULD YOU --

14 A. I'M SORRY, YOU MISSPOKE.

15 Q. I DON'T UNDERSTAND. WHEN YOU'RE SAYING "ALL THINGS  
16 EQUAL," WHAT IS IT THAT HAS TO REMAIN EQUAL? I'M TRYING TO  
17 UNDERSTAND BECAUSE I THINK IT MAY BE IMPORTANT TO THE COURT  
18 BECAUSE THIS ISSUE HAS COME UP A COUPLE OF TIMES AS TO WHAT DO  
19 WE DO ABOUT IF THERE IS A TAINTED PERIOD. SO WHEN YOU SAY "ALL  
20 THINGS EQUAL," WHAT HAS TO BE EQUAL?

21 A. FOR STARTERS, YOU MISSPOKE AGAIN AT THE START OF YOUR  
22 QUESTION. YOU SAID THAT, WHAT IF A TAINTED PERIOD WERE  
23 TAINTED? THAT'S NOT WHAT YOU MEANT. WHAT YOU MEANT WAS, WHAT  
24 IF THE BENCHMARK PERIOD WERE TAINTED BY ANTICOMPETITIVE  
25 CONDUCT.

1 Q. THANK YOU. I APPRECIATE THE CORRECTION.

2 A. SO ALL OTHER THINGS EQUAL WOULD BE THAT THE MARKETPLACE  
3 WOULD OTHERWISE BE THE SAME.

4 Q. THE SAME -- AND THAT'S WHAT I'M TRYING TO JUST DRILL DOWN  
5 ON A LITTLE.

6 A. SURE.

7 Q. IT'S THE SAME.

8 A. RIGHT.

9 Q. IF IT WERE A COMPETITIVE MARKETPLACE VERSUS IF IT WERE  
10 TAINTED BY COLLUSION, THE MARKETPLACE WOULD LOOK -- OTHERWISE  
11 LOOK THE SAME.

12 A. THAT'S WHAT'S BEING DEPICTED ON SLIDE 6, THAT'S CORRECT.

13 Q. I'M JUST TRYING TO UNDERSTAND THAT. THAT WOULD MEAN THAT  
14 IF YOU HAD ANTICOMPETITIVE CONDUCT IN THE BENCHMARK PERIOD, AND  
15 YOU DID NOT HAVE ANTICOMPETITIVE CONDUCT IN THE BENCHMARK  
16 PERIOD, IT WOULDN'T CHANGE ANY OF THE DEMAND CHARACTERISTICS OF  
17 THE MARKET MATERIALLY?

18 A. MATERIALLY, AGAIN THE EXPERIMENT IS YOU HAVE THE SAME  
19 MARKETPLACE FROM 2001 TO MID-2008 WITH OR WITHOUT THE  
20 ANTICOMPETITIVE EFFECTS.

21 Q. IT WON'T CHANGE ANY OF THE SUPPLY CHARACTERISTICS IN THE  
22 MARKETPLACE IF YOU HAD TAINTED CONDUCT OR NO TAINTED CONDUCT.

23 A. THAT'S THE THOUGHT.

24 Q. AND IT WOULDN'T CHANGE ANY OF THE COSTS IN THE MARKET,  
25 TAINTED OR UNTAINTED.

1 A. THAT'S CORRECT. AGAIN, JUST WANT TO BE CLEAR, I'M NOT  
2 SAYING THAT THE COSTS WOULD BE IDENTICAL THROUGHOUT THAT  
3 PERIOD, IT'S JUST THAT IT WOULD BE THE SAME --

4 THE COURT: JUST CHANGING ONE THING.

5 THE WITNESS: YES, JUST ONE THING. THERE EITHER IS OR  
6 IS NOT ANTICOMPETITIVE EFFECTS.

7 Q. I JUST WANT TO BE CLEAR. YOU HAVEN'T TRIED TO DETERMINE  
8 WHETHER THAT WAS TRUE OR WOULD BE TRUE IN THIS CASE.

9 A. I'M SORRY, HAVE I DETERMINED WHETHER OR NOT I THINK  
10 THERE'S ANTICOMPETITIVE EFFECTS IN THE BENCHMARK PERIOD? YEAH,  
11 ABSOLUTELY.

12 Q. I'M ASKING WHETHER YOU'VE TRIED TO DETERMINE WHETHER ALL  
13 THINGS WOULD REMAIN EQUAL, THAT'S WHAT I'M --

14 A. I DON'T KNOW HOW TO ANSWER THAT. IT'S A THOUGHT  
15 EXPERIENCE. OF COURSE ALL THINGS REMAIN WHICH EQUAL. WE'RE  
16 JUST SAYING IF ALL THINGS --

17 Q. WELL, WAIT A MINUTE.

18 A. I'M SORRY, I'M NOT THROUGH WITH MY ANSWER. IF ALL THINGS  
19 REMAIN EQUAL, WHAT'S BEING SHOWN IN SLIDE 6 IS JUST WITH TWO  
20 DIFFERENT STATES OF THE WORLD, THE SAME WORLD, ONE HAS  
21 ANTICOMPETITIVE EFFECTS, ONE DOESN'T. YOU GET LOWER  
22 OVERCHARGES IF YOU HAVE ANTICOMPETITIVE EFFECTS. THAT'S ALL  
23 THAT SLIDE SAYS.

24 Q. RIGHT. BUT IN FACT, SIR, IF YOU HAVE COLLUSIONARY CONDUCT  
25 IN THE BENCHMARK PERIOD, IT DOES IMPACT SUPPLY CHARACTERISTICS

1 IN THE MARKET, RIGHT? DIDN'T YOU TESTIFY ALREADY THAT WHEN  
2 THERE'S COLLUSION, FOR EXAMPLE, YOU TEND TO REDUCE OUTPUT?

3 A. SURE.

4 Q. SO IT DOES IMPACT SUPPLY CHARACTERISTICS.

5 A. THIS IS A THOUGHT EXPERIENCE, JUST SO PEOPLE CAN GET THEIR  
6 ARMS AROUND WHAT IT MEANS TO HAVE ANTICOMPETITIVE EFFECTS.

7 THE COURT: THIS IS INTELLECTUALLY INTERESTING.

8 SCARILY I THINK I UNDERSTAND WHAT THE WITNESS IS SAYING. I  
9 THINK WE SHOULD MOVE ON.

10 MR. GALLO: I'LL MOVE ON, YOUR HONOR. THANK YOU.

11 Q. LET'S TALK ABOUT THE UMBRELLA EFFECTS.

12 A. SURE.

13 Q. YOU SAID THAT YOU WOULD HAVE EXPECTED IF THE DEFENDANTS  
14 WERE COLLUDING THAT THERE WOULD BE FIXING PRICES, THAT THERE  
15 WOULD BE AN UMBRELLA EFFECT, RIGHT? THAT, IN ESSENCE, WAS SOME  
16 OF YOUR TESTIMONY, RIGHT?

17 A. JUST TO BE CLEAR, I DIDN'T SAY "IF THEY WERE COLLUDING."  
18 THEY DID COLLUDE.

19 Q. OKAY. AND WHEN YOU SAID THAT THERE WOULD BE UMBRELLA  
20 EFFECTS, YOU UNDERSTAND THAT THERE -- YOU SAID WORDS TO THE  
21 EFFECT, AND YOU QUOTED IT IN YOUR REPORT, THAT -- YOU QUOTED AN  
22 ARTICLE IN YOUR REPORT, AND I WOULD LIKE TO REFER YOU TO THE  
23 ARTICLE, PARAGRAPH 37, PAGE 18 AND 19 OF YOUR REPLY REPORT,  
24 WHICH IS TAB 3 OF YOUR SMALL BINDER.

25 A. I'M SORRY, WHAT PARAGRAPH?

1 Q. I'M SORRY, SIR, PARAGRAPH -- IT'S PAGE 18, 19, PARAGRAPH  
2 37.

3 A. YES, I'M THERE.

4 Q. AT THE BOTTOM OF THAT PARAGRAPH DO YOU SEE THE REFERENCE  
5 THERE TO THE ARTICLE? I'M NOT SURE HOW YOU PRONOUNCE THE  
6 AUTHOR'S NAME, INDERST?

7 A. YES, SIR.

8 Q. AND YOU SAY -- WHEN YOU QUOTE THAT ARTICLE YOU SAY,  
9 "UMBRELLA EFFECTS -- IN PART YOU SAY, "UMBRELLA EFFECTS  
10 TYPICALLY ARISE WHEN PRICE INCREASES LEAD TO A DIVERSION OF  
11 DEMAND TO SUBSTITUTE PRODUCTS BECAUSE SUCCESSFUL CARTELS  
12 TYPICALLY REDUCE QUANTITIES AND INCREASE PRICES, AND THIS  
13 DIVERSION LEADS TO A SUBSTITUTION AWAY FROM THE CARTEL'S  
14 PRODUCTS TOWARD THE SUBSTITUTE PRODUCTS." DO YOU SEE THE  
15 LANGUAGE I'M REFERRING TO?

16 A. YOU MISSPOKE. YOU SAID I SAID IT, THIS IS A QUOTE.

17 Q. I THOUGHT I INDICATED YOU WERE QUOTING THE ARTICLE THERE,  
18 RIGHT?

19 A. I AM QUOTING THE ARTICLE.

20 Q. RIGHT. AND THEN YOU ALSO GO ON TO QUOTE THE ARTICLE IN  
21 THE BLOCK PARAGRAPH, IN PARAGRAPH 38, "THE NON-CARTEL FIRMS  
22 THAT DO NOT PARTICIPATE IN THE CARTEL, BUT PROFIT FROM  
23 SO-CALLED UMBRELLA EFFECTS, THE CARTEL PRICE INCREASE LEADS TO  
24 A DIVERSION OF DEMAND TO NON-CARTELIZED FIRMS," RIGHT?

25 A. THAT'S WHAT THE QUOTE SAYS, YES, SIR.

1 Q. I WANT TO BE CLEAR. I UNDERSTAND YOU CRITICIZE DR.  
2 HAIDER'S OPINION ON UMBRELLA, AND YOU'VE HAD AN OPPORTUNITY TO  
3 TESTIFY ABOUT THAT. I JUST WANT TO BE CLEAR, YOU DIDN'T DO ANY  
4 EMPIRICAL WORK TO DETERMINE WHETHER THERE WAS A DIVERSION FROM  
5 DEFENDANTS TO NON-DEFENDANTS IN THIS CASE, RIGHT?

6 A. THAT IS CORRECT.

7 Q. AND YOU DIDN'T DO ANY EMPIRICAL WORK OR STATISTICAL WORK  
8 TO DETERMINE WHETHER THE NON-DEFENDANTS' PRICES FOLLOWED THE  
9 DEFENDANTS' PRICES UP WHEN THERE WAS A PRICE INCREASE BY THE  
10 DEFENDANTS.

11 A. THAT IS CORRECT. I WAS HERE ON MONDAY WHEN I SAW DR.  
12 JOHNSON'S MISLEADING GRAPH.

13 Q. AND THERE'S NO -- IN FACT, DIVERSION APPEARS FOR THE FIRST  
14 TIME IN YOUR REPLY REPORT. THERE'S NOTHING ABOUT IT IN YOUR  
15 OPENING REPORT, RIGHT?

16 A. ABOUT THE WORD DIVERSION?

17 Q. RIGHT. I MEAN, YOU DIDN'T RAISE THIS IN YOUR OPENING  
18 REPORT IS ALL I'M TRYING TO SAY.

19 A. NO, OF COURSE NOT, BECAUSE THE ISSUE WASN'T RAISED UNTIL  
20 DR. HAIDER MADE THE CLAIM.

21 Q. OKAY. SO YOU HAVEN'T DONE ANY EMPIRICAL WORK TO SHOW THAT  
22 THE MARKET SHARES OF NON-DEFENDANTS INCREASED, THAT THERE WAS A  
23 SHIFT FROM DEFENDANTS TO NON-DEFENDANTS, NO EMPIRICAL OR  
24 STATISTICAL WORK, RIGHT?

25 A. THAT'S CORRECT.

1 Q. FAIR ENOUGH.

2 MR. GALLO: WOULD YOU PUT UP SLIDE 7 AGAIN, PLEASE.

3 Q. I WOULD LIKE TO TALK TO YOU ABOUT THIS PASS-THROUGH  
4 ISSUE -- THE COMMON IMPACT TO THESE LARGE DISTRIBUTORS, AND  
5 THEN THE PASS-THROUGH ISSUE. SO WE ARE AGAIN TALKING ABOUT SIX  
6 DISTRIBUTORS WHO ARE, YOU SAY, COMMONLY INVOLVED: DOT, SYSCO,  
7 U.S. FOODS, SAM'S CLUB, WALMART, COSTCO. THAT'S WHAT WE'RE  
8 CALLING THE LARGE DISTRIBUTORS HERE ON THIS GRAPH, OKAY?

9 A. YES, SIR.

10 Q. AND NOW LET ME BUILD OUT THE GRAPH A LITTLE MORE.

11 MR. GALLO: WOULD YOU GO FORWARD, PLEASE.

12 Q. SOME OF THESE LARGE DISTRIBUTORS SELL TO RESTAURANTS AND  
13 DELIS, AS INDICATED ON THE GRAPH, RIGHT?

14 A. YES, SIR.

15 Q. AND THOSE RESTAURANTS AND DELIS ARE MEMBERS OF THE CLASS,  
16 RIGHT. THOSE ARE THE PEOPLE YOU'RE SAYING ARE OVERCHARGED,  
17 CORRECT?

18 A. YES, SIR.

19 Q. AND I BELIEVE, AND CORRECT ME IF I'M WRONG, THE STANDARD  
20 YOU'RE USING IS ESSENTIALLY THE FIRST PERSON THAT BOUGHT FROM  
21 THE LARGE DISTRIBUTOR IS THE PERSON THAT'S IN THE CLASS. IT'S  
22 NOT YOUR STANDARD. IT'S THE LEGAL STANDARD. THAT'S WHAT THE  
23 CLASS IS IDENTIFIED AS, CORRECT?

24 A. YEAH.

25 THE WITNESS: YOUR HONOR, IT'S STATED -- IN PARAGRAPH 7

1 OF MY OPENING REPORT IS THE EXACT DEFINITION OF THE CLASS.

2 IT'S TAB 1 IN THE SMALL --

3 THE COURT: JUST GIVE ME THE PARAGRAPH.

4 THE WITNESS: IT'S PARAGRAPH 7, PAGE 3, OF THE OPENING  
5 REPORT.

6 MR. GALLO: RIGHT.

7 THE COURT: GO AHEAD.

8 Q. OKAY. SO SOME OF THE LARGE DISTRIBUTORS -- ALL I'M TRYING  
9 TO GET AT IS THERE'S SORT OF ANOTHER CHANNEL, RIGHT? SOME OF  
10 THE LARGE DISTRIBUTORS DON'T SELL TO THE FOOD SERVICE ENTITY,  
11 THE RESTAURANT OR THE DELI, SOME OF THEM ALSO SELL TO SMALL  
12 DISTRIBUTORS.

13 A. THAT'S MY UNDERSTANDING, YES, SIR. YOU SAID "SOME." JUST  
14 TO BE CLEAR, I THINK YOU'RE REALLY REFERRING TO DOT.

15 Q. AND THEN THOSE SMALL DISTRIBUTORS IN TURN SELL TO  
16 RESTAURANTS OR FOOD SERVICE ENTITIES; IS THAT CORRECT?

17 A. THAT WOULD BE MY UNDERSTANDING.

18 Q. AND THEN AS INDICATED ON THE CHART HERE IN FRONT OF THE  
19 COURT, AND IN FRONT OF YOU, IT'S THE GREEN BOXES THAT ARE THE  
20 CLASS MEMBERS, RIGHT?

21 A. THAT'S CORRECT, THE FIRST PURCHASERS FROM THE SIX LARGEST  
22 DISTRIBUTORS OF THE LARGE-SIZED PACKAGED TUNA.

23 Q. AGAIN JUST TO BE CLEAR, THE RESTAURANT AND DELI, IN THE  
24 FAR RIGHT THAT'S IN RED OVER THERE, THEY'RE NOT IN THE CLASS  
25 BECAUSE THEY'RE A SUBSEQUENT -- THEY'RE NOT IN THE CLASS IF



1           THEY'RE BUYING WITH RESPECT TO A PURCHASE FROM A SMALL  
2           DISTRIBUTOR.

3           A.     AGAIN, LOOK, I'M NOT AN ATTORNEY, CERTAINLY NOT OFFERING  
4           LEGAL OPINIONS, BUT MY UNDERSTANDING IS THAT YOU'RE RIGHT, THAT  
5           THAT PINK-COLORED BOX ON THE FAR RIGHT, THAT THOSE ENTITIES  
6           WOULD NOT BE IN THE CLASS BECAUSE THE SMALLER DISTRIBUTORS  
7           WOULD HAVE BEEN THE FIRST PURCHASERS FROM THE LARGE  
8           DISTRIBUTORS.

9           Q.     OKAY.   GOT IT.

10                         AND I FURTHER UNDERSTAND YOUR TESTIMONY TO BE THAT  
11           THESE LARGE DISTRIBUTORS, THEY MAXIMIZE THEIR PROFITS AND  
12           PASS-THROUGH ALL OR MOST OF ANY OVERCHARGE.

13           A.     THAT'S WHAT THE EMPIRICAL RESULTS SHOWN IN SLIDE 9 OF MY  
14           PRESENTATION DEMONSTRATE.

15           Q.     RIGHT.   AND THAT'S TRUE -- THAT WOULD BE TRUE REGARDLESS  
16           OF THE CAUSE OF THE COST INCREASE TO THEM, RIGHT?  I MEAN, YOU  
17           FOCUSED, OF COURSE, FOR PURPOSES OF THIS CASE, ON ONE OF THE  
18           DEFENDANTS RAISING THE PRICE OF TUNA, BUT THEY WOULD TRY TO  
19           PASS ON COSTS NO MATTER WHAT THE CAUSE OF THE COST INCREASE,  
20           RIGHT?

21           A.     YEAH.   IN FACT, THAT'S PRECISELY WHAT I TOLD HER HONOR.

22           Q.     RIGHT.   SO YOU HAVEN'T ACTUALLY ANALYZED WHETHER THE LARGE  
23           DISTRIBUTORS PASSED ON THE PRICE INCREASE WHEN THEY SOLD TO  
24           SMALL DISTRIBUTORS.  I MEAN, YOU HAVEN'T DONE EMPIRICAL  
25           ANALYSIS LIKE YOU DID WITH RESPECT TO THE TOP BLOCK, YOU DID

1           EMPIRICAL ANALYSIS AND PRESENTED IT THIS MORNING. I DIDN'T SEE  
2           ANY EMPIRICAL ANALYSIS ABOUT PASS-THROUGH TO THE SMALL  
3           DISTRIBUTORS.

4           A.     THE SHORT ANSWER IS YES. I THINK YOU MISSPOKE WHEN YOU  
5           SAID THE "TOP BLOCK." THE PASS-THROUGH -- JUST TO BE CLEAR,  
6           THE PASS-THROUGH I'M LOOKING AT, YOUR HONOR, IS FROM THE  
7           MANUFACTURERS TO THE SIX LARGE DISTRIBUTORS. I THINK WHAT'S  
8           BEING ASKED NOW, AND I BELIEVE THE ANSWER IS YES, IF I  
9           UNDERSTOOD THE QUESTION CORRECTLY, WAS, DID I LOOK AT THE  
10          PASS-THROUGH BY THE LARGE DISTRIBUTORS TO THE CLASS MEMBERS.  
11          NO, I DIDN'T.

12          Q.     I THINK THAT'S RIGHT, BUT I THINK IT MAY BE SLIGHTLY  
13          NARROWER THAN THAT. DID YOU LOOK AT THE PASS-THROUGH -- THE  
14          TOP BLOCK -- WHEN I SAID "TOP BLOCK," I MEANT THE SALE FROM A  
15          LARGE DISTRIBUTOR TO A FOOD SERVICE ENTITY, THE RESTAURANTS AND  
16          DELIS IN THE TOP BLOCK, THAT YOU DEFINITELY ANALYZED, RIGHT?  
17          FROM THE DISTRIBUTOR TO THE FOOD SERVICE ENTITY, YOU SAID  
18          THERE'S A PASS-THROUGH.

19          A.     YES, ABSOLUTELY.

20          Q.     I DIDN'T HEAR ANY ANALYSIS OF YOU SAYING THAT YOU  
21          ANALYZED, AND I'M NOT BEING CRITICAL, I'M JUST TRYING TO GET  
22          THE FACTS OUT, YOU DIDN'T ANALYZE A PASS-THROUGH FROM A LARGE  
23          DISTRIBUTOR TO A SMALL DISTRIBUTOR. FROM DOT TO A SMALL  
24          DISTRIBUTOR, YOU DIDN'T LOOK AT THAT AND GIVE THE COURT ANY  
25          EMPIRICAL DATA ON THAT, DID YOU?

1 A. NO, I DON'T THINK THAT'S RIGHT. THAT'S NOT RIGHT. FOR  
2 EXAMPLE, UNLESS I'M MISUNDERSTANDING YOUR QUESTION, IF WE LOOK  
3 AT SLIDE 9 OF MY PRESENTATION, YOU CAN SEE THAT THE FAR  
4 RIGHT-HAND COLUMN IS THE PASS-THROUGH BY DOT.

5 Q. I'M SORRY. MY COLLEAGUE TOLD ME I MISSTATED THE QUESTION.

6 A. SURE.

7 Q. I'M SORRY. YOU DID IT FOR DOT. WHAT I WAS TRYING TO SAY,  
8 AND I MISSTATED, IS YOU DIDN'T DO IT FOR THE OTHER  
9 DISTRIBUTORS. YOU DIDN'T DO IT FOR ANY OF THE FIVE OTHERS TO A  
10 SMALL DISTRIBUTOR, RIGHT?

11 A. I'M SORRY, SAY THAT ONE MORE TIME.

12 Q. DID YOU DO IT FOR ANY OF THE OTHER FIVE TO A SMALL  
13 DISTRIBUTOR OR DO YOU SAY THAT THEY DON'T SELL TO THE SMALL  
14 DISTRIBUTOR?

15 A. JUST TO BE CLEAR, I USED ALL OF THE -- SO, YOUR HONOR, IN  
16 SLIDE NUMBER 9, SO THE OTHER FIVE MEANS EVERYBODY IN THAT BAR  
17 CHART OTHER THAN DOT, I LOOKED AT THEIR PASS-THROUGH RATES FOR  
18 ALL OF THEIR CUSTOMERS. IF THEIR CUSTOMERS INCLUDED A SMALL  
19 DISTRIBUTOR, IT WAS INCLUDED.

20 Q. THAT'S FINE. NOW LET'S GO ONE MORE STEP.

21 A. SURE.

22 Q. YOU DIDN'T ANALYZE ANY PASS-THROUGH FROM THE SMALLER  
23 DISTRIBUTORS TO THE RESTAURANTS AND DELIS THAT ARE IN RED OVER  
24 THERE.

25 A. NOW, THAT'S CORRECT, THAT'S WHAT I THOUGHT YOU WERE

1 DRIVING AT. SO JUST TO BE CLEAR, I DID NOT, YOUR HONOR, LOOK  
2 AT THE PASS-THROUGH FROM ONE OF THE CLASS MEMBERS, WHO WOULD BE  
3 THE GREEN BOXES. IF THAT CLASS MEMBER WERE A SMALL  
4 DISTRIBUTOR, I DIDN'T LOOK AT THE PASS-THROUGH FROM THAT CLASS  
5 MEMBER TO A RESTAURANT, THAT'S CORRECT.

6 Q. AND DO YOU KNOW WHETHER THE RESTAURANTS THAT ARE IN THE  
7 GREEN BOX UP THERE, THE RESTAURANTS AND DELIS, AND THE  
8 RESTAURANTS THAT ARE IN THE RED BOX DOWN HERE ON THE RIGHT,  
9 WHETHER ANY OF THEM OVERLAP, WHETHER THEY'RE THE SAME ENTITIES  
10 OR NOT?

11 A. I DO NOT KNOW THAT.

12 Q. OR THE DEGREE TO WHICH THEY OVERLAP?

13 A. I DO NOT KNOW THAT.

14 Q. LET'S TALK ABOUT DOT A LITTLE MORE, WHICH IF I UNDERSTAND  
15 YOUR OPINION IS THAT DOT SELLS TO SMALL DISTRIBUTORS.

16 A. THAT'S MY UNDERSTANDING.

17 Q. RIGHT. AND DO YOU KNOW THAT DOT'S SALES OF LARGE CANNED  
18 TUNA PRODUCED BY THE DEFENDANTS IN THIS CASE AMOUNTS TO  
19 13 PERCENT OF THE TOTAL COMMERCE IN THE CLASS PERIOD?

20 A. I THINK WE'RE BACK TO PARAGRAPH -- YOUR HONOR, WE'RE  
21 LOOKING NOW AT PARAGRAPH 14 IN MY OPENING REPORT. IT'S ON PAGE  
22 8. SO, YES, DOT ACCOUNTS FOR 13 PERCENT OF THE COMMERCE IN  
23 THIS CASE.

24 Q. RIGHT. AS WE INDICATED, THEY SELL ESSENTIALLY TRUCKLOADS  
25 SOMETIMES TO THESE SMALLER DISTRIBUTORS OF TUNA PRODUCTS,

1 RIGHT?

2 A. THAT'S MY UNDERSTANDING THAT DOT -- YOUR HONOR, DOT IS  
3 WHAT'S REFERRED TO AS A RE-DISTRIBUTOR, SO THEY'RE A  
4 DISTRIBUTOR AND THEY GENERALLY SELL TO SMALLER DISTRIBUTORS.

5 Q. SO THEY BUY A LOT, MAYBE A TRUCKLOAD, AND THEN RESELL --  
6 BREAK IT UP AND SELL TO SMALLER DISTRIBUTORS, RIGHT?

7 A. THAT'S MY UNDERSTANDING.

8 Q. YOU DON'T HAVE ANY EVIDENCE THAT DOT SELLS DIRECTLY TO THE  
9 CLASS MEMBERS -- STRIKE THAT, TO THE RESTAURANTS AND DELIS, TO  
10 THE ACTUAL FOOD SERVICE COMPANIES.

11 A. THAT'S MY UNDERSTANDING IS THAT THEY DO NOT DO THAT.

12 Q. RIGHT. AND DOT SELLS TO A VERY LARGE NUMBER OF SMALL  
13 DISTRIBUTORS, DON'T THEY, SOMETHING LIKE OVER 4,000?

14 A. THAT SOUNDS PLAUSIBLE TO ME.

15 Q. DO YOU REMEMBER AT YOUR DEPOSITION YOU WERE SHOWN A DOT  
16 DOCUMENT THAT SAID THEY SOLD TO OVER 4,000 SOME HUNDREDS TO  
17 SOME DISTRIBUTORS?

18 A. I RECALL THAT. I THINK IT WAS A SNAPSHOT OF THEIR WEB  
19 PAGE.

20 Q. RIGHT. OKAY. AND ARE YOU OFFERING AN OPINION THAT -- YOU  
21 ARE OFFERING AN OPINION THAT EVERYBODY IN THESE TWO GREEN  
22 BOXES, THE RESTAURANTS AND DELIS, AND THE SMALLER DISTRIBUTORS.  
23 ALL OF THOSE PEOPLE YOU SAY WERE UNIFORMLY IMPACTED, RIGHT?

24 A. YOU SAID "ALL."

25 Q. ALL OR SUBSTANTIALLY ALL.

1 A. I SAID ALL OR NEARLY ALL.

2 Q. THAT'S FINE. HAVE YOU ACTUALLY RENDERED AN OPINION IN  
3 THIS CASE THAT THE IMPACT ON THE DISTRIBUTOR IS THE SAME AS THE  
4 IMPACT ON THE RESTAURANT OR DELI OR FOOD SERVICE PROVIDER, THAT  
5 THE OVERCHARGE IS THE SAME? BECAUSE I DIDN'T SEE SUCH AN  
6 OPINION.

7 A. THE OVERCHARGE IS THE SAME, WELL --

8 Q. HAVE YOU RENDERED AN OPINION THAT THOSE SMALL DISTRIBUTORS  
9 ARE IN FACT OVERCHARGED?

10 A. YEAH, ABSOLUTELY. SO IF YOU LOOK AT SLIDE NUMBER 8, I  
11 HAVE THE OVERCHARGES BY DEFENDANT, AND AS MR. CUNEO ASKED ME,  
12 IF I WANTED TO KNOW WHAT BUYERS FROM DOT, HOW MUCH THEY WERE  
13 OVERCHARGED, YOU CAN MULTIPLY THOSE TWO NUMBERS TOGETHER THAT  
14 COSI WAS SELLING TO DOT, AS MR. CUNEO SAID, IT WOULD BE 16.6.  
15 I WON'T NAME THE OVERCHARGE RATE, BUT YOU WOULD MULTIPLY IT  
16 TIMES THAT DOT FOOD PASS-THROUGH AND THAT WOULD BE THE  
17 OVERCHARGE TO ALL THE BUYERS FROM DOT.

18 Q. YOU DIDN'T ACTUALLY ANALYZE ANY SALES FROM DOT TO THE  
19 SMALL DISTRIBUTORS, DID YOU? YOU DIDN'T LOOK AT ANY EMPIRICAL  
20 DATA FROM DOT SELLING TO THE SMALL DISTRIBUTORS, DID YOU?

21 A. NO, I LOOKED AT -- THAT'S NOT TRUE. THE PASS-THROUGH RATE  
22 FOR DOT IS -- THEY'RE THE RETAIL PRICES THAT DOT IS CHARGING.

23 Q. RIGHT. WHAT I'M SAYING IS, SIR, WHEN YOU WENT THROUGH  
24 YOUR ANALYSIS THIS MORNING, YOU EXPLAINED TO THE COURT THE  
25 EMPIRICAL DATA YOU RELIED ON TO SHOW THAT THESE SIX

1           DISTRIBUTORS PASSED THROUGH PRICE INCREASES TO FOOD SERVICE  
2           OPERATORS, RESTAURANTS, DELIS, PEOPLE LIKE THAT, RIGHT?

3           A.    NO, THAT'S NOT CORRECT.  WHAT I SAID WAS I USED ALL OF THE  
4           DATA OF THE RETAIL SALES FROM THESE SIX LARGE DISTRIBUTORS,  
5           WHOEVER THEY WERE SELLING TO.  THEY COULD BE SELLING TO A  
6           RESTAURANT, THEY COULD BE SELLING TO A SMALL DISTRIBUTOR, AS  
7           DOT DOES.  I LOOKED AT ALL --

8           Q.    THAT'S FINE.  MAY I REFER YOU TO PAGE 51 OF YOUR  
9           DEPOSITION TRANSCRIPT, SIR.

10          A.    SURE.  WHERE COULD I FIND THAT?

11          Q.    TAB 1 OF THE LARGE BINDER.

12          A.    YOU MEAN TAB 4?

13          Q.    I'M SORRY, I THOUGHT IT WAS -- YOU'RE RIGHT, I APOLOGIZE,  
14          TAB 4 OF THE LARGE BINDER, YEAH.

15          A.    YES, WHICH PAGE?

16          Q.    PAGE 51.

17          A.    YES, I'M THERE.

18          Q.    OKAY.  I WANT TO SEE IF YOU STAND BY THIS TESTIMONY TODAY  
19          BECAUSE I'M CONFUSED WHEN YOU SAY YOU RENDERED SUCH AN OPINION.  
20          AT 51, LINE 3 IT SAYS, "SO THE IMPACT TO THE DISTRIBUTOR THAT  
21          BOUGHT FROM ONE OF THESE SIX WOULD BE DIFFERENT THAN AN IMPACT  
22          TO THE DELI THAT BOUGHT FROM ONE OF THESE SIX.  OBJECTION.

23          ANSWER:  MY REPORT DOESN'T SAY THAT EITHER.  OKAY.  DO YOU  
24          BELIEVE THE IMPACT TO A DISTRIBUTOR THAT BOUGHT FROM ONE OF  
25          THESE SIX WOULD BE THE SAME AS THE IMPACT TO A DELI THAT BOUGHT

1 DIRECTLY FROM ONE OF THESE SIX? I DON'T HAVE AN OPINION ON  
2 THAT. THAT IS SOMETHING YOU HAVEN'T ANALYZED, QUESTION.  
3 ANSWER: I HAVE NOT ANALYZED THAT."

4 WASN'T THAT TRUE, SIR, THAT AT YOUR DEPOSITION, AND  
5 AFTER YOU HAD ISSUED YOUR REPORT IN THIS CASE, YOU HAD NOT  
6 ANALYZED WHETHER THE IMPACT TO THE SMALL DISTRIBUTORS WAS  
7 COMMON WITH THE IMPACT TO THE -- WAS THE SAME AS THE IMPACT TO  
8 THE DELIS AND THE FOOD SERVICE OPERATORS?

9 A. YOU COMPLETELY MISUNDERSTOOD.

10 Q. OKAY.

11 A. I DON'T EVEN KNOW HOW YOU COULD GET THERE. AS MR. CUNEO  
12 SAID, IF YOU WANT TO KNOW THE OVERCHARGES FOR ANY SPECIFIC  
13 BUYER, FROM ONE OF THE SIX DISTRIBUTORS, YOU WOULD START WITH  
14 THE OVERCHARGES ON SLIDE 8. YOU WOULD THEN MULTIPLY THOSE  
15 OVERCHARGES BY THE PASS-THROUGH RATES, ON SLIDE 9, TO THE FIRST  
16 PURCHASERS --

17 Q. RIGHT.

18 A. -- FROM THE BIG SIX DISTRIBUTORS. NOW -- THE FIRST  
19 PURCHASER MIGHT BE A SMALL DISTRIBUTOR, MIGHT BE A HOSPITAL,  
20 MIGHT BE A GROCERY STORE, AND SO ON.

21 Q. CAN YOU SHOW ME IN YOUR OPENING REPORT WHERE YOU OPINED  
22 THAT THE IMPACT ON SMALL DISTRIBUTORS WAS THE SAME IMPACT THAT  
23 WAS ON FOOD SERVICE OPERATORS.

24 A. I DON'T THINK I EVER SAID THAT. I JUST SAID THAT THE  
25 IMPACT IS TO THE FIRST PURCHASERS FROM THE BIG SIX



1           DISTRIBUTORS. IT DOESN'T MATTER IF IT'S A SMALL DISTRIBUTOR, A  
2           GROCERY STORE.

3           THE COURT: SO YOU DON'T MAKE THAT DISTINCTION BECAUSE  
4           THE IMPACT IS THE IMPACT, WHOEVER THAT PURCHASER IS.

5           THE WITNESS: YEAH, EXACTLY.

6           Q. DID YOU ANALYZE, SIR, WHETHER -- ONCE THE SMALL  
7           DISTRIBUTORS PAY THE ALLEGED OVERCHARGE TO DOT, WHETHER THOSE  
8           SMALL DISTRIBUTORS THEN PASS THAT THROUGH TO THE NEXT -- TO THE  
9           NEXT PURCHASER IN THE RED BLOCK?

10          A. WELL, COULD YOU PUT --

11          Q. YOU DIDN'T ANALYZE WHETHER THEY PASSED THROUGH THE  
12          OVERCHARGE, RIGHT?

13          A. YOU ALREADY ASKED ME THAT QUESTION. I ALREADY SAID I DID  
14          NOT ANALYZE WHETHER OR NOT A RESTAURANT THAT BOUGHT FROM A  
15          FIRST PURCHASER, WHERE THE FIRST PURCHASER WAS ONE OF THESE  
16          SMALL DISTRIBUTORS, I DID NOT ANALYZE WHETHER OR NOT THAT SMALL  
17          DISTRIBUTOR DID OR DID NOT PASS THROUGH THE --

18          Q. SO IF A SMALL DISTRIBUTOR PAID AN EXTRA DOLLAR OVERCHARGE,  
19          YOU DON'T KNOW WHETHER IT PASSED ON 100 PERCENT OF THAT DOLLAR  
20          TO THE RESTAURANT OR DELI, THE NEXT PURCHASER?

21          A. THAT'S ABSOLUTELY CORRECT. JUST TO BE CLEAR, WE'RE NOW  
22          TALKING AGAIN ABOUT THAT RED OR PINK BOX ON THE FAR RIGHT WHERE  
23          -- THOSE ENTITIES ARE NOT CLASS MEMBERS.

24          Q. SO YOU CAN'T TELL THE COURT WHETHER THAT DISTRIBUTOR WAS  
25          ACTUALLY HURT AFTER IT RESOLD TO THE DELI OR WHETHER IT WAS

1           ABLE TO PASS ON ALL OF THE OVERCHARGE TO THE DELI AND  
2           RESTAURANT ON THE NEXT SALE. YOU DON'T HAVE AN OPINION ON  
3           THAT.

4           A.     THAT'S CORRECT. MY UNDERSTANDING IS THAT'S REALLY A LEGAL  
5           ISSUE.

6           Q.     THANK YOU. WELL, THERE IS A LEGAL ISSUE ABOUT THAT, BUT  
7           THERE'S NO ECONOMIC EVIDENCE FROM YOU THAT SAYS THE SMALL  
8           DISTRIBUTOR DID NOT PASS IT ON. YOU'RE NOT OPINING THAT THERE  
9           WAS NO PASS-ON BY THE SMALL DISTRIBUTOR TO THE SUBSEQUENT DELI  
10          OR RESTAURANT.

11          A.     THAT'S CORRECT.

12          Q.     THAT'S FAIR ENOUGH. WE GOT THERE. I'M SORRY. IT WAS A  
13          LITTLE PAINFUL, AND MOSTLY MY FAULT, BUT WE GOT TO WHERE I  
14          NEEDED TO GO.

15                   NOW, YOU SPOKE AT SOME LENGTH ABOUT WHAT YOU CALL YOUR  
16          CLASS MEMBER SPECIFIC REGRESSIONS, RIGHT?

17          A.     YES, SIR.

18          Q.     AND WE WANT TO BE CLEAR ABOUT WHAT YOUR CLASS MEMBER  
19          SPECIFIC REGRESSIONS ACTUALLY -- HOW YOU ACTUALLY DID THAT.

20          A.     SURE.

21          Q.     YOUR MODEL, YOUR REGRESSION MODEL, WHEN YOU RUN THE  
22          REGRESSION, IT CAME OUT WITH A SINGLE OVERCHARGE FOR COSI,  
23          RIGHT? THE 16.6 PERCENT WAS YOUR REGRESSION RESULT FOR COSI?

24          A.     I BELIEVE THAT'S CORRECT.

25          Q.     I'M NOT TRYING TO TRICK YOU. I'LL REPRESENT TO YOU IT WAS

1 16.6 PERCENT.

2 A. SURE.

3 Q. FOR BUMBLEBEE I THINK IT WAS 15.3 PERCENT, A SINGLE  
4 OVERCHARGE.

5 A. I THINK THAT'S RIGHT. JUST SO WE'RE CLEAR, THOSE WERE NOT  
6 THE OVERCHARGES THAT ARE SHOWN, YOUR HONOR, IN --

7 THE COURT: ON PAGE 8?

8 THE WITNESS: EXACTLY. YOU'RE AHEAD OF ME.

9 Q. AND YOU HAD ANOTHER NUMBER FOR STARKIST, 18.2 PERCENT, I  
10 THINK IT WAS?

11 A. I'LL ACCEPT YOUR REPRESENTATION.

12 Q. SO ALL I'M TRYING TO ESTABLISH IS THERE WAS A SINGLE  
13 OVERCHARGE FOR EACH DEFENDANT THAT YOU SAY THAT DEFENDANT  
14 PASSED -- THAT THAT DEFENDANT CHARGED ITS CUSTOMERS, RIGHT?

15 A. YES. AGAIN, I JUST WANT TO DRAW YOUR ATTENTION -- I'LL  
16 KEEP MY ANSWER SHORT, BUT I JUST WANTED TO MAKE SURE WE'RE  
17 CLEAR ON THAT LAST BULLET ON PAGE 15, WHICH EXPLAINS HOW THE  
18 PREDICTED PRICES VARIED BY CUSTOMER, BY PRODUCT, BY STATE AND  
19 BY MONTH.

20 Q. YEAH, WE'RE GOING TO GET TO THAT.

21 SO YOU START WITH THESE NUMBERS -- THEY'RE ON TABLE 3,  
22 BY THE WAY, IF IT MATTERS, TABLE 3 OF YOUR REPORT. THAT HAS  
23 THE OVERCHARGE NUMBERS THAT I WAS JUST REFERRING TO. AND YOU  
24 START WITH THOSE NUMBERS, AND THEN YOU RUN YOUR --

25 A. I'M SORRY, YOU SAID "TABLE."

1 Q. I THINK IT'S TABLE 3 OF YOUR FIRST REPORT, PAGE 38.

2 A. NO, THAT'S NOT CORRECT.

3 Q. THAT'S NOT?

4 A. NO, IT'S NOT CORRECT. THE FIGURES YOU'RE LOOKING AT IN  
5 TABLE 3 OF THE FIRST REPORT ARE THE SAME THAT HER HONOR JUST  
6 POINTED TO ON PAGE 8 OF THE POWERPOINT.

7 Q. OKAY.

8 A. IF YOU'RE TALKING ABOUT THE CLASS MEMBER SPECIFIC  
9 REGRESSIONS IN SLIDE 16, THOSE DON'T HAVE THE SAME OVERCHARGES.

10 Q. I WAS ABOUT TO GO THERE. I JUST STARTED BUILDING TO THAT.  
11 WE START WITH TABLE 3, AND THEN YOU DO THE CLASS MEMBER  
12 SPECIFIC OVERCHARGES, RIGHT? AS ONE OF YOUR SORT OF  
13 CONFIRMATORY STUDIES, YOU DO A CLASS MEMBER SPECIFIC ANALYSIS;  
14 ISN'T THAT RIGHT?

15 A. WELL, JUST TO BE CLEAR, THE CLASS MEMBER SPECIFIC  
16 REGRESSION WAS THAT SECOND INDEPENDENT METHOD TO ANALYZE  
17 WHETHER OR NOT ALL OR ALMOST ALL PROPOSED CLASS MEMBERS WERE  
18 HARMED.

19 Q. RIGHT. OKAY. AND TO RUN THAT CLASS MEMBER SPECIFIC  
20 REGRESSION, YOU RAN THAT SPECIFICALLY ON SYSCO AND U.S. FOOD  
21 DATA, RIGHT?

22 A. THAT'S CORRECT.

23 Q. AND YOU OFFERED THAT AS A FURTHER TEST OF WHETHER ALL THE  
24 CLASS MEMBERS OR MOST OF THEM -- ALMOST ALL OF THEM WERE  
25 HARMED. THAT'S WHAT YOU JUST SAID, RIGHT?

1 A. AGAIN, IT WAS THE SECOND INDEPENDENT TEST.

2 Q. AND YOU USED -- TO DO THAT, YOU USED THE -- OUT OF THE  
3 ACTUAL TRANSACTIONAL DATA FROM SYSCO AND U.S. FOODS, YOU USED  
4 THE ACTUAL PRICES PAID THAT'S REFLECTED IN THAT TRANSACTIONAL  
5 DATA, RIGHT?

6 A. SURE.

7 Q. AND THEN YOU COMPARED THOSE ACTUAL PRICES TO YOUR  
8 PREDICTED "BUT FOR" PRICE.

9 A. PRICES.

10 Q. PRICES, RIGHT. RIGHT?

11 A. YES, SIR.

12 Q. BUT TO GET TO THE PREDICTED "BUT FOR" PRICE --

13 A. PRICES.

14 Q. -- YOU CALCULATED THE SINGLE OVERCHARGE PERCENTAGE. I  
15 MEAN, YOU USED THE SINGLE OVERCHARGE PERCENTAGES TO DO THAT,  
16 RIGHT?

17 A. THAT'S CORRECT. AGAIN, BUT THE PREDICTED "BUT FOR" PRICES  
18 VARIED BECAUSE OF THE CUSTOMER, BECAUSE OF THE PRODUCT, BECAUSE  
19 OF THE STATE, AND BECAUSE OF THE MONTH.

20 Q. OKAY. FAIR ENOUGH. BUT FOR EACH OF THOSE CUSTOMERS YOU  
21 WERE USING THE SAME OVERCHARGE PERCENTAGE. YOU'RE USING IT --  
22 AS PART OF YOUR CALCULATION, YOU'RE USING THE ACTUAL PRICE  
23 DATA, YOU'RE USING THE SAME OVERCHARGE PERCENTAGE FOR EVERY  
24 CUSTOMER TO GET TO YOUR -- WHAT YOU CALL YOUR INDIVIDUAL  
25 CUSTOMER CALCULATION, RIGHT?

1 A. THAT'S GENERALLY CORRECT. IT CERTAINLY -- THE CALCULATION  
2 OF THESE PREDICTED "BUT FOR" PRICES, AGAIN, THAT VARY BY  
3 CUSTOMER, BY PRODUCT, BY STATE, BY MONTH. THEY START WITH THE  
4 OVERCHARGE FROM -- THAT'S ESTIMATED IN THE SYSCO REGRESSION OR  
5 WHAT'S ESTIMATED IN THE U.S. FOODS REGRESSION; THAT'S CORRECT.

6 Q. SO YOU USED THIS 16.6, FOR EXAMPLE, FOR COSI, AND YOU USED  
7 THAT IN YOUR SYSCO -- YOU USED IT IN YOUR SYSCO REGRESSION,  
8 RIGHT?

9 A. NO. YOU MISSPOKE AGAIN. THE 16.6 IS THE -- THERE'S A  
10 SINGLE OVERCHARGE IN EACH OF THESE TWO REGRESSIONS.

11 Q. SO IN SYSCO -- FAIR ENOUGH. IN SYSCO YOUR SINGLE  
12 OVERCHARGE IS 16.3, RIGHT?

13 A. I DON'T SPECIFICALLY REMEMBER THAT, BUT I'LL ACCEPT YOUR  
14 REPRESENTATION.

15 Q. I THINK IT'S AT TAB 13, IF I'M NOT MISTAKEN. THE  
16 COEFFICIENT YOU'LL RECALL IS ABOUT .15, AND THAT TRANSLATES  
17 INTO ABOUT 16.3. IT'S IN TAB 13 --

18 A. TAB 13?

19 Q. IT'S AT TAB 13 OF THE LARGE BINDER.

20 A. YES, I'M AT TAB 13. WHICH PAGE SHOULD I BE ON? I SEE  
21 SOME REGRESSION OUTPUT HERE.

22 Q. YOU SEE WHERE IT HAS A COEFFICIENT --

23 A. I THINK YOU MEAN ON PAGE 5.

24 Q. YEAH, YOU SEE YOU HAVE A COEFFICIENT OF 1.5 THERE?

25 A. YEAH. LET'S GIVE HER HONOR A SECOND TO CATCH UP.

1 THE COURT: I'M AT TAB 13 IN THE LARGE BINDER. THAT'S  
2 UP ON THE SCREEN, I THINK.

3 MR. GALLO: I JUST WANTED TO SHOW THE WITNESS TO  
4 REFRESH HIS RECOLLECTION.

5 Q. THE COEFFICIENT IS .15?

6 A. THAT'S CORRECT.

7 Q. AND THAT TRANSLATES INTO ABOUT A 16.3 PERCENT OVERCHARGE,  
8 YOU REMEMBER THAT?

9 A. THAT SOUNDS RIGHT. ARE WE ON SYSCO OR U.S. FOODS?

10 Q. THIS I BELIEVE IS SYSCO, IF I'M NOT MISTAKEN. ON THE  
11 PRIOR PAGE -- IT INDICATES "SYSCO" ON THE TOP OF THE PRIOR  
12 PAGE.

13 SO HERE'S A GOOD POINT, I JUST WANT TO BE SURE THE  
14 COURT UNDERSTANDS THIS. YOU THEN WENT TO EVERY ONE OF SYSCO'S  
15 CUSTOMERS AND YOU TOOK -- TO CALCULATE THE PREDICTED "BUT FOR"  
16 PRICE, YOU USED THE 16.3 PERCENT OVERCHARGE.

17 A. THAT IS CORRECT. AGAIN, IT'S MODIFIED -- EVERY SINGLE  
18 COMBINATION OF A CUSTOMER, A PRODUCT, A STATE AND A MONTH HAS A  
19 DIFFERENT PREDICTED "BUT FOR" PRICE.

20 Q. SO WHEN YOU'RE CALLING IT -- I JUST WANT TO BE CLEAR  
21 BECAUSE IT CONFUSED ME. WHEN YOU CALL IT A CLASS MEMBER  
22 SPECIFIC REGRESSION.

23 A. YES, SIR.

24 Q. YOU WENT TO EVERY ONE OF COSI'S CUSTOMERS, YOU USED THE  
25 SAME OVERCHARGE -- I'M SORRY, SYSCO'S CUSTOMERS.

1 A. YES, SIR.

2 Q. TO CALCULATE THE OVERCHARGE THAT THAT CUSTOMER USED, YOU  
3 USED THE SAME 16.3 OVERCHARGE FOR EVERY CUSTOMER.

4 A. THAT IS CORRECT. AGAIN, JUST WANT TO BE CLEAR THAT THESE  
5 PREDICTED "BUT FOR" PRICES DO VARY BY CUSTOMER, BY PRODUCT, BY  
6 STATE AND BY THE MONTH.

7 Q. RIGHT. THE OUTCOME THERE -- THE PRICE THERE VARIES, BUT  
8 THE OVERCHARGE THAT YOU ASSUMED FOR THAT CUSTOMER DOES NOT  
9 VARY, THE 16.3 DOES NOT VARY.

10 A. THAT'S CORRECT. I JUST -- YOU USED THE WORD "OVERCHARGE."  
11 TO ME THE OVERCHARGE IS WHETHER OR NOT THE ACTUAL PRICES GO  
12 EVEN WITH THE PREDICTED "BUT FOR" PRICES, AND THAT CERTAINLY --

13 Q. THE OVERCHARGE PERCENTAGE DOES NOT VARY. FOR EVERY SYSCO  
14 CUSTOMER YOU USED 16.3.

15 A. THAT IS CORRECT.

16 Q. AND FOR EVERY U.S. FOODS CUSTOMER, YOU USED THE SAME  
17 PERCENTAGE.

18 A. THAT IS CORRECT.

19 Q. AND DO YOU REMEMBER IT WAS 17.4 BY CHANCE?

20 A. I'LL ACCEPT YOUR REPRESENTATION. AGAIN, JUST SO WE'RE  
21 CLEAR ON THIS, THE ACTUAL IMPLEMENTATION RESULTS IN HUNDREDS OF  
22 THOUSANDS OF DIFFERENT PREDICTED "BUT FOR" PRICES.

23 Q. I HEARD YOU SAY THAT REPEATEDLY, AND I WANTED TO BE SURE  
24 THE COURT UNDERSTOOD THAT IT'S THE SAME OVERCHARGE PERCENTAGE,  
25 THAT'S ALL.



1 MR. GALLO: THANKS VERY MUCH.

2 THE COURT: THANK YOU, MR. GALLO.

3 MR. CUNEO, DO YOU WANT TO ASK A FEW QUESTIONS NOW OR  
4 RECESS AND TAKE IT UP THIS AFTERNOON, SIR?

5 MR. CUNEO: I THINK I CAN COMPLETE THIS IN SIX MINUTES.

6 THE COURT: THAT'S QUITE A CHALLENGE TO YOURSELF. GO  
7 AHEAD, SIR.

8 MR. CUNEO: I SAID "THINK."

9 REDIRECT EXAMINATION

10 BY MR. CUNEO:

11 Q. NOW, DR. WILLIAMS --

12 A. YES, SIR.

13 Q. -- I WOULD LIKE TO TAKE YOU BACK IN TIME TO WHEN WE WERE  
14 YOUNG, LAST SPRING, AND WHERE YOU WERE PREPARING YOUR EXPERT  
15 REPORT, CORRECT?

16 A. YES, SIR.

17 Q. NOW, DO YOU REMEMBER AT THE OPENING EARLY ON, WHEN I WAS  
18 EXAMINING YOU THIS MORNING, I ASKED YOU WHAT YOU DID WITH  
19 RESPECT TO CLASS CERTIFICATION IN YOUR REPORT; DO YOU REMEMBER  
20 THAT?

21 A. YES, SIR.

22 Q. NOW, WE'VE HEARD MR. GALLO -- YOUR OPENING REPORT  
23 BASICALLY DEALT WITH TWO DIFFERENT RUBRICS; DID IT NOT?

24 A. RIGHT. IF YOU'RE REFERRING TO THE GENERALIZED PRICE  
25 INCREASE VERSUS THE ALL OR ALMOST ALL.

1 Q. LET ME SEE IF I CAN FIND YOUR EXPERT REPORT. LET'S JUST  
2 USE MR. GALLO'S VERSION, REPORT OF MICHAEL WILLIAMS, PAGE --  
3 TAB 1. HE MADE A LOT OF STATEMENTS ABOUT -- HE ASKED YOU A LOT  
4 OF QUESTIONS ABOUT WHAT YOU SAID ABOUT INDUSTRY  
5 CHARACTERISTICS.

6 A. YES, SIR.

7 Q. THAT IS ON PAGE 12. IF YOU LOOK -- ONE LOOKS AT THE TABLE  
8 OF CONTENTS, DOES THAT RELATE TO A PORTION OF THE REPORT THAT  
9 DEALT WITH COMMON ECONOMIC EVIDENCE SUPPORTS THE EXISTENCE OF A  
10 CONSPIRACY OR DOES THAT DEAL WITH CLASS-WIDE IMPACT?

11 A. THE FORMER.

12 Q. SO THOSE STATISTICS, AND THE THINGS THAT YOU PUT IN THERE,  
13 WERE BASICALLY PUT THERE TO SUGGEST, INDICATE, PROVIDE EVIDENCE  
14 OR SUPPORT FOR THE IDEA THAT A CONSPIRACY WAS PLAUSIBLE, AS NOW  
15 REQUIRED BY SOME SUPREME COURT PRECEDENCE; IS THAT CORRECT?

16 A. THAT IS CORRECT.

17 Q. I SAID "WHEN WE WERE YOUNG," THAT WAS PUT -- YOU PREPARED  
18 THAT REPORT WHEN, SIR?

19 A. IT'S DATED MAY 29, 2018.

20 Q. NOW, SUBSEQUENTLY, ISN'T IT A FACT THAT COSI PROVIDED  
21 INTERROGATORY ANSWERS THAT SPEAK DIRECTLY TO THE TOPIC OF  
22 WHETHER THERE WAS A CONSPIRACY, YES OR NO?

23 A. YES, SIR.

24 Q. OKAY. AND THEREFORE, BASED ON THOSE INTERROGATORY  
25 ANSWERS, THE COURT DOES NOT HAVE TO LOOK AT INDUSTRY STRUCTURE

1 TO DETERMINE WHETHER OR NOT THERE WAS A CONSPIRACY, CORRECT?

2 A. THAT'S ABSOLUTELY CORRECT.

3 Q. AND SO THIS OPINION WAS OFFERED DURING A DIFFERENT TIME OF  
4 THE CASE, CORRECT?

5 A. THAT IS CORRECT.

6 Q. AND ESSENTIALLY IT WAS DURING A TIME WHEN WE WERE -- WE AS  
7 PLAINTIFFS WOULD BE TRYING TO PERSUADE THE COURT THAT WE WERE  
8 SERIOUS AND HAD A PLAUSIBLE CASE; IS THAT CORRECT?

9 A. THAT'S CORRECT.

10 Q. NOW, I WANT TO ASK YOU ANOTHER SET OF QUESTIONS ABOUT  
11 THAT. AS YOU UNDERSTAND OUR -- WHEN I SAY "OUR," FOOD SERVICE  
12 ALLEGATIONS, DO WE ALLEGE THAT THERE WAS AN OVERARCHING  
13 CONSPIRACY OR DO WE ALLEGE THAT THERE WAS A SPECIFIC FOOD  
14 SERVICE CONSPIRACY?

15 MR. GALLO: YOUR HONOR, I'M TRYING NOT TO INTERFERE,  
16 BUT THE LEADING IS GETTING A LITTLE OUT OF CONTROL.

17 MR. CUNEO: IT WAS A QUESTION.

18 THE COURT: THE OBJECTION TO LEADING WOULD BE  
19 SUSTAINED. YOU CAN REPHRASE, COUNSEL.

20 Q. WHAT KIND OF A -- DO WE ALLEGE AN OVERARCHING CONSPIRACY?

21 A. I HAVE TO CONFESS I'M NOT A HUNDRED PERCENT SURE WHAT YOU  
22 MEAN BY "OVERARCHING."

23 Q. IN OTHER WORDS -- DO THE COSI -- LET ME COME AT IT THIS  
24 WAY. ARE THE -- ARE YOU FAMILIAR WITH THE COSI ANSWERS TO THE  
25 INTERROGATORIES?

1 A. YES, SIR.

2 Q. SPECIFICALLY, LET'S TALK ABOUT THE ONE THAT DEALS WITH THE  
3 PERIOD 2000 -- DURING THE CLASS PERIOD 2011 TO 2013. CAN YOU  
4 FIND THAT?

5 A. I CAN.

6 MR. ROBERTI: YOUR HONOR, ACTUALLY, FOR THE RECORD,  
7 THESE HAVE BEEN MARKED "HIGHLY CONFIDENTIAL."

8 THE COURT: THESE ARE SOME OF THE DOCUMENTS WE WEREN'T  
9 GOING TO BROACH PUBLICLY BECAUSE THEY WERE SUBJECT TO THE  
10 PROTECTIVE ORDER.

11 MR. ROBERTI: EXACTLY. AGAIN, LIKE MY COLLEAGUE, I  
12 DON'T WANT TO INTERFERE WITH THE EXAMINATION.

13 THE COURT: THANK YOU.

14 Q. ARE THOSE SPECIFICALLY RELATED TO FOOD SERVICE?

15 A. YES, SIR.

16 Q. SPECIFICALLY AND ONLY RELATED TO FOOD SERVICE OR ARE THEY  
17 IN GENERAL, THE ADMISSIONS?

18 A. I'M SORRY, I DIDN'T HEAR THE END OF THE QUESTION.

19 Q. OR ARE THEY GENERAL?

20 A. I BELIEVE -- I DON'T HAVE THEM IN FRONT OF ME. I BELIEVE  
21 THEY'RE GENERAL.

22 Q. NOW, WHEN WE TALK ABOUT -- MR. GALLO TALKED A LOT ABOUT  
23 DOT SALES, OKAY? DID YOU ACCOUNT FOR DOT SALES TO MAKE SURE  
24 THAT YOU DIDN'T DOUBLE COUNT?

25 A. YES. SOMETIMES DOT SELLS TO MIGHT BE A SMALL DISTRIBUTOR.

1 SOMETIMES DOT SELLS TO ONE OF THE OTHER FIVE, SO SOMETIMES DOT  
2 SELLS TO SYSCO OR U.S. FOODS. YOUR HONOR, I WAS VERY CAREFUL,  
3 AND I NETTED ALL OF THOSE TRANSACTIONS OUT SO I WOULD NOT  
4 DOUBLE COUNT ANYBODY.

5 MR. CUNEO: THAT'S ALL MY QUESTIONS, THANK YOU.

6 THE COURT: THANK YOU, MR. CUNEO. IT TAKES US TO AN  
7 APPROPRIATE TIME TO BREAK FOR THE NOON HOUR. WE'LL RESUME AT  
8 1:30.

9 (COURT WAS AT RECESS.)

10

11

12

13

14

C E R T I F I C A T E

15

16

I, GAYLE WAKEFIELD, CERTIFY THAT I AM A DULY  
QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED  
STATES DISTRICT COURT, THAT THE FOREGOING IS A TRUE AND  
ACCURATE TRANSCRIPT OF THE PROCEEDINGS AS TAKEN BY ME IN THE  
ABOVE-ENTITLED MATTER ON JANUARY 16, 2019; AND THAT THE FORMAT  
USED COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED  
STATES JUDICIAL CONFERENCE.

20

21

DATED: JANUARY 22, 2019 /S/ GAYLE WAKEFIELD  
GAYLE WAKEFIELD, RPR, CRR  
OFFICIAL COURT REPORTER

22

23

24

25

1 AFTERNOON SESSION 1:30 P.M.

2 (NOTE: DR. MICHAEL WILLIAMS IS ON THE WITNESS STAND.)

3 THE COURT: OKAY. GOOD AFTERNOON, EVERYBODY.

4 I THOUGHT WE WERE FINISHED WITH THIS WITNESS, BUT WE'RE  
5 NOT.

6 MR. CUNEO: WE WERE TOLD -- WE THOUGHT YOU MIGHT HAVE  
7 SOME QUESTIONS, YOUR HONOR. I HAD FINISHED WITH DR. WILLIAMS.  
8 FOR NOW, I WAS HOPING THAT YOU WOULD GIVE HIM THE SAME  
9 OPPORTUNITY YOU GAVE THE OTHER EXPERTS TO GET BACK UP A LITTLE  
10 BIT AT THE END.

11 THE COURT: THAT WOULD BE MY INTENTION.

12 I'M GOING TO LET YOU STEP DOWN, SIR. IF YOU'RE ABLE TO  
13 STAY WITH US THE REST OF THE DAY, THAT WOULD BE EXCELLENT.

14 DR. WILLIAMS: ABSOLUTELY. THANK YOU.

15 THE COURT: THANK YOU.

16 (THE WITNESS STOOD ASIDE.)

17 THE COURT: SO NOW WE ARE ON TO OUR LAST EXPERT IN THIS  
18 THREE-DAY MARATHON, AND THAT'S DR. HAIDER, WHO WE HAVE MET  
19 BEFORE. SO LET'S PROCEED.

20 MR. ROBERTI: YOUR HONOR, JOHN ROBERTI WITH THE ALLEN &  
21 OVERY LAW FIRM. WE REPRESENT THE CHICKEN OF THE SEA DEFENDANTS  
22 AND THE THAI UNION DEFENDANTS.

23 THE COURT: YOU REMAIN UNDER OATH, MA'AM, FROM YOUR  
24 TESTIMONY YESTERDAY, MA'AM. PLEASE BE SEATED. THANK YOU,

25 MR. ROBERTI: AND, YOUR HONOR, JUST A HOUSEKEEPING

1 MATTER. WE'RE GOING TO REFER TO THREE DOCUMENTS IN THIS  
2 EXAMINATION. WE'RE GOING TO REFER TO A SET OF SLIDES THAT HAVE  
3 BEEN HANDED UP TO YOUR HONOR.

4 THE COURT: OKAY.

5 MR. ROBERTI: JUST VERY BRIEFLY, WE'RE GOING TO REFER  
6 TO ONE OR TWO OF THE SLIDES THAT WERE USED THIS MORNING, AND  
7 THEN WE'RE GOING TO REFER TO DR. HAIDER'S EXPERT REPORT, WHICH  
8 I'M TOLD IS IN SOMETHING CALLED THE LITTLE BINDER.

9 THE COURT: I HAVE MY OWN COPIES OF THE EXPERTS BECAUSE  
10 I'VE BEEN WORKING ON THOSE REPORTS FOR A WHILE. THAT'S FINE.

11 MR. ROBERTI: THOSE WILL BE THE THREE DOCUMENTS.

12 THE COURT: THAT'S VERY HELPFUL.

13 MR. ROBERTI: AND, YOUR HONOR, WE'RE NOT GOING TO  
14 PUBLISH THE SLIDES. WE'RE GOING TO USE THE SAME METHOD THAT  
15 MR. CUNEO DID.

16 LAILA HAIDER, PREVIOUSLY SWORN WITNESS, TESTIFIES:

17 DIRECT EXAMINATION

18 BY MR. ROBERTI:

19 Q. DR. HAIDER, WELCOME BACK.

20 A. THANK YOU. THANK YOU, YOUR HONOR.

21 Q. WE HEARD ABOUT YOUR QUALIFICATIONS YESTERDAY. I HAVE JUST  
22 ONE QUESTION ON THAT. COULD YOU PROVIDE AN EXAMPLE OF A CASE  
23 WHERE A COURT HAS ACCEPTED WORK YOU HAVE DONE SIMILAR TO THE  
24 ONE IN THIS CASE?

25 A. YES. THAT WOULD BE THE LITHIUM ION BATTERIES MATTER IN

1 THE INDIRECT PURCHASER CASE.

2 Q. ALL RIGHT. DR. HAIDER, YESTERDAY, YOU TALKED ABOUT  
3 INDIVIDUAL CONSUMERS' PURCHASES, AND TODAY WE'VE BEEN TALKING  
4 ABOUT THE COMMERCIAL FOOD PREPARERS. JUST PRELIMINARILY, WERE  
5 YOU RETAINED BY COUNSEL FOR THE DEFENDANTS TO PROVIDE AN  
6 OPINION RELATED TO THE COMMERCIAL FOOD PREPARERS CASE?

7 A. YES, THAT'S CORRECT.

8 Q. DID YOU PREPARE A REPORT?

9 A. YES.

10 Q. OKAY. LET'S TURN TO YOUR REPORT, PAGE FOUR -- I'M SORRY.  
11 PARAGRAPH FOUR, PAGE FIVE. YOU DESCRIBE THE SCOPE OF YOUR  
12 ASSIGNMENT. COULD YOU PLEASE EXPLAIN THAT TO THE COURT?

13 A. YES. I'VE BEEN ASKED BY COUNSEL FOR DEFENDANTS TO PROVIDE  
14 AN ASSESSMENT OF THE REPORT SUBMITTED BY DR. MICHAEL WILLIAMS  
15 IN SUPPORT OF COMMERCIAL FOOD PREPARER PLAINTIFFS' MOTION FOR  
16 CLASS CERTIFICATION, AND SPECIFICALLY I WAS ASKED TO DETERMINE  
17 WHETHER THE PROPOSED METHODOLOGY PUT FORWARD BY DR. WILLIAMS IS  
18 CAPABLE OF ESTABLISHING ECONOMIC INJURY TO ALL OR VIRTUALLY ALL  
19 PROPOSED CLASS MEMBERS AND WHETHER IT CAN BE USED TO RELIABLY  
20 ESTIMATE THEIR DAMAGES.

21 Q. AND, DR. HAIDER, IF YOU COULD TURN TO THE SECOND SLIDE,  
22 THE ONE THAT SAYS SUMMARY OF CONCLUSIONS. IN YOUR REPORT,  
23 PARAGRAPH NINE, PAGE SIX, YOU SUMMARIZE YOUR PRINCIPAL  
24 CONCLUSIONS.

25 A. YES. SO I JUST WANT TO KNOW WHICH BINDER TO LOOK IN.



1 MR. ROBERTI: YOUR HONOR, MAY I APPROACH THE WITNESS?

2 THE COURT: OF COURSE, OF COURSE.

3 THE WITNESS: THANK YOU.

4 BY MR. ROBERTI:

5 Q. OKAY. DR. HAIDER, COULD YOU PROVIDE A SUMMARY OF YOUR  
6 CONCLUSIONS?

7 A. YES. I'M HAPPY TO. I HAVE CONDUCTED A DETAILED ANALYSIS  
8 OF THE FOOD-SERVICE SIDE OF THE PACKAGED TUNA INDUSTRY WITH  
9 RESPECT TO PRICING AND SALES FROM DIFFERENT SUPPLIERS, AND I  
10 HAVE ALSO ASSESSED DR. WILLIAMS' PROPOSED METHOD, AND BASED ON  
11 THAT I REACH TWO PRINCIPAL CONCLUSIONS. THE FIRST ONE IS THAT  
12 HIS PROPOSED METHODOLOGY CANNOT, IN FACT, ESTABLISH INJURY FROM  
13 THE DEFENDANTS' ALLEGED CONDUCT FOR ALL OR VIRTUALLY ALL  
14 PROPOSED CLASS MEMBERS, AND, SECOND, IT FAILS TO RELIABLY  
15 CALCULATE THEIR DAMAGES.

16 Q. DR. HAIDER, I WANT TO ASK YOU ONE PRELIMINARY STATISTICAL  
17 QUESTION. I HEARD DR. WILLIAMS SAY THAT IF IT WERE TRUE THAT  
18 THE CONDUCT IN THIS CASE HAD NO EFFECT, THE CHANCE OF GETTING  
19 HIS RESULTS WAS ONE IN 1,000. WHAT, IF ANYTHING, DOES DR.  
20 WILLIAMS, WHAT DR. WILLIAMS SAID ABOUT HIS STATISTICAL  
21 SIGNIFICANCE TELL YOU ABOUT WHETHER OR NOT THERE WAS COMMON  
22 IMPACT IN THIS CASE?

23 A. SO THAT IS NOT THE PARTICULAR QUESTION THAT I'VE BEEN, I  
24 WAS ASKED TO ASSESS HERE TODAY. THE QUESTION IS WHETHER HIS  
25 PROPOSED METHODOLOGY HAS, CAN SHOW INJURY FOR ALL OR VIRTUALLY

1 ALL PROPOSED CLASS MEMBERS, NOT WHETHER IT CAN SHOW INJURY IN  
2 GENERAL OR IF IT CAN SHOW INJURY FOR ONE PERSON.

3 Q. OKAY. LET'S TURN TO SOME OF THE SPECIFICS IN YOUR REPORT,  
4 AND LET'S BEGIN BY TALKING A LITTLE BIT ABOUT THE FOOD-SERVICE  
5 BUSINESS. FIRST, WE TALKED ABOUT THIS A LITTLE BIT THIS  
6 MORNING, BUT, BRIEFLY, WHAT TYPE OF PACKAGED TUNA PRODUCT DOES  
7 YOUR REPORT ANALYZE FOR THIS CASE?

8 A. YES. SO, UNLIKE THE CASE YESTERDAY THAT I WAS HERE  
9 DISCUSSING WITH YOUR HONOR YESTERDAY, THIS PARTICULAR CASE  
10 RELATES TO THE FOOD-SERVICE SIDE OF PACKAGED TUNA.  
11 SPECIFICALLY, THE SIZES ARE AS DEFINED IN THE COMPLAINT OF  
12 PACKAGED TUNA THAT COMES IN SIZES LARGER THAN 40 OUNCES, SO  
13 SOME OF THESE LARGE CANS OR RATHER LARGE CANS WE SEE HERE  
14 TODAY. TWO COMMON SIZES ARE 43-OUNCE POUCHES AND  
15 66-AND-A-HALF-OUNCE CANS, SO MUCH LARGER THAN WHAT WE WERE  
16 TALKING ABOUT ON THE RETAIL SIDE YESTERDAY.

17 Q. AND, DR. HAIDER, WHAT ARE SOME OF THE DIFFERENCES BETWEEN  
18 PACKAGES TYPICALLY SOLD IN RETAIL AND IN PACKAGES THAT ARE SOLD  
19 IN FOOD SERVICE?

20 A. YES. SO WE TALKED ABOUT THESE SIZE DIFFERENCES IN TERMS  
21 OF, YOU KNOW, WHO THE PROPOSED CLASS MEMBERS ARE. THE OTHER  
22 SIGNIFICANT DIFFERENCE, OF COURSE, IS THE DISTRIBUTION CHAIN.  
23 IN THIS PARTICULAR CASE, WHEN WE THINK OF THE FOOD-SERVICE  
24 SIDE, THE PROPOSED CLASS MEMBERS HERE INCLUDE HOSPITALS,  
25 SCHOOLS, DISTRIBUTORS, RESTAURANTS, SANDWICH DELI SHOPS,

1 PRISONS, A HOST OF DIFFERENT ENTITIES, AND SO THEY'RE  
2 PURCHASING THROUGH A DIFFERENT DISTRIBUTION CHAIN THAN  
3 INDIVIDUAL CONSUMERS WHO WILL GO TO A GROCERY STORE AND PICK UP  
4 FOR THEIR PERSONAL CONSUMPTION. FOODS DISTRIBUTORS, OF COURSE,  
5 PLAY A BIG ROLE IN THIS SPACE. THEN THERE ARE LARGE CLUB  
6 STORES AND ONE LARGE RETAILER AND SOME OTHER LARGE RETAILERS  
7 THAT ALSO SELL THIS TYPE FOOD-SERVICE PACKAGED TUNA.

8 Q. AND LET'S TALK A LITTLE BIT ABOUT THAT SPECIFICALLY. I  
9 THINK WE LEARNED THIS MORNING THAT THE CLASS DEFINITION IN THIS  
10 CASE IS LIMITED TO PROPOSED CLASS MEMBERS, INDIVIDUALS OR  
11 BUSINESSES WHO HAVE PURCHASED DIRECTLY FROM SIX SELECTED  
12 INTERMEDIARIES, WHO IN TURN HAVE PURCHASED DIRECTLY FROM THE  
13 DEFENDANTS. WHO ARE THE SELECTED -- AND I THINK DR. WILLIAMS  
14 MAY HAVE REFERRED TO THEM AS LARGE DISTRIBUTORS. I THINK YOUR  
15 REPORT REFERS TO THEM AS SELECTED INTERMEDIARIES. WHO ARE  
16 THEY?

17 A. THAT'S CORRECT; I REFER TO THEM IN MY REPORT AS SELECTED  
18 INTERMEDIARIES. THEY'RE THE SIX THAT WE'VE BEEN HEARING ABOUT  
19 THIS MORNING AS WELL. THEY INCLUDE TWO CLUB STORES, SO COSTCO  
20 AND SAM'S CLUB; A LARGE MASS MERCHANDISER OR RETAILER WE ALL  
21 KNOW, WAL-MART; TWO FOOD DISTRIBUTORS, SYSCO AND U. S. FOODS;  
22 AND, FINALLY, A REDISTRIBUTOR, THAT IS, DOT FOODS. A  
23 REDISTRIBUTOR IS A DISTRIBUTOR THAT BUYS -- IN THIS CASE, DOT  
24 FOODS BUYS TRUCKLOADS OF PACKAGED TUNA FROM DEFENDANTS AND THEN  
25 WILL, IN FACT, SELL IN SMALLER THAN TRUCKLOADS TO SMALLER

1           DISTRIBUTORS AROUND THE COUNTRY.    IN FACT, DOT FOODS ALSO SELLS  
2           TO SYSCO AND U. S. FOODS AND THEN TO THOUSANDS OF SMALLER  
3           DISTRIBUTORS.

4           Q.    DOCTOR, IN YOUR WORK, DID YOU CONSIDER THE IMPORTANCE OF  
5           FOOD-SERVICE PACKAGED TUNA THAT WAS AVAILABLE TO MEMBERS OF THE  
6           PROPOSED CLASS FROM NON-DEFENDANTS?   AND I'D REFER YOU TO  
7           PARAGRAPHS 30 TO 51 OF YOUR REPORT.

8           A.    YES, I DID.

9           Q.    OKAY.   WHO ARE THE KEY COMPETITORS IN THE FOOD-SERVICE  
10          SECTOR?

11          A.    THERE ARE -- OF COURSE, THE DEFENDANTS PLAY A ROLE.   SO  
12          STARKIST AND COSI ARE THE LARGER -- AMONGST THE DEFENDANTS,  
13          THEY'RE THE LARGER SUPPLIERS.   BUMBLE BEE ALSO SELLS  
14          FOOD-SERVICE-SIZED PACKAGED TUNA, BUT PLAYS A SMALLER ROLE, A  
15          SMALL ROLE COMPARED TO THE OTHER TWO DEFENDANTS.   HAVING SAID  
16          THAT, HOWEVER, THERE ARE NUMEROUS OTHER PRIVATE-LABEL IMPORTERS  
17          THAT, IN FACT, SELL FOOD-SERVICE-SIZED PACKAGED TUNA INTO THE  
18          UNITED STATES.   SO, IN ADDITION TO THE TWO DEFENDANTS THAT I  
19          TALKED ABOUT, COSI AND STARKIST, A LITTLE BIT OF BUMBLE BEE,  
20          AND THEN MANY OTHER IMPORTERS THAT ARE SELLING PRODUCTS INTO  
21          THE U. S.

22          Q.    DR. HAIDER, COULD YOU TURN TO THE NEXT SLIDE?   WHO ARE  
23          SOME OF THE -- AND THE QUESTION IS GOING TO BE, WHO ARE SOME OF  
24          THESE NON-DEFENDANT VENDORS THAT YOU'RE REFERENCING?

25          A.    YES.   SO SOME NAMES ARE LISTED HERE IN SLIDE THREE AND

1 ALSO IN MY REPORT. THEY INCLUDE REMA FOODS, ATALANTA, JANA,  
2 C.PACIFIC, SWS. I ALSO HAD NOTED MITSUI AND A COUPLE OF  
3 OTHERS, I BELIEVE, IN MY REPORT.

4 Q. WHAT TYPE OF PACKAGED TUNA DO THESE VENDORS SUPPLY?

5 A. THEY ARE SUPPLYING PRIVATE-LABEL FOOD-SERVICE-SIZED  
6 PACKAGE TUNA INTO THE UNITED STATES.

7 Q. AND WHAT IS PRIVATE LABEL?

8 A. PRIVATE LABEL IS, YOU KNOW, WHAT WE GENERALLY ALSO WILL  
9 SEE IN SUPERMARKETS, AND SO ON, WHEN IT'S NOT A BRANDED  
10 PRODUCT, BUT INSTEAD IT COULD BE THAT THE GROCERY STORE HAS AN  
11 ADDITIONAL PRODUCT THAT THEY'RE SELLING WITH THEIR OWN  
12 GROCERY-STORE BRAND ON IT, AND THAT'S OFTEN WHAT WE THINK OF AS  
13 PRIVATE LABEL. SO SIMILARLY HERE, THEY'RE NOT SELLING BRANDED  
14 PRODUCTS, ALTHOUGH THESE PRODUCTS HAVE CERTAIN LABELS AND  
15 NAMES, LIKE EMPRESS, AND SO ON.

16 Q. OKAY. LET'S TURN TO THE NEXT SLIDE, AND IN PARAGRAPH 30  
17 OF YOUR REPORT, PAGE 22, YOU DISCUSS HOW MUCH NON-DEFENDANT  
18 TUNA WAS PURCHASED BY TWO LARGE DISTRIBUTORS DURING THE CLASS  
19 PERIOD, AND LARGE DISTRIBUTORS IS THE TERM THAT DR. WILLIAMS  
20 USED. WE DON'T WANT TO USE THEIR NAMES.

21 A. UNDERSTOOD.

22 Q. BUT COULD YOU PLEASE DESCRIBE TO THE COURT WHAT THIS SLIDE  
23 ILLUSTRATES?

24 A. SURE. SO WHAT THIS SLIDE ILLUSTRATES IS THAT TWO OF THE  
25 LARGE FOOD DISTRIBUTORS, IN FACT, THEY PURCHASED SUBSTANTIAL

1 QUANTITIES OF PRODUCT, OF PACKAGED TUNA, FOOD-SERVICE SIZE,  
2 FROM THESE IMPORTERS. SPECIFICALLY HERE, ON THE LEFT-HAND  
3 SIDE, YOU'LL SEE THAT THE MAJORITY OF PURCHASES, IN FACT ALMOST  
4 75 PERCENT, ARE COMING TO THAT PARTICULAR LARGE DISTRIBUTOR  
5 FROM THESE PRIVATE-LABEL IMPORTERS. ON THE RIGHT-HAND SIDE IS  
6 THE SECOND-LARGEST DISTRIBUTOR, AND THAT ONE AS WELL, 64  
7 PERCENT, AGAIN A MAJORITY OF THE SALES THERE ARE COMING FROM  
8 THESE PRIVATE-LABEL IMPORTERS ABROAD.

9 Q. WHY IS IT THAT THE LARGE AMOUNT OF NON-DEFENDANT TUNA  
10 MATTERS?

11 A. SO THIS IS CRUCIAL FOR AN ECONOMIC INQUIRY BECAUSE, TO THE  
12 EXTENT SOME OF THESE LARGE, OR THESE SELECTED INTERMEDIARIES,  
13 THE SIX WE WERE TALKING ABOUT, TO THE EXTENT SOME OF THEM ARE  
14 IN AN ECONOMIC POSITION TO TURN TO ALTERNATE SOURCES, TO SOME  
15 OUTSIDE SUPPLY, THEN THAT IS CRITICAL TO UNDERSTANDING WHETHER  
16 THE PRICE THAT THEY ARE PAYING COULD, IN FACT, BE LOWER BECAUSE  
17 THEY HAD THESE OUTSIDE OPTIONS. SO, PUT ANOTHER WAY, BECAUSE  
18 THERE'S THIS OUTSIDE SUPPLY PRESENT, IT, OF COURSE, WILL AFFECT  
19 THE PRICE THAT THEY'RE PAYING FOR THE PACKAGED TUNA THAT  
20 THEY'RE BUYING. THE MORE YOU HAVE OUTSIDE SUPPLY, THE MORE  
21 COMPETITION THERE IS FOR THE PRODUCT THAT THESE PARTICULAR  
22 ENTITIES ARE PURCHASING.

23 Q. HOW, IF AT ALL, DID DR. WILLIAMS ACCOUNT FOR THIS LARGE  
24 SUPPLY OF NON-DEFENDANT TUNA?

25 A. DR. WILLIAMS DID NOT ACCOUNT FOR IT AT ALL. IN FACT, HE

1 OVERLOOKED THIS ISSUE OF NON-DEFENDANT PACKAGED TUNA IN HIS  
2 REPORT.

3 Q. I THOUGHT I HEARD DR. WILLIAMS, THIS MORNING, SAY THAT IT  
4 WAS ACCOUNTED FOR BECAUSE HE STUDIED PRICES. IS THAT CORRECT?

5 A. NO, THAT IS NOT CORRECT, AND I WANT TO MAKE SURE THAT THIS  
6 IS, THAT I EXPLAIN THIS. SO, JUST AT A VERY BASIC AND  
7 FUNDAMENTAL LEVEL, THAT STATEMENT IS INCORRECT. IN GENERAL,  
8 WHEN WE THINK ABOUT, JUST STEPPING BACK, WHAT A REGRESSION  
9 ANALYSIS DOES IS, A REGRESSION ANALYSIS OF THE TYPES THAT, YOU  
10 KNOW, WE'VE BEEN TALKING ABOUT HERE FOR THE LAST COUPLE OF  
11 DAYS, EACH OF THESE REGRESSION ANALYSES IS TRYING TO EXPLAIN  
12 ACTUAL PRICES PAID, AND SO THE REGRESSION ANALYSIS DOES NOT  
13 KNOW ITSELF WHAT, HOW TO EXPLAIN THOSE PRICES THAT ARE OBSERVED  
14 IN THE REAL WORLD. SO IT IS THEN UP TO THE RESEARCHER OR THE  
15 APPLIED ECONOMETRICIAN TO FIGURE OUT WHAT ARE THE RELEVANT  
16 SUPPLY-AND-DEMAND FACTORS THAT EXPLAIN THOSE PRICES. SO LET'S  
17 SAY FOR A MOMENT THAT I'M TRYING TO EXPLAIN PRICES PAID AND I  
18 OVERLOOK SOME VERY IMPORTANT SUPPLY FACTORS IN THIS CASE, THAT  
19 THERE'S PRIVATE-LABEL IMPORTED TUNA THAT'S COMING INTO THE  
20 UNITED STATES. LET'S SAY I OVERLOOK IT. IT'S ABSOLUTELY  
21 INCORRECT FOR ME TO SAY IT'S OKAY THAT I OVERLOOKED THIS VERY  
22 IMPORTANT ROLE OR COMPETITIVE FACTOR BECAUSE THE PRICES, IN  
23 FACT, ALREADY ACCOUNT FOR IT. THE WHOLE PURPOSE IS TO TRY TO  
24 FIGURE OUT WHAT IS EXPLAINING PRICES PAID AND THEN TO DETERMINE  
25 WHETHER TO THE EXTENT THE PRICES THAT CANNOT BE EXPLAINED BY

1 SUPPLY-AND-DEMAND FACTORS, THEN THAT ANYTHING UNEXPLAINED IN  
2 TERMS OF THE ELEVATION IS ATTRIBUTED TO THE OVERCHARGE.

3 THE COURT: SO HOW WOULD YOU TAKE THAT INTO ACCOUNT IN  
4 YOUR REGRESSION MODEL, AND HOW DOES THAT AFFECT THE OUTCOME?

5 THE WITNESS: YES. SO LET'S SAY THAT I WANTED TO TRY  
6 TO EXPLAIN PRICES PAID FOR FOOD-SERVICE PACKAGED TUNA. I WILL  
7 STUDY THE DEMAND-AND-SUPPLY FACTORS. SO WHAT I WOULD WANT TO  
8 DO IS NOT JUST ACCOUNT FOR SOME DEMAND FACTORS, BUT IN FACT  
9 ACCOUNT FOR THE FACT THAT, FOR EXAMPLE, THAT YOU CAN THINK OF  
10 THESE AS PRICES OF SUBSTITUTE PRODUCTS. I'LL TALK A LITTLE BIT  
11 MORE, I THINK, LATER TODAY ABOUT HOW PROPOSED CLASS MEMBERS  
12 WERE, IN FACT, TURNING TO THESE AS SUBSTITUTE PRODUCTS, BUT ONE  
13 WAY TO ACCOUNT FOR THE PRICE OF SUBSTITUTES. THAT'S ONE  
14 APPROACH.

15 THE COURT: YOU MEAN THE PRICE.

16 THE WITNESS: THE PRICE OF THE SUBSTITUTE, THE  
17 SUBSTITUTE THAT YOU WOULD TURN TO. THAT COULD BE ONE. YOU  
18 COULD ALSO THINK, OKAY, THESE ARE IMPORTS AND THEY'RE MAKING  
19 THEIR WAY INTO THE UNITED STATES. SO WHAT WOULD BE AFFECTING  
20 THOSE IMPORTS? SO YOU COULD WANT TO ACCOUNT FOR TARIFFS.  
21 THERE ARE TARIFFS ON --

22 THE COURT: SO DID YOU DO THIS?

23 THE WITNESS: THIS IS -- SO MY ROLE, OF COURSE, HERE  
24 WAS TO ASSESS DR. WILLIAMS' PROPOSED METHOD.

25 THE COURT: SO YOU DON'T KNOW WHAT THE OUTCOME WOULD



1 BE.

2 THE WITNESS: SO ACTUALLY -- SO I THINK THAT'S A GREAT  
3 QUESTION, YOUR HONOR. SO HERE'S THE -- BASED ON SOME TESTING  
4 THAT I DID, WHAT I FOUND WAS THAT WHEN I TAKE DR. WILLIAMS'  
5 APPROACH, WHICH DOES NOT ACCOUNT FOR THIS NON-DEFENDANT TUNA,  
6 AND THEN I ACTUALLY APPLY HIS APPROACH ON THE NON-DEFENDANT  
7 TUNA, I SEE THAT IT YIELDS THIS RESULT THAT YOU HEARD ABOUT,  
8 THAT'S BEEN TALKED ABOUT AS A FALSE POSITIVE. SO WHY DO WE  
9 THINK THAT IT'S A FALSE POSITIVE? THE REASON WE THINK IT'S A  
10 FALSE POSITIVE IS BECAUSE, BECAUSE THE SUPPLY IN THIS INDUSTRY  
11 IS NOT, THE SUPPLY FACTORS ARE NOT ACCOUNTED FOR, THE CONCERN  
12 IS THAT WHEN YOU DON'T ACCOUNT FOR THEM, THAT EFFECT IS GOING  
13 SOMEWHERE ELSE IN THE MODEL, OR IT COULD GO TO THE, WHAT WE  
14 CALL THE ERROR. SOME OF IT MAY GO TO THE ERROR. BUT SOME OF  
15 THIS, AS I'VE DEMONSTRATED, IS, IN FACT, GOING TO THE ALLEGED  
16 OVERCHARGE THAT HE HAS CALCULATED. THAT IS WHAT THAT SHOWING  
17 OF FALSE POSITIVE DESCRIBES, AND I'M HAPPY TO EXPLAIN THAT  
18 MORE.

19 THE COURT: NO. THAT'S ALL RIGHT.

20 MR. ROBERTI: THANK YOU, YOUR HONOR.

21 JUST TO SUM UP, YOUR HONOR.

22 BY MR. ROBERTI:

23 Q. DR. HAIDER, IN YOUR REPORT, YOU OFFER AN OPINION ABOUT THE  
24 IMPORTANCE OF DR. WILLIAMS' FAILURE TO ACCOUNT FOR PURCHASES OF  
25 NON-DEFENDANT TUNA. WHAT WAS THAT OPINION?

1 A. YES. SO WHAT I EXPLAIN IS THAT, BECAUSE DR. WILLIAMS IS  
2 IGNORING THIS NON-DEFENDANT TUNA THAT'S MADE ITS WAY TO THE  
3 UNITED STATES AND IS AVAILABLE AND SOLD TO THESE INTERMEDIARIES  
4 AND TO PROPOSED CLASS MEMBERS, HIS APPROACH IS INCAPABLE OF  
5 ESTABLISHING INJURY FOR THE PROPOSED CLASS MEMBERS BECAUSE HE'S  
6 ESSENTIALLY IGNORED THE COMPETITIVE ROLE THAT THIS OTHER  
7 PRODUCT PLAYS IN THE INDUSTRY.

8 Q. SO WE'VE TALKED ABOUT -- NOW THAT WE KNOW THAT THERE'S A  
9 LOT OF NON-DEFENDANT TUNA, LET'S TALK ABOUT THE ROLE OF THIS  
10 NON-DEFENDANT TUNA AND HOW IT PLAYS OUT IN THE COMPETITION. IN  
11 YOUR REPORT, STARTING AT PAGE 27, YOU DISCUSS THE PURCHASE OF  
12 NON-DEFENDANT TUNA BY PROPOSED CLASS MEMBERS. IS THAT RIGHT?

13 A. THAT'S CORRECT.

14 MR. ROBERTI: YOUR HONOR, I'M GOING TO BE REFERRING TO  
15 THE REPORT THROUGHOUT. THERE MIGHT BE TIMES WHEN I'M QUOTING  
16 FROM IT. YOU'RE WELCOME TO FOLLOW ALONG, BUT OTHERWISE IF THE  
17 COURT WOULD BE ABLE TO LOOK BACK AT THE RECORD.

18 THE COURT: NO, YOU'RE FINE.

19 MR. ROBERTI: ALL RIGHT.

20 BY MR. ROBERTI:

21 Q. WELL, LET'S TURN TO THE NEXT SLIDE. AGAIN WITH THE  
22 CAUTION ABOUT CONFIDENTIALITY, COULD YOU PLEASE EXPLAIN TO THE  
23 COURT WHAT YOU'RE ILLUSTRATING WITH THIS SLIDE?

24 A. YES. SO WHAT THIS SLIDE SHOWS IS THAT, AS I MENTIONED A  
25 MOMENT AGO, WE SEE THESE FOOD DISTRIBUTORS, IN FACT, BUYING

1 THIS PRIVATE-LABEL IMPORTED TUNA. THE SECOND QUESTION WHICH,  
2 THAT I ASKED IS, OKAY, I SEE THAT THEY'RE BUYING THE  
3 PRIVATE-LABEL IMPORTED TUNA, BUT LET ME SEE IF THE PROPOSED  
4 CLASS MEMBERS IN THIS CASE ARE, IN FACT, TURNING TO THIS  
5 PACKAGED TUNA, THE IMPORTED PACKAGED TUNA, WHEN THEY MAKE  
6 PURCHASES FROM THESE FOOD DISTRIBUTORS, AND IN FACT WHAT I FIND  
7 IS THAT A LARGE PROPORTION OF THE PROPOSED CLASS MEMBERS BUYING  
8 FROM EACH OF THESE LARGE DISTRIBUTORS IN FACT DO TURN TO THIS  
9 NON-DEFENDANT TUNA. SO SPECIFICALLY WHEN I LOOK AT THE LARGE  
10 DISTRIBUTOR ON THE LEFT, ABOUT 52 PERCENT OF PROPOSED CLASS  
11 MEMBERS BUYING FROM THEM ALSO HAVE BOUGHT THIS IMPORTED  
12 PRIVATE-LABEL TUNA, WHICH IS WHAT WE'RE CALLING THE  
13 NON-DEFENDANT TUNA. ON THE RIGHT-HAND SIDE, THE NUMBER IS 42  
14 PERCENT, SO 42 PERCENT OF THOSE CUSTOMERS BUYING FROM THIS  
15 LARGE DISTRIBUTOR ARE ALSO BUYING THE IMPORTED TUNA.

16 Q. DR. HAIDER, IN YOUR REPORT, YOU REFER TO SWITCHING. DID  
17 YOU STUDY THAT PHENOMENON?

18 A. I DID. SO I STUDIED NOT ONLY WHETHER WE SEE PROPOSED  
19 CLASS MEMBERS TURNING TO THIS IMPORTED TUNA, BUT I ALSO STUDIED  
20 PRICING, AND I WANTED TO SEE WHETHER PROPOSED CLASS MEMBERS IN  
21 FACT SWITCH BETWEEN THE DEFENDANTS' PRODUCT AND THIS IMPORTED  
22 PRIVATE-LABEL PRODUCT, AND I SEE NUMEROUS EXAMPLES OF  
23 SWITCHING. I FIND THAT IN SOME CASES I HAVE EXAMPLES IN MY  
24 REPORT OF PROPOSED CLASS MEMBERS WHO HAVE SWITCHED FROM  
25 NON-DEFENDANT TO DEFENDANT TUNA, AND WHEN THAT SWITCH OCCURRED,

1 THE DEFENDANT CHARGED -- THE DEFENDANT'S PRODUCT WAS PRICED  
2 LOWER. I ALSO SOMETIMES SEE THAT WHEN THEY'RE SWITCHING THE  
3 PRICES ARE VERY SIMILAR. I SOMETIMES SEE THAT THE DEFENDANTS'  
4 PRODUCT COULD BE A HIGHER PRICE. SO YOU SEE IN THE PRICING  
5 DATA FOR THESE LARGE DISTRIBUTORS THAT IN FACT NOT ONLY ARE  
6 THESE CUSTOMERS BUYING THE IMPORTED PRIVATE-LABEL TUNA, BUT  
7 THEY'RE ACTUALLY SWITCHING BACK AND FORTH BETWEEN THE PRODUCT  
8 OFTEN AND EVEN AT SIMILAR PRICES OR COMPARABLE PRICES.  
9 SOMETIMES ONE IS HIGHER; SOMETIMES THE OTHER ONE IS HIGHER.

10 Q. DR. HAIDER, WHAT DOES THE PRESENCE OF SWITCHING TELL YOU  
11 ABOUT THE TYPE OF INQUIRY REQUIRED TO DETERMINE THE COMMON  
12 IMPACT?

13 A. SO WHAT THIS TELLS ME IS THAT THE FACT THAT YOU SEE  
14 SWITCHING, THE FACT THAT YOU SEE PROPOSED CLASS MEMBERS TURNING  
15 TO THIS OUTSIDE SUPPLY WHEN THEY'RE BUYING FROM THE LARGE  
16 DISTRIBUTORS, THAT TELLS ME THAT AN INDIVIDUALIZED INQUIRY IS  
17 REQUIRED TO DETERMINE WHETHER A PROPOSED CLASS MEMBER, WHEN  
18 BUYING FROM THESE FOOD DISTRIBUTORS, IN FACT WAS ABLE TO AVOID  
19 A HIGHER PRICE FROM THE DEFENDANTS FOR THE FOOD-SERVICE  
20 PACKAGED TUNA. WERE THEY ABLE TO, THEREFORE, AVOID AN ALLEGED  
21 OVERCHARGE?

22 Q. AND HOW, IF AT ALL, DID DR. WILLIAMS ACCOUNT FOR THE  
23 SWITCHING IN HIS ANALYSIS?

24 A. AGAIN, DR. WILLIAMS IN FACT OVERLOOKED THE DATA THAT HE  
25 HAD ON HAND ON THIS NON-DEFENDANT PRIVATE-LABEL TUNA.

1 Q. AND HOW, IF AT ALL, DOES THE FAILURE TO ACCOUNT FOR  
2 SWITCHING AFFECT THE RELIABILITY OF DR. WILLIAMS' ANALYSIS?

3 A. SO, TO SUM UP, BECAUSE THIS NON-DEFENDANT SUPPLY HAS NOT  
4 BEEN ACCOUNTED FOR, WHAT THIS TELLS US IS THAT DR. WILLIAMS'  
5 APPROACH WHERE HE'S ESSENTIALLY IGNORED THE COMPETITIVE ROLE  
6 THAT THIS FOOD PRODUCT THAT'S IMPORTED PLAYS IN THIS  
7 FOOD-SERVICE SPACE, AS A RESULT, THE REGRESSION ANALYSIS THAT  
8 HE HAS PUT FORWARD IS, IN FACT, UNWORKABLE FOR THE ASSESSMENT  
9 OF WHETHER THESE PROPOSED CLASS MEMBERS BUYING FROM THESE FOOD  
10 DISTRIBUTORS AND LARGE INTERMEDIARIES, WHETHER THEY IN FACT DID  
11 SUFFER AN OVERCHARGE.

12 THE COURT: ARE YOU SAYING THAT PEOPLE SWITCHED IN  
13 ENTIRETY, TOTALLY DROPPED DEFENDANTS AND SWITCHED TOTALLY TO  
14 NON-DEFENDANTS?

15 THE WITNESS: SO ACTUALLY WHAT WE FIND --

16 THE COURT: I MEAN, IF IT'S A MIX, IT'S A MIX. IF  
17 YOU'RE BUYING SOME FROM ONE AND SOME FROM THE OTHER, YOU'RE  
18 GOING TO HAVE SOME INTERMEDIARY, AREN'T YOU?

19 THE WITNESS: SO -- ACTUALLY, NOT NECESSARILY. SO  
20 HERE'S WHAT YOU SEE. ONE, YOU SEE SOME EXAMPLES IN MY REPORT,  
21 AND THESE ARE ON EXHIBITS -- LET'S SEE. I CAN GIVE YOU THE  
22 PAGE NUMBER. THEY'RE ON PAGES 30, 31. I HAVE BLACK-AND-WHITE  
23 CHARTS HERE, SO.

24 MR. ROBERTI: JUST FOR THE RECORD, THEY'RE EXHIBITS 4,  
25 5, 6 IN DR. HAIDER'S REPORT, 30 TO 32.

1 THE COURT: OKAY.

2 THE WITNESS: SO HERE, WHAT I SEE HERE, THESE WERE SOME  
3 OF THE EXAMPLES OF SWITCHING THAT I HAD, THAT I'VE DESCRIBED.  
4 SO, FOR EXAMPLE, I'LL GO TO EXHIBIT 4, AND THAT'S AT THE END OF  
5 PARAGRAPH 45. SO EXHIBIT 4 SHOWS, TALKS ABOUT HOW THIS LARGE  
6 DISTRIBUTOR WAS SELLING TO 7-ELEVEN SKY CHEF -- THIS IS JUST AN  
7 EXAMPLE -- AND THAT PARTICULAR PROPOSED CLASS MEMBER WAS  
8 PURCHASING EMPRESS WHITE TUNA FROM REMA FOODS BEFORE SWITCHING  
9 TO STARKIST WHITE TUNA, AND WHEN THEY SWITCHED, YOU ACTUALLY  
10 SEE IN THE GRAPH THAT IN FACT STARKIST GOT THEM TO SWITCH TO,  
11 OR THAT LARGE DISTRIBUTOR GOT THEM TO SWITCH TO STARKIST, BUT  
12 IN FACT AT A LOWER PRICE DURING THE PROPOSED CLASS PERIOD. AND  
13 SO WHAT THIS MEANS, YOUR HONOR, IS THAT BECAUSE I SEE OTHER  
14 EXAMPLES OF THIS, AND YOU'RE ABSOLUTELY CORRECT. IN FACT,  
15 THERE'S A TABLE IN THE BACK OF MY REPORT THAT SHOWS SOME  
16 PROPOSED CLASS MEMBERS ALWAYS BUYING DEFENDANT PACKAGED TUNA,  
17 AND THEN YOU ALSO SEE OTHER PROPOSED CLASS MEMBERS THAT DO BUY  
18 BOTH. THEY LIKE TO -- THEY SEEM TO GO BACK AND FORTH, AND IT  
19 MAKES SENSE GIVEN THE TYPES OF BUSINESS THAT SOME OF THESE  
20 PROPOSED CLASS MEMBERS ARE IN. IF YOU'RE MAKING SANDWICHES AND  
21 PREPARING FOOD AS A CATERER, YOU MAY NOT NECESSARILY ALWAYS  
22 WANT TO BUY BRANDED. YOU COULD SWITCH BACK AND FORTH. WHAT  
23 THIS TELLS YOU IS THAT THE PROPOSED CLASS MEMBERS ARE IN FACT  
24 IN DIFFERENT SITUATIONS. SOME MAY NEVER WANT TO MOVE FROM THE  
25 DEFENDANT TUNA, BUT THOSE WHO SEE IT AS A VIABLE SUBSTITUTE

1 PRODUCT, FOR THOSE IT IS CRUCIAL TO TAKE THIS INTO ACCOUNT TO  
2 DETERMINE WHETHER THAT COMPETITION RESULTED IN THESE PROPOSED  
3 CLASS MEMBERS BEING ABLE TO PAY LOWER PRICES OR AVOID ANY  
4 ALLEGED OVERCHARGE IN THE FOOD-SERVICE SIDE.

5 BY MR. ROBERTI:

6 Q. AND, DR. HAIDER, WHY WOULDN'T THAT JUST BE ACCOUNTED FOR  
7 IN DR. WILLIAMS' MODEL BECAUSE HE LOOKED AT PRICES?

8 A. YES. SO THIS GOES BACK TO WHAT I DESCRIBED EARLIER. SO  
9 THIS ASSERTION THAT, WELL, THE PRICES THAT YOU SEE, LET'S JUST  
10 SAY THE ACTUAL PRICES THAT YOU SEE, THEY IN FACT ACCOUNT FOR  
11 WHAT'S GOING ON IN THE REAL WORLD. THE PRICES THAT YOU SEE, OF  
12 COURSE, WILL, ARE A FUNCTION OF THE COMPETITIVE FACTORS AT  
13 PLAY. NO ONE IS DOUBTING THAT THE PRICES THEMSELVES ARE NOT  
14 AFFECTED BY COMPETITION. WHAT WE'RE SAYING IS THAT THEN IT IS,  
15 HERE, GIVEN THAT A REGRESSION MODEL IS BEING PUT FORWARD AND  
16 THAT REGRESSION MODEL IS SAYING, I'M GOING TO TRY TO EXPLAIN  
17 THOSE PRICES, THEN IT IS ABSOLUTELY THE JOB OF THAT ECONOMIST  
18 TO MAKE SURE THAT THE PRICES ARE BEING EXPLAINED BY ALL THE  
19 APPROPRIATE FACTORS. SO LET'S SAY -- I GAVE MYSELF AS AN  
20 EXAMPLE, BUT PERHAPS I SHOULDN'T. I SHOULD TALK ABOUT DR.  
21 WILLIAMS, BECAUSE IT'S HIS METHOD. DR. WILLIAMS, WHEN HE IS  
22 LOOKING TO STUDY PRICES IN THE FOOD-SERVICE SPACE, HE NEEDS TO  
23 TAKE INTO ACCOUNT THAT THIS IS WHAT'S GOING ON, AND IT'S NOT,  
24 IT'S NOT THE CASE THAT WE'RE TALKING ABOUT SOMETHING SMALL.  
25 WE'RE ACTUALLY TALKING ABOUT THESE LARGE DISTRIBUTORS TURNING

1 TO OUTSIDE SUPPLY FOR THE MAJORITY OF THEIR PURCHASES, AND THEN  
2 THEIR CUSTOMERS ARE, IN FACT, ALSO BUYING THIS OUTSIDE PRODUCT  
3 FROM THOSE LARGE INTERMEDIARIES. SO IT IS ABSOLUTELY THE JOB  
4 OF DR. WILLIAMS TO MAKE SURE THAT HIS REGRESSION MODEL IS  
5 APPROPRIATELY EXPLAINING WHAT'S AFFECTING PRICES SO THAT HE  
6 DOESN'T, IN FACT, ATTRIBUTE TO THE ALLEGED OVERCHARGE EFFECTS  
7 THAT COULD BE EXPLAINED BY SUPPLY FACTORS THAT WERE OTHERWISE  
8 IGNORED.

9 Q. AND, DR. HAIDER, I WANT TO MOVE ON -- THANK YOU FOR THAT.  
10 I WANT TO MOVE ON TO THE NEXT SLIDE, SLIDE SIX, IN THE  
11 MATERIALS. I THINK THIS WAS AN ISSUE THAT WAS COVERED ON  
12 CROSS-EXAMINATION EARLIER TODAY, SO MAYBE JUST BRIEFLY. COULD  
13 YOU DESCRIBE WHAT THIS SLIDE ILLUSTRATES AND WHY IT'S  
14 IMPORTANT?

15 A. YES. SO THIS SLIDE IS TITLED MARKET CONCENTRATION. I  
16 WON'T GO INTO TOO MUCH DETAIL BECAUSE SOME OF THIS GROUND HAS  
17 ALREADY BEEN COVERED TODAY IN DR. WILLIAMS' TESTIMONY AND ALSO  
18 IN MINE JUST A FEW MOMENTS AGO. SO HERE ON THE LEFT-HAND SIDE  
19 YOU SEE THAT IT SAYS DR. WILLIAMS' ESTIMATED MARKET SHARES. I  
20 THINK THERE WAS SOME DISCUSSION IN THE MORNING DURING DR.  
21 WILLIAMS' TESTIMONY THAT HE HAD SAID THE DEFENDANTS HERE, THE  
22 THREE DEFENDANTS ACCOUNT FOR 80 TO 84 PERCENT OF SALES OF  
23 PACKAGED TUNA, AND THEREFORE THE IMPLICATION BEING THAT ONLY 16  
24 TO 20 PERCENT IS, IN FACT, COMING FROM NON-DEFENDANT ENTITIES.  
25 I UNDERSTAND DR. WILLIAMS STATED THAT HE WAS REFERRING TO



1           PACKAGED TUNA IN GENERAL.   THE SOURCE THAT HE RELIED UPON TO  
2           DETERMINE THAT IS IN FACT AT THE RETAIL LEVEL.   SO THESE DATA  
3           IN FACT COME FROM NIELSEN.   THAT WAS DISCUSSED AS WELL.   AND SO  
4           THIS IS ACTUALLY REPRESENTING THE DEFENDANTS' ROLE IN RETAIL,  
5           IN THE RETAIL CHANNEL, AND SO THAT IS LARGELY REFLECTING THEIR  
6           ROLE WITH RESPECT TO THE SMALLER-SIZED CANS, THE TYPES WE'VE  
7           BEEN TALKING ABOUT YESTERDAY.

8           NOW, ON THE RIGHT-HAND SIDE, WHAT THIS SHOWS IS IN FACT  
9           WHAT WE'VE ALREADY JUST TALKED ABOUT, IS THAT WHEN YOU LOOK AT  
10          THE LARGE DISTRIBUTORS, YOU CAN, IN, FACT SEE THAT IN THE  
11          FOOD-SERVICE SPACE THE PICTURE IS VERY DIFFERENT.   THE PICTURE  
12          IN THE FOOD-SERVICE SPACE IS NOT THE SAME AS WHAT HE IS  
13          CONTENDING HOLDS FOR PACKAGED TUNA OVERALL.   AND I UNDERSTAND  
14          THERE WAS DISCUSSION THIS MORNING ABOUT HOW WE DON'T REALLY  
15          KNOW THE SIZE OF THE MARKET AND EXACTLY HOW MUCH, HOW LARGE THE  
16          DEFENDANTS ARE, AND THERE WAS SOME VERY HELPFUL DISCUSSION  
17          EARLIER THAT COVERED THIS POINT, THAT WHAT YOU SEE IN FACT IS  
18          THAT THE MAJORITY GOING TO THESE TWO LARGE FOOD DISTRIBUTORS  
19          IS, IN FACT, COMING FROM THOSE PRIVATE-LABEL IMPORTERS.   SO THE  
20          FACT THAT THE PICTURE IS VERY DIFFERENT IN FOOD SERVICE IS  
21          CRUCIAL FOR AN ECONOMIC INQUIRY THAT IS TRYING TO EXPLAIN  
22          PRICES PAID IN THE FOOD-SERVICE SECTOR.

23          Q.    OKAY.   DR. HAIDER, LET'S TURN TO THE NEXT SLIDE.   EARLIER  
24          TODAY, WE HEARD SOME TESTIMONY ABOUT YOUR STUDY OF FALSE  
25          POSITIVES, AND MAYBE COULD YOU BRIEFLY EXPLAIN TO THE COURT THE

1 STUDY YOU PERFORMED, WHY YOU DID IT, AND EXPLAIN THE SLIDE THAT  
2 YOU'VE CREATED?

3 A. SURE. SO WHAT I DID WAS, I SAW THAT DR. WILLIAMS HAS  
4 THESE -- HE REFERS TO THEM AS CLASS-MEMBER SPECIFIC  
5 REGRESSIONS, BUT PUT SIMPLY, DR. WILLIAMS ESTIMATED OVERCHARGES  
6 FOR THESE, ON DEFENDANT PRODUCTS FOR THESE TWO LARGE  
7 DISTRIBUTORS, AND HIS ESTIMATES WERE THE ONES THAT ARE IN THE,  
8 REFLECTED IN THE RED BARS. WHEN I LOOKED AT THE SALES AND  
9 PURCHASES OF THESE TWO LARGE DISTRIBUTORS, I NOTICED THAT THERE  
10 IS ALL THIS NON-DEFENDANT PACKAGED TUNA IN THE DATA. SO PLENTY  
11 OF DATA HERE. WE'VE BEEN TALKING ABOUT HOW THE MAJORITY OF  
12 PURCHASES IN FACT ARE FROM THE PRIVATE-LABEL IMPORTERS. SO I  
13 LOOKED AT THAT AND I SAW THAT THEY WERE SALES FROM  
14 PRIVATE-LABEL IMPORTERS TO THESE TWO LARGE DISTRIBUTORS, AND  
15 ALSO WE COULD SEE THE PRICES THAT WERE PAID SIMILARLY. YOU  
16 COULD SEE WHAT THE PURCHASES WERE MADE AT.

17 SO WHAT I DID WAS, I SAID, OKAY, LET ME ESTIMATE DR.  
18 WILLIAMS' OWN REGRESSION MODELS NOT ON THE DEFENDANT PACKAGED  
19 TUNA, WHICH HE DID -- THOSE ARE THE RED BARS -- BUT INSTEAD AS  
20 AN ILLUSTRATION, AND I'LL EXPLAIN WHAT IT ILLUSTRATES, ON THE  
21 NON-DEFENDANT PACKAGED TUNA, MEANING THE PACKAGED TUNA THAT IS  
22 NOT SOLD TO CUSTOMERS IN THE UNITED STATES BY THE DEFENDANTS,  
23 BUT INSTEAD FROM THESE IMPORTERS. AND WHEN I DID THAT, I FOUND  
24 THAT IN FACT IT YIELDS THESE SO-CALLED OVERCHARGES. I SAY  
25 SO-CALLED ONLY BECAUSE WE'RE NOT, WE DON'T WANT TO CALL THEM

1 OVERCHARGES BECAUSE THERE'S NO ALLEGATION OF CONDUCT WITH  
2 RESPECT TO THIS PRIVATE-LABEL IMPORTED TUNA, AND SO YOU SEE  
3 THESE SIMILAR OVERCHARGES THERE, ALTHOUGH YOU DO NOT EXPECT TO  
4 SEE ANY.

5 Q. AND WHAT DOES YOUR SLIDE ILLUSTRATE?

6 A. SO THE SLIDE IN FACT ILLUSTRATES THAT FOR THE LARGE  
7 DISTRIBUTOR ON THE RIGHT-HAND SIDE, THAT APPROACH, WHEN APPLIED  
8 TO THE NON-DEFENDANT PACKAGED TUNA, IN FACT YIELDS A VERY  
9 SIMILAR, EVEN SLIGHTLY HIGHER ESTIMATE WITH RESPECT TO THE  
10 LARGE DISTRIBUTOR ON THE LEFT-HAND SIDE. IT'S THE BLUE, AND  
11 THAT'S A LITTLE LOWER THAN WHAT THE RED SHOWS. BUT IN EACH  
12 CASE THE METHOD SHOWS THAT THERE ARE, SAYS THERE ARE THESE  
13 SO-CALLED OVERCHARGES ON PRIVATE-LABEL IMPORTED TUNA, ALTHOUGH  
14 YOU DO NOT EXPECT TO SEE THAT.

15 Q. DR. HAIDER, THIS MORNING, I THOUGHT I HEARD DR. WILLIAMS  
16 REFER TO THIS ARGUMENT AS A STRAWMAN ARGUMENT. COULD YOU TURN  
17 TO SLIDE 19 OF DR. WILLIAMS' SLIDES? IT SHOULD BE IN THIS BLUE  
18 BINDER.

19 MR. ROBERTI: YOUR HONOR, MAY I APPROACH THE WITNESS?

20 THE COURT: OF COURSE.

21 THE WITNESS: THANK YOU.

22 BY MR. ROBERTI:

23 Q. IN SLIDE 19, IN THE, I BELIEVE IT'S THE SECOND BULLET  
24 POINT, YOU SEE A QUOTE THAT BEGINS, NO OVERCHARGES, AND IT'S A  
25 QUOTATION FROM YOUR REPORT, AND I THOUGHT I HEARD DR. WILLIAMS

1 SAY TODAY THAT THIS WAS THE ONLY BASIS THAT YOU HAD FOR  
2 INCLUDING, FOR USING NON-DEFENDANT TUNA IN YOUR FALSE POSITIVE  
3 STUDY. NOW, FIRST OF ALL, IS THAT TRUE? IS THAT THE ONLY  
4 BASIS?

5 A. NO, IT'S NOT THE ONLY BASIS.

6 Q. OKAY. IF WE LOOK AT YOUR REPORT, PLEASE -- CAN WE PULL UP  
7 PAGE 20 OF DR. HAIDER'S REPORT? AND THERE'S A SENTENCE AT THE  
8 BOTTOM OF THE PAGE THAT SAYS, NO OVERCHARGES ARE EXPECTED.  
9 IT'S THE VERY BOTTOM OF THE PAGE, SECOND-TO-LAST LINE. WHAT'S  
10 QUOTED IN THIS SLIDE SAYS, NO OVERCHARGES ARE EXPECTED TO EXIST  
11 BECAUSE THERE ARE NO ALLEGATIONS FROM PLAINTIFFS RELATED TO  
12 NON-DEFENDANT PACKAGED TUNA. IS THERE ANOTHER SENTENCE AFTER  
13 THAT?

14 A. YES, THERE IS. THAT STARTS WITH MOREOVER AT THE END  
15 THERE, AND IT READS, MOREOVER, PACKAGED TUNA FROM NON-DEFENDANT  
16 SUPPLIERS CONSTITUTES A SUBSTANTIALLY LARGER SHARE OF THE  
17 FOOD-SERVICE PACKAGED TUNA TO THESE INTERMEDIARIES THAN FROM  
18 DEFENDANT SUPPLIERS.

19 Q. AND WAS THAT ANOTHER REASON WHY YOU CHOSE NON-DEFENDANT  
20 TUNA FOR YOUR FALSE POSITIVE STUDY?

21 A. YES, ABSOLUTELY. SO THIS WAS NOT A CASE WHERE I SEE, I  
22 GENERALLY AM SEEING A LOT OF DEFENDANT PACKAGED TUNA AND THEN A  
23 LITTLE BIT COMING IN FROM THE OUTSIDE. AS WE'VE DISCUSSED FROM  
24 THOSE PIE CHARTS, WHEN YOU SEE THAT THE MAJORITY OF SALES TO  
25 THESE TWO IMPORTANT PLAYERS, THE TWO LARGE FOOD DISTRIBUTORS

1 THAT WE'VE BEEN TALKING ABOUT, THAT THE MAJORITY OF THEIR  
2 PURCHASES ARE COMING FROM THE OUTSIDE, THAT IS EXTREMELY  
3 RELEVANT. YOU DON'T WANT TO THROW AWAY THAT INFORMATION  
4 BECAUSE IT TELLS YOU SOMETHING QUITE IMPORTANT, AND SO -- AND  
5 IN ADDITION I'D ALSO SAY, BECAUSE I DID HEAR DR. WILLIAMS SAY  
6 THAT THERE'S NO OTHER BASIS, I'M ACTUALLY THE ONE WHO HAS  
7 STUDIED THE PURCHASES OF THESE LARGE INTERMEDIARIES, SELECTED  
8 INTERMEDIARIES OF THIS NON-DEFENDANT TUNA. I'VE STUDIED THEIR  
9 PRICING. I'VE STUDIED SWITCHING. I'VE LOOKED TO SEE WHETHER  
10 THOSE PURCHASES VARY OVER TIME. I'VE LOOKED TO SEE WHETHER  
11 THERE ARE DIFFERENCES ACROSS INTERMEDIARIES, AND SO IT'S ALL OF  
12 THIS EVIDENCE TAKEN TOGETHER THAT TELLS ME THAT THIS IS NOT  
13 SOMETHING THAT NEEDS TO BE OVERLOOKED. IF IT WERE ME, I WOULD  
14 WANT TO SPEND TIME REALLY TRYING TO UNDERSTAND WHAT'S GOING ON  
15 IN THE FOOD-SERVICE INDUSTRY SO THAT I AM PROPERLY CALCULATING  
16 PRICE EFFECT AND NOT MISTAKENLY ATTRIBUTING EFFECTS TO THE  
17 OVERCHARGE THAT DO NOT BELONG THERE.

18 Q. DR. HAIDER, CAN YOU TURN TO THE NEXT SLIDE, WHICH IS SLIDE  
19 EIGHT, IN YOUR PACKET? DID YOU REACH ANY CONCLUSIONS AS A  
20 RESULT OF YOUR FALSE POSITIVE STUDY?

21 A. I DID.

22 Q. WHAT WERE THEY?

23 A. SO, TO SUM UP, I'VE EXPLAINED THAT THIS METHOD YIELDS  
24 OVERCHARGES WHERE NONE ARE EXPECTED TO EXIST, AND SO WHAT THIS  
25 TELLS US, AND I TOUCHED ON THIS ALREADY A COUPLE OF TIMES, BUT

1 THIS FINDING THAT YOU SEE THOSE, WHAT I REFERRED TO AS  
2 SO-CALLED OVERCHARGES, THAT FINDING DEMONSTRATES THAT DR.  
3 WILLIAMS IS INCORRECTLY ATTRIBUTING PRICE EFFECTS THAT ARE  
4 UNRELATED TO THE ALLEGED CONDUCT TO THE OVERCHARGES THAT HE HAS  
5 ESTIMATED, AND THIS ISSUE IS CRITICAL WHEN IT COMES TO  
6 EMPIRICAL ESTIMATION, BECAUSE WHEN SOMEONE IS HOLDING OUT AN  
7 EFFECT TO BE TRUE -- LET'S SAY SOMEONE SAYS, I THINK THIS  
8 PARTICULAR RESULT RESULTED IN A FIVE-PERCENT INCREASE. THERE  
9 IS, THERE IS -- WHAT'S BUILT IN THERE IS THAT THERE WAS  
10 CAUSATION BETWEEN THOSE TWO THINGS, THAT THE EVENT YOU'RE  
11 LOOKING AT HAD A PARTICULAR EFFECT AND YOU'RE ABLE TO ISOLATE  
12 IT AND THAT'S WHAT WAS FIVE PERCENT. HERE, WHAT THIS TESTING  
13 SHOWS US IS THAT THERE'S NO CAUSAL LINK BETWEEN THE OVERCHARGES  
14 THAT DR. WILLIAMS HAS ESTIMATED AND THE ALLEGED CONDUCT IN THIS  
15 CASE, AND THEREFORE IT'S INCAPABLE OF ANSWERING THE QUESTION,  
16 WHICH IS WHETHER PROPOSED CLASS MEMBERS IN FACT SUSTAINED  
17 ECONOMIC INJURY FROM THIS ALLEGED CONDUCT.

18 Q. LET'S TURN TO ANOTHER ONE OF DR. WILLIAMS' CRITICISMS. WE  
19 HAVE TALKED SEVERAL TIMES OVER THESE LAST COUPLE DAYS ABOUT  
20 SOMETHING CALLED THE UMBRELLA EFFECT. I DON'T THINK WE NEED TO  
21 EXPLAIN TO THE COURT AGAIN WHAT THIS IS. BUT JUST BRIEFLY, DR.  
22 HAIDER, ARE THERE ANY FACTORS PARTICULARLY PRESENT IN THE  
23 FOOD-SERVICE SECTOR THAT ARE IMPORTANT TO THE ASSESSMENT OF THE  
24 UMBRELLA EFFECT AND WHETHER IT ACTUALLY APPLIED?

25 A. SO I WANT TO MAKE SURE THAT I'M, FIRST, VERY CLEAR THAT

1 THE ASSERTION THAT THE UMBRELLA THEORY EXPLAINS AWAY EVERYTHING  
2 THAT WE'VE JUST TALKED ABOUT IS AN ASSERTION. SO I WANT TO  
3 MAKE SURE THAT'S VERY CLEAR. I HAVE NEVER USED THE WORD  
4 UMBRELLA. DR. WILLIAMS SAID IN HIS REPLY REPORT THAT ALL OF  
5 THIS THAT I'VE TALKED ABOUT -- THE NON-DEFENDANT SUPPLY, THE  
6 SWITCHING, THE FACT THAT PROPOSED CLASS MEMBERS ARE BUYING THIS  
7 PRIVATE-LABEL IMPORTED TUNA -- HE DOES NOT STUDY THE PRICING,  
8 HE DOES NOT STUDY THE IMPORTED PRIVATE-LABEL TUNA, AND HE SAYS  
9 TWO WORDS, AND THOSE ARE UMBRELLA EFFECT. THAT IS A THEORY AND  
10 IT IS AN ASSERTION THAT HE SAYS EXPLAINS THAT AWAY. NOW,  
11 HAVING SAID THAT, ALL THEORIES NEED TO BE TESTED. I CAN TELL  
12 YOU BASED ON WHAT I'VE STUDIED IN THE PRICING DATA AND ALSO  
13 SOME PATTERNS, AND I CAN POINT YOU TO FIGURES, IF THAT WOULD BE  
14 APPROPRIATE, THAT IN FACT TELL US THAT NOT ONLY DID HE NOT DO  
15 THE INQUIRY, BUT IN FACT THE PATTERNS THAT I'M SEEING ARE  
16 INCONSISTENT WITH THE THEORY THAT HE SAYS CAN EXPLAIN ALL OF  
17 THIS EVIDENCE AWAY.

18 Q. WHAT ARE THE FIGURES YOU'RE REFERRING TO, DR. HAIDER?

19 A. SO, IN MY REPORT -- I'LL POINT, YOUR HONOR, TO THEM, AND  
20 I'LL JUST MAKE THIS POINT QUICKLY. IT RELATES TO SOMETHING DR.  
21 WILLIAMS SAID THIS MORNING. SO FIGURES ONE AND TWO ON PAGES 72  
22 AND 73, YOUR HONOR.

23 Q. AND WHAT DO THOSE FIGURES SHOW, DOCTOR?

24 A. SO THESE FIGURES SHOW THE PURCHASES FROM THOSE LARGE  
25 DISTRIBUTORS OVER TIME OF THE NON-DEFENDANT PACKAGED TUNA.

1 WE'VE ALREADY TALKED ABOUT WHAT IT IS, AN AGGREGATE. WE'VE  
2 TALKED ABOUT THE 75 PERCENT COMING FROM THE OUTSIDE AND THE 64  
3 PERCENT IN FIGURE TWO COMING FROM OUTSIDE. THERE WAS VARIATION  
4 OVER TIME. THE TALL BARS HERE REPRESENT THE SHARE OF PURCHASES  
5 COMING FROM THE NON-DEFENDANTS. DR. WILLIAMS RELIED ON A  
6 PARTICULAR ARTICLE THAT WAS DISCUSSED TODAY WHICH SAID THAT,  
7 AND THESE ARE ALL TESTABLE ASSERTIONS, THAT YOU WOULD WANT TO  
8 SEE IF THERE WAS DIVERSION OF DEMAND WHEN PRICES WENT UP,  
9 MEANING THAT THERE WAS DIVERSION IN DEMAND FROM THE DEFENDANT  
10 PRODUCT TO THE NON-DEFENDANT PRODUCT. AND IN FACT, YOUR HONOR,  
11 IF YOU LOOK AT FIGURE ONE, YOU SEE FOR THAT LARGE DISTRIBUTOR  
12 THEY'RE NOT BUYING MORE FROM THE NON-DEFENDANTS. THEY'RE  
13 ACTUALLY -- YOU KNOW, THAT SHARE STAYS -- IT ACTUALLY GOES DOWN  
14 A BIT. YOU KNOW, IT GOES UP AND DOWN OVER TIME FOR SURE, BUT  
15 IF WE GENERALLY LOOK AT THE PATTERN, IT'S NOT SHOWING THAT  
16 DIVERSION. SO I HEARD THE DISCUSSION THIS MORNING AND I WANTED  
17 TO MAKE SURE THAT IT'S CLEAR THAT EVEN WHEN I LOOK AT SOME OF  
18 THE AGGREGATE EVIDENCE, IT'S NOT CONSISTENT WITH THIS THEORY.

19 I'VE ALSO LOOKED AT THE UNDERLYING PRICING DATA, AND IN  
20 FACT THE PRICING DATA SHOW YOU THAT FOR NUMEROUS PRIVATE-LABEL  
21 IMPORTED PRODUCTS, THESE NON-DEFENDANT VENDORS WERE, IN FACT,  
22 SOMETIMES CHARGING HIGHER PRICES THAN THE DEFENDANTS, AND THE  
23 PRICE INCREASES IN NUMEROUS INSTANCES WERE IN FACT EARLIER THAN  
24 THE DEFENDANT PRICING INCREASE. I'M NOT SAYING IT WAS ALL THE  
25 TIME, BUT THAT'S WHAT YOU SEE WHEN YOU DIG IN. SO THE POINT IS



1 THAT YOU HAVE TO DIG IN AND DO THE DIFFICULT WORK, WHICH IS TO  
2 DO THE INQUIRY. YOU CAN'T JUST SAY WITH A THEORY THAT YOU CAN  
3 EXPLAIN ALL OF THIS AWAY.

4 Q. DOCTOR, YOU MENTIONED EMPIRICAL TEST. DID DR. WILLIAMS  
5 RUN ANY EMPIRICAL TESTS ON THE UMBRELLA EFFECT?

6 A. NO, HE DID NOT CONDUCT ANY TESTING OF HIS ASSERTION.

7 Q. WE TALKED, WE ALSO TALKED TODAY ABOUT THE RELEVANCE OF THE  
8 THAI UNION GROUP IN ASSESSING NON-DEFENDANT TUNA. DOES THE  
9 PRESENCE OF THE THAI UNION GROUP AS AN UPSTREAM SUPPLIER TO  
10 NON-DEFENDANT IMPORTERS ALTER YOUR OPINION IN ANY WAY ABOUT THE  
11 IMPORTANCE OF NON-DEFENDANT TUNA TO THE STUDY OF CLASS-WIDE  
12 IMPACT?

13 A. NO, IT DID NOT ALTER MY OPINION.

14 Q. LET'S TURN TO THE NEXT SLIDE AND I'LL ASK YOU WHY NOT, AND  
15 MAYBE YOU CAN ILLUSTRATE THAT BY TALKING THROUGH THIS SLIDE.

16 A. YES. SO THIS IS SLIDE NINE. SO WHEN, IN MY REPORT, I  
17 RAISED THIS ISSUE WHERE I SAID I SEE ALL THIS NON-DEFENDANT  
18 PRODUCT COMING IN AND I SEE PROPOSED CLASS MEMBERS IN FACT  
19 BUYING THIS PRODUCT AND THIS NEEDS TO BE TAKEN INTO ACCOUNT.  
20 WE'VE ALREADY HAD THE DISCUSSION OF UMBRELLA EFFECTS. THE  
21 OTHER POINT THAT WAS RAISED, AND THIS CAME UP THIS MORNING AS  
22 WELL, IS THAT SOME OF THE, THESE PRIVATE-LABEL IMPORTERS -- I  
23 UNDERSTAND WHAT DR. WILLIAMS IS SAYING, THAT THEY'RE NOT  
24 MANUFACTURING THIS PACKAGED TUNA. THEY ARE THE ONES THAT ARE  
25 SELLING IT INTO THE UNITED STATES TO THE FOOD DISTRIBUTORS AND

1 TO OTHER ENTITIES. BUT HE SAYS THEY'RE NOT MAKING IT, AND IN  
2 FACT, IN SOME CASES, THEY ARE BUYING IT FROM THAI UNION GROUP  
3 ABROAD. SO THAI UNION GROUP ABROAD IS SELLING SOME  
4 FOOD-SERVICE-SIZED PACKAGED TUNA TO SOME OF THOSE PRIVATE-LABEL  
5 IMPORTERS. AND HE SAYS, BECAUSE I SEE THAT THAI UNION GROUP IS  
6 SELLING TO SOME OF THEM ABROAD, THAT MEANS YOU JUST CANNOT SAY  
7 THAT IT'S NON-DEFENDANT, OR IT'S NOT, OR THAT SOMEHOW THAT IS,  
8 AGAIN IS YET ANOTHER WAY I THINK HE'S SAYING, EXPLAINS AWAY WHY  
9 THIS ISSUE IS NOT IMPORTANT FOR THE INQUIRY AT HAND. SO THAT  
10 IS ALSO MISLEADING, BECAUSE WHAT WE IN FACT SEE IS THAT THAI  
11 UNION GROUP, FROM THE DATA THAT WE HAVE FOR THEM, THAI UNION  
12 GROUP ABROAD HAS CERTAINLY SOLD TO SOME PRIVATE-LABEL  
13 IMPORTERS, BUT THAI UNION GROUP SALES TO THE PRIVATE-LABEL  
14 IMPORTERS ARE FAR LESS THAN THE PURCHASES THAT THESE FOOD  
15 DISTRIBUTORS HAVE MADE OF THE PRIVATE-LABEL IMPORTS.

16 SO THAT'S A MOUTHFUL. I WANT TO MAKE SURE I JUST MAKE IT  
17 CLEAR WITH A GRAPH. SO WHAT THIS GRAPH SHOWS BY YEAR IS, THE  
18 BLUE BARS SHOW THE -- THE DARK-BLUE ONES -- EXCUSE ME -- SHOW  
19 THE SALES FROM THAI UNION GROUP ABROAD TO THESE PRIVATE-LABEL  
20 IMPORTERS. SO THOSE ARE THE SHORTER BARS. SO THAT'S THAI  
21 UNION GROUP SELLING PACKAGED TUNA TO THESE PRIVATE-LABEL  
22 IMPORTERS. THEN WE HAVE THE LIGHT-BLUE BARS. THE LIGHT-BLUE  
23 BARS IN FACT SHOW HERE THE PURCHASES FROM THOSE TWO LARGE FOOD  
24 DISTRIBUTORS THAT WE'VE BEEN TALKING ABOUT OF THAT PACKAGED  
25 TUNA FROM IMPORTERS. SO WE CAN SEE HERE THAT THE LIGHT-BLUE

1 BARS ARE MUCH TALLER THAN THE DARK BLUE. SO WHAT DOES THAT  
2 TELL ME? THAT TELLS ME THAT THEY ARE SOURCING THE PACKAGED  
3 TUNA NOT JUST FROM THAI UNION GROUP, BUT FROM OTHER SUPPLIERS  
4 ABROAD, AND WE KNOW OF TRI MARINE. WE KNOW OF KAWASHO. THERE  
5 ARE OTHER SUPPLIERS ABROAD. IN FACT, THE PLAINTIFFS' OWN  
6 COMPLAINTS TALK ABOUT HOW THAI UNION ABROAD ONLY ACCOUNTS FOR  
7 18 PERCENT OF WHAT'S WORLDWIDE. SO THERE ARE OTHER SUPPLIERS  
8 THAT ARE SELLING PRIVATE-LABEL TUNA THAT MAKES ITS WAY INTO THE  
9 UNITED STATES.

10 Q. DR. HAIDER, IF YOU WANTED TO PROVE THAT THE THAI UNION  
11 GROUP'S UPSTREAM SUPPLY OF TUNA TO NON-DEFENDANTS WAS IMPORTANT  
12 IN THIS CASE, WHAT WOULD YOU HAVE TO SHOW?

13 A. SO WHAT -- IF, IF THE CONCERN IS THAT THAI UNION GROUP HAS  
14 SOMEHOW INFLATED PRICES ON THE, YOU KNOW, THE SHORTER DARK-BLUE  
15 BAR, THAT THAI UNION GROUP HAS INFLATED THOSE PRICES TO THE  
16 PRIVATE-LABEL IMPORTERS ABROAD, THAT IS SOMETHING THAT NEEDS TO  
17 BE, THAT'S, THAT'S SOMETHING THAT NEEDS TO BE TESTED AND SHOWN.  
18 SO YOU WOULD NEED TO SHOW THAT THERE WAS AN OVERCHARGE FROM  
19 THAI UNION TO THE PRIVATE-LABEL IMPORTERS AND THEN THAT THAT  
20 OVERCHARGE WAS, IN FACT, PASSED THROUGH INTO THE UNITED STATES  
21 TO THESE LARGE DISTRIBUTORS THAT WE'VE BEEN TALKING ABOUT, AND  
22 THAT IS NOT AN INQUIRY THAT DR. WILLIAMS HAS CONDUCTED. AGAIN,  
23 HE -- I THINK HE'S ASSERTING THAT TOOK PLACE.

24 Q. ALL RIGHT, DOCTOR. DR. HAIDER, LET'S SKIP AHEAD. I HAD A  
25 QUESTION ABOUT SOMETHING THAT WAS SAID THIS MORNING ABOUT

1 REDUCED-FORM REGRESSIONS. DR. WILLIAMS, I THINK, TALKED TODAY  
2 ABOUT HOW REGRESSIONS HERE ARE CALLED REDUCED-FORM REGRESSIONS.

3 A. YES.

4 Q. I THOUGHT I HEARD DR. WILLIAMS SAY THAT IN A REDUCED-FORM  
5 REGRESSION IT IS NOT A PROBLEM IF YOU SEE COEFFICIENTS WITH THE  
6 WRONG SIGN. DID YOU HEAR THAT AS WELL?

7 A. I DID.

8 Q. DO YOU AGREE THAT IT'S NOT A PROBLEM AS A MATTER OF  
9 ECONOMETRICS TO HAVE COEFFICIENTS WITH THE WRONG SIGN?

10 A. I DON'T AGREE, FOR THE FOLLOWING REASON. IF IN A  
11 REDUCED-FORM REGRESSION MODEL YOU SEE AN IMPORTANT VARIABLE  
12 HAVING THE WRONG SIGN, IT TELLS YOU THAT THE MODEL, THERE'S  
13 SOMETHING WRONG WITH THE MODEL. IT IS NOT APPROPRIATELY  
14 CAPTURING THE RELATIONSHIPS THAT ARE EXPECTED, AND THEREFORE  
15 THAT'S A SIGN THAT THE RESEARCHER NEEDS TO GO BACK TO THE  
16 DRAWING BOARD AND SEE IF THERE'S, YOU KNOW, ADDITIONAL WORK TO  
17 BE DONE.

18 Q. OKAY. NOW, DR. HAIDER, I WANT TO SKIP AHEAD ALL THE WAY  
19 TO SLIDE 12, AND I THINK WE HAD A LOT OF DISCUSSION THIS  
20 MORNING IN CROSS-EXAMINATION ABOUT DOT FOODS, AND SO I'M REALLY  
21 JUST GOING TO ASK YOU ONE QUESTION. I KNOW YOU HEARD ALL ABOUT  
22 IT THIS MORNING. I WANT TO ASK YOU ONE QUESTION. AS I  
23 UNDERSTAND IT, DR. WILLIAMS BELIEVES THAT THE LARGE  
24 DISTRIBUTORS PASS THROUGH 100 PERCENT OF AN OVERCHARGE TO THE  
25 FOLKS IN THE ORANGE BAR. WE'VE HEARD THAT THIS MORNING. AND I

1 KNOW YOU DISAGREE WITH THAT PASS-THROUGH ANALYSIS, BUT IF YOU  
2 ACCEPT HIS PREMISE, IF YOU ACCEPT DR. WILLIAMS' ASSUMPTION  
3 ABOUT PASS-THROUGH BY DISTRIBUTORS, WHAT DOES THAT MAKE YOU  
4 CONCLUDE ABOUT THE 13 PERCENT OF THE RELEVANT COMMERCE FLOW?

5 A. SO WHAT I NOTED IN MY REPORT IS THAT DR. WILLIAMS'  
6 ASSESSMENT OF IMPACT IS INCOMPLETE, BECAUSE WE SEE THAT DOT  
7 FOODS SALES TO THESE OTHER DISTRIBUTORS, IF YOU MAKE THE  
8 ASSUMPTION THAT DR. WILLIAMS IS CORRECT WITH RESPECT TO  
9 PASS-THROUGH, THAT THERE WOULD, IN FACT, YOU WOULD ALWAYS SEE  
10 PASS-THROUGH AND IT WOULD NECESSARILY PASS ON, THEN THESE OTHER  
11 DISTRIBUTORS IN THE ORANGE, THE ASSUMPTION, YOU KNOW, WHAT THAT  
12 WOULD TELL YOU IS THAT THOSE DISTRIBUTORS WOULD, IN FACT,  
13 FURTHER PASS ON THE ALLEGED OVERCHARGE FURTHER DOWNSTREAM.  
14 HOWEVER, HAVING SAID THAT, DR. WILLIAMS' FRAMEWORK IS THAT YOU  
15 NEED TO STUDY THAT DISTRIBUTOR BY DISTRIBUTOR, AND SO WHAT THAT  
16 TELLS US IS THAT HIS FRAMEWORK REQUIRES THAT AN INDIVIDUALIZED  
17 INQUIRY IS REQUIRED TO DETERMINE WHETHER THESE DISTRIBUTORS IN  
18 THE DARK ORANGE THAT ARE PROPOSED CLASS MEMBERS IN THIS CASE,  
19 WHETHER THEY IN FACT PASSED ON THE ALLEGED OVERCHARGE FURTHER  
20 DOWNSTREAM AND DID NOT SUSTAIN IT THEMSELVES.

21 Q. NOW, DR. HAIDER, I KNOW WE DIDN'T COVER EVERY -- WE TRIED  
22 TO MAKE SOME CHOICES TODAY, AND I KNOW WE DIDN'T COVER EVERY  
23 SINGLE POINT AND COUNTERPOINT IN YOUR REPORT. SO IF I COULD  
24 JUST ASK, WHAT ARE, OVERALL, WHAT ARE YOUR CONCLUSIONS ABOUT  
25 DR. WILLIAMS' ANALYSIS?

1 A. SO MY -- ONE, I WOULD SAY -- I WOULD SUM UP BY SAYING,  
2 WHEN I ASSESSED DR. WILLIAMS' WORK HERE, WHAT JUMPED OUT FROM  
3 MY INQUIRY OF THE SALES AND PRICING DATA IS THAT DR. WILLIAMS  
4 HAS MISSED THE MARK IN TERMS OF UNDERSTANDING THE FOOD-SERVICE  
5 SIDE OF THE INDUSTRY. HE HAS IGNORED THESE RELEVANT ECONOMIC  
6 FACTS THAT NEEDED TO BE TAKEN INTO ACCOUNT TO APPROPRIATELY  
7 DETERMINE WHAT'S HAPPENING WITH PRICING. AS A RESULT, HIS  
8 CONCLUSIONS ARE UNRELIABLE, AND IN FACT HIS APPROACH IS  
9 INCAPABLE OF TELLING US WHETHER THESE PROPOSED CLASS MEMBERS  
10 HERE IN FACT SUSTAINED INJURY.

11 MR. ROBERTI: YOUR HONOR, AT THIS TIME, I HAVE NO  
12 FURTHER QUESTIONS.

13 THE COURT: OKAY. THANK YOU.

14 MR. CUNEO, GO AHEAD, SIR.

15 MR. CUNEO: YOUR HONOR, I WOULD PROPOSE TO ASK DR.  
16 HAIDER ONLY TWO OR THREE QUESTIONS, AND THEN WHAT I WOULD LIKE  
17 TO DO IS ASK DR. WILLIAMS TO COME BACK ON THE STAND.

18 THE COURT: THAT'S FINE.

19 MR. CUNEO: OKAY. AND I THINK THE QUESTIONS ARE PRETTY  
20 EASY. OKAY?

21 THE COURT: PULL THE MIKES UP.

22 CROSS-EXAMINATION

23 BY MR. CUNEO:

24 Q. ALL RIGHT. I THINK I'M GOING TO GIVE YOU A PRETTY EASY  
25 TEST. THIS DOCUMENT THAT MY FRIEND AND COLLEAGUE HAS BEEN

1 WORKING OFF TALKS ABOUT A REBUTTAL REPORT OF DR. HAIDER.

2 YOU'VE ONLY WRITTEN ONE REPORT, RIGHT? THERE ISN'T A SECOND  
3 REPORT THAT WE DON'T KNOW ABOUT.

4 MR. ROBERTI: YOUR HONOR --

5 A. THAT IS, THAT IS MY OATH.

6 MR. ROBERTI: THAT'S A TYPOGRAPHICAL ERROR, YOUR HONOR.  
7 WE APOLOGIZE.

8 MR. CUNEO: NO, I JUST WANT TO MAKE SURE THAT THERE'S  
9 NOTHING --

10 THE COURT: IT'S A FAIR QUESTION.

11 MR. CUNEO: I JUST WANT TO MAKE SURE THAT THERE'S NOT  
12 SOMETHING --

13 THE COURT: NOTHING HAS BEEN KEPT FROM YOU, SIR.

14 MR. CUNEO: RIGHT. I JUST WANT TO MAKE SURE --

15 THE COURT: THERE'S NO REBUTTAL REPORT.

16 MR. CUNEO: RIGHT. SOME OTHER, SOME OTHER DOCUMENT  
17 THAT WE'VE GOT TO GO TRY TO FIND. ALL RIGHT.

18 THE COURT: OKAY.

19 A. (CONTINUING) I SEE. NO. IT'S REFERRING TO MY EXPERT  
20 REPORT.

21 Q. CORRECT.

22 A. I'VE ONLY SUBMITTED ONE REPORT.

23 Q. THAT'S WHAT I THOUGHT. I JUST WANTED TO MAKE SURE THAT WE  
24 HAD THEM. OKAY?

25 A. AND THAT WAS AN EASY QUESTION. THANK YOU.

1 Q. OKAY. I'VE GOT ANOTHER EASY ONE FOR YOU.

2 A. OKAY.

3 Q. OKAY? YOU WERE RETAINED BY THE DEFENDANTS TO EVALUATE DR.  
4 WILLIAMS' REPORT. CORRECT?

5 A. YES, I WAS RETAINED BY COUNSEL FOR DEFENDANTS. THAT'S  
6 CORRECT.

7 Q. TO EVALUATE AND TO BASICALLY SAY, YES, NO, REALLY NO, BUT.  
8 IN OTHER WORDS, YOU WERE NOT HIRED TO DO AN INDEPENDENT  
9 ANALYSIS OF THE INDUSTRY AND TO COME UP WITH AN ALTERNATIVE  
10 THEORY UNDER WHICH A CLASS COULD BE CERTIFIED. CORRECT?

11 A. THAT IS CORRECT. I WAS NOT ASKED TO COME UP WITH AN  
12 ALTERNATIVE METHOD. THAT'S CORRECT.

13 Q. BUT THE ULTIMATE QUESTION HERE IS WHETHER THE PLAINTIFFS  
14 AND DR. WILLIAMS HAVE PRESENTED A SCENARIO OF COMMON IMPACT AND  
15 MEASURABLE DAMAGES ON A CLASS-WIDE BASIS. CORRECT?

16 A. I THINK THAT'S CORRECT, YES. I THINK THAT'S WHAT I HAVE  
17 ASSESSED.

18 Q. SO YOU WERE NOT RETAINED TO LOOK AT THE ULTIMATE QUESTION.  
19 CORRECT?

20 A. I DON'T AGREE WITH THAT. MY ASSIGNMENT WAS DESCRIBED AT  
21 THE BEGINNING OF MY DIRECT EXAMINATION. IT'S LAID OUT IN  
22 PARAGRAPH FOUR. I WAS ASKED TO ASSESS WHETHER DR. WILLIAMS'  
23 PROPOSED METHODOLOGY CAN SHOW WHETHER ALL OR VIRTUALLY ALL  
24 PROPOSED CLASS MEMBERS SUSTAINED INJURY AS A RESULT OF  
25 DEFENDANTS' CONDUCT AND WHETHER IT CAN RELIABLY ESTIMATE THEIR



1 DAMAGES. SO I'VE ASSESSED DR. WILLIAMS' PROPOSED METHODOLOGY.

2 Q. ALL RIGHT. YOU JUST REACTED TO DR. WILLIAMS; YOU DIDN'T  
3 COME UP WITH YOUR OWN METHODOLOGY ABOUT HOW TO DO THIS.  
4 CORRECT?

5 A. I -- YOU'RE CORRECT. I DID NOT COME UP WITH AN  
6 INDEPENDENT METHODOLOGY. OF COURSE, I'VE DONE A GREAT DEAL OF  
7 WORK IN TERMS OF LOOKING AT DR. WILLIAMS' PROPOSED METHODS AS  
8 I'VE DESCRIBED.

9 Q. THE BASIC TECHNIQUE -- DO YOU AGREE THAT THE BASIC  
10 TECHNIQUE THAT DR. WILLIAMS EMPLOYED WAS TO STUDY VARIOUS  
11 SOURCES AND DO REGRESSION ANALYSIS?

12 A. OF COURSE, DR. WILLIAMS, I AGREE, HAS DONE A REGRESSION  
13 ANALYSIS, BUT BY NO MEANS IS IT THE CASE THAT JUST DOING THE  
14 REGRESSION ANALYSIS IS, IS OKAY, AND THIS IS WHAT ANY ECONOMIST  
15 WOULD TELL YOU. YOU WOULD NEED TO LOOK AT THE REGRESSION  
16 ANALYSIS, SEE IF IT'S ANSWERING THE RELEVANT QUESTION AND IF  
17 IT'S IN FACT UP TO THE JOB THAT IT IS SET OUT TO DO, AND I'VE  
18 LOOKED AT THAT QUESTION VERY CAREFULLY.

19 Q. AND I KNOW WHAT YOUR CONCLUSIONS ARE. I JUST WANT TO MAKE  
20 SURE THAT YOU'RE NOT AWARE OF SOME OTHER TECHNIQUE BESIDES  
21 REGRESSION ANALYSIS AND STUDY, FORGETTING WHAT THE INPUTS ARE,  
22 THAT AN ECONOMIST WOULD USE IN ORDER TO ESTABLISH COMMON IMPACT  
23 AND MEASURABLE DAMAGES, SOME OTHER SECRET WAY.

24 A. THERE'S NO SECRET WAY, BUT I THINK YOU SAID SOMETHING  
25 ABOUT PUTTING AWAY THE OTHER, PUTTING AWAY THE INPUTS. A

1 REGRESSION MODEL IS ABOUT THE INPUTS AND WHAT YOU'RE TRYING TO  
2 EXPLAIN, I'M AFRAID. SO THE TECHNIQUE, REGRESSION TECHNIQUE,  
3 OF COURSE, IN GENERAL, THE USE OF REGRESSION AS A STATISTICAL  
4 TOOL ABSOLUTELY IS ROUTINELY USED IN ANTITRUST CASES. THAT'S  
5 NOT WHAT I'M TALKING ABOUT HERE. WHAT I'M TALKING ABOUT HERE  
6 IS WHETHER THE REGRESSION ANALYSIS THAT HE HAS PUT FORWARD IS  
7 DOING WHAT IT IS SET OUT TO TEST AND ANSWER.

8 MR. CUNEO: OKAY. THANK YOU.

9 I HAVE NO FURTHER QUESTIONS, BUT I'D LIKE DR. WILLIAMS  
10 TO COME BACK TO THE STAND JUST FOR A FEW MINUTES.

11 THE COURT: IS THAT AGREEABLE, COUNSEL?

12 MR. ROBERTI: NO OBJECTION, YOUR HONOR.

13 THE COURT: OKAY. VERY GOOD.

14 SO THANK YOU SO MUCH.

15 THE WITNESS: THANK YOU VERY MUCH.

16 THE COURT: YOU MAY STEP DOWN.

17 THE WITNESS: THANK YOU.

18 (THE WITNESS STOOD ASIDE.)

19 THE COURT: AND WE WILL RECALL DR. WILLIAMS.

20 MR. CUNEO: YOUR HONOR, MAY I HAND THIS PRESENTATION UP  
21 TO DR. WILLIAMS?

22 THE COURT: OF COURSE, OF COURSE. MAYBE HE HAS ONE.

23 MR. CUNEO: YOU'VE GOT IT. OKAY. COVERED.

24 MICHAEL WILLIAMS, PREVIOUSLY SWORN WITNESS, TESTIFIES:

25 THE COURT: THANK YOU.

DIRECT EXAMINATION

1  
2 BY MR. CUNEO:

3 Q. NOW, DR. WILLIAMS, SITTING IN THIS COURTROOM IN THE LAST,  
4 AS MUCH AS YOU HAVE IN THE LAST COUPLE OF DAYS, WOULD YOU AGREE  
5 THAT THE COURT SEEMS INTERESTED IN HEARING FROM THE EXPERT  
6 ECONOMISTS?

7 A. THAT'S CERTAINLY MY IMPRESSION.

8 Q. OKAY. IN ORDER TO MAKE THAT PROCESS, I MADE AN AGREEMENT  
9 WITH THE DEFENSE LAWYERS THAT I WOULDN'T SPEAK TO YOU DURING  
10 THE COURSE OF YOUR TESTIMONY, OKAY, EXCEPT AS WE'RE SPEAKING  
11 NOW.

12 A. YES.

13 Q. OKAY. SINCE YOU TOOK THE STAND THIS MORNING, HAVE YOU AND  
14 I EXCHANGED ONE SUBSTANTIVE WORD?

15 A. NO.

16 Q. HAVE YOU EXCHANGED A SUBSTANTIVE WORD WITH ANY MEMBER OF  
17 THE CUNEO TEAM?

18 A. NO.

19 Q. OKAY. THANK YOU. NOW GOING THROUGH THE ANALYSIS THAT YOU  
20 JUST HEARD, I THINK WE ALL HEARD A LOT ABOUT THE UMBRELLA  
21 EFFECT AND WHETHER YOUR ANALYSIS TOOK INTO ACCOUNT THE SALES OF  
22 LARGE-SIZED TUNA IN THE FOOD-SERVICE DISTRIBUTION CHANNEL THAT  
23 WERE LABELED WITH OTHER THAN LABELS OF THE BIG THREE  
24 DEFENDANTS. CORRECT?

25 A. YES, SIR.

1 Q. AND CAN WE REFER TO THOSE, WHETHER IT'S TECHNICALLY PROPER  
2 OR NOT, BUT JUST FOR THE SAKE OF CONVERSATION, AS (PAUSE) --  
3 I'LL THINK OF A GOOD WORD FOR IT -- AS PRIVATE LABELS?

4 A. SURE, WITH THE UNDERSTANDING THAT SOME OF IT IS PRODUCED  
5 BY THE DEFENDANTS.

6 Q. OKAY. BUT WHAT I'M SAYING IS LABELS OTHER THAN THE  
7 DEFENDANTS'. FOR THE PURPOSE OF THIS DISCUSSION, LET'S JUST  
8 CALL IT PRIVATE LABELS.

9 A. I UNDERSTAND.

10 Q. OKAY. DID YOUR ANALYSIS TAKE ACCOUNT OF THE PRESENCE OF  
11 PRIVATE-LABEL BRANDS IN THE FOOD-SERVICE INDUSTRY?

12 A. ABSOLUTELY. SO, YOUR HONOR, YOU ASKED DR. HAIDER AT ONE  
13 POINT, HOW WOULD YOU DO IT? WHAT WOULD YOU DO TO TAKE INTO  
14 ACCOUNT THIS NON-DEFENDANT TUNA? AND SHE SAID TWO THINGS.  
15 THEY WERE BOTH WRONG. SHE SAID, I MIGHT INCLUDE THE PRICES  
16 CHARGED BY THE NON-DEFENDANTS OR I MIGHT INCLUDE THE QUANTITIES  
17 SOLD BY THE NON-DEFENDANTS. AGAIN, EVERY TIME I SAY  
18 NON-DEFENDANTS, I JUST CRINGE BECAUSE IT'S JUST NOT TRUE. BUT  
19 ANYWAY, THOSE ARE BOTH WRONG FOR THE REASON THAT YOU AND I  
20 DISCUSSED THIS MORNING. THEY'RE DIRECTLY AFFECTED BY THE  
21 CARTEL. YOU CANNOT INCLUDE ON THE RIGHT-HAND SIDE OF A  
22 REGRESSION A VARIABLE -- IT'S CALLED ENDOGENOUS, BUT WHAT IT  
23 MEANS, BASICALLY, YOU CAN'T INCLUDE A VARIABLE THAT'S DIRECTLY  
24 AFFECTED BY THE CARTEL. IT'S THE SAME REASON THAT YOU CAN'T  
25 USE THE COGS VARIABLE. SHE SAID, I'LL USE THE PRICES THAT WERE

1 CHARGED BY THE NON-DEFENDANTS. THOSE PRICES ARE AFFECTED --  
2 SHE TALKED ABOUT THE SUBSTITUTION BACK AND FORTH. YOU ASKED  
3 ABOUT, HEY, AREN'T THERE CUSTOMERS THAT BUY BOTH? AND YOU'RE  
4 ABSOLUTELY RIGHT. THE POINT IS THAT THE PRICES OF BOTH THE  
5 CARTEL AND THESE NON-DEFENDANTS ARE BEING AFFECTED BY THE  
6 CARTEL CONDUCT. SO YOU CAN'T PLUG IN THE PRICES CHARGED BY THE  
7 NON-DEFENDANTS, NOR CAN YOU PLUG IN THE QUANTITIES SOLD.  
8 THEY'RE COMPLETELY AFFECTED BY THE CARTEL. ALL OF THE  
9 VARIABLES IN MY ANALYSIS -- SAME WITH DR. MANGUM, SAME WITH DR.  
10 SUNDING -- ARE INDEPENDENT, EXOGENOUS VARIABLES THAT CAN'T BE  
11 AFFECTED BY THE CARTEL. THAT'S THE ONLY WAY YOU CAN RUN A  
12 PROPER REGRESSION. YOU JUST -- IN FACT, IF YOU LOOK AT AN  
13 ECONOMETRICS TEXTBOOK AND YOU WANT TO KNOW WHAT'S THE SINGLE  
14 BIGGEST MISTAKE YOU CAN MAKE, IT'S INCLUDING A VARIABLE THAT'S  
15 AFFECTED BY THE CONDUCT, INCLUDING AN EXOGENOUS LABEL. YOU  
16 CAN'T MAKE A BIGGER MISTAKE THAN THAT.

17 Q. IS IT YOUR TESTIMONY THAT THE MODEL, YOUR MODEL, EXPLAINS  
18 THE PRICING CHARGED FOR, OTHER THAN BIG THREE, LABELED FOR  
19 PRIVATE LABELS?

20 A. SURE.

21 THE WITNESS: YOUR HONOR, IF WE COULD TAKE A QUICK LOOK  
22 AT SLIDE EIGHT IN MY (PAUSE) --

23 THE COURT: THAT'S OVERCHARGES.

24 THE WITNESS: YES, MA'AM.

25 THE COURT: OKAY.

1 THE WITNESS: YES, MA'AM.

2 A. (CONTINUING) SO THIS IS, AS YOU CORRECTLY SAID, THIS IS  
3 THE -- THESE ARE THE ESTIMATED, GENERALIZED OVERCHARGES, NOT  
4 THE INQUIRY INTO ALL OR ALMOST ALL. THERE'S A -- BOY, HERE'S  
5 ANOTHER STATISTIC FOR YOU. THERE'S A STATISTIC CALLED AN  
6 R-SQUARED. I DON'T KNOW IF YOU'VE HEARD OF THAT ONE YET. IT'S  
7 VERY SIMPLE, ACTUALLY. IT'S THE PERCENT OF VARIATION EXPLAINED  
8 BY THE REGRESSION. SO THE DEPENDENT VARIABLES, THE TUNA  
9 PRICES, HOW MUCH OF THOSE TUNA PRICES, HOW MUCH OF THE  
10 VARIATION IN THE PRICES OF THE TUNA SOLD BY THE DEFENDANTS DOES  
11 MY REGRESSION ACTUALLY EXPLAIN? DR. HAIDER SUGGESTED THAT  
12 THERE'S THIS GIGANTIC SET OF IMPORTS THAT SOMEHOW I'M NOT  
13 ACCOUNTING FOR. AGAIN, YOU CAN'T PUT IN THE TWO VARIABLES SHE  
14 SUGGESTED. THAT WOULD BE A FUNDAMENTAL MISTAKE. BUT IF YOU  
15 ASKED, HOW MUCH OF THE VARIATION IN THE DEFENDANTS' TUNA PRICES  
16 DOES THE REGRESSION IN SLIDE EIGHT SHOW, THE ANSWER IS 96  
17 PERCENT. THAT'S HOW MUCH OF THE VARIATION IN THE DEFENDANTS'  
18 TUNA PRICES IS EXPLAINED BY MY GENERAL OVERCHARGE REGRESSION,  
19 96 PERCENT.

20 Q. DOES DR. HAIDER OFFER AN ALTERNATIVE EXPLANATION OF THE  
21 PRICING OF WHAT YOU AND I ARE CALLING PRIVATE-LABEL TUNA?

22 A. NO.

23 Q. DID SHE OFFER ANY REGRESSIONS THAT EXPLAIN THAT?

24 A. WELL, SHE RAN A REGRESSION THAT SHOWED THAT THE  
25 NON-DEFENDANTS RAISED THEIR PRICES DURING THE CARTEL. AGAIN,

1           THERE'S NOTHING SURPRISING ABOUT THAT.    THAT'S WHAT YOU'D  
2           EXPECT TO SEE.    SO HER OWN REGRESSION DEMONSTRATES THE PRESENCE  
3           OF THE UMBRELLA EFFECT.

4           THE COURT:    LET ME ASK A QUESTION.

5           THE WITNESS:   SURE.

6           THE COURT:    SO YOU'RE SAYING A NON-DEFENDANT SALE, AND  
7           I KNOW YOU DON'T LIKE THAT TERM, THE NON-DEFENDANT SALES CAN'T  
8           BE TAKEN INTO ACCOUNT BECAUSE THEY'RE IMPACTED BY THE CARTEL'S  
9           ACTIONS.

10          THE WITNESS:   YES.   YOU CAN'T JUST PLUG IN THE QUANTITY  
11          OF NON-DEFENDANT SALES, YOU CAN'T JUST PLUG IN THE PRICING IN  
12          THE REGRESSION, BECAUSE THEY'RE BOTH DIRECTLY AFFECTED BY THE  
13          CARTEL.   THEY'RE ENDOGENOUS.

14          THE COURT:    OKAY.

15          BY MR. CUNEO:

16          Q.    NOW, DR. HAIDER TALKED A LITTLE BIT ABOUT TUNA THAT WAS  
17          MANUFACTURED BY TUG.   DID HER EXPERT REPORT MENTION THAT?

18          A.    NO, IT DID NOT.

19          Q.    DID IT TAKE IT INTO ACCOUNT IN ANY WAY?

20          A.    NOT THAT I'M AWARE OF.

21          Q.    NOW, A LOT HAS BEEN SAID ABOUT SALES TO, THROUGH DOT  
22          FOODS.

23          A.    YES, SIR.

24          Q.    AND IT'S TRUE, IS IT NOT, OR DOES DOT FOODS SELL TO SYSCO?

25          A.    YES, THEY DO.

1 Q. DOES IT SELL TO U. S. FOODS?

2 A. YES, THEY DO.

3 Q. AND ARE THOSE SALES TAKEN INTO ACCOUNT BY YOUR MODEL?

4 A. WELL, YEAH. I MENTIONED EARLIER THAT I DIDN'T  
5 DOUBLE-COUNT. SO I NET THOSE OUT SO THERE'S NO  
6 DOUBLE-COUNTING.

7 Q. AND I THINK YOU HEARD SOME TESTIMONY ABOUT REDISTRIBUTORS.

8 A. YES.

9 Q. OKAY. UNDER THE CLASS DEFINITION THAT'S IN YOUR EXPERT  
10 REPORT AND IN OUR FOURTH AMENDED COMPLAINT -- I THINK IT'S THE  
11 FOURTH -- THE LATEST ONE, WOULD THOSE REDISTRIBUTORS BE CLASS  
12 MEMBERS?

13 A. IF THEY PURCHASED -- IF THE -- YEAH. THE FIRST PURCHASERS  
14 FROM DOT ARE PROPOSED CLASS MEMBERS.

15 Q. EXCEPT THAT IF IT'S SYSCO OR U. S. FOODS, YOU'D DO  
16 SOMETHING DIFFERENT.

17 A. THAT'S CORRECT.

18 THE WITNESS: IN FACT, JUST TO BE COMPLETELY CLEAR,  
19 YOUR HONOR, IF WE COULD TAKE A LOOK -- GOSH, THERE ARE SO MANY  
20 BINDERS. I'M LOOKING AT ONE -- I THINK IT WAS HANDED TO ME BY  
21 THE DEFENDANTS CALLED CF -- IT'S MY REPORT.

22 THE COURT: IT'S YOUR REPORT. OKAY.

23 THE WITNESS: YES. IF YOU JUST TAKE A QUICK LOOK AT  
24 PARAGRAPH SEVEN ON PAGE THREE.

25 THE COURT: OKAY.



1 THE WITNESS: AND WHAT MR. CUNEO IS DRAWING OUR  
2 ATTENTION TO IS, YOU SEE IN THE NEXT-TO-THE-LAST THERE'S A  
3 PAREN. IT STARTS, OTHER THAN INTERCOMPANY PURCHASES AMONG THE  
4 DISTRIBUTORS. SO THE ACTUAL CLASS DEFINITION NETS OUT ANY  
5 SALES FROM DOT TO THE OTHER FIVE.

6 BY MR. CUNEO:

7 Q. IS YOUR CONCLUSION IN ANY WAY -- ABOUT THE UMBRELLA  
8 EFFECT -- IN ANY WAY CHANGED BY DR. HAIDER'S CHART FIVE SHOWING  
9 THE SHARES, PURPORTING TO SHOW SHARES OF PROPOSED CLASS MEMBERS  
10 THAT BOUGHT WHAT WE'RE CALLING PRIVATE-LABEL PACKAGED TUNA?

11 A. NO, NOT AT ALL. IN FACT, WHEN THE DEMAND INCREASED --  
12 REMEMBER, ONE OF THE EFFECTS OF THE UMBRELLA EFFECT IS THAT  
13 PEOPLE SHIFT DEMAND TO THE NON-CARTEL PRODUCTS, AND I THINK --  
14 WHAT DOES THAT DO? THAT INCREASES THEIR PRICE. WHAT DOES THAT  
15 DO TO THEIR SALES? IT DECREASES THEIR SALES. SO IT'S NOT  
16 SURPRISING IT'S FLAT AT ALL.

17 Q. IS THERE ANYTHING ELSE THAT DR. HAIDER TESTIFIED TO THAT  
18 YOU'D LIKE TO RESPOND TO?

19 A. YEAH. THERE'S A COUPLE THINGS.

20 ONE IS, SHE NOW CLAIMS THAT SHE HAS THIS OTHER REASON FOR  
21 WHY THE UMBRELLA EFFECT SHOULD NOT BE EXPECTED, IN ADDITION TO  
22 HER INITIAL, WELL, AS I READ IT, HER OWN CLAIM, WHICH WAS THAT  
23 YOU DIDN'T SUE THEM, BUT SHE'S NOW SUGGESTED THAT SHE HAD A  
24 SECOND REASON, WHICH IS THAT THERE'S SUBSTANTIAL SALES OF THIS  
25 POSSIBLY NON-DEFENDANT TUNA. I BELIEVE I'VE READ EVERY ARTICLE

1 ON THE UMBRELLA EFFECT THAT'S EVER BEEN PUBLISHED, AND I HAVE  
2 NEVER SEEN ANY DISCUSSION SAYING THAT THE UMBRELLA EFFECT DOES  
3 NOT APPLY CONDITIONAL ON SOME SHARE OF THE NON-CARTEL MEMBERS.  
4 I JUST HAVE NEVER SEEN THAT BEFORE. SO THAT WOULD NOT  
5 CONSTITUTE, IN MY MIND, ANY REASON TO EXPECT THAT IT WOULDN'T  
6 BE PRESENT HERE.

7 ONE OTHER MINOR NOTE, REALLY. WE GOT SLIGHTLY DISTRACTED  
8 THIS MORNING ABOUT THIS REDUCED-FORM STRUCTURAL AND THE SIGN OF  
9 A REGRESSION. DR. HAIDER SAID SOMETHING THAT'S ABSOLUTELY  
10 FALSE. SHE SAID THAT, THAT THE SIGN ON A VARIABLE -- OKAY.  
11 THIS IS REALLY TECHNICAL, BUT IN FACT I HAVE A PAPER ON THIS  
12 SUBJECT, AND SO THAT'S PROBABLY WHY I'M TALKING ABOUT IT. IT'S  
13 JUST NOT CORRECT. IT DEPENDS ON THE -- IT DEPENDS ON A LOTS OF  
14 THINGS, BUT IN PARTICULAR IT DEPENDS ON HOW COLLINEAR, HOW  
15 CLOSELY THE VARIABLES MOVE TOGETHER. YOU CAN CERTAINLY HAVE  
16 CIRCUMSTANCES WHERE THE SIGN OF A VARIABLE CAN SWITCH IN THIS  
17 REDUCED-FORM MODEL BECAUSE OF THE PRESENCE OF  
18 MULTICOLLINEARITY. I KNOW THAT'S A MOUTHFUL, BUT IT'S JUST --  
19 YOU KNOW, I HAVE A PAPER ON THIS SUBJECT, AND SO I'VE JUST GOT  
20 TO GET THAT OFF MY CHEST. SORRY.

21 ACTUALLY, I JUST REALLY WANTED TO MAKE ONE OTHER QUICK  
22 COMMENT, AND THAT WAS -- JUST BRIEFLY. I'LL DO THIS FAST, I  
23 PROMISE. JUST QUICKLY ON THE SUBJECT OF THESE CHOW TESTS. I  
24 JUST WANTED TO POINT OUT FOR YOUR HONOR THAT IN MY REBUTTAL  
25 REPORT I DO NOTE, AND I JUST WANTED TO FLAG IT FOR YOU

1 (PAUSE) -- WE DON'T NEED TO GO THROUGH IT IN ANY GREAT DETAIL.  
2 BUT PARAGRAPH 93 OF MY REBUTTAL REPORT, I JUST WANTED TO FLAG  
3 FOR YOU, IF I ACTUALLY ADOPTED DR. HAIDER'S SUGGESTIONS BASED  
4 ON HER CHOW TESTS, THE DAMAGES, AS I'VE NOTED IN THE LAST  
5 SENTENCE IN PARAGRAPH 93, I WOULD ACTUALLY GET 46 MILLION  
6 DOLLARS IN DAMAGES IF I ACTUALLY ADOPTED HER APPROACH. I  
7 DIDN'T RAISE MY -- REMEMBER, I WAS AT 37-5. I DID NOT RAISE MY  
8 ESTIMATED DAMAGES FROM 37-5 TO 46 BECAUSE I JUST DON'T BELIEVE  
9 THE RESULTS OF HER CHOW TEST, AND THE PASS -- I WON'T MENTION  
10 IT IN COURT. BUT REMEMBER THE PASS-THROUGH RATES WE WERE  
11 LOOKING AT, THE REALLY LOW ONES? I DON'T BELIEVE THOSE. BUT  
12 IF I ACTUALLY DID ADOPT HER APPROACH, THE DAMAGES WOULD HAVE  
13 GONE UP BY NINE MILLION DOLLARS, BUT I DIDN'T DO THAT.

14 Q. JUST TO CLARIFY ONE THING. I THINK YOU HEARD MY  
15 DISTINGUISHED COLLEAGUE REFER TO A HUNDRED-PERCENT PASS-ON.  
16 THAT WAS WHAT I WOULD CALL LITERARY LICENSE WITH THE 99.

17 A. WELL, YEAH, I HEARD MR. ROBERTI, TOO. I DIDN'T (PAUSE) --

18 Q. BUT IT'S LIKE 92.

19 A. YEAH. I DIDN'T TAKE ANY OFFENSE AT IT. I THINK HE WAS  
20 JUST ROUNDING IT.

21 Q. I THINK SO, TOO. OKAY. ALL RIGHT.

22 MR. CUNEO: YOUR HONOR, I HAVE NOTHING ELSE.

23 THE COURT: OKAY. THANK YOU.

24 THANK YOU, MR. CUNEO.

25 MR. GALLO: I HAVE A FEW QUESTIONS, YOUR HONOR.

1 THE COURT: OF COURSE.

2 CROSS-EXAMINATION

3 BY MR. GALLO:

4 Q. SO I AM INTRIGUED BY THE IDEA AND I WOULD LIKE TO DISCUSS  
5 WITH YOU THE IDEA THAT YOU WERE NOT ALLOWED TO LOOK AT  
6 NON-DEFENDANT SALES IN YOUR REGRESSION. YOU'RE TRYING TO  
7 FIGURE OUT IN YOUR REGRESSION WHAT IS CAUSING THE PRICES THAT  
8 THE DISTRIBUTORS ARE PAYING, WHAT'S CAUSING THOSE PRICES TO BE  
9 WHATEVER LEVEL THEY'RE AT.

10 A. THAT'S CORRECT.

11 Q. RIGHT? ONE OF THE MAJOR DISTRIBUTORS, IF YOU PUT ASIDE  
12 THE TUG ISSUE FOR A MOMENT, AND I KNOW YOU DON'T AGREE WITH  
13 THAT, BUT JUST FOR THE MOMENT, BUYS 75 PERCENT OF ITS PRODUCT  
14 FROM NON-DEFENDANTS. WE SAW THAT.

15 A. YES.

16 Q. THE OTHER ONE BUYS 66 PERCENT FROM NON-DEFENDANTS.

17 A. RIGHT. AND JUST TO BE CLEAR, THE OTHER FOUR DISTRIBUTORS  
18 BUY A LOT LESS.

19 Q. OKAY. WE'RE TRYING TO FIGURE OUT WHAT CAUSES, WHAT CAUSES  
20 THE PRICES TO BE WHERE THEY ARE FOR THOSE TWO DISTRIBUTORS.  
21 LET'S TAKE THEM RIGHT NOW. THEY'RE BUYING TWO-THIRDS OR MORE  
22 FROM NON-DEFENDANTS, RIGHT?

23 A. ALLEGEDLY.

24 Q. AND YOUR TESTIMONY TO THIS COURT IS, AS AN ECONOMIST, YOU  
25 DON'T WANT TO LOOK OR CONSIDER OR HAVE YOUR REGRESSION CONSIDER

1 ANY OF THAT DATA. THAT'S WHAT YOU'RE ASKING THE COURT TO  
2 BELIEVE.

3 A. WHAT I'M ASKING THE COURT TO -- I'M NOT ASKING THE COURT  
4 TO BELIEVE SOMETHING, BUT WHAT'S TRUE IS THAT YOU CAN OPEN UP  
5 ANY ECONOMETRICS TEXTBOOK. FOR EXAMPLE -- I'LL GIVE YOU  
6 ANOTHER EXAMPLE.

7 Q. CAN I SAY --

8 A. SUPPOSE -- I JUST WANT TO FINISH MY ANSWER. REMEMBER, THE  
9 REGRESSION HAS PRICE ON THE LEFT. NOW, YOU MIGHT ASK YOURSELF,  
10 PRICES ARE AFFECTED BY QUANTITY. WHY DON'T I JUST PUT THE  
11 QUANTITY SOLD BY THE DEFENDANTS ON THE RIGHT-HAND SIDE? AND  
12 YOU CAN'T PUT THE QUANTITY SOLD BY THE DEFENDANTS ON THE  
13 RIGHT-HAND SIDE BECAUSE IT'S AFFECTED BY THE PRICE, BUT SO IS  
14 THE QUANTITY SOLD FOR THE NON-DEFENDANTS. YOU JUST CANNOT,  
15 FROM A STATISTICAL STANDPOINT, YOU CANNOT PUT THE QUANTITY SOLD  
16 EITHER BY THE DEFENDANTS OR BY THE NON-DEFENDANTS AS AN  
17 EXPLANATORY VARIABLE BECAUSE IT'S DIRECTLY AFFECTED BY THE  
18 CONDUCT.

19 Q. SO YOU CAN'T PUT IT IN BOTH THE BENCHMARK PERIOD WHEN THE  
20 NON-DEFENDANTS AND DEFENDANTS ARE SELLING TO THESE BIG  
21 DISTRIBUTORS AND PUT IT IN THE CONSPIRACY PERIOD AND SEE WHAT  
22 YOUR REGRESSION TELLS YOU WHEN YOU ACTUALLY CONSIDER THE PRICES  
23 THAT THEY'RE PAYING TWO-THIRDS OF THE TIME? YOU'RE NOT ALLOWED  
24 TO DO THAT?

25 A. WELL, I MEAN, YOU'RE --

1 Q. IS THAT YOUR TESTIMONY?

2 A. YOU'RE ALLOWED TO DO ANYTHING YOU WANT. THERE'S A CORRECT  
3 WAY TO DO IT AND THERE'S AN INCORRECT WAY.

4 Q. THAT WOULD BE INCORRECT TO DO THAT?

5 A. ABSOLUTELY.

6 Q. OKAY. LET ME ASK YOU ANOTHER QUESTION. WHEN STARKIST AND  
7 BUMBLE BEE AND COSI ARE IN A CONSPIRACY --

8 A. WHICH THEY WERE.

9 Q. OKAY. DOES, DOES THE PRICE THAT BUMBLE BEE IS CHARGING A  
10 CUSTOMER HAVE AN EFFECT ON THE PRICE THAT STARKIST IS CHARGING  
11 A CUSTOMER WHEN THEY'RE FIXING PRICES?

12 A. WELL, I MEAN --

13 Q. YES OR NO.

14 A. I'M SORRY. SAY AGAIN.

15 Q. DOES IT HAVE AN EFFECT, DOES BUMBLE BEE'S PRICE HAVE AN  
16 EFFECT ON STARKIST WHEN THEY'RE FIXING PRICES?

17 A. I'M NOT SURE EXACTLY OF THE UNDERLYING OPERATIONS OF THE  
18 CARTEL. THESE ARE ALL DEPENDENT VARIABLES, BUT NONE OF THESE  
19 APPEAR ON THE RIGHT-HAND SIDE.

20 Q. YOU'RE AN ECONOMIST.

21 A. YES, SIR.

22 Q. IF THE DEFENDANTS ARE FIXING PRICES AND THEY AGREE THEY'RE  
23 ALL GOING TO CHARGE \$10 --

24 A. RIGHT.

25 Q. -- ARE THEIR PRICES AFFECTING EACH OTHER?

1 A. THEY'RE AGREED ON. YES.

2 Q. THEY'RE IN YOUR REGRESSION MODEL.

3 A. THEY'RE ON THE LEFT-HAND SIDE, SIR. THEY'RE NOT ON THE  
4 RIGHT-HAND SIDE. IT'S NOT A PROBLEM FOR THEM TO BE ON THE  
5 LEFT. THEY'RE SUPPOSED TO BE ON THE LEFT.

6 Q. THERE'S NO PRICING DATA, NONE OF THEIR PRICING DATA.  
7 THERE ARE ALL KINDS OF INFORMATION ABOUT THEM ON THE RIGHT-HAND  
8 SIDE, RIGHT? THEIR, THEIR -- ALL THEIR COGS DATA IS ON THE  
9 RIGHT-HAND SIDE.

10 A. NO, THAT'S ABSOLUTELY NOT TRUE.

11 Q. ALL RIGHT.

12 A. THAT'S THE COGS VARIABLE THAT SHOULD NOT BE ON THE  
13 RIGHT-HAND SIDE. ALL THE COST VARIABLES IN MY REGRESSION ARE  
14 INDEPENDENT VARIABLES NOT AFFECTED BY THE COGS VARIABLES.

15 Q. OKAY. I JUST WANTED IT TO BE ABSOLUTELY CLEAR ON THE  
16 RECORD THE BASIS FOR YOUR OPINION TO IGNORE 75 PERCENT OF THE  
17 SALES. ALL RIGHT? AND WE HAVE IT. THAT'S ALL I WANTED TO DO.

18 MR. GALLO: I'M DONE, YOUR HONOR.

19 THE COURT: WHAT WOULD HAPPEN IF YOU INCLUDED THAT  
20 DATA?

21 THE WITNESS: WELL, FOR EXAMPLE, THE SALES, THE  
22 QUANTITY SOLD BY?

23 THE COURT: ANY PART OF IT.

24 THE WITNESS: SURE. YOU'D GET A BIAS. THE TECHNICAL  
25 TERM IS YOUR COEFFICIENTS NOW WOULD ALL BE BIASED, WHICH IS A

1           SERIOUS ECONOMETRICS PROBLEM.

2                   MR. GALLO: I'M SORRY, YOUR HONOR. MAY I ASK ONE OR  
3 TWO QUESTIONS?

4                   THE COURT: GO AHEAD.

5           Q. (BY MR. GALLO: WHEN YOU'RE DOING A MERGER ANALYSIS --

6           A. UH-HUH.

7           Q. -- ARE YOU TELLING THE COURT THAT THE DOJ, WHEN IT DOES A  
8 MERGER ANALYSIS, DOES NOT CONSIDER PRICES OF SUBSTITUTE  
9 PRODUCTS WHEN IT DOES ITS MERGER ANALYSIS AND WHETHER THERE'S  
10 ANY ANTI-COMPETITIVE EFFECT?

11          A. ARE YOU TALKING ABOUT LIKE IN A STANDARD SSNIP TEST?

12          Q. I'M TALKING ABOUT YOU'RE ANALYZING WHETHER THE MERGER IS  
13 LIKELY TO HAVE AN ANTI-COMPETITIVE EFFECT.

14          A. RIGHT.

15          Q. DOES THE DEPARTMENT OF JUSTICE CONSIDER NOT ONLY THE  
16 COMPETITOR PRICES WHO ARE MERGING, BUT SUBSTITUTE PRICES,  
17 SUBSTITUTE GOODS THAT COULD COME, BE SOLD INSTEAD?

18          A. SURE. NOT IN A REGRESSION, BUT IN A SSNIP TEST YOU  
19 CERTAINLY WOULD. JUST FOR THE RECORD, I SHOULD SAY A SSNIP  
20 TEST -- SSNIP IS AN ACRONYM. IT STANDS FOR SMALL BUT  
21 SIGNIFICANT NON-TRANSITORY INCREASE IN PRICE. IT'S HOW THE  
22 DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION DECIDES  
23 ON MERGER GUIDELINES TO FIND RELEVANT ANTITRUST MARKETS.

24          Q. BY MY COUNT, IN THE LAST FOUR YEARS, YOU'VE BEEN AN EXPERT  
25 IN CLASS CERTIFICATIONS SEVEN OR EIGHT TIMES, I THINK. DOES



1 THAT SOUND ABOUT RIGHT?

2 A. I'M NOT SURE. IN MY ENTIRE CAREER, I'VE BEEN AN EXPERT IN  
3 CLASS-CERTIFICATION CASES TEN TIMES.

4 Q. AND HOW MANY ON THE PLAINTIFF'S SIDE?

5 A. NINE TIMES ON THE PLAINTIFF'S SIDE AND ONE TIME ON THE  
6 DEFENSE SIDE.

7 MR. GALLO: THANK YOU.

8 THAT'S ALL, YOUR HONOR. THANK YOU VERY MUCH. I  
9 APPRECIATE ALL THE TIME AND PATIENCE YOU'VE GIVEN US.

10 THE COURT: OKAY.

11 MR. CUNEO, ANYTHING ELSE YOU WOULD LIKE TO ASK THE  
12 WITNESS?

13 MR. CUNEO: NO, THANK YOU, YOUR HONOR.

14 THE COURT: OKAY.

15 THANK YOU. WHY DON'T YOU STEP DOWN AND RESUME YOUR  
16 SEAT?

17 (THE WITNESS STOOD ASIDE.)

18 THE COURT: AND I'D LIKE TO TAKE A BREAK RIGHT NOW AND  
19 GO THROUGH MY NOTES TO SEE IF I HAVE ANY QUESTIONS.

20 THERE HAD BEEN A REQUEST TO -- MISS LEE HAD A REQUEST,  
21 AND I THINK SHE STILL HAS THAT REQUEST. I THINK SHE WOULD LIKE  
22 TO MAKE CONCLUDING COMMENTS.

23 IS THAT WHAT YOU WANT TO DO, MISS LEE?

24 MS. LEE: THAT'S RIGHT, YOUR HONOR. I WOULD LIKE TO  
25 JUST CONCLUDE. I THINK IT WOULD BE HELPFUL TO THE COURT TO DO

1 THAT.

2 THE COURT: OKAY. IN DOING THAT, I HAVE OTHER  
3 REPRESENTATIVES WHO WANT EQUAL TIME ON THIS.

4 AND SO IS THAT TRUE, MISS MANIFOLD, MISS SWEENEY?

5 MS. SWEENEY: YES, YOUR HONOR.

6 THE COURT: OKAY.

7 MR. CUNEO: MISS LEE IS NOT ALONE.

8 THE COURT: OKAY.

9 MS. MANIFOLD: BETSY MANIFOLD, WOLF HALDENSTEIN, ON  
10 BEHALF OF THE END-PAYER PLAINTIFFS.

11 THE COURT: OKAY.

12 MS. SWEENEY: AND BONNY SWEENEY ON BEHALF OF THE DIRECT  
13 PURCHASER PLAINTIFFS.

14 THE COURT: AND YOU'RE PART OF THIS, TOO, MR. CUNEO,  
15 AND SO WORK OUT HOW MUCH TIME. WE'LL RECESS AT 4:30. I THINK  
16 WE NEED TO TAKE A TEN-MINUTE BREAK.

17 YES, SIR.

18 MR. CUNEO: I'LL BE BRIEF. OKAY?

19 THE COURT: AND I CAN'T TELL YOU HOW MUCH THAT IS  
20 APPRECIATED AND HOW MUCH THAT DISTINGUISHES YOU, MR. CUNEO.  
21 THAT'S WONDERFUL.

22 OKAY. THANK YOU.

23 (RECESS)

24 THE COURT: SO WHAT HAS COUNSEL DECIDED AS FAR AS TIME?

25 MS. LEE: SO, YOUR HONOR -- BELINDA LEE. I THINK WE

1 ARE ALL IN AGREEMENT, AND PLEASE WEIGH IN IF I'M GETTING THIS  
2 WRONG, THAT WE'LL SPLIT THE TIME 50-50, PLAINTIFFS AND  
3 DEFENDANTS, BECAUSE WE HAVE THREE MOTIONS THAT WE HAVE TO  
4 RESPOND TO.

5 THE COURT: AND YOU'RE TAKING A HUNDRED PERCENT OF THAT  
6 TIME FOR THE DEFENDANTS.

7 MS. LEE: YES.

8 THE COURT: OKAY. YOU'RE THE SPOKESPERSON, AND YOU  
9 FOLKS ARE GOING TO DIVIDE IT UP.

10 MS. LEE: RIGHT.

11 MS. MANIFOLD: YOUR HONOR, BETSY MANIFOLD. YES.

12 THE COURT: THANK YOU, MISS MANIFOLD.

13 AND YOU'RE GOING FIRST.

14 MS. LEE: YES. WE DECIDED, SINCE THEY HAVE THE BURDEN  
15 OF PROOF ON THE MOTION, THAT I WOULD GO FIRST AND THEN THEY  
16 WOULD RESPOND AND THEN WE'LL CALL IT A DAY.

17 THE COURT: OKAY. SO HOW MUCH TIME ARE YOU PLANNING TO  
18 TAKE, MA'AM?

19 MS. LEE: MY GOAL IS 20 MINUTES.

20 THE COURT: OKAY. THAT'S FINE.

21 AND SO THEN YOU'RE GOING TO EACH TAKE (PAUSE) --

22 MS. MANIFOLD: YOUR HONOR, WE'RE EACH THINKING,  
23 ROUGHLY, FIVE TO SEVEN MINUTES EACH. MAYBE SOME PEOPLE MIGHT  
24 BE TEN. SOME PEOPLE MIGHT BE FIVE.

25 THE COURT: OKAY. THAT'S FINE. THAT'S EXCELLENT. I

1 APPRECIATE YOUR WORKING IT OUT.

2 GO AHEAD, MISS LEE.

3 MS. LEE: THANK YOU, YOUR HONOR.

4 FIRST OFF, I PROMISE AT THE END OF THE DAY WE WILL MAKE  
5 SURE THAT ALL OF THE EXTRA PAPER GOES AWAY, AS WELL AS US.

6 SO WE'VE HEARD A LOT OF TESTIMONY OVER THE LAST THREE  
7 DAYS, AND I'M GOING TO DO MY BEST TO TRY TO BE EFFICIENT AND TO  
8 NARROW EVERYTHING DOWN TO A FEW KEY TAKEAWAYS TO YOUR HONOR. I  
9 WANT TO START WITH SOME IMPORTANT ADMISSIONS FROM DR. SUNDING  
10 YESTERDAY ON THE ISSUE OF INDIVIDUALIZED INQUIRIES, WHICH  
11 MATTERS BECAUSE INDIVIDUALIZED INQUIRIES, THAT'S THE HEART OF  
12 THE PREDOMINANCE ANALYSIS. DR. SUNDING, LIKE DR. MANGUM ON THE  
13 EPP CASE, RELIES ON A MODEL FOR PROVING COMMON IMPACT THAT, BY  
14 DESIGN, CAN ONLY PRODUCE AN AVERAGE OVERCHARGE. DR. MANGUM  
15 CHOSE TO USE A REGRESSION THAT PRODUCED ONLY ONE SINGLE AVERAGE  
16 OVERCHARGE ACROSS ALL DIRECT PURCHASERS FOR ALL THREE  
17 DEFENDANTS. DR. SUNDING DISAGREED AND THOUGHT IT WAS NECESSARY  
18 TO DO THREE DIFFERENT REGRESSIONS AND THREE AVERAGE OVERCHARGES  
19 BECAUSE OF THE DRAMATICALLY DIFFERENT COST STRUCTURES FOR EACH  
20 OF THE DEFENDANTS.

21 BUT THE POINT IS THAT NO ONE, NEITHER OF THEM HAS A  
22 MODEL THAT IS CAPABLE OF TELLING YOU WHAT IS BEHIND THAT  
23 AVERAGE OVERCHARGE, WHETHER THAT AVERAGE OVERCHARGE IS  
24 MEASURING THE EFFECT OF THE CONSPIRACY OR SOMETHING ELSE. AND  
25 EVEN THOUGH PLAINTIFFS' EXPERTS ACKNOWLEDGED THAT THEY USED

1 DATA THAT SHOWED SIGNIFICANT DIFFERENCES IN WHAT THE DIRECT  
2 PURCHASERS PAID EVEN FOR THE SAME PRODUCTS, YOUR HONOR, THEY  
3 HAVE YET TO COME UP WITH AN AVERAGE -- THEY STILL ALL COME UP  
4 WITH AN AVERAGE THAT THEY SAY APPLIES TO EVERYONE IN THE CLASS,  
5 DESPITE THIS DRAMATIC PRICE VARIATION THAT WE SEE.

6 NOW, DR. SUNDING AND DR. MANGUM BOTH CLAIM THAT THEY  
7 DID SENSITIVITY TESTING TO ADDRESS THE VALIDITY OF THEIR  
8 AVERAGE OVERCHARGES. THIS WAS THE WAL-MART TEST THAT EVERYONE  
9 WAS TALKING ABOUT FOR DAYS NOW. THEY EACH FOUND A POSITIVE  
10 OVERCHARGE ON WAL-MART AND SAID THAT WAS A BASIS TO CONCLUDE  
11 THAT ALL OTHER DIRECT PURCHASERS HAD SUSTAINED A POSITIVE  
12 OVERCHARGE. BUT DR. SUNDING ADMITTED YESTERDAY AFTERNOON THAT  
13 IF HE HAD TESTED COSTCO INSTEAD OF WAL-MART, HE WOULD HAVE  
14 GOTTEN A NEGATIVE OVERCHARGE WITH HIS MODEL.

15 THAT'S A PROBLEM FOR DR. SUNDING AND IT'S A PROBLEM FOR  
16 DR. MANGUM, TOO, BECAUSE, AS YOU HEARD, THEY BASICALLY HAVE THE  
17 SAME MODEL, ACCORDING TO BOTH OF THEM, AND IN FACT DR. SUNDING  
18 SAID HE WAS COMFORTED BY THE FACT THAT HE AND DR. MANGUM USED  
19 ESSENTIALLY THE SAME METHODOLOGIES AND REACHED THE SAME  
20 RESULTS. WELL, THE PROBLEM WITH COSTCO AND THE NEGATIVE  
21 OVERCHARGE THAT DR. SUNDING FOUND IS THE SAME PROBLEM, IS  
22 REPLICATED, AND IS ALSO A PROBLEM FOR DR. SUNDING WITH RESPECT  
23 TO TARGET, WHERE DR. SUNDING'S MODEL ALSO RETURNED A NEGATIVE  
24 OVERCHARGE.

25 COSTCO AND TARGET, OF COURSE, ARE BIG RETAILERS, JUST

1           LIKE WAL-MART, WHO YIELDED NEGATIVE OVERCHARGES IN DR.  
2           SUNDING'S MODEL, AND BECAUSE DR. SUNDING, BECAUSE DR. SUNDING'S  
3           METHODOLOGY WORKED -- SORRY. LET ME START AGAIN. DR. SUNDING,  
4           IN FORMULATING HIS OPINION, TESTED WAL-MART AND HE STOPPED  
5           THERE, AND HIS METHODOLOGY WORKS ONLY BECAUSE HE STOPPED AT  
6           WAL-MART. IF HE HAD CONTINUED ON AND HE HAD TESTED COSTCO AND  
7           TARGET, OR IF HE HAD TESTED COSTCO AND TARGET INSTEAD OF  
8           WAL-MART, HE WOULD HAVE HAD THAT NEGATIVE OVERCHARGE, AND THE  
9           REST OF HIS OPINIONS WOULD HAVE UNRAVELED. THAT JUST CAN'T BE  
10          RIGHT, THAT THE ONLY REASON HIS OPINION STANDS TOGETHER IS  
11          BECAUSE HE TESTED WAL-MART FIRST BEFORE HE TESTED THE REST OF  
12          THEM.

13                 NOW, IF DR. SUNDING HAD ALSO TESTED PIGGLY WIGGLY  
14          MIDWEST, AS DR. HAIDER DID, HE WOULD HAVE GOTTEN A NEGATIVE  
15          OVERCHARGE THERE, TOO. AND REMEMBER, WE HEARD DR. SUNDING SAY  
16          YESTERDAY THAT THE PIGGLY WIGGLY MIDWEST WAS SUCH A SMALL  
17          RETAILER THAT YOU WOULDN'T EXPECT SOMEONE LIKE PIGGLY WIGGLY  
18          MIDWEST TO BE ABLE TO NEGOTIATE ITS WAY OUT OF AN OVERCHARGE  
19          WHEN WAL-MART COULDN'T. RIGHT? HE SAID THAT, AND YOU HAD TO  
20          LOOK AT THE SIZE OF THE RETAILERS, AND BECAUSE WAL-MART WAS  
21          SUCH A BIG RETAILER, IF WAL-MART COULDN'T AVOID AN OVERCHARGE,  
22          THEN NO ONE ELSE COULD.

23                 WELL, DR. SUNDING'S OWN MODEL SHOWS THAT, RETURNS A  
24          POSITIVE OVERCHARGE FOR WAL-MART AND A NEGATIVE OVERCHARGE FOR  
25          PIGGLY WIGGLY MIDWEST. IF THOSE RESULTS ARE IMPLAUSIBLE,

1 THAT'S ONLY BECAUSE DR. SUNDING'S OWN MODEL DOES NOT DO A  
2 RELIABLE JOB OF PREDICTING PRICES. THAT'S A PROBLEM WITH THEIR  
3 MODELS. THAT'S NOT A PROBLEM WITH DEFENDANTS' TESTING OF THE  
4 MODELS.

5 AND, YOUR HONOR, I THINK IT'S IMPORTANT TO TAKE A STEP  
6 BACK AND THINK ABOUT ALL OF THESE NEGATIVE OVERCHARGES, ALL  
7 THESE NEGATIVE OVERCHARGES AND THE IMPLICATIONS THAT THEY HAVE  
8 FOR THE COURT'S ABILITY TO RELY ON THESE MODELS AS PROOF OF  
9 COMMON IMPACT. WITH THESE, BECAUSE DR. SUNDING'S MODELS  
10 RETURNED ALL OF THESE NEGATIVE OVERCHARGES, AS DR. HAIDER'S  
11 TESTING REVEALED, DR. SUNDING HAD TO COME UP WITH SOME WAY TO  
12 DEAL WITH THAT, AND AS HE ADMITTED YESTERDAY AFTERNOON IN  
13 TESTIMONY, HIS ONLY WAY OF DEALING WITH THAT WAS TO COME UP  
14 WITH INDIVIDUALIZED, RETAILER-BY-RETAILER, CUSTOMER-BY-CUSTOMER  
15 INQUIRIES IN THE FORM OF 30 NEW REGRESSIONS.

16 WE GOT THE TRANSCRIPT LAST NIGHT FOR THE MORNING  
17 SESSION, AND JUST BEFORE THE BREAK MR. GALLO ASKED DR. SUNDING,  
18 MAYBE WE CAN AGREE ON ONE THING. THIS IS FROM PAGE NINE OF THE  
19 TRANSCRIPT. I THINK IT'S THE FINAL TRANSCRIPT. IT CAME IN ON  
20 A RUSH BASIS, SO I THINK THIS IS THE FINAL CITE AND IS NOT A  
21 ROUGH. BUT ON PAGE 93, LINES 17 TO 22, MR. GALLO ASKED, MAYBE  
22 WE CAN AGREE ON ONE THING. THE ONLY WAY YOU CAN FIGURE IT,  
23 FIGURE IT OUT WAS TO LOOK AT CUSTOMERS INDIVIDUALLY. DR.  
24 SUNDING, WITHOUT HESITATING, TESTIFIED, AND I DID THAT. I DID  
25 AN INDIVIDUALIZED INQUIRY ALREADY ON JANUARY 15TH FOR 60

1 PERCENT OF THE MARKET. THAT'S INDIVIDUALIZED INQUIRY, YOUR  
2 HONOR. THAT'S, THAT'S WHAT PREVENTS PLAINTIFFS' METHODOLOGY  
3 FROM SATISFYING THE DEMANDING BURDEN OF PREDOMINANCE UNDER RULE  
4 23(B)(3).

5 NOW, I THINK IT'S ALSO IMPORTANT TO REMEMBER HOW WE GOT  
6 TO THIS POINT, THE POINT OF DR. SUNDING NEEDING TO RUN ALL OF  
7 THESE DIFFERENT METHODOLOGIES. HE TESTED COSTCO, TARGET,  
8 PIGGLY WIGGLY MIDWEST AFTER DR. HAIDER DID, AND THEN HE TESTED  
9 TEN CUSTOMERS, THE TOP TEN CUSTOMERS FOR THE THREE DEFENDANTS.  
10 HE GOT FIVE NEGATIVE OVERCHARGES WHEN HE DID THAT. AND SO WHAT  
11 DID HE DO? HE FUNDAMENTALLY CHANGED HIS MODEL LESS THAN TWO  
12 DAYS BEFORE HE CAME TO TESTIFY HERE, YOUR HONOR. DR. SUNDING  
13 CHANGED THE MODEL THAT HE HAD BEEN RELYING ON FOR THE PAST  
14 SEVEN MONTHS. HE CHANGED THE COEFFICIENTS FOR PACKAGE SIZE AND  
15 PACKAGE TYPE SO THAT EACH OF THOSE COEFFICIENTS COULD VARY.  
16 THIS IS WHAT HE DID TO TURN THE NEGATIVE OVERCHARGE FROM COSTCO  
17 INTO A POSITIVE OVERCHARGE. HE DID THAT SO HE COULD GET A  
18 POSITIVE OVERCHARGE FOR THESE CUSTOMERS.

19 NOW, YESTERDAY, DR. SUNDING TRIED TO MINIMIZE THIS  
20 ADMISSION AND HE DESCRIBED WHAT HE HAD DONE AS DATA CLEANING,  
21 BUT WHAT DR. SUNDING DESCRIBES AS DATA CLEANING I CALL CHANGING  
22 MULTIPLE EXPLANATORY VARIABLES AND WRITING A BRAND-NEW  
23 REGRESSION.

24 NOW, JUST THIS MORNING, WE HEARD DR. WILLIAMS GIVE US A  
25 LENGTHY EXPLANATION OF EXPLANATORY VARIABLES, AND I THINK IT'S



1           IMPORTANT TO PUT THE CONTEXT OF THE TWO WITNESS TESTIMONIES  
2           TOGETHER. DR. WILLIAMS EXPLAINED THE IMPORTANCE OF EXPLANATORY  
3           VARIABLES AND RIGHT-SIDE INPUTS IN A REGRESSION EQUATION. DR.  
4           WILLIAMS TESTIFIED THAT IT'S IMPORTANT TO MAKE SURE THAT THOSE  
5           RIGHT-SIDE VARIABLES AS ARE ACCURATE AS POSSIBLE. HE AGREED  
6           WITH DR. GALLO -- DOCTOR GALLO -- MR. GALLO ON QUESTIONING. HE  
7           AGREED WITH MR. GALLO THAT CHANGING EXPLANATORY VARIABLES COULD  
8           MAKE A MATERIAL DIFFERENCE IN THE OUTCOME OF YOUR REGRESSION,  
9           AND HE AGREED THAT IT WAS CONCEIVABLE -- THOSE WERE DR.  
10          WILLIAMS' OWN WORDS -- IT WAS CONCEIVABLE THAT CHANGING  
11          EXPLANATORY VARIABLES COULD CHANGE A COEFFICIENT FROM POSITIVE  
12          TO NEGATIVE. THAT'S EXACTLY WHAT DR. SUNDING DID TO CHANGE THE  
13          NEGATIVE COEFFICIENT ON COSTCO FROM NEGATIVE TO POSITIVE.

14                 BUT THESE, YOU KNOW, THESE NEW REGRESSIONS, THESE  
15          CHANGES TO DR. SUNDING'S MODEL WEREN'T ENOUGH TO ELIMINATE THE  
16          NEGATIVE OVERCHARGE FOR TARGET. SO, AFTER DR. SUNDING MODIFIED  
17          HIS ORIGINAL MODEL TO COME UP WITH A POSITIVE OVERCHARGE FOR  
18          COSTCO AND PIGGLY WIGGLY, HE THEN HAD TO SET ABOUT WRITING A  
19          NEW REGRESSION WITH DIFFERENT CHANGES TO ARRIVE AT A POSITIVE  
20          OVERCHARGE FOR TARGET. SO, IN THE CASE OF TARGET, DR. SUNDING  
21          CHANGED THE CUSTOMER TYPE, THEIR COEFFICIENT, AND HE DID NOT  
22          MAKE THE CHANGES HE HAD MADE FOR THE OTHER CUSTOMERS OF PACKAGE  
23          TYPE AND PACKAGE SIZE.

24                 SO AGAIN, YOUR HONOR, WHAT WE'RE SEEING IS THAT, IN  
25          ORDER FOR THE EPP'S TO BE ABLE TO ARRIVE AT A POSITIVE

1 OVERCHARGE FOR THESE LARGE RETAILERS, THEY'VE HAD TO ENGAGE IN  
2 AN INDIVIDUALIZED INQUIRY. THEY'VE HAD TO WRITE INDIVIDUAL,  
3 CUSTOMER-BY-CUSTOMER, RESELLER-BY-RESELLER REGRESSIONS. THAT'S  
4 EXACTLY WHAT THE COURTS IN GRAPHIC PROCESSING UNITS, GPU, AND  
5 FLASH MEMORY HAVE SAID ARE THE REASON TO DENY CERTIFICATION IN  
6 AN END-PAYER CLASS.

7 NOW, YOU'VE HEARD A LOT -- AND HOPEFULLY I'M DOING OKAY  
8 ON TIME. YOU'VE HEARD A LOT FROM PLAINTIFFS ABOUT THE GUILTY  
9 PLEAS. THE TWO INDIRECT CASES HAVE EVEN ARGUED THAT THEY'RE  
10 ENTITLED TO PRESUMPTION OF IMPACT. I WON'T BELABOR THE POINT.  
11 I PUT THE LAW IN FRONT OF YOUR HONOR ON THE SLIDES AND OUR  
12 BRIEFING WHY THAT'S INCORRECT, BUT I THINK THE POINT TO FOCUS  
13 ON IS THAT THERE'S A BIG DIFFERENCE BETWEEN THE GUILTY PLEAS  
14 AND THE THREE DIFFERENT CLASSES THAT ALL OF PLAINTIFFS ARE  
15 SEEKING TO CERTIFY HERE.

16 THE GUILTY PLEAS ARE FOR A VERY LIMITED TIME PERIOD  
17 COMPARED TO WHAT THE THREE CLASSES ARE ASKING THIS COURT TO  
18 CERTIFY. STARKIST, OUR GUILTY PLEA IS 13 MONTHS, FROM  
19 NOVEMBER, 2011, THROUGH DECEMBER, 2013. PLAINTIFFS WERE TRYING  
20 TO CERTIFY THREE CLASSES OF ABOUT FOUR YEARS EACH, FROM JUNE,  
21 2001, THROUGH JULY, 2015.

22 OUR PLEA'S ALSO ABOUT CANNED TUNA FISH ONLY. ALL THREE  
23 CLASSES ARE CLAIMING MUCH BROADER CLASSES OF PRODUCTS, ALL  
24 TYPES OF CANNED AND TUNA PRODUCTS IN ALL SHAPES AND, AS WE SAW  
25 TODAY, ALL SIZES. DR. JOHNSON TESTIFIED THAT THERE ARE OVER

1 1,136 SEPARATE PRODUCTS IN THE DPP'S CLASS. THAT DOESN'T MATCH  
2 UP TO THE GUILTY PLEAS.

3 AND MOST IMPORTANTLY ON THE ISSUE OF THE GUILTY PLEAS,  
4 YOUR HONOR, A GUILTY PLEA DOES NOT MEAN THERE WAS IMPACT ON A  
5 CLASS-WIDE BASIS, AND CERTAINLY NOT WHEN IT COMES TO CLASSES AS  
6 BROAD AS WHAT WE'RE TALKING ABOUT HERE. THE COURTS IN FLASH  
7 MEMORY, OPTICAL DISK DRIVE, LITHIUM ION BATTERIES, AND JUST  
8 LAST WEEK IN THE VARES [PHONETIC] CASE AND THE AUTO PARTS MDL,  
9 THOSE COURTS WERE FACED WITH AMNESTY APPLICANTS AND GUILTY  
10 PLEAS, AND THEY DENIED CLASS CERTIFICATION.

11 AND I'M SORRY. I WAS TOLD I DON'T KNOW HOW TO DO MATH.  
12 OUR GUILTY PLEA WAS NOT 13 MONTHS. IT WAS 26 MONTHS.

13 NOW, YESTERDAY -- I WANT TO PAUSE ON SOMETHING BECAUSE  
14 MISS MANIFOLD, IN HER ARGUMENT, READ TO YOU FROM THE BUMBLE BEE  
15 PLEA AND SAID THAT FOR HER END-PURCHASER CLIENTS IT'S EITHER A  
16 CLASS-ACTION REMEDY OR NOTHING. AND, YOUR HONOR, WE CAN'T BE  
17 GUIDED BY THAT SENTIMENT. WE CAN ONLY BE GUIDED BY RULE 23 AND  
18 WHAT IS REQUIRED UNDER RULE 23.

19 THE COURT: BUT THERE WAS SOMETHING UP IN THE NORTHERN  
20 DISTRICT THAT RESTITUTION WOULD BE PROVIDED THROUGH THIS  
21 VEHICLE, AND SO NONE WAS SOUGHT UP THERE. THAT WAS HER POINT,  
22 AND IT'S AN ACCURATE POINT.

23 MS. LEE: SURE, YOUR HONOR.

24 THE COURT: IT DOESN'T CONTROL WHAT WE DO HERE.

25 MS. LEE: SURE. AND I THINK THE POINT IS THAT IT'S,

1           THERE IS THE POSSIBILITY OF RESTITUTION THROUGH CIVIL CLAIMS,  
2           NOT NECESSARILY THROUGH A CLASS ACTION.

3           I ALSO WANTED TO RECOMMEND TO YOUR HONOR THE FIRST  
4           CIRCUIT'S DECISION IN ASACOL. PLAINTIFFS HAVE CRITICIZED  
5           ASACOL AS AN OUT-OF-CIRCUIT DECISION. IT'S TRUE; IT'S NOT FROM  
6           THE NINTH CIRCUIT. BUT I FOUND IT TO BE A VERY THOUGHTFUL  
7           DECISION ABOUT INJURED AND UNINJURED PLAINTIFFS AND  
8           PREDOMINANCE IN END-PAYER CLASSES. IN THE ASACOL DECISION --  
9           IT'S 907 F.3D 42, AT PAGE 56 -- THE FIRST CIRCUIT WROTE, WE  
10          RECOGNIZE THAT THERE REMAINS THE PROBLEM OF HOW TO DEAL WITH  
11          CONDUCT THAT INFLICTS SMALL AMOUNTS OF DAMAGE ON LARGE NUMBERS  
12          OF PEOPLE. CERTAINLY, RULE 23 SERVES AS AN IMPORTANT TOOL TO  
13          ADDRESS MANY SUCH SITUATIONS. THEN THE COURT CONTINUES ON TO  
14          SAY, BUT THE FACT, THAT FACT GRANTS US NO LICENSE TO CREATE A  
15          RULE 23 CLASS IN EVERY NEGATIVE-VALUE CASE BY EITHER ALTERING  
16          OR REALLOCATING SUBSTANTIVE CLAIMS OR DEPARTING FROM THE RULES  
17          OF EVIDENCE. I THINK THE FIRST CIRCUIT WAS EXACTLY RIGHT.  
18          RULE 23 APPLIES IN EQUAL AND EXACTING MEASURE, AND THERE ARE NO  
19          PRESUMPTIONS EVEN IN THE CASE, EVEN IN CASES WITH GUILTY PLEAS.

20          I WANTED TO SHIFT A LITTLE, YOUR HONOR, AND COME TO THE  
21          ISSUE OF TESTING AND BURDEN-SHIFTING. THERE WAS A LOT OF  
22          QUESTIONING ABOUT IT JUST BEFORE AND THE IDEA THAT DEFENDANTS'  
23          EXPERTS HAD NOT PROPOSED THEIR OWN INDEPENDENT MODELS TO PROVE  
24          PASS-THROUGH AND TO PROVE OVERCHARGE. YOUR HONOR, MY ONLY  
25          POINT HERE -- I SEE YOU SHAKING YOUR HEAD.

1 THE COURT: I UNDERSTAND WHAT YOU'RE SAYING, COUNSEL,  
2 BUT KEEP GOING.

3 MS. LEE: WELL, I THINK THE ONE THING I WANTED TO HIT  
4 ON HERE, YOUR HONOR, IS THAT RULE 23, AND THE SUPREME COURT HAS  
5 MADE IT CLEAR IN WAL-MART, IN COMCAST, THE BURDEN IS ON  
6 PLAINTIFFS TO PUT FORWARD A MODEL THAT SATISFIES RULE 23, AND  
7 THAT'S THE ONLY MODEL THAT MATTERS FOR CLASS CERTIFICATION.  
8 THIS COURT NEEDS TO PERFORM ITS RIGOROUS ANALYSIS OF THAT MODEL  
9 AND DETERMINE IF THAT MODEL MEETS THE STANDARD. OUR EXPERTS  
10 ARE HERE TO ASSIST YOU IN TESTING THOSE MODELS, BUT OUR EXPERTS  
11 ARE NOT HERE TO COME UP WITH THEIR OWN INDEPENDENT MODEL TO  
12 DISPROVE IMPACT OR TO PROVE THAT SOMETHING ELSE IS CAUSING THE  
13 IMPACT THAT THEIR REGRESSION IS MEASURING.

14 AND I PAUSE ON TESTING, YOUR HONOR, BECAUSE OVER THE  
15 COURSE OF THE LAST THREE DAYS I THINK WE'VE HEARD CONSISTENTLY  
16 THAT THE PLAINTIFFS HAVE SAID, YOU KNOW, THEY WANT THE COURT TO  
17 CONSIDER AND ACCEPT THEIR TESTING OF THEIR OWN MODELS, BUT THEN  
18 IGNORE DEFENDANTS' TESTING OF THEIR MODELS, AND I THINK THAT,  
19 YOUR HONOR, THAT THAT, THAT ATTEMPTS TO WRITE OUT THE  
20 DEFENDANTS' ROLE IN THE CLASS-CERTIFICATION ANALYSIS.

21 PLAINTIFFS HAVE CRITICIZED DR. JOHNSON AND DR. HAIDER.  
22 WE HEARD IT, I THINK, TWO OR THREE TIMES TODAY ABOUT THEIR  
23 SLICING AND DICING OF DATA. THEY SAY IT'S ILL-MOTIVATED, WHAT  
24 DR. JOHNSON AND DR. HAIDER DID, BUT THE FACT IS THAT DR.  
25 JOHNSON AND DR. HAIDER RAN THE SAME TYPES OF SENSITIVITY TESTS

1 ON PLAINTIFFS' MODELS THAT PLAINTIFFS THEMSELVES RAN: THE  
2 WAL-MART REGRESSION TEST, THE ROBUSTNESS CHECK THAT DR. MANGUM  
3 HAD, THE WAL-MART SENSITIVITY OF DR. SUNDING'S. THIS IS  
4 EXACTLY WHAT PLAINTIFFS DID, AND DR. JOHNSON AND DR. HAIDER  
5 JUST APPLIED IT TO ANSWER THE RELEVANT QUESTION AT CLASS  
6 CERTIFICATION, WHICH IS, ARE THESE CLASS MEMBERS, ARE THESE  
7 DIRECT PURCHASERS SHOWING IMPACT?

8 THE PLAINTIFFS CRITICIZE THAT AND SAY THAT DR. JOHNSON  
9 AND DR. HAIDER HAVE SLICED THE DATA TOO THINLY. RIGHT? WE  
10 HEARD THAT A LOT. THEY SAID THAT, YOU KNOW, THERE ARE PROBLEMS  
11 WITH DR. JOHNSON'S APPROACH AND THERE ARE PROBLEMS WITH DR.  
12 HAIDER'S METHODOLOGY. OF COURSE, THEY DON'T HAVE  
13 METHODOLOGIES. RIGHT? BUT THE CRITICISM WAS THAT THEY SLICED  
14 THE DATA TOO THINLY SO THAT THERE ARE ONLY A HANDFUL OF  
15 TRANSACTIONS BY ONE CUSTOMER IN THE CLASS PERIOD OR SOME  
16 CUSTOMERS WHO HAD NO TRANSACTIONS IN THE BENCHMARK PERIOD.

17 THAT'S NOT A PROBLEM WITH DR. JOHNSON'S OR DR. HAIDER'S  
18 TESTING. THAT'S NOT THEIR FAULT, AND THAT'S WHAT IT IS, YOUR  
19 HONOR. IT'S LIFE. RIGHT? IT'S DIRECT PURCHASERS. IT'S  
20 CUSTOMERS WHO HAVE ONLY MADE A SMALL NUMBER OF PURCHASES, AND  
21 THE FACT THAT THEY MADE A SMALL NUMBER OF PURCHASES, THAT IS,  
22 THAT'S NOT AN EXCUSE TO GROUP TOGETHER THESE, GROUP TOGETHER  
23 LOTS OF CUSTOMERS AND HIDE UNINJURED CUSTOMERS IN A GROUP OF  
24 LARGER INJURED CUSTOMERS, ESPECIALLY NOT WHEN THE CHOW TEST  
25 TELLS YOU YOU CAN'T POOL THIS DATA TOGETHER.

1 SO THE PROBLEM HERE IS THE CHOICES THAT PLAINTIFFS HAVE  
2 MADE WITH THEIR METHODOLOGY. THE PROBLEM THAT THEY'RE HONING  
3 IN ON HERE WITH DATA AND, YOU KNOW, THE LACK OF PURCHASES IN  
4 BENCHMARK PERIODS, THAT'S A PROBLEM WITH THE METHODOLOGY THAT  
5 PLAINTIFFS CHOSE TO USE HERE. PLAINTIFFS ARE THE ONE WHO SHOW  
6 A BOTH BEFORE AND AFTER MODEL, AND DR. MANGUM, WE HEARD, ADMITS  
7 THAT IT'S INCAPABLE OF MEASURING IMPACT FOR 61 DIRECT  
8 PURCHASERS BECAUSE OF THE TIMING OF THEIR PURCHASERS. THAT'S  
9 TEN PERCENT OF THE CLASS, BUT HE STILL CHOSE A MODEL THAT'S  
10 INCAPABLE OF PROVING IMPACT TO THAT MANY CLASS MEMBERS. YOU  
11 HEARD DR. JOHNSON TESTIFY THE OTHER DAY THAT THERE ARE ACTUALLY  
12 OTHER WAYS PLAINTIFFS COULD HAVE CHOSEN TO PROCEED. HE  
13 MENTIONED THE YARDSTICK METHOD AS A POSSIBILITY. BUT  
14 PLAINTIFFS CHOSE THIS METHODOLOGY, AND IT'S JUST NOT CAPABLE OF  
15 MEETING THEIR BURDEN.

16 THERE'S BEEN A LOT OF TESTIMONY ON TIME PERIODS, TOO,  
17 SO I WON'T RECAP ALL OF THAT. I THINK IT WOULD TAKE ME MUCH  
18 TOO LONG TO DO THAT ANYWAY. I THINK THE POINT HERE IS THAT  
19 PLAINTIFFS CHOSE TO USE WHAT THEY CALLED A CONSERVATIVE,  
20 TAINTED BENCHMARK. THERE'S NOT -- BUT THERE'S NOT A SINGLE  
21 TREATISE THAT SAYS IT'S OKAY TO USE A TAINTED BENCHMARK. IN  
22 FACT, ALL OF THE TREATISES SAY THE OPPOSITE.

23 PLAINTIFFS' EXPERTS THEMSELVES SAID THAT THE BENCHMARK  
24 MUST BE UNTAINTED IN THEIR REPORTS, AND UNTIL WE ESTABLISHED ON  
25 CROSS-EXAMINATION THE REASON TO BELIEVE THAT THEIR BENCHMARKS

1 WERE NOT UNTAINTED, THAT IS WHAT THEY SAID. DR. SUNDING,  
2 THOUGH, ADMITTED THAT YOU CANNOT ASSUME HIS BENCHMARK WAS  
3 UNTAINTED BECAUSE THERE WERE TOO MANY OTHER FACTORS CHANGING.  
4 DR. HAIDER TESTED THAT AND EXPLAINED THAT, TOO.

5 THIS ISSUE IS SOMETHING THAT PLAINTIFFS HAVE FOCUSED  
6 ON. WE CAN TELL THEY'RE CONCERNED ABOUT THIS BECAUSE THEY  
7 ELICITED A LOT OF GENERALIZED TESTIMONY ABOUT WHAT IT GENERALLY  
8 MEANS TO HAVE CONDUCT IN THEIR BENCHMARK PERIOD. BUT THE ONE  
9 THING, YOUR HONOR, THAT WAS MISSING FROM ALL OF THAT TESTIMONY  
10 WAS ANY EMPIRICAL EVIDENCE PUT FORWARD BY PLAINTIFFS, ANY GROUP  
11 OF PLAINTIFFS, DEMONSTRATING THAT THEIR USE OF THE BENCHMARK  
12 PERIODS DID, IN FACT, MAKE THEIR MODELS MORE CONSERVATIVE.

13 AND WHY WOULDN'T THEY HAVE PUT IN REAL EMPIRICAL  
14 EVIDENCE OF THAT GIVEN HOW IMPORTANT THIS IS? THE REASON IS  
15 THAT THE ONLY EVIDENCE THERE IS BEFORE THIS COURT IS THAT  
16 OVERCHARGES DIMINISH TO THE POINT OF EVEN DISAPPEARING WHEN YOU  
17 DO THAT. AND THIS ISN'T JUST DR. SUNDING. THIS IS DR.  
18 WILLIAMS AND DR. MANGUM WHO MADE THESE SAME TYPES OF  
19 TIME-PERIOD CHOICES. THESE CHOICES ARE IMPORTANT, BECAUSE IF  
20 YOU TAKE DPP'S AS AN EXAMPLE, IF DR. MANGUM HAD USED THE LONGER  
21 ORIGINAL CLASS PERIOD, HIS COMMON METHOD PRODUCES AN AVERAGE  
22 NEGATIVE 10.6-PERCENT OVERCHARGE.

23 SO, REGARDLESS OF WHETHER YOU THINK IT'S CONSERVATIVE,  
24 IT'S A CONSERVATIVE APPROACH, OR IF YOU BELIEVE IT HAS NO  
25 ECONOMIC BASIS, THE FACT IS PLAINTIFFS MADE A CHOICE FOR THE



1           SAKE OF PRESERVING THEIR REGRESSION AND A POSITIVE OVERCHARGE.  
2           THEY CHOSE THIS METHOD, THEY CHOSE THE TIME PERIODS THEY DID,  
3           AND THEY JETTISONED SEVEN YEARS OF PURCHASERS FROM THEIR  
4           CLASSES. THIS SHOULD GIVE THE COURT SOME PAUSE OVER THESE  
5           ABSENT CLASS MEMBERS WHO ARE JUST THROWN FROM THE CLASS.

6                       NOW, WE HAD A LOT OF TESTIMONY THIS AFTERNOON ABOUT  
7           FALSE POSITIVE, AND GIVEN ALL OF THESE OUTCOME-DRIVEN CHOICES,  
8           IT SHOULD BE NO SURPRISE, THEN, THAT WE HAVE METHODOLOGIES THAT  
9           ARE PREDISPOSED, BIASED, AS WE JUST HEARD, TO FINDING IMPACT.  
10          WHEN YOUR METHODOLOGY FINDS IMPACT ON PURCHASES THAT ARE CLEAN,  
11          IT CAN'T BE TRUSTED AS EVIDENCE OF IMPACT ANYWHERE ELSE.

12                      YOU HEARD THIS MORNING THAT DR. WILLIAMS, FROM DR.  
13          WILLIAMS THAT DR. HAIDER HAD FAILED TO REJECT THE NULL  
14          HYPOTHESIS. HE SAID THAT SHE HAD FAILED TO PROVE THAT YOU  
15          WOULD NOT EXPECT AN INCREASE IN NONDEPENDENT PRICES. HE EVEN  
16          SAID AT ONE POINT, AND I WAS TRYING TO GET THIS DOWN AS FAST AS  
17          I CAN, SO I APOLOGIZE IF I GOT THE EXACT WORDS WRONG, BUT HE  
18          SAID, DR. HAIDER OFFERS NO EVIDENCE THAT NON-DEFENDANTS  
19          MANUFACTURED THE LARGE-SIZED TUNA THAT THEY SOLD TO U. S. FOODS  
20          AND SYSCO. OF COURSE, IT'S NOT DEFENDANTS' BURDEN TO PROVE  
21          THAT. IT'S WRONG AS A MATTER OF LAW BECAUSE IT'S NOT DR.  
22          HAIDER'S BURDEN TO PROVE OR DISPROVE ANYTHING. IT'S  
23          PLAINTIFFS' BURDEN TO PROVE, TO, IN THE WORDS OF THE D. C.  
24          CIRCUIT IN RAIL FREIGHT, TO -- IT'S THEIR BURDEN TO ADDUCE  
25          SPECIFIC EVIDENCE THAT THIS IS NOT ANY FALSE POSITIVE. AND I

1 DON'T HAVE THE CITE WITH ME, BUT I DO KNOW THAT IT IS IN MY  
2 OPENING SLIDES FROM DAY ONE. IT'S SLIDE 21.

3 AND ON THIS ISSUE, YOUR HONOR, THE ISSUE OF PRODUCING  
4 EVIDENCE TO NEGATE THE FALSE POSITIVE, THE CFP'S AND DR.  
5 WILLIAMS, THE TESTIMONY WE HEARD THIS AFTERNOON, IT JUST  
6 DOESN'T PASS GO. HE THEORIZES, DR. WILLIAMS THEORIZES THAT  
7 NON-DEFENDANTS LOOK AROUND AT THE PRICES IN THE MARKET AND THEY  
8 KNOW THE PRICES THAT DEFENDANTS ARE CHARGING, SO THAT'S WHY  
9 THERE'S AN UMBRELLA EFFECT. HE DOES NOTHING TO TEST THIS. DR.  
10 MANGUM MAKES THE SAME TYPE OF UMBRELLA ARGUMENT, AND NOT ONLY  
11 DOES DR. MANGUM FAIL TO TEST THIS, AS DR. JOHNSON TESTIFIED,  
12 THE DATA SHOW THAT NON-DEFENDANT PRICES INCREASED BEFORE  
13 DEFENDANTS' PRICES INCREASED.

14 NOW, BUT BACK TO DR. WILLIAMS, EVEN WORSE, DR. WILLIAMS  
15 EXPECTS DR. HAIDER TO DISPROVE THEORIES THAT HE MADE UP OUT OF  
16 WHOLE CLOTH ABOUT THE UMBRELLA EFFECT, AND DR. WILLIAMS HAS  
17 OPINED THAT DR. HAIDER HAS NOT PROVEN THAT THE TWO PARENT  
18 COMPANIES, AND WE JUST HAD A LOT OF TESTIMONY ABOUT THIS AT THE  
19 VERY END. HE SAYS THAT DR. HAIDER HAS NOT PROVEN THAT THE TWO  
20 PARENT COMPANIES DID NOT SELL THE PACKAGED TUNA TO  
21 NON-DEFENDANTS; THAT, FOR EXAMPLE, MY CLIENT STARKIST'S PARENT  
22 COMPANY, DONGWON INDUSTRIES, DID NOT SELL PACKAGED TUNA TO  
23 SYSCO OR TO THE VENDORS WHO SOLD TO SYSCO OR U. S. FOODS, BUT  
24 YOU DIDN'T -- YOU FINALLY HEARD DR. WILLIAMS ADMIT, WHEN  
25 CONFRONTED ON CROSS-EXAMINATION BY MR. GALLO, HE FINALLY

1 ADMITTED THAT, DR. WILLIAMS FINALLY ADMITTED THAT HE DID NO  
2 RESEARCH INTO DONGWON INDUSTRIES, NO RESEARCH INTO THE PRODUCTS  
3 THAT DONGWON INDUSTRIES SELLS OR THE CUSTOMERS THAT DONGWON  
4 INDUSTRIES SELLS TO, AND THAT'S BECAUSE DONGWON INDUSTRIES DOES  
5 NOT SELL PACKAGED TUNA IN FOOD-SERVICE SIZE OR ANY SIZE. THIS  
6 WAS A, THIS WAS AN ASSERTION THAT DR. WILLIAMS MADE UP.

7 NOW, WE ALSO HEARD AT THE END OF DR. WILLIAMS'  
8 TESTIMONY THAT YOUR HONOR CANNOT CONSIDER 75 PERCENT OF THE  
9 MARKET BECAUSE OF THESE SAME PROBLEMS WITH NON-DEFENDANT  
10 SUPPLY. THAT'S ASTOUNDING TO ME, YOUR HONOR. THAT'S WHAT  
11 PLAINTIFFS ARE SUPPOSED TO BE TESTING AGAINST, AND THIS NOTION  
12 THAT THE COURT AND, OR A RESPONSIBLE ECONOMIST WOULDN'T  
13 CONSIDER THOSE NON-DEFENDANT SUPPLIES, THAT THAT'S ASSUMING  
14 AWAY THE QUESTION HERE.

15 FINALLY, WITH RESPECT TO NON-DEFENDANT SUPPLY, YOU  
16 HEARD MR. CUNEO ASK IF DR. HAIDER HAD MENTIONED TUG IN HER  
17 REPLY REPORT. AGAIN, THIS SEEMS TO BE AN IMPLICATION THAT DR.  
18 HAIDER HAD NOT MET HER BURDEN OF PROOF ON THIS ISSUE. OF  
19 COURSE, IT'S NOT HER BURDEN TO MENTION TUG. IT'S NOT HER  
20 BURDEN TO PROVE ANYTHING ABOUT TUG. BUT MORE IMPORTANTLY, AND  
21 MR. CUNEO AND DR. WILLIAMS SHOULD REALIZE THIS, DR. HAIDER HAD  
22 NO OPPORTUNITY TO EVEN MENTION TUG IN HER REPLY REPORT BECAUSE,  
23 OF COURSE, DR. WILLIAMS DIDN'T MENTION THE UMBRELLA EFFECT  
24 UNTIL HIS REBUTTAL REPORT THAT CAME IN AFTER DR. HAIDER'S REPLY  
25 REPORT.

1 SO I WILL WRAP UP NOW. I KNOW I'VE TAKEN A LITTLE  
2 EXTRA TIME, AND I'M SORRY ABOUT THAT.

3 AT THE END OF YESTERDAY'S HEARING, I HEARD YOUR HONOR  
4 SAY SOMETHING ABOUT HOW WE HAVE A RESPECTFUL DISAGREEMENT AMONG  
5 EXPERTS, AND YOUR HONOR WAS EXACTLY RIGHT IN WHAT YOU SAID  
6 RIGHT AFTER THAT, WHICH IS THAT IT'S THE COURT'S ROLE TO  
7 DECIDE, IT'S THE COURT'S ROLE TO DECIDE IF PLAINTIFFS' MODELS  
8 ARE CAPABLE OF PROVING CLASS-WIDE IMPACT. AND IF THIS COURT  
9 GENUINELY CAN'T DECIDE BETWEEN THE EXPERTS, WE HAVE TO REMEMBER  
10 THAT THE BURDEN OF PROOF IS ON THE PLAINTIFFS. IF IT'S A TIE,  
11 THE PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THEY HAVEN'T  
12 PROVEN THAT THEY CAN PROVE COMMON IMPACT BY A PREPONDERANCE OF  
13 THE EVIDENCE.

14 NOW, YOUR HONOR, IT'S OUR POSITION THAT PLAINTIFFS HAVE  
15 NOT SATISFIED THE DEMANDING REQUIREMENTS OF RULE 23. YOU HEARD  
16 FROM DPP'S THAT THEY SUSTAINED AN AVERAGE 10.28-PERCENT  
17 OVERCHARGE ACROSS THE ENTIRE CLASS. THE DAPS ARE IN YOUR COURT  
18 CLAIMING DAMAGES INDIVIDUALLY, AND MANY OF THOSE DAPS HAVE  
19 TESTIFIED THAT THEY DON'T ALWAYS PASS ON THOSE OVERCHARGES.  
20 BUT THEN THE TWO INDIRECT CLASSES ARE HERE CLAIMING THAT  
21 OVERCHARGES WERE UNIVERSALLY PASSED THROUGH 100 PERCENT, ACROSS  
22 THE BOARD, DOWN EVERY LENGTH OF THE DISTRIBUTION CHAIN, DOWN TO  
23 THEM AS CONSUMERS AND COMMERCIAL FOOD PROCESSORS. YOUR HONOR,  
24 THOSE THINGS CAN'T ALL SIMULTANEOUSLY BE CORRECT. NO CLASS HAS  
25 COME FORWARD WITH A METHODOLOGY CAPABLE OF PROVING COMMON

1 IMPACT TO ALL OR NEARLY ALL OF THE CLASS, ALL OF THEIR CLASS.

2 AND WITH THAT, YOUR HONOR, I WILL CONCLUDE BY THANKING  
3 YOU ALSO FOR THE TIME AND PATIENCE THAT YOU'VE SHOWN TO US OVER  
4 THE LAST THREE DAYS.

5 THE COURT: YOU'RE WELCOME, MISS LEE. THANK YOU VERY  
6 MUCH. I APPRECIATE YOUR COMMENTS.

7 WHO'S GOING FIRST?

8 MS. MANIFOLD: YOUR HONOR, WE DECIDED THE ORDER WILL BE  
9 MR. CUNEO, FOLLOWED BY MYSELF, AND THEN BONNY SWEENEY.

10 THE COURT: VERY WELL.

11 MR. CUNEO, YOU'RE UP, SIR.

12 MR. CUNEO: THANK YOU. BRIEFLY.

13 I WANTED TO SAY THAT THE ISSUE BEFORE THE COURT HERE IS  
14 A NARROW ONE.

15 THE COURT: PULL THE MIKES UP.

16 MR. CUNEO: YES, MA'AM.

17 IT FOCUSES ON JUST ONE ASPECT -- ADMITTEDLY, IT'S AN  
18 IMPORTANT ONE -- ONE ELEMENT OF CLASS CERTIFICATION,  
19 PREDOMINANCE. IT'S NOT ALL PREDOMINANCE. IT'S JUST ONE  
20 PREDOMINANCE. ALMOST ALL THE ELEMENTS, OTHER ELEMENTS OF CLASS  
21 CERTIFICATION ARE CONCEDED ONE WAY OR ANOTHER, AND THOSE THAT  
22 ARE AT ISSUE ARE DISCUSSED IN OUR BRIEFS, AND WITH THE  
23 EXCEPTION OF SOME THINGS WE SAID TODAY, I HAVE NO INTENT OF  
24 GOING BACK TO THOSE OR READING THOSE TO THE COURT.

25 NOW, OUR CLASS IS ABOUT AS CABINED AN INDIRECT

1 PURCHASER CASE AS CAN BE IMAGINED. IT INVOLVED A SINGLE SET OF  
2 PRODUCTS THAT MOVES THROUGH SIX DISTRIBUTORS TO A LIMITED  
3 NUMBER OF MOSTLY IDENTIFIED CLASS MEMBERS. THE PRODUCT DOESN'T  
4 CHANGE FORM. IT'S A STABLE PRODUCT. PEOPLE EAT IT. IT'S  
5 IMPORTANT. IT'S AN INGREDIENT -- IT'S NOT AN INGREDIENT,  
6 EXCEPT IN RECIPES. IT'S NOT A COMPONENT. IT DOESN'T GO INTO  
7 SOMETHING LARGER. IT'S JUST PLAIN OLD TUNA FISH, AND THIS IS  
8 JUST PLAIN OLD PRICE-FIXING. AT STAKE, AS YOU HEARD DR.  
9 WILLIAMS TESTIFY, IS SOMETHING OVER A THOUSAND DOLLARS ON  
10 AVERAGE, AS BEST WE CAN ESTIMATE, TO THE COMMERCIAL FOOD  
11 PREPARERS.

12 NOW, LET'S TALK ABOUT BURDEN FOR ONE SECOND, AND THAT  
13 IS THAT THIS COURT IS NOT ALONE IN FACING THESE VERY DIFFICULT  
14 QUESTIONS, AND THERE'S A RICH BODY OF JURISPRUDENCE BY  
15 COLLEAGUES OF YOURS TO THE NORTH THAT DEAL WITH MANY OF THESE  
16 ISSUES: RAMEN, CAPACITORS, LIDODERM, QUALCOMM, AND FROM THE  
17 SUPREME COURT OF THE STATE, CLAYWORTH. ALL THOSE CASES, ONE  
18 WAY OR ANOTHER, SUPPORT OUR POSITION.

19 NOW, WE HAVE PUT FORWARD A MODEL THAT'S ROBUST AND  
20 ADEQUATE TO SHOW COMMON IMPACT AND DAMAGES. JUDGE ORRICK, IF I  
21 CAN FIND IT, HAS STATED IN THE RAMEN DECISION A LOT OF  
22 SIMILARITIES. IT COMES IN A PACKAGE. YOU EAT IT. IT GOES  
23 THROUGH A DISTRIBUTION CHAIN, AND INDIRECT CLASS IS CERTIFIED  
24 IN THAT CASE. HE WROTE, THE DEFENDANTS RAISE REASONABLE  
25 CRITICISM OF PLAINTIFFS' EXPERT'S OPINIONS, BUT IT'S NOT MY

1 JOB, MEANING JUDGE ORRICK'S JOB, TO CHOOSE WHICH SIDE'S EXPERT  
2 APPEARS STRONGER, AT LEAST AT THIS STAGE. IT'S THAT I NEED TO  
3 DETERMINE THAT THE EXPERT'S METHODOLOGIES AND OPINIONS ARE  
4 SUFFICIENTLY RELIABLE TO SUPPORT CERTIFICATION OF THE CLASS BY  
5 A PREPONDERANCE OF THE EVIDENCE AND THE EXPERT'S OPINIONS ARE  
6 ADMISSIBLE.

7 NOW, ONE THING WE DO NOT HAVE IN THIS CASE, AND I'M  
8 GOING TO CLOSE BY SAYING THIS, IS DAUBERT MOTIONS. IN OTHER  
9 WORDS, WE LOOKED AT THE DEFENDANTS' REPORT AND DECIDED WE  
10 WOULDN'T WASTE THE COURT'S TIME IN FILING ONE. THE BASIC  
11 CREDIBILITY OF THE EXPERTS IS ESSENTIALLY CONCEDED. THEIR  
12 METHODOLOGIES ARE ALL THERE. THIS IS JUST A QUESTION, IN MY  
13 OPINION, OF COMPETING EXPERTS. IF THE COURT FINDS THAT WE  
14 PRESENTED A CREDIBLE EXPERT CASE, THAT JUDGE ORRICK'S  
15 EXPRESSION IN RAMEN COUNTS FOR CERTIFICATION OF THE CLASS.  
16 THEY RAISE A COUPLE OF PROBLEMS THAT THEY SEE WITH DOT. THOSE  
17 ARE ALL THINGS THAT ARE RED HERRINGS. BUT IF THE COURT NEEDS  
18 US TO FIX IT UP, WE CAN FIND A WAY OF DOING THAT.

19 THANK YOU VERY MUCH, YOUR HONOR.

20 THE COURT: OKAY. THANK YOU.

21 MS. MANIFOLD: GOOD AFTERNOON, YOUR HONOR. BETSY  
22 MANIFOLD, WOLF HALDENSTEIN, ON BEHALF OF THE END-PAYER  
23 PLAINTIFFS.

24 FIRST OF ALL, THANK YOU, YOUR HONOR. WE'VE ALL  
25 PARTICIPATED IN THIS MARATHON TOGETHER. I APPRECIATE THE COURT

1 GOING THE 26TH MILE WITH US.

2 YESTERDAY, WE HEARD TESTIMONY THAT COMPLETED THE RECORD  
3 FOR THE END-PAYER PLAINTIFFS' MOTION FOR CLASS CERT. PROFESSOR  
4 SUNDING TESTIFIED FOR QUITE A LONG TIME. HE SUPPLEMENTED HIS  
5 REPORTS BY EXPLAINING HIS QUANTITATIVE WORK IN SOME DETAIL, AND  
6 I ALSO -- I FORGOT MY (PAUSE) -- I'M NOT USED TO ELECTRONICS.  
7 AND DR. SUNDING SUPPLEMENTED HIS REPORTS AND EXPLAINED HIS  
8 QUANTITATIVE WORK.

9 I CAN'T PRETEND TO BE AS ARTICULATE AS PROFESSOR  
10 SUNDING WAS, BUT I'M GOING TO TRY AND SUMMARIZE. THE WEIGHT TO  
11 BE ACCORDED TO THE EXPERT'S OPINIONS AND THEIR CREDIBILITY DO  
12 PLAY INTO THE COURT'S EVALUATION, AND I WAS ACTUALLY GOING TO  
13 USE THE SAME EXACT RAMEN QUOTE THAT MY COLLEAGUE, JOHN CUNEO,  
14 DID, SO JUST ASSUME THAT I READ THE QUOTE. IT REALLY IS NOT  
15 THE COURT'S DECISION TO DECIDE WHO APPEARS THE STRONGEST. IT'S  
16 REALLY JUST TO LOOK AT METHODOLOGIES AND OPINIONS. SO THAT  
17 ALREADY SAVES ME 30 SECONDS.

18 AND I THINK THE DIFFERENCES BETWEEN THE TWO EXPERTS  
19 WERE VERY STRIKING. YOU HAD PROFESSOR SUNDING, WHO WAS FIRST  
20 AND FOREMOST AN ACADEMIC. HE'S THE CHAIR OF THE ECONOMICS  
21 DEPARTMENT AT A VERY FINE ACADEMIC INSTITUTION, A HUNDRED  
22 PUBLISHED ARTICLES IN PEER-REVIEWED JOURNALS, SERVES AS A  
23 GOVERNMENT ECONOMIC ADVISER, AND HE'S TESTIFIED IN AND BEFORE  
24 THE HIGHEST COURT IN THIS COUNTRY. DR. HAIDER DOES NOT HAVE  
25 THAT KIND OF ACADEMIC PUBLISHING OR BACKGROUND. HER EMPLOYER



1 FOCUSES SOLELY ON DEFENDING CLASS ACTIONS.

2 HER SLICING-AND-DICING SUBREGRESSION METHODOLOGY IS  
3 REALLY JUST SIMPLY DIRECTED AT TRYING TO DEFEAT CLASS ACTIONS.  
4 IT'S NOT BASED ON A SOUND ANALYSIS OF THE EVIDENCE IN THIS  
5 CASE. INSTEAD, DR. HAIDER FOUND IDIOSYNCRASIES IN THE BIG POOL  
6 OF DATA AND THEN DECLARED VICTORY. IT'S COUNTERINTUITIVE IN  
7 HER ANALYSIS, AND HER ANALYSIS IGNORED THE REAL WORLD. WHAT  
8 SHE DID WAS JUST TO DO A STATISTICAL EXERCISE THAT WAS REALLY  
9 JUST DESIGNED TO CONFUSE AND DEFEAT CLASS CERTIFICATION.

10 AND, IN FACT, HER MODELING TECHNOLOGY DESIGN WAS  
11 RECENTLY REJECTED IN CAPACITORS, AND I RECOMMEND THAT CASE TO  
12 THE COURT. IT'S NOT IN OUR PAPERS BECAUSE IT'S VERY RECENT.  
13 IT IS -- I WANTED TO GIVE THE CITE TO THE COURT. IT'S 2018  
14 WESTLAW 5980139, AND IN THAT CASE EXACTLY WHAT HAPPENED. THEY  
15 DID THE SAME TYPE OF SLICE-AND-DICE ANALYSIS, AND IT WAS  
16 REJECTED.

17 AND THE STANDARD THERE ALSO WAS IN TERMS OF LOOKING AT  
18 COMCAST AND IN LOOKING AT WAL-MART. THE CLAIM OF CONSPIRACY TO  
19 FIX PRICES INHERENTLY LEADS ITSELF TO A FINDING OF COMMONALITY  
20 AND PREDOMINANCE EVEN WHEN THE MARKET INVOLVES DIFFERENT  
21 PRODUCTS AND DIFFERENT PRICES. SO IT NOT ONLY LOOKS AND  
22 EXAMINES THE SAME TYPES OF OPINIONS AND METHODOLOGIES THAT IS  
23 AT ISSUE HERE AND DECIDES THAT THE METHODOLOGY USED BY DR.  
24 SUNDING IS SUFFICIENT, BUT IT ALSO HAS SOME GREAT STANDARDS IN  
25 IT, AND I DON'T WANT TO WASTE THE TIME READING THE CASE TO THE

1 COURT, BECAUSE I KNOW THAT THE COURT WILL LOOK AT IT CAREFULLY.

2 AND WE TALKED A LOT ABOUT THE CRIMINAL PLEAS, AND  
3 THAT'S REALLY UNDISPUTED EVIDENCE THAT THE COURT SHOULD  
4 CONSIDER IN EVALUATING WHETHER THERE'S COMMON PROOF OF IMPACT  
5 AND DAMAGES.

6 A LOT WAS MADE OF THE MOTION FOR CLASS CERTIFICATION  
7 THAT WE NARROWED THE CLASS PERIOD. IT'S REALLY ODD TO ME THAT  
8 THE DEFENDANTS ARE COMPLAINING THAT WE NARROWED THE CLASS  
9 PERIOD, BUT THEY DO. AND ALSO IN THAT EARLIER 2002 AND 2008  
10 PERIOD, THE DEFENDANTS HAVE ADAMANTLY, AS THE COURT KNOWS, AND  
11 REPEATEDLY DENIED ANY COLLUSIVE BEHAVIOR PRIOR TO 2011. SO THE  
12 CLASS PERIOD THAT'S IN THE CURRENT OPERATIVE COMPLAINT IS BASED  
13 ON THE FIRST TIME THAT BUMBLE BEE ADMITTED COLLUSIVE CONDUCT IN  
14 ITS PLEA AGREEMENT. IT ENDS WHEN THE DOJ ANNOUNCED THE  
15 INVESTIGATION. IN THOSE GUILTY PLEAS BY THE DEFENDANTS, THEY  
16 DIDN'T LIMIT THE CONSPIRACY TO ANY MARKET STATEMENTS --  
17 SOMETIMES IT DOES HAPPEN IN THAT CASE, BUT NOT HERE -- TO ANY  
18 GROUP OR ANY WHOLESALE CUSTOMERS, NOR IS THERE ANYTHING IN THE  
19 TESTIMONY OR DOCUMENTARY EVIDENCE THAT LIMITS THE SCOPE OF THE  
20 MARKET HERE.

21 SO PROFESSOR SUNDING, IN GREAT DETAIL IN BOTH OF HIS  
22 REPORTS AND THE TESTIMONY YESTERDAY, TESTIFIED ABOUT THE  
23 OVERCHARGE FOR EACH OF THE THREE DEFENDANTS IN THE TESTS THAT  
24 HE DID. NOW, THE DEFENDANTS MAKE A HUGE ATTACK ON THE  
25 SENSITIVITY TESTING THAT HE DID. DR. SUNDING PRESENTED A MODEL

1 THAT PROVIDED A WAY TO MEASURE CLASS-WIDE DAMAGES, AND THEN HE  
2 TESTED THAT MODEL. BECAUSE HE'S AN ACADEMIC, BECAUSE HE'S A  
3 THOROUGH ECONOMIST, HE DID A SERIES OF SENSITIVITY TESTS. IT  
4 DOESN'T DEFEAT THE FACT THAT HE TESTIFIED THAT HIS COMMON MODEL  
5 STILL HOLDS TO SHOW CLASS-WIDE DAMAGES. IT JUST SHOWS THAT HE  
6 WAS THOROUGH AND DID A LOT OF TESTING.

7 AND, IN FACT, THE TESTING -- HE EVEN LOOKED AT THE  
8 TESTING THAT DR. HAIDER DID, WHICH MADE NO SENSE, FIRST, IN  
9 REAL-WORLD IMPACT, BECAUSE DR. HAIDER CONCLUDED FOR A VERY  
10 LARGE RETAILER THAT A CARTEL WAS UNSUCCESSFUL AND SUFFERED NO  
11 DAMAGE FROM PRICE-FIXING, WHICH IN THE REAL WORLD OF A  
12 PRICE-FIXING CARTEL MAKES NO SENSE WHATSOEVER. SO BEING THE  
13 EXCELLENT ACADEMIC AND EXPERT THAT DR. SUNDING IS, HE LOOKED  
14 AND ANALYZED THE DATA THAT DR. HAIDER USED AND DISCOVERED SOME  
15 PUZZLING RESULTS, AND HE WENT BEHIND AND RE-RAN AND DISCOVERED  
16 THAT THE DATA HAD BEEN MISUSED IN THE SENSE OF THERE WAS A  
17 CODING CHANGE WITHIN ONE COMPANY AND THAT THAT COMPANY, AND  
18 THAT ONE OF THE GROCERIES HAD SWITCHED FROM, LIKE, FIVE-OUNCE  
19 CANS TO SEVEN-OUNCE CANS. THESE WERE NOT EXTRANEIOUS FACTORS  
20 THAT HE CHANGED OR HE DID TO ALTER THE MODEL. IT WAS TO FIX  
21 THE MODEL SO THAT THE MODEL WOULD RUN CORRECTLY.

22 AND THE DEFENDANTS POUNCE ON THAT AS PROOF OF THIS THAT  
23 SHOWS THAT THEY ARE UNRELIABLE, NOT SOLID, NOT STABLE, NOT  
24 ROBUST. AND AGAIN I AGREE WE SHOULD LOOK AT THE TESTIMONY THAT  
25 MISS LEE CITED, WHICH IS ON PAGES 92 AND 93 OF THE TRANSCRIPT,

1 WHERE THEY, YOU KNOW, POUNCE ON THE FACT OF INDIVIDUALIZED  
2 DAMAGES, AND HE EXPLAINS THERE, YES, BECAUSE -- AND I'M READING  
3 FROM PAGE 92 -- BECAUSE THOSE TWO CHANGES, AS WELL AS THE  
4 CUSTOMER TYPE, THOSE OCCURRED DURING THE CARTEL PERIOD, SO THAT  
5 THERE WAS MORE THAN JUST ONE THING THAT WAS CHANGING, AND WHAT  
6 DR. HAIDER WAS UNCOVERING WAS A RESULT OF HER NEGATIVE  
7 COEFFICIENT. THAT HAD NOTHING TO DO WITH THE CARTEL. THAT WAS  
8 A RESULT THAT HAD TO DO WITH THE FACT THAT ONE COMPANY CHANGED  
9 ITS CATEGORIZATION SCHEME AND ANOTHER COMPANY STARTED SELLING  
10 SEVEN-OUNCE TUNA CANS. THAT HAD NOTHING TO DO WITH THE  
11 VIABILITY OF A ROBUST, OR DEPENDABILITY OF THIS MODEL. THAT'S  
12 JUST SIMPLY AN ISSUE OF FACT IN HOW TO MAKE THE MODEL RUN  
13 EFFICIENTLY, AND DR. HAIDER TESTIFIED IT'S THE SAME KIND OF *EX*  
14 *POST FACTO* DATA CLEANING THAT'S BEEN DONE TO REALLY UNDERSTAND  
15 WHAT YOU'VE GOT AND TO UNTANGLE THE FACTORS THAT DON'T HAVE  
16 ANYTHING TO DO WITH THE CARTEL.

17 SO THE COURT'S BEEN LISTENING TO ECONOMISTS ARGUE ABOUT  
18 WHETHER AND TO WHAT EXTENT STATISTICAL EVIDENCE PROVIDES  
19 SUPPORT FOR TESTIMONY, DOCUMENTS, AND FACTUAL INFERENCES THAT  
20 CAN BE DRAWN. THIS REALLY GOES NOT TO METHOD, BUT TO MERITS,  
21 AND THESE ARE THE TYPES OF DISCUSSIONS, THEY'RE GOING TO OCCUR  
22 IN A JURY TRIAL, THAT IT COULD OCCUR IN A SUMMARY JUDGMENT, BUT  
23 THEY'RE NOT FOR A MOTION FOR CLASS CERTIFICATION.

24 PROFESSOR SUNDING AND DR. MANGUM TESTIFIED THAT THE  
25 OVERCHARGES WERE FELT THROUGHOUT THE MARKET BY PERFORMING THE

1 SENSITIVITY TESTS THAT THE DEFENDANTS MAKE SO MUCH OF. THESE  
2 TESTS WERE INCLUDED TO INTERPRET THE BASIS OF CUSTOMER TYPE,  
3 PRODUCT TYPE, AND IN RESPONSE TO DEFENDANTS' EXPERTS, AGAIN,  
4 THEY DEVELOPED A RELIABLE, ROBUST COMMON METHOD, BUT IN  
5 RESPONSE TO THE DEFENDANTS' EXPERTS, THEY LOOKED AT CUSTOMERS  
6 THAT CONSTITUTE OVER 60 PERCENT OF THE MARKET. THIS IS NOT A  
7 FLAW IN THE MODEL. THIS JUST SHOWS HOW ROBUST AND RELIABLE THE  
8 MODEL ACTUALLY IS.

9 SO, IN LOOKING AT THESE TYPES OF CASES, I KNOW MY  
10 COLLEAGUE, MR. CUNEO, ALSO GAVE YOU SOME CASES TO LOOK AT.  
11 THESE ARE ALSO CITED IN OUR PAPERS: CRT, QUALCOMM, AND THE  
12 DISPOSABLE LENS CASE.

13 MISS LEE'S ARGUMENT ON THIS ISSUE IS A BIT MISLEADING,  
14 I THINK, BECAUSE DR. HAIDER IS THE ONE THAT FELL INTO THE DATA  
15 ERRORS. IT WAS NOT A PROBLEM WITH THE METHOD. IT WAS A  
16 PROBLEM WITH THE TESTING, AND THAT'S A BIG DISTINCTION TO MAKE.  
17 AND DR. HAIDER'S ARGUMENT THAT YOU MUST INDIVIDUALLY EXAMINE  
18 EACH AND EVERY DIRECT PURCHASER ON ITS OWN TO DECIDE WHETHER A  
19 MARKET-WIDE PRICE INFLATION AFFECTED THEM DOESN'T MAKE ANY  
20 SENSE AT ALL. AS DR. MANGUM SAYS, A RISING TIDE FLOATS ALL  
21 BOATS. SO WHEN THERE'S PRICE-FIXING IN THE MARKET, THINGS GO  
22 UP AND DOWN. THERE MAY NOT BE A CONSISTENT HIGH OR LOW PRICE,  
23 BUT THE DIFFERENCE BETWEEN THE TWO RISES AND FALLS WITH THE  
24 PRICE-FIXING. TO THINK OTHERWISE, AND ESPECIALLY IN A CARTEL  
25 WHERE THE DEFENDANTS HAVE ALREADY ADMITTED PRICES, DOESN'T MAKE

1 ANY SENSE AT ALL.

2 IN LOOKING AT -- LET'S SEE. OH. THIS IS ONE OF THE  
3 CONCLUSIONS THAT WAS REACHED IN THE CAPACITORS CASE.  
4 PLAINTIFFS' EXPERTS DID NOT CALCULATE SEPARATE OVERCHARGE CASES  
5 FOR THE CLASS MEMBERS ON AN INDIVIDUAL BASIS. THERE, JUDGE  
6 DONATO STATED, EVEN IF THESE CRITICISMS WERE ACCEPTED FOR THE  
7 SAKE OF DISCUSSION, THEY DON'T WARRANT DENIAL OF CLASS MOTION.  
8 THE COURT CONCLUDED, QUOTE, THE DEFENDANTS DEMAND TOO MUCH.  
9 AND THAT'S REALLY -- IF THERE'S ANY SORT OF WEIGHING, AS MISS  
10 LEE SUGGESTS, THEY'RE DEMANDING TOO MUCH. THESE ARE MERIT  
11 QUESTIONS, NOT METHODS.

12 I ALSO TOLD THE COURT YESTERDAY WE'RE GOING TO GET INTO  
13 THE WEEDS A LITTLE BIT. WE DID GET IN THERE. THE DEFENDANTS  
14 PROVIDED ALL SORTS OF IDIOSYNCRATIC TESTIMONY FROM THE RETAILER  
15 SAYING THEY NEGOTIATED OFF A NATIONAL PRICE LIST. THAT'S  
16 NEITHER SURPRISING NOR FATAL IN A COMMERCIAL MARKET. TO THE  
17 EXTENT THERE WERE NEGOTIATIONS, EVERY RETAILER, WHETHER BIG OR  
18 SMALL, CONFIRMED THAT ALL THE NEGOTIATIONS WERE STARTED OFF THE  
19 NATIONAL PRICE LIST. AND TO SEE FOR YOURSELF, I CAN RECOMMEND  
20 EXHIBITS 17 AND 28.

21 MANY OF THE COURTS, INCLUDING COURTS IN THIS CIRCUIT,  
22 HAVE CERTIFIED INDIRECT PURCHASER ANTITRUST ACTIONS EVEN WHEN  
23 THERE ARE NEGOTIATIONS OF THESE TYPES. JUDGE ILLSTON, AND I'M  
24 QUOTING FROM THE LCD CASE, SAID, EVEN IF THERE IS CONSIDERABLE  
25 INDIVIDUAL VARIETY IN PRICING BECAUSE OF INDIVIDUAL PRICE

1 NEGOTIATIONS, PLAINTIFFS MAY SUCCEED IN PROVING CLASS-WIDE  
2 IMPACT BY SHOWING THAT THE MINIMUM BASELINE FOR BEGINNING  
3 NEGOTIATIONS FOR A RANGE OF PRICES WHICH RESULTED FROM  
4 NEGOTIATION WAS ARTIFICIALLY INFLATED BY COLLUSIVE ACTIONS OF  
5 THE DEFENDANTS.

6 YOUR HONOR, THIS IS EXACTLY WHAT HAPPENED IN THIS  
7 MARKET. EVEN THE 800-POUND GORILLA, WHICH WE'RE NOT ALLOWED TO  
8 NAME, SAYS THERE'S A NATIONAL PRICE LIST, AND I'M UNDERSTANDING  
9 THAT THAT'S THE STARTING OF THE BASIS POINT THAT THEY  
10 NEGOTIATED FROM. SO IT'S REALLY NOT THE COURT'S DECISION TO  
11 DECIDE WHAT THE ULTIMATE EFFECT OF EACH VARIABLE IS GOING TO  
12 BE. RATHER, THE TASK IS DETERMINED IF THE CONCEPTS AND THE  
13 DESIGN OF THE MODEL ARE SOLID.

14 AND I THINK, AS DR. SUNDING TESTIFIED SO ELOQUENTLY  
15 YESTERDAY, THE MODEL AND THE CONCEPT THAT HE DESIGNED IS SOUND  
16 AND IS ROBUST, AND THE EXTENT OF THE SENSITIVITY TESTING THAT  
17 HE DID REALLY SHOWS THAT. HE TESTED MORE DATA, MORE PARTY  
18 INFORMATION, MORE THINGS THAN I THINK I'VE SEEN IN ANY CASE,  
19 AND HAS LIKELY DONE MORE THAN ANY OF THE OTHER CASES THAT YOU  
20 SEE.

21 DR. SUNDING ALSO STUDIED PASS-THROUGH. HE PERFORMED  
22 EMPIRICAL STUDIES, AGAIN WHICH EXCEEDED EXPECTATIONS THAN ANY  
23 OTHER CASE THAT WE'VE HAD. HE DID NINE STUDIES OF PASS-THROUGH  
24 AND INCLUDED STATISTICALLY CONSTRUED, RELIABLE DATA SETS USED  
25 BY ACADEMICS AND DEFENDANTS ALIKE. IT SHOULD BE NOTED THAT DR.

1 HAIDER DID NOT FIND NO PASS-THROUGH, BECAUSE THAT WOULDN'T HAVE  
2 MADE ANY SENSE AT ALL. SO THE ATTACKS LEVELED AT DR. SUNDING'S  
3 PASS-THROUGH ANALYSIS AMOUNT TO, REALLY, A DIFFERENCE IN  
4 METHODOLOGY, AND AGAIN AT TRIAL THE DEFENDANTS ARE WELCOME TO  
5 CROSS-EXAMINE DR. SUNDING ON THESE ISSUES.

6 DEFENDANTS' RELIANCE ON OPTICAL DISK, GPU, AND FLASH  
7 MEMORY WAS MISPLACED. THESE CASES ARE NOT INSTRUCTIVE.  
8 THEY'RE ON HIGHLY CUSTOMIZED ORDER TO SPECIFICATION BY ORIGINAL  
9 EQUIPMENT MANUFACTURERS, AND SOMETIMES THE CONSPIRACY ITSELF  
10 WAS LIMITED TO A FEW CUSTOMERS. IT'S REALLY NOT VERY SIMILAR  
11 TO THIS CASE AT ALL. THE PRODUCT HERE IS FISH IN A CAN. YOU  
12 KNOW, THERE ARE MORE MOVING PARTS IN A BALLPOINT PEN, FRANKLY.  
13 I MEAN, TUNA IS SOLD AT NATIONAL LIST PRICES. IT'S REDUCED TO  
14 BARGAINING WITHIN A SANDBOX, AND THERE'S LITTLE VARIATION IN  
15 THE CHAIN OF DISTRIBUTION. IT GOES FROM THE DEFENDANTS THROUGH  
16 A DISTRIBUTOR TO A GROCERY STORE AND OUR CONSUMERS BUY IT.  
17 ECONOMICALLY, IT'S A VERY SIMPLE AND INTUITIVE PICTURE.

18 THE DEFENDANTS REALLY CAN'T HOPE TO DEFEAT LIABILITY.  
19 INSTEAD, BECAUSE, AS MISS LEE RECOGNIZED, THEY TOLD THE FEDERAL  
20 COURT THAT THEY DIDN'T INTEND TO WALK AWAY FROM THEIR  
21 RESPONSIBILITIES, THAT THEY INTENDED TO PAY RESTITUTION TO THE  
22 VICTIMS, BUT THEY'VE COME HERE TRYING TO RAISE THE LEVEL OF  
23 CRITICISMS TO CHALLENGE THE METHOD OF CALCULATION IN ORDER TO  
24 DEFEAT THE POSSIBILITY THAT MY CLIENTS CAN RECOVER. I THINK  
25 THAT OUR CONSUMERS ARE ENTITLED TO A COMPETITIVE PRICE, RATHER



1 THAN A PRICE-FIXED, INFLATED PRICE.

2 I RESPECTFULLY ASK THAT THE COURT GRANT OUR MOTION FOR  
3 CLASS CERTIFICATION.

4 AND AGAIN THANK YOU, YOUR HONOR, FOR ALL YOUR HARD  
5 WORK.

6 THE COURT: OKAY. THANK YOU, MISS MANIFOLD. I  
7 APPRECIATE YOUR COMMENTS.

8 MISS SWEENEY.

9 MS. SWEENEY: THANK YOU, YOUR HONOR. BONNY SWEENEY  
10 FROM HAUSFELD FOR THE DIRECT PURCHASER CLASS.

11 SO I'D LIKE TO START WITH A COMMENT SIMILAR TO THE ONE  
12 I MADE ON MONDAY, WHICH IS YOU HAVE TO LOOK AT THE APPROPRIATE  
13 STANDARD. AND MISS LEE CITED THE LEGAL STANDARD, BUT I DON'T  
14 THINK WE ARE IN PRECISE AGREEMENT. THE SUPREME COURT RECENTLY  
15 HELD IN THE AMGEN CASE THAT THE PURPOSE OF THE RULE 23(B)(3)  
16 CERTIFICATION RULING IS NOT TO ADJUDICATE THE CASE; RATHER, IT  
17 IS TO SELECT THE METHOD BEST SUITED TO ADJUDICATION OF THE  
18 CONTROVERSY FAIRLY AND EFFICIENTLY. AND WHAT WE HAVE SEEN OVER  
19 THE LAST THREE DAYS IS MULTIPLE ATTACKS BY THE DEFENDANTS ON  
20 THE METHODOLOGY PUT FORTH BY PLAINTIFFS' EXPERT, DR. MANGUM,  
21 EVEN THOUGH HE HAS CONDUCTED AN EXTRAORDINARILY THOROUGH  
22 ANALYSIS WITH A WIDELY ACCEPTED METHODOLOGY. AND YOUR HONOR IS  
23 SUPPOSED TO GIVE THAT METHODOLOGY A RIGOROUS REVIEW, BUT AS  
24 ANOTHER COURT HELD IN THE NORTHERN DISTRICT IN THE CATHODE RAY  
25 TUBE CASE, CRT, THE COURT CANNOT UNDERTAKE A FULL MERITS

1 ANALYSIS AT THIS POINT AND TO AVOID ENGAGING IN A BATTLE OF THE  
2 EXPERTS.

3 AND MY COLLEAGUES HAVE ALREADY REFERRED TO THE  
4 CAPACITORS CASE, AND WE ALL HIGHLY RECOMMEND THAT CASE. IT'S  
5 SO VERY RECENT AND VERY MUCH ON POINT. DR. JOHNSON WAS THE  
6 DEFENSE EXPERT IN THAT CASE, AND THERE JUDGE DONATO CERTIFIED  
7 THE CLASS, AND HE REJECTED DR. JOHNSON'S INDIVIDUAL,  
8 CUSTOMER-BY-CUSTOMER REGRESSION ANALYSIS, AND HE REJECTED  
9 DEFENDANTS' CRITICISMS OF THE PLAINTIFFS' ANALYSIS. AND JUDGE  
10 DONATO SAID, IN ADDITION, THE PREVAILING VIEW, WHICH THE COURT  
11 AGREES WITH, IS THAT PRICE-FIXING AFFECTS ALL MARKET  
12 PARTICIPANTS, CREATING AN INFERENCE OF CLASS-WIDE IMPACT EVEN  
13 WHEN PRICES ARE INDIVIDUALLY NEGOTIATED. SETTING THE  
14 CERTIFICATION BAR AT THE EXTREME HEIGHT THE DEFENDANTS PROPOSE  
15 WOULD ALMOST CERTAINLY KILL OFF MOST ANTITRUST ACTIONS WELL  
16 BEFORE AN ADJUDICATION OF THE MERITS. AND AS YOUR HONOR SAW,  
17 I'M SURE, IN ALL OF OUR BRIEFS, ANTITRUST CASES ARE A SPECIES  
18 OF CASES THE SUPREME COURT AND MANY OTHER COURTS HAVE HELD ARE  
19 VERY WELL SUITED TO CLASS TREATMENT.

20 NOW, THE PLAINTIFFS ALSO RELY ON MUCH MORE THAN SIMPLY  
21 THE REGRESSION ANALYSIS PERFORMED BY DR. MANGUM, AND THIS IS  
22 VERY IMPORTANT. AS YOUR HONOR KNOWS, WE RELY HEAVILY ON THE  
23 GUILTY PLEAS AND OTHER ADMISSIONS OF GUILT TO SHOW CLASS-WIDE  
24 IMPACT. WE RELY ON THE UNIFORM NATIONAL PRICE LIST. WE RELY  
25 ON THE FACT THAT ALL THREE DEFENDANTS GAVE QUARTERLY GUIDANCE

1 TO THEIR SALES PEOPLE TO LIMIT THE DISCOUNTS AND REBATES THEY  
2 CAN NEGOTIATE, AND WE ALSO HAVE THE EXTENSIVE ECONOMIC ANALYSIS  
3 OF DR. MANGUM OF THE MARKET WHICH SUGGESTS THAT IT'S VERY  
4 DIFFICULT FOR CUSTOMERS IN THAT MARKET TO AVOID THE EFFECTS OF  
5 AN ADMITTED PRICE-FIXING CONSPIRACY. WE ALSO HAVE, IN ADDITION  
6 TO DR. MANGUM'S REGRESSION ANALYSIS, WE HAVE THE SEVERAL  
7 CORRELATION ANALYSES THAT HE PERFORMED WHICH SHOWED THAT PRICES  
8 MOVED TOGETHER ACROSS PRODUCTS, ACROSS CUSTOMER TYPES, ACROSS  
9 DEFENDANTS, ETC.

10 NOW, AS THE COURT SAID IN THE CAPACITORS CASE, THIS IS  
11 IMPORTANT, TO LOOK AT THESE OTHER KINDS OF EVIDENCE. THE COURT  
12 IN THAT CASE DESCRIBED THIS KIND OF EVIDENCE AS PLUS FACTORS  
13 AND DISTINGUISHED THAT CASE FROM THE GPU CASE AND THE O-D-D  
14 CASE, WHICH DEFENDANTS RELY UPON VERY HEAVILY, BECAUSE THAT  
15 KIND OF EVIDENCE, YOUR HONOR, WAS GLARINGLY ABSENT IN THOSE TWO  
16 CASES.

17 NOW, A LOT OF THE CRITICISM OF DR. MANGUM HAS FOCUSED  
18 ON HIS POOLED MODEL WITH A SINGLE OVERCHARGE COEFFICIENT, AND  
19 ALL OF THESE CASES ARE IN OUR BRIEFS, BUT I WOULD JUST LIKE TO  
20 HIGHLIGHT FOR YOUR HONOR THERE ARE NUMEROUS COURTS WITHIN THE  
21 NINTH CIRCUIT THAT HAVE APPROVED JUST SUCH A METHOD, AND MOST  
22 RECENTLY, OF COURSE, IN THE CAPACITORS CASE. ALSO, THE CRT,  
23 CATHODE RAY TUBE, CASE, 2015. THE LIDODERM CASE, NORTHERN  
24 DISTRICT, 2017. THE WORTMAN VS. NEW ZEALAND AIR CASE, 2018.  
25 THAT WAS JUDGE BREYER UP NORTH. THE AFTERMARKET AUTO LIGHTS

1 CASE. I THINK THAT'S 2012, CENTRAL DISTRICT OF CALIFORNIA.

2 NOW, DEFENDANTS HAVE VERY LITTLE TO CITE ON THEIR SIDE.  
3 THEY RELIED HEAVILY ON AN EASTERN DISTRICT OF PENNSYLVANIA  
4 CASE. THIS IS THE PLASTICS ADDITIVES CASE THAT WE TALKED  
5 ABOUT. THEY ALSO CITE A CASE, I THINK, FROM THE WESTERN  
6 DISTRICT OF TENNESSEE. I THINK THEY MAY HAVE REFERRED TO THE  
7 BATTERIES CASE IN THE NORTHERN DISTRICT, BUT IN THAT CASE THE  
8 COURT DECIDED THE CLASS MOTION ON A DIFFERENT GROUND. SO  
9 THERE'S NO SUPPORT IN THE CASE LAW FOR THEIR ARGUMENT THAT YOU  
10 CANNOT EVER RELY UPON A POOLED MODEL WITH A SINGLE OVERCHARGE  
11 COEFFICIENT.

12 THE DEFENDANTS ALSO DISPUTE THE CHARACTERIZATION OF  
13 WHAT DR. JOHNSON DID AS BEING A CUSTOMER-BY-CUSTOMER REGRESSION  
14 ANALYSIS, BUT THE DISTINCTION THAT THEY ARE DRAWING IS A  
15 DISTINCTION WITHOUT A DIFFERENCE. AND JUST TO ILLUSTRATE, DR.  
16 HAIDER PERFORMED JUST THAT KIND OF ANALYSIS, AND THERE'S NO  
17 DISPUTE ABOUT THAT. SHE DID A CUSTOMER-BY-CUSTOMER REGRESSION  
18 ANALYSIS, AND WHAT THAT MEANS IS THAT NOT ONLY WAS THE  
19 OVERCHARGE VARIABLE DIFFERENT FOR EACH CUSTOMER, BUT ALSO ALL  
20 THE COEFFICIENTS. NOW, THAT'S WHAT DR. JOHNSON DID IN THE  
21 CAPACITORS CASE, WHICH MISS MANIFOLD REFERRED TO, AND THAT WAS  
22 REJECTED BY JUDGE DONATO AS A CRITICISM OF THE PLAINTIFFS'  
23 MODEL.

24 NOW, IN OUR CASE, DR. JOHNSON DID PRINCIPALLY THE SAME  
25 THING, BUT HE RAN, USED THE POOLED MODEL. SO HE KEPT, AS HE

1 SAYS, DR. MANGUM'S DATA WITH THE CUSTOMER-SPECIFIC OVERCHARGE  
2 VARIABLES. SO IT KEPT THE -- SO (PAUSE) -- I HAVE TO BACK UP.  
3 SO HE KEPT ALL THAT DATA IN THERE SO THE COEFFICIENTS HAD ALL  
4 THAT DATA, BUT WHEN HE RAN THE OVERCHARGE THROUGH, IT ONLY HAS  
5 THE OBSERVATIONS RELATED TO THAT PARTICULAR CUSTOMER.

6 SO THE PROBLEM WITH DR. HAIDER'S ANALYSIS AND DR.  
7 JOHNSON'S ANALYSIS IS THE SAME ONE. IT'S A PROBLEM OF SAMPLE  
8 SIZE, AND THIS IS A VERY SERIOUS PROBLEM. AND I TALKED ON  
9 MONDAY ABOUT THE PLASTICS ADDITIVES CASE, AND I THINK IT'S  
10 WORTH MENTIONING AGAIN THAT IF DR. JOHNSON HAD DONE WHAT THE  
11 DEFENSE EXPERT DID IN THAT CASE, ALL OF HIS UNINJURED CLASS  
12 MEMBERS, EXCEPT FOR LESS THAN TWO PERCENT, WOULD GO AWAY.

13 AND I WOULD REFER YOUR HONOR TO SLIDES 22 AND 23 FROM  
14 DR. MANGUM. THESE ARE -- HE HAD A TABLE IN HIS REPORT. I  
15 THINK IT'S TABLE 11, WHICH SHOWS THE SAMPLE SIZE FOR ALL THOSE  
16 CUSTOMERS FOR WHOM DR. JOHNSON FOUND EITHER NO RESULT BECAUSE  
17 THERE WAS NO BEFORE DATA, NO BEFORE OBSERVATIONS, OR POSITIVE  
18 BUT INSIGNIFICANT RESULTS, OR NEGATIVE BUT INSIGNIFICANT  
19 RESULTS. AND IF YOU DO WHAT THE DEFENSE EXPERT IN THE  
20 ADDITIVES CASE DID -- AND BY THE WAY, WE DON'T THINK THAT THIS  
21 COURT SHOULD RELY ON THAT CASE, BUT THAT'S THE ONLY CASE THAT  
22 THE DEFENDANTS HAVE TO SUPPORT THEIR THEORY -- THEN YOU END UP  
23 USING DR. JOHNSON'S METHOD WITH 98.5-PERCENT INJURED CLASS  
24 MEMBERS. SO HIS CRITICISM GOES AWAY IF HE HAD DONE IT RIGHT  
25 AND TAKEN ACCOUNT OF SAMPLE SIZE THE WAY THAT THE DEFENSE

1 EXPERT DID IN THE PLASTICS ADDITIVES CASE.

2 ANOTHER PROBLEM WITH THEIR CRITICISM OF THE POOLED  
3 MODEL APPROACH IS THAT THERE IS NO REASON TO BELIEVE THAT ANY  
4 DIRECT PURCHASER WAS SITUATED DIFFERENTLY, AND AGAIN THIS IS  
5 UNLIKE WHAT HAPPENED IN GPU AND O-D-D, AND EVEN POOL PRODUCTS,  
6 A CASE IN WHICH DR. JOHNSON WAS THE EXPERT. AND YOU'VE  
7 LISTENED TO THREE DAYS OF TESTIMONY FROM DEFENSE EXPERTS, AND  
8 THERE HAS BEEN NO TESTIMONY ABOUT ANY KIND OF CUSTOMER TYPE OR  
9 SEGMENT OF THE MARKET OR REGION OF THE UNITED STATES THAT IS  
10 DIFFERENT IN SOME FUNDAMENTAL WAY SUCH THAT THAT CATEGORY OF  
11 CUSTOMERS COULD AVOID THE OVERCHARGE.

12 IN ADDITION, YOUR HONOR, THE DEFENDANTS OFFER UP  
13 SEVERAL OTHER CRITIQUES OF DR. MANGUM'S MODEL. THEY HAVE THIS  
14 FALSE POSITIVES ARGUMENT, AND THERE'S BEEN A LOT OF TESTIMONY,  
15 SO I'LL BE VERY BRIEF. FIRST OF ALL, OF COURSE, HE ATTACKS  
16 THE -- HE SAYS THERE'S FALSE POSITIVES BECAUSE HE FINDS  
17 OVERCHARGES ON NON-DEFENDANT TUNA. OF COURSE, I THINK ALL  
18 THREE OF THE PLAINTIFF EXPERTS HAVE POINTED OUT THAT THERE'S A  
19 LOT OF DEFENDANT TUNA IN THAT SO-CALLED NON-TUNA, NON-DEFENDANT  
20 TUNA. FOR PURPOSES OF THE DIRECT PURCHASER CLASS, THOSE ARE  
21 NOT DIRECT PURCHASES. THEY'RE INTERMEDIATE. SO IT'S NOT  
22 SURPRISING THAT YOU WOULD FIND THE PRICE TO BE HIGHER. AND  
23 THERE'S THE UMBRELLA EFFECT, WHICH HAS BEEN TESTIFIED ABOUT AT  
24 LENGTH OVER THE COURSE OF THE PAST COUPLE DAYS.

25 AND THEN DEFENDANTS' RESPONSE TO DR. MANGUM'S CRITICISM

1 THAT YOU SEE THESE PRICES GOING UP SOONER. I THINK DR. MANGUM  
2 ALSO ANSWERED THAT CRITICISM, BECAUSE ALL THREE OF THE  
3 DEFENDANTS PRE-ANNOUNCED THEIR PRICE INCREASES. SO IT'S NOT  
4 SURPRISING THAT YOU WOULDN'T SEE THE PRICES OF THE  
5 NON-DEFENDANT SUPPLIERS GOING UP BEFORE AS OPPOSED TO AFTER THE  
6 DEFENDANTS' PRICE INCREASES.

7 THE DEFENDANTS ALSO CRITICIZED DR. MANGUM'S COST  
8 VARIABLE. RECALL THAT HE USED, HE CONSTRUCTED AN INDEX OF  
9 COSTS, RELYING ON MARKET DATA, AND WHAT THE DEFENDANTS SAY IS  
10 SOMEWHAT MISLEADING. THEY SAY THAT THEIR EXPERT, DR. JOHNSON,  
11 USED ACTUAL COSTS. WELL, THEY DIDN'T, HE DIDN'T ACTUALLY USE  
12 ACTUAL COST DATA. WHAT HE USED WAS COST DATA, COST AND GOODS  
13 SOLD DATA, ACCOUNTING DATA, AND DR. MANGUM AND I THINK THE  
14 OTHER PLAINTIFF EXPERTS HAVE EXPLAINED WHY YOU CAN'T USE  
15 ACCOUNTING COST DATA IN A REGRESSION AND EXPECT TO GET RELIABLE  
16 RESULTS. THERE ARE ALL SORTS OF COSTS THAT ARE ALLOCATED IN  
17 DIFFERENT WAYS, AND THAT'S WHY YOU GET THESE PECULIAR RESULTS.

18 YOU MAY RECALL DR. MANGUM PUT TOGETHER A SLIDE THAT HAD  
19 THOSE ELLIPTICAL, VERTICAL OVALS WHICH SHOWED THAT PRICES ON  
20 THE SAME DAY, OF THE SAME PRODUCT, THE COSTS WERE ALL OVER THE  
21 PLACE, THAT THAT DOESN'T MAKE SENSE, AND THAT'S BECAUSE THE  
22 COSTS ARE ALLOCATED HOWEVER THE COMPANY CHOOSES TO ALLOCATE  
23 THEM, AND THERE'S A PROBLEM OF ENDOGENATING, WHICH YOUR HONOR  
24 HAS PROBABLY HEARD MORE ABOUT THAN SHE WOULD LIKE TO.

25 THEY ALSO HAVE -- THERE'S BEEN A LOT OF DISCUSSION

1 ABOUT THE BENCHMARK PERIOD AND MUCH CRITICISM OVER WHEN THE  
2 PLAINTIFFS' DAMAGES PERIOD STARTS, WHEN THE BENCHMARK PERIOD  
3 SHOULD END, WHETHER THERE SHOULD BE A COOLING-OFF PERIOD,  
4 WHETHER THE 2008-THROUGH-2010 PERIOD WAS TAINTED. AS MISS  
5 MANIFOLD POINTED OUT, IT'S VERY INTERESTING THAT THE DEFENDANTS  
6 CRITICIZE THE PLAINTIFFS FOR SHORTENING THEIR TESTIMONY. IT'S  
7 EVEN MORE INTERESTING THAT THEY CRITICIZE PLAINTIFFS FOR  
8 AMENDING THEIR COMPLAINT AND THEIR CLASS DEFINITION TO COMPORT  
9 WITH THE EVIDENCE THAT HAS BEEN ADDUCED SO FAR IN THIS CASE.

10 WE HAVE BEEN LITIGATING THESE ISSUES VERY HARD. YOUR  
11 HONOR HAS SAT THROUGH MANY MOTIONS TO DISMISS AND A LOT OF  
12 EVIDENCE, AND WE HAVE TAKEN DOZENS AND DOZENS OF DEPOSITIONS.  
13 AS DR. MANGUM TESTIFIED, THE CLASS PERIOD AND THE OTHER PERIODS  
14 WERE DETERMINED IN AN INTERIM PROCESS WITH DISCUSSIONS WITH  
15 COUNSEL AND ALSO BASED ON HIS OWN ECONOMIC ANALYSIS. BUT  
16 IMPORTANTLY, THESE ISSUES THAT THE BENCHMARK QUESTION, WHETHER  
17 THE COST VARIABLE IS CORRECT, THESE ARE QUESTIONS THAT GO TO  
18 THE WEIGHT OF THE ANALYSIS, NOT TO WHETHER IT SHOULD DEFEAT  
19 PREDOMINANCE, AND THERE'S AN ABUNDANCE OF CASE LAW THAT  
20 SUPPORTS THE NOTION THAT THESE ARE THE KINDS OF QUESTIONS THAT  
21 SHOULD BE RESERVED FOR TRIAL. DEFENDANTS CAN CROSS-EXAMINE OUR  
22 EXPERTS ABOUT THEM.

23 AND I WOULD JUST REFER YOUR HONOR TO THE CAPACITORS  
24 DECISION. THAT'S STAR SIX. VERY SIMILAR KINDS OF CRITICISMS  
25 WERE MADE BY THE DEFENDANTS IN THAT CASE OF THE MODEL, AND



1 JUDGE DONATO SAID THAT GOES TO THE QUALITY OF DATA. THAT  
2 DOESN'T DEFEAT PREDOMINANCE. THE SAME THING IN THE RAMEN CASE,  
3 ALSO NORTHERN DISTRICT. THE MUSHROOM CASE, EASTERN DISTRICT OF  
4 PENNSYLVANIA. THAT WAS A CASE THAT WAS CERTIFIED EVEN THOUGH  
5 DEFENDANTS' EXPERT WAS DR. JOHNSON, AND HE ARGUED AGAINST  
6 CERTIFICATION. THE URETHANE CASE. THAT'S A 10TH CIRCUIT  
7 DECISION. THE KLEEN CASE, SEVENTH CIRCUIT, AND THE BLOOD  
8 REAGENTS CASE, EASTERN DISTRICT OF PENNSYLVANIA, ALSO VERY  
9 RECENT. ALL OF THESE CASES ARE IN OUR BRIEFS, YOUR HONOR.

10 I THINK I'M GOING OVER. I'M GOING TO WRAP UP VERY  
11 SOON, BUT ONE MORE POINT. IN MY OPENING REMARKS ON MONDAY, I  
12 SAID THAT I DIDN'T THINK THAT THE DEFENDANTS CONTESTED  
13 SUPERIORITY. WELL, I WAS APPARENTLY WRONG ABOUT THAT. MISS  
14 LEE ASSURED ME THAT IN FACT THEY DO CONTEST SUPERIORITY, AND  
15 THE REASON THEY DO, THEY SAY, WELL, THERE'S 108 OPT-OUTS. SO I  
16 CAN DO ARITHMETIC, AND ACCORDING TO DR. JOHNSON, THERE ARE 604  
17 DIRECT PURCHASERS AND THERE WERE 108 OPT-OUTS. THAT LEAVES 496  
18 DIRECT PURCHASERS IN THE CLASS, AND ACCORDING TO DR. JOHNSON,  
19 THEY ACCOUNT FOR 36 PERCENT OF THE SALES IN THIS CASE.

20 SO IF I UNDERSTAND DEFENDANTS' ARGUMENT, IT'S THAT,  
21 WELL, THE BIG PURCHASERS ARE TAKEN CARE OF. THEY'RE TAKING  
22 CARE OF THEMSELVES. WHY DO YOU NEED TO CERTIFY A CLASS?  
23 WHICH, TO ME, REALLY TURNS THE WHOLE CERTIFICATION ANALYSIS ON  
24 ITS HEAD. THIS IS A CASE THAT IS BETTER SUITED TO  
25 CERTIFICATION THAN ALMOST ANY OTHER ONE THAT YOU ARE GOING TO

1 FIND.

2 AND THEN I WOULD, ON THAT POINT, I WOULD JUST CITE TO  
3 THE LIDODERM CASE. A SIMILAR ISSUE CAME UP IN THAT CASE, A  
4 VERY SMALL CLASS. I THINK THERE WERE 53 CLASS MEMBERS, AND THE  
5 DEFENDANTS ARGUED THAT CLASS TREATMENT WASN'T SUPERIOR BECAUSE  
6 THREE VERY LARGE CLASS MEMBERS OPTED OUT, TAKING OUT A HUGE  
7 CHUNK OF THE CUSTOMERS. AND THE COURT SAID, NO, THAT INCREASES  
8 THE UTILITY OF THE CLASS PROCEEDING WHEN THE BIG ONES OPT OUT  
9 AND YOU JUST HAVE THE SMALL CLASS MEMBERS THAT MAY NOT HAVE THE  
10 RESOURCES TO LITIGATE A CASE LIKE THIS, WHICH YOUR HONOR CAN  
11 SEE IS ENORMOUSLY INTENSIVE.

12 AND THEN FINALLY, MISS LEE SPOKE ABOUT THE ASACOL CASE,  
13 WHICH IS A RECENT FIRST CIRCUIT DECISION, WHICH SAID YOU CAN'T  
14 CERTIFY A CLASS WITH TEN-PERCENT UNINJURED, AND SHE SAID THAT  
15 WAS A VERY THOUGHTFUL OPINION, AND I AGREE. THAT'S A VERY  
16 LENGTHY OPINION, AND IT'S INTERESTING BECAUSE THE ASACOL CASE  
17 FOLLOWED ON THE HEELS OF ANOTHER FIRST CIRCUIT CASE THAT SAID  
18 YOU CAN'T HAVE A CLASS WITH TEN-PERCENT UNINJURED. THE ASACOL  
19 CASE IS DIFFERENT BECAUSE IN THAT CASE THE COURT SAID YOU CAN'T  
20 TELL WHO'S UNINJURED AND WHO'S INJURED, AND THAT'S AN IMPORTANT  
21 DISTINCTION.

22 AND IT BRINGS TO MIND THE NINTH CIRCUIT DECISION IN  
23 TORRES, WHICH I REFERRED TO ON MONDAY, AND THAT CASE IS CITED  
24 IN OUR BRIEF, AND THAT'S, THAT'S A BINDING DECISION. WE HAVE  
25 TO LEAVE MASSACHUSETTS. WE'VE GOT TO COME BACK TO CALIFORNIA

1 AND LOOK AT THE AUTHORITY IN THIS CIRCUIT. AND THE TORRES  
2 COURT SAID, FIRST OF ALL, YOU DON'T REFUSE TO CERTIFY A CLASS  
3 BECAUSE THERE ARE UNINJURED CLASS MEMBERS IN IT. SOMETIMES YOU  
4 MAY HAVE TO REDEFINE THE CLASS, OR YOU MAY HAVE TO, AT THE  
5 TRIAL-COURT LEVEL, WINNOW OUT UNINJURED CLASS MEMBERS.

6 THIS IS A CASE WHERE IT'S VERY EASY TO SEE. IN DR.  
7 MANGUM'S ANALYSIS, THERE'S ONLY A TEENY PERCENTAGE OF CLASS  
8 MEMBERS WHO WERE UNINJURED, AND IT'S EASY TO IDENTIFY THOSE  
9 CLASS MEMBERS. THERE IS NO PROBLEM ABOUT INDIVIDUAL ISSUES OF  
10 DETERMINING WHO THOSE PEOPLE ARE, WHO THOSE COMPANIES ARE,  
11 DESTROYING PREDOMINANCE.

12 SO I WOULD JUST URGE YOUR HONOR TO LOOK AT THE TORRES  
13 CASE ON THAT POINT, AS WELL AS LIDODERM, WHICH ALSO TALKED  
14 ABOUT THE WHOLE QUESTION OF UNINJURED CLASS MEMBERS. I THINK  
15 THE DEFENDANTS, THEIR THEORY ON UNINJURED CLASS MEMBERS IS  
16 WRONG ON THE FACTS AND IT'S WRONG ON THE LAW.

17 THANK YOU, YOUR HONOR, FOR YOUR PATIENCE.

18 A COUPLE OF HOUSEKEEPING MATTERS. THERE HAVE BEEN A  
19 LOT OF EXHIBITS THAT HAVE BEEN PUT UP THERE ON THE BENCH AND  
20 DELIVERED TO US. IT'S OUR POSITION -- PLAINTIFFS' POSITION IS  
21 THAT THE SLIDES THAT WERE THE LAWYER ARGUMENT SHOULD NOT BE  
22 INTRODUCED INTO EVIDENCE. THOSE ARE DEMONSTRATIVES.

23 THE COURT: I AGREE. I'M ASSUMING EVERYBODY ELSE WOULD  
24 AGREE WITH THAT. DEMONSTRATIVES, I'M KEEPING THEM, BUT THEY  
25 ARE NOT EXHIBITS TO THIS HEARING.

1 MS. MANIFOLD: AND FROM THE POINT OF VIEW OF THE DIRECT  
2 PURCHASER PLAINTIFFS, WE SUBMITTED THE SLIDES OF DR. MANGUM.  
3 WE DO HAVE -- THOSE ARE ALL BASED UPON HIS WORK, BUT WE WOULD  
4 LIKE TO INTRODUCE THOSE SO THAT YOUR HONOR HAS THEM AND CAN  
5 REVIEW THEM, AND IN ADDITION --

6 THE COURT: SO YOU WANT THOSE TO BE ADMITTED AS AN  
7 EXHIBIT.

8 MS. MANIFOLD: YES, YOUR HONOR. AND THEN IN ADDITION  
9 THERE IS, THERE'S A BIT OF TESTIMONY FROM MIKE WHITE WHICH IS  
10 PART OF THE RECORD, WHICH CAME IN THROUGH DR. MANGUM, AND WE  
11 WOULD LIKE YOUR HONOR TO CONSIDER THAT EVIDENCE.

12 MS. LEE: YOUR HONOR, WE HAVE NO PROBLEM WITH THEIR  
13 EXPERT'S SLIDES BEING ADMITTED. WE WOULD JUST WANT OURS TO BE  
14 ADMITTED AS WELL.

15 THE COURT: OKAY. COULD WE HAVE SOMETHING ACROSS THE  
16 BOARD THAT THE EXPERT SLIDES TO THE EXTENT TO WHICH THEY'VE  
17 BEEN PRESENTED TO THE COURT AND OF ASSISTANCE ARE ADMITTED?

18 MS. MANIFOLD: AGREED, YOUR HONOR.

19 THE COURT: MR. CUNEO?

20 MR. CUNEO: AGREED, EXCEPT TOWARD THE END IS WHERE THE  
21 DEFENDANTS OBJECT. I DON'T WANT TO (PAUSE) --

22 THE COURT: I'M SORRY. I'M NOT ABLE TO HEAR YOU, SIR.  
23 ARE YOU AGREEING THAT THE SLIDES OF THE EXPERTS COULD BE  
24 ADMITTED?

25 MR. CUNEO: YES.

1 THE COURT: "EXCEPT." AND THEN YOU STARTED TO SAY  
2 "EXCEPT" SOMETHING.

3 MR. CUNEO: WELL, I SAID THAT THE DEFENDANTS OBJECTED  
4 TO FOUR OF OUR SLIDES AT THE END.

5 THE COURT: OH. EXCEPT FOR THAT.

6 MS. MANIFOLD: AND WE ALSO HAVE A SIMILAR OBJECTION BY  
7 MY COLLEAGUE, MR. STEWART, WITH REGARD TO A COUPLE OF THE  
8 SLIDES THAT YOUR HONOR SHOWED OUR EXPERT TO SEE IF THEY WERE --  
9 WE HAD A MOTION TO STRIKE.

10 THE COURT: OKAY. EXCEPT FOR THOSE, THEY'RE ADMITTED.

11 MR. CUNEO: AND WE'RE AGREEABLE TO NOT HAVING THOSE  
12 ADMITTED.

13 THE COURT: OKAY. VERY WELL.

14 MR. GALLO: AND JUST FOR THE RECORD, THEY'RE THE LAST  
15 FOUR SLIDES IN (PAUSE) --

16 MR. CUNEO: RIGHT.

17 THE COURT: THE LAST FOUR SLIDES OF?

18 MR. CUNEO: DR. WILLIAMS' SLIDE DECK THERE.

19 THE COURT: THE LAST FOUR SLIDES OF DR. WILLIAMS.  
20 OKAY.

21 MS. SWEENEY: YOUR HONOR, THERE HAVE BEEN A LOT OF  
22 BINDERS PUT UP THERE WHERE NONE OF THE EVIDENCE WAS EVER  
23 MENTIONED BY ANY WITNESS. WE ASSUME NONE OF THAT IS PART OF  
24 THE RECORD.

25 THE COURT: I ASSUME THAT, TOO. THERE ARE A LOT OF

1 DOCUMENTS THAT AREN'T PART OF THE RECORD, AND A LOT OF WHAT I  
2 LOOKED AT HERE WERE THINGS SUBMITTED WITH THE MOTIONS. FOR  
3 EXAMPLE, I HAVE MY OWN COPIES OF THE EXPERT REPORTS THAT I HAVE  
4 RELIED ON. THOSE ARE PART OF THE RECORD UNDER SEAL. I, QUITE  
5 HONESTLY, DON'T KNOW WHAT'S IN MOST OF THESE BINDERS, BECAUSE A  
6 LOT OF IT WASN'T REFERRED TO, AND A LOT OF IT WAS EXPERT  
7 REPORTS, I THINK. SO WHAT WASN'T REFERRED TO THAT ISN'T  
8 ALREADY PART OF THE RECORD, EXCEPT FOR THE EXPERT'S SLIDES AND  
9 THE TESTIMONY OF WITNESS WHITE AND THE LAST FOUR PAGES OF DR.  
10 WILLIAMS' SLIDE PRESENTATION, ARE NOT ADMITTED OR PART OF THE  
11 RECORD.

12 IS THAT EVERYBODY'S AGREEMENT AND UNDERSTANDING?

13 MS. SWEENEY: YES, YOUR HONOR.

14 THE COURT: AND SO WE HAVE (PAUSE) --

15 MS. MANIFOLD: YOUR HONOR, CAN I JUST --

16 MR. GALLO: YOUR HONOR, THAT'S FINE.

17 I'M SORRY.

18 MS. MANIFOLD: I'M SORRY. NO, I APOLOGIZE.

19 I JUST WANTED TO ASK FOR A CLARIFICATION. I'M SORRY.  
20 SO YOU ARE SAYING IF IT WAS REFERRED TO IN COURT, IT WOULD BE  
21 CONSIDERED PART OF THE RECORD, AND IF IT WAS NOT REFERENCED OR  
22 PART OF THE MOTIONS, IT WOULD NOT BE PART OF THE RECORD. I  
23 JUST WANTED TO MAKE SURE I UNDERSTOOD, AND I APOLOGIZE IF I AM  
24 MISSTATING THE COURT.

25 MS. LEE: YOUR HONOR, I THINK THERE ARE A FEW INSTANCES

1 WHERE SOME NEW DEPOSITION TESTIMONY FOR DEPOSITIONS THAT WERE  
2 TAKEN AFTER THE CLOSE OF BRIEFING WERE SUBMITTED.

3 THE COURT: I THINK THAT'S TRUE.

4 AND IS THERE ANY OBJECTION TO THOSE?

5 MS. MANIFOLD: THERE IS, YOUR HONOR.

6 THE COURT: OKAY. THERE IS NOT.

7 MS. MANIFOLD: THERE IS.

8 THE COURT: STATE YOUR OBJECTION.

9 MS. MANIFOLD: THAT WE FELT THAT THE ORDER WAS CLEAR  
10 THAT THERE SHOULD BE NO SUPPLEMENTAL DEPOSITION TESTIMONY AFTER  
11 THE CLOSE OF JANUARY 7TH.

12 THE COURT: I DON'T REALLY NEED THE SLIDES FROM  
13 EVERYBODY. PRETTY SOON, I'M JUST GOING TO KEEP EVERYTHING OUT  
14 EXCEPT WHAT CAME TO ME IN ADVANCE.

15 BUT GO AHEAD, MR. GALLO.

16 MR. GALLO: MAY I MAKE A PROPOSAL?

17 THE COURT: CERTAINLY.

18 MR. GALLO: MAYBE WE SHOULD TALK AMONG OURSELVES AND  
19 COMMIT WITHIN 48 HOURS TO GET YOU AN AGREED LIST OF EXHIBITS,  
20 AND MAYBE WE WON'T HAVE ANY DISPUTES AND WE CAN HAVE A CLEAN  
21 RECORD. IT'S NOT FAIR TO THE COURT TO DO THIS.

22 THE COURT: THAT'S FINE.

23 I WANT TO HEAR FROM THIS COUNSEL.

24 COME FORWARD, AND STATE YOUR NAME AND WHO YOU REPRESENT  
25 AGAIN, MA'AM

1 MS. LAVERY: HI. CATRIONA LAVERY OF SUSMAN GODFREY FOR  
2 THE WAL-MART PLAINTIFFS.

3 THE COURT: OKAY. WHAT'S YOUR CONCERN, MA'AM?

4 MS. LAVERY: I JUST WANTED TO MAKE A NOTE THAT THERE  
5 ONE SLIDE, I BELIEVE, DURING DR. HAIDER'S TESTIMONY YESTERDAY  
6 THAT WE PUT UP BRIEFLY AND THEN TOOK DOWN, AND WE WOULD JUST  
7 ASK THAT THAT PARTICULAR SLIDE NOT BE A PART OF THE PUBLIC  
8 RECORD, BUT WE WILL WORK THAT OUT.

9 THE COURT: I THINK IF YOU PARTICIPATE IN THIS LITTLE  
10 GROUP HERE, MA'AM, EVERYTHING WILL BE TAKEN CARE OF.

11 MS. LAVERY: RIGHT.

12 THE COURT: THERE WAS REALLY NO INTENTION TO DO THAT.

13 MS. LAVERY: I JUST WANTED TO MAKE THAT NOTE.

14 THE COURT: OKAY. NO, I APPRECIATE THAT. THANK YOU.

15 MISS MANIFOLD, COME FORWARD.

16 MS. MANIFOLD: JUST FOR YOUR CONVENIENCE, YOUR HONOR,  
17 THE MOTION TO STRIKE THE EXHIBIT WAS ON PAGE 62 OF YESTERDAY'S  
18 AFTERNOON TRANSCRIPT, JUST FOR YOUR RECORD SO IT MIGHT BE  
19 EASIER TO FIND IT.

20 THE COURT: OKAY. THANK YOU.

21 MR. GALLO: SO WE SHOULD ENDEAVOR TO COME TO YOU WITH A  
22 JOINT LIST?

23 THE COURT: THAT WOULD BE GREATLY APPRECIATED. THAT  
24 WAS A GREAT SUGGESTION, MR. GALLO. THANK YOU.

25 I'M GOING TO KEEP EVERYTHING, BUT I'M GOING GO RETURN



1 THIS. I'M ASSUMING THIS GOES BACK TO MR. CUNEO BECAUSE HE HAS  
2 ONE IN FRONT OF HIM.

3 BE CAREFUL, ALEX. THIS IS HEAVY. IT'S HEAVY.

4 ANYTHING ELSE? ANYTHING BY WAY OF HOUSEKEEPING?

5 I'LL EXPECT TO HEAR FROM YOU ON THE EXHIBITS BY  
6 THE BEGINNING OF MONDAY, NO LATER THAN MONDAY. DOES THAT GIVE  
7 YOU ENOUGH TIME?

8 MS. MANIFOLD: THAT'S FINE, YOUR HONOR.

9 THE COURT: SAFE TRAVELS HOME TO ALL OF YOU.

10 THANK YOU.

11 (PROCEEDINGS ADJOURNED AT 4:23 P.M.)

12 -----

13 (END OF TRANSCRIPT)

14

15 I, FRANK J. RANGUS, OFFICIAL COURT REPORTER, DO  
16 HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS A TRUE AND  
17 ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES.

18

19 S/FRANK J. RANGUS

20 FRANK J. RANGUS, OCR

21

22

23

24

25