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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION,)	
et al.,)	
)	
Plaintiffs,)	Case No. 3:24-cv-00347-AN
)	
v.)	
)	
THE KROGER COMPANY and)	September 3, 2024
ALBERTSONS COMPANIES, INC.,)	
)	
Defendants.)	Portland, Oregon
)	

PRELIMINARY INJUNCTION HEARING
DAY 6 - AFTERNOON SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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T. Broderick - D

1 (September 3, 2024)

2 P R O C E E D I N G S

3 (Afternoon session; open court:)

4 THE COURT: You may be seated. And you may
5 continue with your direct examination.

6 DIRECT EXAMINATION (Resumed)

7 BY MR. BRYSON:

8 Q Mr. Broderick, we have been talking a little bit about
9 pricing before the break, correct?

10 A Yes.

11 Q And Albertsons periodically will change prices in its
12 stores in your division, correct?

13 A Yes.

14 Q Prices can go up or down, correct?

15 A Yes.

16 Q Prices go down, that could help Albertsons attract more
17 customers to its stores, correct?

18 A It could.

19 Q And if prices go down, that could help Albertsons
20 increase sales, correct?

21 A That would depend.

22 Q What would that depend on?

23 A It would depend on the frequency of the items that you
24 sold and then the rate that you -- that you dropped the
25 price. So in some examples, if you lowered the price, you

T. Broderick - D

1 may sell the same amount of items or even more items, but
2 your total sales could actually be less because of the
3 lowering the price.

4 Q So in some cases, if you lower prices on specific
5 items, that could decrease the number of units of sales; is
6 that correct?

7 A It could.

8 Q Now, each store in your division employs a certain
9 number of associates to work in the stores, correct?

10 A Yes.

11 Q When Albertsons lowers its prices, does that change the
12 number of employees that work in a particular store?

13 A I've never really looked at it in those terms, so I
14 don't think I could honestly give you an answer if it does.
15 What I could tell you -- that may not answer your
16 question -- is that we have hiring and staffing needs, so we
17 haven't been at a point where we have had more employees
18 than what we actually needed.

19 Q And do you recall any specific time where because
20 Albertsons lowered its prices on any given item, that led to
21 a change in the number of workers in a particular store?

22 A No.

23 Q When Albertsons does lower its prices, does that
24 necessitate reformatting or renovating a store?

25 A No, I don't think that the two are connected.

T. Broderick - D

1 Q Are you familiar with the concept of a margin target?

2 A In what terms? Or maybe an example?

3 Q Do you look at a margin target in the ordinary course
4 of your business at all?

5 A I don't really get too involved in any of the pricing
6 or the margins or the targets from my position.

7 Q So it's fair to say that the margin target is not one
8 of your core responsibilities; is that right?

9 A It is something that I'm not really involved with.

10 Q Okay. Mr. Broderick, you try to earn new customers
11 from your competitors by providing fair prices, hiring great
12 employees, and having fully stocked stores, correct?

13 A Yes. Among other things.

14 Q Outside of competing on price, Albertsons attempts to
15 offer higher quality products than other grocery stores,
16 correct?

17 A Where we can, yes.

18 Q And you believe Albertsons is successful in that
19 endeavor?

20 A I think we try every day to do that.

21 Q And do you think you're successful?

22 A Sometimes.

23 Q You also try to earn new customers by offering better
24 customer service than your competitors, correct?

25 A Yes.

T. Broderick - D

1 Q And you visit your competitors' stores in the normal
2 course of business, correct?

3 A I do.

4 Q And that includes Kroger or King Soopers stores, right?

5 A It includes all of our competitors.

6 Q And so that includes visiting Kroger and King Soopers
7 stores in your competitor visits?

8 A Yes.

9 Q When you visit Kroger or King Soopers stores, you are
10 trying to ensure that Albertsons stores are either equally
11 good or better than those Kroger stores, correct?

12 A When I visit their stores, I am looking at a bunch of
13 different things, as I would in any competitive visit. So
14 it may not necessarily be if it was as good as they are at
15 something as much as it might be what is somebody doing, one
16 of our competitors, how they might be performing in a
17 certain area, or what might be the offering to a customer.
18 So I look at a lot of different things to include that.

19 Q And when you look at those things, do you take that
20 back and then try to improve Albertsons stores?

21 A Well, we are always trying to improve our stores, so
22 regardless of whether or not I visit a store or not, we are
23 always looking at areas where we can improve.

24 Q I want to talk about your employees that you employ for
25 your stores. In terms of your store employees, the Denver

T. Broderick - D

1 division employs about 11,000 individuals, correct?

2 A Yes.

3 Q And when staffing your stores, Albertsons attempts to
4 attract and retain quality employees, correct?

5 A Yes.

6 Q And part of that effort to retain and hire talent,
7 Albertsons offers competitive salaries, correct?

8 A Yes.

9 Q And competitive benefits, correct?

10 A Yes.

11 Q Competitive benefits specifically are important so that
12 Albertsons can continue to maintain and attract talent,
13 correct?

14 A I think they're one of the reasons of why we need to be
15 competitive.

16 Q Retaining talent is important because of the costs
17 associated with employee turnover, correct?

18 A Yes.

19 Q Now, in your stores, your division does employ
20 unionized labor, correct?

21 A Yes.

22 Q Do you know about how many of your roughly 11,000
23 employees are unionized?

24 A No. I don't know exactly how many of them are. When
25 you say "11,000," and you use the term "stores," not all

T. Broderick - D

1 11,000 work in our stores. We have a portion of those that
2 work in our distribution center. So that total that you're
3 referencing is a total amount approximately of the employees
4 that we have in our division but not necessarily the store
5 count.

6 Q Do you know roughly how many of your employees are
7 unionized?

8 A I believe it's around 70 percent, but I'm just
9 estimating. I really don't get involved in any of our
10 union/non-union in terms of anything to do with the labor of
11 those, so I would say it is probably around 70 percent. But
12 that's a guess.

13 Q Now, for the labor union wages for your unionized
14 employees, those wages are set in negotiations with labor
15 unions, correct?

16 A I believe so.

17 Q Besides Albertsons, King Soopers is the other grocer in
18 your division that uses unionized employees, correct?

19 A Yes.

20 Q Mr. Broderick, I would like you to turn to another
21 document in your binder. It is PX2082. It is also going to
22 be put on the screen in case you want to look at it that
23 way. Please let me know when you are there.

24 A Okay. I'm here.

25 Q Okay. PX2082 is an email from Brent Bohn to you and

T. Broderick - D

1 others, correct?

2 A Yes.

3 Q And who is Brent Bohn?

4 A He is part of the Albertsons labor team.

5 MR. BRYSON: Your Honor, we move to admit PX2082
6 into evidence.

7 MR. PODOLL: No objection.

8 THE COURT: It will be received.

9 BY MR. BRYSON:

10 Q Mr. Broderick, if you'd turn to the third email in the
11 chain in Andy Lukes and others, it has popped up on your
12 screen as well. Do you see that?

13 A I lost it.

14 Q There it is. Do you see that email from Andy Lukes to
15 you and others? I'm not sure what is happening with the
16 technology right now. Perhaps you can look in your book.

17 A Yes, I'm looking in my book. Could you help me and
18 just make sure -- is it the one that begins with "Hello,
19 Todd and Mike"?

20 Q Correct. Who is Andy Lukes?

21 A Andy Lukes is also part of the labor team.

22 Q And the subject of this email is "Local 7 negotiations
23 update," correct?

24 A Yes.

25 Q And Local 7 is the local UFCW union that Albertsons

T. Broderick - D

1 negotiates with, correct?

2 A Yes.

3 Q Okay. If you look in the email, he writes: "Hello
4 Todd and Mike. I want to provide you with an update on
5 negotiations of Local 7," correct?

6 A Yes.

7 Q Then he writes: "As we have in the past, we are
8 coordinating bargaining with King Soopers;" correct?

9 A Yes.

10 Q But those joint negotiations were not working well,
11 correct?

12 A I wasn't part of those negotiations, so I don't know if
13 they were working well or weren't.

14 Q Mr. Lukes then writes: "To our frustration (and
15 despite several calls attempting to a talk them out of it)
16 King Soopers made a comprehensive proposal to L7 this week
17 that included wages and other economic terms."

18 Do you see that?

19 A I do.

20 Q "L7" here refers it to Local 7?

21 A Correct.

22 Q He writes: "Labor relations believes it would have
23 been wiser to wait to see what the union would propose on
24 wages and calibrate the employer's proposals based on that.
25 But King Soopers went ahead and made economic proposals

T. Broderick - D

1 anyway;" correct?

2 A Yes.

3 Q So when you received this email, was it your
4 understanding that Safeway and King Soopers were not aligned
5 in terms of their negotiating strategy here?

6 A I don't really recall what my thought was of that other
7 than this was just an update that he was providing.

8 Q Okay. If you'll turn to the next page, Mr. Lukes
9 continues. He writes: "Local 7 rejected this proposal,"
10 and that refers to the King Soopers' proposal, correct?

11 A Sir, when you say "next page."

12 Q Sorry. If you are in your binder, it is on the next
13 page. It is also on the screen in front of you. It is the
14 first full paragraph on the second page of PX2082?

15 A Okay. I have it. Thank you.

16 Q Mr. Lukes writes: "Local 7 rejected this proposal,"
17 correct?

18 A Yes.

19 Q And that refers to the King Soopers proposal, correct?

20 A I believe so.

21 Q Okay. Then if you look two paragraphs down, there is a
22 paragraph that starts "Safeway/Albertsons' negotiations with
23 Local 7."

24 Do you see that?

25 A Yes.

T. Broderick - D

1 Q Okay. Mr. Lukes writes: "Safeway/Albertsons'
2 negotiations with Local 7 have been going much better than
3 King Soopers' negotiations," correct?

4 A Yes.

5 Q And so the negotiations were having different outcomes,
6 correct?

7 A I don't know what the difference in the actual outcomes
8 were between the two.

9 Q Well, if you look two sentences later, Mr. Lukes
10 writes: "The union has called a strike vote against
11 King Soopers for this Sunday and Monday, January 2nd and
12 3rd."

13 Do you see that?

14 A Yes.

15 Q And do you recall Local 7 calling for a strike vote at
16 this time against King Soopers?

17 A I do.

18 Q And Local 7 did not call for a strike against Safeway
19 or Albertsons, correct?

20 A Correct.

21 Q Okay. If you look a little bit further down, there is
22 a sentence in that same paragraph. It starts: "If Local 7
23 is able."

24 Do you see that?

25 A Yes.

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1 Q Mr. Lukes writes: "If Local 7 is able to extract a
2 high settlement out of King Soopers by threatening to strike
3 (or going on strike), local 7 will, of course, expect us to
4 agree to the same settlement," correct?

5 A Yes.

6 Q And then he writes: "We will continue doing all we can
7 to steer King Soopers in the right direction," correct?

8 A Yes.

9 Q And is your understanding of this that the right
10 direction would be to minimize the labor wage increase?

11 A I don't have an understanding of what that meant. I
12 don't know if it had it to do with a wage increase; if it
13 had to do anything with the health and welfare benefits. I
14 just simply don't know.

15 Q Okay. After UFCW Local 7 and Kroger failed to agree to
16 a collective bargaining agreement in the winter of 2021-22,
17 Local 7 did in fact strike Kroger's King Soopers stores,
18 correct?

19 A Yes.

20 Q You saw a massive drop in sales at Albertsons because
21 customers came to Albertsons stores from King Soopers
22 stores, correct?

23 A We saw -- we definitely saw an increase in business,
24 but my impression is all the competitors saw that as well
25 other than King Soopers.

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1 Q Did you agree that the increase in sales at Albertsons
2 was massive?

3 A I don't know if I used the term "massive." I know it
4 was significant, so -- from what we were experiencing in
5 terms of increases.

6 Q Okay. Mr. Broderick, I would like to look at your
7 deposition transcript. It is in your binder. It is PX4114.
8 Specifically I would like you to turn to page 183 starting
9 at line 12. It is also going to pop up on your screen, if
10 that's an easier way for you to access it.

11 A Okay. Sir, can you remind me of the page number?

12 Q Page 183, starting at line 12. Mr. Dunkin, if we can
13 put that on the screen.

14 MR. PODOLL: Your Honor, I would object. I don't
15 think it is actually inconsistent with what he just
16 testified.

17 THE COURT: Overruled.

18 BY MR. BRYSON:

19 Q Are you there, Mr. Broderick?

20 A I am.

21 Q It reads:

22 "QUESTION: And then we see a massive jump in
23 Denver's advantage over the other regions," right?

24 A Yes.

25 Q "ANSWER: What column are you looking at?"

T. Broderick - D

1 "QUESTION: Wednesday ID percentage.

2 "ANSWER: Okay. Correct.

3 "QUESTION: Now, was part of that a massive jump
4 in Denver's advantage due to the rise or increase in the
5 number of customers coming to Albertsons stores from King
6 stores?

7 "ANSWER: Yes."

8 Did I read that correctly?

9 A You did.

10 Q Mr. Broderick, I would like you to turn to another
11 document in your binder. It is PX2076. It is also going to
12 pop up on your screen as well. Please let me know when you
13 are there.

14 A I'm here. Thank you.

15 Q PX2076 is an email from you to Wes Jackson, correct?

16 A Yes.

17 Q Who is Wes Jackson?

18 A Wes Jackson is a division president in our southern
19 division.

20 Q That's the southern division for Albertsons, correct?

21 A Yes.

22 MR. BRYSON: Your Honor, we move to admit PX2076
23 into evidence.

24 MR. PODOLL: No objection, Your Honor.

25 THE COURT: It will be received.

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1 BY MR. BRYSON:

2 Q Okay. If you turn to the second email from Wes Jackson
3 to you in the middle of the page, it starts, "Hello Todd."

4 Do you see that?

5 A I do.

6 Q Mr. Jackson writes: "Hello Todd. Great ID QTD,"
7 correct?

8 A Yes.

9 Q What is ID QTD?

10 A ID QTD stands for identical store sales quarter to
11 date.

12 Q What does that mean? So when he says, "Great ID QTD,"
13 he is congratulating you on your ID sales; is that right?

14 A Quarter to date.

15 Q Then he writes: "Congratulations. I need to know what
16 you are doing to get it," correct?

17 A Yes.

18 Q Then if you turn to your top email, you do respond to
19 Mr. Jackson, correct?

20 A Yes.

21 Q And you write: "Wes, thanks for your note. It is
22 really simple (just have your competitor go on strike.)"
23 Correct?

24 A Yes.

25 Q Then you write: "Our major Kroger competitor

T. Broderick - D

1 (King Soopers), went on strike yesterday," correct?

2 A Yes.

3 Q So you're telling Mr. Jackson that your major
4 competitor, Kroger/King Soopers went on strike, which led to
5 this increase in sales, correct?

6 A Yes.

7 Q Okay. Please turn to another document in your binder.
8 It is PX2395. Again, it will also pop up on your screen.
9 Please let me know if you're there.

10 A I'm there.

11 Q PX2395 is an email from you to Shane Dorcheus, correct?

12 A Yes.

13 Q Who is Shane Dorcheus?

14 A Shane Dorcheus at the time of this email was my direct
15 supervisor. He was an executive vice president.

16 Q For Albertsons, correct?

17 A Yes.

18 MR. BRYSON: Your Honor, we move to admit PX2395
19 into evidence.

20 MR. PODOLL: No objection, Your Honor.

21 THE COURT: It will be received.

22 BY MR. BRYSON:

23 Q Okay. If you could turn to your email. It is your
24 final email. It is actually on page 2, but it will pop up
25 on your screen.

T. Broderick - D

1 Are you there?

2 A Yes.

3 Q This is an email from you to Daniel Dosenbach and Brent
4 Bohn and others, correct?

5 A Yes.

6 Q Who is Daniel Dosenbach?

7 A He is our lead -- I believe he is a vice president or
8 executive vice president for the company.

9 Q And you write: "Dan, I know we had an agreement with
10 Kroger to not hire their employees during the strike as well
11 as to not actively solicit/promote the transfer of their
12 prescriptions," correct?

13 A Yes.

14 Q It was your understanding that this agreement was in
15 place with Kroger, correct?

16 A I wasn't really sure who it was in place with. I had
17 an understanding, based on conversations I had with our
18 labor team, of certain things that we were allowed to do and
19 not supposed to do. So I think that this other -- this
20 understanding morphed into an agreement on my end, but
21 whether or not there was an agreement from our team to
22 theirs, I don't know. I certainly have no conversations or
23 any interaction with anyone from Kings, and I think I just
24 used the term "agreement," for lack of a better term.

25 Q Okay. Would you look at the third paragraph in this

T. Broderick - D

1 email?

2 A Sure.

3 Q You write: "Can you let me know when this agreement of
4 not hiring their employees with them is over," correct?

5 A Yes.

6 Q Because you wanted to hire away Kroger employees to
7 work at Albertsons, correct?

8 A I don't know if we were looking to hire away anyone. I
9 think what I wanted to make sure is that we weren't hiring
10 people that we shouldn't be. But we typically never had a
11 policy to go out and hire away people from King Soopers.

12 Q Okay. But you did want to know when the agreement was
13 over, correct?

14 A Yes.

15 Q And then you write just after these hyphens: "They
16 have actively recruited store directors and department
17 managers of ours," correct?

18 A Yes.

19 Q And "they" refers to Kroger or King Soopers here,
20 right?

21 A Yes.

22 Q Okay. If you would turn to the second email, it is
23 Mr. Dorcheus. He is writing to you.

24 Are you there?

25 A Yes.

T. Broderick - D

1 Q The previous page, Mr. Dorcheus writes to you: "Todd,
2 I'm catching up and just listened to this; also all of the
3 correspondence around it. Man, they are really tone deaf,
4 and it is our opportunity," correct?

5 A Yes.

6 Q And there "they" refers to Kroger or King Soopers,
7 right?

8 A I believe so.

9 Q Then you respond to Mr. Dorcheus' email at the top,
10 correct?

11 A Yes.

12 Q And if you look at the third paragraph, it starts, "We
13 gained over 800 transferred."

14 Do you see that?

15 A Yes.

16 Q Okay. You write: "We gained over 800 transferred
17 prescriptions from Kings," correct?

18 A Yes.

19 Q So despite at least your understanding of this
20 agreement with Kings not to actively poach the prescriptions
21 during the strike, you already gained 800 prescriptions from
22 Kings, correct?

23 A Yes. That's correct, but that wasn't a result of any
24 type of marketing we did or didn't do.

25 Q Certainly. I understand that. But it is correct that

T. Broderick - D

1 you gained these 800 prescriptions from Kings during the
2 strike, correct?

3 A Yes.

4 Q Then you write: "And I'm going to continue with the
5 ramped up seven-day grocery/fresh orders through Super Bowl.
6 They are struggling to get their stores stocked, so this
7 will be a competitive advantage for us," correct?

8 A Yes.

9 Q And "they" there refers to Kroger or King Soopers,
10 right?

11 A Yes.

12 Q And you write: "These guys are spiraling down, and I
13 need to push my foot on the back of their neck (in a
14 friendly way, of course)," correct?

15 A Yes.

16 Q And "these guys" is referring to Kroger or
17 King Soopers, correct?

18 A Yes.

19 Q Because your competition with Kroger or King Soopers is
20 fierce, correct?

21 A Well, competition in my division is fierce with
22 everyone. It is not just King Soopers. It is everyone.

23 Q Would you agree that your competition with King Soopers
24 and Kroger is fierce?

25 A Just as fierce as what it is with Walmart, Costco,

T. Broderick - D

1 Target, and certainly Kings and any other independents we
2 compete with.

3 Q Okay, Mr. Broderick. I want to talk to you a little
4 bit about your work-related text messages.

5 A Okay.

6 Q You frequently sent work-related text messages,
7 correct?

8 A Yes.

9 Q In fact, you typically sent between 25 and 100
10 work-related text messages per day, correct?

11 A Probably, yes.

12 Q The proposed merger between Kroger and Albertsons was
13 announced sometime in the fall of 2022, correct?

14 A Yes.

15 Q And you provided sworn testimony in this matter at an
16 investigational hearing before the FTC, correct?

17 A Yes.

18 Q You took an oath to tell the truth during that in
19 investigational hearing, correct?

20 A Yes.

21 Q That investigational hearing was on November 17th of
22 2023, a little over a year after the announcement of the
23 merger, correct?

24 A Yes.

25 Q Your phone had an auto delete policy in place three to

T. Broderick - D

1 four weeks before your investigational hearing on
2 November 17, 2023, correct?

3 A Yes.

4 Q Your auto deletion setting was not changed until three
5 to four weeks before your investigational hearing, correct?

6 A Yes.

7 Q At the time of your investigational hearing on
8 November 17th, 2023, you did not remember whether you had
9 read the document preservation notice that you received in
10 connection with the FTC's investigation into this merger,
11 correct?

12 A That's what I said, yes.

13 Q At the time of your investigational hearing on
14 November 17th, 2023, you did not remember if you had
15 complied with that document preservation notice, correct?

16 A That's what I said, yes.

17 Q And you manually deleted work-related text messages,
18 correct?

19 A Yeah. I don't remember exactly what was manually
20 deleted or auto deleted, but I can tell you that I never
21 intentionally deleted any message or email because of this.

22 Q Certainly. But you deleted work-related text messages,
23 correct?

24 A I have, yes.

25 Q And you were aware that several text messages from your

T. Broderick - D

1 files produced to the FTC are missing your responses,
2 correct?

3 A Yes.

4 Q Okay. Mr. Broderick, I would like you to turn to
5 PX12729 in the binder. It will pop up on the screen.

6 Are you there?

7 A I am.

8 Q PX12729 is a text message chat between you and Benjamin
9 Hansford, correct?

10 A Yes.

11 Q Who is Benjamin Hansford?

12 A Benjamin Hansford is my vice president of marketing and
13 merchandising.

14 Q Is he a direct report?

15 A Yes.

16 Q This text message conversation is from December 2nd,
17 2022, correct?

18 A Yes.

19 Q And we have text messages from you, correct?

20 A Yes.

21 MR. BRYSON: Your Honor, we move to admit PX12729
22 into evidence.

23 MR. PODOLL: No objection, Your Honor.

24 THE COURT: It will be received.

25

T. Broderick - D

1 BY MR. BRYSON:

2 Q Mr. Broderick, please turn to PX2376 in your binder.

3 It will also pop up on the screen. Let me know when you're
4 there.

5 A I'm there.

6 Q Okay. PX2376 is a text messages conversation between
7 Scott Shores and Todd Broderick.

8 Do you see that?

9 A I do.

10 Q Who is Mr. Shores?

11 A Scott is our director of human resources.

12 Q Is Mr. Shores a direct report?

13 A Yes.

14 Q Okay. This text message conversation is about the
15 Senate hearing on November 29th, 2022, concerning Kroger's
16 potential acquisition of Albertsons, correct?

17 A Yes.

18 Q This document only contains text messages from
19 Mr. Shores, correct?

20 A It appears so, yes.

21 Q And you received Mr. Shores' text messages in this
22 document?

23 A Yes.

24 MR. BRYSON: Your Honor, we move to admit PX2376
25 into evidence.

T. Broderick - D

1 MR. PODOLL: Again, no objection, Your Honor.

2 THE COURT: It will be received.

3 BY MR. BRYSON:

4 Q Okay. The date for this one is November 29th, 2022,
5 correct?

6 A Yes.

7 Q This is just a couple of days before the text message
8 conversation we just looked at, correct?

9 A Yes.

10 Q And for PX -- and for this particular document, it is
11 just you and Mr. Shores that are on the text message chain,
12 correct?

13 A Yes.

14 Q Okay. We are missing your responses to Mr. Shores in
15 this text message chain, correct?

16 A It appears so, yes.

17 Q Why are we missing your responses in this text message
18 chain from November 29th, 2022, but we have your messages
19 from December 2nd, 2022?

20 A I have no idea.

21 Q Is it possible that you deleted these work-related text
22 messages?

23 A I have no idea why they're not there.

24 Q Would you agree that it is possible that you deleted
25 them?

T. Broderick - D

1 A I would agree that that could have happened, but I
2 don't know that that happened.

3 Q Okay. Regarding this conversation in PX2376, you
4 testified in your investigational hearing that you did not
5 remember if you responded to Mr. Shores' text messages,
6 correct?

7 A Yes.

8 Q And since you do not remember responding to them, you
9 don't remember the contents of any responses you had,
10 correct?

11 A That's correct.

12 Q Okay. Please turn to the first message from Mr. Shores
13 to you. It will pop up on the screen. It is also on the
14 first page.

15 Do you see it?

16 A I see it.

17 Q It reads -- well, hold on. Wait for it to pop up on
18 the screen. It reads: "McMullen is struggling," correct?

19 A Correct.

20 Q Does this refer to Rodney McMullen, Kroger's CEO?

21 A I believe so.

22 Q This text chain is generally discussing Mr. McMullen's
23 testimony before Congress about the proposed merger between
24 Kroger and Albertsons, right?

25 A Yes.

T. Broderick - D

1 Q You and Mr. Shores were both watching that testimony;
2 is that right?

3 A I remember watching this, and I'm assuming that Scott
4 was watching it. I was in a different location.

5 Q And you were sharing text messages concerning that
6 testimony, correct?

7 A Well, it looks like we did.

8 Q Okay. Turn to page 2, the bottom of the page. There
9 is a message from Mr. Shores. It starts: "It seems clear
10 to me."

11 Are you there?

12 A Yes.

13 Q Mr. Shores write: "It seems clear to me" -- Mr. Shores
14 writes: "It seems clear to me that there is bipartisan
15 opposition to this merger, and that's likely what will be
16 communicated to the FTC."

17 Do you see that?

18 A I do.

19 Q We don't know if you had a response or the contents of
20 the response to this message, correct?

21 A Correct.

22 Q The next message, Mr. Shores writes: "It is all" --
23 I'll wait for it to pop up on the screen.

24 The next message is on the next page. It starts,
25 "It is all about pricing."

T. Broderick - D

1 Do you see that?

2 A I do.

3 Q Okay. I'll go ahead and read it. It states: "It all
4 about pricing and competition, and we all know prices will
5 not go down," correct?

6 A Yes.

7 Q And then he says: "A 500M investment in pricing to our
8 company won't get our prices down to Kroger levels in my
9 view, therefore the conclusion that's easily drawn is
10 overall prices will increase," correct?

11 A Yes.

12 Q And we don't know if you had a response to that or the
13 contents of that response, correct?

14 A Correct.

15 Q Okay. If you turn to the next message, Mr. Shores
16 writes: "Well, Rodney should stay home for those hearings.
17 He didn't do well." Correct?

18 A Yes.

19 Q "Rodney" refers to Mr. McMullen, correct?

20 A I believe so.

21 Q We don't know if you responded to this text or the
22 contents of any response you had, correct?

23 A Yes.

24 Q If you'll turn the page -- I'm sorry. If you could go
25 back to the previous page and the next message. We have got

T. Broderick - D

1 another message from Mr. Shores. He writes: "I think the
2 chance are still slim this happens," correct?

3 A Yes.

4 Q And that refers to the Kroger/Albertsons merger,
5 correct?

6 A I believe so.

7 Q We do not know if you had a response or the contents of
8 any response, correct?

9 A Yes.

10 Q Okay. If you'll turn to page 4, which is the next
11 page, the third message down reads: "He totally didn't
12 answer."

13 Do you see that?

14 A Yes.

15 Q Mr. Shores writes: "He totally didn't answer that
16 question. He left the impression" -- Mr. Shores writes:
17 "He totally didn't answer that question. He left the
18 impression that zero stores would close and that zero people
19 be out of work," correct?

20 A Yes.

21 Q And that's referring to Mr. McMullen again, correct?

22 A I believe so.

23 Q And we do not know if you had a response or the
24 contents of any response to this message, correct?

25 A Correct.

T. Broderick - X

1 MR. BRYSON: Your Honor, I pass the witness.

2 MR. PODOLL: Thank you, Your Honor. May my
3 colleague pass out binders, please?

4 THE COURT: Yes.

5 MR. PODOLL: Thank you.

6 CROSS-EXAMINATION

7 BY MR. PODOLL:

8 Q Good afternoon, Mr. Broderick.

9 A Good afternoon.

10 Q Now, Mr. Broderick, I would first like to step back and
11 go quickly through your background. How long have you been
12 at either Albertsons or Safeway, sir?

13 A A little over 43 years.

14 Q What was your first role?

15 A Courtesy clerk.

16 Q What does a courtesy clerk do, Mr. Broderick?

17 A We were responsible for bagging groceries, taking our
18 customers' groceries out to their cars, cleaning the store,
19 that sort of stuff.

20 Q Mr. Broderick, my colleague Ms. Nickerson just gave you
21 a binder. Could you open that to the first page.

22 Mr. Simmons, could you display DDX8, please.

23 Mr. Broderick, what generally does this show?

24 A This shows my career path from the time I was hired as
25 a courtesy clerk.

T. Broderick - X

1 Q Could you walk us through that career path at a high
2 level sir?

3 A Sure. As I mentioned, I was hired as a courtesy clerk
4 before becoming a store manager. I held several positions
5 inside of the store. I moved along to being a district
6 manager. That's where you're in charge of a district of
7 stores, around 20 or so. From there, I moved along to vice
8 president roles in both operations and marketing. I also
9 went down to Pleasanton and worked in our corporate office
10 on different projects. From there, I was in our Northern
11 Cal division as an SVP of operations. I held the same role
12 at the Portland division until about eight years ago where I
13 was promoted to division president of Denver.

14 Q You said, sir, that was around eight years ago you
15 became the Denver division president?

16 A Yes.

17 Q What are your responsibilities generally in that role?

18 A Generally I would say I oversee 122 stores, around 8-,
19 9,000 employees. I directly supervise five people that have
20 functional responsibilities that range from our human
21 resources department, our government relations, finance,
22 marketing, and then our operations.

23 Q Now, Mr. Broderick, you talked us through your career
24 at Albertsons. But what actually got you started in the
25 grocery industry, sir?

T. Broderick - X

1 A Well, my father was a store manager for Safeway, so I
2 was born into it.

3 Q You spent time in the stores as a kid?

4 A Yes, I did.

5 Q Now that you have talked about your past,
6 Mr. Broderick, I want to talk for a second about your
7 future. What's next for you?

8 A We, I accepted -- should this merger proceed, I have
9 accepted to be the division president of the Denver area for
10 C&S.

11 Q Why did you take that role?

12 A Well, I took it for a couple of reasons: One is I
13 wanted to just make sure that the employees that I work
14 with, I'm there to help lead them through the transition,
15 and more important than that, when I learned that Susan
16 Morris was assigned or took CEO, I certainly want to be part
17 of that with Susan.

18 Q Why is that?

19 A Well, I've worked with Susan for over eight years and
20 Susan -- and in my 43-year career, I would say that Susan is
21 probably the brightest, smartest, best grocer I've ever
22 worked with, and I know that Susan can help make this a big
23 success.

24 Q Now, Mr. Broderick, have you heard others express the
25 same sentiments about Ms. Morris in your division?

T. Broderick - X

1 A I have.

2 Q What have you heard?

3 A Well, Susan preceded me as division president. So
4 Susan has a lot of relationships with people, both in our
5 stores and in the office that I work in, and so they were
6 all very encouraged and excited when they learned that Susan
7 was made CEO.

8 Q Now, Mr. Broderick, I want to spend just a few minutes
9 on the grocery market in Denver. Can you name for me some
10 grocery retailers who your stores compete with in the Denver
11 Division today?

12 A Sure. There are a bunch of them. We have Costco,
13 Walmart, Target, Whole Foods, Kroger, independents, dollar
14 stores.

15 Q Mr. Simmons, could you display the second page of the
16 demonstrative, and, Mr. Broderick, could you turn the page
17 in your binder. This is the second page of DDX8.

18 Is this at least a subset of the retailers you
19 compete with in Denver?

20 A Yes.

21 Q Now, Mr. Broderick, if you were walk into or order from
22 some of those retailers, some of them look different than
23 Albertsons; is that true?

24 A That's true.

25 Q Am I right that not all of them are accounted in the

T. Broderick - X

1 food channel that you discussed a little earlier with
2 Mr. Bryson?

3 A Yes.

4 MR. BRYSON: Objection. Leading.

5 MR. PODOLL: I can rephrase.

6 THE COURT: Rephrase.

7 BY MR. PODOLL:

8 Q What channel or channels are all of these retailers in?

9 A They are all in grocery retail channels and e-comm for
10 most of them.

11 Q What about MULO? Are any of them in that?

12 A They are in MULO and MULO+.

13 Q Mr. Broderick, while we are on that, do you recall
14 Mr. Bryson showing you some deposition testimony during your
15 earlier examination?

16 A I do.

17 Q I would like to show you the question and answer just
18 before the piece you were shown.

19 Mr. Simmons, could you pull up PX4026, page 12,
20 lines 2 to 13. So this will be what you were shown and just
21 the Q and A before.

22 MR. BRYSON: I object. I'm not sure if this is an
23 exhibit. It's improper. It is certainly not impeachment.

24 MR. PODOLL: Your Honor, this is for completeness
25 to avoid the earlier impeachment being somewhat misleading,

T. Broderick - X

1 given his answer.

2 THE COURT: What lines?

3 MR. PODOLL: This is page 12, lines 2 to 13.

4 MR. BRYSON: I'll withdraw my objection.

5 THE COURT: Go forward.

6 MR. PODOLL: Thank you, Your Honor.

7 BY MR. PODOLL:

8 Q Mr. Broderick, in the question before the one that I
9 think Mr. Bryson showed you, did you make the same
10 distinction between the food and MULO channels that we have
11 heard you make at other times today?

12 A I thought I did.

13 Q And, sir, you say all of these retailers, Food and MULO
14 and MULO+ all compete with Albertsons. Why do you say that?

15 MR. BRYSON: Objection. Leading.

16 THE COURT: Rephrase.

17 MR. PODOLL: I'll rephrase.

18 BY MR. PODOLL:

19 Q Mr. Broderick, why is it that you say retailers beyond
20 the food channel compete with Albertsons?

21 A Well, because they're all selling the same
22 groceries/categories that we are. So any time anyone other
23 than Safeway is selling those items and Albertsons, I look
24 at those as competitors, and it doesn't matter what sized
25 box or if it is an online business.

T. Broderick - X

1 Q Sir, I think you said earlier you go and visit your
2 competitors' stores?

3 A Yes, I do.

4 Q How often do you do?

5 A You know, I do it -- I do it consistently.

6 Q About how often? Every week? Every month?

7 A Once a month.

8 Q What are you looking for in those visits, just outside
9 the store and inside?

10 A Well, for me, it starts with the outside, and as I
11 mentioned, in the parking lot. So as I'm driving in to any
12 competitor, I look to see how full their parking lot is.
13 And what's drawn a lot of my attention probably over the
14 last couple of years is I look to see how many parking
15 stalls are dedicated to e-commerce business, so from our
16 side we would call it drive-up-and-go.

17 Once I get in the store, I'm looking at a bunch of
18 different things. I like to see how clean it is, how busy
19 it is, how well it is merchandised. I like to see a
20 category coverage that the competitors have; look at prices.

21 Q Now, sir, you just mentioned e-commerce spots. Have
22 you -- what have you seen in terms of the growth or not of
23 e-commerce over the last several years?

24 A I would say that over the last several years and
25 probably at the start of COVID, I don't recall a segment of

T. Broderick - X

1 business growing at a faster rate than I've seen -- that I
2 can think of in my career than that of e-comm.

3 Q And e-comm specifically in the grocery industry is what
4 you are referring to, sir?

5 A Yes.

6 Q Now, when you refer to e-commerce, what are you
7 referring to? Drive-up-and-go or is it ordering from
8 Amazon?

9 A Yes. Drive-up-and-go. It could be DoorDash. It could
10 be Amazon. It's anything that's ordered through that
11 channel.

12 Q What kinds of groceries can one get through e-commerce?

13 A You can get anything inside the store.

14 Q Now, Mr. Broderick, based on your own experience, do
15 you see the grocery industry as more competitive or less
16 competitive than it was when you started 43 years ago?

17 A I think it is more competitive now. I just think that
18 there are more players in the market, and there is more
19 platforms where customers can choose to do their shopping.

20 Q Now, Mr. Broderick, earlier were asked about the term
21 "traditional grocery store." Do you remember that?

22 A Yes.

23 Q What does that term mean to you in this day and age?

24 A Well, this day and age, to me, it's more of a
25 description of size of location. In my grocery speak, we

T. Broderick - X

1 call it "size of box." So when that term is used, I'm just
2 thinking about it in terms of size.

3 Q Now, Mr. Broderick, does Albertsons compete with what
4 someone might refer to as a traditional grocery store?

5 A Yes.

6 Q Are those stores your only competitors, sir?

7 A No.

8 Q Can you identify some stores that didn't used to be
9 considered traditional grocers who you compete with?

10 A Yeah. I would say Costco, Walmart, Target.

11 Q Now, Mr. Broderick, you were also asked on your
12 examination by Mr. Bryson about one-stop shopping.

13 Do you remember that?

14 A I do.

15 Q Sir, is one-stop shopping for food something your
16 stores offer?

17 A Yes.

18 Q I want to talk about a few of your competitors. Does
19 Walmart offer one-stop shopping?

20 A They do.

21 Q Why do you say that?

22 A Well, because they offer all the same categories that
23 we offer, and then I would also say "and then some." So you
24 have what we would call outdoor. You have appliances. You
25 have apparel. Lawn and garden. So everything we do and

T. Broderick - X

1 then some.

2 Q What about Target? Does Target offer the same kind of
3 one-stop shopping as Walmart?

4 A Very similar.

5 Q What about Costco?

6 A Very similar.

7 Q And one more, sir. What about Amazon?

8 A Absolutely.

9 Q Why do you say that?

10 A Well, because you can order anything under the sun, I
11 think, from Amazon.

12 Q Now, Mr. Broderick, you were shown a series of text
13 messages --

14 MR. PODOLL: Your Honor, this is PX2369.

15 BY MR. PODOLL:

16 Q -- where you and your team were commenting on ads to
17 King Soopers.

18 Do you remember those texts?

19 A I do.

20 Q Mr. Broderick, is King Soopers the only competitor
21 whose ads you monitor?

22 A No.

23 Q What other competitors do you monitor?

24 A We monitor Costco, Walmart, Target.

25 Q Okay. Sir, I would like to show you an exhibit for

T. Broderick - X

1 identification. It is called DX2643. It is tab 2 in your
2 binder.

3 Do you recognize this document, sir?

4 A I do.

5 Q What is it?

6 A This is basically digital ads from those competitors I
7 just mentioned that we use to compare. So similar to our
8 print ads that we saw earlier today, comparing us versus
9 King Soopers, this is the digital platform that we would
10 also compare those two.

11 Q Is this something that you received in the ordinary
12 course of your work?

13 A Yes.

14 MR. PODOLL: Your Honor, I move to admit DX2643.

15 MR. BRYSON: No objection.

16 THE COURT: It will be received.

17 BY MR. PODOLL:

18 Q I would like to shift gears for a minute,
19 Mr. Broderick, and talk about labor. As the Denver Division
20 president, do you have an understanding about the
21 qualifications somebody needs to get hired as an entry-level
22 worker in one of your stores?

23 A I do.

24 Q What are those qualifications, sir?

25 A Well, they are typically limited to age restrictions,

T. Broderick - X

1 depending on what the job requires.

2 Q Any prior experience required or anything like that,
3 sir?

4 A No.

5 Q What about employees who want to work in a specific
6 department, something like meat cutters or floral or the
7 bakery? Do those people need particular experience?

8 A They don't. In fact, in all of those we offer
9 apprentice programs in our meat departments. We have
10 apprentice programs. Same thing in our floral department;
11 in our bakery department. I would go as far to say that
12 probably most of our -- of our skilled labor in those
13 departments, they came to those departments without
14 experience.

15 Q So, Mr. Broderick, who do you compete against for
16 employees?

17 A Everyone.

18 Q What do you mean? Can you elaborate on that, sir?

19 A Sure. So when we are lucky enough to hire employees,
20 we are all competing for the same type of a person, I think;
21 somebody that is outgoing, friendly, willing to work. But
22 in terms of competing, particularly in Colorado, we're
23 competing against ski resorts, hotels, home improvement
24 centers, restaurants, other grocery retailers, so people are
25 all out there trying to recruit those same types of

T. Broderick - X

1 employees.

2 Q Is Kroger your primary competitor for entry-level-store
3 employees?

4 A No.

5 Q Mr. Broderick, have you ever personally recruited
6 someone to work at one of your stores?

7 A I have.

8 Q Can you tell me about how you have done that?

9 A Yeah. Well, typically when I personally recruit
10 somebody, it is based on if I have experienced or witnessed
11 what I would say great service, or I see someone working
12 really hard doing a good job. Typically I'll just introduce
13 myself, hand them my business card, and let them know what I
14 saw, what I liked about it, and let them know if they are
15 ever interested in changing professions, looking for a
16 different job that could lead into a career like mine, just
17 to send me a note.

18 Q So sticking with labor, Mr. Broderick, you were shown
19 some documents during your examination about a strike in
20 2022.

21 Do you remember those?

22 A I do.

23 Q Now, sir, I want to step back for a minute. What role,
24 if any, do you have in collective bargaining?

25 A None.

T. Broderick - X

1 Q Before 2022, Mr. Broderick, had you ever been involved
2 in a strike before as a member of division leadership?

3 A Never.

4 Q Okay. So let's talk about the particular documents
5 that you were shown. Do you remember -- actually this was
6 testimony. Do you remember discussing an increase in your
7 sales --

8 A I do.

9 Q -- during the strike? Sorry, sir. I need to finish my
10 question.

11 When you think about those sales numbers during
12 that strike, what are your thoughts as to how your stores
13 performed?

14 A Well, I think the employees worked incredibly hard and
15 did a great job. But when I looked at it on a more holistic
16 level and just backing into some basic math, knowing what
17 our average store sales were, estimating what our
18 competitors were specific to that of Kroger, and then
19 knowing the amount that we saw an increase in business, I
20 felt that there was probably a couple hundred thousand
21 dollars more than what we saw out there that probably went
22 to either competitors other than us and/or King, so Costco,
23 Walmart, Amazon, maybe some independents.

24 Q Now, Mr. Broderick, do you recall being shown a
25 document regarding Safeway's hiring of striking employees?

T. Broderick - X

1 A I do.

2 Q And there was a reference in those documents to an
3 agreement with King Soopers.

4 Do you remember that?

5 A I do.

6 Q Sir, what communications, if any, did you have with
7 anyone at King Soopers about the 2022 strike?

8 A None.

9 Q Did you ever personally reach an agreement with anyone
10 at King Soopers not to hire King Soopers' employees during
11 the strike?

12 A No.

13 Q So, sir, where did -- you talked about an understanding
14 earlier -- getting an understanding about what you would and
15 wouldn't do. Where did that understanding come from?

16 A These were conversations I had with our labor team just
17 asking them, because of my lack of experience with being
18 involved in a strike, just some protocols around what we
19 were supposed to do or not supposed to do. So that was my
20 understanding.

21 Q And what understanding did you develop through those
22 conversations, sir?

23 A Well, my understanding was that we weren't to hire
24 King Soopers' employees during the time of the strike and
25 also actively solicit King Soopers' pharmacy customers.

T. Broderick - X

1 Q Did you have any understanding whether that was a
2 result of an explicit agreement with King Soopers or was
3 just an independent decision from your labor team?

4 A I have no understanding of where it came from.

5 Q Who could give us more information about that, sir?

6 A Our labor people, and probably specifically that would
7 be Dan Dorcheus.

8 Q Mr. Broderick, understanding you are not part of the
9 labor team and you don't know the rules of the road for
10 strikes, from your perspective as the division president,
11 are there business reasons why one might not want to hire
12 striking employees?

13 A Sure.

14 Q What are those?

15 A Well, I think it is the cost that you have with
16 onboarding any new employee. For us, it averages over a
17 thousand dollars per employee. And if you have a sense that
18 there might be an employee that you hire that is going to
19 not be with you very long, meaning less than maybe ten days,
20 there would be a lot of cost associated with that.

21 Q Now, I want to shift gears a little bit, Mr. Broderick.
22 You were asked some questions earlier about document
23 retention.

24 Do you remember those?

25 A I do.

T. Broderick - X

1 Q Now, I know you don't remember the specifics, but
2 around when did you learn about the need to retain documents
3 for this case?

4 A I believe it was back in November of '23.

5 Q And once you had that awareness, did you try to comply
6 with your obligation to retain documents as best you could?

7 A I did. I tried.

8 Q Now, you testified, Mr. Broderick, and you were asked
9 that some of your text messages were lost or deleted.

10 Do you remember that?

11 A I do.

12 Q I want to talk about that in a little bit more detail.
13 Sir, you now understand that your phone had an auto delete
14 function. Why didn't you turn that off?

15 A Well, I never knew it was actually turned on.

16 Q You have also testified, Mr. Broderick, that you had
17 manually deleted texts in the past when you were asked by
18 Mr. Bryson?

19 A Yes.

20 Q Oh, I'm sorry. Mr. Broderick, did you receive, do you
21 think, that email about retention in November 2022 or
22 November 2023? I want to make sure the record is clear.

23 A Excuse me. That would be November of '22.

24 Q Thank you, sir.

25 Now, up until 2023, for the whole time you had a

T. Broderick - X

1 cell phone, had it been your practice to delete text
2 messages once you were done with them?

3 A Typically, yes.

4 Q After 2023, have you continued that practice?

5 A No.

6 Q Now, just stepping back, Mr. Broderick, was it your
7 practice to delete text messages on your business phone,
8 your personal phone, or both?

9 A Both.

10 Q Why did you do that?

11 A I think for me it was -- I looked at any type of emails
12 or text messages as one might look at something on a to-do
13 list. And once that business was handled, instead of
14 crossing it off, I would just delete it. So it was just a
15 habit that probably went back probably 15 or 20 years.

16 Q Mr. Broderick, how many times did you make your
17 phone -- your cell phone available for collection by
18 Albertsons?

19 A Two times.

20 Q Did you make other devices available for collection by
21 Albertsons?

22 A I did.

23 Q Did you ever push back on or refuse any requests to
24 have anything collected by Albertsons?

25 A Absolutely not.

T. Broderick - X

1 Q Mr. Broderick, I think you covered this earlier, but I
2 want to be totally clear, did you ever delete any messages
3 with the intention of hiding anything?

4 A No.

5 Q Did you ever delete anything else with the intention of
6 hiding anything?

7 A Never.

8 Q Okay. Now, Mr. Broderick, after you discussed document
9 retention, you were shown some text messages with Scott
10 Shores about a congressional hearing.

11 Do you remember that?

12 A I do.

13 Q And when you look at that conversation, only
14 Mr. Shores' messages show up, right?

15 A Yes.

16 Q Do you know why that is?

17 A I have no idea.

18 Q Do you know anything about how your text messages are
19 backed up to the Cloud or otherwise?

20 A I don't.

21 Q Okay. So I want to talk about the substance of those
22 messages though. More particularly, Mr. Shores; who is
23 Mr. Shores?

24 A Mr. Shores is the director of our human resource
25 department.

T. Broderick - X

1 Q Now, you say "director." Is Mr. Shores an executive of
2 Albertsons?

3 A No.

4 Q Is he an executive of your division?

5 A No.

6 Q Is Mr. Shores an officer of Albertsons?

7 A No.

8 Q Is he an officer of your division?

9 A No.

10 Q So what are Mr. Shores' job responsibilities?

11 A Well, as a director of human resources, he is in charge
12 of running and overseeing the daily interactions that would
13 be associated with -- with all things human resources.

14 Q Does Mr. Shores have any responsibility for grocery
15 pricing?

16 A No.

17 Q How long have you known Mr. Shores?

18 A Over eight years.

19 Q During that entire time has he ever had any
20 responsibilities related to grocery pricing?

21 A None.

22 Q Mr. Broderick, to your knowledge, was Mr. Shores
23 involved in any way with merger negotiations?

24 A None.

25 Q Did Mr. Shores have any nonpublic knowledge about the

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1 merger, as far as you know?

2 A No.

3 Q Has Mr. Shores ever worked at Kroger?

4 A No.

5 Q All right. Mr. Broderick, you know there is going to
6 be a divestiture in the Denver division, correct?

7 A Yes.

8 Q How many stores will be divested?

9 MR. BRYSON: Objection. Beyond the scope. I did
10 not ask him any questions about the divestiture.

11 THE COURT: Sustained.

12 MR. PODOLL: Thank you, Your Honor. I have no
13 further questions.

14 MR. BRYSON: No redirect, Your Honor.

15 THE COURT: You can step down.

16 MS. BLACKBURN: Your Honor, Emily Blackburn on
17 behalf of plaintiff, the Federal Trade Commission. The FTC
18 would call Dr. Nicholas Hill to the stand.

19 (The witness was duly sworn.)

20 THE CLERK: Thank you. Please be seated. Would
21 you please state your name for the record, spelling your
22 last.

23 THE WITNESS: Nicholas Hill. N-I-C-H-O-L-A-S;
24 H-I-L-L.

25 MS. BLACKBURN: May I proceed, Your Honor?

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1 THE COURT: Yes.

2 DIRECT EXAMINATION

3 BY MS. BLACKBURN:

4 Q Dr. Hill, in this binder that was just passed out are
5 demonstratives relating to your testimony today, and it also
6 contains your expert reports. Were these demonstratives
7 prepared at your direction?

8 A They were.

9 Q Dr. Hill, would you please give the Court a brief
10 overview of your educational background?

11 A Sure. I have an undergraduate degree and a Masters
12 degree in economics from the University of Warwick and a
13 Ph.D. in economics from Johns Hopkins University.

14 Q Where did you first work after receiving your Ph.D.?

15 A I worked as part of the antitrust division of the U.S.
16 Department of Justice in the economic analysis group.

17 Q For how long did you work at the DOJ in the economic
18 analysis group?

19 A I was there for about seven years, and then I joined
20 the FTC in the Bureau of Economics.

21 Q And what sort of work did you do at the DOJ and the
22 FTC?

23 A I worked on antitrust economics, but mostly on merger
24 review.

25 Q How long did you work at the FTC?

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1 A About two years, and then I joined the U.S. Department
2 of Justice Antitrust Division, again, as a supervising
3 economist.

4 Q Did you win any awards for government service?

5 A I did. I worked on the Aetna-Humana transaction and I
6 won an Attorney General's award for my work.

7 Q Did you work on any retail mergers during your
8 government service?

9 A I did.

10 Q Did you work on any supermarket cases?

11 A Yes.

12 Q Did you analyze any mergers that involved local markets
13 or local competition?

14 A Yes. Many.

15 Q Have you ever worked on a merger case that involved
16 analysis of a divestiture?

17 A Yes. That's pretty common, and I've twice prepared as
18 an expert on what are called Toniyac (phonetic) proceedings,
19 which are to evaluate whether a proposed divestiture is in
20 the public interest.

21 Q After you left DOJ, where did you go on to work?

22 A I joined Bates White Economic Consulting.

23 Q What is your title at Bates White?

24 A I'm a partner.

25 Q What type of work do you do at Bates White?

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1 A Again, I do the antitrust economics. I mostly do
2 mergers, but I also do other types of antitrust work like
3 monopolization or cartel cases.

4 Q About how many different mergers have you worked on
5 during your total career as an economist?

6 A I don't have an exact number, but it is more than 250,
7 I would estimate.

8 Q Have you ever testified as an economic expert in
9 federal court before today?

10 A Yes, I have.

11 Q How many times?

12 A Six times.

13 Q Was any of that testimony relating to merger cases?

14 A All six related to merger cases.

15 Q Have you ever published on the subject of merger
16 analysis?

17 A Yes.

18 MS. BLACKBURN: Your Honor, at this time I would
19 like to offer Dr. Hill as an expert in the field of
20 industrial organization economics as applied to mergers.

21 MR. WOLF: No objection, Your Honor.

22 THE COURT: He is qualified as an expert.

23 MS. BLACKBURN: Thank you, Your Honor.

24 BY MS. BLACKBURN:

25 Q Dr. Hill, would you please describe what you were

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1 retained by the FTC to do in the Kroger-Albertsons case?

2 A Sure. If we could please advance one more slide. So
3 this is summarizing my assignment, and that's to evaluate
4 whether the proposed merger would substantially reduce
5 competition in any relevant antitrust market.

6 Q Did you prepare expert reports in this case summarizing
7 your opinions and the materials you relied on in forming
8 them?

9 A I did.

10 Q Are those expert reports in your binder at the tabs
11 marked PX7004 and PX7006?

12 A Yes. Those look like my expert reports.

13 Q Who drafted these reports?

14 A I did.

15 MS. BLACKBURN: Your Honor, we request that PX7004
16 and 7006 be moved into evidence?

17 MR. WOLF: No objection.

18 THE COURT: It will be received.

19 BY MS. BLACKBURN:

20 Q Dr. Hill, in connection with your assignment, what
21 information did you review?

22 A I looked at data, documents, and testimony from the
23 parties and from third parties.

24 Q Have you attended or listened to any of this hearing
25 prior to today?

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1 A No. I read all the transcripts from the previous days
2 with the exception of the opening statements and the
3 witnesses who pertained solely to labor.

4 Q Dr. Hill, first I would like to discuss the framework
5 you used for merger analysis. So at a high level, how can
6 mergers between competitors impact competition and
7 consumers?

8 A Sure. So if you would advance one more slide. So
9 firms compete with one another to attract consumers. We
10 heard some testimony just now from Mr. Broderick about
11 competition in the Denver area, how firms are competing to
12 attract consumers, and they may do it with lower prices.
13 They may do it with better service, better selection. So in
14 all these ways, firms are competing with one another. If a
15 merger substantially reduces competition between firms, it
16 can weaken that incentive to compete, and it can lead to
17 higher prices, lower-quality service, et cetera.

18 Q Do all mergers harm consumers?

19 A No.

20 Q Do all mergers benefit consumers?

21 A No. Some mergers may benefit consumers, some mergers
22 may harm consumers, and some mergers will be competitively
23 neutral.

24 Q How do you go about determining whether a specific
25 merger may have a beneficial, a detrimental, or simply a

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1 neutral effect on consumers?

2 A There is standard framework. If we could advance one
3 more slide, please. So typically you start with the
4 overlaps. You are trying to understand what competition may
5 be eliminated by a transaction. So you start by asking:
6 Where do the parties overlap? Where do they compete with
7 one another today? So that's the first step here.

8 The second step is market definition. So we have
9 identified the areas where the parties are competing with
10 each other. And then we ask the question who else is
11 competing with them in a substantial way in those areas. So
12 that's the process of market definition. Then we look at
13 that both in products and in geographies.

14 After that, we look at market shares and
15 concentration. So we have got the parties competing. We
16 have got a list of important competitors. Then we use
17 market shares to put some structure around how important are
18 those competitors. So a firm that has a 2 percent market
19 share may not be particularly competitively important, while
20 a 50 percent market share may be competitively important.
21 So that helps us separate from there are ten competitors to
22 understanding how important each of those competitors is.

23 Similarly, concentration allows us to measure how
24 much competition is in the market. Is there a lot? Is
25 there a little? How many choices do consumers really have?

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1 After that, we move on to competitive effects,
2 using economic models and tools to analyze how much
3 competition will the merger eliminate and how significant is
4 that loss. Then finally, you typically look at potentially
5 mitigating factors, like divestiture or cost efficiencies,
6 so savings that are generated by the merger.

7 Q Have you formed any opinions as to the likely
8 competitive effect of Kroger's proposed purchase of
9 Albertsons?

10 A Yes, I have.

11 Q Will you briefly summarize those opinions.

12 A Sure. If we could advance one more slide, please.
13 Here for the overlap areas, I take 95 core-based statistical
14 areas. So those are areas like Portland -- maybe we saw
15 some of these examples today, including Chicago, and eleven
16 non-metro areas around the country.

17 So this is the area where both parties are present
18 today, and they are competing with one another. Having
19 identified those overlaps, the next step is who else is
20 competing in those markets. There, I'm identifying
21 supermarket markets and large-format store markets in local
22 areas around particular stores.

23 For market shares and concentration, I find that
24 the change in concentration in the post-merger concentration
25 levels in many of those markets will be high enough that the

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1 market is presumed to substantially reduce competition.

2 Turning to competitive effects, I find that the
3 parties compete closely with one another in many markets and
4 that the elimination of that competition in those markets is
5 likely to harm consumers.

6 And then finally, for the proposed divestiture, I
7 find the proposed divestiture is not likely to fully
8 mitigate the anticompetitive effect of the transaction.

9 Q So I understand you began your merger analysis by
10 identifying overlap areas. What do you mean by "overlap
11 areas"?

12 A Sure. If we could advance one more slide. So this is
13 a map of the United States. And the red dots are areas
14 where the parties are competing with one another. Those are
15 the overlap areas I talked about before. The gray dots are
16 areas where only one party is present.

17 So, for example, in Ohio, Kroger is present, but
18 Albertsons is not. So there is not competition between them
19 there today. By way of contrast, the red dots are areas
20 where both parties are present and competing.

21 Q I just want to be sure as we continue to progress
22 through the merger analysis framework, will you be
23 presenting results for the overlap areas or nationwide?

24 A The results I am going to present are going to be
25 focused on the overlap areas. That's where there is

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1 competition today. That competition will be eliminated by
2 the merger, and so the task is to ask how significant is
3 that loss of competition.

4 Q Dr. Hill, I understand that market definition is the
5 next step in the merger analysis framework. Can you start
6 by explaining why economists define antitrust markets in the
7 first place?

8 A Sure. If we could advance one more slide.

9 As I said, we found overlap areas, places where
10 the parties are competing. Now we want to identify who are
11 the other reasonable substitutes that consumers might turn
12 to if the parties attempted to raise price or worsen service
13 or take some other action that doesn't benefit consumers.

14 Q I see here that an antitrust market has two dimensions.
15 What does that mean?

16 A So we are asking the question where else might
17 consumers be able to go? And we can think of that in two
18 ways. One is sort of a products level. So if I today am
19 shopping at a traditional grocery store and conditions
20 worsen at that traditional grocery store, what other store
21 formats might I consider as good substitutes?

22 Then there is a geographic dimension. If today
23 I'm shopping at a traditional supermarket and conditions
24 worsen there, how far might I go? If I don't want to switch
25 store format, I want to stick with the traditional

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1 supermarket, how far might I go to find the closest
2 traditional supermarket? So it is looking at those two
3 different ways that consumers might react and substitute a
4 way from the parties where there is a raised price.

5 Q How does the exercise of market definition fit into the
6 merger analysis framework? In other words, what does
7 defining a market allow you to do?

8 A Yes. If you don't mind going back one slide for a
9 second. So it has two benefits -- market definition. One,
10 it gives you sort of a disciplined framework for saying what
11 is a close substitute and making sure you didn't miss some
12 close substitutes. Then once you define markets, you can
13 calculate market shares. So we have a number of
14 competitors. How important is each of them in the market;
15 how concentrated is the market.

16 Q Dr. Hill, are you aware that defendant's expert,
17 Dr. Israel, claims that market definition is not a useful
18 exercise in this industry?

19 A Yes.

20 Q Do you agree with him?

21 A No. I think the Court has heard a lot of testimony
22 about the people who are competing, and market shares is a
23 way to get a handle on how important are those competitors
24 in the larger picture of the market. It is useful in this
25 industry. It is useful in many other industries.

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1 Q Let's start with the product dimension of market
2 definition. What market products did you define in this
3 case?

4 A Sure. If we could advance one more slide, please. So
5 here I looked at two different market definitions. The one
6 on the left is the supermarket market. So this includes
7 traditional supermarkets, like Safeway and Kroger, and it
8 includes supercenters, like Walmart, Target, or Fred Meyer.
9 So all of those types of stores are going to be included in
10 this market.

11 The large-format store market on the right is
12 going to include both of those categories, and it is also
13 going to include club stores, like Costco and Sam's Club.
14 It is going to include natural and gourmet, like Whole Foods
15 and Sprouts, and it is going to include limited assortment
16 stores, like Aldi or Grocery Outlet.

17 Q Does this mean that store firms acting outside the
18 supermarket market compete with the private supermarkets?

19 A In the supermarket market, we are saying the stores --
20 the supercenters and the traditional supermarkets are
21 competing closely with one another. Just the removal of the
22 competition in that market would be enough to harm
23 consumers. In the large-format market, we are broadening
24 that to include club stores, natural and gourmet, and
25 limited assortment.

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1 Q Are you aware that defendants have criticized the fact
2 that you defined two product markets?

3 A Yes.

4 Q Why did you choose to analyze two product markets?

5 A I think there is a factual dispute here between the
6 plaintiffs and the defendants about whether the market is
7 what I will call narrow, the supermarket market, or
8 relatively broad, like the large-format store market. So I
9 looked at the transaction in both of those markets, and I'm
10 going to present results in both markets. And what I find
11 is the transactions likely to reduce competition in both of
12 these sets of markets, and so that's telling me that the
13 transaction is likely materially reduce competition,
14 whichever way you decide about whether club stores, natural
15 and gourmet, and limited assortment are close enough
16 substitutes to include the market.

17 Q Now that we understand the contours of the two product
18 markets you defined and the reason you analyze two, can you
19 describe what analyses you conducted in support of product
20 definition in this case?

21 A Sure. There are a number of analyses in my report.
22 The ones I'll talk about today are price checking. So
23 that's in the perspective of firms where they're checking
24 prices. I'll talk about where consumers are actually
25 shopping, so share of sales. Then I'll talk a little bit

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1 about the hypothetical monopolist test. So that's a way of
2 determining: Did I exclude a relevant substitute that's so
3 close that it should be in the market?

4 Q I'm going to ask you some questions about each of the
5 three analyses you just described. I would like to begin
6 with price-checking behavior of the parties. So what data
7 did you use to analyze the parties' price checking behavior?

8 A I took the most recent data produced by the parties to
9 the FTC.

10 Q Why did you analyze the price-checking behavior of
11 Kroger and Albertsons?

12 A So I think we have heard -- the Court has heard
13 testimony about price checking is an important function for
14 supermarkets, and they're looking to identify what is
15 pricing like in the market. And typically you're likely to
16 price-check firms you compete with, and you're less likely
17 to price-check firms that are not relevant competitors for
18 you.

19 Q Let's start with Kroger. Can you describe your
20 analysis with respect to Kroger's price-checking behavior?

21 A Sure. If we can advance one more slide. One more as
22 well.

23 So here, we are looking at the Kroger Everyday
24 Essentials price checks. So this is Kroger defines five
25 Everyday Essentials, and so that's milk, eggs, bananas,

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1 lettuce, and sugar. And so they break their stores in
2 groups of between one and six stores. And for those groups
3 of stores, they find other stores to price check what are
4 the prices of those Everyday Essentials.

5 So in this figure I'm summarizing the format of
6 the stores that they chose to price check. And you can see
7 that the largest segment here is traditional supermarkets at
8 47 percent and then supercenters at 33 percent. So
9 combined, those two are roughly 80 percent or 79 percent to
10 be precise of all of these price checks. So it's showing me
11 that these Kroger stores, by and large, when they are
12 price-checking what are the prices of Everyday Essentials,
13 they are looking at formats that are in the supermarket
14 market.

15 If I broaden a little bit more and go to the
16 large-format stores, then I get one hundred percent of all
17 of the Everyday Essential price checks. There is no price
18 checks in these data in the overlap areas outside of these
19 types of stores.

20 Q Is it your understanding that Kroger uses price checks
21 to inform its own pricing?

22 A Correct.

23 Q Does Albertsons also check the prices as competitor
24 stores?

25 A It does. So if we could please advance one more slide.

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1 So Albertsons splits its stores into price areas, and each
2 price area will super a primary food competitor that is
3 going to be price checked. Here, I'm doing the same thing
4 that I did for the Everyday Essentials. I'm looking at what
5 formats were checked by the Albertsons stores, and you can
6 see here 78 percent of those price checks were traditional
7 supermarkets; 21 percent were supercenters, like Walmart or
8 Target; and then 1 percent were at club stores. So
9 99 percent of the price checks that were done here were of
10 supermarkets, and if I broaden it just a tiny bit to include
11 club stores, so the large-format stores, I get a hundred
12 percent of these price checks.

13 Q Is it your understanding that Albertsons uses the
14 results of price checks to inform its pricing decisions?

15 A Yes. My understanding is, based on the testimony,
16 these price checks feed into the Albertsons pricing system
17 for alerts and other things.

18 Q Did you analyze any other types of price-checking
19 behavior that the parties engaged in?

20 A Yes. There are some other analyses in my report for
21 Kroger.

22 Q What did you find with those analyses?

23 A The results were qualitatively similar.

24 Q Turning to the second of the three product market
25 analyses you described, what do you mean by the "share of

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1 sales"?

2 A Sure. So the previous -- these previous two slides are
3 looking at things in the perspective of producers: Where
4 are they checking prices? If we advance one more slide, we
5 will start to ask, what does the picture look like from the
6 perspective consumers?

7 So if we can advance one more. Thank you.

8 So this is looking in the overlap areas, where are
9 consumers spending their dollars on food and grocery sales.
10 So what have consumers chosen in the past when they are
11 purchasing food and groceries. You can see 44 percent of
12 the spending goes to traditional supermarkets and 25 percent
13 goes to supercenters. So 68 percent of the consumer's
14 dollar is going to store formats in the supermarkets market.
15 If I broaden it further to include club, natural, and
16 limited, then I get to 96 percent of all consumer spending
17 is going to stores that are in the large-format store
18 market. But there's only 4 percent that are going to the
19 other formats here, and that's telling me that the consumer
20 is very heavily focused on the supermarkets and the
21 large-format store markets.

22 Q And these results are for all of the overlap areas.

23 Can you provide a sense of what the same share of sales
24 analysis would look like here in the Portland, Oregon, MSA?

25 A Sure. If we could advance one more, please.

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1 So this is the same figure but for Portland. You
2 can see the specific numbers shift around a little bit. We
3 have 32 percent now for traditional market and 38 for
4 supercenter, probably reflecting the popularity of
5 Fred Meyer. But we see an aggregate. Again, the
6 supermarkets market accounts for 70 percent of all consumer
7 spending. If I broaden it again to large-format stores, I
8 again get 96 percent. So only 4 percent of consumer
9 spending is going to some other format. So when I'm
10 thinking about where consumers might substitute, the past
11 behavior of consumers is telling me that the supermarkets
12 markets and the large-format store markets are a good place
13 to look for substitutes.

14 Q You said "past behavior," but these past two slides
15 focus on 2022. Have you analyzed share of sales over time
16 to see if there are any seismic or tectonic changes in the
17 market in recent years?

18 A Yes. If you would advance one more slide, please. We
19 will see the same figure. It will run from 2014 on the left
20 to 2022 on the far right. What you can see is over time the
21 shares of each of these types of formats are pretty stable.

22 Q Did you observe any discernible change in the sales
23 around the COVID pandemic?

24 A There is no significant change in the percentages
25 really around that time period. There is a little bump-up

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1 in total sales, perhaps reflecting people eating in more and
2 eating out less. Then the total amount comes down a little
3 bit in 2022. But the shares across formats stay relatively
4 stable over time.

5 Q What conclusions did you draw from the analysis of
6 share of sales?

7 A Yeah. So the share of sales, again, are showing us
8 when consumers in the past have looked to spend their money
9 on food and grocery, they have spent the overwhelming
10 majority of it in the supermarkets market and the
11 large-format stores market.

12 Q Dr. Hill, what store formats are included in the other
13 category that's represented by that thin gray slice at the
14 top of this figure?

15 A So that includes dollar stores, general merchandisers,
16 and superettes, which you can think as a smaller corner-type
17 stores that will still sell some groceries.

18 Q Did you test whether those formats actually might be
19 close substitutes for supermarkets and supercenters or for
20 large-format stores?

21 A I did. I did so using the hypothetical monopolist
22 test, which we will discuss later.

23 Q Dr. Hill, have you heard testimony during this hearing
24 about something about called cross-shopping?

25 A Yes.

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1 Q Is this testimony inconsistent with your market
2 definition?

3 A No. Cross-shopping can be completely consistent. A
4 consumer may spend part of their budget on groceries and
5 food at a traditional supermarket, and they may spend
6 another at a supercenter or club store.

7 Q Thus far we have discussed the two product markets,
8 supermarkets and large-format stores side by side, but are
9 you going to focus on one of these product markets in your
10 testimony today?

11 A Yes. I'm going to focus on the large-format store
12 market. That includes a broader set of substitute. So I'm
13 going to focus on that today. Both in my reports and at the
14 end of the deck you'll see some slides summarizing the same
15 results for the supermarket market.

16 Q Just for the avoidance of any doubt, Dr. Hill, is
17 Walmart included in both the supermarket and the
18 large-format store product markets?

19 A Yes. All supercenters, I'm including -- Walmart and
20 Target are included in both of those markets.

21 Q Okay. Let's move on to the geographic or the "where"
22 dimension of market definition. So similar to product
23 market, can you explain why economists define geographic
24 markets in antitrust cases?

25 A Sure. Advance two more slides, please.

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1 So if we think about a consumer today that lives
2 close to a Safeway and a Fred Meyer and shops at those two
3 stores today or considers those two stores today, if prices
4 were to go up after the merger, that consumer may say: I'm
5 not beholden to these two nearby stores. I can travel
6 further to shop at another store. Maybe a Walmart, maybe a
7 Costco, maybe somewhere else that is a little further away.
8 So the geographic dimension is asking how far might
9 consumers be willing to travel to find an alternative.

10 Q Can you first describe the approach you used to define
11 geographic markets in your initial expert report.

12 A Sure. So I define my geographic markets around focal
13 stores. So I took each store in the overlap area, and I
14 took that as a geographic market. I tried to define who are
15 the competitive stores for that store. So in the initial
16 reports, I picked this focal store. That's at the center of
17 the market. And then I used data from the parties to try to
18 identify how far out would you have to draw a circle from
19 that store to capture 75 percent of that store's customers.
20 So that's step two.

21 Then having done that, I doubled that circle to
22 capture the stores that could compete for those customers.
23 So if you think about the 75 percent circle, that's where
24 the store has 75 percent of its customers. A store just
25 outside that area can also compete for the customers in the

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1 circle. So that's why I doubled the catchment or draw area
2 and took all of the stores in that doubled area.

3 Q What data did you use to determine each store's
4 75 percent catchment for service area?

5 A So the parties produced to the FTC loyalty card data
6 that tracks where a customer is located and where they made
7 their purchases. So I used that at the store level. So for
8 each individual store, I calculated how far do you have to
9 draw out a circle to get 75 percent of its customers.

10 Q Can you please next describe the process you used to
11 define geographic markets in your rebuttal report.

12 A Sure. Dr. Israel criticized my initial approach. One
13 of his arguments was, look, if you have a store just outside
14 of the circle, it is not going to get counted, and one store
15 just inside the circle is going to get counted. It doesn't
16 make sense to have the break where going from a small
17 changes you from being inside the market to outside the
18 market.

19 He also argued, look, some store formats like
20 Costco may draw from larger distances, and your methodology
21 isn't paying attention to that because it's based around the
22 draw area of the focal store. So in the rebuttal report I
23 used an alternative approach. So again, I picked a focal
24 store to put at the center of the geographic market, and
25 then I found all the census block groups -- these are small

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1 areas, smaller than a ZIP Code, where that store has
2 customers.

3 So I took all of the areas where that store today
4 is attracting customers, and I included any store that sells
5 into that area. So that group of stores that is selling
6 into that focal store's competitive area are going to be
7 included. So if you have a very distant club store that's
8 competing for those very same customers, it will get
9 captured in the market.

10 Q Let's take each of these two approaches in turn. First
11 of all, do you have an example of the initial report
12 store-based approach in practice?

13 A Sure. If we could advance one more slide, please.

14 So this slide is looking at the initial report
15 approach. The blue dot at the center is the focal store.
16 You can see there is a smaller circle around it. It says
17 inside that that 75 percent of this focal store's sales are
18 within five miles. So if I draw a five-mile circle around
19 the store, I get 75 percent of its sales. Then as I said, I
20 double this to get the total area of the geographic market,
21 and I'm going to include all stores that fall in that
22 broader area, so stores A, B, C, D, those are all within the
23 area, and so they are going to be included within the
24 market. Then store E, you can see in the upper left-hand
25 corner, that's outside the market. So that store is not

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1 going to be counted.

2 Q Did you find that each focal store had a draw area with
3 the same radius?

4 A No. The draw area is varied by store. So if we
5 advance one more slide, please.

6 This is a slide looking at in the overlap areas,
7 on average, how far are customers traveling to go to
8 Albertsons on the left and Kroger on the right. So if we
9 just focus on Albertsons to begin with, you can see the
10 first bar says zero to five miles. So that's telling us
11 that for the average Albertsons store, 73 percent of its
12 customers are coming from within five miles. If we go five
13 to ten miles, 14 percent of the customers are coming from
14 five to ten miles away. So these figures are showing us the
15 average distance the customers are traveling, but it varies
16 from store is to store. So a store in a very dense area --
17 think of New York -- might draw from a relatively limited
18 area. A store in a rural area might draw from a very
19 broader area.

20 Q Is the catchment or draw area approach defining
21 geographic markets commonly used in the antitrust analysis
22 of mergers?

23 A Yes. It is commonly used in any spacial industry --
24 sorry -- any industry with spacial competition, and that's
25 any industry where the distance for consumers or firms to a

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1 potential supplier affects the decision-making process.

2 Q So turning to your second method of defining geographic
3 markets, do you have an illustrative example of the rebuttal
4 report approach in action?

5 A Sure. If we could advance one more slide, please.

6 Here, this is again an illustrative example. The
7 blue store, again, is the focal store. Then this green area
8 I have drawn around it happens to be a circle. I could have
9 made it a square or another shape. This is just capturing
10 all the census block groups that this store is selling to.
11 So the customers the store is drawing, they are contained
12 within this area. You can see inside that area there are
13 three stores; A, B, and C. So these stores are very likely
14 to sell to customers in that same area, so they are also
15 included in the market.

16 Now, there is a store D that is 22 miles away.
17 Store D has a long service area, so they are drawing from
18 far above them and far below them, and their draw area
19 overlaps with the focal stores. So they are making stores
20 where that blue oblong, I'll call it, overlaps with the
21 circle. That's a group of customers that the focal store
22 today is drawing from and store D is competing for
23 customers. So store D is going to be included.

24 Store E, which has the rectangle, the orange
25 rectangle, its service area doesn't overlap with the focal

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1 stores, even though it is closer to store D. So it is not
2 going to be included in the market because it is not today
3 competing for the same customers that the focal store is
4 serving.

5 Q Did you compare the results of your two approaches to
6 define geographic markets?

7 A I did.

8 Q What did you find?

9 A So I found an aggregate that the results of the two
10 markets are qualitative -- the two market definition
11 strategies are qualitatively similar.

12 Q Dr. Hill, I want to return to your earlier statement
13 about the hypothetical monopolist test and the idea that an
14 antitrust market doesn't need to include all possible
15 substitutes. Could you give an example of the more distant
16 substitute for an Albertsons or a Kroger supermarket that
17 might be properly excluded from the market?

18 A Sure. So if you think about dollar stores, the Court
19 has heard testimony about how dollar stores are
20 differentiated from these large-format stores that we're
21 talking about. When we are looking at the share of consumer
22 sales, dollar stores were a very small portion. They were a
23 part of the 4 percent other, and they didn't show up in the
24 price-checking behavior in the overlap areas. So this is a
25 format when we are trying to understand what are the

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1 principal competitors for the parties, I feel comfortable
2 excluding dollar stores.

3 Q What about a store that would be a more distant
4 substitute from a geographic perspective?

5 A So if you think about a store that's a hundred miles
6 away, it is possible that some consumer views that as a
7 really good substitute for the close, nearby store, but it
8 seems a little bit far, and so those stores in general are
9 not going to be included in the market.

10 Q Just to be sure, in the rebuttal report methodology, if
11 that store was serving the customers that were also being
12 served by the focal store, would that store be in the
13 market?

14 A That's correct. Although the weight it would get would
15 depend on how many of the focal store's customers it is
16 competing for. When we get to market shares, I'll discuss
17 that more in detail.

18 Q Understood. So how do you determine if you have
19 included enough important substitutes in an antitrust
20 market?

21 A So that's done using the hypothetical monopolist test.

22 Q So would it be okay if we refer to the hypothetical
23 monopolist test as the HMT today?

24 A Sure.

25 Q First of all, what is the purpose of the hypothetical

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1 monopolist test, or the HMT?

2 A If we could please advance two more slides.

3 So as I was saying before, the hypothetical
4 monopolist test is a very widely used in antitrust
5 economics, and it is used to determine if a market is too
6 narrowly defined. In defining the market, did I exclude
7 some important substitute that might mean my analysis of
8 market shares and concentration are not reliable?

9 Q So how does the hypothetical monopolist test help to
10 answer that question?

11 A So it works by asking, if you controlled all of the
12 stores in your candidate market where one entity controlled
13 all of them, would it have an incentive to raise price for
14 at least one of those stores, the focal store in this case?
15 So we are really asking, if you have all of the stores in
16 your market controlled by one entity, and you would not want
17 to raise price, that likely reflects the fact that you are
18 excluding some close substitute. If you would want to raise
19 price, it is telling us, yes, this is a group of stores over
20 which you might be able to exercise market power.

21 So I think a simple example that I find helpful is
22 if you imagine there is a street in a town, and it has three
23 lemonade stands on it, and the next closest lemonade stand
24 is on the other side of town. So people on this block, when
25 they want to get lemonade, they walk to one of the three

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1 stands. Let's say they are each charging \$1 for a glass of
2 lemonade. Now, if you controlled two of the lemonade
3 stands, and you say, "Now I've got two. I'm going to raise
4 the price of my lemonade to the price of \$1.25." Your
5 customers would say, "The third lemonade stand is selling
6 for a dollar; I'm going to go there." So you would lose
7 many of your customers. So that would not be profitable.
8 Why isn't it profitable for the owner of those two stores,
9 the monopolist of those two stores? Because we are missing
10 a very close substitute. That third lemonade stand is also
11 selling lemonade, and they are selling it for a dollar. So
12 your customers are going to divert away, and you are going
13 to lose too much revenue. But if you took over the third
14 lemonade stand as well, now you control all three lemonade
15 stands. And if you want to raise price, your customers'
16 only alternative is go other side of town. Maybe some of
17 them will go, but likely most of them will stay on. So now
18 they buy from you. So now, once you have got the broader
19 set of stores, once you are not excluding a close
20 substitute, you do want to raise price, and the hypothetical
21 monopolist test is satisfied.

22 Q So in this example, would the three lemonade stands on
23 the one side of town constitute properly defined antitrust
24 market?

25 A That's correct. But any group of the other two would

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1 not, because you are missing one of the three that's a close
2 substitute.

3 Q Is the hypothetical monopolist test a widely used
4 economic tool in the antitrust analysis of mergers?

5 A Yes, it is used all the time.

6 Q Do both the 2010 merger guidelines and the 2023 merger
7 guidelines endorse the use of the hypothetical monopolist
8 test in market definition?

9 A Yes.

10 Q What did you find when you applied the hypothetical
11 monopolist test to the candidate markets you defined in this
12 case?

13 A So if we could advance one more slide, please.

14 These two figures here are summarizing the results
15 of the test for the supermarkets markets on the left and
16 large-format store market on the right. If we start on the
17 left of the supermarket markets, we can see that 2,055 of
18 the markets are passing the hypothetical monopolist test and
19 474 are failing. If we look at the large-format stores,
20 2,498 are passing and 35 are failing. So what it's telling
21 us is for both of these product markets, and using the
22 geographic markets that I discussed, a large number of
23 stores is passing the hypothetical monopolist test. Those
24 are properly defined markets.

25 Q Does this slide depict the store-based approach to

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1 geographic markets or customer-based approach?

2 A So this is the store-based approach. If I look at the
3 customer-based approach, all but eleven supermarket markets
4 pass the test, and for the large-format stores all but one
5 store passed the test.

6 Q Dr. Hill, do you know that Dr. Israel asserts that he
7 performed an actual monopolist test in this case and argues
8 that this approach is superior to the hypothetical
9 monopolist test?

10 A I am.

11 Q Do you have a response to that criticism?

12 A Yeah, I don't agree with that criticism. So what
13 Dr. Israel is doing, he is saying let's look at each one of
14 your markets, and we will calculate the margin in that
15 market, and we will calculate the number of competitors. So
16 we are going to see in practice if you have less
17 competition, do you see higher prices? And he finds no
18 relationship between those two things, and so he concludes
19 that you can't pass the hypothetical monopolist test.

20 The problem with this approach is it is not
21 controlling for other factors adequately. So both
22 competition and margins are driven by demand and supply. In
23 particular, if you think about demand, if you have an area
24 with high demand, you may have high prices and a lot of
25 competitors who want to get a piece of the high demand. If

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1 you have a low demand market, you may have fewer competitors
2 and lower prices. So demand in this case may result in you
3 concluding that having more competitors leads to higher
4 prices, and that confuses the impact of supply, which is
5 what we are interested in.

6 So when you are mixing together demand and supply
7 the way Dr. Israel does, all you can say there is a
8 correlation, but you can't say there is causation between
9 them. And so it is not an appropriate way to determine
10 would you be able to raise price if you controlled those
11 stores.

12 Q Just to be clear, is the term "actual monopolist test"
13 commonly used in antitrust analysis?

14 A I have not seen it before this case.

15 Q Does the phrase or the term "actual monopolist test"
16 appear in either the 2010 or 2023 merger guidelines?

17 A It does not.

18 Q So, Dr. Hill, now that we have identified the overlaps,
19 defined the relevant markets, and tested them using the
20 hypothetical monopolist test, what's the next step in the
21 merger analysis framework?

22 A So the next step is to calculate market shares so we
23 could advance -- sorry. Yeah. One more slide, please.

24 So market shares are commonly used in antitrust
25 analysis to get a sense of the importance of the competitors

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1 in the market. A competitor with 2 percent may have a very
2 different competitive significance than one with 20 percent.
3 And a market in which the parties each have 25 percent, so
4 the post-merger they account for one in two sales in the
5 market. It may be very different from a market where the
6 parties each have 1 percent today and after the merger they
7 would have 2 percent of the sales in the market. So markets
8 help us sort out how likely is it that the transaction will
9 materially reduce competition.

10 Q So how does calculating market shares help one analyze
11 a merger's likely impact on competition and consumers?

12 A Yes. So properly defined market shares give us a sense
13 of a firm's competitive significance. A firm with a large
14 market share is a large, important competitor; a firm with a
15 small market share is not as an important competitor.

16 Q What methodologies did you use to calculate market
17 shares here?

18 A So if we advance one more slide.

19 So I used two different methodologies; one for
20 each of the geographic markets that I defined, or geographic
21 market types. So on the left-hand side, we have the
22 store-based shares. So this is the markets where I'm taking
23 all the stores inside a particular area, and I'm including
24 them in the market. So this calculates shares in those
25 areas. I take all of the stores that are identified. I add

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1 up their shares and then each store's share is its sales
2 over the total sales of all the stores in the market.

3 Q And can you similarly describe your customer-based
4 approach to calculating market shares?

5 A Sure. In that approach, remember we took where are all
6 the census-blocked groups where the focal store is drawing
7 customers, and we are going to take all of those
8 census-blocked groups, and in each one we're going to
9 calculate market shares. So every store that makes sales in
10 those census-blocked groups will be added up, and we will
11 have shares for each census-blocked group that focal store
12 currently active in. And then we will add those up
13 together. When we add them up, we are going to weight them.
14 Census-blocked groups where the focal stores has a lot of
15 sales, they are going to get a heavy weight. And market
16 shares in census-blocked groups where the store focal has a
17 very small presence, those are going to get a small weight.

18 Q Can give us a little more detail on why you weight the
19 competitors' sales differently depending on how many sales
20 they have into census-blocked group?

21 A Sure. If you think of a focal store and you think of a
22 census-block group 20 miles away where it has a small number
23 of sales, that census blocked group is not particularly
24 important for that store. It is making a small number of
25 sales there. So those shares are relatively less important

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1 for understanding the competitive picture. But for the
2 focal store for a census-block group that the focal store is
3 actually located, where it may have a large amount of sales,
4 the competitive picture there is very important. So I want
5 to give more weight to that census-blocked group than I do
6 with the one that is more distant.

7 Q Before we discuss the details of each approach, why did
8 you calculate market shares in two different ways?

9 A As I mentioned earlier, Dr. Israel criticized my
10 store-based shares. He made two points substantially. One
11 was you might have a store that's just outside of the
12 boundary of the geographic market. That store is not going
13 to get any weight in the market shares. And one just inside
14 the boundary is going to get full weight, and that doesn't
15 seem fair. And then also different store formats may have
16 different draw areas. So if a club store draws from a large
17 distance, you may exclude because it is outside the
18 boundary, yet it is an important competitive strength.

19 So in response to that I also defined these
20 customer-based shares, where we essentially are giving each
21 store weight according to how often it competes with the
22 focal store. If you compete with them a lot, you get a bit
23 market share. If you compete with them rarely, you get a
24 small market share. So this is giving us two different
25 lenses on what the market shares of the focal store are.

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1 Q Can you first walk through an example showing how you
2 calculate the store-based market shares using a real local
3 market?

4 A Sure. So if we could advance one more slide, please.

5 So this slide is looking at the geographic market
6 around a Fred Meyer focal store in Corvallis. The focal
7 store is the red square that has 22 percent next to it. You
8 can see about halfway across the page there is a line that's
9 marked the geographic boundary, 6.4 miles. So there is a
10 circle around this red store, and I cut off the other parts
11 of the circle because there aren't any stores there. In the
12 upper left-hand corner. You can see a market share chart.
13 Those are the market shares using the market-share
14 methodology for this market.

15 Something I want to draw attention to here is, if
16 you look carefully in the Corvallis area, you will see three
17 blue stars. One has 8 percent, one has 5 percent, and one
18 has 14 percent. So those are Albertsons stores. They're
19 Safeways. And all three are within the geographic market.
20 So they're included, and some of their individual shares
21 totals 27 percent.

22 Now, if you look at Albany in the upper right-hand
23 corner, you will see there is another star, but this one is
24 grayed out. That is also a Safeway store. It is the right
25 store format, but it is outside the geographic market. So

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1 it doesn't get included in the market, and it has zero
2 percent next to it. Then if you look back at Corvallis,
3 you'll see some other shapes there that are gray. Those are
4 stores that are not large-format stores, so they are not
5 included in the market share. I take all large-format
6 stores inside the geographic market, I add up their sales,
7 and I calculate market shares. That's how the store-based
8 market share methodology works.

9 Q Thank you, Dr. Hill. Just to confirm, the geographic
10 boundary at 6.4 miles, is that based on the parties'
11 ordinary course data about where that particular Fred Meyer
12 is drawing customers from?

13 A Yes. It is based on the loyalty card data for that
14 Fred Meyer store.

15 Q Do you have a similar approach calculating market
16 shares using the alternative customer-based approach?

17 A Sure. If we could advance one more slide.

18 So this is an illustrative example. If we look at
19 the store marked A, this is the focal store. Then I have
20 drawn four shapes that represent the CBGs, or the
21 census-blocked groups, where the focal store is making
22 sales. And the color of each of the census-blocked groups
23 tells me how many sales the focal store is making. You can
24 see census-blocked group one is a light blue. That tells me
25 there are relatively few sales for the focal store.

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1 Census-blocked group 4 is a darker blue, and that is saying
2 the focal store makes a lot of sales there. So when adding
3 up market shares, census-block group 4 will get more weight
4 than census-blocked group 1. Then there are three
5 competitor stores here. B and C are inside the CBGs where
6 the focal store is making sales. So they're included. But
7 only their sales in census-blocked groups 1, 2, 3, and 4 are
8 going to be included. If store C makes sales outside of the
9 census-blocked groups, they are not going to be counted
10 because the focal group is not making sales in those
11 census-blocked groups. Similarly, store D, which is outside
12 the geography and would be excluded in the previous slide,
13 their sales in census-blocked groups 1, 2, 3, and 4 will be
14 included even though store D is outside of the
15 census-blocked groups.

16 Q Have you reached any conclusions about the merged
17 firm's market shares in the markets you have defined?

18 A Yes. If we advance one more slide, please.

19 So the merged firm share in the market gives us a
20 sense of how significant a competitive force they will be in
21 those markets post-merger. And the bars on the left-hand
22 side, these are markets using the store-based market share,
23 and on the right-hand side, this is stores using the
24 customer-based market share. And if we look at the green
25 bars on the left-hand side, it is telling us in 341 markets,

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1 the merged firm will have a market share below 20 percent.
2 And if we look at the far right of that left-hand pane, we
3 see above 50 percent. That's telling us in 165 markets the
4 merged firm will have more than 50 percent of all food and
5 grocery sales. So that's the left-hand side of the
6 store-based markets. The right-hand side does the same
7 thing but for customer-based market shares.

8 Q What do you find -- did you compare the results of the
9 store-based and customer-based market shares?

10 A Yes. You can see that the two broadly speaking look
11 quite similar to one another. The one difference I would
12 like to highlight is if you look at the bars that say 40 to
13 50 percent and above 50 percent, my customer-based market
14 shares that I developed in response to Dr. Israel's
15 criticism, those actually have more markets with very high
16 market shares than the store-based market shares. So
17 addressing that criticism actually ended up in more markets
18 where the merged firm has a share of 40 to 50 percent or
19 above 50 percent.

20 Q Did you also calculate results for the supermarkets
21 product market?

22 A Yes. And qualitatively the results look similar.

23 Q So let's move on now to the next step in the merger
24 analysis framework, which is market concentration. First,
25 what do antitrust economists mean by market concentration?

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1 A Sure. So we can advance two more slides, please.

2 So market concentration is a way of boiling down:
3 Do consumers in a particular market have a lot of choices,
4 so that's an unconcentrated market? Or do they have
5 relatively few choices? And that would be a concentrated
6 market. And a market with a pure monopoly where there are
7 no other alternatives, that would be 100 percent
8 concentrated.

9 Q So how does calculating market concentration help one
10 to analyze a merger's likely impact on competition and
11 consumers?

12 A Sure. So if a merger significantly increases
13 concentration and results in a highly concentrated market,
14 it is telling us that the transaction is going to reduce
15 consumer options and lead them in a place where they don't
16 have a large number of options, and that is likely to be
17 harmful.

18 Q How is market concentration typically measured?

19 A So in merger analysis, we almost always use the
20 Herfindahl-Hirschman Index. So this is a metric that
21 calculates market concentration by squaring market shares
22 and then adding them up. So the values are going to range
23 from zero to 10,000. If you have a pure monopoly, one firm
24 has 100 percent, if I square that, I get 10,000. So that's
25 the most concentrated market possible. If you have many,

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1 many, many, many small firms, then when you square their
2 shares and add them up, you are going to get something close
3 to zero. Then in between, you move from unconcentrated zero
4 percent up to one-ten thousandths,000, which is completely
5 concentrated and dominated by a single firm.

6 Q Is the Herfindahl-Hirschman Index commonly used in the
7 antitrust analysis of mergers?

8 A Yes.

9 Q Do both the 2010 and 2023 merger guidelines endorse of
10 the HHI for market concentration?

11 A They do. HHI is just a widely used tool.

12 Q Did you calculate market concentration in all the local
13 markets you defined in this case?

14 A I did.

15 Q Can you summarize your findings with respect to market
16 concentration?

17 A Sure. If we could advance one more slide, please.

18 So this slide here is looking at market shares --
19 concentration measures on the left for store-based market
20 shares and on the right for customer-based market shares.
21 And these are all the stores where the transaction is
22 presumed likely to substantially reduce competition. So if
23 you look at the upper left-hand corner of either of the two
24 panes, there is a box that determines the -- that defines
25 what that presumption is. And there are two ways a market

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1 can satisfy that presumption. One is if the post-merger
2 concentration is 1,800 or above and the increase in
3 concentration is 100 points or more, or if the merged firm
4 has a market share above 30 percent and the change in the
5 concentration is above 100 percent.

6 You then look at the figure -- you can see in the
7 horizontal axis, it has the post-merger concentration
8 levels. That ranges from zero to 10,000, as the HHI does.
9 Then the vertical axis here is looking at the change in
10 concentration. How much does concentration change due to
11 the transaction? And the pink shaded area is the area that
12 satisfies the first part of the presumption. So the
13 post-merger concentration levels is above 1,800, and the
14 change in concentration is 100 or more, and all the markets
15 inside that area are colored pink.

16 Then you can see, there are also some pink dots
17 that are outside of that area. These are markets where the
18 merged firm share is going to be greater than 30 percent and
19 the change in concentration is going to be greater than 100.
20 Then in the lower right-hand side of each figure, it gives
21 us the number of presumptive markets using each of the two
22 market share methodologies. So on the left, we have 1,788;
23 on the right, we have 1,897.

24 Q And when it says "presumptive markets" on this slide,
25 does that mean markets where the transaction is presumed

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1 likely to substantially reduce competition?

2 A Yes. The transaction is presumed to be
3 anticompetitive.

4 Q Did you calculate the number of presumptive markets
5 using any other approaches or any other inputs?

6 A Yes, I did. So if we could advance one more slide.

7 So Dr. Israel calculated using a number of
8 different inputs, and so this slide is looking at the number
9 of presumptive markets using variations on those inputs. So
10 the bar on the far left, for example, that's in my initial
11 report, and I found 1,788 markets, large-format store
12 markets where they're presumptively anticompetitive.

13 Q What does the second bar from the left represent where
14 it says "excluding four closed stores"?

15 A Yes. Dr. Israel identified four stores that have
16 closed since I did -- that have closed since 2022. So that
17 reduces the number of presumptive markets to 1,785.

18 Q Are you aware that defendants have also criticized your
19 diversions and said they're derived from the hospital
20 context and they're inappropriate for this industry?

21 A Yes. And so this second bar here is saying, instead of
22 using my diversion ratios when I'm performing the
23 hypothetical monopolist test, I used Dr. Israel's
24 calculations that is using a different methodology, and that
25 slightly increases the number of presumptive markets. I

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1 should say this third bar and the fourth, fifth, and sixth
2 bar, each of them excludes the four closed stores. So the
3 four closed stores are removed from bars 3, 4, 5, and 6.
4 But bars 3, 4, 5, and 6 are not otherwise compound, and so
5 in each of them I'm changing one thing.

6 Q Just so we are clear on terminology, Dr. Hill, what is
7 diversion?

8 A Diversion is if you raise price, and some of your
9 customers leave, where will they go? Where are they
10 diverting to away from your store?

11 Q Are diversions ratios an input into merger analysis
12 commonly?

13 A They are inputs into both the hypothetical monopolist
14 test and into many competitive effects models.

15 Q Dr. Hill, I see that the next bar on this chart says
16 "Dr. Israel's margins." Can you explain what this analysis
17 represents?

18 A Dr. Israel and I disagree about the right margins to
19 use. If I use Dr. Israel's margins in place of mine, the
20 number of presumptive stores falls to 1,273.

21 Q Did you also calculate the number of presumptive large
22 format store markets considering the parties' proposed
23 divestiture of stores to C&S?

24 A Yes. So the last bar here says 551. That's the number
25 of presumptive illegal markets if the divestiture functions

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1 perfectly. So the stores are divested, and they continue to
2 compete with the same vigor that they do today.

3 Q Before moving on, Dr. Hill, are you aware that
4 defendants have also claimed that market shares and
5 concentration measures are uninformative about competition
6 in this particular industry?

7 A Yes.

8 Q Do you agree with that?

9 A I don't. I think that market shares are a useful way
10 to understand how important are competitors in a market.

11 Q The next step in merger analysis is competitive
12 effects. First, could you describe what you mean by
13 "competitive effects"?

14 A Sure. So if we could advance two more slides, please.

15 So in competitive effects, we would say that a
16 merger is likely to have an adverse competitive effect if
17 the elimination of the competition between the merging
18 parties is likely to result in harm to consumers.

19 Q What are some examples of consumer harm that can result
20 from a merger?

21 A Yeah. So a merger eliminates competition between the
22 merging parties, and that can lead to higher prices, worse
23 service, less variety, you know, lower quality, lots of
24 things could potentially change.

25 Q Can a merger have adverse competitive effects even if

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1 some competition remains after the parties combine?

2 A Yes. The more intensely the parties compete with one
3 another, the more likely it is that just eliminating the
4 competition between them is likely to result in an adverse
5 competitive effect.

6 MS. BLACKBURN: Your Honor, I do want to see if
7 the Court would like to take a break at any time in the near
8 future. We are happy to pause.

9 THE COURT: How much longer do you have? I know
10 what your estimate is. It is probably is a good time. We
11 have been here for two hours. I'm like, "Hmm."

12 We will in recess for 15 minutes.

13 (Recess.)

14 (Open court; proceedings resumed:)

15 THE COURT: Please be seated.

16 BY MS. BLACKBURN:

17 Q Dr. Hill, what economic model did you use to analyze
18 the likely competitive effects of this merger?

19 A If we could advance one more slide, please. Sorry --
20 two.

21 I used the compensating marginal cost reduction
22 model. So this model asks, given the elimination of
23 competition between the parties, by how much in percentage
24 terms would you need to reduce marginal costs to offset the
25 anticompetitive effects.

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1 Q And why did you use compensating marginal cost
2 reduction threshold of 5 percent here?

3 A So that's a conservative threshold. So it is saying if
4 the compensating marginal cost reduction is not 5 percent or
5 greater, then I'm going to say in that market, the
6 transaction is likely to have an anticompetitive effect. If
7 I compare that to the potential efficiencies that have been
8 identified by the parties, Mr. Yeater estimates they're less
9 than 1 percent. And if I take their claimed cost
10 efficiencies, they are less than 1 percent of combined total
11 cost. So 5 percent is conservative in the sense that it is
12 significantly larger than 1. So I'm giving something of a
13 grace period between 1 and 5.

14 Q Do you think the merger could have adverse competitive
15 effects even in markets with CMCR values below 5?

16 MR. WOLF: Objection. It exceeds the scope of his
17 report, and he said in deposition he would offer no such
18 testimony here.

19 MS. BLACKBURN: Dr. Hill --

20 THE COURT: Hold on. I didn't rule yet.

21 MS. BLACKBURN: I'm sorry.

22 THE COURT: I guess I need to know some more about
23 the deposition.

24 MR. WOLF: Your Honor, I asked the witness
25 specifically at deposition whether he would be offering

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1 testimony of potential competitive harm below the 5 percent
2 threshold, and the witness testified he would not be
3 offering such testimony. We acknowledge his
4 characterization is conservative. No one is going to be
5 fighting about the word "conservative." And if we are not
6 going to talk about anything less than 5 percent, then this
7 probably much ado about nothing. But if we are, then it is
8 beyond the scope and contrary to deposition.

9 THE COURT: I know what your response is.

10 MS. BLACKBURN: Your Honor, Dr. Hill is not
11 offering an opinion that there will be competitive harm in
12 the markets with the CMCR --

13 THE COURT: I'm talking about in response to what
14 he just said about the deposition and how it was couched.

15 MS. BLACKBURN: So my understanding was that in
16 the deposition, Dr. Hill did testify that he believed that
17 there could be competitive harm in markets with a CMCR below
18 5 percent. I don't think there was an agreement to not
19 offer such testimony.

20 MR. WOLF: Your Honor, I can read the deposition,
21 if you want, or I can cross him.

22 THE COURT: I'm going to allow you to cross him.

23 MR. WOLF: Thank you.

24 THE WITNESS: If I may.

25 THE COURT: No. No, you can't.

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1 BY MS. BLACKBURN:

2 Q Dr. Hill, why did you decide to use the CMCR
3 methodology to evaluate the competitive effects of this
4 transaction?

5 A So there are two things I like about the CMCR
6 methodology. One is it builds in the efficiencies or the
7 claimed deficiencies directly into the methodology. It is
8 trying to compare the loss in competition to potential
9 efficiencies, and so it is nice to bring those things
10 together in one framework. Two, compared to the methodology
11 that Dr. Israel used, the GUPPI, the CMCR captures an
12 important feedback effect, and that's the feedback between
13 the parties. So if a Kroger store were to raise price, it
14 softens the competitive environment, it reduces competitive
15 pressure, for example, on an Albertsons store, and so that
16 Albertsons store may also raise its price in response. So
17 that dynamic is captured in the CMCR.

18 But GUPPI methodology that Dr. Israel uses can't
19 capture that dynamic. It can capture -- if a Kroger store
20 raises its price, another Kroger store may see its
21 competitive environment soften, but it can't compare a
22 Kroger store -- an impact of its price raise to an
23 Albertsons store.

24 Q I just want to make sure that I'm clear. When
25 implementing the CMCR methodology, does this analysis depend

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1 on us believing that the markets you have defined are
2 correct?

3 A No. So when I do the compensating marginal cost
4 reduction methodology, I move away from market definition,
5 and I allow diversion to things that were excluded from the
6 market. For example, the supermarkets market, I excluded
7 the club stores and the natural and organic and so on. But
8 when I'm implementing the CMCR, I'm now allowing
9 substitution to all potential stores, including dollar
10 stores and general merchandisers and superettes.

11 Q Does the CMCR methodology -- would you say then it is
12 independent of market definition?

13 A Yeah. In this particular case I'm implementing it,
14 ignoring the market definition that I did earlier, with one
15 exception, which is I'm only going to calculate the CMCR for
16 markets that are presumptively anticompetitive.

17 Q Let's review the results of your CMCR analysis. What
18 did you find with respect to the number of markets where the
19 value exceeds 5 percent?

20 A Right. So if you could advance one more slide, please.

21 So this slide here is assuming no divestiture. So
22 this is looking at, for the presumptive large-format store
23 markets, how many have a CMCR greater than 5 percent, and
24 that's represented by the red dots, and then the gray dots
25 are other markets where there is not a CMCR greater than

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1 5 percent, or they are not presumptive. Then the writing in
2 the lower right summarizes the number of dots. We have
3 1,513 such markets, and the focal stores in those markets
4 have annual sales of \$62 billion.

5 Q So this slide states that it presents results without
6 the divestiture. Have you calculated CMCR results that do
7 take account of the proposed divestiture?

8 A Yes. So in two ways: So if we go one more, we will
9 see the first take on that.

10 This is looking at the same results but assuming
11 the divestiture works perfectly, so the stores have the same
12 vigor as they do today. Then we find there are 242
13 large-format store markets with CMCR greater than 5 percent,
14 and they total annual sales of 9 billion.

15 Q So I understand that these results use your preferred
16 inputs and assumptions, but did you calculate CMCR results
17 using any other approaches, inputs, or assumptions?

18 A Yes. So if we could advance more slide, please.

19 So this is the same as the slide we looked at
20 earlier for the presumptions. This is asking how many
21 presumptive large-format store markets have a CMCR greater
22 than 5 percent, using a range of inputs. And on the left,
23 we have the Hill initial report, which has 1,517. Then next
24 to it, that's 1,513, if we exclude the four closed stores
25 that Dr. Israel has identified.

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1 Q What do you find with respect to the number of
2 presumptive large-format store markets with the CMCR above
3 5 percent using Dr. Israel's margins?

4 A If I use his margins, the number of stores goes down to
5 693. And then on the far right, you see the number with
6 divestiture, which we saw on the earlier slide. That's 234
7 stores.

8 Q Now, you mentioned earlier that Dr. Israel relied on a
9 different competitive effects methodology called GUPPI.
10 What is the GUPPI methodology?

11 A So that's Gross Upward Pricing Pressure Index. It is
12 another methodology that is sometimes used to try to measure
13 the likely reduction in competition from a merger.

14 Q Are the GUPPI and the CMCR methodologies the same?

15 A No.

16 Q Which one do you think is better for analyzing this
17 merger?

18 A So if we advance one more slide, please.

19 The CMCR is preferred to the GUPPI, and so here
20 are a couple of quotes on that. The first one paper by
21 Nathan Miller and Gloria Sheu. Dr. Miller is now the chief
22 economist in the Antitrust Division at Department of
23 Justice. Prior to that he was a professor at Georgetown.
24 They wrote a paper on the quantitative methods for
25 evaluating the unilateral effects of mergers in 2021. You

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1 can see their analysis, Results of UPP, which here is their
2 reference to GUPPI. CMCR analysis usually align, but in
3 close cases or if greater precision is desired, then the
4 CMCR is more appropriate. So there are two reasons for
5 that. One is the CMCR builds in efficiencies. So it is on
6 sort of on a natural scale of how does the harm compare to
7 the potential efficiency benefits. Then the other is it
8 captures that feedback effect between the parties themselves
9 that I was talking about earlier.

10 Then the second quote here is from a paper by
11 Dennis Carlton and Mark Israel, also saying that the CMCRs
12 are preferred to GUPPIs.

13 Q So, Dr. Hill, I now want to turn to the final factor in
14 your analysis of this merger, which is potential mitigating
15 effects. Have you analyzed whether the divestiture to C&S
16 is likely to sufficiently mitigate the transaction's
17 anticompetitive effects?

18 A Yes.

19 Q Can you describe your approach to analyzing the
20 parties' proposed divestiture?

21 A Yes. So I took a number of approaches, which are
22 discussed in my report and looking at parts of the
23 divestiture that may raise risk. The part I want to talk
24 about today, if we could please advance two slides, is to
25 look at what I'll call retrospectives. So looking back at

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1 the effect of past divestitures in transactions involving
2 supermarkets.

3 Q Which paths to divestiture did you conduct
4 retrospective studies of?

5 A I looked at three. The first one is 2015 merger
6 between Albertsons and Safeway, in which there was a
7 divestiture of 168 stores. The second is the 2016 merger
8 between Ahold and Delhaize, where 81 stores were divested.
9 Then the final one is the -- it says 2021, but I think it
10 actually closed early in 2020 -- the Price Chopper-Tops
11 merger where there is a divestiture of 12 stores to C&S.

12 Q Let's start with Albertsons and Safeway. Why did you
13 choose to conduct a retrospective study of this particular
14 traditional supermarket divestiture?

15 A Well, it involved one of the two parties. I believe it
16 involved some of the same stores, and it was a merger
17 between two relatively large supermarket chains, and there
18 was a relatively number large number of divested stores,
19 less than the divested stores here.

20 Q What did your retrospective study reveal about the
21 effectiveness of the Albertsons-Safeway divestiture?

22 A If we could advance one more slide, please.

23 To try to answer that, I looked at the performance
24 of two groups of stores. The first group of stores was the
25 divested stores. The second group of stores were stores

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1 that were retained by the merged firm. And I asked, how
2 often did each of these types of stores fail after the
3 divestiture or transaction closed? And so we just for the
4 moment could focus on the left-hand side where it says "all
5 CBSAs." For all stores for all CBSAs in that transaction,
6 the green bar showing us that 57 percent of the divested
7 stores ended up closing and 7 percent of the retained stores
8 closed. So there is a very significant gap in the
9 performance of the stores that were divested vis-à-vis the
10 stores that were retained.

11 Q And there are two sets of bars here. One says "all
12 CBSAs"; the other says "divestiture CBSA." Can you explain
13 the difference between those two sets of bars?

14 A Sure. So they don't affect the divested stores. The
15 divested stores are going to be the same in either case.
16 What the two on the left and right are the retained stores.
17 On the left-hand side, I looked at retained, including all
18 CBSAs, including some CBSAs where there was no divestiture.
19 So it is possible that the divested stores fared worse or
20 more poorly because they were in areas that had particular
21 shocks or particular challenges. So to account for that on
22 the right-hand side, I said let's look at the retained
23 stores in the divestiture CBSAs. There, you can see 8
24 percent of retained stores closed, so qualitatively the same
25 as the 7 percent. So it doesn't seem to be the case that

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1 the poor performance of the retained stores was driven by
2 the CBSAs in which they were divested.

3 Q I believe next you evaluated the 2016 Ahold-Delhaize
4 divestiture. So why did you choose to conduct a
5 retrospective study there?

6 A Again, it was a merger between two large supermarket
7 chains, and there was a relatively large divestiture of 81
8 stores. So it seemed like a good choice to examine.

9 Q What did you find when you compared the stores that
10 were divested compared to the stores retained?

11 A So if we could advance one more slide, please.

12 Here, we have the same figure. Again, the
13 divested stores are going to be in green. The retained
14 stores in blue. Again, we are looking at the closure rate.
15 You can see the divested stores closed at five to six times
16 the rate of the retained stores. So the divested stores
17 ended up having a much worse performance than the retained
18 stores.

19 Q Finally, you looked at the Tops-Price Chopper
20 divestiture. Could you describe that retrospective study.

21 A Sure. If we advance one more slide, please.

22 This was the merger between Tops and Price
23 Chopper, and to address FTC concerns they divested 12
24 stores. I believe eleven are in what I'll call Upstate
25 New York and one in Vermont. Here, we are looking at the

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1 number of stores before and after the divestiture. So the
2 first three bars here are prior to the divestiture, looking
3 at different financial periods, and you can see the average
4 weekly sales. And then the last two bars are showing the
5 sales of the stores after the divestiture, where you can see
6 in fiscal year '22 it dropped by about 28 percent compared
7 to the previous physical period, and then they fell again in
8 fiscal year '23 although only by a small amount.

9 Q Were these stores that C&S acquired and then
10 re-bannered to Grand Union?

11 A That's correct.

12 Q Did you read the hearing testimony of Mr. McGowan,
13 C&S's CEO, about these Grand Union stores?

14 A Yes, he did.

15 Q Was Mr. McGowan's testimony consistent with your
16 analysis of their sales performance?

17 A Yes. I think his testimony was that they haven't
18 performed up to the level that C&S had expected and that
19 they have struggled financially.

20 Q But have any of the stores that C&S acquired in the
21 Tops transaction closed?

22 A No. So in a sense this transaction is saying --
23 sorry -- this analysis is saying one way a divested store
24 may lose competitive significance is if it loses sales. So
25 it doesn't compete as well -- it doesn't connect as well

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1 with the consumer, so it is less of a competitive constraint
2 on the stores. The two previous slides were saying a second
3 potential risk factor is the store closes altogether and
4 exits the market.

5 Q What did you conclude from these retrospective studies,
6 taken together, about supermarket divestitures?

7 A There's a risk. Divestiture is a risky process. It is
8 true in the supermarket industry, if you look at these three
9 perspectives, and it is true in other industries. If you
10 break out a part of a business and you sell it, you can have
11 a range of outcomes, and some of those are negative.

12 Q So the first thing you found is that the divested
13 stores tend to close at elevated rates compared to the
14 retained stores. Have you analyzed the likely competitive
15 effects of the Kroger-Albertsons transaction if the stores
16 that are divested to C&S were also to close at elevated
17 rates?

18 A Yes. If you'd advance one more slide, please.

19 So this slide -- I think it is actually easiest to
20 start on the far right of this slide. So this is saying if
21 there is a perfectly functioning divestiture, what is the
22 total number of presumptive large-format store markets and
23 what's the volume of the commerce of the focal stores in
24 those markets. So the answer is 551, and there is
25 \$23 billion commerce in the focal stores.

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1 Then as we move to the left, in each successive
2 bar we are saying what would happen if a certain percentage
3 of the stores lost sales? So here, the second bar to the
4 left shows a 10 percent loss of sales. The third bar from
5 the right, I guess the middle bar, shows what would happen
6 if there was a 30 percent sales less and so on, all the way
7 over to no divestiture, where the stores would lose all of
8 their sales. So it is showing us, as the risk -- if there
9 is a risk, and the divestiture stores perform poorly, or
10 less well than they do today, then the risk to consumer
11 increases, and the number of presumptive markets increases.

12 Q So I believe that this slide title might have gotten
13 mixed up with the next one, Dr. Hill. So this slide depicts
14 what would happen if the stores divested to C&S from lost
15 sales; is that correct?

16 A Yes. The title here is flipped to the following one.
17 If you look at the bottom here, this graph is looking at
18 sales lost, even though the title says closure of stores.
19 The next one will look at closures of stores, but it will
20 say lost sales.

21 Q What does the -- let's take the figure for what it
22 shows and ignore the title here. What does the scenario
23 where 30 percent of sales are lost correspond to in the
24 context of your retrospective studies?

25 A Yes. So this is saying if the divested stores were to

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1 lose 30 percent of their sales, then you would have 716
2 presumptive markets with 32 billion in commerce for the
3 focal stores. So that's roughly the size of the fall in
4 sales for the -- the now Grand Union stores that were
5 divested to C&S.

6 Q Would the transaction -- would elevated rates of store
7 closures change the proposed divestiture's ability to
8 mitigate the anticompetitive effects of the transaction?

9 A Yes. That's what the figure is showing. As the sales
10 loss increases, the number of presumptive stores rises, and
11 the volume of commerce for those stores rises.

12 Q So are you aware that C&S has pledged that no stores
13 will close?

14 A Yes.

15 Q What's your understanding of that commitment?

16 A The testimony that I saw was that it is not a binding
17 commitment, and there is no time limit on it. So, you know,
18 eventually C&S is going to keep open the stores that it
19 feels are maximizing its profit and it is going to close the
20 ones that are not, if any.

21 Q Have you analyzed what would happen in terms of the
22 proposed divestiture's ability to mitigate the
23 anticompetitive effects of this transaction if the stores
24 divested to C&S were to close at elevated rates?

25 A Sure. If you would advance one more slide, please.

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1 So this is looking at the number of presumptive
2 markets based on a closure rate for the divested stores. So
3 again, if we start on the right, we have the perfectly
4 functioning divestiture. Then as we move left, we have
5 increasing closure rates for stores, so 10 percent,
6 30 percent, 50 percent. Then you can think of the no
7 divestiture if all the divested stores were to close. And
8 the 50 percent closure rate is roughly the closure rate of
9 the stores in the Albertsons-Safeway, and the 30 percent
10 closure rate is roughly the closure rate in the
11 Ahold-Delhaize merger.

12 Q How many presumptive markets would there be if
13 30 percent of the stores closed?

14 A Here, there would be 710, and the focal stores in those
15 markets would have 31 billion in commerce.

16 Q What if 50 percent of the stores closed?

17 A You would get 860 presumptive markets and 40 billion in
18 commerce for the focal stores.

19 Q Just to remind the Court, how many presumptive markets
20 would there be if the divestiture functioned perfectly and
21 no store closed and no store lost sales?

22 A That would be 551 and 23 billion in commerce for the
23 focal store.

24 Q You separately evaluated effect of closures and sales
25 losses, but did you analyze both together?

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1 A I did not. It may be that some stores would close and
2 some stores would see a loss in sales, but here, I'm just
3 looking at one or the other.

4 Q Taking a step back, are you aware that defendants claim
5 that their proposed divestiture is an integral part of their
6 merger such that the deal can't be analyzed without it?

7 A I read something like that.

8 Q Do any of Dr. Israel's competitive effects analysis
9 consider the possibility that even one divested store will
10 close?

11 A No. I believe he focuses on the perfectly functioning
12 divestiture bar.

13 Q Do any of Dr. Israel's analyses consider the
14 possibility that one divested store will lose sales?

15 A I don't believe so.

16 Q Do you believe those assumptions are flawed in his
17 analysis?

18 A I think here -- yes. I think here it makes sense to
19 look at what would the world be like if the divestiture
20 works perfectly; what would the world be like without a
21 divestiture, which gives us a sense of the total harm to
22 competition; and in between, if the divestiture works
23 imperfectly, what would that mean for competition?

24 Q Considering both the merger and the parties' proposed
25 divestiture, what do you conclude about the likely impact of

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1 Kroger's purchase of Albertsons on competition and on
2 consumers?

3 A I think the transaction is likely to substantially
4 reduce competition and harm consumers, and that that's not
5 going to be fully mitigated by the proposed divestiture or
6 by efficiencies.

7 Q Dr. Hill, I would like to shift gears and ask you about
8 some labor market issues. Have you ever testified in a
9 merger case involving labor markets?

10 A Yes.

11 Q Can you describe that testimony?

12 A Sure. So I testified on the Penguin Random House-
13 Simon & Schuster merger. That was a merger between two
14 publishers who purchased the rights to manuscripts from
15 authors. So it was what you might call a monopsony case,
16 where you are looking at: Would the reduction in
17 competition harm the authors?

18 Q Did you conduct any analysis of the Kroger-Albertsons
19 merger as it relates to labor markets?

20 A Yes.

21 Q Can you describe the analysis you performed?

22 A Sure. I calculated market shares in markets proposed
23 by the FTC in, I believe, four states.

24 Q What did you conclude with respect to market shares in
25 the plaintiffs' candidate labor markets?

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1 A Yeah. The market shares showed that the transaction
2 was likely to materially increase competition and result in
3 highly concentrated markets such that if those markets are
4 properly defined, then the transaction would substantially
5 reduce competition.

6 Q Dr. Hill, are those market share results contained in
7 your expert reports?

8 A They are. They are in the initial report.

9 MS. BLACKBURN: Thank you, Dr. Hill. I have no
10 further questions at this time, and I pass the witness.

11 MR. WOLF: Your Honor.

12 THE COURT: Go right ahead with cross-examination.

13 CROSS-EXAMINATION

14 BY MR. WOLF:

15 Q Good afternoon. Good to see you again, Dr. Hill.

16 A Good to see you, Mr. Wolf.

17 Q We concluded -- at least the bulk of the end of your
18 testimony was about the divestiture and the hundred-or-so
19 Albertsons stores that would be going to C&S. I would like
20 to start with the 1,700-plus stores that are going from
21 Albertsons to Kroger, okay?

22 A Okay.

23 Q And you would agree with me that a fundamental question
24 of merger analysis is what's going to happen to prices in a
25 world where there is a merger versus a world where there

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1 isn't a merger, right?

2 A That's fair.

3 Q And you reviewed the testimony of Mr. Groff last week
4 that Albertsons' prices are 10 to 12 percent -- call it
5 11 percent higher than Kroger prices, right?

6 A I don't recall exactly how he characterized them, but I
7 recall he said they were higher on average.

8 Q It is undisputed in this case that Albertsons prices
9 are roughly 10 to 12 percent higher than Kroger's, right?

10 A I don't know if that is undisputed.

11 Q Have you heard anybody dispute that?

12 A I haven't heard anyone affirm that or dispute that.

13 Q Sir, you are saying you don't remember Mr. Groff's
14 testimony?

15 A I don't remember his testimony.

16 Q We will hear more about that as well from Mr. McMullen.
17 You read his deposition, didn't you?

18 A I may have read parts of it, but I don't recall the
19 entire deposition.

20 Q You didn't remember his deposition when he said that
21 Kroger's prices were 10 to 12 percent less than Albertsons'
22 prices?

23 A I don't recall that.

24 Q You read Mr. Aitken's deposition, right?

25 A I may have read parts of it.

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1 Q Do you remember him saying the same thing; that the
2 prices at Kroger were 10 to 12 percent less than at
3 Albertsons?

4 A I do not.

5 Q Post-merger Kroger will be in changer of pricing over
6 the former Albertsons stores that are now part of the Kroger
7 family, right?

8 A Correct.

9 Q You were in the courtroom today when there was a text
10 exchange with Mr. Broderick about congressional testimony,
11 right?

12 A Correct.

13 Q And in that text exchange there was a statement made
14 that Kroger's prices were so much lower than Albertsons'
15 prices that that particular person didn't think \$500 million
16 would be sufficient to do the job, right?

17 A I was in the public gallery. I don't recall the exact
18 details of that. I remember there was a discussion about
19 that text message, but I didn't see some of the text
20 messages.

21 Q I think all of that was on the public screen.

22 A I recall that he said, "I don't think 500 million is
23 enough."

24 Q And at the end of the day, after getting ahold of
25 Albertsons' internal pricing during the diligence, Kroger

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1 came to agree with that statement, right?

2 A I don't know.

3 Q Kroger decided that 500 million wasn't enough to get
4 where they wanted to go in terms of pricing, and so they
5 committed to a billion dollars -- double that amount -- to
6 lower prices at Albertsons, right?

7 A You told me before they have a commitment to lower by a
8 billion dollars, but I don't know.

9 Q You know that was stated in Mr. McMullen's deposition
10 testimony?

11 A I don't recall.

12 Q Mr. Aitken's testimony?

13 A I don't recall.

14 Q Mr. Cosset's deposition testimony?

15 A I don't recall.

16 Q Mr. Maharroof's deposition testimony?

17 A I'm sorry. I don't recall it.

18 Q Take it as a given for a moment that Kroger is
19 committed to a billion dollars, after a ramp-up period, of
20 annual price investment. You don't consider that commitment
21 in any of your analysis or conclusions in your reports,
22 right?

23 A Correct.

24 Q And you didn't analyze in your reports whether Kroger
25 has a track record of lowering prices in the ordinary course

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1 of its business, correct?

2 A Correct.

3 Q And you didn't analyze in your report whether Kroger
4 has a track record of lowering prices specifically after a
5 merger, right?

6 A That's correct.

7 Q Instead, you assumed that choices made by Kroger's
8 board of directors and senior management must follow your
9 understanding of "neoclassical economics," correct?

10 A I don't quite agree with that. I would put it
11 differently. What I would say is in antitrust analysis we
12 don't general credit claims we are going to lower price or
13 do something after a merger. Evidence of lower costs, those
14 feed into models, like in the compensating marginal cost
15 reduction, and those will be taken account of, that effect
16 of the lower cost on incentives. But otherwise we assume
17 that incentives are going to be similar. If everyone who
18 pledged a price increase were allowed to merge, no mergers
19 would ever be fought.

20 Q Even those you have a history of proven price reduction
21 after mergers, we should just disregard their testimony?

22 A I think you need to look at the incentives; what would
23 happen to the stores afterwards.

24 Q And you are aware that Mr. Maharroof and Mr. Aitken and
25 Mr. McMullen and Mr. Cosset have testified that the synergy,

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1 the expanded scope, the cost savings, the additional revenue
2 would all allow them to make the commitments real in terms
3 of margin reduction at the former Albertsons stores, right?

4 A So I'm not aware of that testimony, but efficiencies
5 are built in into the compensating marginal cost reduction.

6 Q You would agree if prices came down at the former
7 Albertsons, now owned by Kroger, that would be good for
8 consumers?

9 A Yes.

10 Q And you would agree if prices came down at those former
11 Albertsons, that that would in turn have a positive knock-on
12 effect of putting pressure on Stater Bros. and Raley's and
13 Sprouts and everybody else to lower their prices to compete,
14 right?

15 A If they went down to what they otherwise would have,
16 yes, that would put pressure on others.

17 Q And that would be good for consumers, correct?

18 A Yes. Likely.

19 Q In the "but for" world that needs to be analyzed in
20 this case, the question is: Are prices going to be lower as
21 a result of the merger than they would be absent the merger,
22 right?

23 A Correct. That's one way to think about it.

24 Q Are you aware of testimony from Albertsons' witnesses
25 that they cannot provide the price reductions that Kroger

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1 intends to provide?

2 A No.

3 Q You stated today that correctly defining a market to
4 you is a very important part of the merger analysis; is that
5 right?

6 A Correct.

7 Q It's a threshold question with a lot of other later
8 analysis, right?

9 A In this case it doesn't feed into my CMCR, and
10 sometimes that's true, but in general I think market
11 definition is useful for identifying substitutes.

12 Q All right. Counsel was very careful to ask you which
13 markets you had identified in this case. But to be clear,
14 the plaintiffs in this case, and we are talking markets --
15 there are two different markets you discussed, right? There
16 is the large-format market that you spent most of your time
17 on, right?

18 A Correct.

19 Q And then there is the supermarket market, right?

20 A That's correct.

21 MR. WOLF: And we have a demonstrative,
22 Your Honor. I don't know if you can see it, given that I
23 put it behind Dr. Hill's head.

24 THE COURT: I can see it.

25

N. Hill - X

1 BY MR. WOLF:

2 Q The supermarket market excludes Costco, Sam's, BJ's,
3 Smart & Final, Sprouts, Whole Foods, Trader Joe's, Lidl,
4 Aldi, Grocery Outlet, and Amazon.com, among others, right?

5 A I'm not a hundred percent sure about Amazon.com, but
6 otherwise, yes.

7 Q You are not sure whether Amazon.com is not in the
8 supermarket market?

9 A I don't recall whether their Amazon store -- you mean
10 orders from Amazon itself or orders from its Amazon
11 supermarkets?

12 Q Well, Amazon Fresh is a different animal, right?

13 A Well, the reason I'm hesitating is if you order from
14 Amazon.com and it's fulfilled through Amazon Fresh, it may
15 included in the traditional supermarket market shares.

16 Q You just don't know, sitting here today?

17 A I think that's what it would be. If it turns out it is
18 Amazon Fresh data, then it is going to be in the market.

19 Q I think we will agree to disagree on that, but I don't
20 think it is material to my questioning, so I'll move on.

21 Everybody else on that screen and on the board you
22 agree is excluded from the supermarket market, right?

23 A Correct.

24 Q You would agree with me that the large-format market is
25 not mentioned in plaintiffs' complaint, correct?

N. Hill - X

1 A I don't recall that. But if you represent that, I'll
2 accept it.

3 Q I don't want a representation. I want your actual
4 recollection. At your deposition I asked you: "You also
5 did that alternative -- you also did that for the
6 alternative large-format market that the FTC did not allege
7 in its complaint, correct?"

8 You answered, "Correct."

9 So at the time you knew that the large-format
10 market was not alleged to be the right market by the
11 Government, right?

12 A They didn't allege it. I think your original question
13 here was "discussed." I don't recall whether it is
14 discussed.

15 Q All right. Fair enough. You agree that in the
16 complaint the Government does not allege that the
17 large-format market is the market we should be talking
18 about, right?

19 A Correct.

20 Q And in the preliminary injunction motion, the
21 Government doesn't suggest that the large-format market is
22 the market that we should be talking about as the threshold
23 discussion we had before, right?

24 A I believe that's correct.

25 Q Even in the PI reply filed -- the preliminary

N. Hill - X

1 injunction reply filed two weeks ago, the Government was
2 still referring to the large-format market as "a sensitivity
3 test," not as a "properly defined antitrust market,"
4 correct?

5 A That may be true. I'm not sure.

6 Q Did you review the preliminary injunction reply?

7 A I don't recall.

8 Q So at least, as alleged, as you know in the complaint
9 and in the preliminary injunction motion, your large-format
10 market is not the operating theory of the lawsuit in this
11 case, right?

12 A It just sounds like it is not in the complaint or the
13 PI brief.

14 Q So let's talk about this supermarket market first. Can
15 we call up a statement from the Government's PI reply at
16 page 4? We see in the last full paragraph a statement, "The
17 relevant" -- can we highlight that.

18 "The relevant antitrust question is: For those
19 consumers who value a one-stop shop supermarket experience,
20 which companies offer reasonably interchangeable substitutes
21 for that purpose."

22 Do you see that?

23 A I do.

24 Q And the Government has defined what it means to be a
25 one-stop shop, right?

N. Hill - X

1 A I think they include traditional supermarkets and
2 supercenters.

3 Q Let me rephrase my question. It wasn't perfect by far.
4 The Government has explained what you need to do to provide
5 to shoppers to be a one-stop shop, right?

6 A I don't know.

7 Q If we look at paragraph 45 of the complaint,
8 Mr. Rennick.

9 "We see supermarkets allow customers to purchase
10 most, if not all of their food and grocery shopping
11 requirements in a single trip to a store that offers
12 substantial products in each of the following categories."
13 And then you identify ten: Bread and baked goods, dairy
14 products, refrigerated food and beverage products, frozen
15 food and beverage products, fresh prepared meats and
16 poultry, fresh fruits and vegetables, shelf-staple food,
17 including canned, jarred, bottled, boxed and other types of
18 packaged products; staple foodstuff, such as salt, sugar,
19 flour, sauces, spices, coffee, tea, et cetera, and other
20 staples; other grocery products, including nonfood items
21 such soaps, detergents, paper goods, other household
22 products and beauty aids; and to the extent permitted by
23 law, wine, beer, and distilled spirits.

24 That's the Government's definition of what it
25 takes to be a one-stop shop, right?

N. Hill - X

1 A I know what you just read. I don't know if elsewhere
2 in this document they amend or change that. But I agree
3 with what you just read.

4 Q In Dr. Israel's report -- if we can go to table five of
5 that, Mr. Rennick:

6 Dr. Israel addresses each of those. He puts
7 together a chart. This is on page 60. Can you blow that
8 chart up, please.

9 Dr. Israel put in his report a chart that said
10 that if you ask which of the potential competitors had each
11 of the ten categories that the Government said -- each of
12 the ten categories the Government says you need to be a
13 one-stop shop, Albertsons has it; Kroger has it; H-E-B has
14 it; Amazon Fresh has it; Walmart has it; Target has it;
15 Meijer has it; Costco has it. Now, BJ interestingly doesn't
16 have alcohol, but they have the other nine. Sam's Club has
17 it. Whole Foods, Sprouts, Trader Joe's, Aldi, and Lidl.
18 And you did not rebut this chart in your report, right?

19 A I don't recall this chart, so I definitely didn't rebut
20 it.

21 Q You didn't respond to it at all, right?

22 A Correct.

23 Q So all of those stores carry all of the items that the
24 Government says you need to have to be a one-stop shop,
25 right?

N. Hill - X

1 A Yeah. I don't know what else the Government says about
2 a one-stop shop. I'm just not familiar with their
3 definition of it. I did my own independent market
4 definition. I'm not sure what they did.

5 Q If we could call back up the relevant antitrust
6 question, Mr. Rennick.

7 This is again at page 4 -- thank you. The
8 relevant antitrust question is: "For those consumers who
9 value a one-stop shop supermarket experience, which
10 companies offer reasonably interchangeable substitutes for
11 that purpose?"

12 Do you agree that's the relevant antitrust
13 question in this case?

14 A I think you're reading this a little narrowly. The way
15 I read this, "The relevant antitrust question is: For
16 consumers who value a one-stop shop supermarket experience,
17 which companies offer reasonably interchangeable
18 substitutes?" That doesn't mean the substitute has to be or
19 does not have to be a one-stop shop, and it doesn't mean
20 that other features don't affect their preferences. The
21 first clause is identifying a group of consumers; the second
22 is saying, were the reasonably interchangeable substitutes
23 on purpose?

24 Q Exactly. So let's focus on the first clause. For
25 those customers who value a one-stop shop supermarket

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1 experience, we identified what the Government says is a
2 one-stop shop supermarket experience. Now, let's ask about
3 those consumers. In either of those reports did you
4 identify the subset of consumers that use Kroger as a
5 one-stop shop?

6 A Well, no. I'm sorry. Let me go back. Again, the
7 fact, as I say, the value of a one-stop shop supermarket
8 experience doesn't mean that they value other things. I
9 mean, I just don't know the full context here. If you want
10 to know what the Government defines, you can ask them. But
11 I can only tell you what I defined in my reports.

12 Q I'm asking you, did you identify in your report the
13 subset of Kroger consumers that "value a one-stop shop
14 supermarket experience"?

15 A No.

16 Q In your report, did you identify the subset of
17 customers that used Kroger as a one-stop shop?

18 A I did not.

19 Q Same question for Albertsons: Did you identify the
20 subset of Albertsons' consumers that value a one-stop shop
21 supermarket experience?

22 A I did not.

23 Q Same question for Whole Foods: Did you identify how
24 many consumers value Whole Foods as a one-stop shop
25 supermarket experience?

N. Hill - X

1 A I did not.

2 Q You would certainly agree that Whole Foods is a
3 one-stop shop, right?

4 A I did not analyze it.

5 Q Are you aware that Whole Foods routinely holds
6 themselves out as a one-stop shop?

7 A I am not.

8 Q Did you analyze that at all? Did you look on Google,
9 Whole Foods, one-stop shop, question mark?

10 A I don't think it is relevant, so I didn't analyze it.
11 Again, I can tell you what I did for my market definition.
12 I don't know the full context of what they're saying here.

13 Q Did you identify whether -- how many Costco customers
14 use Costco as a one-stop shop?

15 A I did not.

16 Q How about Trader Joe's? Same question.

17 A I did not.

18 Q Aldi?

19 A I did not.

20 Q Lidl?

21 A I did not.

22 Q Any of the folks that I read off in Dr. Israel's
23 charts -- just for that chart. That's a good point. Thank
24 you for looking your way. It made it easy on me.

25 A I didn't look at the "one-stop shop" definition for any

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1 competitor.

2 Q So you didn't think this was the relevant antitrust
3 question, to your analysis at least?

4 A Well, I think the second clause here, "for those
5 customers who they have identified which are the reasonably
6 interchangeably substitutes," that's what I used in defining
7 my markets.

8 Q First, you have to identify the universe of that first
9 clause. Who is it that values that experience, and for
10 those people, what substitution -- what's available for
11 substitution? That's the question as phrased by the
12 Government, right?

13 A Well, in my report, what I'm looking at for those
14 customers who shop at Kroger and Albertsons, what do they
15 view as reasonable alternatives?

16 Q And you just precisely made my point. Your view of the
17 world is different than the Government's view of the world,
18 isn't it?

19 A I don't know what their exact view of the world is. I
20 can testify to what I found. I don't know. You would have
21 to ask them.

22 Q All right. You agree when a new store opens, its
23 impact on an existing store in the area shows the extent to
24 which the new store competes with the existing store,
25 correct?

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1 A It can, yeah.

2 Q And you studied the effects of competitors' new store
3 openings, including Costco on Kroger and Albertsons sales,
4 using a regression model, correct?

5 A That's correct.

6 Q And you found that the entry of a Costco and the entry
7 of an Albertsons have the same effect on Kroger, correct?

8 A In that analysis, yes. Well, it is substantively the
9 same. The numbers are slightly different, and I didn't test
10 their statistical significance, but they are in the same
11 general ballpark.

12 Q In fact, you used the word "roughly" in your
13 deposition, and I was going to read it back to you so as not
14 to pin you in. The evidence that you cited in your report
15 indicates that Albertsons, Walmart, and Costco are competing
16 with Kroger at roughly the same level, correct?

17 A For that particular analysis for entry events, I get
18 similar numbers. If memory serves, for Albertsons, they're
19 all in the range of five to six -- or maybe I have got it
20 backwards. And then maybe for Kroger, the impact -- no.
21 For Albertsons, the impact of a Kroger is larger than
22 Walmart and Costco. I didn't test the statistical
23 significance of that difference. Then for Kroger, they are
24 all about the same.

25 Q Albertsons, Walmart, and Costco all compete with Kroger

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1 at roughly the same level of effectiveness, correct?

2 A That analysis finds that the impact of the stores is
3 similar.

4 Q Costco -- you read their deposition testimony in
5 preparing your report?

6 A I may have. I don't recall.

7 Q Do you recall that Costco testified that Kroger is one
8 of its most significant competitors due to its size and
9 market relevance, right?

10 A I do not.

11 Q You didn't cite the deposition of Whole Foods at all in
12 your reports, did you?

13 A I don't recall, but if you say I didn't, I'll accept
14 it.

15 Q Did you read Whole Foods' testimony that it viewed
16 Kroger and Albertsons as key competitors?

17 A I don't recall.

18 Q Clearly you didn't consider or incorporate the fact
19 that Costco views Kroger as a key competitor in your
20 analysis, correct?

21 A Correct.

22 Q In your rebuttal report -- let me ask you this first.
23 You testified, I think earlier today, and I wrote it down as
24 best as I could. So if I got it wrong, please tell me.

25 A I apologize. I should correct the previous answer.

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1 The CMCR is calculating the effect of eliminating the
2 competition between Kroger and Albertsons. And if that
3 elimination of competition is large enough, it really
4 doesn't matter how much they are competing with other
5 players. So I don't know how that responds to what you were
6 asking in that question. But it is not directly relevant to
7 the elimination of competition between Kroger and
8 Albertsons.

9 Q It didn't relate at all, because I asked you whether
10 you considered Whole Foods' deposition in your report.

11 You stated earlier today, I believe -- and again,
12 correct me -- that folks are likely to price-check folks
13 they compete with. Is that roughly right?

14 A Yeah. Something like that.

15 Q In your rebuttal report you calculated Kroger's top 20
16 price check competitors by share of rule base pricing,
17 correct?

18 A Top 20?

19 Q No memory test needed. Can we bring up figure 22 from
20 PX7006. Let's limit it to the overlap area, to be fair to
21 my colleagues from the Government.

22 Do you recall this chart in your report?

23 A Sure.

24 Q What you're showing is in rule-based pricing, what
25 percentage of zones were checked by a competitor, correct?

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1 A Yes.

2 Q Let's zoom in on the right side. Thank you,
3 Mr. Rennick.

4 So No. 1 -- this is for Kroger, right?

5 A Correct.

6 Q No. 1 is Walmart?

7 A Correct.

8 Q And so you said you are likely to price-check folks you
9 compete with. So no. 1 is Walmart.

10 No. 2 is Albertsons.

11 Nos. 3, 4, and 5 are Whole Foods, Aldi, and
12 Sprouts, correct?

13 A Correct.

14 Q Confirm for me that the third, fourth, and fifth-most
15 price checked customer for Kroger are excluded from the
16 Government's supermarket market?

17 A That's right.

18 Q So the folks by your analysis that are the third,
19 fourth, and fifth most concerning from a competitive
20 perspective, the Government suggests we should just
21 disregard in this case?

22 A Well, for this particular analysis, yes.

23 Q In forming your opinions, you did not cite once to
24 Walmart's pricing strategy documents that are available in
25 this case, did you?

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1 A I don't know.

2 Q In your direct examination you presented price check
3 data for Kroger's Everyday Essentials program; is that
4 right?

5 A That is correct.

6 Q I think that was 14. Can we call that up for a second.

7 Do you recall this testimony?

8 A I do.

9 Q Can you tell the Court what percentage of product the
10 Everyday Essentials program represents in terms of sales?

11 A Oof -- I don't know. I'm sorry. It may be in my
12 report. It is going to be relatively small. It is only
13 five products.

14 Q It is less than 2 percent of sales, right?

15 A Yeah. But it is products -- there is testimony that
16 they are viewed as being particularly important to consumers
17 in terms of forming a view of the pricing at a store.

18 Q But if we wanted to see more like what half the
19 products were, we would have to go to the chart we were
20 looking at the on screen, right?

21 A I wouldn't go to that chart. There is a separate chart
22 in my report that looks at rule-based pricing. It is the
23 same as this, except it does rule-based pricing.

24 Q And we see that Aldi and Sprouts and Costco and
25 Whole Foods matter a lot, right?

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1 A Well, if you could call up the chart from my report, we
2 can certainly talk about it.

3 Q I think we just did.

4 A No, we didn't. That' s from the rebuttal report. If
5 you could please go to my initial report, you will find the
6 analogue to this for rule-based pricing.

7 Q If your counsel on redirect wants to bring up a
8 different chart -- let's stick with the questions.

9 Ahold is a large supermarket chain that operates
10 on the East Coast, correct?

11 A They do operate on the East Coast.

12 Q And their deposition was taken in this case?

13 A I believe so.

14 Q Ahold testified at deposition that it considers Costco
15 a key competitor, right?

16 A I don't recall.

17 Q You didn't consider that testimony when deciding
18 whether the supermarket market was appropriate or not?

19 A No.

20 Q Ahold also testified that it considered Aldi and Lidl
21 key competitors, correct? Do you recall that?

22 A I do.

23 Q But that didn't factor in your analysis as to whether
24 the supermarket market was valid, right?

25 A I mean, I already told you how I defined these. You do

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1 the hypothetical monopolist test to test whether you're
2 missing key substitutes. And in some markets the
3 supermarket market did not pass, but in roughly in 2,000
4 markets it did pass the test, telling me that I'm not
5 missing, in antitrust terms, an important anticompetitive to
6 constraint.

7 Q We will talk about that test in a minute. Just to be
8 clear, you didn't consider the actual testimony of the
9 actual players on that board as to who they considered their
10 key competitors in your report, right?

11 A Right. But remember the -- you're confusing the
12 direction. In the hypothetical monopolist test, you are
13 asking about the constraint on the focal store rather than
14 the other direction.

15 Q You read Sprouts's trial testimony in this case?

16 A Yes.

17 Q You heard about who they identify in their annual
18 report as their primary competitors, right?

19 A I don't recall it, but I'm sure it was in there.

20 Q And they identified Costco, Albertsons, Kroger, Amazon,
21 Target, Walmart, and Publix as key competitors, right?

22 A They may have. But the testimony I recall is they were
23 also talking about the difference between natural and
24 organic stores and traditional supermarkets.

25 Q Did you review the leakage documents that were shown to

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1 the Court but not to general public with regard to that
2 topic you just raised?

3 A With Sprouts?

4 Q Yes.

5 A No.

6 Q So did counsel not provide you the leakage documents?

7 A No, I did not click on them. Sorry.

8 Q So you don't know whether those leakage documents tend
9 to establish that Sprouts competes heavily against Costco,
10 Whole Foods, Safeway, Food Max, Lucky, Kroger, Sam's,
11 et cetera?

12 A So I wouldn't argue that they don't compete with those
13 stores. I am just saying -- what I took from their
14 testimony is they do view the world as having differentiated
15 store formats, and the different consumers are attracted to
16 different formats. So the hypothetical monopolist test is
17 testing and saying, if I take supercenters and traditional
18 supermarkets, is that enough or do I need to include these
19 other formats?

20 Q Let's move on to your geographic market. You noted
21 that you had two different geographic approaches. We will
22 call the one in your opening report the circle approach. Is
23 that okay?

24 A We can call it the store-based approach, if you'd like.

25 Q You described it as like a circle around a focal store,

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1 so I was shortening that to the circle approach?

2 A That's fine.

3 Q The circles you drew were meant to capture 75 percent
4 of the focal stores sales, right?

5 A Not quite -- yes and no. I mean, the first circle
6 captures 75 percent of sales, and then I take the twice the
7 radius of that to get the market.

8 Q And you call that a catchment area?

9 A A sales area, a catchment area, a draw area, yes.

10 Q But there wasn't any magic to that 75 percent figure
11 you just mentioned right?

12 A That's correct.

13 Q There is no academic literature that has specifically
14 studied whether a 75 catchment area is the ideal number to
15 use, right?

16 A That's fair.

17 Q You cited no documents in the report that suggested
18 that either Kroger or Albertsons put any particular
19 significance on a 75 percent catchment area, right?

20 A That's fair.

21 Q Did you read Stater Bros.' CEO testimony when he said
22 he never even heard of the term "catchment area"?

23 A I did read his testimony. I don't recall that. I
24 think he talks about sales or draw areas. It is all the
25 same thing. It is where are you drawing 75 percent of your

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1 customers.

2 Q He specifically testified that it wasn't a circle; that
3 things like geography and demographics and physical barriers
4 and Costco and the like all factored into who his customers
5 were, right?

6 A Sure. And that's a separate question from the
7 catchment area point. But, yes, the circle is an
8 abstraction from the actual contours.

9 Q Your report does not include any work explaining why
10 75 percent is the right number, right?

11 A That's fair.

12 Q So you explained just now how you drew your circles.
13 And let's pull one up. Let's look at figure 20 of your
14 initial report.

15 A In my report or Dr. Israel's report?

16 Okay. Great.

17 Q This is from your report, correct?

18 A Correct.

19 Q And so we have a focal store in blue. We will call
20 that an Albertsons. Is that all right?

21 A Sure.

22 Q And then we have for this particular category
23 75 percent of sales are within five miles, so you double
24 that to ten. And that's the geographic market that you have
25 defined, right?

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1 A Correct.

2 Q Now, the problem with this, as pointed out by
3 Dr. Israel, is that hypothetical shopper in green -- if that
4 lower left orange dot -- can we call that Kroger, the lower
5 left dot?

6 A Sure. If you want to.

7 Q You give that a hundred percent credit for market share
8 purposes, right?

9 A Correct. All of its sales would be included.

10 Q Whereas if we call that upper left gray dot, we will
11 call that Walmart, you give that zero percent credit for
12 this purpose, right?

13 A Correct.

14 Q And that's true even though it is undisputed in the
15 record that people are willing to drive farther for a
16 Walmart than a Kroger or an Albertsons, right?

17 A I think in general people have larger draw areas.
18 Remember, sometimes this will be flipped, and the Walmart
19 will be in, and the Kroger will be out.

20 Q Right. But in the real world, this scenario occurs, as
21 pointed out by Dr. Israel in his report, right?

22 A Right. And the reverse scenario will also occur.

23 Q Of course. And this is true, that Kroger counts a
24 hundred percent and Walmart counts zero percent for the
25 analysis, even though some of the shoppers in there will

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1 actually be much closer to Walmart than Kroger, right?

2 A Some of them will be closer -- you're thinking of the
3 ones on the right-hand side of the circle.

4 Q Or the top, the north, the Northwest?

5 A I haven't calculated the distance, so I can't testify
6 to that, but maybe.

7 Q Can't we see the fact -- just a matter of simple
8 geometry, if you are anywhere in the top third of the pie,
9 you are closer to Walmart than Kroger?

10 A My geometry is terrible. Maybe if you drew an arc from
11 the unlabeled orange dot over to "grocery" in gray, then
12 maybe you would have an area that is closer to the Walmart.

13 Q So Dr. Israel pointed out in his report all the
14 problems with this approach, and then you changed approach
15 in your reply report, right?

16 A I don't agree with your preamble at all. This is a
17 widely used antitrust methodology, but I did take account of
18 Dr. Israel's criticisms, and I used a different approach.

19 Q And that's the customer-based market share?

20 A Correct.

21 Q Both of your methods of calculating market share come
22 from hospital cases, right?

23 A That's not correct. I know why you are confused,
24 because in my deposition we talked about hospitals. The
25 hospital case gives the labels. So in a hospital case you

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1 talk about facility-based shares, which is what this is.
2 You label the whole facility and then you count all the
3 patients. Then you use patient-based shares, which is
4 closer to my second methodology. But these methodologies
5 predate the current way people look at hospital mergers.

6 Q True or false: A lot of this comes from hospital
7 literature?

8 A There is a longer quote there, if you'd pull up my
9 deposition. I can see where you are confused by it. But
10 the labeling comes from hospital markets, but this
11 methodology is a very old methodology for determining market
12 shares and spacial competition.

13 Q To calculate your customer-based market shares, you
14 look at customer location, right?

15 A Correct.

16 Q But you only had customer loyalty card data, and
17 therefore location for Kroger and Albertsons, not for the
18 other stores, correct?

19 A That's not quite true. I had it for a couple of other
20 stores, but in general, yes. I had it for a limited number
21 of stores.

22 Q When I asked you, "I understand you looked at loyalty
23 card data for Albertsons and Kroger, but did you look at
24 loyalty card date for any other store," you answered, "No, I
25 don't believe we had it for other stores."

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1 Does that refresh your recollection?

2 A I'm sorry. That's a mistake. If you look at the back
3 of my initial report, you will see I did testing to make
4 sure -- I used firms that did have the data. I tested the
5 methodology I used for allocating sales, using third parties
6 who produced data. It is a very small number of firms, but
7 there are firms that produced loyalty card data.

8 Q I may have missed it, but did you submit an errata that
9 that was a mistake?

10 A On the deposition transcript?

11 Q Yeah?

12 A I don't think so. I only noticed it yesterday.

13 Q At least for the majority of competitive stores you did
14 not have customer information about the census block that
15 lived in, right?

16 A That's correct.

17 Q You did not ask the FTC to subpoena those folks to get
18 that data, did you?

19 A That's correct.

20 Q Because you did not have sales data by census-block
21 group for the majority of the competitors, you had to
22 estimate where the customers were located based on the
23 distance from the store, right?

24 A Yeah. I had from them distance bans -- what percentage
25 of their stores were distances from the stores.

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1 Q So you described the weighting briefly. I want to call
2 up the figure from your report, the rebuttal report, Figure
3 37, page 98, Mr. Rennick.

4 Thank you.

5 And we went through this chart at your deposition,
6 and we spent a fair amount of time with the math. First of
7 all, A is the focal store here?

8 A That's correct.

9 Q And what we figured out is if just by changing what we
10 are looking at first, C to A., if we make C the focal store
11 and no other changes -- none -- its share would be
12 46 percent instead of 16 percent when A was the focal store,
13 right?

14 A Yeah, you can't calculate -- I mean, we talked about
15 this in the deposition. You can't calculate -- if C were
16 was the focal store, you would take all the CBGs where C is
17 present, and then you have to include all the stores selling
18 to C's CBGs. So you really can't calculate market shares
19 here for anyone here for anyone but A -- I apologize. For
20 the geographic margin around A as the focal store.

21 Q And we get a similar analysis when we flipped C and A
22 that did the reverse, and that went from 41 percent share to
23 22 percent share.

24 Do you recall that?

25 A Again, the only store here you have the information for

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1 to calculate the market share using the focal store is A.
2 You just can't do it for the others. But I will generally
3 agree that if I calculate market share for store C, with it
4 as the focal store, the market shares will change.

5 Q You said in your testimony earlier today that the focal
6 store is in the center of the area. Do you recall saying
7 that?

8 A Yes.

9 Q Could we leave that up and call up slide 31, please.

10 You will confirm for me in the slide that you
11 showed Her Honor this morning that the focal is not in the
12 center of the area, is it?

13 A Yeah. I mean, the focal store is center in the sense
14 that it determines the CBGs that you look at. In principle,
15 A's CBGs could be located anywhere, so it is not going to be
16 in the geographic center. I definitely misspoke.

17 Q You will confirm for me that you changed the location
18 of the A, because when A is in the center, it makes it look
19 an awful like you're trying to double market shares for
20 purposes of your analysis, right?

21 A No. The reason I moved these locations around is I
22 wanted to emphasize Dr. Israel's point that store D is
23 outside the market, and they are going to be counted if they
24 sell into the CBGs. So that's why I tried to move D far
25 away. I just moved A into the center of 4, because A has

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1 the most sales in 4, so it seemed weird to have it at the
2 center when it is actually selling more in 4.

3 Q Dr. Israel will be talking about this at length, of
4 course. But just to confirm, there is no dispute that you,
5 for purposes of presenting to the Court, after the
6 questioning that showed the doubling of the market share
7 just by changing that perspective, you decided you better
8 move the store location, right?

9 A I disagree about your characterization of the
10 testimony. I rearranged this to try to make it more clear.
11 And I dropped the table, because the table confuses
12 everybody except me. So I didn't think it was useful to
13 spend time on it.

14 Q Let's shift gears to talk about the actual versus
15 hypothetical monopolist test. You stated that there were
16 multiple variables that make performing the actual
17 monopolist test hard, right?

18 A The actual monopolist test is, again, intuitively
19 attractive, but it is not something that economists do in
20 merger analysis.

21 Q Well, that's not true, is it? It was done in Staples
22 versus Office Depot, right?

23 A I don't know.

24 Q It was done in FTC versus Whole Foods, wasn't it?

25 A I mean, those cases are a long time ago, A; and B, I

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1 didn't work on them. I don't know exactly what was done.

2 Q Not only did you not work on them, you didn't read
3 those cases before your deposition, did you?

4 A Correct.

5 Q You didn't read the expert reports from those cases,
6 right?

7 A Correct.

8 Q So when you said to counsel no one has used the actual
9 monopolist test, you meant no one in the cases or the expert
10 reports that you've read did someone use the actual
11 monopolist list?

12 A If you look at any paper talking about acceptable
13 methodologies in antitrust analysis, you are not going to
14 find a mention of the actual monopolist test. You will find
15 mentions of this methodology saying that it is not one that
16 economists use anymore.

17 Q We will look forward to seeing that later. You would
18 agree that the 2010 and 2023 merger guidelines specifically
19 call out the use -- the potential beneficial use of "direct
20 evidence" when doing HMT analyses, right?

21 A No. I think they are talking about the direct evidence
22 of price effects.

23 Q The direct evidence of price effects. And that's
24 exactly what Dr. Israel called the actual monopolist test,
25 right?

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1 A No. I think they're talking about in the past -- we
2 saw a transaction in a market -- so I did this myself on
3 Tronox, which was a case I testified on, where there was an
4 outage of a particular store. You have a nice, normal event
5 study, and you can see what the effect was of that
6 particular transaction. You are trying to control for the
7 fact that demand and supply together make it impossible to
8 identify effects. You can only talk about correlations.

9 Q To be clear, you stated to counsel that you're unaware
10 of anybody using the regression test that Dr. Israel called
11 the actual monopolist test, and you didn't read two of the
12 cases where it was specifically called out, right?

13 A You're representing that it is called "the actual
14 monopolist test" in those cases?

15 Q I'm representing the test that was done, the same way
16 that Dr. Israel did, was used and approved in those two
17 cases.

18 Did you read those?

19 A I have not read those cases.

20 Q All right. Let's move on to margins. You testified
21 earlier about CMCR and GUPPI, right?

22 A Correct.

23 Q One of the key inputs in either one of those is
24 margins, right?

25 A That's correct.

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1 Q And you would agree that the difference between using
2 the variable margins factor Israel calculated and the gross
3 margins you used has a significant effect on a number of
4 stores that raise competitive concerns in your model?

5 A I would say that he and I used different margins, and
6 those make a material difference to the outcome.

7 Q You would agree that using the appropriate margin is
8 critical to a competitive effects analysis, right?

9 A It's certainly important yes.

10 Q And the correct margin for a competitive effects
11 analysis is the margin that "captures variable costs to the
12 extent you can," correct?

13 A Yeah. You're trying to capture the marginal costs. If
14 I make a small change in output, what happens to my cost?
15 Just to be clear, that can be different from variable costs,
16 so you can have an average variable cost that differs from
17 your marginal costs.

18 Q You're trying to capture variable costs to the extent
19 you can, correct?

20 A Yeah. You're reading from the deposition. Again --

21 Q Yes, I am.

22 A I know, because I read it last night. What you're
23 really after, I agree, is the marginal cost at a particular
24 point. I just want to flag for you that you can have
25 different variable costs at different output levels, so the

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1 marginal costs, the change of the current output level, may
2 be different than your average variable cost.

3 Q Are you disagreeing with what you said in the
4 deposition? Yes or no, please.

5 A Yeah. The language there is loose. The way I'm using
6 "variable" instead of "marginal" is loose, I'll admit.

7 Q For your competitive effects analysis, you used
8 defendants' gross margins right?

9 A Correct.

10 Q You also used defendants' gross margins for your
11 hypothetical monopolist test analysis, right?

12 A That's correct.

13 Q You read Mr. Groff's testimony from last week?

14 A Remind me who Mr. Groff was.

15 Q Mr. Groff was Kroger's head of pricing.

16 A Yeah.

17 Q And Mr. Groff testified that variable costs or anything
18 for which the dollar amount of the cost changes, the more
19 you sell, right?

20 A Yeah. That's a very --

21 Q Are you done? I didn't mean to cut you off.

22 THE COURT: He didn't seem to be finished.

23 THE WITNESS: I'm sorry. I'm thinking about it,
24 Your Honor.

25 Sure. We can use that.

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1 BY MR. WOLF:

2 Q For example, Mr. Groff testified that the cost of
3 grocery bags are variable costs because the more groceries
4 you sell, the bags you buy, the more cost is associated with
5 those bags, right?

6 A It depends. If you sell one more jar of peanut butter,
7 and it goes into an existing bag, then you won't sell any
8 more bags. If you sell enough groceries, and you need
9 additional bags, then you may sell additional bags.

10 Q And your gross margins did not include, for example,
11 the cost of additional grocery bags?

12 A I will agree with you for Albertsons, but on the Kroger
13 side there is a group of other costs that may or may not
14 include bags. I just can't remember.

15 Q Your gross margins did not include the cost of credit
16 card fees?

17 A Same answer.

18 Q It did not include the costs of labor, right?

19 A Same answer.

20 Q Now, Mr. Broderick was asked in his testimony earlier
21 today whether he had ever had a situation where he had such
22 good sales that he needed to hire additional people, but
23 that's not really what we are talking about here. We are
24 talking if you have more sales, you have to -- your hourly
25 workers work more hours, right? At least potentially?

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1 A Well, what we're talking about is if you have a
2 marginal change in your volume, what happens to your total
3 cost position.

4 Q And if there are more people coming through your
5 stores, selling more product, there is a good chance you're
6 going to need your folks to stick around longer to serve
7 them, right?

8 A I think Mr. Broderick testified he didn't find himself
9 in a position where he had to hire additional staff. As I
10 recall, he didn't testify about whether he had to extend
11 hours or not.

12 Q Do you disagree -- putting aside Mr. Broderick -- that
13 at some point if you sell more product, people need to work
14 longer hours, and you need to pay people for the hours they
15 work?

16 A It depends on your employment and how much it
17 increases.

18 Q Your gross margins did not include any cost to restock
19 the shelves, right?

20 A Certainly true for Albertsons. I can't recall the
21 other costs for Kroger.

22 Q Your gross margins don't include maintenance costs?

23 A Same answer.

24 Q Warehousing costs?

25 A It is included for Kroger. I don't think it is

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1 included for Albertsons.

2 Q Distribution costs?

3 A Included for Kroger, I believe; not included for
4 Albertsons.

5 Q Kroger submitted a list of the portion of each cost
6 within its P&L statements that it considered variable costs,
7 but you didn't look at the column before you conducted your
8 analysis, correct?

9 A Correct.

10 Q You did not go through Kroger or Albertsons P&Ls to
11 figure out which costs were fixed and which were variable,
12 correct?

13 A Correct.

14 Q But you agree that margins make a big difference in
15 whether a merger is or is not deemed anticompetitive,
16 correct?

17 A Well, we saw in one of the slides it changed the number
18 of markets from 1,800 to 1,200 if you use Dr. Israel's
19 margins instead of mine.

20 Q Let's talk about the competitive effects of the merger.
21 Your opinion is the merger will substantially reduce
22 competition, correct?

23 A Correct.

24 Q You are not asserting harm to competition as a result
25 of the merger in the 32 states there is no overlap between

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1 Kroger and Albertsons, right?

2 A Yeah.

3 Q You are also not asserting harm to stores that do not
4 pass your hypothetical monopolist test; is that fair?

5 A That's correct. Although just a minor point on that,
6 which is they may pass in the large-format store and fail in
7 the supermarket. But if you're talking about a particular
8 market, and it fails the hypothetical monopolist test, for
9 that market, I'm not including it.

10 Q You are not asserting harm for stores that pass the HMT
11 but don't meet the concentration thresholds of the 2023
12 merger guidelines, right?

13 A Correct? Again, with the same caveat as before.

14 Q Diversion ratios are an important input to CMCR and
15 GUPPI calculations, right?

16 A That's fair.

17 Q Dr. Israel uses what's called an "EGK model"; is that
18 right?

19 A That's right.

20 Q And that's based on the first names of the three
21 authors of the paper five years ago or four years ago?

22 A I don't remember the date, but correct, yes.

23 Q He used the EGK model to calculate the diversions that
24 go into GUPPI and CMCR analyses, right?

25 A Sure.

N. Hill - X

1 Q You did not critique the EGK model outlined in the
2 original paper in your report?

3 A Correct.

4 Q You also do not critique Dr. Israel's EGK model in your
5 original report, correct?

6 A That is fair.

7 Q We agreed -- I think you testified to this with
8 counsel -- whether you account for the divestiture matters a
9 lot for what stores or focal stores or markets, or generally
10 whatever you want to call it, exceed the 5 percent threshold
11 you've outlined?

12 A Yeah. How you treat the divestiture materially affects
13 that number.

14 Q So let's call up figure 13, which I believe at least a
15 version of this was shown to you by counsel. Figure 13 from
16 your rebuttal report. Page 40.

17 Thank you, Mr. Rennick. If we could zoom in on
18 the top.

19 I believe we agreed at your deposition that we
20 would never again discuss the issue of the four closed
21 stores, right?

22 A I violated our agreement earlier today, but yes.

23 Q So what we see here is in the fourth bar, you take that
24 1,513 number, and you say what happens if we apply
25 Dr. Israel's margins, right?

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1 A Correct.

2 Q Is that the number of -- what you do you call them?
3 Concerned stores. Is that the word you used? What word
4 should we use for that?

5 A I would say this is the number of markets where there
6 is likely to be anticompetitive harm.

7 Q Okay. Stores with harm. Can we shorten that to
8 "stores with harm"?

9 A Harmed stores.

10 Q So if we take Dr. Israel's margins, under your
11 calculations however, we go from 1,513 to 693 stores with
12 harm, right?

13 A That's correct.

14 Q Alternatively, if we take the 1,513 and consider the
15 divestiture, we go from 1,513 all the way down to 234
16 stores, right?

17 A That's correct.

18 Q Now, you said something that confused me a little bit,
19 and I think you said it twice. You said that assumes if the
20 divestiture works perfectly; in other words, the stores
21 compete with the same vigor they do today?

22 A Correct.

23 Q Those are two very different things, aren't they? Let
24 me explain -- I don't mean to cut you off.

25 A Please. Go ahead.

N. Hill - X

1 Q You read Mr. Winn's testimony?

2 A Yes.

3 Q He testified that, for example, in the former
4 Albertsons stores, they anticipated making \$200 million in
5 price investment, right?

6 A I don't recall the exact number.

7 Q Do you recall him saying there would be price
8 investment?

9 A I recall him also saying that they were projecting the
10 stores would struggle initially, yes.

11 Q Initially, because of transition. But he said there
12 would be price investment, right?

13 A I'll take your word for it. I don't recall it. I'll
14 take it as given.

15 Q To be clear, if there is price investment and what was
16 an Albertsons store, now an answer C&S store, lowers its
17 prices, that increases its competitiveness, at least along
18 the price issue, right?

19 A Yeah. It is the same answer I gave earlier about
20 Kroger. Unbinding commitments that we are going to make
21 these investments -- in antitrust economics, we look at the
22 current state of the store, and we consider that as a
23 predictor for what's going forward. But I take your point,
24 which you are saying, there's a state of the world where the
25 divestiture is such a rousing success, that the stores

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1 perform even better than they do today.

2 Q That they are more competitive than they are today,
3 right? And if C&S lowers its prices, not only is that good
4 for C&S customers, but that puts pressure on all the stores
5 surrounding the C&S stores to look at their prices and
6 potentially lower them, right?

7 A Conditional on its quality staying the same and its
8 attractiveness to consumers. Another reason you might cut
9 prices is if you worry that your banner is not as effective
10 as it was.

11 Q Quality. Great point. C&S also committed to spend
12 \$1.2 billion to improve the quality of the stores it was
13 acquiring from Albertsons, right?

14 A I don't recall the exact number.

15 Q So if it lowers prices through price investment and
16 spruces up the stores to the tune of \$1.2 billion, not only
17 might it compete with equal vigor at Albertsons stores, it
18 might compete with greater vigor than Albertsons stores,
19 right?

20 A It is possible that they will do better than the
21 existing stores, yes.

22 Q You will confirm for me that nowhere on your chart do
23 you ask the question what happens if we apply Dr. Israel's
24 margin and assume a well-functioning divestiture, right?

25 A Correct.

N. Hill - X

1 Q And when Dr. Israel did combine it, he came up with a
2 number that was, I believe, four stores left; is that right?

3 A That might be his GUPPI methodology. I don't recall.
4 I am sure he will testify about it.

5 Q And you didn't quibble with the math that he did to
6 your chart?

7 A Correct.

8 Q And when you apply price zones to those four stores,
9 you end up with zero stores that suffer competitive harm
10 from this merger, right?

11 A That is correct.

12 Q You also conducted a GUPPI analysis and presented the
13 results in Figure 16 of your rebuttal report; is that right?

14 A I took Dr. Israel's GUPPI analysis, and I applied my
15 inputs to it, yes.

16 Q And understanding that you have a gentlemen's
17 disagreement about whether GUPPI or CMCR is superior, you
18 would agree that GUPPI is a widely analyzed used tool by
19 courts, right?

20 A I don't know about widely used by courts, but it is
21 used in antitrust analysis. Yes.

22 Q Fair enough. In your world -- Dr. Israel's and your
23 world, you use GUPPI all the time?

24 A People do use GUPPI. I use it relatively rarely, but
25 other people do use it.

N. Hill - X

1 Q So in this chart we see a baseline. You present the
2 predicted price increase through GUPPI without the
3 additional factors worked in that we talked about before,
4 right? That's your baseline on the left side of the chart?

5 A This is annual harm in qualifying GUPPI markets. So
6 there is a separate chart in my appendix, if you pick the
7 qualifying markets using CMCR. But yes, this is using
8 qualifying GUPPI markets. On the left is my baseline. Then
9 the next one, which is Dr. Israel's GUPPI model, that is
10 essentially in Dr. Israel's diversions. But the next one is
11 using his margins but not his GUPPI. Then the last one is
12 using the divestiture.

13 Q So doing the same thing again, if we combine
14 Dr. Israel's margins with the divestiture, we end up with a
15 number of about \$3 million of annual harm; is that right?

16 A I can't remember the exact number, but it is not a
17 large number.

18 Q Single-digit millions?

19 A I don't remember the number.

20 Q Even at 52 million, you would agree that 52 million is
21 way, way less than a billion-dollar-price investment, right?

22 A 52 million is less than a billion.

23 Q So when analyzing harm, we have to compare, in the "but
24 for" world, your prediction as to what the merger will cost
25 versus what the merger will benefit, right?

N. Hill - X

1 A Yes.

2 Q You talked a little bit about efficiencies. Just so we
3 are clear, that's not really your bailiwick in this case,
4 or, for that matter, Dr. Israel's. We have Mr. Gokhale and
5 Dr. Yeater coming to talk about office efficiencies; is that
6 right?

7 A I think it is Mr. Yeater. I may be wrong. Yes, I
8 incorporate them into the CMCR, but otherwise I don't
9 independently calculate them with the exception of the
10 percentage.

11 Q I'm just trying to shorten our day. You're just
12 borrowing another expert's, and we should talk with him
13 about how he got to these numbers?

14 A Yeah. I verified -- I believe I calculated
15 independently the total claimed deficiencies versus total
16 costs. But the cognizable efficiencies come from
17 Mr. Yeater.

18 Q I want to talk a little bit about your last few slides
19 on divestiture, and you did, I guess, a sensitivity
20 analysis. Would that be a fair way to characterize it?

21 A I would say, yeah, if the divestiture -- I apologize.
22 If it works perfectly or if it struggles.

23 Q And you compared a few past divestitures and saw what
24 happened there?

25 A I did retrospectives, correct.

N. Hill - X

1 Q To be clear, when you were analyzing those past
2 divestitures, you didn't do any analysis, for example, the
3 quality and number of people that went with the divested
4 stores there versus the quality and number of people that
5 are going with the divested stores here, right? You didn't
6 do that type of analysis?

7 A That's correct. I just looked back at the divestiture.

8 Q And you didn't do an analysis of the financial
9 commitments made by the divestiture buyers there versus the
10 divestiture buyers here, right? You just didn't do that
11 analysis?

12 A That's correct.

13 Q And you didn't do an analysis of the relative value or
14 common sense of the TSAs in the examples you gave versus the
15 one here, right?

16 A Correct.

17 Q And you heard this morning that in the Haggen
18 divestiture, they were given five months to re-banner,
19 whereas here, they are given three years to re-banner, and
20 you didn't do the impact of that analysis, for example,
21 right?

22 A That was represented. I did not study how long the
23 window for re-bannering will affect the outcome.

24 Q By the way, you referred to the second divestiture you
25 talked about with 81 stores as "a relatively large

N. Hill - X

1 divestiture," right?

2 A Correct.

3 Q So 579 stores would be nine times relatively large in
4 terms of divestitures?

5 A If you represent it is nine. I'll take your word.

6 Q Back-of-the-envelope math. But any characterization
7 that there aren't a really large number of stores being
8 divested here compared to the past?

9 A I think it is a lot less than nine, because 9 times 80
10 would be 720.

11 Q So seven-and-a-half? Sorry if I got that wrong.

12 A 6 times 8 is 56, so that's roughly right.

13 Q I apologize. You would agree that 579 stores is a very
14 large divestiture, lots of stores, lots of scale, lots of
15 scope?

16 A It is definitely a large number of stores.

17 Q Now, you were comparing sensitivity analyses to what
18 would happen if the stores closed versus what's going on
19 today, right?

20 A So I looked separately at store closures and loss of
21 sales compared to what's going on today.

22 Q But that's not the right analysis. The "but for"
23 analysis is what the world looks like if there is merger and
24 if there isn't a merger, right?

25 A I think it is the right analysis. Can you say why you

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1 think it isn't?

2 Q For example, are you aware that Albertsons has
3 indicated that they may well need to close stores if the
4 merger doesn't occur?

5 A No, I haven't analyzed that.

6 Q Well, assuming that to be the case, the proper
7 comparison is not C&S versus today. It is C&S versus what
8 the world will look like with no merger, right?

9 A You know, after -- when parties are in the middle of
10 merger proceedings, I generally found it best not to take
11 too seriously the pronouncements that they make. Maybe;
12 maybe not. I think it is a reasonable basics to look at
13 what are the current stores doing and what would it look
14 like if they fell off on that performance.

15 Q So your testimony is that your comparison of whether
16 there is substantial risk of competitive harm is based on
17 what the world looks like today, not what it will look or
18 could look like a year from now? Three years from now? Or
19 five years from now?

20 A What the world will look like from three or five years
21 from now, I think is uncertain. I think today is the
22 starting point -- is a good starting point for the analysis.

23 Q What about a year from now? Shouldn't we worry about
24 that?

25 A I think what I did was perfectly reasonable.

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1 Q But shouldn't we worry about what the world will
2 actually look like a year from now when deciding whether
3 this merger is or is not an anticompetitive threat?

4 A I mean, look, if the transaction is blocked, Albertsons
5 is going to have a billion dollars to invest in its stores.
6 I don't know how to weigh that against what might happen if
7 the transaction is blocked, and they close a few stores. I
8 don't know where those stores are going to be located. I
9 think the way I did it makes a lot of sense.

10 Q You would agree that you did not compare in the "but
11 for" world what the world will actually look like a year
12 from now in the two different scenario, right?

13 A I disagree. I think the way I did it is correct.

14 Q You agree that competition between two grocery store
15 chains can be asymmetric, right?

16 A Correct.

17 Q Kroger can be a key competitor of Albertsons, but that
18 doesn't necessarily mean that Albertsons is a key competitor
19 of Kroger, right?

20 A That's true.

21 Q And your entry analysis, for example, in your rebuttal
22 report showed that the defendants have different-sized
23 defects on each other, right?

24 A I didn't whether they are statistically significantly
25 different, but the raw numbers are different.

N. Hill - X

1 Q They have different-sized defects on each other, right?

2 A I can't answer that in statistical terms, but the
3 actual numbers are different sizes.

4 Q Dr. Israel's analysis of the pricing data in his report
5 shows that Albertsons' average prices were higher than
6 Kroger's prices in every division they compete, but you did
7 not evaluate those particular figures in your report, right?

8 A Correct.

9 Q You read last week that Kroger considers Albertsons to
10 be a high-price retailer; is that right?

11 A They sometimes designate them as the high-price
12 retailer when they're doing their pricing zones.

13 Q And you read Mr. Groff's testimony that the impact that
14 Albertsons has on Kroger's pricing is very, very minimal?

15 A I saw him say that, but he also talked about specific
16 incidents in which it had an impact.

17 Q That's a great point. Do you respect -- how many SKUs
18 are on a typical Kroger, for example?

19 A I don't know the exact number.

20 Q 60- to 100,000?

21 A I think it is less than a hundred thousand. I think
22 60- is more in the ballpark.

23 Q It is in the range. It depends on what store it is.
24 Fred Meyer is over a hundred thousand. In any event, let's
25 pick 60,000. 60,000 SKUs. How often are prices changed?

N. Hill - X

1 A I don't know.

2 Q A couple of times a week potentially in an inflationary
3 environment?

4 A They testified about this, and I don't recall the
5 frequency.

6 Q Just simple math: If Albertsons is on average 11
7 percent higher than Kroger, you would expect that on any
8 given day in any given store in any different region you are
9 going to find a few of those 60,000 SKUs where Albertsons
10 prices are a little lower than Kroger's, right?

11 A I don't know.

12 Q Just as a mathematical matter?

13 A I haven't done the analysis. I'm sorry.

14 Q You wouldn't expect -- strike that. You would warn us
15 to draw any conclusions from a half dozen anecdotes of a
16 particular product on a particular day in a particular store
17 being higher at Kroger than at Albertsons. We shouldn't
18 draw anything from that, should we?

19 A I'm not sure I understand your question. All I'll say
20 is look, different stores have different positions. They
21 are offering different quality, store experiences, and
22 prices. The idea that just because your prices are lower
23 than a competitor, that you purchasing them will increase
24 competition, Walmart can buy every other competitor. That's
25 just not how antitrust analysis works. Throwing out a bunch

N. Hill - X

1 -- "throwing" is the wrong word -- evolved into a bunch of
2 stores who compete with each could attract consumers and
3 using their best strategy to do it.

4 Q I'm sorry to interrupt.

5 You looked at Kroger and Albertsons price check
6 data, but you did not analyze the price check data in your
7 reports to determine whether Albertsons had any impact on
8 Kroger's prices, correct?

9 A Using the price check data?

10 Q Yes.

11 A I don't believe so.

12 Q You did not do any analysis --

13 A I apologize. There is -- I took Dr. Israel's analysis
14 and showed that Albertsons affects Kroger's prices even when
15 Walmart is present.

16 Q You agree with me that proving a correlation between
17 Kroger and Albertsons' prices does not prove causation,
18 correct?

19 A Correct.

20 Q You haven't analyzed whether there is a single market
21 post-divestiture in which Albertsons is a more important
22 price setting determinant than Walmart, correct?

23 A Post-divestiture?

24 Q Yes.

25 A There is no Albertsons post-divestiture.

N. Hill - X

1 Q But the store that existed -- let me step back.

2 Did you do any analysis whatsoever of whether
3 Walmart will cease to be the No. 1 price determinant for
4 Kroger post-merger?

5 A I didn't determine whether they were the No. 1 factor
6 pre- or post-merger.

7 Q That's my next question. You didn't determine today
8 who the No. 1 determinant of Kroger's prices was from a
9 competitive perspective, right?

10 A Correct. Remember, the elimination of competition
11 between two firms can harm consumers even if they compete
12 with other firms.

13 Q Where you did look at Kroger and Albertsons' prices,
14 you found that Kroger's prices were correlated to Walmart at
15 nearly three times the strength of Albertsons, right?

16 A Are you referring to my vocalization of Dr. Israel's
17 analysis?

18 Q Yes.

19 A It's something like three. I don't recall the exact
20 amount.

21 Q Last question: You agree that the ultimate
22 determination here is what the world looks like with or
23 without a merger? There is a no dispute between us on that
24 one, right?

25 A I think so.

N. Hill - ReD

1 MR. WOLF: Thank you, sir.

2 THE COURT: Any redirect?

3 MS. BLACKBURN: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MS. BLACKBURN:

6 Q So, Dr. Hill, my colleague, Mr. Wolf, asked you some
7 questions about why you define two product markets but then
8 focused on one in your presentation today.

9 Do you recall that?

10 A Yes.

11 Q But did you, in fact, conduct all the same analysis for
12 the supermarkets product market?

13 A Yes.

14 Q And could we please pull up demonstrative PX12, slide
15 53.

16 Dr. Hill, what did you conclude with respect to
17 market shares in the supermarket product markets?

18 A Yes. This analogue for a figure for large-format store
19 markets looking at merged market share. So here we can see
20 there is a large number of markets for both store-based
21 market shares and customer-based market shares on the order
22 of 1,000, 1,100 on the right, where the merged firm will
23 have more than 50 percent share in the supermarket markets.

24 Q And slipping to the next slide, please, 54.

25 Dr. Hill, what did you conclude with respect to

N. Hill - ReD

1 concentration and presumptions in the supermarket market?

2 A So again, the number of presumptive stores here on the
3 left is 1,928. On the right, it is 1,959. That's a little
4 larger than for the large-format stores, but it is
5 qualitatively similar.

6 Q Next slide, 55.

7 Dr. Hill, did you analyze which supermarkets are
8 anticompetitive using a variety of inputs?

9 A Yes.

10 Q And how many supermarket markets would be presumptively
11 anticompetitive even accounting for the parties' proposed
12 divestiture?

13 A In this case it is 1,002.

14 Q Let's flip to the next slide, please.

15 Dr. Hill, did you conduct a CMCR analysis in the
16 supermarket markets?

17 A Yes.

18 Q And what did you find with respect to the number of
19 presumptive supermarket markets that would have a CMCR above
20 5 percent even with the proposed divestiture that functions
21 perfectly?

22 A There is 335.

23 Q Do you believe the supermarket markets is properly
24 defined?

25 A Yes.

N. Hill - ReD

1 Q Do you believe that analyzing the supermarket markets
2 is informative about the likely impact of this transaction
3 on competition?

4 A Yes. So let me just modify my previous statement. It
5 is correctly defined in the markets that I find that pass
6 HMT. For those that don't, it is not.

7 Q Of course. My colleague also asked you a number of
8 questions focused on the FTC's complaint.

9 Do you remember that?

10 A I do.

11 Q Could we please pull up the complaint and direct our
12 attention to paragraph 57. We can flip to it in the witness
13 binder to avoid taking too long here. Paragraph 57 of the
14 complaint.

15 A What's the DX number or PX number?

16 Q The cross binder. It is DX3. Paragraph 57 appears on
17 page 23, I think.

18 And paragraph 57 reads, "Even if the
19 non-supermarket retail formats described above are included
20 in the relevant product market, the proposed acquisition is
21 still presumptively unlawful in most of the identified
22 geographic markets."

23 Dr. Hill, did you assess market shares, including
24 non-supermarket retail formats that were described in the
25 Government's complaint?

N. Hill - ReD

1 A I'm not sure which ones you described in here, but I
2 did look at the large-store format, which is the supermarket
3 market plus three other formats.

4 Q So did you analyze non-supermarket retail formats and
5 conclude that including those retail formats still results
6 in many presumptively unlawful markets?

7 A Yes.

8 Q Dr. Hill, my colleague also asked you some questions
9 about the 75 percent service area in your geographic market
10 analysis.

11 Do you recall that?

12 A Yes.

13 Q Did you test any draw areas or percentages other than
14 75 percent?

15 A I don't think it is summarized in my report, but I did
16 look at other draw areas and got similar results, but I
17 don't think it is in my report.

18 Q You did also test the store-based markets using the
19 hypothetical monopolist test?

20 A Yes.

21 Q Is it true that if there were stronger competition that
22 existed outside of the boundary of the store-based
23 geographic market, that geographic markets might fail the
24 hypothetical monopolist test?

25 MR. WOLF: Your Honor, at this point counsel is

1 testifying. I object as leading.

2 THE COURT: I'll sustain the objection. You can
3 rephrase the question.

4 MS. BLACKBURN: Thank you, Your Honor.

5 BY MS. BLACKBURN:

6 Q Dr. Hill, if there was strong competition outside of a
7 store-based geographic market, might that market fail the
8 HMT?

9 A The goal of the HMT is to identify if you are excluding
10 a relevant substitute. So, yes, if you excluded a relevant
11 substitute, you would fail.

12 Q My colleague also asked you about larger draw areas of
13 certain stores.

14 Do you recall that?

15 A I do.

16 Q Do any of your methodologies account for the
17 possibility that certain stores or store formats might have
18 larger draw areas?

19 A Yes. The customer-based methodology gives credit to
20 stores based on the sales it makes where the focal store is
21 making sales. So it's adjusting for the fact that some
22 stores may have smaller draw areas and some may have larger
23 draw areas.

24 Q You were also asked a number of questions about the
25 competition in these formats outside the supermarket market.

1 Do you recall that?

2 A Yes.

3 Q Does an antitrust market have to include every
4 conceivable substitute that a consumer might turn to in the
5 event of a price increase?

6 A No.

7 Q How did you test whether the market included enough
8 substitutes?

9 A The hypothetical monopolist test purpose is to test
10 whether you exclude relevant substitutes.

11 Q Did the majority of the supermarkets markets pass the
12 hypothetical monopolist test?

13 A Yes.

14 Q And did the majority of the large-format markets pass
15 the hypothetical monopolist test?

16 A Yes, in using both geographic definitions.

17 Q Taking a step back, is it the case that a merger can
18 have anticompetitive effects even if the parties compete
19 with each other asymmetrically?

20 A Yes.

21 Q Is it the case that a merger can still have
22 anticompetitive effects even if some competition remains?

23 A Yes.

24 Q Mr. Wolf asked you a series of questions about Kroger's
25 promise to lower prices, which they call "price

1 investments."

2 Do you remember that?

3 A I do.

4 Q Do you consider a CEO's promise to lower prices a
5 mitigating factor in your merger analysis?

6 A As I said, typically I don't put a great deal of weight
7 on that.

8 MS. BLACKBURN: Thank you, Dr. Hill. I have no
9 further questions.

10 THE COURT: All right. You can step down.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: We are going to end for the day. We
13 will start again at 9:00 a.m.

14 Court is adjourned.

15 (Recess.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca
2024

DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

September 3,

DATE

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