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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 - MORNING SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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EDWARD FOX

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TRANSCRIPT OF PROCEEDINGS

(September 3, 2024)

(In open court:)

THE COURT: Good morning. Please be seated.

We are continuing the preliminary hearing in Case No. 3:24-cv-00347, Federal Trade Commission, et al. v. Kroger Company and Albertsons Company, Incorporated.

If we have new counsel appearing, let's note that; otherwise, the attorneys who have made their appearances, they continue. Those appearances continue.

MS. MAINIGI: Your Honor, we have Jon-Peter Kelly, SVP from Albertsons' legal department, with us today.

THE COURT: Good morning.

MR. KELLY: Good morning, Your Honor.

MS. PFAFFENROTH: Your Honor, we have Antonio Matthews, in-house counsel with Kroger, with us today.

MR. MATTHEWS: Good morning.

THE COURT: Good morning.

MR. VENKAT: Saivignesh Venkat with the State of Arizona.

THE COURT: All right.

MS. HIEMSTRA: Cheryl Hiemstra for the State of Oregon.

MS. BLACKBURN: All right. Good morning, Your

1 Honor. Emily Blackburn from the Federal Trade Commission.

2 THE COURT: Good morning.

3 MS. MUSSER: And, Your Honor, before we call our
4 first witness, I just had a few housekeeping issues for the
5 Court this morning.

6 THE COURT: Yes.

7 MS. MUSSER: First, I would like to start the day
8 with good news, a scheduling update. We have three
9 witnesses that the plaintiffs intend on calling. Our first
10 expert, Professor Fox; Todd Broderick, the last of
11 defendants' witnesses; and, finally, Dr. Hill.

12 We -- there is a possibility that we rest our
13 case-in-chief today. It may move into tomorrow. We would
14 do -- we do reserve the opportunity for rebuttal but wanted
15 to let you know that good news, being that we are on track
16 to finish in time, which hopefully is good news to this
17 Court.

18 THE COURT: It is good news to the Court, but I
19 can tell you I'm not surprised, based on how diligent
20 counsel on both sides have been. I, again, appreciate how
21 professional you have been, how you have been able to
22 confer, as I ask, to move this along, because I know this is
23 important to many, many people, as we can tell by the number
24 of people that continue to come every day, and that's a very
25 good thing.

1 So thank you.

2 MS. MUSSER: Then, just a few other updates. The
3 first is on Your Honor's recent words on
4 meet-and-conferring, we continue to meet and confer with
5 defendants kind of as the course of the proceeding continues
6 on evidentiary issues and confidentiality issues. In the
7 course of the meet-and-confer, defendants raised a concern
8 about some representations made in my opening statement,
9 specifically about the number of customer complaints.

10 If Your Honor recalls, I spoke to a customer in-box or
11 a complaint in-box that customers could email in to, to
12 express concern about any antitrust issue. They brought to
13 my attention over the weekend in the course of these very
14 productive meet-and-confers that there was some duplication
15 in the number of people coming in.

16 In other words, instead of it being 100 unique people
17 that came in, some people were concerned and wrote multiple
18 times.

19 THE COURT: I see.

20 MS. MUSSER: I wanted to make sure that I took the
21 opportunity to correct that for the record. While there are
22 still tens upon tens of thousands of people who wrote in, it
23 wasn't 100,000 unique people, and just to make sure that the
24 Court was aware of that.

25 THE COURT: Thank you.

1 MS. MUSSER: We were continuing to meet and confer
2 about how to handle the underlying 1006 exhibits, which just
3 summarize those number of complaints. I don't think we're
4 quite at impasse on that but continue to work together as to
5 how and when to raise that issue.

6 THE COURT: That's fine. Thank you.

7 And just so -- not for the attorneys' knowledge, but
8 for the non-attorneys, opening arguments and closing
9 statements are not part of the evidence. So while it's
10 always helpful for people to get an understanding of what
11 the evidence will be or the summary of the evidence as it
12 should be, the evidentiary portion, the witnesses and the
13 exhibits, are what -- will determine what the Court uses to
14 base its decision.

15 MR. PERRY: Mark Perry for Kroger, Your Honor. We
16 agree with the Government's last statement, that we are
17 continuing to meet and confer on the substantive evidentiary
18 point, and either we will come to an agreement or we won't,
19 but we're not there yet.

20 THE COURT: Understood.

21 MR. PERRY: Thank you.

22 MS. MUSSER: And, separately, we're intending to
23 call our first experts, as I just mentioned, and wanted to
24 alert the Court to an area of agreement, which, again, is
25 always good news, so I'll hopefully end this discussion

1 there today.

2 We've both agreed to move into evidence the expert
3 reports with the exclusion of any underlying cited material,
4 subject to this Court's permission; but I wanted to alert
5 the Court that we had been meeting and conferring throughout
6 the weekend and today on that.

7 MR. PERRY: We are in agreement, Your Honor, as
8 long as it's an application of the "goose and gander" rule.
9 If theirs goes in, ours go in, or vice versa. And it's, of
10 course, at the discretion of the Court, in a preliminary
11 injunction hearing, as to the admissibility issue.

12 THE COURT: All right.

13 MS. MUSSER: And then, finally, I just wanted to
14 get this Court's guidance on any preferred means to proffer
15 the expert. I know that we've already had some decisions
16 on -- on motions -- various motions in limine on both sides,
17 so the FTC's approach was to present the qualifications of
18 the expert and then proffer each expert as an expert in a
19 particular area; but, of course, if there's something
20 else --

21 THE COURT: That's the plan. That's the plan.
22 That's kind of what we were all taught.

23 MS. MUSSER: You know, it is, but I've also been
24 taught to do whatever the Court would prefer.

25 THE COURT: Well, I'm not going to change what is

1 a point of understanding for all, but yes.

2 MS. MUSSER: All right. That's all for me, Your
3 Honor. Thanks so much.

4 MR. PERRY: No preliminaries for the defendants,
5 Your Honor.

6 Oh, no. I'm sorry. Oh, okay.

7 THE COURT: Oh, go ahead.

8 MS. PFAFFENROTH: Thank you, Your Honor. We had
9 one question from a third party that's testifying remotely,
10 and they understand that they should have counsel in the
11 courtroom in person, but they asked whether they are also
12 permitted -- if the Court will allow them to have an
13 attorney sitting with the witness in the remote location as
14 well.

15 THE COURT: That's up to them. I'm not going to
16 micromanage people. I mean, if they are comfortable with
17 it. They are not going to have an opportunity to confer
18 with counsel, because I understand that conferral would go
19 against your time, and I know everyone is following the time
20 clocks very, very carefully.

21 That's fine.

22 MS. PFAFFENROTH: Okay. Thank you, Your Honor.

23 MS. DRUMMONDS: Your Honor, the FTC would call
24 Professor Edward Fox to the stand.

25 THE COURT: Okay. Thank you.

Fox - D

1 EDWARD FOX,
2 called as a witness in behalf of the Plaintiff, being first
3 duly sworn, is examined and testified as follows:

4

5 DEPUTY COURTROOM CLERK: Please state and spell
6 your first and last name for the record.

7 THE WITNESS: Edward Fox. E-d-w-a-r-d. Last name
8 F-o-x.

9 MS. DRUMMONDS: May I proceed, Your Honor?

10 THE COURT: Yes.

11

12 DIRECT EXAMINATION

13 BY MS. DRUMMONDS:

14 Q. Good morning, Professor Fox.

15 In the binder I just passed out are demonstratives for
16 your testimony as well as your expert reports in this case.

17 Professor Fox, were the slides and demonstratives we'll
18 use today prepared at your direction?

19 A. Yes, they were.

20 Q. Professor Fox, could you please give the Court an
21 overview of your educational background.

22 A. Yes. I went to West Point and earned a bachelor's
23 degree in engineering, after which I served in the Army for
24 seven and a half years. Following my service, I went to
25 Northwestern University, where I earned an MBA degree from

Fox - D

1 the Kellogg School, and then, simultaneously, a master of
2 science degree in marketing communications, while helping to
3 found a retail research center.

4 I served at the retail center for a few years, after
5 which I enrolled in a doctoral program and earned my Ph.D.
6 in management science, with an emphasis in marketing. The
7 management science degree included studies in statistics,
8 econometrics, and economics as well, and also a master's
9 degree in marketing.

10 Q. And where did you work after you received your Ph.D.?

11 A. I took a position as a marketing professor at Southern
12 Methodist University at Cox School of Business, where I also
13 got the directorship of a retail research center.

14 Q. And what is your current position?

15 A. I am professor of marketing and the chairperson for the
16 marketing department at Southern Methodist University's
17 School of Business. I have been designated as Dean's
18 Distinguished Research Professor, and I hold the endowed
19 position as the W.R. & Judy Howell director of the JCPenney
20 Center for Retail Excellence, all at SMU.

21 Q. And could you explain for the Court what the JCPenney
22 Center for Retail Excellence is?

23 A. The JCPenney Center is a retail center that focuses on
24 industry outreach with retailers, managers, executives, as
25 well as student engagement, getting students interested in

Fox - D

1 and helping them with retail employment, as well as
2 supporting retail-related research.

3 Q. And, Professor Fox, what is the focus of your academic
4 research?

5 A. My research is in retail decisions, pricing, promotion,
6 assortment, management; and, among other things, inventory
7 management and site location.

8 I have done some work in customer management as well.
9 This is all based on my research in consumer shopping
10 behavior. Specifically, in how consumers choose their
11 stores.

12 Q. Has your academic research and publications included an
13 analysis of grocery stores?

14 A. Yes. That's been the core of my research.

15 Q. Could you explain the origin of your interest in
16 grocery retailing, Professor Fox?

17 A. While I was a graduate student at Northwestern, I was
18 asked to help with the founding of a retail research center;
19 and at that retail research center, we focused on a grocery
20 industry initiative called "category management."

21 The idea behind category management is to manage all of
22 the various brands and private label products in a category
23 as a single business unit, more or less the way a consumer
24 would shop, with the aid of data and analytics.

25 Q. What courses do you teach today?

Fox - D

1 A. I -- I teach data analysis, managerial statistics, and
2 retail pricing.

3 Q. Have you taught other courses in the past?

4 A. Yes. I've taught marketing fundamentals and marketing
5 research for undergraduate students and taught marketing
6 management for graduate students and multiple retail
7 courses, undergraduate retailing, retailing and sales
8 promotion, and retail analytics as well.

9 Previous to my academic work, I taught category
10 management to executives and managers in various different
11 supermarket chains, including two that were later purchased
12 by Safeway.

13 Q. And do your academic courses include material specific
14 to grocery stores?

15 A. Yes, they do.

16 Data analysis includes grocery data, and the other
17 courses include retail strategy and shopping behavior.

18 MS. DRUMMONDS: Your Honor, at this time I would
19 offer Professor Fox as an expert in retail operations in
20 consumer shopping behavior.

21 MR. COWIE: No objection.

22 THE COURT: He is established as an expert.

23 BY MS. DRUMMONDS: (Continuing):

24 Q. Professor Fox, you mentioned you have published
25 materials relating to grocery stores.

Fox - D

1 Have you written any articles about the proposed merger
2 of Kroger and Albertsons?

3 A. Yes. I wrote a thought piece about 20 months ago,
4 after the merger was announced but before any information
5 regarding the merger, other than the parties, were public,
6 and posed some thought questions that might be relevant.

7 Q. And did you draw any conclusions regarding the merger
8 at the time of that article?

9 A. No, I didn't draw any conclusions. It wasn't a
10 peer-reviewed article. It was a simple thought piece.

11 Q. And could you please turn in the tab of your binder to
12 the tab marked DX2641.

13 A. Okay. I'm there.

14 Q. Is this the article you wrote about the proposed
15 merger?

16 A. Yes, it is.

17 Q. Professor Fox, why are you here today?

18 A. I'm here because I was asked by the FTC to evaluate the
19 proposed divestiture, specifically to evaluate that in the
20 context of this supermarket retail business in which Kroger
21 and Albertsons and C&S operate. I was asked to identify
22 challenges that C&S will have to overcome in order to
23 attract and retain shoppers at the 700 -- or 579 divested
24 stores -- excuse me -- and to compete effectively in the
25 supermarket business.

Fox - D

1 I was also asked to assess the report and conclusions
2 of Mr. Daniel Galante in the sense that they relate to the
3 challenges that C&S would have to overcome.

4 Q. Professor Fox, you mentioned "compete effectively" in
5 describing your assignment.

6 What do you mean when you use the term "compete
7 effectively"?

8 A. I mean be able to attract and retain shoppers.

9 Specifically, in order to meet shoppers' expectations
10 for the in-store experience or the shopping experience more
11 broadly.

12 Q. And did you prepare expert reports in this case
13 summarizing your opinions and the materials upon which you
14 relied in forming those opinions?

15 A. Yes, I did.

16 Q. And what were those -- what were the dates of those
17 reports?

18 A. I -- my first report was filed on the 18th of June of
19 this year and my second report on the 12th of July of this
20 year.

21 Q. And if you turn to the tabs in your binder at PX7002
22 and PX7008, are those the expert reports that you filed in
23 this matter?

24 A. Yes, they are.

25 MS. DRUMMONDS: Your Honor, I would ask that

Fox - D

1 PX7002 and PX7008 be admitted into evidence.

2 MR. COWIE: No objection.

3 THE COURT: They both will be received.

4 BY MS. DRUMMONDS: (Continuing):

5 Q. Professor Fox, have you formed any opinions regarding
6 challenges C&S will face in competing effectively with the
7 divested stores?

8 A. Yes. I -- in order to succeed in -- in this
9 competition, they need to maintain or build the brand equity
10 of the acquired stores. I used the customer-based or
11 consumer-based brand equity framework. And they need to
12 address specific challenges in attracting and retaining
13 customers specific to the banners of the supermarkets.

14 Some of the stores will be rebannered, and they -- and
15 they need to build the equity of the new banners at those
16 stores. Some stores will be -- will retain their banners,
17 and they'll need to work to retain the brand equity in the
18 banner at those stores.

19 They will be challenged to develop private label
20 programs that offer compelling product -- or private label
21 programs that are attractive to shoppers and help them
22 develop attractive product assortments, including a
23 competitive private label program.

24 They also need to develop effective marketing
25 capabilities. In particular, a loyalty program, or vehicle

Fox - D

1 for personalized promotions, and a retail media network.

2 Q. Professor Fox, you mentioned you were also asked to
3 review and assess the report of Mr. Galante.

4 Did you ultimately form any opinions regarding
5 Mr. Galante's analysis of the divestiture?

6 A. Yes, I did.

7 My first conclusion was that Mr. Galante's focus on
8 diligence and projected financial returns isn't sufficient
9 to assess C&S's ability to attract and retain shoppers at
10 the -- the individual divested stores; and, second, that the
11 assets in the proposed divestiture, which, together with the
12 TSA support, was claimed to be the functional equivalent of
13 a standalone business, is, in fact, not that but, rather,
14 it's a patchwork of assets, some of which are mismatched,
15 with -- with significant deficits.

16 Q. Professor Fox, I believe you stated earlier that you
17 used a customer-based brand equity framework in your
18 analysis.

19 What are the key components of brand equity?

20 A. So let me start by saying that in retail the brand is
21 the banner, and you see brand -- banner logos there. These
22 are the brands that -- with which consumers have
23 relationships. These -- these banners hold the brand
24 equity. Brand equity, effectively being what consumers
25 think about the brand, their expectations of the brand, and

Fox - D

1 this reflects the value that the brand holds. So those
2 brands relate to the banners.

3 The components of customer-based brand equity are brand
4 loyalty, so the consumers' attachment to the brand, their --
5 their shopping -- or their preference to shop there; name
6 awareness, their familiarity with the brand, received
7 quality of the products and services, as well as the
8 shopping experience; and brand associations, which is
9 effectively anything that they connect with the brand in
10 their minds; and, in grocery, that's particularly important
11 to assess price perceptions.

12 Q. Professor Fox, let's start by talking about your key
13 conclusions relating to supermarket banners.

14 Could you please explain what retail banners convey to
15 consumers?

16 A. So as I mentioned, the brand is the banner. The
17 various components of brand equity are specifically affected
18 by that banner, the associations with the brand, the beliefs
19 about the brand, and expectations of the brand.

20 I'll take a second to talk about those. The
21 expectations of the shopping experience, they include
22 product assortments and private labels that are -- that are
23 specific to that retailer. They include one-stop shopping
24 convenience from various different categories, including
25 pharmacy and, in some cases, for the divested stores, fuel.

Fox - D

1 It includes pricing and promotions that offer value. It
2 includes marketing communications which communicate the
3 value. And then, loyalty programs or personalization
4 programs that help deliver that value.

5 So these are the kinds of things in the experience that
6 are associated with the brand.

7 So the loyalty programs, as I just mentioned, they have
8 perks, they're -- they co-promote fuel and, in some cases,
9 pharmacy, and those relationships help form shoppers'
10 expectations of, in this case, the Safeway brand and their
11 expectations for particularly fresh products that they would
12 get at Safeway.

13 Q. Professor Fox, what is a rebanner?

14 A. It's when you change the banner of a store to a new
15 one.

16 Q. How can rebannered a store impact sales?

17 A. So there are multiple risks in rebannered a store.

18 You're taking away the store's brand when you do that,
19 and the brand equity of the new banner may not be as strong
20 as the old banner.

21 You have to assess the awareness of shoppers in that
22 geography and whether they have different associations with
23 the banner, whether that banner is a fit for the particular
24 store, and it -- the demographics and taste of shoppers in
25 the area. And then you have to monitor changes in price and

Fox - D

1 quality perceptions, the associations, as I mentioned, with
2 the brand, because you can potentially lose customers with
3 them and see reductions in sales.

4 Q. Can rebannering ever lead to a positive impact on
5 sales?

6 A. Yes. There's testimony in this case about Ahold
7 rebannering a number of BI-LOs and Harveys stores to the
8 Food Lion banner in the Southeast.

9 The Food Lion banner, in this case, has high-brand
10 equity in the markets where the stores were rebannered, high
11 awareness in those markets, and it was a great deal of
12 research done to confirm that fact in advance.

13 So between that and remodeling stores, that rebanner,
14 it's my understanding, was successful.

15 Q. Professor Fox, what are your conclusions about the
16 challenges that C&S would face in attracting and retaining
17 customers to rebannered stores?

18 A. So C&S will face four challenges. The first is the
19 scale and scope of rebannering here. So C&S currently
20 operates 23 stores. More than 12 times that will be
21 rebannered in -- in the proposed divestiture, and that will
22 be across communities/geographies around the country.

23 Second, banners that C&S is getting in the proposed
24 divestiture are more localized, and in many of the
25 geographies where there are divested stores, there aren't

Fox - D

1 banners that have any current local presence, and awareness
2 would be expected to be impacted.

3 Third, the various timelines in the TSA provisions
4 don't sync, necessarily, with the rebannered plans and
5 timelines and could lead to changes in loyalty programs,
6 pricing and ecommerce, that would confuse customers about
7 the rebannered stores, and customer confusion is a
8 significant challenge here.

9 And then, fourth, the divested stores will be
10 challenged to retain shoppers because they'll face
11 competition from Kroger and Albertsons' retained stores in
12 the divestiture market in most cases.

13 Q. Professor Fox, what banners will C&S receive from
14 Kroger and Albertsons as a part of the proposed divestiture?

15 A. They'll receive from Kroger the QFC banner, which
16 operates 55 stores in Washington and four here in Portland,
17 the Mariano's Banner, 44 stores in the Chicago area; from
18 Albertsons, 11 Carr stores in Alaska and 15 Hagen's stores
19 in Washington.

20 All of these are geographically localized banners
21 for -- given the broad scope of the divestiture. They do
22 receive perpetual licenses for Safeway and Albertsons but in
23 limited geographies; so Safeway in Arizona and Colorado and
24 Albertsons in California and Wyoming.

25 Q. Are there geographies in which C&S is acquiring

Fox - D

1 divested stores but no existing banner?

2 A. Yes, there are. Across these -- these 11 stores, if
3 you include Oregon, there are no stores with banners that
4 currently operate in that state, and so C&S will be forced
5 to use a banner that doesn't currently have a local
6 presence.

7 Q. What about Oregon? Why is it a different color here on
8 the map?

9 A. So QFC has four stores, as I just mentioned, here in
10 Portland; but in other areas of the state where there will
11 be divested stores, they don't have an operating presence.

12 Q. How many stores will C&S need to rebanner in total?

13 A. 286.

14 Q. Professor Fox, what did you conclude about how the --
15 about how the scale and scope of the rebannering, required
16 by the divestiture package, would impact C&S?

17 A. Well, at least 286 stores are going to lose their
18 brand, and they will use it at some point over time in the
19 next three years. If -- if not once, more than once.

20 These rebannered stores will -- well, if one considers
21 the time frame, my understanding is that plans are not to
22 rebanner a substantial number of stores in year one.

23 After year two, stores would have to get an interim
24 banner or endorsement banner which would require a second
25 rebannering after the interim banner was no longer

Fox - D

1 available.

2 And so one would expect most of the stores to be
3 rebannered in year two or use interim banners and rebanner
4 twice.

5 The 286 stores, rebannered within a year would
6 require stores to be done in rapid succession or
7 simultaneously. So that's a real logistical challenge, and
8 at the same time, you have to build all the components of
9 brand equity at those stores. They're losing their brands.
10 You need to build them back up.

11 Q. Did you analyze the number of divestiture stores where
12 C&S will need to introduce a banner without existing
13 presence in the relevant geography?

14 A. I did.

15 These are -- the count is 129 stores where there is no
16 prior presence for the banner -- or for a banner in the
17 local area. I define local areas based on core-based
18 statistical areas, which incorporate both metro and
19 non-metro markets.

20 And these -- in these geographies, there isn't a local
21 presence for any of the banners that C&S will have. So that
22 represents a significant challenge in awareness of the
23 banners that they'll have to use.

24 MS. DRUMMONDS: Mr. Duncan, I would ask that you
25 keep this next slide off of the public screen.

Fox - D

1 BY MS. DRUMMONDS: (Continuing):

2 Q. Professor Fox, without disclosing the name of the
3 banner, did you analyze which banner C&S is planning to
4 introduce at the 129 stores you just mentioned?

5 A. I did. These -- the banner that they're planning to
6 use in up to 190 different geographies or -- I'm sorry -- of
7 these divested stores, is not one that currently has a local
8 presence there. It's also a banner that has been identified
9 as -- as weak, frankly.

10 MS. DRUMMONDS: Mr. Duncan, please also keep this
11 next slide off of the public screen.

12 BY MS. DRUMMONDS: (Continuing):

13 Q. Professor Fox, did you review materials relating to
14 diligence that C&S, or its advisors, conducted about whether
15 it was advisable to expand that banner into new geographies?

16 A. So C&S's own consultants determined that that banner
17 was weak and advised that, if that banner were used for
18 stores outside of its current operating areas, that they
19 would have to strengthen that -- the brand of that banner.

20 MS. DRUMMONDS: Mr. Duncan, please also keep the
21 next slide off of the public screen.

22 BY MS. DRUMMONDS: (Continuing):

23 Q. Professor Fox, can you please explain the basis for
24 your conclusion that the timelines in the transition
25 services agreement may cause customer confusion?

Fox - D

1 A. Yes.

2 As I alluded to earlier, the time frame for rebannered
3 stores extends for three years. The first year, my
4 understanding, is that C&S has -- doesn't have plans to
5 transition or to rebanner many stores, and the bulk will be
6 rebannered in years two and three. Some, as I mentioned,
7 with an interim banner, as the slide show states -- okay. I
8 apologize.

9 Anyway, the TSA timelines for other capabilities,
10 including loyalty programs and data analytics, pricing
11 capabilities, and pricing support, will end at 12 months.

12 So, largely, before the stores are rebannered, they'll
13 lose some of the supporting assets in support -- support
14 services, particularly as they relate to marketing and
15 marketing-related capabilities.

16 MS. DRUMMONDS: Mr. Duncan, please also keep the
17 next slide off of the public screen.

18 BY MS. DRUMMONDS: (Continuing):

19 Q. Professor Fox, why would the difference between the
20 rebannered time period and some of the commercial TSA time
21 periods be a challenge for C&S?

22 A. So I'll -- I'll offer an example of a Safeway store
23 here. In -- in Oregon, you would have both retained stores
24 and, in this case, I'll use Safeway as an example, and
25 divested stores, where the Safeway would be divested to a

Fox - D

1 different banner.

2 In terms of -- of what's retained by the store --
3 stores that are retained with the Safeway banner would have
4 all of the supporting pricing systems, loyalty program,
5 marketing and promotions capabilities, and ecommerce that
6 the stores currently have.

7 The divested store, which -- which would rebanner -- be
8 rebannered to a different banner within 36 months would lose
9 the support of pricing loyalty, marketing and promotions,
10 and ecommerce solutions over time at different intervals.

11 So they would lose the supporting assets that help make
12 the brand, the brand.

13 Q. And given the time periods in the transition services
14 agreement, are there times where C&S and Kroger would
15 potentially be operating the same banner for some period of
16 time?

17 A. Yes. In fact, there are -- and that contributes to
18 confusion in the sense that a Safeway store that -- that's
19 to be retained in a Safeway store that's to be divested,
20 would have the same banner but, at various points, a
21 different loyalty program and different ecommerce options.

22 So someone who wanted to use their loyalty points at
23 the divested store wouldn't be able to.

24 MS. DRUMMONDS: Mr. Duncan, the next slide can be
25 displayed on the public screen again.

Fox - D

1 BY MS. DRUMMONDS: (Continuing):

2 Q. Professor Fox, did you analyze C&S's assessments of
3 potential customer confusion?

4 A. Yes.

5 C&S's senior vice president, Ms. Florenz, had
6 identified that there would be likely customer confusion.
7 Let me say that right. There might be customer confusion --
8 and identified that as a significant execution risk for C&S.

9 Q. Finally, Professor Fox, can you describe what you
10 concluded regarding the challenges C&S will face in
11 competing against retained Kroger-Albertsons stores?

12 A. I can describe that with an example that -- that's
13 shown.

14 On the right-hand side, there's a map of San Diego that
15 shows all of the current Vons stores; not other Kroger and
16 Albertsons stores, just Vons. The retained stores count
17 number 37, and they're shown in green. The rebannered
18 stores, there are only seven.

19 Clearly, the density of retained stores is much greater
20 than the density of divested stores, and so those -- those
21 Vons stores that will be rebannered to Albertsons will have
22 less density in the market after losing their brand, and the
23 subject of competition from nearby, Vons retained stores.

24 Q. And why would competing against the retained, in this
25 case, Kroger-Vons stores be a challenge for C&S at the Vons

Fox - D

1 stores that they would need to rebanner?

2 A. So those stores will have to use -- well -- I'm
3 sorry -- the retained stores will have all the supporting
4 assets that they require or that the shoppers' expectations
5 would -- shoppers would expect -- excuse me. The divested
6 stores wouldn't over time. Those divested stores could --
7 could be targeted by the retained Kroger-Albertsons banner,
8 in this case Vons, with promotional offers to attract
9 current shoppers at the Vons store -- or at the divested
10 Vons store to the retained Vons-Kroger -- or
11 Vons-Kroger-Albertsons store.

12 MS. DRUMMONDS: Mr. Duncan, please keep the next
13 slide off of the public screen.

14 Actually, sorry. This slide can go on the public
15 screen.

16 BY MS. DRUMMONDS: (Continuing):

17 Q. Professor Fox, I believe you just referred to some of
18 Kroger's advertising practices. How might Kroger's
19 advertising impact the shopping behaviors at the divested
20 stores?

21 A. So Kroger, and in this case Vons, would retain the
22 ability to make offers, targeted offers, to customers who
23 had shopped at the divested store based on their geography
24 or based on additional consumer information.

25 There are alternatives. There are stores nearby the

Fox - D

1 divested store, and the retained Kroger-Albertsons banners
2 would have every incentive to try to attract shoppers who
3 had already been shopping at Vons.

4 And so as the divested store loses its supporting
5 capabilities, supporting assets, and then its banner, the --
6 it would be a safe bet that -- I don't want to make safe
7 bets. It would -- it would behoove Kroger-Albertsons to
8 attempt to -- to draw shoppers from the divested store to
9 the retained stores.

10 That's one of the reasons that Raley's CEO, Mr. Knopf,
11 said that if there were divested stores -- or that he
12 wouldn't buy stores if there were retained stores operating
13 in the same market and that he would lose the essence of --
14 or those stores that were purchased would lose their
15 essence, lose the components of brand equity, and would
16 struggle in competition with the retained stores.

17 MS. DRUMMONDS: Mr. Duncan, please keep this next
18 slide off of the public screen.

19 BY MS. DRUMMONDS: (Continuing):

20 Q. Professor Fox, what is the potential impact of the
21 various rebannered challenges that we've discussed on the
22 divested stores?

23 A. Among other things, lost sales.

24 The -- the C&S financial model assumes that customers
25 and sales will be lost after the divestiture, away to the

Fox - D

1 rebannered of those divested stores, and the numbers are
2 significant, but more significant, actually, because the
3 underlying assumption in C&S's financial model is 3 percent
4 growth. So the sales detriments that they predict are
5 compared to a 3 percent growth rate.

6 Q. Professor Fox, did you analyze the basis for C&S's
7 assumptions about rebannered sales losses?

8 A. Yes. Bain conducted a consumer survey where they asked
9 shoppers at various banners what the amount of grocery
10 shopping that they do would change if the store's name
11 changed, its banner changed, or ownership changed; and based
12 on those survey results, Bain created two estimates of sales
13 losses, a base case and a worst case, for the detriments.

14 It's my understanding that the base case was used, the
15 worst case was not; and the base case itself was reduced by
16 a third from Bain's -- or from Bain's base case estimates.

17 So it was significantly smaller than Bain had
18 estimated.

19 MS. DRUMMONDS: Mr. Duncan, could you please keep
20 the next slide off of the public screen.

21 BY MS. DRUMMONDS: (Continuing):

22 Q. Professor Fox, did you analyze the Bain survey that was
23 conducted for C&S?

24 A. I did. The -- as I mentioned, those sales projections
25 ignored the worst case, which is ignoring the risk that Bain

Fox - D

1 had identified, and Bain themselves didn't create or verify
2 C&S's model, and they testified to that fact.

3 So does it matter the base case versus the worst case?
4 I have identified three -- in -- for three of the banners,
5 what the base case and worst case numbers calculated by --
6 by Bain were, but the worst case numbers were three times,
7 roughly speaking, larger than the base case.

8 So it was a significant risk.

9 Q. Professor Fox, as a part of your analysis in this case,
10 did you review previous examples of C&S acquiring retail
11 stores and then rebannering them?

12 A. I --

13 MS. DRUMMONDS: This slide can go back on the
14 public screen.

15 Thank you.

16 THE WITNESS: So there are two examples of
17 rebannering a significant number of stores that C&S
18 themselves had undergone. The first was the Southern Family
19 Markets rebannering that was conducted in 2005. So a
20 hundred stores, give or take, from seven different banners
21 in six Southeastern states, so multiple banners, and C&S
22 created the Southern Family Markets banner from scratch,
23 with, by definition, no -- no awareness and no brand equity,
24 and applied them to the approximately 100 stores.

25 The new banner struggled. They -- in short order, they

Fox - D

1 sold off almost half of the stores and sold the remaining
2 stores in 2012.

3 Although it's my understanding, from the trial
4 testimony, that at that point they had become -- seven years
5 later had become marginally profitable.

6 The second example is Grand Union. It's more recent
7 rebannering. C&S acquired 12 stores, 11 in Upstate New York
8 and one in Vermont, from the Tops-Price Chopper merger, and
9 rebannered from Tops to Grand Union.

10 The stores, since that rebannering, have both missed
11 the expectations of C&S, prior to the rebannering, and been
12 losing money consistently.

13 So these two rebannerings haven't been successful.

14 BY MS. DRUMMONDS: (Continuing):

15 Q. Professor Fox, let's switch gears to discuss the focus
16 of the second set of key challenges you've identified
17 related to private label products.

18 Professor Fox, how do private label products contribute
19 to supermarket brand equity?

20 A. In general, they contribute in two ways. So private
21 label brands, like Simple Truth and Private Selection, are
22 generally exclusive to a particular retailer. Also
23 Signature Select and O Organics to Albertsons-bannered
24 stores. They're generally exclusive, and that exclusivity
25 allows shoppers to form positive associations with the

Fox - D

1 banner.

2 So if it's an attractive private label, high product
3 quality, positive associations would be expected with the
4 banner. Because shoppers can't get the product anywhere
5 else, it would tend to drive banner loyalty as well.

6 As the same time, private labels, though they're not
7 necessarily all value items -- and I'll speak to that in a
8 minute -- do represent a value, compared to national brands,
9 and would -- and do have the effect of improving price
10 perceptions at the banner.

11 Q. Professor Fox, based on your research, has the
12 importance of private label changed in recent years?

13 A. Yes. Historically, private labels were value priced --
14 or value items that were targeted at the most
15 price-sensitive shoppers. They weren't known to be of high
16 quality, and so represented a high-quality/price trade-off
17 for shoppers.

18 More recently, private label portfolios have expanded a
19 great deal. So -- so leading supermarkets have tiered
20 private label with national brand equivalent products,
21 better for you natural and organic products in different
22 private labels, as well as even premium products, in
23 addition to value-based products as well.

24 So we have private label tiers now, giving shoppers
25 options for value.

Fox - D

1 In terms of the importance of private labels to
2 shoppers at this point, according to the food industry
3 associations' most recent surveys, approximately 90 percent
4 of shoppers say that private labels are at least somewhat
5 important in picking a store, so in their choice of store,
6 and over half say it's very or extremely important in their
7 choice of store. So winning trips is very important and
8 private labels now play a substantial role in winning trips.

9 The bottom line is for retailers like Kroger and
10 Albertsons, private label products represent a substantial
11 proportion of their revenues. For both, 25 percent.

12 Q. Professor Fox, you used a term "national brand
13 equivalent" earlier. Could you just clarify for the Court
14 what that means?

15 A. Yes. So national brand equivalent private labels are,
16 as you might expect, private labels whose quality is
17 perceived by shoppers to be the equivalent of comparable
18 national brands.

19 Often, the comparison is easy to make because they --
20 they're similar, but the quality is perceived by shoppers to
21 be the same or better.

22 Q. Professor Fox, could you please summarize your
23 conclusions the challenges C&S will face relating to private
24 label products?

25 A. There are two primary challenges. First, C&S's private

Fox - D

1 label product assortments will lack the scale and scope of
2 Kroger and Albertsons today and therefore the scale and
3 scope of the offerings in the divested stores today, and
4 this risks the erosion of brand equity for those divested
5 stores.

6 Second, C&S's assumption that private label sales won't
7 change but will remain constant at the divested stores isn't
8 a conservative assumption.

9 Q. Professor Fox, did you analyze Kroger and Albertsons'
10 private label programs as a part of your assignment in this
11 matter?

12 A. Yes, I did.

13 Q. How do private label products contribute to Kroger and
14 Albertsons' profitability today?

15 A. Private label products have higher margins, in general,
16 than national brands. There are cost-related reasons, but
17 as reported -- or -- I'm sorry -- based on the testimony of
18 Mr. Sankaran and Mr. McMullen, for Albertsons, the margins
19 of private label products are ten points higher than
20 comparable national-branded products for Albertsons; and for
21 Kroger, the margin is 6 to 7 percent higher than for
22 national brands, though the quote is in basis points.

23 Q. Let's first discuss Kroger's private label program.

24 Does Kroger manufacture any private label products
25 today?

Fox - D

1 A. Yes. Kroger manufacturers approximately 30 percent of
2 its private label products in 33 facilities around the
3 country as of 2023. Those facilities manufacture different
4 types of product: dairy, meat, deli, bakery, and grocery;
5 and, in fact, Kroger manufactures over 40 percent of its
6 grocery products -- or private label grocery products.

7 Excuse me.

8 Q. Is C&S acquiring any Kroger manufacturing facilities
9 that currently produce products for the divested stores?

10 A. No, they are not.

11 Q. Did you analyze Kroger's private label sales data as a
12 part of your assignment?

13 A. Yes. I analyze private label sales, both by private
14 label brand and by category. The pie chart in the middle
15 represents the sales by brand, the predominant -- for
16 Kroger, the primary source of revenues is the Kroger brand
17 itself and -- and small amounts of that or specific private
18 labels similar to Kroger.

19 Private Selection, Simple Truth are other major
20 banners -- or major private label brands, and then there are
21 some others.

22 Collectively, they include approximately 12,500 unique
23 items or SKUs per -- that are offered in stores. And over a
24 third of those, getting to the -- to the mix of categories,
25 over a third of those are in fresh product categories,

Fox - D

1 including meat, seafood, deli, and produce, and not
2 including dairy in that number.

3 Q. Is C&S acquiring or receiving a perpetual license to
4 any of Kroger's private label brands as a part of the
5 divestiture?

6 A. No, they're not.

7 MS. DRUMMONDS: Mr. Duncan, can we please keep the
8 next slide off of the public screen.

9 BY MS. DRUMMONDS: (Continuing):

10 Q. Professor Fox, what does this mean for the QFC, Harris
11 Teeter, and Mariano's Kroger stores that C&S is acquiring?

12 A. So for QFC, Harris Teeter, and Mariano's, simple
13 arithmetic shows that they'll have to replace the lost
14 revenues from those Kroger private label brands, which are
15 currently at 25 percent of total retail revenues. They will
16 have access to Kroger's private label brands for a time, for
17 at least a year, with optional extensions; and those
18 extensions will vary by region, with Illinois having a
19 longer time to retain that -- that -- those Kroger private
20 label products, although add in increasing costs.

21 Q. Let's shift gears to Albertsons' private label program.

22 Does Albertsons manufacture any private label products
23 today?

24 MS. DRUMMONDS: Mr. Duncan, this can go back on
25 the public screen.

Fox - D

1 THE WITNESS: Yes. Albertsons manufactures more
2 than 10 percent of its private label products at 19
3 factories around the country. Those factories or -- I'm
4 sorry -- those facilities manufacture different kinds of
5 products. Beverages, milk, ice cream, ice, bread, and
6 groceries. So they have a portfolio of manufacturing
7 capabilities.

8 According to Albertsons, those manufacturing
9 capabilities offer Albertsons the ability to make
10 profitable -- or not profitable, but effective make-or-buy
11 decisions to optimize not just on profitability but also on
12 product quality.

13 So they appear to value that capability in their -- in
14 their operations.

15 BY MS. DRUMMONDS: (Continuing):

16 Q. Could you describe a little bit more for the Court what
17 a make-versus-buy decision is?

18 A. Yes. The make-versus-buy decision is a sourcing
19 problem of whether to -- to source, in this case, finished
20 products, private label products, but it could be anything.
21 Either from in-house manufacturing or production facilities
22 or to buy it from outside from a vendor.

23 In this case, according to Albertsons' testimony, that
24 make-or-buy decision has earned them \$100 million in
25 additional probability, at least according to that

Fox - D

1 testimony.

2 Q. Is C&S receiving any manufacturing facilities from
3 Albertsons as a part of the divestiture agreement?

4 A. They are receiving a dairy plant in Colorado that would
5 be able to serve the areas or geographies around that plant
6 with dairy products.

7 Q. Did you analyze Albertsons' private label sales data as
8 a part of your assignment, Professor Fox?

9 A. Yes, I did.

10 Q. Could you please summarize what you found in your
11 analysis?

12 A. I did a similar analysis by private label brand and by
13 product category or by general product categories.

14 Albertsons has the Signature private label or Signature
15 Select private label that represents the large majority of
16 their private label sales, but also significant private
17 label brands Lucerne and O Organics. There are multiple
18 other private label brands that have less revenue, including
19 the five that are listed and a few others.

20 Together, they comprise 14,000 unique items,
21 approximately, and those items are available in
22 Albertsons-bannered stores. Of particular interest, nearly
23 half of those are fresh products, including meat, seafood,
24 deli, and produce, as well as dairy.

25 And, again, to reiterate, these represent a quarter of

Fox - D

1 Albertsons' retail revenues.

2 Q. Is C&S acquiring any of Albertsons' private label
3 brands in the proposed divestiture?

4 A. Yes, they are. They are acquiring the five private
5 label brands listed in the upper left, which, together,
6 represent just under 15 percent of Albertsons' private label
7 revenues.

8 MS. DRUMMONDS: Mr. Duncan, could we please keep
9 the next slide off of the public screen.

10 BY MS. DRUMMONDS: (Continuing):

11 Q. Professor Fox, you stated that C&S is receiving
12 ownership of private label brands comprising about
13 15 percent of Albertsons' private label sales. What does
14 that mean for the Albertsons stores that C&S is acquiring?

15 A. So those -- those private label products will be
16 available at -- or to the divested stores that -- that are
17 being acquired. Those stores will also have access to
18 Signature and O Organics private labels that are offered for
19 two years at -- at cost, at Albertsons' cost, and with
20 options to extend three or four years with cost markups
21 that, in the fourth year, vary by region.

22 Mr. Winn, among others, identified signature as --
23 while it's a private brand, there are consumers who really
24 don't know it's a private brand because it's perceived to be
25 of very high quality and identified switching from that

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1 private label, as they'll have to do within some period of
2 two to four years, to its own Best Yet brand, as a cause for
3 concern because it would result in customer churn or
4 effectively erode the loyalty of shoppers at the divested
5 stores.

6 Q. Professor Fox, can you describe the basis for your
7 conclusion that C&S's private label program will lack the
8 scale and scope of that of Kroger and Albertsons?

9 A. So I've already identified that Albertsons --

10 MS. DRUMMONDS: Sorry. Mr. Duncan, this can go
11 back on the public screen.

12 Thank you.

13 THE WITNESS: I've already identified that
14 Albertsons' program offers 14,000 items to -- for its stores
15 at retail and Kroger's 12,500 -- should I wait?

16 BY MS. DRUMMONDS: (Continuing):

17 Q. Please proceed, Professor Fox.

18 A. There we go. I didn't want to make reference to
19 something that no one could see.

20 So the Kroger and Albertsons bars represent the number
21 of total SKUs offered in their stores. As I -- as I spoke
22 to earlier, for C&S, their current offerings testimony has
23 varied, anywhere from approximately 1,300 total SKUs to
24 3,000 total SKUs, which -- which are offered not just to --
25 at C&S's operated stores, but also to their wholesale

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1 customers.

2 There are plans to increase that number but not by an
3 amount sufficient to generate the robust program that
4 Albertsons and Kroger currently have, nor what Albertsons
5 and Kroger will have or would -- would have after the
6 merger, should they -- should they use multiple -- or
7 private labels both from Kroger and Albertsons, and -- and
8 have a larger offering with a more robust program.

9 Q. Professor Fox, you mentioned earlier that private label
10 products are generally exclusive to retailers.

11 Do you -- are C&S's private label products exclusive to
12 its owned and operated retail stores?

13 A. My understanding is they are not; that -- that their --
14 their products are offered in their operated stores but also
15 to all of their wholesale customers and would be offered to
16 their wholesale customers in divestiture markets as well.

17 So my understanding is that the private label products
18 that they offer, whatever they are -- they end up doing with
19 the private label program, won't be exclusive to the
20 divested stores in the divestiture markets.

21 MS. DRUMMONDS: Mr. Duncan, please keep the next
22 slide off of the public screen.

23 BY MS. DRUMMONDS: (Continuing):

24 Q. Professor Fox, we just discussed how C&S's private
25 label program scale compares to that of Kroger and

Fox - D

1 Albertsons. What did you conclude regarding C&S's private
2 label category coverage?

3 And, please, for confidentiality reasons, please do not
4 disclose the exact figures in the bar charts, but you can
5 discuss the magnitude.

6 A. Okay. Albertsons and Kroger offer an extensive
7 assortment of private label products in fresh categories,
8 and here I specifically looked at meat and produce, the two
9 largest fresh categories, and as a share of total private
10 label sales, they are substantial for Albertsons and Kroger.

11 For C&S, I -- I reviewed information of the -- for the
12 Best Yet brands sourced from Topco where there's really a
13 de minimus amount of fresh -- or fresh products outside of
14 dairy, and this was identified by Mr. McGowan as not just
15 specific to Best Yet but to the other private label brands
16 that they carry and offer to their wholesale customers.

17 Q. And just to clarify for the record, what specifically
18 was identified by Mr. McGowan?

19 A. That there were very small amounts of fresh meat and
20 produce products offered in C&S stores.

21 MS. DRUMMONDS: Mr. Duncan, could we please keep
22 the next slide off the public screen as well.

23 BY MS. DRUMMONDS: (Continuing):

24 Q. Professor Fox, did you analyze whether C&S projects
25 sales losses due to the loss of Kroger and Albertsons'

Fox - D

1 private label brands of at the divested stores in its deal
2 model?

3 A. So my understanding is that even though C&S will
4 clearly be challenged to replace the private label sales
5 that will be lost with the loss of the Kroger private label
6 brands and key Albertsons brands over time, that that is
7 significant.

8 Bain performed a survey of -- a consumer survey, much
9 like they did for banners for private label products,
10 determining the amount that shoppers -- the amount that
11 shoppers shopping -- that customers shopping would be
12 affected and found that it was significant, the amount of
13 shopping that would be reduced, and yet neither of those was
14 accounted for in C&S's diligence.

15 To the best of my understanding, there were no sales
16 detriments for the change of private labels, nor was there
17 any recognition that private label sales themselves would be
18 a lower proportion of the divested stores' total sales.

19 MS. DRUMMONDS: Mr. Duncan, we can put the next
20 slide back up on the public screen.

21 BY MS. DRUMMONDS: (Continuing):

22 Q. Professor Fox, are the results of the Bain survey that
23 you just mentioned consistent with what you would expect,
24 given your work on this matter?

25 A. Yes, they are consistent.

Fox - D

1 My understanding is that, as I said, exclusive private
2 labels that generate positive brand associations and brand
3 loyalty, would fare better than private labels that weren't
4 exclusive and didn't have the same quality association.

5 An example of that was testified to by Stater Bros.
6 They found themselves in a position where, because of
7 minimum order quantities, they could no longer source their
8 cereal products, their private label cereal products, under
9 the Stater Bros. banner or under the Stater Bros. private
10 label name from the same source, and so they switched to
11 Topco's Food Club private label brand, and the brand itself
12 didn't have awareness, didn't have the same positive
13 associations as the Stater Bros. banner had, and saw a
14 15 percent decline in a year after making that transition.

15 According to Stater Bros., that was what they expected
16 and to be expected for such a private label transition.

17 So private label transitions can be problematic.

18 Q. In summary, Professor Fox, do you conclude C&S is
19 likely to be challenged in meeting shopper expectations for
20 private label products at the divested stores?

21 A. Clearly, Kroger and Albertsons have robust private
22 label programs, and the -- as well as the production
23 capability to support those programs. C&S has a much less
24 robust program and no capability to manufacture those.

25 So they can't -- they can't improve the quality of

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1 their private labels, necessarily, if they're outsourcing
2 them, nor can they keep their private label costs at the
3 level that they might if they had production.

4 So, clearly, they'll be at a competitive
5 disadvantage -- C&S will be at a competitive disadvantage as
6 it relates to private label to the robust programs offered
7 by Kroger and Albertsons.

8 Q. Professor Fox, let's now discuss the third key set of
9 challenges that you identified relating to C&S's ability to
10 build effective marketing programs for the divested stores.

11 What capabilities do supermarkets use to market to
12 consumers?

13 A. Advertising is critical. It communicates temporary
14 price discounts. It drives awareness of the banner within
15 markets and supports their active awareness. It also
16 attracts shoppers to the store based on their -- the
17 attractiveness of the price points in their -- and the
18 products in their promotions, and helps lower price
19 expectations and perceptions at the banner.

20 Importantly, it also earns vendor funding for those
21 trade promotions.

22 Personalization and loyalty programs allow retailers to
23 target those discounts and offer cross-promotions with
24 pharmacy or fuel or other in-store offerings and generate --
25 it also generates data for the supermarket retailer that

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1 they can, in turn, leverage for -- to make better offers,
2 more attractive offers, and for retail media networks as
3 well. The analytics really enable those things.

4 Better customer knowledge, more effective marketing,
5 more effective discounting, and targeting of its offers.
6 And as I just alluded to, leveraging that customer
7 information of suppliers who want to engage with its
8 shoppers, all those capabilities are really enabled by a
9 robust IT infrastructure.

10 Q. And how do these marketing capabilities contribute to
11 the supermarket brand equity as a whole?

12 A. Advertising drives awareness. Its primary outreach for
13 new customers and -- and to drive awareness in markets.

14 Marketing drives loyalty. In particular, loyalty
15 programs help support loyalty as well as effective analytics
16 and pricing. And this affects the quality perceptions and
17 the price perceptions of that banner.

18 Together, essentially, it helps position the retailer
19 in this quality/price spectrum.

20 Q. Professor Fox, how has supermarket marketing programs
21 changed in recent years?

22 A. In recent years, the development and prominence of
23 retail media networks has been a primary innovation, and it
24 benefits both retailers and suppliers.

25 So how this works, consumer packaged goods companies or

Fox - D

1 other suppliers will pay supermarket retailers to -- to use
2 in-store space, screens, signs, space at the checkout, or
3 space on their online sites and -- and search advertising
4 and display advertising on retailers' websites in order to
5 engage with the supermarket shoppers. They -- it lets the
6 consumer packaged goods companies leverage that customer
7 information -- customer information demographics, contact
8 information, their history of purchases, as well as online
9 shopping behavior, and make more effective offers. And this
10 is important -- or make more targeted compelling offers to
11 the supermarket shoppers.

12 This is important because brand advertising for
13 consumer packaged goods companies has become more
14 challenging with TV viewing habits changing, streaming, and
15 depredation of cookies. It's an issue in transition.

16 So digital targeting is also potentially fraught for --
17 well, could be fraught for the consumer packaged goods
18 company.

19 Anyway, this is an alternative to traditional TV and
20 digital advertising for the CPG companies to target the
21 customers who buy their products or might buy their
22 products.

23 Q. And, Professor Fox, what are your conclusions about the
24 challenges C&S will face with respect to building marketing
25 capabilities for the divested stores?

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1 A. Three challenges. The first is that they must build
2 marketing capabilities largely from scratch. I mentioned
3 loyalty programs several times. The data analytic
4 capabilities that C&S doesn't currently possess, pricing
5 capabilities with a degree of sophistication and scope of
6 the markets in this case, retail media network is -- is now
7 table stakes, and C&S has to develop a retail media network,
8 and there's testimony to that effect.

9 Delays or shortfalls in C&S's ability to develop those
10 marketing capabilities is also risky.

11 So, in particular, their ability to maintain vendor
12 funding as they're developing their marketing programs.
13 Specifically, vendor funding around promotions and retail
14 media networks, those are vitally important to retailers.

15 Third, Kroger and Albertsons in stores will have a
16 marketing advantage, and the ability, as I alluded to
17 earlier, to attract and retain customers that currently shop
18 at the divested stores.

19 The loyalty programs are clearly -- are clearly
20 important to that. The shoppers at the divested stores
21 currently have Kroger/Albertsons loyalty programs, and they
22 expect that.

23 They also have expectations that are set by Kroger's
24 current marketing programs, including ecommerce.

25 Q. Professor Fox, did you analyze Kroger and Albertsons'

Fox - D

1 loyalty programs as part of your work?

2 A. Yes. Their loyalty programs are -- I used the term
3 "robust." They're quite strong. Kroger Plus has 60 million
4 members and remarkably attract 90 percent of Kroger sales,
5 offer shopper benefits, including grocery and fuel -- points
6 for grocery and fuel purchases and personalized coupons.

7 There is an additional subscription service that was
8 recently offered. So for a subscription fee of \$99 a year,
9 double points and free delivery on orders of \$35 or more.
10 So it's integrated with ecommerce.

11 For Albertsons, the story is similar. Over 39 million
12 households are members of Albertsons "for U" program.
13 Similar benefits, including points for grocery and fuel
14 purchases and personalized coupons. And they also have
15 developed a new subscription service called FreshPass, and
16 that program offers similar benefits to Kroger's Boost.

17 Q. Is C&S acquiring permanent access to Kroger or
18 Albertsons' loyalty programs as a part of the divestiture?

19 A. No, they're not.

20 Q. Professor Fox, did you analyze Kroger and Albertsons'
21 retail media networks as a part of your assignment?

22 A. Yes. Kroger Precision Marketing, the name of their
23 retail media network, was launched in 2017; and it sources
24 data from Kroger Plus loyalty -- from the Kroger Plus
25 loyalty program, demonstrating the synergy. It delivers two

Fox - D

1 trillion personalized recommendations a day and has resulted
2 in the large part of the \$1.2 billion in profit from
3 alternative profit businesses.

4 As of 2022, Albertsons' retail media programs -- or
5 network is called Albertsons Media Collective. It was
6 launched more recently, in 2020, and includes a partnership
7 with Meta, among other third parties, and the objective is
8 to allow brands to connect with Albertsons' customers both
9 in-store and online.

10 Q. Is C&S acquiring retail media capabilities as a part of
11 the proposed divestiture?

12 A. No, they're not.

13 MS. DRUMMONDS: Mr. Duncan, please keep this next
14 slide off of the public screen.

15 BY MS. DRUMMONDS: (Continuing):

16 Q. Professor Fox, did you analyze C&S's current marketing
17 capabilities as a part of your work?

18 A. Yes, I did. C&S has a loyalty programs. They have
19 separate programs for Grand Union called Red Dot Savings and
20 Pig Points for Piggly Wiggly stores.

21 They were created, and -- and they were created in 2022
22 and launched in the Grand Union and Piggly Wiggly stores,
23 but they're separate. The points are not able to be
24 redeemed in the other banner, and they have no fuel benefits
25 because they don't operate in fuel -- any retail fuel at

Fox - D

1 their stores.

2 The retail media network, that is in development, and
3 they're working with third-party vendors. Currently, I
4 understand it's in the pilot stage, and they estimate the
5 sales in the first year to be de minimis compared to the
6 parties.

7 Q. Professor Fox, did you review information relating to
8 the retail services C&S provides its wholesale customers
9 today?

10 A. My -- yes.

11 My understanding, based on a review, is that -- that
12 those retail services are generally used by their
13 independent wholesale customers and not by their large chain
14 customers.

15 They have some retail marketing capabilities, and
16 those -- based on the fact that they're getting retail
17 marketing capabilities, to the extent that they're available
18 in the divestiture, my conclusion was that these are not
19 sufficient for C&S to operate the divested stores.

20 So, yes, they have some retail marketing support.

21 Q. You stated earlier that you concluded C&S would need to
22 build many marketing capabilities for the divested stores.

23 Is C&S acquiring any relevant marketing information
24 technology from Kroger or Albertsons?

25 A. The answer is a bit complex. I --

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1 MS. DRUMMONDS: Oh, sorry. Mr. Duncan, this can
2 go on the public screen.

3 THE WITNESS: Yes. I intended to refer to the
4 slide, and I apologize that it's an eye chart.

5 There are sets of technology capabilities that are --
6 well, stepping back, they're receiving a license for
7 Albertsons' tech stack. They -- some of the assets are
8 excluded from that tech stack. They're shown in blue in the
9 first two panels, and they relate to loyalty programs,
10 ecommerce, and customer management issues that I've just
11 been talking about, as well as digital consumer outreach.
12 And my understanding is that they are protected for
13 competitive purposes.

14 In the bottom panel, there are examples of assets that
15 are conveyed but without the models and algorithms on which
16 those systems run.

17 So Albertsons' pricing tools from McKinsey are -- are
18 conveyed, I understand, but without the models and
19 algorithms that run them.

20 BY MS. DRUMMONDS: (Continuing):

21 Q. Professor Fox, what is the basis for your second
22 conclusion that C&S's ability to maintain vendor funding may
23 be at risk?

24 A. The primary issue is that C&S currently doesn't have an
25 operating retail media network, testimony that that is

Fox - D

1 expected, and that is expected in the industry at this
2 point, and it -- it's an important vehicle to attract
3 funding from a broad range of suppliers, but primarily CPG
4 suppliers, and it's been identified as a risk in the -- by
5 C&S's consultants. They don't model any risk to vendor
6 funding.

7 I would also note that the vendor funding supports
8 pricing and promotions. It's substantial. It is a
9 substantial component of retailer profitability. And my
10 understanding is that C&S hasn't concluded negotiations for
11 trade funding from its suppliers based on the divestiture.

12 Q. And I think you touched on this, but to clarify, did
13 you analyze whether C&S modeled risk relating to vendor
14 funding in its deal model?

15 A. My understanding is they did not.

16 Q. And, Professor Fox, what is the basis for your third
17 conclusion that Kroger and Albertsons would have a marketing
18 advantage in areas where it's competing with C&S?

19 A. The answer is retail density.

20 In the four core base statistical areas, these are the
21 largest. The four largest core-based statistical areas in
22 the country. They show a map of the retained
23 Kroger-Albertsons stores in green and the divested stores
24 the red. The intention is to show the density of stores
25 that are -- that will be retained compared to the density of

Fox - D

1 stores that C&S will acquire.

2 There are numerous references to density being an
3 advantage, both in terms of awareness, in terms of
4 marketing, and the efficiency of marketing activities in
5 the -- in these areas; and, clearly, Albertsons-Kroger
6 post-merger will retain a density advantage in many major
7 markets in which divested stores will operate.

8 Q. And what specific advantages does density provide from
9 a marketing perspective?

10 A. So efficiency is an important benefit that is provided.
11 There are logistical advantages, in terms of distribution,
12 and the ability to distribute to and -- and -- or to
13 distribute to and drop to multiple stores.

14 So the density primarily offers a marketing advantage
15 from an efficiency standpoint, so ads will cover more
16 stores. Communications to shoppers and media will cover
17 more customers of more stores, and the -- well, distribution
18 will also be more efficient.

19 Q. Professor Fox, at the beginning of this examination,
20 you noted that part of your assignment was reviewing and
21 responding to defendants' expert Mr. Galante.

22 I'd like to discuss your conclusions related to his
23 report now.

24 What's the basis of your first conclusion that
25 Mr. Galante's focus on C&S's diligence and projected

Fox - D

1 financial returns is insufficient?

2 A. What my assignment was in this case was to assess the
3 ability of C&S to attract and retain shoppers at the
4 divested stores and to be competitive in a supermarket
5 environment that includes Kroger and Albertsons retained
6 stores.

7 That requires, for the stores that are being
8 rebannered, maintaining their brand -- or improving their
9 brand equity. For stores that aren't being rebannered, they
10 have to build brand equity at those stores.

11 There are several challenges that I've identified in
12 doing that. That's not what Mr. Galante did. He analyzed
13 projected returns for investors and identified specifically
14 synergies in the -- in the divestiture from C&S's
15 wholesaling business, which currently dwarfs its retail
16 operations.

17 Q. And why did you conclude that this focus on projected
18 financial returns was insufficient to -- insufficient, in
19 your view?

20 A. It doesn't speak to brand equity at all. It doesn't
21 speak to consumers at all. They are projections of
22 revenues.

23 My -- my focus was on competition and consumers,
24 shoppers, and his was on financial returns. So I -- that
25 wasn't instructive for me, and it -- it didn't pertain

Fox - D

1 directly to my assignment regarding customers and
2 competitors.

3 Q. And what is the basis of your second conclusion that
4 the divestiture assets are not the functional equivalent of
5 a standalone business?

6 A. So the stores themselves, there are 579. Many come
7 from Albertsons; others come from Kroger. Those stores
8 themselves currently rely on different IT systems and
9 various supporting assets. So the stores from Albertsons
10 and Kroger have different supporting capabilities and
11 assets.

12 Banners come from Kroger, from Albertsons, as well as
13 the retaining Albertsons banners private labels come from
14 Albertsons.

15 Not many of Kroger's assets or Albertsons assets -- and
16 I'll call them "key assets" -- are conveyed in this,
17 suggesting what I termed a "mixed bag of assets."

18 Limited supporting manufacturing. A single dairy plant
19 which keeps -- so the parties will have many manufacturing
20 plants and a strong manufacturing capability for their
21 private label products. C&S currently has none, will get a
22 single dairy plant in Colorado.

23 Limited supporting distribution assets; in particular,
24 almost half of the stores will not have their primary
25 distribution center to date so will have to switch to

Fox - D

1 another primary distribution center.

2 And as I mentioned before, Albertsons tech stack will
3 apply at all of the divestment stores, including those from
4 Kroger, but without the capabilities that would support --
5 or the algorithms and models that would support them.

6 So it would require, I believe, C&S to build out a
7 competitive marketing program at scale, largely from
8 scratch.

9 Q. You used the term "primary distribution center."

10 Can you explain to the Court what you mean when you use
11 that term in this context?

12 A. So stores in retail chains receive distribution from
13 multiple distribution centers. Different products,
14 different temperatures, in some cases, and -- and different
15 frequency of resupply.

16 The primary distribution center is the one from which
17 they receive the most goods most often. Typically,
18 including center-store dry groceries.

19 Q. And how many of the divested stores are being conveyed
20 without their primary distribution center?

21 A. Oh, a math problem.

22 I believe it's 312 -- or 267 without their primary
23 distribution center. So it's on the slide, and I didn't
24 need to do the math.

25 Q. Professor Fox, does C&S have an existing distribution

Fox - D

1 network in areas where it's acquiring divested stores?

2 A. In some of the areas in which it's acquiring divested
3 stores, it has assets -- sufficient distribution assets. In
4 some it has distribution assets, but they're not sufficient;
5 in others, it doesn't have distribution assets to support
6 those stores.

7 My understanding is that its distribution assets in
8 Southern California and the Intermountain Region are
9 insufficient. It's also my understanding that, among other
10 areas, it will need additional distribution assets in the
11 Chicago market.

12 Q. And, Professor Fox, can you now explain how the various
13 challenges that you've identified could impact individual
14 divested stores?

15 A. Sure. I'm going to go back to the example of a
16 divested Vons store in San Diego.

17 Today, it operates under the Vons banner. It has
18 Signature, Lucerne, O Organics, and all -- the entire
19 portfolio of private label products that are offered. It
20 has the loyalty program, the ecommerce platform, the working
21 data analytics and pricing that include models and
22 algorithms. It has a retail media network that generates
23 vendor funding, along with manufacturing facilities and
24 distribution centers.

25 It will not only lose its banner and lose its brand,

Fox - D

1 but the supporting assets over time, according to the --
2 according to the TSA, will be lost.

3 And as I mentioned, the analytics and pricing
4 algorithms, they'll have the tools but not the models and
5 algorithms.

6 Q. So this is an example of a store that would need to be
7 rebannered. Could you discuss how the challenges you've
8 discussed would impact a store that does not require
9 rebannered?

10 A. So the Vons store in San Diego would lose its brand. A
11 QFC store in Portland wouldn't lose its brand, because the
12 QFC banner is licensed here, so it would retain it. But
13 looking at the same supporting assets and capabilities,
14 private label, loyalty programs -- programs, ecommerce data
15 analytics and pricing algorithms, it will lose all of those
16 over time, and the -- in the interim, it will have access,
17 in terms of IT, to the Albertsons tech stack, which is the
18 IT capability that currently drives the store's marketing
19 and distribution.

20 Q. And, Professor Fox, what do these two examples have in
21 common?

22 A. In both cases, whether the brand is lost or the
23 supporting assets -- whether the brand and the supporting
24 assets are lost over time or the brand remains but the
25 assets that make the brand "the brand" and the capabilities

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1 that make the brand "the brand" in the consumers' eyes are
2 lost, C&S will be challenged to make up for those
3 capabilities, build its own capabilities, in some cases,
4 from scratch, at a scale and scope that -- that's quite
5 daunting.

6 MS. DRUMMONDS: Thank you. I have no further
7 questions at this time.

8 THE COURT: We're going to take our morning break
9 We'll be in recess for 15 minutes.

10 (Recess taken.)

11 DEPUTY COURTROOM CLERK: All rise.

12 THE COURT: Please be seated. You may begin your
13 cross-examination.

14 MR. COWIE: Your Honor, Michael Cowie for
15 Albertsons. My colleague will approach with binders.

16 THE COURT: All right.

17

18 CROSS-EXAMINATION

19 BY MR. COWIE:

20 Q. Good morning, Professor Fox. I want to start with some
21 questions on the scope, the scope of your opinions.

22 You didn't -- you did not analyze C&S's due diligence
23 on the divested business; correct?

24 A. No, I didn't.

25 Q. And you didn't -- you did not analyze C&S's financial

Fox - X

1 ability to acquire the business; correct?

2 A. Correct.

3 Q. You did not analyze C&S's sources of funds -- sources
4 of funds it's using to acquire the business; correct?

5 A. Correct.

6 Q. And you have not opined, Professor Fox, on C&S's
7 projected synergies; correct?

8 A. Opined on those synergies? I mentioned them in my --
9 in my direct examination.

10 Q. You did not do an analysis of the synergies; correct?

11 A. Correct.

12 Q. Professor Fox, you did not compare the financial
13 position of C&S to Haggen; correct?

14 A. No, I didn't.

15 Q. And you didn't compare the debt levels of C&S to
16 Haggen; correct?

17 A. Correct.

18 Q. And your reports do not compare the investment C&S
19 projects to Haggen's investments; correct?

20 A. Can you please rephrase?

21 Q. You did not compare the level of investment in the
22 acquired business that C&S is making versus what Haggen did;
23 correct?

24 A. Versus what Haggen did? No, I didn't.

25 MR. COWIE: Mr. Simmons, will you please pull up

Fox - X

1 DX233, page 49.

2 THE COURT: Are you referring to the deposition
3 transcript?

4 MR. COWIE: Yes, Your Honor.

5 BY MR. COWIE: (Continuing):

6 Q. Professor Fox, this is the deposition transcript?

7 A. Yes.

8 Q. Professor Fox, you never conclude in your expert
9 reports that C&S is likely -- likely to fail as a
10 divestiture buyer, do you?

11 A. No. I rendered no opinion on the likelihood of
12 failure.

13 Q. Professor Fox, I'm going to shift subjects. I have a
14 few more questions on your education.

15 A. Sure.

16 Q. You have -- you have an MA from University of
17 Pennsylvania in marketing; correct?

18 A. Correct.

19 Q. And from Northwestern, you had both an MBA in marketing
20 and an MS in marketing communications?

21 Did I get that right?

22 A. That's correct.

23 Q. Okay. And you have a Ph.D. in -- I think, technically,
24 it's management science with an emphasis in marketing; is
25 that right?

Fox - X

1 A. Yes, that's correct.

2 Q. You do not have an accounting degree; correct?

3 A. No, I don't.

4 Q. You do not have a finance degree?

5 A. No, I don't.

6 Q. You do not have a computer science degree?

7 A. No, I don't.

8 Q. Let's turn to work experience.

9 Professor Fox, have you ever worked as an employee of a
10 food retailer?

11 A. Not as a W-2 employee.

12 Q. Have you ever worked as an employee of a food
13 distributor or wholesaler?

14 A. Again, not as a W-2 employee.

15 Q. Have you ever worked as an employee of a food
16 manufacturer?

17 A. No, I have not.

18 Q. Have you ever managed a retail business?

19 A. Best to say no.

20 Q. And, Professor Fox, prior to this project, you've never
21 worked on a divestiture -- a divestiture in any capacity;
22 correct?

23 A. No, I have not.

24 Q. Do you know the term "transition services agreement"?

25 A. Yes, I do.

Fox - X

1 Q. You have not published any articles on transition
2 services agreements; correct?

3 A. No, I haven't.

4 Q. And you haven't been retained by a company to advise on
5 transition services agreements; correct?

6 A. No, I haven't.

7 Q. And prior to this case, you had no experience -- no
8 experience working with transition services agreements;
9 correct?

10 A. Evaluating -- when you say "working with them," what do
11 you mean?

12 Q. Well, have you read a transition services agreement
13 before this case?

14 A. No, I didn't.

15 Q. Sir, you -- or, Professor Fox, you testified earlier
16 that C&S may be disadvantaged in private label; correct?

17 A. Words to that effect, yes.

18 MR. COWIE: Mr. Simmons, would you pull up
19 PX7002-78? And this should be on the confidential screen,
20 not the public screen, please.

21 THE WITNESS: What page?

22 BY MR. COWIE: (Continuing):

23 Q. This is -- so for your report, Professor Fox, it's
24 page 74 of your June 18th report, for the -- we have
25 separate numbers for exhibits. The lower right-hand number

Fox - X

1 is 78, but you may recognize it better as page 74 of your
2 June report.

3 A. Thank you.

4 Q. Do you see toward the bottom of page 98 you wrote,
5 "Finally, without the development of additional
6 manufacturing infrastructure, C&S will face higher costs to
7 source its private label products"?

8 That's what you wrote; correct?

9 A. Yes.

10 Q. Okay. I think you testified this morning they'll --
11 they'll be at a disadvantage because the lack of portfolio
12 of plants? Do you recall you using that phrase? "Portfolio
13 of plants"?

14 A. Very specifically. Because they -- they -- if they had
15 manufacturing capabilities and had the option to make or buy
16 private label products, they would necessarily have -- at
17 least as -- well, it would have a lower cost of goods than
18 they would if -- if they only had the option to buy.

19 They could buy everything at -- from third-party
20 sources, even if they had manufacturing capability, if it
21 was optimal to do so.

22 So having that in-house capability to manufacture only
23 gives them an option to do it more inexpensively.

24 Q. And just to repeat some background, C&S is buying one
25 plant, a dairy plant, in Colorado; correct?

Fox - X

1 A. That's correct, to the best of my knowledge.

2 Q. And you're aware that Albertsons outsources about 90
3 percent? I think you testified they make over 10 percent,
4 but is it fair they outsource about 90 and produce about 10
5 percent?

6 A. Approximately, yes.

7 Q. Now, are you aware, Professor Fox, that Walmart has
8 just two plants for private label production? Just two? A
9 dairy plant and a beef plant?

10 A. Okay. I -- I don't have specific information about the
11 manufacturing capabilities of Walmart.

12 Q. So you're unaware that Walmart outsources close to
13 100 percent of its private label production?

14 A. Assuming that what you told me is correct, I now know.

15 Q. You haven't looked at that; correct?

16 A. No. I didn't consider Walmart's private labels for
17 this case.

18 Q. Okay. Are you aware that Target -- sorry. Were you
19 still speaking?

20 A. I didn't consider Walmart's private label production
21 for this case.

22 Q. Are you aware that Target has zero food plants for
23 private label? 100 percent outsourced?

24 A. Food plants for private label?

25 I don't know whether that number is correct or not.

Fox - X

1 Does -- does -- by "food plants," mean that they have other
2 plants for nonfood products?

3 Q. Let me -- let me try to ask you more clearly.

4 You testified that C&S would acquire one production
5 plant or food plant for private label. That's a dairy;
6 correct?

7 A. Correct.

8 Q. And we talked about you lacked knowledge that Walmart
9 has just two plants.

10 I'm asking if you know that Target has zero plants.

11 A. Pardon me. I -- the way you phrased it was "had food
12 plants." In the -- in the slides that I showed, I included
13 plants that weren't for food products but for other products
14 as well.

15 So is that limited to food or all private label?

16 Q. Let me -- let me state it with more clarity.

17 Are you aware that Target has zero plants for
18 production of private label products?

19 A. I am now aware, assuming that that is correct.

20 Q. Okay. And you're aware that Target has billions of
21 dollars in sales of private label products; correct?

22 A. Yes, they do.

23 Q. Are you aware that Trader Joe's operates no plants for
24 private label production? 100 percent outsourced?

25 A. I didn't review Trader Joe's private label program for

Fox - X

1 this assignment.

2 Q. Professor Fox, you've heard of Raley's, a food retailer
3 that testified in this case? You've heard of them?

4 A. I have.

5 Q. Are you aware that Raley's has zero plans for private
6 label production? Also 100 percent outsourced?

7 A. Yes. Again, with the caveat, assuming what you just
8 told me is correct, I now know that.

9 Q. Have you heard of Sprouts, another food retailer that
10 testified in this case?

11 A. Yes.

12 Q. Are you aware that Sprouts operates no plants for
13 private label production? Also 100 percent outsourced.
14 Correct?

15 A. If that's correct, then I did not know that.

16 Q. Have you heard of the chain WinCo, present here in
17 Oregon?

18 A. Yes, I have.

19 Q. Okay. Are you aware that WinCo operates no plants for
20 private label production, also 100 percent outsourced?

21 A. With -- assuming that's correct, I did not know that.

22 Q. Let me -- Professor Fox, let me ask about the work you
23 did. You did not do any systematic or comprehensive
24 analysis measuring the extent to which food retailers
25 outsource or self-produce for private label; correct?

Fox - X

1 A. No. My analysis was a comparison of C&S with Kroger
2 and Albertsons. And their capabilities, which are available
3 to the stores that C&S would -- would acquire in the
4 divestiture.

5 Q. You did not benchmark versus other successful
6 retailers; correct?

7 A. No, I did not benchmark.

8 Q. Professor Fox, I want to turn next to customer loyalty
9 programs.

10 You testified this morning and you have stated in your
11 reports that C&S may face challenges developing a customer
12 loyalty program; correct?

13 A. I'm not certain that I'd characterize it as "may face
14 challenges," but it is my analysis that they'll face
15 challenges.

16 Q. Professor Fox, let's take a look at your June report.
17 It's PX7002. It's page 104 of the exhibit numbers.

18 MR. COWIE: And, Mr. Simmons, this is for
19 confidential display, not public.

20 BY MR. COWIE: (Continuing):

21 Q. And, Professor Fox, this is page 100 of your June
22 report.

23 Do you see the heading "D"?

24 A. Yes.

25 Q. You stated, Professor Fox, that C&S's ability to build

Fox - X

1 brand equity is complicated by challenges -- challenges in
2 developing a loyalty program as well as a retail media
3 network. That's what you wrote?

4 A. Yes. Yes.

5 Q. Are you familiar with the Texas food retailer H-E-B?

6 A. Yes, I am.

7 Q. Does H-E-B have a customer loyalty program?

8 A. My understanding is that they had a customer loyalty
9 program up to two years ago, and they have replaced that
10 with DigiDeals, of which I am a member.

11 Q. Professor Fox, you had access to deposition transcripts
12 from food retailers; correct?

13 A. Yes.

14 Q. Did you read the deposition transcript of H-E-B?

15 A. Before I answer, can I --

16 Q. In the preparation for your reports, did you review --

17 A. I'd like to consult my "materials considered" list to
18 make sure that I don't miss --

19 Q. Okay. Please do so.

20 A. Do you have the PX number for that?

21 Q. Well, are you looking, Professor Fox, for the section
22 of your report that was "materials considered"?

23 A. No. For the designation of the report that you're
24 speaking about.

25 Q. The question is do you recall reviewing a deposition

Fox - X

1 transcript from H-E-B? I'm just asking today if you recall
2 reviewing it.

3 A. I don't want to misspeak. If it wasn't on my
4 "materials considered" list, I didn't review it. If it is,
5 then I -- then I reviewed it. I don't want --

6 Q. Fair enough.

7 A. -- to misspeak.

8 Q. So you don't recall H-E-B testifying about the absence
9 of a customer loyalty program?

10 A. The specific -- the specific -- I was aware that the
11 inference was that C&S -- or that H-E-B didn't have a
12 customer loyalty program, but I'm aware, based on personal
13 experience, of a program that they have that offered
14 personalized offers to me and other people in my -- in my
15 area.

16 Q. Professor Fox, does Trader Joe's have a customer
17 loyalty program?

18 A. To the best of my knowledge, they do not.

19 Q. Does Walmart have a customer loyalty program?

20 A. I believe the correct answer is yes.

21 Q. What is your understanding?

22 A. They have a program called Walmart Plus, of which I was
23 a member, and it, again, is a -- an ecommerce-oriented
24 personalized program that -- that offers both online and
25 in-store benefits for a subscription rate.

Fox - X

1 Q. Is your understanding that is a program where customers
2 can pay about \$98 a year for benefits in ecommerce and
3 shipping?

4 A. More than benefits and ecommerce and shipping. Early
5 access to deals, scan-and-go in store. So there's benefits
6 both online and for in-store shopping.

7 Q. Are you familiar with the grocery retailer Aldi?

8 A. Yes, I am.

9 Q. Does Aldi have a customer loyalty program?

10 A. To the best of my knowledge, no.

11 Q. We talked about WinCo, a grocer here in Oregon. Does
12 WinCo have a customer loyalty program?

13 A. I'm not familiar with WinCo's program. I couldn't say.

14 Q. Professor Fox, you have not done a systematic analysis
15 to measure the extent to which food retailers have adopted
16 customer loyalty programs; correct?

17 A. No, I haven't.

18 Q. Professor Fox, let's talk next about rebannered.

19 You have never published an article on rebannered;
20 correct?

21 A. No, I have not. I -- I did a search for academic
22 articles, which is what I would publish in peer-reviewed
23 journals, and I don't believe that I found anything. So
24 it's not a topic of academic interest, to the best of my
25 understanding.

Fox - X

1 Q. Professor Fox, you yourself have not published an
2 article on rebannered; correct?

3 A. No.

4 Q. And you've never been retained by a company to advise
5 on retail store rebannered; correct?

6 A. Not on rebannered specifically, no.

7 Q. And you don't have any prior work experience on retail
8 store rebannered; correct?

9 A. I haven't been -- done that as a consultant or haven't
10 been retained as a consultant and wasn't involved in -- as
11 an employee of a retailer. So I think -- I think that's
12 what you're getting at, and the answer would be no.

13 Q. Thank you.

14 You testified about brand equity of the banners
15 earlier, and I think you testified you reviewed the Bain
16 document; correct? You reviewed that?

17 A. There are multiple Bain documents. Are we talking
18 about the deal model?

19 Q. Yes.

20 A. Okay. Yes.

21 Q. You reviewed that?

22 You did not do your own quantitative analysis or survey
23 measuring the strengths or weaknesses of the banners;
24 correct?

25 A. For the purpose of my analysis, I assumed that Bain's

Fox - X

1 consumer research was done correctly, as I suspect that C&S
2 did.

3 MR. COWIE: Mr. Simmons, please pull up PX7 --
4 PX0002-32.

5 BY MR. COWIE: (Continuing):

6 Q. Professor Fox, this is your June report, and I'd like
7 you to focus on page 28, paragraph 30 -- 38.

8 Professor Fox, you see toward the bottom of this page
9 you wrote, "Using my industry knowledge, I analyzed prior
10 instances of rebannering in the grocery industry."

11 Do you see that?

12 A. Yes.

13 Q. And later in this paragraph -- maybe Mr. Simmons can
14 help me with this -- you also referred to these as "case
15 studies"?

16 A. Yes, I believe I did.

17 Q. You see that?

18 And your report uses the Haggen rebannering as a case
19 study; correct?

20 A. Yes, it does.

21 Q. Did you compare the amount of time Haggen management
22 spent on rebannering compared to C&S's projected timeline?

23 A. For Haggen, I -- I reviewed the materials that were
24 available on Haggen, both from -- from the trial record here
25 or from the record here as well as from public sources, and

Fox - X

1 I didn't analyze why Haggen failed. I used contemporaneous
2 information that was reported out at the time, which
3 included rebannered as an important reason.

4 Q. Are you aware there's a public consent order covering
5 the Haggen divestiture? Are you aware of that?

6 A. I'm not sure of the implication; but, yes, I was aware
7 of that.

8 Q. Do you know the consent order requires Haggen to
9 complete the divestiture in five months?

10 A. I haven't reviewed the consent order in that case.
11 Again, I wasn't analyzing the reasons for -- for
12 Haggen's failure, other than what I saw reported in
13 contemporaneous accounts of the incident.

14 Q. You are aware C&S will have three years; correct?

15 A. Yes, I am.

16 Q. I want to ask you, Professor Fox, about other
17 rebannered case studies besides Haggen.

18 Did you consider Ahold's rebannered of 160 stores in
19 New York and New Jersey to Stop & Shop, bringing that banner
20 into that region?

21 Did you study that?

22 A. I didn't include that in my report. As I sit and
23 recall, in my two reports, I didn't include that. So I
24 didn't review it carefully.

25 I -- I looked for case studies that were recent and

Fox - X

1 relevant, and I -- and unless my recall is failing me, I
2 didn't include it in my reports.

3 Q. You used a C&S case study from 2005; correct?

4 A. Yes.

5 Q. So you've gone back 19 years to find that case study;
6 correct?

7 A. Yes. And it was particularly relevant because it was a
8 C&S acquisition.

9 Q. Professor Fox, I appreciate we have a voluminous record
10 in this case and a compressed time schedule, but did you get
11 a chance to read Mr. McGowan's trial testimony about Ahold's
12 successful rebannerings?

13 A. I reviewed Mr. McGowan's trial testimony. I don't
14 recall what he said about that, as I was reviewing it.

15 Q. Did you study, as one of your case studies, Whole
16 Foods' rebannerings of Wild Oats stores?

17 A. No, I didn't. They're not supermarkets. Well, I
18 didn't think that they were sufficiently relevant to this
19 particular example; so, no, I did not.

20 Q. Okay. Let's just leave aside your view that they're
21 not supermarkets, but you -- so you didn't know that that
22 brought the Whole Food banner into five completely new
23 states?

24 A. I am aware.

25 Q. Did you study Sprouts' rebannerings of Sunflower Market

Fox - X

1 stores?

2 A. No, I didn't.

3 Again, I was looking for supermarket case studies.

4 Q. And so you're not aware that that brought the Sprouts
5 banner into four completely new states?

6 A. That rebannerings, I'm not familiar with.

7 Q. Did you study any rebannerings in Oregon?

8 A. I don't believe -- so the extent of the rebannerings
9 that I -- that I assessed and included, to the best of my
10 recollection, no, not an Oregon store.

11 Q. Okay.

12 A. Certainly not a retailer with several Oregon stores.

13 Q. And, Professor Fox, I think you said you focused on
14 what you consider supermarkets. Do you consider WinCo a
15 supermarket?

16 A. I didn't just say I -- I focused on supermarkets. I
17 focused on case studies that I thought were relevant to this
18 case, which included -- or was limited to supermarkets but
19 also relevant for other reasons.

20 For example, the C&S rebannerings would be relevant to
21 a C&S rebannerings -- recent rebannerings, like the Ahold
22 example, would also be relevant.

23 So I didn't do a statistical analysis of rebannerings.
24 I used case studies instead to make my assessment.

25 Q. As a case study, did you consider WinCo's rebannerings

Fox - X

1 of Waremart and Cub stores here in Oregon?

2 A. I don't believe I considered that.

3 Q. So you're not aware that brought the WinCo banner into
4 Oregon? It extended the banner into Oregon? You're not
5 aware of that?

6 A. Again, I didn't study that particular rebannerings. I
7 looked at a lot of candidates. That was not one that I
8 considered.

9 Q. Okay. And, Professor Fox, you didn't do a systematic
10 review of supermarket or food retail rebannerings over, say,
11 the last 10 or 20 years?

12 A. I -- as I explained, I tried to identify rebannerings
13 that were relevant for this particular situation and used
14 those as case studies. I didn't do, as I said, a
15 statistical analysis.

16 You wouldn't need a statistical analysis if I got all
17 the rebannerings from the last 15 or 20 years, but I didn't
18 do anything comprehensive like that, because some of them
19 are relevant, some of them are less relevant, and I
20 exercised my judgment in determining which were more
21 relevant.

22 Q. Professor Fox, I have a few questions on retail media
23 networks.

24 A. Okay.

25 Q. I believe you testified this morning that that may be a

Fox - X

1 shortfall or a challenge for C&S?

2 A. What I testified to is that they currently don't have a
3 functioning retail media network, and that itself presents
4 challenges going forward.

5 Q. Are you aware that Costco -- Costco just launched its
6 retail media network in June of this year? It just started?

7 A. I did read that, yes.

8 Q. Okay. Did you also read the announcement that -- from
9 earlier this year, that Aldi's is exploring -- exploring
10 retail media networks? It's in the early stages? Did you
11 see that announcement?

12 A. I saw that announcement.

13 Q. Professor Fox, did you benchmark C&S's planned
14 investment and timeline for retail media network compared to
15 competitors?

16 A. No, sir. What I did was assess the capabilities that
17 they had and the capabilities that Kroger and Albertsons
18 had, and given that they will compete with Kroger and
19 Albertsons in the divestiture markets, that -- that they
20 would be at a disadvantage relative to particular Albertsons
21 in these divestiture markets.

22 That was -- those were the contours of what I opined
23 on.

24 MR. COWIE: Mr. Simmons, would you pull up DX2641?
25 And this can be on the public display.

Fox - X

1 BY MR. COWIE: (Continuing):

2 Q. Professor Fox, is this the article that Ms. Drummond
3 showed you for a moment this morning?

4 A. Yeah. Yes, it is.

5 Q. And so this is the article you twice described this
6 morning as a "thought piece" in contrast to a "peer-reviewed
7 article"; correct?

8 A. It is a thought piece and a non-peer-reviewed article.

9 Q. You authored this thought piece or article,
10 Professor Fox; correct?

11 A. Yes, I did.

12 Q. And you entitled your article: Retail Landscape --
13 Landscape Changes -- Retail Landscape Changes May Affect
14 Kroger-Albertsons deal. Correct? That was the title you
15 chose?

16 A. Yes, it is.

17 I'm sorry. I'm not certain if I chose that headline,
18 but I think that was mine.

19 Q. And you published this in Law360; correct?

20 A. Correct.

21 Q. And you published this in February -- or you wrote this
22 and published this in February of 2023; correct?

23 A. I think I wrote it in January, but it was published in
24 February.

25 Q. And this was about four months after Kroger and

Fox - X

1 Albertsons announced their proposed merger; correct?

2 A. Correct.

3 Q. When did the plaintiffs hire you?

4 A. I believe I was hired in October -- or my first
5 communications were in October of 2023, and I was hired in
6 February of 2024.

7 Q. Okay. So your recollection is the first communications
8 were about six months, or so, after you published this?

9 A. As I said, in October of 2023.

10 Q. Let's focus on page 1, fifth paragraph, the paragraph
11 beginning with the word "Second."

12 Do you see that, Professor Fox?

13 A. I do.

14 Q. And you wrote, "Second, the increased prominence of
15 supercenters and warehouse club stores potentially brought
16 into the competitive -- relevant competitive set beyond
17 traditional grocery retailers."

18 That's -- that's what you wrote before you were hired;
19 correct?

20 A. That's what I wrote when the merger was announced --
21 or, admittedly, it was three months after the merger was
22 announced, or so; so I didn't have any information about the
23 merger other than the parties. So that's what I wrote at
24 that time.

25 Q. You -- Professor Fox, you had over 50 footnotes in the

Fox - X

1 article; correct?

2 A. I believe there are only 19.

3 Q. But you had -- you cited to reports from Walmart;
4 correct?

5 A. Cited Walmart's annual report. I see that in my ninth
6 footnote I'm quite sure that I cited Walmart in another
7 place or two.

8 Q. You cited a report from McKinsey; correct?

9 A. If recollection serves me, yes.

10 Q. You cited data on club stores from Statista; correct?

11 A. Correct.

12 Q. Okay. So that's some of the information you used and
13 researched before you wrote "The increased prominence of
14 supercenters in warehouse club stores potentially broadens
15 the relevant competitive set"; correct?

16 A. Correct.

17 Q. Let's stay on the same page with the sentence beginning
18 "Finally."

19 So here, Professor Fox, you wrote, "Finally, emerging
20 channels offer different mixes of nonperishable and
21 perishable grocery products, potentially blurring the lines
22 of competition and the outlets considered when grocery
23 shopping."

24 That's what you wrote before you were hired; correct?

25 A. That's what I wrote in January of 2023, yes.

Fox - X

1 Q. Let's go to page 2. I want to cover two statements you
2 wrote about Walmart.

3 You see the -- it would be the fourth full paragraph,
4 beginning "Since."

5 So you wrote, "Since well before the pandemic, Walmart,
6 Inc., has been the undisputed leader among U.S. grocery
7 retailers after converting its Division 1 discount stores to
8 supercenters, large footprint stores that include both the
9 supermarket and a discount store under one roof."

10 Professor Fox, that's what you wrote? That Walmart
11 would be the -- that Walmart has been the undisputed leader?

12 A. Yes, that's what I wrote. I believe that's true. I --
13 on evidence, I know that's true.

14 Q. Professor Fox, I have one more statement I want to
15 focus on from your article on the changing retail landscape.

16 Same page, the paragraph beginning, "There is therefore
17 little doubt."

18 Do you see that?

19 A. Yes.

20 Q. And here you wrote, "There is therefore little doubt
21 that supercenters, in particular Walmart supercenters, are
22 key competitors to traditional grocery stores because they
23 sell the same variety of perishable and nonperishable
24 products and similar assortments of branded and private
25 label products in each category."

Fox - ReD

1 That's what you wrote, correct, Professor Fox?

2 A. That's correct.

3 MR. COWIE: Your Honor, we move to admit -- to
4 admit this exhibit.

5 THE COURT: What exhibit is it that you're --
6 which one? The number.

7 MR. COWIE: DX2641. DX2641.

8 MS. DRUMMONDS: No objection, Your Honor.

9 THE COURT: It will be received.

10 It's noted that it's same exhibit as DX2641. They're
11 the same, one and the same. It --

12 MS. DRUMMONDS: I believe that's correct
13 Your Honor.

14 THE COURT: All right.

15 MR. COWIE: Your Honor, I pass the witness.

16 THE COURT: Oh. All right. Any redirect?

17 MS. DRUMMONDS: Very briefly, Your Honor.

18

19 REDIRECT EXAMINATION

20 BY MS. DRUMMONDS:

21 Q. Professor Fox, counsel asked you if you had ever worked
22 as an employee.

23 THE COURT: Hold on a second. It seems like we're
24 getting some type of feedback. I don't know what's going
25 on. Which it can kind of be annoying for people.

Fox - ReD

1 MS. DRUMMONDS: May I proceed, Your Honor?

2 THE COURT: Yes.

3 BY MS. DRUMMONDS: (Continuing):

4 Q. Professor Fox, counsel asked you if you had worked as
5 an employer of food retailers, and you stated that you had
6 not as a W-2 employee.

7 Have you ever -- have you consulted for food retailers?

8 A. Yes, I have.

9 Q. Have you consulted for grocery store chains?

10 A. Yes, I have.

11 MS. DRUMMONDS: No further questions.

12 THE COURT: You can step down.

13 THE WITNESS: Thank you --

14 THE COURT: You're welcome.

15 THE WITNESS: -- Your Honor.

16 MR. BRYSON: Your Honor, Alex Bryson on behalf of
17 the FTC. We'd like to call our next witness, Mr. Todd
18 Broderick.

19 DEPUTY COURTROOM CLERK: Please raise your right
20 hand.

21

22

TODD BRODERICK,

23 called as a witness in behalf of the Plaintiff, being first
24 duly sworn, is examined and testified as follows:

25

Broderick - D

1 THE WITNESS: I do.

2 DEPUTY COURTROOM CLERK: Thank you. Please have a
3 seat.

4 THE WITNESS: Todd Broderick. T-o-d-d.
5 B-r-o-d-e-r-i-c-k.

6 THE COURT: So while we're trying to get the
7 exhibit binders to everyone, I understand that you probably
8 have more than 15 minutes of direct.

9 MR. BRYSON: That is correct.

10 THE COURT: So why don't we find a stop somewhere
11 around noon. It doesn't have to be at noon. It can be a
12 little bit into the lunch hour so it is a natural stop. So
13 we can have lunch.

14 MR. BRYSON: Certainly.

15 THE COURT: Thank you.

16

17 DIRECT EXAMINATION

18 BY MR. BRYSON:

19 Q. Mr. Broderick, I'm Alex Bryson. I'm an attorney with
20 the FTC. I don't believe we've met. Good morning.

21 A. Good morning.

22 Q. Mr. Broderick, who is your employer?

23 A. Albertsons Companies.

24 Q. And what is your title at Albertsons Companies?

25 A. Denver Division President.

Broderick - D

1 Q. And how long have you been Denver Division President?

2 A. A little over eight years.

3 Q. But you have responsibilities to run retail supermarket
4 operations for Albertsons stores in the Denver Division;
5 correct?

6 A. Correct.

7 Q. And what states does your division operate in?

8 A. South Dakota, Nebraska, Wyoming, Colorado, and New
9 Mexico.

10 Q. Mr. Broderick, I'm going to ask you a few questions
11 about your supermarkets. You define a traditional grocer as
12 a standalone brick-and-mortar store that typically sells
13 primarily groceries and fresh foods; correct?

14 A. That's correct.

15 Q. And the standard Albertsons store in your division is
16 around 55,000 square feet; correct?

17 A. Correct.

18 Q. Albertsons stores in your division offer produce, meat,
19 bakery items, deli, general groceries, and general nonfood
20 products in your stores; correct?

21 A. Correct.

22 Q. And stores in your division offer a staffed bakery
23 counter; correct?

24 A. Most of them do.

25 Q. And most of your stores offer a staffed floral counter;

Broderick - D

1 is that correct?

2 A. Correct.

3 Q. In your stores, offering a deep breadth of products or
4 breadth of basket is important to Albertsons' customers;
5 correct?

6 A. Yes. I think that's correct.

7 Q. Albertsons also offers national brand products in its
8 stores; correct?

9 A. Correct.

10 Q. An example of a national brand product would include a
11 product that Albertsons does not produce on its own, such
12 as, for example, Doritos or Coca-Cola; correct?

13 A. Correct.

14 Q. Albertsons stores in your division also offer private
15 label products; correct?

16 A. Correct.

17 Q. And a private label product is one that is specific and
18 unique to Albertsons; correct?

19 A. True.

20 Q. And would you give some examples of some private labels
21 that are offered in your stores?

22 A. Sure. Primo Taglio, Open Nature, Lucerne.

23 Q. And one of the reason -- reasons that Albertsons offers
24 private label products, like the ones you just mentioned, is
25 to differentiate Albertsons from its competitors; correct?

Broderick - D

1 A. That's true.

2 Q. Additionally, in your stores, it is important to offer
3 different package sizing for customers; right?

4 A. Yes. I think -- when I think about package sizing,
5 what I would say is it's important to offer categories in
6 addition to package sizing.

7 Q. Would you just give an example of a product where you
8 offer different package sizing?

9 A. Sure. Cheese.

10 Q. And what are some of the different package sizes that
11 you offer for cheese?

12 A. 8 ounce, 16 ounce, 32 ounce.

13 Q. Additionally, to get customers to shop at Albertsons'
14 stores, you try to do everything you can; correct?

15 A. That's true.

16 Q. And part of that effort to get customers to shop at
17 your stores is for Albertsons to offer customer convenience;
18 right?

19 A. Yes.

20 Q. So all the offerings we've been talking about,
21 including the breadth and depth of products and services
22 that are offered within Albertsons' stores in your division,
23 is in an effort to offer a one-stop shopping experience to
24 Albertsons' customers to maximize convenience; correct?

25 A. That's true.

Broderick - D

1 Q. I want to talk a little bit about your competition.

2 Now, in terms of your competition, when you look at the
3 food sales channel, you just look at Albertsons and Kroger;
4 correct?

5 A. Well, we look at -- in my division, we look at what's
6 called MULO+, which includes all of our competitors, and so
7 that would include Costco, Walmart, Target, and Kroger.

8 Q. Mr. Broderick, I wasn't asking about MULO+. I was
9 asking about the food channel.

10 A. Okay.

11 Q. And so for the food channel, you just look at
12 Albertsons and Kroger; correct?

13 A. In my division, we're one of -- I think, at most, two
14 divisions where we don't receive food channel data. It's
15 just MULO+, so we don't see that sort of information.

16 Q. Okay. You provided sworn testimony in an
17 investigational hearing before the FTC on November 17, 2023;
18 correct?

19 A. Yes.

20 Q. You testified under oath during that investigational
21 hearing; correct?

22 A. Correct.

23 Q. Your testimony during that investigational hearing was
24 truthful; correct?

25 A. Yes.

Broderick - D

1 Q. In your binder, I'm going to ask you to turn to your
2 investigational hearing transcript.

3 Okay. It's PX4026. Specifically, I want you to turn
4 to page 12, lines 10 to 13.

5 Additionally, Mr. Duncan is going to put it on the
6 screen. So if you don't want to look at your binder, you
7 can just look at your screen.

8 A. Okay.

9 Q. Do you see that?

10 A. Yes.

11 Q. It reads: Question: So when you look at just the food
12 sales channel, it's just Albertsons and Kroger; is that
13 right?

14 Answer: That's correct.

15 Did I read that correctly?

16 A. You did.

17 Q. Mr. Broderick, price is important to your customers;
18 correct?

19 A. I think it is.

20 Q. Price is important to your customers because they want
21 to be able to get as much value for their dollar as
22 possible; right?

23 A. Yes. I think a lot of things are important to our
24 customers, price being one of them.

25 Q. And if Albertsons offered the lowest prices on any

Broderick - D

1 given item, such as bananas or something else, then
2 Albertsons would stand a chance of gaining the most customer
3 share; correct?

4 A. I think it's possible.

5 Q. It's possible that they would stand -- that Albertsons
6 would stand a chance to gain customer share; is that
7 correct?

8 A. Can you repeat your statement?

9 Q. Sure. If Albertsons offered the lowest prices on any
10 given item, such as bananas or something else, then
11 Albertsons would stand a chance of gaining the most customer
12 share; correct?

13 A. Yes. I think that's possible.

14 Q. In contrast, being known as having the highest price or
15 among the higher prices for bananas or other products would
16 be concerning to you; correct?

17 A. It would.

18 Q. Because it could be a reason for somebody to want to
19 shop at a competitor; correct?

20 A. Yes.

21 Q. Now, in terms of your competitors' pricing, your
22 division has local employees that price-check competitors;
23 correct.

24 A. We do.

25 Q. Price-checking involves physically going into a

Broderick - D

1 competitor's store and checking the price on any given item;
2 correct?

3 A. Correct.

4 Q. Price-checking occurs at least monthly and frequently
5 weekly; correct?

6 A. I believe so.

7 Q. Albertsons price-checks against Kroger; correct?

8 A. We price-check against all of our competitors, Kroger
9 being one of them.

10 Q. And Albertsons, in fact, most frequently indexes its
11 pricing against Kroger and Walmart in your division;
12 correct?

13 A. Yes.

14 Q. Specifically for Kroger, Albertsons seeks to be
15 competitive with Kroger on regular items or white tag
16 pricing; correct?

17 A. Yes.

18 Q. Now, specifically for Kroger, you want to be no more
19 than a few percentage points higher for that white tag or
20 regular pricing; correct?

21 A. I guess I would need to have a better understanding of
22 what you would define as a "few percentage points."

23 Q. And I'm going to get to that, but I understand this is
24 sensitive information.

25 A. Yes.

Broderick - D

1 Q. And so I think the easiest way for us to do this will
2 be to turn back to your investigational hearing transcript.

3 Okay. Mr. Duncan is going to put a question and answer
4 on the screen, but it's not for the public. So you'll be
5 able to see it and the Court will be able to see it.

6 A. Okay.

7 Q. Do you see it?

8 A. I do.

9 Q. Let me know when you have had a chance to read the
10 question and answer here?

11 MR. PODOLL: Your Honor, I would object to the
12 extent he's trying to impeach. This isn't proper
13 impeachment, I don't think.

14 MR. BRYSON: I'm not trying to impeach. I'm
15 trying to get around the confidentiality and the stickiness
16 of specific numbers here.

17 THE COURT: I'm going to overrule the objection.
18 It's not for impeachment.

19 MR. PODOLL: Understood, Your Honor.

20 THE COURT: Yeah.

21 BY MR. BRYSON: (Continuing):

22 Q. Mr. Broderick, have you read it, or are you still
23 reading?

24 A. I'm still reading it.

25 Q. Okay. Sorry.

Broderick - D

1 A. Okay. I've read it.

2 Q. Okay. Do you see at the end of your answer it talks
3 about white tag pricing; correct?

4 A. Yes.

5 Q. And that white tag pricing compared to Kroger; correct?

6 A. Yes.

7 Q. And then there's a number. Do not read the number. Do
8 you see the number?

9 A. I do.

10 Q. And that number is a low number; correct?

11 A. Yes.

12 Q. Okay. And then, additionally, Albertsons seeks to be
13 competitive with Kroger on promotional or yellow tag
14 pricing; correct?

15 A. Yes.

16 Q. And similar to how we did it with the white tag
17 pricing, your answer here discusses the strategic goal for
18 the range in terms of percentage for promoted items;
19 correct?

20 A. That's true.

21 Q. And without reading the specific numbers, it is a low
22 number; correct?

23 A. Correct.

24 MR. BRYSON: Your Honor, I would like to move to
25 admit this section of Mr. Broderick's IH into evidence.

Broderick - D

1 MR. PODOLL: No objection, Your Honor.

2 THE COURT: It will be received. And let's be
3 clear, you're talking about -- put the page number and line
4 so that we're clear.

5 MR. BRYSON: Yes. And just for the record, this
6 is the IH testimony. It's PX4026, page 112, lines 2 to 13.

7 BY MR. BRYSON: (Continuing):

8 Q. Mr. Broderick, I want to talk to you a little bit about
9 your printed advertisements.

10 A. Okay.

11 Q. For promoted items, Albertsons still sends around
12 printed advertisements; correct?

13 A. Yes.

14 Q. And those traditional print advertisements consist of
15 ad circulars; correct?

16 A. Correct.

17 Q. What's an ad circular?

18 A. It's a weekly -- it's a weekly printed version of our
19 ad that we're featuring items on promotion for any given
20 week.

21 Q. And Albertsons uses these ad circulars because you feel
22 it still resonates with your customer base; right?

23 A. Yes. But to be clear, we're only able to circulate
24 those ads in about 60 percent of our -- of our market. So
25 we do think that they're important, but there's also other

Broderick - D

1 avenues that we also use to promote our features.

2 Q. So the ads are important; correct?

3 A. Yes.

4 Q. And they do resonate at least with some of your
5 customer base; correct?

6 A. I think they do.

7 Q. The Denver division ad circulars are published on a
8 weekly basis; correct?

9 A. Yes.

10 Q. And they're effective from Wednesday to Tuesday;
11 correct?

12 A. Yes.

13 Q. Now, King Soopers is a Kroger banner operating in your
14 division; correct?

15 A. Yes.

16 Q. King Soopers also sends around printed ads that are
17 effective on Wednesdays; correct?

18 A. Yes.

19 Q. For these King Soopers ads, you specifically compare
20 your ad circulars to the King Soopers ads; correct?

21 A. Yes. For our printed versions, we compare those; and
22 then we also do the same for our digital versions.

23 Q. And then for these King Soopers ads, you are looking at
24 prices; correct?

25 A. I'm looking at a few things in addition to prices.

Broderick - D

1 Q. But one of the things that you do look at in the ads is
2 prices; correct?

3 A. Yes.

4 Q. And for the pricing in the ads, you think it's
5 important for Albertsons to be competitive; correct?

6 A. I do.

7 Q. Okay. Mr. Broderick, I'd like to look at a document.
8 It's in your binder. It's PX2369.

9 In addition, it will pop up on the screen. Feel free
10 to look at whichever version you want.

11 A. Okay. Excuse me.

12 Q. PX2369 is a text message conversation between you,
13 Shaun Fields, and some others; correct?

14 A. Yes.

15 Q. Who is Shaun Fields?

16 A. Shaun Fields, at the time of this email, was our
17 grocery sales manager.

18 Q. And was he a direct report to you?

19 A. No.

20 Q. But he was an employee working under you; correct?

21 A. Yes.

22 Q. And are the rest of the folks on this text message
23 conversation also Albertsons employees?

24 A. Yes.

25 MR. BRYSON: Your Honor, we move to admit PX2369

Broderick - D

1 into evidence.

2 MR. PODOLL: No objection, Your Honor.

3 THE COURT: It will be received.

4 BY MR. BRYSON: (Continuing):

5 Q. Okay. Mr. Broderick, turn to the first page, it
6 contains a message from you; correct?

7 A. Correct.

8 Q. There's an image with this message; correct?

9 A. Yes.

10 Q. And in the image, it's a comparison between Safeway and
11 King Soopers' printed advertisements; correct?

12 A. Yes.

13 Q. And is this your desk that the advertisements are on in
14 the background?

15 A. Yes.

16 Q. Now, did you go into the King Soopers to get this
17 particular advertisement yourself?

18 A. No.

19 Q. Somebody else did it for you?

20 A. No.

21 Q. How did you get this King Soopers advertisement?

22 A. We receive them in our office mail.

23 Q. Understood.

24 And then you compared it to your printed advertisement;
25 correct?

Broderick - D

1 A. Yes.

2 Q. And you try to beat King Soopers on these
3 advertisements; right?

4 A. Well, generally speaking, what we try to do is -- is
5 make sure that our ad invitation is one that's inviting to
6 the customers and we have an attractive price.

7 Q. You see your quote there in the message; correct? It
8 reads, "The beating continues - second pick is w their front
9 gate."

10 Do you see that?

11 A. Yes.

12 Q. And what is "front gate"?

13 A. If you look on the right-hand side of King Soopers' ad,
14 that's what's called "a gate." It looks like there's a
15 second picture to this --

16 Q. Certainly.

17 A. -- based on that.

18 So the front gate would be on the second picture, which
19 would be folded over.

20 Q. Oh, I see. So there's a little foldover on the right?

21 A. So what you're looking at right now would be the inside
22 of the front gate, or we might reference it as "inside the
23 gate."

24 Q. Okay. When you are referring to "The beating
25 continues," you're referring to beating King Soopers;

Broderick - D

1 correct?

2 A. Yeah. I think -- I think what I was really referring
3 to in this is that my team was -- I felt like they were
4 doing a great job of doing everything they could to put a
5 great ad -- ad invitation out.

6 And if we look in terms of like-items within the ads,
7 sometimes there's more like-items, sometimes there isn't.
8 If our price is lower, we would consider that. We would
9 say, "Hey, we won there." So we beat them on that
10 particular one.

11 Q. And sometimes you do win in these advertisements; is
12 that correct?

13 A. Yes. Winning, in terms of how I just described it.

14 Q. In terms of having a lower price than King Sooper?

15 A. On the same item, yes.

16 Q. Turn to the second page.

17 There's a message from Shaun Fields. Do you see that's
18 popped up on your monitor?

19 A. Yes.

20 Q. He writes, "Massive week. Last week in share";
21 correct?

22 A. Yes.

23 Q. And so is he reporting a massive week for produce share
24 in terms of gaining market share?

25 A. Yeah. I don't know what he -- what particular

Broderick - D

1 department he was referencing in total share.

2 Q. It was an increase in some sort of market share; is
3 that correct?

4 A. Correct.

5 Q. And did you attribute this increase in market share due
6 to the fact that you were beating King Soopers or winning
7 against King Soopers in terms of advertised prices?

8 A. No. Because I don't -- when I -- when I look at --
9 when you look at share through that lens, it's -- it's more
10 about what the total store sales are doing. It isn't
11 necessarily specific to an ad -- an ad feature.

12 And then when we look at share, we look at it through
13 windows of time. So it would be four weeks, eight weeks,
14 and twelve weeks.

15 So if we were looking at last week -- and I'm going
16 back a couple of years and trying to interpret what -- what
17 Shaun was saying. If he was looking at last week's share
18 gain, it would have been a four-week time -- time window; so
19 it wouldn't have been one-week specific.

20 Q. And your message -- it said, "The beating continues";
21 correct?

22 A. Yes, it did.

23 Q. So you would beat King Soopers on that particular ad
24 circular; correct?

25 A. Yeah. Or on some of those items within it, but yes.

Broderick - D

1 Q. And you mentioned that it continues, so you had
2 probably beaten them on some of the ad circulars immediately
3 previously; is that correct?

4 A. Well, again, I'm going back a couple years in time. So
5 what -- what I would probably say was that they continue to
6 do a good job. We continue to win. But whether or not that
7 is specific to an ad or whether or not that's specific to
8 share, I don't recall.

9 Q. And if you turn to the third page, you write another
10 message. You write, "their lower lips are quivering";
11 correct?

12 A. Yes.

13 Q. And that refers to Kroger or King Soopers; correct?

14 A. Yes.

15 Q. Now, King Soopers is your closest and most meaningful
16 competitor for white tag or regular pricing, yellow tag or
17 promotional pricing, or advertisements, and one that you try
18 to beat regularly to benefit your customers; correct?

19 A. Can you repeat the first part of your statement or
20 question?

21 Q. Certainly. I'll repeat the whole question.

22 King Soopers is your closest and most meaningful
23 competitor for white tag or regular pricing, yellow tag or
24 promotional pricing, or advertisements, and one that you try
25 to beat regularly to benefit customers; correct?

Broderick - D

1 MR. PODOLL: Objection, Your Honor. Compound.

2 THE COURT: You can break it down.

3 BY MR. BRYSON: (Continuing):

4 Q. King Soopers is one of your closest and most meaningful
5 competitors for white tag or regular pricing; correct?

6 A. They're among our closest, but I wouldn't say they're
7 necessarily our closest. We look at more than just King
8 Soopers. We're looking at Kroger -- excuse me -- we're
9 looking at Walmart as well when we -- when we look at this
10 information.

11 Q. And King Soopers is one of your closest and most
12 meaningful competitors for yellow tag or promotional
13 pricing; correct?

14 A. They're among our most, but I don't know that they are
15 our number one most. We look at all of our competitors to
16 see how we -- how we compare in pricing. So it's important
17 for us to be looking at Kroger. It's important for us to be
18 looking at Walmart and others. So I don't know that I would
19 say they're the number one most, but I would definitely say
20 that they are among the most.

21 Q. And Kroger or King Soopers is one that you do try to
22 beat regularly to benefit customers; correct?

23 A. In advertised pricing or -- or in white tag/yellow tag.

24 Q. Advertised pricing.

25 A. Yeah. I think it's one that we try to make sure that

Broderick - D

1 we're very competitive with versus their ads.

2 MR. BRYSON: Your Honor, we can take a break now.

3 THE COURT: Fair enough. We're going to stand in
4 recess until 1:00.

5 Please mill around. It's going to take me a minute to
6 get everything together.

7 (Recess taken.)

8 THE COURT: You can get off the witness stand, and
9 we'll be in lunch until 1:00.

10 (Morning session concluded at 12:07 PM.)

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C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 6 - AM Session

September 9, 2024

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 8/30/2024
CSR Expiration Date: 9/30/2026

BY MR. BRYSON:**(Continuing): [4]**1368/21 1370/7 1373/4
1378/3**BY MR. COWIE:****(Continuing): [5]** 1336/51338/22 1343/20 1348/5
1354/1**BY MS. DRUMMONDS:****(Continuing): [21]**1286/23 1289/4 1297/1
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1324/15 1326/20 1359/3**DEPUTY COURTROOM****CLERK: [4]** 1283/5

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1368/14 1369/24 1370/5
1372/25 1379/2**MR. COWIE: [12]**1286/21 1289/2 1334/14
1335/25 1336/4 1338/18
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1358/3 1358/7 1358/15**MR. KELLY: [1]** 1277/14**MR. MATTHEWS: [1]**

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1373/2 1378/1**MR. VENKAT: [1]**

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1359/11**MS. HIEMSTRA: [1]**

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MS. MAINIGI: [1]

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MS. MUSSER: [9]1278/3 1278/7 1279/2
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1281/13 1281/23 1282/2**MS. PFAFFENROTH: [3]**

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1359/12 1359/14 1360/6
1360/10 1360/15 1368/17
1368/20 1370/2 1373/3
1378/2 1379/3 1379/8**THE WITNESS: [10]**1283/7 1304/16 1311/1
1314/13 1326/3 1338/21
1359/13 1359/15 1360/1
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11000 [1] 1272/18**112 [1]** 1370/6**115 [1]** 1272/21**1162 [2]** 1273/2 1273/5**12 [4]** 1293/20 1298/11

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15 percent [3] 1313/6
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