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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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|-----------------------------|---|---------------------------|
| FEDERAL TRADE COMMISSION, |) | |
| et al., |) | |
| |) | |
| Plaintiffs, |) | Case No. 3:24-cv-00347-AN |
| |) | |
| v. |) | |
| |) | |
| THE KROGER COMPANY and |) | September 5, 2024 |
| ALBERTSONS COMPANIES, INC., |) | |
| |) | |
| Defendants. |) | Portland, Oregon |
| |) | |

PRELIMINARY INJUNCTION HEARING
DAY 8 - AFTERNOON SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES

FOR PLAINTIFF FEDERAL
TRADE COMMISSION:

Ms. Susan Musser
Mr. Charles Dickinson
Mr. Daniel John Matheson
Mr. Jacob Hamburger
Ms. Emily Blackburn
Ms. Guia Dixon
Federal Trade Commission
400 7th Street S.W.
Washington, DC 20024

Ms. Laura Hall
Ms. Elizabeth Arens
Ms. Lily Hough
Mr. Harris Rothman
Mr. Alexander J. Bryson
Ms. Katherine Drummonds
Mr. Barrett Anderson
Ms. Jeanine Balbach
Ms. Trisha Grant
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

FOR PLAINTIFF STATE
OF ARIZONA:

Mr. Saivignesh Venkat
Office of the Arizona Attorney General
400 W. Congress Street, Suite S-215
Tucson, AZ 85701

FOR PLAINTIFF STATE
OF CALIFORNIA:

Ms. Nicole Gordon
Office of the California Attorney
General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

FOR PLAINTIFF STATE
OF ILLINOIS:

Mr. Paul Harper
Office of the Illinois Attorney
General
115 S. LaSalle Street
Chicago, IL 60603

1

FOR PLAINTIFF STATE
OF OREGON:

2

Mr. Christopher J. Kayser
Larkins Vacura Kayser LLP
121 S.W. Morrison Street, Suite 700
Portland, OR 97204

3

4

5

Mr. Tim D. Nord
Oregon Department of Justice
Civil Enforcement
1162 Court Street NE
Salem, OR 97301

6

7

8

Ms. Cheryl Hiemstra
Oregon Department of Justice
Civil Enforcement Division
1162 Court Street N.E.
Salem, OR 97301

9

10

FOR DEFENDANT KROGER
COMPANY:

11

12

Mr. B. John Casey
Stoel Rives LLP
760 S.W. Ninth Avenue, Suite 3000
Portland, OR 97205

13

14

Mr. Bambo Obaro
Weil, Gotshal & Manges LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065

15

16

17

Ms. Luna Ngan Barrington
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

18

19

Mr. Matthew M. Wolf
Ms. Sonia Kuester Pfaffenroth
Mr. Christian Schultz
Mr. Joshua Davis
Mr. Michael Kientzle
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001

20

21

22

23

24

25

1 (Continued:)

2 Mr. Mark Andrew Perry
3 Mr. Luke Sullivan
4 Mr. Sebastian Laguna
5 Weil, Gotshal & Manges LLP
6 2001 M Street NW, Suite 600
7 Washington, DC 20036

8 Rebecca J. Sivitz
9 Weil, Gotshal & Manges LLP
10 100 Federal Street, 34th Fl.
11 Boston, MA 02110

12 Ms. Christine Wheatley
13 Kroger General Counsel
14 The Kroger Company
15 1014 Vine Street
16 Cincinnati, OH 45202

17 Antonio Matthews
18 In-house counsel with Kroger
19
20
21
22
23
24
25

1 FOR DEFENDANT
2 ALBERTSONS COMPANIES,
3 INC.:

Mr. David H. Angeli
Angeli Law Group LLC
121 S.W. Morrison Street, Suite 400
Portland, OR 97204

4
5 Ms. Enu Mainigi
6 Mr. Jonathan Bradley Pitt
7 Mr. Adam Joshua Podoll
8 Ms. Beth A. Stewart
9 Mr. Michael Cowie
10 Mr. Tyler Infinger
11 Ms. Adwoa Seymour
12 Mr. Thomas Moriarty
13 Mr. Thomas Ryan
14 Williams & Connolly
15 680 Maine Avenue S.W.
16 Washington, DC 20024

17 Mr. James Andrew Fishkin
18 Dechert, LLP
19 1900 K Street NW
20 Washington, DC 20006

21 Jon-Peter Kelly
22 Senior Vice President - Head of
23 Litigation at Albertsons Companies

24 Dan Richardson, C&S Wholesale Grocers
25 Sullivan & Cromwell LLP
1700 New York Avenue NW
Washington, D.C. 20006

19 Present For Third-
20 Witness George:

Jeremy Larson

22 COURT REPORTER:

Dennis W. Apodaca, RMR, RDR, CRR, CRC
United States District Courthouse
1000 S.W. Third Avenue, Room 301
Portland, OR 97204
dennis_apodaca@ord.uscourts.gov

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| Witnesses: (On behalf of Kroger) | Direct | Cross | ReD |
|----------------------------------|--------|-------|------|
| Sarah George | 2002 | 2026 | 2059 |
| Mohomed Maharroof | 2065 | 2096 | 2105 |
| Rajiv Gokhale | 2108 | 2143 | |

1 (September 5, 2024)

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

3 (Afternoon session; open court:)

4 THE COURT: Please be seated. Good afternoon.

5 MR. OBARO: Good afternoon, Your Honor.

6 MS. MUSSER: I'm so sorry. I do have a new colleague
7 to enter her appearance.

8 Go ahead.

9 MS. DIXON: Guia Dixon, Your Honor.

10 THE COURT: Thank you.

11 Go ahead.

12 MR. OBARO: Thank you, Your Honor.

13 We also have Mr. Rajiv Gokhale, who is one our
14 experts, in the jury box.

15 THE COURT: Hello.

16 MR. OBARO: Your Honor, we would like to call
17 Sarah George, and she is appearing remotely.

18 MR. LARSON: Your Honor, Jeremy Larson on behalf of
19 third-party witness for Costco.

20 Thank you.

21 THE COURT: And who is that on the side?

22 MS. GORDON MOORE: Cori Gordon Moore, Your Honor. I
23 am in-house counsel for Costco.

24 THE COURT: Go away. We don't need to see you. You
25 may need to go on the other side. You are not part of the

S. George - D

1 witness.

2 We need to swear her in.

3 Oh, my gosh. I don't know what happened.

4 Do you have the Owl?

5 So in-house counsel may need to step outside. I
6 mean, she does not need to be in the view while we are here.
7 It is one thing if you wanted to be in person.

8 MS. GORDON MOORE: Okay. I will do that, Your Honor.

9 THE COURT: I don't know what is going on with the
10 technology. It was fine with you in the room, but we don't
11 need to have you on camera.

12 So we're going to swear you in.

13 THE WITNESS: Okay.

14 (The witness was duly sworn and appeared remotely
15 through video.)

16 THE COURT: You need to spell your first and last
17 name on the record.

18 THE WITNESS: My name is Sarah, S-A-R-A-H; last name
19 George, G-E-O-R-G-E.

20 THE COURT: All right. Go ahead.

21 DIRECT EXAMINATION

22 BY MR. OBARO:

23 Q Good afternoon, Ms. George.

24 A Hello.

25 Q Ms. George, where do you currently work?

S. George - D

1 A I work for Costco Wholesale in Issaquah, Washington.

2 Q And what is -- I'm sorry -- I think I interrupted you in
3 your response. Where do you currently work?

4 A I work for Costco Wholesale in Issaquah, Washington.

5 Q Ms. George, what's your current title at Costco?

6 A Senior vice president of food and sundries.

7 Q When did you start working at Costco?

8 A It was May of 1994.

9 Q Mr. Rennick, can we please put up DDX17.

10 Ms. George, can you see the demonstrative that's on
11 the screen?

12 A I can see it.

13 Q And can you please walk us through some of the positions
14 you have had at Costco between 1994 and today?

15 A As it says, I started working in a retail location in our
16 Portland, Oregon, warehouse in 1994 and held a couple of
17 different positions, mostly as a cashier in that location.

18 I transferred to our corporate offices in 1998 to a
19 position we call inventory control specialist, which is the
20 beginning of a buy-on career, a reorder clerk.

21 Then I was promoted through a couple of different
22 positions there, so I relocated to Plano, Texas, as assistant
23 general merchandise manager, which is effectively a manager of
24 the buyers in our Texas office in 2008.

25 I was promoted to the general manager of the

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1 Los Angeles office in 2015, and then I relocated back to
2 Issaquah in 2019 as senior vice president of fresh foods, and
3 since I have lateral responsibilities now into corporate food
4 and sundries.

5 Q What are your responsibilities as SVP of corporate food
6 and sundries?

7 A I oversee the buying operations of our buyers of food
8 categories that are packaged foods, candy, snack food, liquor,
9 frozen, refrigerated, and specialty foods.

10 Q And does Costco operate in the majority of states in the
11 United States, Ms. George?

12 A The majority, yes.

13 Q The only states that Costco doesn't have a warehouse,
14 Rhode Island, West Virginia, and Wyoming?

15 A Yes.

16 Q And here in Oregon, Costco has 13 warehouses; is that
17 right?

18 A As of today, I believe that's correct.

19 Q I think I read earlier this week that Costco is in the
20 process of opening a new warehouse location in October of this
21 year in Oregon?

22 A October 19 in Bend, yes.

23 Q I would like to talk briefly about how Costco's business
24 is structured. Is Costco's business divided into core
25 merchandise categories?

S. George - D

1 A Yes.

2 Q And what are those core business merchandise categories?

3 A Foods and sundries. Which I oversee; fresh foods, which
4 was my prior position, and then non-foods.

5 Q Can you give the Court a sense of what types of products
6 are included in the foods and sundries categories.

7 A An easy way to describe it would be most of the products
8 that are edible that come in prepackaged directly from a
9 supplier are included in food and sundries.

10 Q Can you give the Court a sense of what's included in the
11 fresh foods category.

12 A The fresh foods would be more of the items that we bake
13 in-house or cut in-house -- service, deli, meat, rotisserie
14 chicken, et cetera, with the exception of produce, which we
15 also consider fresh, although we don't package in-house.

16 Q Lastly, can you give us a sense of what's included in the
17 non-food categories?

18 A Most of everything else.

19 Q TVs?

20 A Electronics. We do health and beauty aids into non-foods.

21 Q Thank you, Ms. George. Does Costco also operate gas
22 stations and pharmacies?

23 A We do.

24 Q And how many gas stations does Costco operate in the
25 United States?

S. George - D

1 A In most of the locations that we operate, so over 550.

2 Q And how many pharmacies does Costco operate in the
3 United States?

4 A Similar answer; over 550.

5 Q You testified earlier, Ms. George, that you started
6 working at Costco about 30 years ago in 1994?

7 A Yes.

8 Q I would like to talk about how much Costco has changed and
9 how its market share has grown in the 30 years that you have
10 been at the company. Is it fair to say that Costco has grown
11 significantly during your time at the company?

12 A Yes.

13 Q And, for example, Costco's employees, the employee count
14 in the U.S. has grown in the 30 years that you have been at the
15 company; is that right?

16 A Yes.

17 Q And we have here 47,000 employees in '94 and then in
18 2023 --

19 MR. ANDERSON: Objection, Your Honor. Lack of
20 foundation for these numbers.

21 THE COURT: Overruled.

22 BY MR. OBARO:

23 Q We have 47,000 employees in 1994 and 208,000 employees in
24 2023. Is that consistent with your understanding of the
25 employee growth over the last 30 years at Costco?

S. George - D

1 A That is consistent with my understanding.

2 Q We also have U.S. store count. Has the U.S. store count
3 grown over the last 30 years since you have been at Costco?

4 A It has.

5 Q And do the figures of 182 stores in 1994 and now 591
6 stores in 2023, is that consistent with your understanding of
7 the growth of the U.S. stores for Costco?

8 A Yes.

9 Q Stock prices over the last 30 years also have
10 significantly grown, I imagine, for Costco; is that right?

11 A Yes.

12 Q We have \$15.75 in 1994 and in 2023, \$504.68. Is that
13 consistent with your understanding of the growth in stock price
14 over the last 30 years of Costco?

15 A I did not research 1994, nor do I know exactly when in
16 2023 that was pulled, but those numbers seem reasonable.

17 Q Those numbers seem generally directionally reasonable in
18 your opinion?

19 A Yes.

20 Q And has Costco sales in the food and fresh categories
21 grown since the 1990s?

22 A Yes.

23 Q And has the change that's reflected on the screen here
24 illustrate the growth in the food and fresh categories over the
25 last 30 years?

S. George - D

1 A Again, that seems directionally correct.

2 Q That's \$10 billion in 1994 in the food and fresh
3 categories, and \$128 billion worth of sales in 2023
4 directionally seems right?

5 A Correct.

6 Q Next, Ms. George, I would like to talk about the
7 competitive landscape in the retail grocery industry. Can you
8 turn in your binder to DX1456. It is also going to be on the
9 screen, if that's easier for you.

10 A Okay.

11 Q Do you recognize DX1456 as Costco's 2023 annual report for
12 fiscal year ending September 3rd, 2023?

13 A I do.

14 Q If you could turn to page 68 of DX1456. It is also going
15 to be on the screen.

16 A Okay.

17 Q Can you see the list of executives and senior officers
18 listed at Costco on DX1456?

19 A I can.

20 Q On the left, about half way down, do you see that you're
21 listed as one of the executives and senior officers at Costco?

22 A I do.

23 MR. OBARO: Your Honor, I move to admit DX1456 into
24 evidence.

25 MR. ANDERSON: No objection.

S. George - D

1 THE COURT: It will be received.

2 BY MR. OBARO:

3 Q Ms. George, if you could now turn to the page ending in
4 Bates number 14. It will also be on the screen. I want you to
5 focus on the section titled "Competition."

6 A The page labeled 14 or my actual?

7 Q Labeled at the bottom 14, ending in 14.

8 A Okay. Thank you.

9 Q Do you see the section titled "Competition"?

10 A I do.

11 Q And do you see the first sentence that says, "Our industry
12 is highly competitive, based on factors such as price,
13 merchandise, quality, and selection, location, convenience,
14 distribution strategy, and customer service."

15 Do you see that?

16 A I do.

17 Q And do you agree with that sentence, Ms. George?

18 A I do.

19 Q And you agree that the grocery retail industry is highly
20 competitive?

21 A I do.

22 Q Why do you think the grocery retail industry is highly
23 competitive?

24 A Based on -- based on the number of competitors in the
25 market and the pricing strategies of those different

S. George - D

1 competitors.

2 Q Do you also agree that the different competitors in the
3 retail grocery industry all compete for members' shared wallet?

4 A I do.

5 Q And do you also agree that people have a choice of where
6 to shop and competition is to entice the members to shop at
7 Costco as opposed to other retail grocery options that they
8 have?

9 A I do.

10 Q The next sentence there says, "We compete on a worldwide
11 basis with global, national, and regional wholesalers and
12 retailers, including supermarkets, supercenters, online
13 retailers, gasoline stations, hard discounters, department and
14 specialty stores, and operators, selling a single category or
15 narrow range of merchandise."

16 Do you see that?

17 A I do.

18 Q And do you agree with that sentence?

19 A I do.

20 Q And why does Costco view itself as competing with all of
21 these various channels?

22 A Because we sell all of those various channels to one
23 example or another, and so we consider anybody selling that
24 competitors to that a share of wallet that you mentioned.

25 Q Then you say you "consider anybody selling any of that."

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1 What do you mean by "that"?

2 A Hard discounting specialty stores, single categories, or
3 narrow ranges, any of the above listed.

4 Q Moving on to the next sentence in that paragraph titled
5 "Competition," other than Costco, who does Costco view as
6 significant players in the grocery retail industry?

7 A I wouldn't qualify one thing to say that we would
8 consider -- this is not specific to grocery retail. This
9 statement is about retail. So that word inserted into that
10 is -- it's just not what this says. But Walmart, Target,
11 Kroger, and Amazon are among our significant general
12 merchandise retail competitors in the U.S.

13 Q And thank you for the clarification. And we have heard a
14 lot about Walmart so far in this case. And why does Costco
15 view Walmart as a significant retailer and competitor for
16 Costco?

17 A Because they are one of the largest sellers of general
18 retail merchandise; and therefore, they are one of our larger
19 competitors.

20 Q And would you say that Walmart's scale is also one of the
21 reasons that you would consider Walmart to be a significant
22 competitor for Costco?

23 A Yes.

24 Q And would you also say that Walmart's market significance
25 is a reason you would consider Walmart to be a significant

S. George - D

1 competitor for Costco?

2 A Yes.

3 Q And we have also heard a lot about Amazon in this case.
4 Why does Costco think Amazon is a significant competitor to
5 Costco as a retailer?

6 A Similar answer. Because they are a significant general
7 merchandise retailer competitor in the U.S.

8 Q Costco also identifies Kroger as one of its significant
9 competitors, correct?

10 A Correct.

11 Q And why does Costco view Kroger as one of its significant
12 competitors?

13 A Similar answer. Because Kroger is a significant general
14 merchandise retail competitor, although they focus more into
15 the grocery than the others do.

16 Q Is it because -- is it fair to say, because Costco also
17 sells grocery items, Costco views Kroger as a significant
18 competitor even though Kroger doesn't sell items other than
19 grocery items for the most part?

20 A Yes.

21 Q Next, Ms. George, I would like to focus on Costco's
22 go-to-market strategies and some of the competitive
23 differentiators for Costco, which include product selection or
24 assortment, scale, pricing, and private label. I would like to
25 start with product selection or assortment.

S. George - D

1 How does Costco compete in the retail industry with
2 respect to its product selection or assortment?

3 A We believe by limiting our product selection or assortment
4 to only those that we deem to be the most popular or most
5 desired by our membership base that we are able to have
6 purchasing power in those and offer a simplicity of business
7 that allows our prices to remain low.

8 Q And we are going to talk about each of those points one at
9 a time in a little bit. But before we do that, we've heard a
10 lot about Costco's "limited selection in its product
11 assortment," which is what you also referred to. How does
12 Costco choose the items that make up its product selection?

13 A I think that's a hard question to give a simple answer. I
14 think that's part of what the buyers do as their job, and those
15 criteria for that selection is different by each category. It
16 is different by time of year and by location of a building,
17 et cetera.

18 Q And for the food category, is it fair to say that one of
19 Costco's objectives in selecting the products is to make sure
20 that in any given food category Costco tries to make sure that
21 it's selling the best item that a customer would be looking
22 for?

23 MR. ANDERSON: Objection, Your Honor. Leading.

24 THE COURT: Sustained.

25

S. George - D

1 BY MR. OBARO:

2 Q I'll rephrase, Ms. George.

3 Ms. George, do you agree that one of Costco's
4 objectives in selecting items for the food category is to make
5 sure that Costco is selling the best items that a consumer
6 would be looking for?

7 A I would agree.

8 Q I would like to go back to the 10-K that we were just
9 looking at on page 4 in your binder under "General." It is
10 also reproduced on the screen for you if that is easier.
11 Costco says here -- I'll give you a minute to find it.

12 A All right.

13 Q Costco says on page 4 under "General" that it "operates
14 based on the concept that offering its members low prices on a
15 limited selection of nationally branded and private label
16 products produces high sales volume and rapid inventory
17 turnover."

18 Do you see that?

19 A Yes.

20 Q Do you agree with that statement?

21 A I do.

22 Q How does Costco's limited selection produce high sales
23 volume?

24 A By driving higher volume into fewer selected items, we are
25 able to purchase more of those items and make -- hopefully make

S. George - D

1 suppliers and ourselves and the entire supply chain more
2 efficient, lowering the cost.

3 Q I'm sorry. I interrupted. I think I missed the last part
4 of your answer?

5 A In turn driving more sales into those same items by
6 lowering costs.

7 Q How does Costco's limited selection produce rapid
8 inventory turnover?

9 A Through that same process, I guess. By driving all of the
10 sales for people looking for a particular category of item into
11 fewer item selections, you drive volume into that item makes
12 that item more efficient through the supply chain, lowers the
13 cost, and in turn you sell more.

14 Q Does that rapid inventory turnover that you just discussed
15 allow Costco to sell inventory before it has to pay for it
16 while also taking advantage of early discounts?

17 A Each item is negotiated individually, and so that's a
18 broad statement, but it is a goal to try to negotiate terms
19 that allow us to sell an item before we pay for it.

20 Q And is the ability to sell an item before you pay for it
21 one of the advantages of having a limited selection strategy?

22 A I believe so, yes.

23 Q And next I would like to focus on Costco's scale, and
24 specifically the impact of Costco's scale on Costco's costs and
25 prices, and you've touched on this a little bit. Does Costco's

S. George - D

1 reduced selection in high sales volume impact its buying power
2 with suppliers?

3 A We believe it does.

4 Q And how does it do so?

5 A We believe that by having the scale or the volume per
6 individual item be higher than other supply chains, we are able
7 to make that supply chain from production to logistics,
8 transport, et cetera, packaging, everything is able to be more
9 efficient and purchased at a lower cost.

10 Q If I could ask you to turn to DX2686 in your binder, which
11 is a transcript of Costco's Q1 2022 earnings call.

12 A Okay.

13 Q Do you see it? Are you there?

14 A I am.

15 Q And if you could look at page 12, it's a response to a
16 question by Mr. Richard Galanti. First of all, who is
17 Mr. Galanti?

18 A Mr. Galanti is the former executive vice president and
19 chief financial officer.

20 MR. OBARO: Your Honor, we move to admit 2686 in
21 evidence.

22 MR. ANDERSON: Lack of foundation, Your Honor. There
23 is no explanation for how this witness knows anything.

24 THE COURT: Sustained.

25 MR. OBARO: Your Honor, we produced this document to

S. George - D

1 the FTC yesterday, and they didn't raise any objections.

2 THE COURT: But you haven't established it in court.

3 BY MR. OBARO:

4 Q Ms. George, are you familiar with the earnings call,
5 DX2686, the Q1 2023 earnings call? Does that look familiar to
6 you?

7 A I am.

8 Q Does it look like the Q1 2022 earnings call to you?

9 A It does.

10 MR. OBARO: Your Honor, we would move to admit 2686.

11 MR. ANDERSON: Renew the objection, Your Honor.

12 THE COURT: You missed a part.

13 BY MR. OBARO:

14 Q Ms. George, is this document a document that's generally
15 created in the regular course of business, the earnings call?

16 A To my understanding, this is a transcript created by an
17 outside company of our public earnings call, which is a
18 forecast.

19 Q Have you seen this particular document before?

20 A I have not seen this branded prior to this process.

21 Q But through this process, have you had a chance to see
22 this document?

23 A Yes.

24 Q And are you familiar with Mr. Galanti?

25 A I am.

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1 Q And are you familiar with generally Mr. Galanti's
2 discussions of how he generally discusses the business?

3 A I am.

4 Q And you mentioned that you'd seen -- through this process
5 before today you have seen this particular document, DX2686?

6 A Yes.

7 MR. OBARO: Your Honor, I move to admit DX2686 into
8 evidence.

9 MR. ANDERSON: We renew the objection. He has only
10 established that this is Mr. Galanti's statement, not
11 Ms. George's.

12 MR. OBARO: Your Honor, I'm going to ask her about
13 her impression of Mr. Galanti's statement, and we established
14 for the purpose of the document that she is familiar with the
15 document; that she understands the document.

16 THE COURT: She didn't say she was familiar with the
17 document.

18 MR. OBARO: Your Honor, she said --

19 THE COURT: I'm going to sustain the objection. You
20 may continue. You can keep trying.

21 BY MR. OBARO:

22 Q Ms. George, are you familiar with DX2686?

23 A I am.

24 Q I'm sorry?

25 A I am.

S. George - D

1 MR. OBARO: Your Honor, I move to enter 2686 into
2 evidence.

3 MR. ANDERSON: We will renew the objection.

4 MR. OBARO: Your Honor, I'm asking her about --

5 THE COURT: I understand, but you have not
6 established --

7 MR. OBARO: I have established that she is familiar
8 with --

9 THE COURT: You have not established it. I am going
10 to sustain it.

11 BY MR. OBARO:

12 Q Ms. George, do you agree generally -- well, let's look at
13 the document, page 12 of DX2686?

14 MR. ANDERSON: Objection, Your Honor. This is not in
15 evidence.

16 THE COURT: It is not in evidence. You might need to
17 move on. You may want to re-circle back.

18 MR. OBARO: I'll move on, Your Honor.

19 BY MR. OBARO:

20 Q Ms. George, do you generally agree that Costco has
21 significant buying power?

22 A I do.

23 Q Do you?

24 A I do.

25 Q Thank you. We talked about Costco's competitive

S. George - D

1 advantages with product selection and scale earlier, and I now
2 want to move on to talk about Costco's pricing. Does Costco's
3 scale help with its pricing?

4 A We believe it does.

5 Q And how does Costco's scale help with its pricing?

6 A I think part of what explained earlier, that as we drive
7 volume and more purchasing power into an item, we anticipate
8 that the entire supply chain becomes more efficient and lowers
9 the cost of the acquisition of that item from all steps of the
10 supply chain.

11 Q And does Costco leverage the cost savings -- the cost
12 savings that it's able to establish through its scale to invest
13 in pricing for its customers?

14 A We do.

15 Q And reproduced on the demonstrative on page 21 of DX1456
16 is, again, 2023 10-K, and Costco writes: "It believes it has a
17 perception among its customers of pricing authority,
18 consistently providing the most competitive values."

19 Do you see that? It is also on the screen.

20 A I see it on the screen, but I believe I'm on the wrong
21 page.

22 Q It is page 21.

23 A Again, I see it on the screen. I agree with it. I don't
24 find it on the numbered page on my book.

25 Q Let me ask you the question, do you agree that Costco has

S. George - D

1 a strong pricing perception?

2 A I agree.

3 Q And the Court has heard from Kroger and Albertsons about
4 how difficult it is to compete with some of the major grocery
5 retailers, like Costco, on price. In your opinion, does
6 Costco's pricing strategy and business model make it
7 challenging for traditional grocery stores to compete with
8 Costco on price?

9 A We believe it does.

10 Q And let's move on to private label. In your role at
11 Costco, have you overseen private label programs?

12 A I have.

13 Q And were those all under the Kirkland Signature brand?

14 A Historically. Maybe there were a couple different, but
15 now they are under one private label brand called Kirkland
16 Signature.

17 Q Is the Kirkland Signature brand one of the most successful
18 signature brands in the country?

19 A I like to think so.

20 Q Do you have a sense of what percentage of Costco's food
21 sales are attributable to Kirkland Signature's brands?

22 A Yes.

23 Q And what percentage of Kirkland's food sales is attribute
24 to Kirkland Signature brand?

25 A We believe it's about one-third of the sales.

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1 Q About 33 percent?

2 A Yes.

3 Q Ms. George, we have discussed some of Costco's competitive
4 differentiators and its go-to-market strategies. Does Costco
5 go-to-market strategies help Costco better compete with some of
6 the grocery retailers we have previously discussed?

7 A Our go-to-market strategies help us compete, we believe,
8 with everybody we compete with.

9 Q And that includes Amazon?

10 A Yes.

11 Q That includes Walmart?

12 A Yes.

13 Q That includes Kroger?

14 A Yes.

15 Q Does that include Target?

16 A Yes.

17 Q Does that include other supermarkets like Albertsons?

18 A Yes.

19 Q Does that include hard discounters like Aldi?

20 A Yes.

21 Q Ms. George, would you say that during your time at Costco,
22 Costco has been able to gain market share from traditional
23 supermarkets because of its business model?

24 A Yes.

25 Q In your view, Ms. George, is Costco's product selection

S. George - D

1 and overall shopping experience for groceries a better value
2 proposition than what is offered at traditional supermarkets?

3 A I think by the way I would define it, yes.

4 Q And why don't you tell us why.

5 A I mean, we define "value" as the intersection of price and
6 quality, and with certain other factors influencing that
7 decision, we believe that value is not just the lowest price on
8 an item, but the intersection and that quality. And we believe
9 that we exceed that equation more often than any other
10 retailer.

11 Q Including traditional supermarkets?

12 A And that sounds very arrogant (laughter).

13 Q And you said other retailers, and that would include other
14 grocery retailers?

15 A Yes.

16 Q Ms. George, does Costco have an e-commerce business?

17 A We do.

18 Q Can you describe Costco's e-commerce business?

19 A We are available for purchase of general merchandise as
20 well as grocery on the Costco.com website and many other
21 countries that we operate but not all yet.

22 Q Has Costco been able to gain additional members through
23 its same-day and two-day grocery delivery options?

24 A We have.

25 Q And has Costco been able to grow its business through its

S. George - D

1 grocery delivery options?

2 A We have.

3 Q How so?

4 A There are members who want products delivered directly to
5 their home without having to go to a Costco location, and so we
6 have offered them those three options that you mentioned,
7 two-day delivery, via shipping to their home, same-day
8 delivery, or gourmet purchases, which we consider a different
9 chapter, kind of drop-shipped direct from the supplier, and
10 those are available all across the U.S.

11 Q And I would like to show you slide 18 on the
12 demonstrative, DDX17. Does Costco provide --

13 MR. ANDERSON: Objection, Your Honor. This slide
14 comes from another earnings call transcript that has not been
15 offered into evidence.

16 MR. OBARO: We can take the slide down. I'll ask you
17 the question I want to ask you, Ms. George. Does Costco
18 provide online and pick-up delivery services through Instacart
19 and Uber Eats.

20 A We do not offer pick-up like curbside pick-up of
21 groceries. We offer delivery through Instacart and Uber Eats.

22 Q So a customer could, through Instacart, order items from
23 Costco that would be delivered to the customer's home?

24 A Yes.

25 Q The customer could also through Uber Eats order items from

S. George - D

1 Costco that would be delivered to the customer's home?

2 A Correct. Within a range of space outside of the Costco
3 location.

4 Q And is it true that the customer does not need to be a
5 Costco member to utilize Instacart or Uber Eats to purchase
6 items from Costco?

7 A Instacart. And yes, that's true.

8 Q Instacart. I'm sorry. Instacart and Uber Eats -- I made
9 the same mistake in your deposition. Instacart and Uber Eats,
10 you don't need to be a member of Costco to purchase items; is
11 that correct?

12 A Correct.

13 Q Finally, Ms. George, I would like to ask you about
14 Costco's expansion plans. We talked about Costco's plans to
15 open a new location in Oregon next month. Other than that, how
16 many new locations does Costco plan to open over the next five
17 years?

18 A In general, we usually aim to open between 20 and 30 a
19 year; approximately 50 percent of those within the U.S. and
20 50 percent in other locations around the world. So over five
21 years, that's between 100 and 150.

22 MR. OBARO: Thank you, Ms. George. I pass the
23 witness.

24 THE COURT: Any cross-examination?

25 MR. ANDERSON: Yes, Your Honor. Barrett Anderson for

S. George - X

1 the FTC.

2 May I proceed?

3 THE COURT: Yes.

4 CROSS-EXAMINATION

5 BY MR. ANDERSON:

6 Q Good afternoon, Ms. George. My name is Barrett Anderson.

7 I am going to ask you a few questions now.

8 A Okay.

9 Q Ms. George, on direct examination, Mr. Obaro asked you how
10 Costco competes in the grocery industry. I would like to ask
11 you more about that. In your line of work, you are familiar
12 with different kinds of grocery stores; is that right?

13 A Correct.

14 Q In your line of work, those might be called formats or
15 channels?

16 A Yes.

17 Q Costco is in the warehouse club format; is that fair?

18 A Yes.

19 Q Can you name some other stores that are in the warehouse
20 club format?

21 A Sam's Club and BJ's Wholesale.

22 Q Now, other than the warehouse club format, you're familiar
23 that another kind of grocery format is a conventional grocery
24 store?

25 A Yes.

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1 Q Also referred to as a traditional grocery store?

2 A Okay. Yes.

3 Q At Costco, you refer to that kind of format as a
4 supermarket; is that right?

5 A I would say we use both -- all of that terminology, yes.

6 Q Ms. George, you have visited supermarkets before yourself;
7 is that right?

8 A I have.

9 Q You are familiar with what supermarkets look like inside?

10 A I am.

11 Q You're familiar with how they are laid out and what
12 products they sell?

13 A Yes.

14 Q Ms. George, you know what Kroger is; is that right?

15 A I do.

16 Q It operates -- Kroger operates more than 20 supermarket
17 banners around the United States. Is that fair to say?

18 A That sounds reasonable.

19 Q Would that include QFC in Portland?

20 A To my knowledge, yes.

21 Q Are you also familiar with Albertsons Companies?

22 A I am.

23 Q They also -- Albertsons also operates several supermarket
24 banners around the country; is that fair?

25 A That's fair.

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1 Q And that includes Safeway in the Pacific Northwest?

2 A Yes.

3 Q Ms. George, I would like to ask you about how Costco is
4 different than supermarkets. Costco operates membership-only
5 club warehouses.

6 Did I say that right?

7 A Yes.

8 Q Now, on direct examination, counsel showed you Costco's
9 2023 annual report, and I would like to look at it again. That
10 is a document marked DX1456.

11 I'll have Mr. Dunkin put that on the screen.

12 Ms. George, are you there?

13 A Yes.

14 Q This is the same document that you were asked about on
15 direct examination; is that right?

16 A Yes.

17 Q If you could flip with me to the page ending in -011.

18 A Okay.

19 Q I would like you to look at the second paragraph on that
20 paper which begins, "Our average warehouse space."

21 Do you see that?

22 A Yes.

23 Q "Our a average warehouse space is approximately 147,000
24 square feet, with newer units being slightly larger."

25 Is that still correct today?

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1 A In general, yes, although as we open newer, they are
2 slightly larger. The average might go up slightly.

3 Q But we are in the ballpark of the high 140,000 square feet
4 area; is that right?

5 A Yes.

6 Q Now, you would agree that square footage is much bigger
7 than the typical supermarket?

8 A Yes.

9 Q Ms. George, Costco warehouses also have a distinctive
10 appearance, don't they?

11 A Yes.

12 Q If you could look at the second sentence of that paragraph
13 where it says, "Floor plans are designed for economy and
14 efficiency in the use of selling space, the handling of
15 merchandise, and the control of inventory."

16 Is that still accurate with respect to Costco
17 warehouses?

18 A Yes.

19 Q Ms. George, I'm a Costco member myself, so I have been in
20 warehouses before. I would like to ask you a little bit about
21 them. You would agree that Costco warehouses have concrete
22 floors?

23 A Yes.

24 Q And they have very high ceilings?

25 A Yes.

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1 Q And in many warehouses you can see the rafters exposed in
2 the ceiling; is that right?

3 A Yes.

4 Q And when you walk in the store, around the perimeter of
5 the store, there are aisles, right?

6 A Yes.

7 Q And those aisles are very tall and have wide spaces
8 between them; is that fair?

9 A Yes.

10 Q That's large enough to accommodate forklifts; isn't that
11 right?

12 A Correct.

13 Q And products in Costco are stacked on pallets generally
14 when they are in the aisles, correct?

15 A Yes.

16 Q And you can see those pallets stacked on those high
17 shelves above each aisle?

18 A Yes.

19 Q And in the middle of the store you generally see tables
20 and low shelves holding merchandise; is that right?

21 A Yes.

22 Q And general merchandise would include clothes and
23 Christmas decorations and things of that nature?

24 A Correct.

25 Q Now, other than those characteristics, can you name any

S. George - X

1 other distinctive feature of Costco warehouses?

2 A Overall lack of fixtures or other fixtures, meaning
3 cabinetry or display mechanisms outside of pallets would be a
4 pretty distinctive one.

5 Q Ms. George, conventional supermarkets also have a
6 distinctive appearance, don't they?

7 A Yes.

8 Q They have lower ceilings than Costcos?

9 A Usually, yes.

10 Q Typically the center of the store has aisles with dry
11 goods and other grocery items?

12 A Yes.

13 Q And those aisles are narrower than in Costco, correct?

14 A Yes.

15 Q And they have individual products on the shelves, not on
16 pallets generally, correct?

17 A Generally, yes.

18 Q In a typical supermarket, the service departments are
19 around the perimeter of the store; is that right?

20 A Yes.

21 Q And they will have staffed service departments on
22 perimeter; is that right?

23 A Yes.

24 Q So overall you would agree that Costco warehouses appear
25 noticeably different than conventional supermarkets?

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1 A Yes.

2 Q And you would agree that the shopping experience, as a
3 whole, at Costco warehouses is noticeably different than that
4 of conventional supermarkets?

5 A Yes.

6 Q Let's talk about operating hours. If you could, stay on
7 that same page and go to the third paragraph where it begins,
8 "Our warehouses on average operate on a seven-day, 70-hour
9 week."

10 Do you see that?

11 A Yes.

12 Q Is that still an accurate statement today?

13 A It is.

14 Q Ms. George, in your experience, 70 hours per week is
15 several hours per day fewer than the typical supermarket; is
16 that correct?

17 A Yes.

18 Q Mr. Dunkin, you can take down that exhibit.

19 Now, Ms. George, Costco warehouses sell both food and
20 non-food products. I think you testified to that on direct
21 examination; is that right?

22 A Yes.

23 Q I would like to take a moment to talk about some of the
24 non-food items. Costco warehouses stock a wide variety of
25 non-food items; is that right?

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1 A Yes.

2 Q That would include electronics?

3 A Yes.

4 Q Lawn furniture?

5 A Seasonally, yes.

6 Q Jewelry?

7 A Yes.

8 Q Clothing?

9 A Yes.

10 Q The list goes on; is that right?

11 A Yes.

12 Q Those non-food categories that I just mentioned, they're
13 not generally available at the typical supermarket. Is that
14 fair to say?

15 A In most cases, no.

16 Q Now, on direct examination, counsel asked you about
17 Costco's product selection. If we could go back to DX1456 and
18 look down on the page that ends in 010. Under the section that
19 says "General," the last paragraph that page begins, "We
20 operate membership warehouses."

21 Do you see that?

22 A Yes.

23 Q You see in that sentence -- this is the sentence that you
24 looked at on direct examination. It says, "The limited
25 selection."

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1 Do you see where it says "limited selection"?

2 A Yes.

3 Q I want to focus on what the word "limited" means.

4 So if we could go back to page 11 in this DX1456 and
5 look to the fourth paragraph on the page where it begins, "Our
6 strategy."

7 Do you see that?

8 A Yes.

9 Q In the middle of that paragraph there is a line that
10 begins, "We carry less than 4,000 active stock-keeping units
11 (SKUs) per warehouse in our core warehouse business,
12 significantly less than our broad line retailers."

13 Is that still correct today, Ms. George?

14 A It is.

15 Q You would agree with me that only a subset of those 4,000
16 SKUs would be similar to those types of products that are
17 carried by supermarkets?

18 A Correct.

19 Q In your experience Costco carries a very narrow selection
20 of items compared to conventional supermarkets?

21 A Yes.

22 Q Ms. George, at this time I would like to ask you
23 specifically how many SKUs Costco carries in certain product
24 categories, but that is information that Costco has designated
25 confidential. To allow the Court to have that information

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1 while keeping it confidential, we are going to look at this
2 declaration you provided in this case without revealing it in
3 open court.

4 Do you understand?

5 A I do.

6 Q If you could look in your binder to PX506. Let me know
7 when you are there, Ms. George.

8 A I am.

9 Q Is this the declaration that you provided in this case?

10 A It is.

11 Q I would like you to turn to the last page of that
12 declaration.

13 Mr. Dunkin is showing us -- only the Court and
14 counsel, not the public -- the same things that you are looking
15 at right now, Ms. George, in PX5006. But I would like you to
16 confirm that's your signature on the last page of this
17 document.

18 A It is.

19 Q And then you signed it on November 17th, 2023; is that
20 fair?

21 A Yes.

22 Q Ms. George, you provided this declaration under the
23 penalty of perjury, correct?

24 A Yes.

25 Q Everything that you put in this declaration is truthful?

S. George - X

1 A Yes.

2 Q And everything you put in this declaration is accurate?

3 A Yes.

4 Q And you are under the same oath today to be truthful; is
5 that right?

6 A Yes.

7 Q And, Ms. George, you recall being deposed earlier in this
8 case by Mr. Obaro; is that fair?

9 A Yes.

10 Q And you were under oath at that deposition that you are
11 today, to be truthful?

12 A Yes.

13 Q And Mr. Obaro had the opportunity to ask you questions
14 about this particular declaration?

15 A Yes.

16 MR. ANDERSON: Your Honor, at this time we understand
17 the Court has granted Costco's motion to seal this document, so
18 in order to resolve the confidentiality issues, we move the
19 declaration into evidence.

20 MR. OBARO: No objection, Your Honor.

21 THE COURT: It will be received.

22 BY MR. ANDERSON:

23 Q Ms. George, I would like to direct your attention to the
24 first page of paragraph 4 of the declaration. Let me know when
25 you are there.

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1 A I am.

2 Q I would like you to read silently to yourself the first
3 two sentences of that paragraph and then look up when you are
4 done.

5 Okay. Ms. George, do you agree that sentence lists
6 the number of SKUs that Costco carries in the grocery, fresh,
7 and health and beauty categories combined?

8 A I do.

9 Q Those are the three categories at Costco that are similar
10 to categories at supermarkets, correct?

11 A Correct.

12 Q Is that number of SKUs in those three categories still
13 accurate for Costco warehouses on average today?

14 A Yes.

15 Q And just to be clear, it does say that Costco carries
16 fewer than the number listed in that paragraph; is that right?

17 A Yes.

18 Q You can put that to the side.

19 Now, Ms. George, in your experience, conventional
20 supermarket typically carry 40,000 or more SKUs, correct?

21 A Yes.

22 Q And you would agree that the number of SKUs in the grocery
23 categories carried by a Costco warehouse is significantly
24 smaller than the number of SKUs cared by a typical supermarket?

25 A Yes.

S. George - X

1 Q And, Ms. George, you know what a supercenter is, correct?
2 That's a Walmart.

3 A Yes.

4 Q In your experience, supercenters carry around 125,000 SKUs
5 on average?

6 A That's my understanding, yes.

7 Q You would agree that the number of SKUs that Costco
8 carries in grocery categories compared to a supercenter is even
9 smaller?

10 A Yes.

11 Q Ms. George, I would like to talk to you now about the
12 product sizes that Costco carries. Let's look at DX1456, which
13 is the annual report, and look at the page ending in 011, which
14 is where we just were.

15 If you would look at the fourth paragraph, the last
16 sentence, which begins, "Many consumable products."

17 It says, "Many consumable products are offered for
18 sale in case, carton, or multiple pack quantities only."

19 Is that still correct with respect to Costco's
20 product sizes today?

21 A It is.

22 Q So you would agree that another way that Costco's product
23 selection is limited is that Costco Warehouses generally only
24 carry large pack sizes?

25 A Correct.

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1 Q For example, a Costco member cannot buy a single banana at
2 a Costco?

3 A True.

4 Q Just for the record, can you say your answer one more
5 time.

6 A True.

7 Q They would have to buy a 3-pound bunch in most locations?

8 A Yes, they do.

9 Q And a Costco member can't buy a single box of a Kraft Mac
10 and Cheese at a Costco?

11 A Correct.

12 Q They would have to buy a pack of 18 boxes of Kraft Mac and
13 Cheese; is that fair?

14 A Yes.

15 Q Ms. George, in your experience, conventional supermarkets,
16 they carry more than just large-pack sizes of their products;
17 is that right?

18 A Yes.

19 Q And the same is true with supercenters?

20 A Yes.

21 Q These stores carry a wide variety of product sizes?

22 A Usually, yes.

23 Q A shopper could buy a single banana or a bunch of bananas
24 at either of those types of stores?

25 A Yes.

S. George - X

1 Q Ms. George, let's talk about another way that Costco's
2 product selection is limited. Costco does not sell some types
3 of grocery products that supermarkets and supercenters do sell.

4 Is that fair to say?

5 A Yes.

6 Q One example would be that Costco does not carry refresh
7 herbs, for example?

8 A Not usually, no.

9 Q And that's because consumers usually don't buy fresh herbs
10 in large quantities; is that fair?

11 A Yes.

12 Q And, Ms. George, you are aware that something that Costco
13 does offer is a category of product called "Treasure Hunt"
14 products. You've heard that phrase?

15 A I have.

16 Q And Treasure Hunt items at Costco are rotating products
17 that members in the warehouse may have never seen before?

18 A Yes.

19 Q As a Costco members, I can tell you sometimes I have
20 purchased an item at a Costco warehouse that I didn't even know
21 existed when I walked in. Would you say that's a fairly common
22 experience for Costco members?

23 A I hope so.

24 Q It is fair to say that Costco considers Treasure Hunt
25 items as part of its unique shopping experience?

S. George - X

1 A Yes.

2 Q Without saying a percentage number, you would agree that
3 Treasure Hunt products form a significant part of Costco's
4 product selection?

5 A Yes.

6 Q I would like to talk about products that are not Treasure
7 Hunt products that Costco carries on a regular basis. So of
8 those products, Ms. George, Costco carries a mix of national
9 brands and the Kirkland brand; is that fair?

10 A Yes.

11 Q And for some product categories Costco may only carry one
12 brand?

13 A True.

14 Q And for other product categories Costco may carry only two
15 brands?

16 A Yes.

17 Q Now, in your experience, conventional supermarkets usually
18 carry a wide variety of brands in each product category?

19 A Yes.

20 Q So it is fair to say that Costco carries on average fewer
21 brand options in each category than supermarkets?

22 A Yes.

23 Q And the same would be true of supercenters?

24 A Yes.

25 Q Now, I would like to talk to you about the differences in

S. George - X

1 the services at a Costco warehouse compared to a supermarket or
2 supercenter. Costco warehouses do not have staffed deli
3 counters like the typical supermarket, do they?

4 A Not in the sense of interacting with a member and serving
5 a member directly.

6 Q That's fair, Ms. George. Costco warehouses do not have an
7 employee to make special cuts of deli meats for customers when
8 they come in; is that fair?

9 A Correct.

10 Q And Costco warehouses don't have staffed meat counters to
11 do special cuts of meat?

12 A Correct.

13 Q And the same is true of seafood; is that right?

14 A Yes.

15 Q So those types of products at Costco are only offered in
16 pre-selected sizes and amounts?

17 A Yes.

18 Q Is it fair to say that the limited services at a Costco is
19 another way that its shopping experience is noticeably
20 different than that at a conventional supermarket?

21 A In many cases, yes.

22 Q On direct examination, counsel asked you about the number
23 of warehouses that Costco has in the United States, so I would
24 like to ask you about that. If we could turn in the annual
25 report, DX1456, to the page ending in -004.

S. George - X

1 Mr. Dunkin will be putting that on the screen for us.

2 Do you see that map there, Ms. George? I'll pause
3 for a moment.

4 A Yes.

5 Q That says there that there are approximately 600
6 warehouses in the United States and Puerto Rico right now; is
7 that fair?

8 A Yes.

9 Q Is that more or less accurate today?

10 A This is as of December 31st of 2023, so there would be
11 some additions to this list, but it is generally correct.

12 Q Okay. Earlier you testified on direct examination that
13 Costco is aiming to add approximately 25 to 30 stores per year;
14 is that fair?

15 A Yes.

16 Q You're aware that some supermarket companies have far more
17 than 600 stores in the United States; is that right?

18 A Yes.

19 Q Some have over 2,000 stores?

20 A I don't know, but I would not be surprised to hear that.

21 Q It is fair to say that at Costco's current expansion rate,
22 Costco isn't going to get into the thousands of warehouses in
23 the next couple of years; is that right?

24 A That's correct.

25 Q Ms. George, I would like to ask you now about how Costco

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1 selects its warehouse locations. That's another area that
2 Costco has designated confidential. This time we will just
3 need to take a look at your deposition transcript instead of
4 your declaration. The deposition transcript is in your binder
5 marked PX40796, if you could turn to that tab and let me know
6 when you are there.

7 MR. OBARO: Objection, Your Honor. Beyond the scope.
8 I didn't ask anything about the selection of warehouses.

9 THE COURT: Sustained.

10 BY MR. ANDERSON:

11 Q Ms. George, on direct examination, Mr. Obaro asked you
12 about Costco's competitiveness with supermarkets. Now, it is
13 fair to say that Costco has an understanding of how frequently
14 its members visit its warehouses; is that fair?

15 A Yes.

16 Q And, Ms. George, this is a piece of information that
17 Costco has designated confidential, so I would like you to look
18 in your deposition transcript to page 78. That, again, is
19 PX4096.

20 Page 78 refers to the number -- the small number in
21 the upper right-hand corner, you will see the deposition
22 transcript has four pages per large page. So it is the page
23 ending in -021 of the transcript. Let me know when you are
24 there.

25 A I'm here.

S. George - X

1 Q If you could read silently to yourself lines 15 through 20
2 and then look up at me when you're completed. In the meantime,
3 Mr. Dunkin is showing that to the Court and counsel only, not
4 the public.

5 Okay. Ms. George, is it fair to say that this answer
6 remains approximately accurate today?

7 A Yes.

8 MR. ANDERSON: At this time we offer this section,
9 page 78, lines 15 through 20 into evidence.

10 MR. OBARO: No objection.

11 THE COURT: It will be received.

12 BY MR. ANDERSON:

13 Q So it is fair to say, Ms. George, without revealing the
14 number, that Costco members visit club warehouses less
15 frequently than once a day?

16 A Yes.

17 Q And they don't visit every week either, do they?

18 A Correct.

19 Q It is fair to say that on those trips the average Costco
20 member buys enough groceries to last them for more than a day?

21 A Yes.

22 Q In fact, Costco has a name, a special term for the types
23 of larger stock-up trips that its members take. Are you
24 familiar with that term?

25 A I'm familiar with what I call it, yes.

S. George - X

1 Q What does Costco refer to those larger stock-up trips?

2 A "Making a Costco run."

3 Q Ms. George, I would like to move on to membership fees.

4 Now, generally to shop a Costco warehouse, a shopper has to
5 purchase a membership; is that right?

6 A That's correct.

7 Q And just a few days ago Costco raised its membership fees;
8 is that right?

9 A Yes, they did, a few days ago.

10 Q So the cost of a base membership now is \$65 a year?

11 A Yes.

12 Q And the higher tier is now \$130 per year; is that right?

13 A Correct.

14 Q Okay. If we could look at DX1456, the Costco 2023 annual
15 report, the page ending in 011, again, a page that we have been
16 on frequently, I would like to look at the second paragraph,
17 the last sentence, where it says, "By strictly controlling the
18 entrances and exits and using a membership format, we believe
19 our inventory losses (shrinkage) are well below those of
20 typical retail operations."

21 Is that still an accurate statement for Costco
22 warehouses today?

23 A It is.

24 Q And "by strictly controlling entry," that means a member
25 must scan or show a card to get into the warehouse at all; is

S. George - X

1 that right?

2 A Yes.

3 Q And "by strictly controlling the exit," that means a
4 member must have their card scanned before a checker will even
5 begin scanning their items, right?

6 A Yes.

7 Q Let's now look in the same document, the page ending in
8 028. If you look down at the fourth paragraph, where it
9 begins, "The membership format is an integral part of our
10 business and has a significant effect on our profitability.
11 This format is designed to reinforce member loyalty and provide
12 continuing fee revenue."

13 Is that still an accurate representation of Costco's
14 business today?

15 A It is.

16 Q Ms. George, you're aware that conventional supermarkets
17 don't charge membership fees to shop their stores; isn't that
18 right?

19 A I am not actually aware if they can't, but I'm aware that
20 they don't.

21 Q Apologies. They do not generally charge membership fees;
22 is that fair?

23 A Fair.

24 Q And neither do supercenters?

25 A Correct.

S. George - X

1 Q Okay.

2 Now, overall, Ms. George, you would agree that there
3 are few opportunities for non-Costco members to purchase Costco
4 products?

5 A Correct.

6 Q Mr. Dunkin, we can take down the demonstrative.

7 Now, one of the opportunities, Ms. George, you were
8 asked about on direct examination was purchasing products
9 through a Costco website or a third-party app, like Instacart
10 or Uber Eats.

11 Do you remember that question?

12 A Yes.

13 Q I would like to take those categories one at a time. The
14 first one, Costco's website, you would agree that in most
15 cases, in order to shop Costco's website, you must be a Costco
16 member?

17 A Yes.

18 Q Costco charges a delivery fee for products purchased on
19 its website?

20 A In some cases, not all.

21 Q In some cases. Ms. George, it's fair to say that not all
22 products of Costco's are available on its website?

23 A Many are. We have -- this is where it gets a little bit
24 confusing in that we use -- we have what we call a white label
25 site hosted and link to our site. If you include that, then

S. George - X

1 most items are. If you do not include that, then grocery --
2 the same-day site, that's true, a large category of them are
3 not included on Costco.com.

4 Q I would like to ask you about the second category,
5 Instacart and Uber Eats. To be clear, a non-member can't get
6 all of Costco products through one of those third party apps;
7 is that right?

8 A That's true.

9 Q A shopper cannot get access to Costco's shopping
10 experience through a third-party app?

11 A Not the same as a traditional building experience, no.

12 Q Is it fair to say that in order to get products -- Costco
13 products on a third-party app, third-party apps charge an
14 additional fee per product?

15 A Yes.

16 Q Now, Ms. George, on direct examination counsel asked you
17 about some of Costco's competitors, so let's revisit that
18 topic. Let's look back at DX1456 and let's look at the page
19 ending in 014.

20 A Okay.

21 Q This is the section where it says, "Competition." This is
22 where Mr. Obaro asked you some questions.

23 Do you remember that?

24 A Yes.

25 Q I would like to start with the sentence near the end that

S. George - X

1 says, "We also compete with other warehouse clubs, including
2 Walmart's, Sam's Club, and BJ's Wholesale Club in the
3 United States."

4 Is that still accurate today?

5 A Yes.

6 Q And these are the warehouse clubs that are in the same
7 channel as Costco?

8 A Yes.

9 Q You would agree with me, Ms. George, that Costco views
10 warehouse clubs as primary competitors?

11 A Yes. This is where it gets a bit also confused through my
12 testimony and the document on hand.

13 Q Okay. I'm going to ask you a few questions to make sure
14 we are clear on that. Now, the reason that Costco views these
15 warehouse clubs as primary competitors is because they offer
16 similar product selection as Costco; is that fair?

17 A That is fair. It is also -- a good portion of that is
18 because of their business model and pricing -- and product
19 selection, they have a similar pricing model.

20 Q A similar pricing model is also one reason Costco
21 considers them primary competitors?

22 A Yes.

23 Q These warehouse clubs offer large pack sizes like Costco;
24 is that right?

25 A Yes.

S. George - X

1 Q Sometimes -- in fact, most often they generally require
2 memberships or special fees in order to purchase products
3 there; is that right?

4 A Yes.

5 Q And warehouse clubs' shopping experiences are the most
6 similar to shopping at a Costco; is that fair?

7 A Yes.

8 Q Ms. George, in contrast, Costco does not view Kroger as a
9 direct competitor?

10 A I would say we view -- we view them as a direct competitor
11 of sales. We don't view them as a primary competitor of
12 pricing.

13 Q So, Ms. George, your testimony, just to make sure we are
14 clear, is that Costco does not view Kroger as a direct pricing
15 competitor?

16 A We are on most items; if I could be any more vague, yes.

17 Q Is it fair to say the same is true for Albertsons; that
18 Costco does not consider Albertsons to be a direct competitor
19 on pricing?

20 A Yes.

21 Q Now, Costco does not view Kroger or Albertsons as direct
22 competitors because of all the differences we have discussed
23 between Costco and supermarkets generally. Is that fair to
24 say?

25 A Could you repeat that.

S. George - X

1 Q Sure. Costco does not view supermarkets as direct pricing
2 competitors, in part, because of the differences between
3 warehouse clubs like Costco and conventional supermarkets that
4 we've been discussing?

5 A In general on most items, yes.

6 Q I would like to look back at the page that we were just
7 on, the sentence that Mr. Obaro -- the sentence that he asked
8 you about that begins, "We compete on a worldwide basis with
9 globe, national, and regional wholesalers and retailers,
10 including supermarket, supercenters, online retailers, gasoline
11 stations, hard discounters, department and specialty stores,
12 and operators, selling a single category or narrow range of
13 merchandise."

14 Do you remember discussing that sentence?

15 A Yes.

16 Q It is fair to say that sentence includes a whole variety
17 of retail formats, doesn't it?

18 A Yes.

19 Q One of them is supermarkets; is that fair?

20 A Yes.

21 Q One of them is supercenters?

22 A Yes.

23 Q Now, earlier you testified that Costco sells a variety of
24 non-food items that supermarkets do not sell, like electronics
25 and lawn furniture. Is it fair to say that Costco does not

S. George - X

1 compete with supermarkets in those product categories?

2 A That's true.

3 Q I would like to use another example. You've seen the
4 sentence that mentions gasoline stations. Do you agree that
5 Costco does not compete with gasoline stations for sales of,
6 say, of appliances?

7 A Correct.

8 Q Or fresh salmon?

9 A Correct.

10 Q So when this section says Costco competes with certain
11 retailers, it means that Costco sells at least one category
12 that is sold by that retailer. Is that a fair
13 characterization?

14 A Yes.

15 Q Now, on direct examination Mr. Obaro asked you about
16 Costco's pricing. Do you recall that?

17 A Yes.

18 Q Ms. George, Costco conducts price checks on other grocers.
19 Again, we are about to get into confidential areas. I would
20 ask you to agree -- yes or no -- whether Costco conducts price
21 checks on other grocers?

22 A Yes.

23 Q It is fair to say that Costco does not check equally all
24 grocery format's prices?

25 A Correct.

S. George - X

1 Q If you could open to your declaration, paragraph 9.
2 Again, for the record, that is PX5006.

3 A Okay.

4 Q If you look at the sentence that begins, "Costco buyers
5 typically conduct."

6 Do you see that sentence? Please read it silently to
7 yourself.

8 A Okay.

9 Q Is that still accurate today with respect to Costco's
10 pricing strategy?

11 A Yes.

12 Q Now read the sentence that begins, "Costco adjusts its
13 prices."

14 Do you see that sentence?

15 I'm looking now at paragraph 11. I missed that step.
16 If we could look at paragraph 11, at the very bottom of page 2,
17 there is a sentence that begins, "Costco adjusts its prices."

18 Do you see it there?

19 A Yes.

20 Q If you could read that silently to yourself and look up
21 when you are done.

22 Is that still accurate with respect to Costco's
23 pricing strategy today?

24 A Yes.

25 Q I would like you to look at the sentence back in paragraph

S. George - X

1 9 where it says, "Costco" -- I'm sorry. We are still in
2 paragraph 11. That's my mistake. It is on page 3. It begins,
3 "Costco price checks," and I'm going to stop reading there.

4 A Yes.

5 Q Is that still accurate with respect to Costco's pricing
6 strategy today?

7 A Yes.

8 Q Thank you, Ms. George.

9 Mr. Dunkin, you can take that down. Just a few more
10 questions here, Ms. George. In your work at Costco, it is true
11 that you've observed situations when a conventional supermarket
12 has opened near an existing Costco warehouse; is that fair?

13 A Yes.

14 Q Based on your observations, you know about how much a
15 Costco warehouse's sales are affected by the opening of a new
16 conventional supermarket?

17 A I know how much it has in the past so far on average.

18 Q Historically speaking, you know approximately how much a
19 Costco warehouse's sales have been affected by opening of a new
20 conventional supermarket?

21 A Yes.

22 Q Again, this is designated confidential, so let's look at
23 paragraph 10. The first sentence begins, "If a conventional
24 grocery store opens near a Costco."

25 Do you see that sentence?

S. George - X

1 A Yes.

2 Q If you could read that sentence and look up at me when you
3 are done.

4 Is that section -- is that sentence of paragraph 10
5 still accurate as it was at the time you made it?

6 A Yes.

7 Q Now, Ms. George, in contrast, you have also observed
8 situations when a conventional supermarket has closed that used
9 to be near an existing Costco warehouse; is that right?

10 A Yes.

11 Q In that same paragraph, if you could start with the
12 sentence -- the second-to-last sentence that says, "Similarly,
13 if a nearby conventional grocery store closes," and then look
14 up at me when you are done.

15 Is that sentence accurate with respect to historical
16 understandings of what happens when a conventional supermarket
17 closes near a Costco warehouse?

18 A Yes.

19 Q Ms. George, on direct examination counsel asked you about
20 share of wallet.

21 Do you remember that?

22 A Yes.

23 Q It's fair to say that share of wallet is the percentage of
24 a shopper's spending within a certain category that is captured
25 by a particular format or retailer. Is that a fair

S. George - X

1 characterization?

2 A Yes.

3 Q In your experience, Costco does not track share of wallet
4 of its members; is that right?

5 A Correct.

6 Q Ms. George, you're familiar with the proposed acquisition
7 by Kroger of Albertsons?

8 A I am.

9 Q I would like to ask you about Costco's view of the effect
10 of that merger on its business, but this, again, has been
11 designated as confidential, so look in your declaration at
12 paragraph 12, which is on page 3.

13 MR. OBARO: Objection, Your Honor. Beyond the scope.
14 I didn't ask any questions about her view of the merger.

15 THE COURT: Sustained.

16 BY MR. ANDERSON:

17 Q Now, Ms. George, it's fair to say that in your work you've
18 observed Costco and its advertising strategy against
19 supermarkets; is that right?

20 A I would not categorize it as an advertising strategy
21 against supermarkets.

22 Q It's fair to say that you know a little bit about Costco's
23 advertising strategy; is that correct?

24 MR. OBARO: Objection. Beyond the scope.

25 MR. ANDERSON: Your Honor, this is about competition

S. George - X

1 with supermarkets. It is well within the --

2 THE COURT: Then ask that question.

3 BY MR. ANDERSON:

4 Q Ms. George, Costco does not advertise to Kroger shoppers
5 specifically, does it?

6 MR. OBARO: Same objection, Your Honor.

7 THE COURT: Overruled.

8 THE WITNESS: I am not -- I -- I am sure it's
9 something that we do reaches a Kroger member, but I do not know
10 of anything targeted specifically.

11 BY MR. ANDERSON:

12 Q And it is fair to say that Costco does not target
13 Albertsons' customers specifically with advertising?

14 A Same answer. I'm unaware of any.

15 MR. ANDERSON: I pass the witness.

16 MR. OBARO: Your Honor, one objection I would like to
17 make with respect to the declaration now that counsel has gone
18 through it. If counsel wants to admit the specific paragraphs
19 that he referenced, which were within the scope I asked of the
20 declaration, I have no objections to that. But there are
21 paragraphs within the declaration that are beyond the scope of
22 what I asked, and so I don't think that should be admitted.

23 MR. ANDERSON: Your Honor, the document is in
24 evidence already. They should have asserted an objection at
25 the time.

S. George - ReD

1 THE COURT: Agree.

2 MR. OBARO: Your Honor, I'm objecting now because
3 when he submitted --

4 THE COURT: It's too late.

5 MR. OBARO: Okay, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. OBARO:

8 Q Ms. George, I have a few follow-up questions for you. I
9 would like to start with the declaration, which you were asked
10 about, and you were asked a number of questions about the
11 contents of the declaration, and I have a few questions about
12 the process of creating the declaration as well as the contents
13 of the declaration itself.

14 If you look at the last paragraph of the declaration,
15 and we shouldn't put this on the public screen. But it's on
16 the private screen. Do you see where it says, "This
17 declaration is provided to the Federal Trade Commission
18 voluntarily in lieu of responding to a subpoena, and I hereby
19 request that my identity, my company's identity, and the
20 contents of this declaration be kept confidential."

21 Do you see that?

22 A Yes.

23 Q Is it your understanding that the declaration was provided
24 in lieu of responding to a subpoena from the FTC?

25 A Yes.

S. George - ReD

1 Q Okay. Ms. George, you did not draft the declaration
2 yourself, did you?

3 A I did not.

4 Q And you didn't draft any part of it yourself, did you?

5 A No.

6 Q Mr. Anderson asked you about primary competitor and
7 whether Kroger was a primary competitor of Costco.

8 Do you remember that?

9 A Yes.

10 Q A primary competitor -- in your 30 years that you've
11 worked at Costco, "primary competitor" is not a term that you
12 use in the regular course of business; is that right?

13 A Correct.

14 Q And Mr. Anderson also asked you about the term "direct
15 competitor."

16 Do you remember that?

17 A Yes.

18 Q And again, "direct competitor," in your 30 years you've
19 worked at Costco, that's not a term you use in the regular
20 course of business; is that right?

21 A Correct.

22 Q Now, you responded that Costco -- Kroger is not a primary
23 competitor of Costco on pricing. Do you remember testifying to
24 that?

25 A Yes.

S. George - ReD

1 Q I want to unpack that. Costco price-checks Kroger; is
2 that right?

3 MR. ANDERSON: Objection, Your Honor. Leading.

4 BY MR. OBARO:

5 Q Does Costco price-check Kroger?

6 THE COURT: Okay. You can answer that question.

7 THE WITNESS: Yes.

8 BY MR. OBARO:

9 Q Does Costco price-check Walmart?

10 A Yes.

11 Q Does Costco price-check Aldi?

12 A In theory, yes.

13 Q Does Costco price-check Albertsons?

14 A Minimally, yes.

15 Q Does Costco price-check Wegmans?

16 A Yes.

17 Q When you say Costco is not a primary competitor of
18 Kroger -- or Kroger is not a primary competitor of Costco on
19 pricing, do you mean that it's difficult for traditional
20 grocery stores like Kroger to compete with Costco on pricing.

21 A I mean that we do not check as comprehensively or as often
22 because the business model does not allow it to compete as
23 directly on price --

24 Q I'm sorry. Go ahead.

25 A In most cases.

S. George - ReD

1 Q And when you say "the business model," what are you
2 referring to?

3 A What we discussed regarding the efficiency of our model
4 and therefore our pricing strategy and ability.

5 Q So is it your testimony that Costco's business model,
6 including everything we discussed earlier, its limited
7 assortment, the advantages it gets from limited assortment on
8 all the business models that we discussed earlier, allows
9 Costco to be in a position where traditional grocery stores
10 cannot compete with Costco on price?

11 A Everything -- I agree with everything except "cannot." I
12 don't know the frame of the word "cannot," but they do not.

13 Q They do not. And when you say they do not compete with
14 Costco on price, do you mean the price differential between
15 traditional grocery stores and Costco is fairly significant?

16 A Yes.

17 Q Mr. Anderson also asked you a number of questions about
18 Costco's membership. Do you know how many members Costco has
19 in the U.S., including its corporate membership and its total
20 number of members?

21 A Are you asking between members and cardholders?

22 Q Yes.

23 A I do, but I don't have it right in front of me. I would
24 want to refer to it just to make sure I didn't misspeak. It is
25 in the financials -- in one of the disclosures.

S. George - ReD

1 Q Do you have a sense directionally --

2 A That they are growing?

3 Q And worldwide, is Costco's membership over a hundred
4 million?

5 A Yes.

6 Q Is it fair to say that about a third -- is it fair to say
7 that about a third of American families are members of Costco?

8 A I haven't phrased it that way exactly, so I would have to
9 do a little math.

10 Q And if we could look at DX1456.

11 A Page 6.

12 THE COURT: What page?

13 MR. OBARO: Page 6, Your Honor.

14 THE WITNESS: My page 6 is blank.

15 BY MR. OBARO:

16 Q Page 12. Page 6 of the PDF; page 12 with the Bates number
17 at the bottom.

18 A Okay. Yes.

19 Q Do you see the table that has the membership for Costco?
20 The numbers?

21 A Yes.

22 Q Is that consistent with your understanding?

23 A Yes.

24 Q Ms. George, Mr. Anderson also asked you a number of
25 questions about the differences between Costco and traditional

S. George - ReD

1 grocery stores.

2 Do you remember that?

3 A Yes.

4 Q And some of those differences were how wide the aisles are
5 and how high the ceilings are and hours of operation.

6 Do you remember all that?

7 A Yes.

8 Q And despite all the purported differences between Costco
9 and supermarkets, do you agree that Costco views Kroger as a
10 significant competitor for grocery retail?

11 A Yes.

12 MR. OBARO: No further questions.

13 THE COURT: You are finished. I can't tell you to
14 step down, but you can go off screen.

15 Thank you.

16 You may call your next witness.

17 MR. KIENZLE: Good afternoon.

18 THE COURT: Good afternoon.

19 MR. KIENZLE: Michael Kientzle behalf of Defendant
20 Kroger. Defendants next call Mohomed Maharroof.

21 (The witness was duly sworn.)

22 THE CLERK: Have a seat. Would you please state your
23 name for the record, spelling your last.

24 THE WITNESS: Mohomed Maharroof.

25 THE COURT: So will you spell your first and last

M. Maharroof - D

1 name.

2 THE WITNESS: M-O-H-O-M-E-D. Last name is Maharroof,
3 M-A-H-A-R-O-O-F.

4 DIRECT EXAMINATION

5 BY MR. KIENTZLE:

6 Q Good afternoon. Can you tell us a little bit about
7 yourself.

8 A Yeah. Something about me, I'm originally from a country
9 called Sri Lanka. It is a tropical island in the Indian Ocean.
10 I left that country to come to the United States for college,
11 and I ended up in Wisconsin. When you've never seen snow
12 before, it's a really bad idea, you know, but I'm here now. I
13 survived.

14 Q And what do you do at Kroger?

15 A I am currently the vice president of strategic finance at
16 Kroger, which means I have responsibility for capital planning,
17 long-range planning, and mergers and acquisitions for Kroger.

18 Q How long have you been in that role?

19 A About two years and nine months now.

20 Q When you say "capital management," what do you mean by
21 that?

22 A So I have the responsibility for capital allocations. So
23 annually we spend about 3.5 billion in capital, and I have
24 responsibility for allocating that capital by function. I also
25 review and approve capital projects when those come forward for

M. Maharroof - D

1 approval, and then after the fact we review the performance of
2 those capital investments to make sure that we are meeting our
3 financial and operational goals.

4 Q When you talk about capital investments, where does that
5 money go generally?

6 A We think about capital in two buckets: One being in-store
7 investments, so think about new stores, relocations, remodels.
8 The other bucket would be what we call non-storing, which
9 includes technology investment, supply chain investments and
10 the like.

11 Q You also mentioned responsibilities for long-range
12 planning. What does that refer to?

13 A So my team is responsible for the financial model for
14 Kroger, which includes the three-year outlook. So we take into
15 account our expectations from our overall sales perspective,
16 margin perspective, profitability of cash flow strategy, and my
17 team maintains that overall financial model.

18 Q Where did you work before Kroger?

19 A I was with Best Buy for 15 years prior to Kroger, and I
20 had similar roles in capital management and mergers and
21 acquisitions.

22 Q Are you familiar with the integration management office?

23 A I am.

24 Q What is it?

25 A That's the office that we created with representatives

M. Maharroof - D

1 from both Kroger and Albertsons to help with integration
2 planning. So if you think about how we integrate the two
3 companies, we have a group of people both from the Kroger side
4 and the Albertsons side working towards that day-one readiness.
5 Then there is also a group that is focused on efficiency
6 planning, so to make sure we have a clear plan to achieve the
7 efficiency goals that we have set forth.

8 Q What is your role in the integration management office?

9 A I'm part of the executive leadership team of the
10 integration management office with specific responsibility for
11 value realization.

12 Q Sir, I would like to start by discussing the efficiencies
13 work that the integration management office has performed. And
14 if you look in your binder, and I will ask Mr. Rennick to put
15 it on the private screen. You should find DX1727. This
16 document has been previously admitted. While the first page is
17 not redacted, the page we are going to discuss is, so we will
18 keep it on the private screen.

19 Can you please remind us what this document is.

20 A This is a board document. This is part of an update we do
21 on a regular basis to the board at Kroger.

22 Q Now I would like to look at slide 15, please. Is this
23 slide something you helped prepare?

24 A This was prepared by Boston Consulting Group with my
25 direction.

M. Maharroof - D

1 Q What is the purpose of this slide?

2 A The purpose of this is to give the board an update on the
3 process of the progress we are making with the efficiency
4 planning.

5 Q Do you see a line item labeled, "Total gross
6 efficiencies"?

7 A Yes.

8 Q And to the right of that, is there a column labeled
9 "Efficiency range"?

10 A Yes.

11 Q And in that column is Kroger's current estimate of total
12 gross efficiencies set forth?

13 A Right. The high end of that range is what we are working
14 towards internally, so that's our internal goal.

15 Q Is that a one-time or an ongoing efficiency?

16 A It is an ongoing efficiency.

17 Q Does this slide also set forth Kroger's efficiency
18 estimates by individual category?

19 MS. DIXON: Objection, Your Honor. This lacks
20 foundation and calls for hearsay. Mr. Maharroof testified in
21 his deposition that he didn't have access to you all the
22 information underlying this and that he didn't have access to
23 the data analysis. It is the Kroger consultants that actually
24 had access to the detailed information, and they provided a
25 summarized view to Mr. Behalf Maharroof.

M. Maharroof - D

1 MR. KIENTZLE: The witness just testified that the
2 slide was prepared at his direction.

3 THE COURT: Overruled.

4 BY MR. KIENTZLE:

5 Q I'll ask you again, Mr. Maharroof: Does this slide also
6 set forth the efficiency estimates by category?

7 A Yes.

8 Q And are those numbers also listed in the efficiency range
9 column?

10 A Yes. Again, the high end of the range is what we are
11 working towards internally as our goal.

12 Q So would the high end of the range be the current estimate
13 that Kroger has?

14 A Yeah. The numbers have shifted a little bit, but
15 generally they are in that range .

16 Q The lower left-hand corner of this slide mentions
17 "one-time cash benefits." What are those?

18 A Those are the efficiencies that we are expecting, which
19 are one-time in nature after we bring the two companies
20 together. These are things like working capital benefits as a
21 result of terms, negotiations, things like tax savings, because
22 we have captives on both sides of the company, and we bring
23 them together, and there are immediate tax savings. So those
24 one-time efficiencies I captured in this bucket.

25 Q Are those separate from the gross efficiencies listed

M. Maharroof - D

1 above?

2 A They are.

3 Q And again, is Kroger's current estimate of one-time
4 efficiencies set forth here consistent with current
5 expectations?

6 A The range actually has narrowed. We are now working to
7 the low end of this range, but we have a higher confidence in
8 achieving that low end of the range.

9 Q Mr. Maharroof, the Court will hear shortly from the
10 defendants' efficiency expert, Mr. Gokhale. Much of the work
11 that you and the integration management office have done is an
12 input into his analysis. So I would like to give the Court an
13 opportunity to hear from you about the work that will feed into
14 Mr. Gokhale's analysis.

15 So if we continue to look at this slide, and we look
16 at the very top row under "Revenue," I see a line item for
17 revenue growth. Could you give us a brief explanation of what
18 that refers to?

19 A Yes. That refers to -- so both Kroger and Albertsons, we
20 are expecting to continue to see top-line revenue growth
21 similar to what we have seen in the past -- in the past five
22 years or so. To get there, we are planning on accelerating
23 that growth, and a couple of strategies in terms of
24 merchandising will help with that.

25 One of the key areas of merchandising efficiency

M. Maharroof - D

1 growth would be Own Brands. So Kroger and Albertsons both have
2 an Own Brands portfolio. Kroger's Own Brands' portfolio is
3 double the size of Albertsons' in terms of revenue. And what
4 we are planning on doing is, based on the learnings we've had
5 with clean room information with our consultants, we have
6 learned that there are certain categories that Kroger does
7 better in, and there are certain categories that Albertsons
8 does better in.

9 I'll give you some examples, one being in the spices
10 and salty snacks, Kroger would be ahead of Albertsons, and we
11 intend to provide those additional options to our customers
12 through the extension of the Own Brand portfolio. And then we
13 also know that Albertsons does better in multicultural
14 offerings, so Kroger can learn from that. So overall, as we
15 think about learnings from the merger, these are incremental
16 efficiencies that we are capturing.

17 Q Thank you. And if we move one row down to "alternative
18 profit streams," can you help us understand what falls in that
19 category?

20 A Kroger has a successful media business. So this related
21 to retail media. We allow CPGs, or consumer packaged goods
22 companies or national brands to use our assets, so it would be
23 Kroger's website, Kroger's app, to advertise to our customers,
24 and in turn we provide them with data insights.

25 We have enlisted over the past ten years extensively,

M. Maharooof - D

1 including the acquisition of 84.51 to build that capability
2 in-house, and we are able to provide very targeted data --
3 insights into the CPGs, who are able to then advertise to the
4 customers and provide them personalized solutions that they can
5 use -- that they will actually use.

6 So this essentially is contemplating the fact that we
7 would bring Albertsons' retail media into our platform, which
8 is earlier in there -- is in Albertsons' earlier stage in terms
9 of alt. profit, and this would create that incremental
10 opportunity when you bring the two companies together.

11 Q Thank you. What does "health and wellness" refer to?

12 A This refers to incremental pharmacy revenue. Kroger,
13 through a platform called EPRN, have historically achieved
14 incremental revenue growth because we have been able to create
15 efficiencies within the store. We have been able to connect --
16 to better connect with our customers because of this EPRN
17 software, where they can have texting reminders for
18 prescriptions. We've created loyalty because we have provided
19 efficiency pharmacists and pharmacy techs in the store by
20 taking away some of the manual tasks and automated them.

21 So we currently see, based on the clean room
22 information, that Kroger's prescriptions per week is about
23 80 percent higher than Albertsons'. So what this is
24 contemplating is that we plan to improve the revenue --
25 pharmacy revenue in Albertsons stores, not up to Kroger's, but

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1 somewhere in between, and this is capturing that incremental
2 revenue related to that.

3 Q And I see on the slide here that the next bucket of
4 efficiencies is labeled "gross margin." Could you tell us what
5 the first one there refers to that is labeled "merchandising."

6 A Yeah. Merchandising here captures Own Brands. So think
7 about this Fred Meyer water here. So this is part of our Own
8 Brands portfolio. What's captured here is incremental margin
9 related to mixed ships so as we are able to offer more Own
10 Brands in our stores, along with Albertsons stores, we are able
11 to provide additional options to our customers, but at the same
12 time link it because Own Brands' portfolio is more profitable
13 than national brands.

14 Q I'm going to ask you next about sourcing in the row below,
15 but before I do, there are a couple of acronyms. Can you
16 explain to us what GRF and GNFR refer to, please.

17 A GFR means goods for resale. The categories here are
18 national brands. so think about Coke, P&G, and so on. And
19 within that, you have national brands, you have Own Brands, and
20 fresh categories. GNFR stands for goods not for resale. So
21 these are goods and services that we procure but not for sale
22 in one of our stores, things like supplies or security services
23 and things like that would fall into this category.

24 What this savings bucket contemplates is that -- we
25 know from clean room information and also in partnership with

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1 Bain, that Kroger and Albertsons pays different prices for the
2 same product and sometimes the same vendor. So we are able to,
3 as part of the merger, have that price transparency and then
4 negotiate the prices to make the gaps smaller between the two
5 companies.

6 Q And the final item under "gross margin, supply chain, and
7 manufacturing," what does that entail?

8 A This has two buckets of efficiencies, one being as part of
9 the 579 store package that we have announced as part of the
10 divestiture. There are certain distribution centers and one
11 manufacturing plant that's being divested. So as part of that,
12 we will have to absorb the volume within our existing
13 facilities.

14 And as we do that, we have an opportunity to
15 reconfigure the network. And as part of that reconfiguration,
16 we will be able to get savings because we will be manufacturing
17 products closer to the stores, and we will be able to provide
18 fresh products to the customers a lot sooner, but at the same
19 time we will be able to get cost savings.

20 The same thing with the distribution center as well.
21 We are able to support the stores in a much more efficient
22 manner, because we will be able to do that in the reconfigured
23 network. So the savings related to that is captured here.

24 Another saving bucket within supply chain and
25 manufacturing is what we call own more transportation. So the

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1 prices we pay to bring a product from a vendor to one of our
2 distribution centers include, not only the price we pay for the
3 product, but freight as well, and we usually pay a premium for
4 that freight. Kroger, over time, has converted some of that
5 in-bound transportation from a vendor-owned to retailer-owned,
6 and we have increased that percentage from 20 percent to
7 50 percent.

8 Albertsons is still in the early stages of that
9 conversion, and they're at about 20 percent currently. So what
10 this contemplates is that we would be using our learnings and
11 our capabilities to convert the in-bound transportation to be
12 owned by Kroger and Albertsons going forward.

13 Q Next, what does the admin. line item refer to?

14 A This refers to a fixed cost savings as a result of
15 bringing the two companies together. So think about two CEOs,
16 two CFOs. There are certain functions like industry relations
17 within finance that you wouldn't need to duplicate. So these
18 are savings related to that.

19 Q And the final line item here, "technology," what does that
20 refer to?

21 A So currently Kroger and Albertsons pay different prices
22 for contracts with Oracle and Microsoft and the likes. This
23 contemplates renegotiating those contracts to be close to the
24 lower end of the two prices that we pay.

25 Q Thank you. We can take that document down, please.

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1 Mr. Maharroof, I would like to understand better where these
2 estimates came from. Can you explain how the process of
3 estimating efficiencies started?

4 A Yeah. It originally started as part of our due diligence.
5 We partnered with our investment bankers at the time,
6 Wells Fargo and Citi, to come up with the efficiency buckets
7 that you see -- that we have kind of talked through right now.
8 And as part of that, we brought in a small group of Kroger
9 leaders to estimate what the high-level ranges would be.

10 Then we brought in BCG, Boston Consulting Group, to
11 help us with the outside view around the reasonableness of the
12 range of these efficiencies. As we went further in integration
13 planning, we have now brought in several consultants to help us
14 with different functional areas. Some examples would be, we
15 have -- I mentioned earlier, with sourcing, we have Bain
16 helping us. We have A.T. Kearney helping us with supply and
17 manufacturing. BCG is helping us with overall integration
18 planning, but also merchandising, health and wellness, and a
19 few other areas as well.

20 Q Did Kroger start analyzing efficiencies before the deal
21 was announced?

22 A Yes.

23 Q You mentioned several consulting firms. What did you ask
24 these consulting firms to do?

25 A We asked them to provide us with the most realistic

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1 estimates, the most realistic ability for us to achieve these
2 efficiencies, and generally they've taken a conservative
3 approach, if you look at the methodology that they have used in
4 all of these estimates. So generally we wanted to make sure
5 that we had a high likelihood and high confidence in achieving
6 the efficiency numbers.

7 Q What types of data do the consultants have access to?

8 A They have access to clean room information. In the
9 majority of the cases, they have encrypted clean room
10 information, which is a highly sensitive level of information
11 that non -- that Kroger employees don't have access to.

12 Q What sort of information is in a clean room?

13 A So things like SKU-level information. The sourcing team
14 would want to understand the different prices. So Bain has
15 access to that. They are able to review the SKU-level category
16 level of information. And the level of information that I get
17 to see or anybody outside of the clean room get to see will be
18 a consolidated level of information.

19 Q What was your team's involvement at this stage in working
20 with the consultants?

21 A My team was very closely involved in reviewing the
22 efficiency estimates with the consultants along with the
23 leaders from both Kroger and Albertsons, because the
24 integration management office, as I mentioned earlier, has
25 representatives from both Kroger and Albertsons, and my team

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1 closely worked with all of them.

2 Q How does your approach to evaluating efficiencies in
3 connection with transactions compare to the way you evaluate
4 investments in the ordinary course of business?

5 A The approach is very similar in the sense that when you
6 look at a capital investment, we think about all investments
7 that you have to make to generate the benefits, and
8 holistically that's how we kind of approached the efficiencies
9 as well. We want to make sure that we understand the overall
10 benefits of each and every category of efficiencies. We take a
11 reasonableness approach, conservative in most cases, and then,
12 also, we want to make sure that we are taking into account the
13 one-time cost to achieve those efficiencies as well, and so
14 it's a similar framework that we use.

15 Q And why has Kroger decided to invest the efforts that
16 you've just described in estimating efficiencies in this case?

17 A Because efficiencies are a key part of our investment
18 thesis, and we want to make sure that we are confident in
19 achieving these numbers.

20 Q Does the integration management office have a process for
21 validating its efficiencies estimates?

22 A Yes.

23 Q Can you describe that for us.

24 A Yeah. There are key criteria to validating efficiencies,
25 one having detailed project level information for each of the

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1 functional areas. So think about -- a supply chain may have
2 200 different projects with dollars ranging from a million to
3 ten. And having that level of information, with dependencies
4 called out, we want to make sure the right teams are involved
5 in understanding the dependency. So one example would be
6 sourcing wouldn't be able to achieve their efficiencies without
7 having dependencies called out with merchandising and supply
8 chain. So we want to make sure it is a holistic discussion.

9 Then the other one being, which I mentioned earlier,
10 around one-time cost to achieve, we want to make sure that
11 teams are taking into account the costs related to these
12 benefits as well. One of the criteria is making sure that the
13 technology team is involved in understanding any technology
14 related, whether it's a system, a change system, an upgrade,
15 and that's part of the conversation as well.

16 Q And as a result of the work that you've just described,
17 approximately what proportion of the efficiency estimates has
18 the integration management office been able to validate as of
19 today?

20 A We are at about 85 to 90 percent validated.

21 Q So given time constraints -- I don't want to discuss all
22 to discuss all of that validation work here today -- but I
23 thought it would be great if we touch on one example.

24 I think we discussed a moment ago national brand
25 savings in the "sourcing" category. Can you describe what sort

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1 of validation work has gone on in that category?

2 A So for national brands, as I mentioned earlier, the
3 SKU-level information that sourcing team and Bain has reviewed
4 along with my evaluation team in understanding the cost
5 differences, so based on that SKU-level information by
6 category, they have estimated what a gross variance is, so the
7 cost variance between what Kroger pays and what Albertsons pays
8 for the same product or similar products.

9 Then they adjust it using multiple kind of
10 contingencies, one of them being the divestiture adjustment.
11 Sourcing specifically uses a 10 percent divestiture adjustment
12 based on guidance from the integration management office.

13 There is also additional contingencies built in,
14 mainly because when you think about sourcing costs, the costs
15 that we pay to the vendors have multiple components to it.
16 There is the base price. There is the promotional funding
17 aspect of it, because we always get some kind of funding tied
18 to it. There is base funding. There is promotional funding.
19 To make sure we are accounting for the aspects related to
20 funding, Bain is taking an additional discount to the overall
21 number, and the net variance is what they are capturing as part
22 of the efficiency number for national brands.

23 Q Does the valuation process include developing plans to
24 achieve the efficiencies?

25 A Yes.

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1 Q Can you describe those plans generally.

2 A Yes. Specifically related to sourcing, Bain is continuing
3 to build what we call "fact packs," which will have detailed
4 information around -- think about it as a template, where a
5 sourcing professional can take it, and it will have all the
6 information they would need to be able to execute on those
7 efficiencies, including SKU-level information, the prices that
8 we pay both Albertsons and Kroger. The volume by supplier and
9 all of that relevant information will be in fact pack.

10 Q And sticking with the national brand savings, are you
11 confident that Kroger will be able to achieve the estimated
12 savings post-close?

13 A Yes.

14 Q Why is that?

15 A A couple of reasons: One being that we have a solid
16 sourcing function that we have been able to -- we have a track
17 record of delivering sourcing benefits in the past several
18 years. And the second thing is the approach and the
19 methodology Bain used gives me comfort that they have taken
20 into account all aspects of negotiations and also have taken
21 the contingencies that I had mentioned earlier have taken a
22 conservative approach in estimating those numbers.

23 Q Have you approached any national brand suppliers to
24 renegotiate prices as of today?

25 A No.

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1 Q Why not?

2 A Because that's -- my understanding is that legally we are
3 not allowed to do so.

4 Q Does that affect your confidence in the likelihood of
5 achieving these savings?

6 A No, because we always contemplated that we wouldn't be
7 able to negotiate until close.

8 Q Does the integration management office have a further step
9 for moving the efficiency estimates from validated to final?

10 A Yes.

11 Q And what sorts of additional steps are involved at that
12 stage?

13 A In order to get efficiencies from validated to final, one
14 key criteria would be to have detailed executable plans. So
15 from having detailed project-level plans, it needs to convert
16 to more of an executable plan. And the second thing being we
17 need to have finalized the one-time customer achieved
18 efficiencies. In some cases, if they are ready to go to what
19 we call the capital committee, which is the committee that
20 approves capital investments, those need to be brought to the
21 capital committee. And then the most important thing is making
22 sure the executive leadership team, so the sponsors on the
23 Kroger side and Albertsons side, are signed off on the final
24 estimates as these are the executable plans, and we are going
25 to be holding them accountable to delivering these numbers.

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1 Q Has Kroger finalized all of its efficiency estimates yet?

2 A No.

3 Q Do you expect the estimates to change materially during
4 the finalization process?

5 A I expect that the numbers will shift around a little bit,
6 but generally speaking, the total efficiency number, I'm pretty
7 confident that it will stay relatively the same.

8 Q So zoom back out to the overall efficiencies picture. In
9 developing these estimates, have you and the integration
10 management office taken into account what Kroger and Albertsons
11 could do as standalone businesses without a merger?

12 A The way we think about these efficiencies is that Kroger
13 has a long-range plan, which we have communicated with our
14 teams, and each team is aware of the goal internally that they
15 have as part of the long-range plan. We have a high-level
16 forecast of Albertsons' business that we have used in our
17 model. The way we think about efficiencies is those need to be
18 incremental to these kind of baseline LRPs.

19 Q Can you provide an example of how that works in connection
20 with any particular efficiencies?

21 A One example is, within supply chain and manufacturing, I
22 talked about owning more transportation earlier. So we have
23 progressed from owning -- from 20 percent vendor in-bound
24 transportation to converting it to retail-owned transportation
25 from 20 percent to 50 percent. But we have continuous work we

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1 can do to achieve a higher goal. We have an internal goal of
2 getting to 80. Getting from 50 percent to 80 percent, which is
3 Kroger's work, is not included in the efficiency estimate.
4 That's part of our LRP, so we consider that separate from the
5 incremental range.

6 Q Speaking generally, do the current efficiencies account
7 for the current divestiture package?

8 A Yes.

9 Q And how do they account for it?

10 A Each team has approached it slightly differently. So
11 sourcing, as I mentioned earlier, they're using a 10 percent
12 adjustment based on guidance from the integration management
13 office. Supply chain and manufacturing, they have -- they want
14 the earlier teams to get engaged in the divestiture package, so
15 they have taken into account the current divestiture package.
16 There are other teams that, like merchandising, that is taking
17 a conservative approach, and so they are using a 650 number
18 adjustment. So all teams have taken into account the
19 divestiture adjustment. It just varies by the teams.

20 Q Have you also assessed the cost that Kroger is likely to
21 incur to achieve the efficiencies?

22 A Yes.

23 Q Now, to preserve confidentiality, there is a demonstrative
24 in your binder. We can also put it on the private screen. It
25 is DDX16. This document, when you find it, has just a couple

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1 of numbers on it. Can you please, without saying the number,
2 point out of us to which letter corresponds to the current
3 estimate of Kroger's cost to achieve these efficiencies.

4 A The point-in-time estimate as of current is what's
5 reflected in B, but this is always evolving, and it's trending
6 towards a higher number than that. So it will be something
7 close to what we have in A is what I'm expecting as we kind of
8 continue to work through some of the details.

9 Q Does that correspond to a specific total gross
10 efficiencies estimate?

11 A Yes. It is the number in A.

12 Q And in your assessment as vice president of strategic
13 finance, is that a reasonable amount for Kroger to spend to
14 achieve these efficiencies?

15 A The way we think about one-time cost to achieve
16 efficiencies is kind of a holistic financial value creation
17 model. So the purchase price for purchasing Albertsons, then
18 the one-time cost to achieve efficiencies, the overall benefit
19 to Albertsons' incremental EBITDA, adjusted with divestiture,
20 and then layering on efficiencies on top of it. So we think
21 about it holistically. And when as we think about our
22 financial model that way, the resulting financial outcomes are
23 acceptable to us.

24 Q Does Kroger have plans to track its efficiencies targets
25 post-close?

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1 A Yes.

2 Q And does it have plans to incentivize employees to achieve
3 the full efficiencies estimates?

4 A Yes. And both those are being finalized right now.

5 Q Does Kroger intend to have employee performance reviews
6 depend meeting the full efficiency target?

7 A Yes.

8 Q Will you personally be held responsible for achieving the
9 full efficiency targets?

10 A Yes.

11 Q Mr. Maharroof, if someone told you that instead of the
12 total gross efficiencies that we have been discussing here
13 today, which, again, I won't say for confidentiality purposes,
14 that Kroger was only expected to achieve \$40 million in
15 efficiencies, what would your reaction be?

16 A Well, the two companies combined will have over 200
17 billion in revenue. It is hard for me to believe that
18 efficiency number would be that low.

19 Q So I would like to shift gears a bit and talk about your
20 day job in capital management. Are you part of the capital
21 committee at Kroger?

22 A I am.

23 Q I believe you testified earlier that you were involved in
24 capital planning?

25 A Correct.

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1 Q When you are planning for a capital project, how do you
2 assess the potential benefits of an investment?

3 A We use the same framework that I mentioned earlier. So
4 the way I think about it, we take the investment. We look at
5 the benefits specifically if there is incremental revenue
6 generated from that type of project, we look at the incremental
7 revenue and then apply a factor to estimate what the EBITDA
8 pass-through would be, and generally we do it in two ways. So
9 if you have source-specific information or specific information
10 that we will be able to calculate the EBITDA pass-through, we
11 would do that. If not, we would use a proxy to calculate what
12 the bottom-line contribution is. Now, this is to calculate
13 EBITDA profitability. Of course, as you make final capital
14 decisions, it takes into account cash flow and other financial
15 metrics, but in order to get there, you need the profitability
16 that I mentioned.

17 Q So, Mr. Maharroof, there is a debate in this case about
18 which margins capture all variable costs. Does the EBITDA
19 pass-through margin you just described capture all variable
20 costs?

21 A It does.

22 Q Do Kroger's gross margins capture all variable costs?

23 A No.

24 Q In capital planning projects, would it be appropriate to
25 consider only Kroger's gross margins?

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1 A No.

2 Q Why not?

3 A Because we would be overestimating the benefit from the
4 capital investment.

5 Q Are there times when Kroger speaks in terms of gross
6 margins?

7 A Potentially. We sometimes talk about gross margins
8 externally, as we have our earnings calls. But for what we do
9 from an investment evaluation perspective, we always have to
10 take into account some EBITDA pass-through or some measure of
11 EBITDA bottom-line profitability.

12 Q Let's look at DX2640 in your binder.

13 I will ask my colleague Mr. Rennick to put this on
14 the private screen only.

15 Can you tell us what this is.

16 A This is an email from one of my team members to me talking
17 about -- what we call a leverage-proof exercise, but it is
18 related to variable costs and what is used in the model.

19 MR. KIN: Your Honor, I move to admit DX2640.

20 MS. DIXON: No objection, Your Honor.

21 THE COURT: It will be received.

22 BY MR. KIENTZLE:

23 Q On the first page, if we go down to a section titled
24 "Non-storing projects," the third bullet there references the
25 original fixed versus variable rates being used in the business

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1 case.

2 Can you help us understand what that means?

3 A Yeah. They're communicating to me that, based on the
4 EBITDA pass-through model that we are using, their assumptions
5 around fixed and variable percentages, and they are confirming
6 that they have reviewed that with the controllership team, and
7 we are in agreement with what the EBITDA pass-through is.

8 Q And is that rate set forth in the bullets below?

9 A Yes.

10 Q Is it that 17.94 percent figure?

11 A That's correct.

12 Q Let's turn to the attachment to this email, which is
13 entitled "Leverage proof exercise." This is also in your
14 binder. We can actually publish this one on the public screen,
15 I believe. It has been marked DX2640A.

16 Mr. Maharroof, what does this spreadsheet show?

17 A This is a sample store profitability statement kind of
18 showing on the left side what a typical operating statement
19 would look like starting with sales, gross margin, all the
20 variable and fixed costs and getting to EBITDA. The middle
21 section is showing for incremental sales that you would
22 generate. So in this case, 100, 000 weekly sales from this
23 store, how much is the bottom-line contribution, or the EBITDA
24 pass-through. So if you follow all the way to the bottom, the
25 17.15 is the EBITDA pass-through for those incremental sales

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1 that you would generate from the store. Then on the right is
2 the resulting operating statement taking into account this
3 additional pass-through from incremental revenue.

4 Q Is this type of analysis actually used for
5 capital-planning purposes at Kroger?

6 A Yes.

7 Q How long has Kroger used breakdowns like this one?

8 A I've seen it used in my two-and-a-half years, almost three
9 years at Kroger, and I know it has been used prior to that as
10 well.

11 MR. KIENTZLE: Your Honor, I move to admit DX2460A.

12 MS. DIXON: No objection.

13 THE COURT: It will be received.

14 BY MR. KIENTZLE:

15 Q Now, if we look on this slide here in the middle portion
16 of the chart, we see there are three general categories of
17 numbers. One is labeled "gross," one is labeled "total
18 variable," and one is labeled "total fixed." Can you explain
19 at a high level what those categories cover?

20 A The gross margin takes into the account the cost of
21 bringing the product to the store, the price you pay to the
22 vendors, any warehouse and transportation, so the
23 transportation costs to the store, that's all taken into
24 account in gross margins.

25 Then there are incremental spend within the store, so

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1 think about employee costs, things like supplies and credit
2 card fees that will be borne within the store are captured
3 within variable costs. Then other costs that are fixed in
4 nature, like taxes, are captured on the fixed costs.

5 Q I would like to focus on the "total variable" section. If
6 you would go to the first row labeled "total employee cost."
7 Can you say specifically what that row covers?

8 A Yeah. For employee costs, typically in a store you have
9 management labor. So if you have a store leader and assistant
10 leaders, they mostly fall into the fixed aspect of labor. And
11 then you also need associates, whether in terms of additional
12 hours or additional headcount to process these sales, so that's
13 why that line item is 75 percent variable.

14 Q And going down a couple of rows to supplies, what does
15 that cover?

16 A Within supplies there are two buckets, so one being a
17 variable from a supplies perspective. Things like shopping
18 bags in a store would be variable with sales. And then there
19 are things like maintenance -- I'm sorry -- supplies that you
20 would use -- cleaning supplies, which would mean more fixed in
21 nature in a store, and so that's why it is reflecting
22 85 percent variable.

23 Q And finally, credit card. What does that line item refer
24 to?

25 A That refers to fees that you would pay Visa or Mastercard

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1 as you process transactions through credit cards.

2 Q And if we look at the bottom right corner of this middle
3 section of the chart, there is a highlighted percentage figure.
4 What does that relate to?

5 A The figure all the way at the bottom is the EBITDA
6 pass-through from these incremental sales.

7 Q Do you use that rate in the ordinary course of business?

8 A We do. The rate fluctuates a little bit, but generally
9 what I normally see is 15 to 20 percent, and it ranges within
10 that.

11 Q We can take that document down, please. I would like to
12 look at an example of a Kroger capital-planning project. Can
13 you look in your binder for a document labeled DX2565A.

14 I will ask my colleague, Mr. Rennick, to put this
15 document just on the private screen.

16 Can you see the document?

17 A Yes.

18 Q Can you tell us what this document is?

19 A This is a capital write-up. So this is the type of
20 write-up that we bring to capital committee as we request
21 capital approval. This one is specifically related to general
22 merchandise acceleration, so investment is going to enhance our
23 e-commerce platform to be able to support general merchandising
24 sales. And primarily with Fred Meyer being one of our formats,
25 with additional general merchandise assortment, this would

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1 allow Fred Meyer customers to purchase the products online and
2 pick it up in a store, and this capital investment is related
3 to that.

4 Q Did you receive a copy of this memorandum in connection
5 with your role in the capital committee?

6 A I did.

7 Q In your role in the capital committee, were you
8 responsible for approving the contents of this memorandum?

9 A I was.

10 MR. KIENZLE: Your Honor, I move to admit DX2565A.

11 MS. DIXON: Objection, Your Honor. Mr. Maharooft is
12 not mentioned anywhere in this document.

13 MR. KIENZLE: I believe the witness just explained
14 his relationship to the document, and he was responsible for
15 approving it.

16 THE COURT: So the fact that he is not mentioned
17 anywhere, what is the basis? You have to give me more
18 information than that.

19 MS. DIXON: Yes, Your Honor. It lacks foundation,
20 Your Honor. I don't think they have established that he
21 actually received this document. I don't think there is an
22 email showing that he just received it.

23 THE COURT: He just testified that he was on the
24 committee that received it. So does that make a difference for
25 you? He just testified to that.

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1 MS. DIXON: I'll withdraw, Your Honor.

2 THE COURT: All right. It will be received.

3 BY MR. KIENZLE:

4 Q So do we see the EBITDA pass-through rate used in
5 connection with this project?

6 A Yes.

7 Q Where can we find it?

8 A On the next page under the "Benefits" section, if you
9 scroll down to the fourth bullet point, there, the team talks
10 about aligning on the EBITDA pass-through rate with seamless
11 finance business partner, and the pass-through rate that's used
12 is 15 percent.

13 Q So we have talked about capital planning for a while. We
14 can take this document for a while, please. I want to shift
15 back to the long-range planning aspect of your job that you
16 talked about at the start of our conversation. Does Kroger use
17 similar margins in its long-range planning?

18 A Yes.

19 Q Can you give us an example?

20 A As we forecast out our sales projections for the next
21 three years, sometimes we need to do sensitivities around the
22 sales growth changes, and when we do that, in order to
23 understand the profitability of those incremental sales, we use
24 the 15 percent EBITDA pass-through -- 15 to 20 percent, as I
25 mentioned. It ranges, but the EBITDA pass-through concept is

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1 used in that.

2 Q In the long-range planning context, would it be
3 appropriate to use gross margins?

4 A No.

5 Q Why not?

6 A Because you would be overestimating the benefit.

7 MR. KIENZLE: Your Honor, I am prepared to pass the
8 witness, but I would like to correct the record briefly about
9 one of the documents that I asked to have admitted. I think I
10 misspoke. I want to make sure the exhibit number is correct.
11 It is not a different document.

12 THE COURT: Okay.

13 MR. KIENZLE: I believe the document we should have
14 admitted was 2640A and not 2460A. It is just the 6 and the 4
15 got switched around there.

16 THE COURT: We don't have 2460.

17 MR. KIENZLE: That's exactly right. That's what I
18 am saying.

19 THE COURT: That's fine.

20 MR. KIENZLE: Thank you.

21 THE COURT: The record will be corrected.

22 MR. KIENZLE: I pass the witness.

23 MS. DIXON: Your Honor, Guia Dixon, Federal Trade
24 Commission, for the plaintiffs.

25 Did you want to take a break, Your Honor, before I

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1 begin?

2 THE COURT: No. But we may take one in between, just
3 depending on how long it is. I have estimates, so continue.
4 I'm not shy. If I feel like everyone needs a break, I'll say
5 so. But thank you for asking.

6 CROSS-EXAMINATION

7 BY MS. DIXON:

8 Q Good afternoon, Mr. Maharroof. How are you?

9 A Good afternoon. How are you?

10 Q Good. Thank you.

11 You testified on direct with my colleague about the
12 total synergies that Kroger hopes to achieve in this
13 transaction, right? We can't say the number, but it was the
14 letter A as far as the total synergies?

15 A Yes.

16 Q Now, in your deposition back in June, you described that
17 number an optimistic goal for Kroger, right?

18 A It's our internal goal, yes.

19 Q But you described it as an optimistic goal, correct?

20 A There is a number that we use in our financial model and
21 then -- I actually do not recall calling it an optimistic goal,
22 but it is our internal goal.

23 Q So let's go to your deposition testimony. You remember
24 testifying in a deposition in this case, right?

25 A Yes.

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1 Q If you look at your binder, PX4064, I'm going to go to
2 page 56.

3 THE COURT: Just give them one second. They are
4 passing it out.

5 Give us that number again, please.

6 MS. DIXON: Yes, Your Honor. PX4064.

7 THE COURT: All right. And the page number?

8 MS. DIXON: Page 56.

9 BY MS. DIXON:

10 Q I'm going to start with line 20. Let me know when you are
11 there, Mr. Maharooof.

12 A I see it on the screen.

13 Q "QUESTION: Why the difference between what you've
14 presented to the board and your internal numbers?

15 "ANSWER: We have presented to the board both views
16 so -- and that's why here it says, "Midpoint of the current
17 range. So we certainly have a -- have a more optimistic goal
18 internally, which is the higher end of that range. Those are
19 the numbers that I just quoted. But what we are showing as
20 midpoint of the current range here is what flows to the model
21 from an overall conservative standpoint."

22 Did I read that correctly?

23 A Yes.

24 Q Now, Mr. Maharooof, I want to go over your basis for
25 testifying to all the synergy numbers that you mentioned

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1 earlier. So let's talk about the process that went into that.
2 Now, to estimate efficiencies, the consultants that you
3 mentioned, they have reviewed sensitive data from Kroger and
4 Albertsons, right?

5 A Correct.

6 Q And that sensitive data would include data from Albertsons
7 about cost or pricing information, right?

8 A Correct.

9 Q And that sensitive data is kept in a clean room, correct?

10 A Yes.

11 Q And because the clean room contains sensitive data, access
12 to that is restricted to everyone, right?

13 A Right.

14 Q I think you mentioned that Kroger executives don't have
15 access to that sensitive data, correct?

16 A Yes. Certain executives at Kroger don't have access to
17 the data. There are different levels of clean room. I have
18 access to clean room, but I don't have access to sensitive
19 clean room, so the level that Bain or some of the other
20 consultants would see.

21 Q So the consultants are able to -- can access information,
22 including sensitive data; is that right?

23 A That's right.

24 Q And that sensitive data would be important to the
25 efficiencies analysis, right?

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1 A Yes.

2 Q And you only have access to a summarized version of that
3 data; is that right?

4 A That's correct.

5 Q So because consultants are not here testifying today,
6 Mr. Maharroof, let me ask you, you don't personally have access
7 to the Albertsons sensitive data, correct?

8 A I do not have access to the sensitive data. I do see a
9 summarized version, as you mentioned.

10 Q So in the majority of the areas that Kroger was looking at
11 from an efficiency standpoint, the data analysis is only
12 accessible to restricted key team members, right, which you are
13 not on?

14 A Yeah. The actual data is only accessible by clean team
15 members, yes.

16 Q As well as data analysis, correct?

17 A Data analysis can be provided at a more consolidated level
18 to those outside of the restricted clean team, and I'm part of
19 the clean team that I can see a consolidated level above that,
20 and certain executives at Kroger cannot see even that level of
21 information.

22 Q So let's go back to your deposition testimony.

23 MR. KIENZLE: Objection, Your Honor. I'm not sure
24 this is proper impeachment. Why are we going back to the
25 deposition testimony, Counsel?

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1 MS. DIXON: I asked about data analysis.

2 MR. KIENZLE: Are you refreshing recollection?

3 MS. DIXON: No. It's because his answer conflicts
4 with what he said in deposition, so I wanted to make the record
5 clear.

6 MR. KIENZLE: Is there something you are looking at
7 in particular?

8 MS. DIXON: Yes. That's what I was about to do.

9 THE COURT: Yes. But you just can't read it into the
10 record like you did before.

11 MS. DIXON: Yes, Your Honor.

12 BY MS. DIXON:

13 Q Let's look at PX4064. This is your deposition testimony,
14 right, Mr. Maharroof?

15 A I was waiting for it to come up on the screen.

16 Q It is also in the binder?

17 A What's the page?

18 Q 4064.

19 THE COURT: You didn't give him the page number. He
20 asked for the page number and line number.

21 MS. DIXON: Yes, Your Honor. I couldn't hear. 4064,
22 at page 21.

23 THE COURT: Lines?

24 MS. DIXON: Page 21, 9 to 21, 21, Your Honor.

25 THE WITNESS: Could you mention those lines again?

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1 MS. DIXON: Sure. 21, line 9 to page 21, line 21.

2 MR. KIENZLE: Your Honor, objection again. I don't
3 think this is proper impeachment. I think what we are being
4 pointed to is consistent with what the witness testified to.

5 MS. DIXON: I'll move on, Your Honor.

6 THE COURT: Okay. Move on.

7 BY MS. DIXON:

8 Q So I just want to be clear, Mr. Maharroof, just looking
9 from an efficiency perspective, the data analysis for those
10 efficiency categories are only available to restricted clean
11 team members, correct?

12 A Not all the analysis. Analysis can be summarized in a way
13 that those that are outside of the restricted clean team can
14 see. So I see a level of analysis that's a little bit more
15 consolidated than those that see in a restricted clean team
16 environment, and those that are outside the clean team, it is
17 at a more summarized level.

18 Q But you are not on the restricted clean team; is that
19 correct?

20 A I am not, but I'm on the clean team.

21 Q But being on the clean team, you are only able to see
22 summarized information, correct?

23 A One level above, yes.

24 Q And I believe you testified on direct that Kroger will use
25 fact packs to help plan -- in achieving its efficiencies; is

M. Maharroof - X

1 that right? And again, you don't have access to those fact
2 packs, right?

3 A I don't.

4 Q Because they contain sensitive data?

5 A Correct.

6 Q So you don't know what's in those fact packs, correct?

7 A I don't.

8 Q And the consultants that Kroger hired, they were the ones
9 that created those fact packs, correct?

10 A That's correct.

11 Q And they are the ones who did the analysis for those fact
12 packs, right?

13 A Yes.

14 Q Now, you are not aware of Albertsons' specific strategic
15 plans, correct?

16 A I am not.

17 Q And so you don't know what strategic plans Albertsons
18 might have; for example, for its private label brands; is that
19 right?

20 A I don't have specific information, no.

21 Q So Mr. Maharroof, you're testifying here today about
22 efficiencies that Kroger may get from the transaction, but you
23 are not aware of what Albertsons might be doing on its own to
24 realize these same cost savings; is that right?

25 A I don't have visibility to specific plans, correct.

M. Maharroof - X

1 Q And then some of the efficiencies you've testified about
2 today use the "best of both pricing" approach, right, to
3 estimate cost savings?

4 A Correct.

5 Q Those would include sourcing savings?

6 A Yes.

7 Q And then "best of both pricing" means that you would look
8 at Albertsons' standalone costs and then compare it to Kroger's
9 standalone costs, right?

10 A Correct.

11 Q And the assumption there is that the merged entity would
12 then be able to get the lower cost between the two, correct?

13 A Yes. That's a broad assumption, but as I kind of walked
14 through in the methodology, there are contingencies or
15 adjustments that are being made, and so it takes into account
16 the fact that you may not get the exact, same -- or the lowest
17 of the two, because if you kind of follow the national brands
18 example, for example, you get to a number that's about half of
19 the gross variance. So we are not capturing the overall gross
20 variance. So it is essentially saying from a math perspective
21 that you would land somewhere in the middle.

22 Q In essence, you are comparing the cost from the two
23 companies and from that deriving a cost savings estimate; is
24 that fair?

25 A Yes.

M. Maharroof - X

1 Q But to get the lower cost, the merged entity would still
2 need to have discussions with suppliers, right?

3 A Yes.

4 Q And that's what those fact packs are for, right?

5 So post-merger, it is not as simple as Kroger going
6 to a supplier and saying, "Look, I'm going to buy what I used
7 to buy; I am going to buy what Albertsons used to buy; now give
8 me the lower price," right?

9 A That is my understanding after the merger.

10 Q I'm sorry. What is your understanding?

11 A That the sourcing professionals will go to the suppliers
12 and discuss prices.

13 Q So discuss prices, but they can't just say, "I will pay
14 you the lower price," right?

15 A It's part of the negotiation based on the information they
16 have in front of them.

17 Q And Kroger has not discussed post-merger pricing with any
18 supplier; is that right?

19 A Correct.

20 Q And Kroger has no plans to reach out to suppliers until
21 the merger closes, right?

22 A That's correct.

23 Q So Kroger has no commitment, no agreement, no discussions
24 with suppliers, but you are testifying that the merged entity
25 would still be able to achieve those sourcing efficiencies; is

M. Maharooof - ReD

1 that right?

2 A Not as a merged company, but as I mentioned, we have a
3 sourcing function, and we have a track record of delivering
4 those sourcing efficiencies over the past several years, so
5 that gives me confidence that we are able to do that as a
6 merged company as well.

7 MS. DIXON: No further questions, Your Honor.

8 MR. KERIN: Redirect.

9 MR. KIENTZLE: Just briefly, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. KIENTZLE:

12 Q Mr. Maharooof, my colleague asked you some questions about
13 your access to restricted clean room data. Do you remember
14 that?

15 A Yes.

16 Q In your role in the integration management office, are you
17 responsible for supervising consultants who had access to data
18 like that?

19 A I am.

20 Q I believe -- did they provide you summaries of those
21 analyses they performed using that data?

22 A They did.

23 Q Were you allowed to ask questions about how those analyses
24 were performed?

25 A Yes.

M. Maharooof - ReD

1 Q Are you confident in those analyses performed using the
2 restricted clean team data?

3 A Yes.

4 MR. KIENZLE: No further questions.

5 THE COURT: You can step down.

6 THE WITNESS: Thank you.

7 THE COURT: They don't have any more questions for
8 you.

9 Okay. We will take our afternoon break: We will be
10 in recess for 15 minutes.

11 (Recess.)

12 (Proceedings resumed:)

13 THE COURT: Please be seated. You may call the next
14 witness.

15 MR. PERRY: Your Honor, Mark Perry for Kroger. May I
16 raise a brief scheduling issue before we do?

17 THE COURT: Yes.

18 MR. PERRY: The good news is we are moving a little
19 faster than we expected this week. A consequence of that is we
20 disclosed two more witnesses to the Government for this week:
21 Mr. Gokhale, who will testify next; and another third-party
22 witness, Ahold, tomorrow. We thought that would take us close
23 to the noon hour tomorrow. It may be. It is more like eleven
24 o'clock tomorrow.

25 THE COURT: Okay.

M. Maharooof - ReD

1 MR. PERRY: I wanted to raise that with the Court.

2 THE COURT: Okay.

3 MR. PERRY: I don't know if we could get another
4 witness here. I don't know if that timing will hold.

5 THE COURT: If you can get somewhere there to fill
6 the time, that would be great. My concern is next week you are
7 going to be really tight, because are trying to do your closing
8 arguments Friday afternoon. So it is up to you how you want to
9 fill it. I just want to make sure you don't run out of time,
10 because we have to be mindful that there is rebuttal time
11 reserved.

12 Understood, Your Honor.

13 Thank you.

14 MR. KIENTZLE: Your Honor, defendants call
15 Rajiv Gokhale.

16 THE COURT: All right.

17 (The witness was duly sworn.)

18 THE CLERK: Please have a seat. Would you please
19 state your name for the record, spelling your last.

20 THE WITNESS: First name is Rajiv, spelled R-A-J-I-V;
21 the last name is Gokhale, spelled G-O-K-H-A-L-E.

22 THE COURT: All right.

23 DIRECT EXAMINATION

24 BY MR. KIENTZLE:

25 Q Mr. Gokhale, you should have a binder in front of you, and

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1 you should have a copy of a demonstrative and your report.

2 This demonstrative, was it prepared at your direction?

3 A Yes, it was.

4 Q I'm going to ask my colleague, Mr. Rennick, to put it up
5 on the private screen. It contains significant amounts of
6 confidential information. I think we will keep it on the
7 private screen, I think, throughout our discussion today.

8 Can you tell us a little bit about your background?

9 A I have a bachelor's in mechanical engineer from what was
10 the University of Mumbai at the time. I have a master's in
11 mechanical engineering from Vanderbilt University in Nashville,
12 Tennessee. And I have a master's in business administration
13 from the University of Chicago. It was called the Graduate
14 School of Business at the time. After I graduated with my MBA,
15 I started at Lexecon, before it was Compass Lexecon in 1992. I
16 have been there since except for a gap for about two years
17 where I went to a more traditional management consulting firm.

18 Q And what is your area of expertise?

19 A Financial economics, which covers a broad area of
20 applications, including valuations of businesses, assets,
21 damage calculations, transfer pricing, and as here, estimating
22 cost at synergies or efficiencies for mergers.

23 Q Have you previously provided expert testimony regarding
24 merger efficiencies?

25 A I have. I have worked on several instances where we

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1 estimated efficiencies. Some of them were incorporated into
2 reports of my colleagues. And myself, I have been retained and
3 filed reports. I have been deposed. I have testified twice:
4 Once in the Aetna-Humana merger where I testified on behalf of
5 the parties; and once in the matter of Sysco Foods and U.S.
6 Foods where I testified on behalf of the FTC.

7 MR. KIENTZLE: Your Honor, at this time I tender this
8 witness as an expert in the field of financial economics.

9 MS. DIXON: No objection, Your Honor.

10 THE COURT: He will be deemed an expert.

11 BY MR. KIENTZLE:

12 Q Mr. Gokhale, what was your assignment in this matter?

13 A Very simply to estimate the cognizable efficiencies from
14 this transaction.

15 Q And how does that assignment compare to what you've done
16 in previous cases where you provided expert testimony on
17 efficiencies?

18 A It is the same thing. Different industries, different
19 applications, but estimating cognizable efficiencies.

20 Q Did you prepare a report in this case?

21 A I did.

22 Q And is it in your binder at the tab labeled DX2736?

23 A Yes.

24 Q Does this report summarize your conclusions regarding the
25 cognizable efficiencies likely to result from Kroger's

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1 acquisition of Albertsons?

2 A It does.

3 MR. KIENTZLE: Your Honor, I move to admit DX2736.

4 MS. DIXON: No objection, Your Honor.

5 THE COURT: It will be received.

6 BY MR. KIENTZLE:

7 Q Mr. Gokhale, did you utilize the FTC's merger guidelines
8 in your analysis?

9 A I did.

10 Q And you prepared a slide regarding those guidelines?

11 A I have, yes.

12 Q Sir, just initially looking at the slide, I see two sets
13 of guidelines, 2010 and 2023. Can you explain why both are on
14 the slide here?

15 A The 2023 guidelines have been issued more recently, and as
16 I understand it, they have not yet been adopted by a Court. So
17 for that purpose, I referred to both the 2010 merger guidelines
18 and the 2023 guidelines.

19 Q Do your conclusions in your report differ based on the
20 version of the guidelines that you used?

21 A They do not.

22 Q So I see under both versions of the guidelines there is a
23 bullet for merger-specific. What does that mean?

24 A You see similar language under both guidelines, but it
25 means whether it's cost savings or additional revenue, what can

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1 the parties expect to achieve because of the merger that they
2 would not be able to achieve as standalone companies by some
3 alternative means. As a financial economics interpretation, to
4 me that means what is the incremental effect of a merger on the
5 financial performance of the companies.

6 Q How about the factor labeled "verified"?

7 A I'm going to talk more about how I verified the
8 efficiencies in this instance, but you can see in the 2010
9 guidelines it says, "Reasonable means," and the '23 it says
10 "reliable methodology." So it is how -- my interpretation, we
11 will discuss in a few minutes, but it is what I have been able
12 to check myself and verify.

13 Q Under the 2023 merger guidelines, there are two additional
14 factors. Can you explain what those are, please.

15 A The first one, prevent a reduction in competition, I
16 should note that the 2010 guidelines do have a discussion about
17 efficiencies and competition, but the '23 guidelines seem to
18 explicitly include these two factors. So as I say here,
19 prevent reduction in competition, first clause is that
20 efficiencies cannot merely benefit the merging firms and
21 benefits will prevent the risk of a substantial lessening of
22 competition.

23 So in my opinion the price investment that we have
24 heard discussed, initially 500 million, now a billion dollars,
25 speaks to both, and it's inconsistent with any efficiencies

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1 benefiting only the merging parties or the lessening of
2 competition because price reduction speaks against either of
3 these.

4 Q What about the final factor, not be anticompetitive?

5 A I have not seen any evidence that it will be
6 anticompetitive worsening of terms and, as to my knowledge, I
7 haven't seen it alleged.

8 Q You mentioned a price investment a moment ago, and the
9 Court has heard about that throughout this hearing. In your
10 words what, is a price investment?

11 A The best way I can put it is that it is a commitment that
12 Kroger has made publicly to its board that it would reduce to
13 prices by a billion dollars a year, all is equal.

14 Q So we will come back to the price investment in just a
15 moment. First, I would like to discuss your conclusions on
16 cognizable efficiencies. Have you also prepared a slide on
17 that?

18 A I have.

19 Q So again, the information on this slide is redacted, and
20 we will do our best not to phrase any questions not to reveal
21 any confidential information.

22 A Okay.

23 Q With that in mind, where should we look on this slide here
24 to find your bottom-line conclusions about what you found to be
25 cognizable efficiencies in this case?

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1 A It's at the bottom right of this table in the numbers that
2 are boxed out. That's the range. I have entered cognizable
3 efficiencies.

4 Q I see several columns on this slide. What do the
5 different columns of information here refer to?

6 A So if we started the column on the very left that has text
7 in it, and we will discuss what each of those rows mean. But
8 at a very high level, the analysis is cost savings. Those are
9 efficiencies or cost savings that the parties should be able to
10 recognize or realize because of the merger. And then there is
11 a set that says "incremental revenue or profit." So those are
12 additional revenue profits that, again, the parties expect they
13 will realize because of the merger.

14 And then if you go from left to right on the columns
15 that are A, B, C, D, E, and F, columns A and B are the range
16 of -- I call it projected synergies. Maybe I should pause here
17 and use -- you have heard the word "efficiencies" being used.
18 I am calling columns A and B synergies. Those are what is the
19 starting point, which is the projected synergies by the parties
20 and consultants. And all the way to the right, I call that
21 column cognizable efficiencies, because that's my articulation
22 of what I find cognizable under the merger guidelines. So
23 that's the difference in how I use those terms. The projected
24 synergies are what the parties, as of the date of my report,
25 had provided information, gathered information in a more

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1 granular fashion that I was able to analyze.

2 Then what's to the next up there in columns C and D,
3 my team and I were able to check the methodologies, understand
4 the calculations, and in instances where I concluded that the
5 parties likely may be able to achieve the same cost savings or
6 revenue increments as standalone companies, I deleted those,
7 and so generally C and D are lower than columns A and B.

8 And finally, columns E and F -- again, we will get to
9 the next slide in the minute -- but it is what I have found
10 cognizable, so the numbers decrease as you go from A/B to C/D
11 to E/F.

12 Q Mr. Gokhale, you were unable to verify efficiencies in
13 your analysis under the merger guidelines. Does that mean you
14 determined that they are unlikely to occur?

15 A No. If anything, I would see the range in the bottom
16 right as the minimum starting point that I conclude the parties
17 will achieve. But a substantial portion of the merger,
18 specific efficiencies, are also based on similar methodologies,
19 similar logic; and therefore, I fully expect that the parties
20 will be able to actually achieve the merger's specific
21 efficiencies numbers here.

22 The other thing I would add is, in several categories
23 the parties haven't fully analyzed what I said "in a granular
24 way." So I haven't taken -- my number of cognizable is a
25 subset of what the granular analysis that has been done to

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1 date, and so I haven't scaled it up to say, if 50 percent has
2 been analyzed, then double that number would be the cognizable
3 number.

4 Q Mr. Gokhale, are the efficiencies set forth on this slide,
5 are they one-time efficiencies or are they ongoing?

6 A They should be an annual run rate.

7 Q I would like to discuss in a bit more detail the approach
8 you took to analyzing these numbers. Have you also prepared a
9 slide that sets forth how you determined what was cognizable
10 under the merger guidelines?

11 A I have.

12 Q And how did you assess the parties' methodologies?

13 A So we heard discussion about fact packs earlier. So we --
14 my team and I received fact packs for each of the categories,
15 and the fact packs are generally higher level summaries of the
16 methodologies, the data that has been analyzed, and the results
17 and start laying out a framework whereby the parties can
18 actually achieve those efficiencies.

19 But importantly, underlying those fact packs are
20 models. In the most common form. They are Excel spreadsheets
21 that contain the data, the actual information and the actual
22 math that was employed to estimate efficiencies. So the
23 combination of those two allowed my team and I to, first,
24 understand the methodology ourselves, but importantly, to be
25 able to go to the models, check that the methodology was

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1 actually being implemented, and then having done that, we were
2 able to interview Kroger personnel, we reviewed the deposition
3 testimony of ACI personnel, and we were able to interview
4 consultants to both confirm our understanding of the
5 methodology, and if we had questions, to make sure we
6 understood the math.

7 So based on that review, I was comfortable that
8 parties' methodology was indeed designed to estimate the
9 incremental benefit of the merger, whether it's cost savings or
10 revenue side.

11 Q In this next bullet here, beginning "approximately half of
12 cost savings," what does that refer to?

13 A So if you remember the top panel that was the cost
14 savings, this is safe to say matching -- sometimes it is safe
15 one-to-one. But this is, for the most part, in these
16 categories, what has been done is that if you take the same
17 product -- and "same" to me would mean if both parties are
18 buying the same product from the same supplier, then you can
19 compare the price head-to-head, and that difference in price is
20 the opportunity that's available for the parties to capture all
21 of or some of those transactions.

22 Importantly, that sort of price discovery, in my
23 opinion and experience, can't happen without a merger, because
24 these parties have no incentive or reason to share their
25 pricing with each other. It is unlikely -- or I haven't seen

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1 evidence that whether they would jointly purchase. So that
2 price discovery is an important component. That's the part
3 that makes this result of the merger.

4 And finally, they would be able to achieve these
5 synergies because they have periodic conversations with their
6 suppliers. It is not as if the contracts are so long-dated
7 that you wouldn't be able to extract some of that price
8 difference.

9 Q Does this slide set forth any other factors you considered
10 in setting forth your opinions?

11 A So the next two bullets are also important. First, that
12 the analysis holds constant the current product mix,
13 quantities, and destination. That is, whether the product is
14 going to the distribution center and ultimately to the stores.
15 So it doesn't factor in changing the choice that the customer
16 ultimately has at the store level.

17 And the last component also gives me -- is consistent
18 or gives me comfort with my opinion that the parties expect to
19 and likely will achieve even the higher number, because even as
20 it stands now, if we look at Kroger's SEC filing, their 10-K,
21 and proxy statements, it describes the incentive structure for
22 what is called NEOs or named executive officers. And a
23 significant portion of the total compensation for the NEOs is
24 based on operating profits and free cash flow. And 547,000
25 associates at Kroger are also eligible for incentive payments,

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1 again, having to do with achieving the goals and plans that the
2 company sets forth.

3 So this link with operating cash flow and operating
4 profits means in a way it's -- lack of a better term, it is
5 real. This is how people are incentivized to actually achieve
6 the performance that's set forth.

7 Q Did you compare your estimates in this case to any
8 third-party benchmarks?

9 A I did. And I have a slide for that.

10 Q So what do we see on this slide?

11 A This is data from a textbook. It discusses transactions,
12 amongst other things. But if I may draw your attention to the
13 bottom left, that's the table. You see highlighted on that are
14 food and retail. What this says is that for transactions in
15 the food or retail industries, the median announced synergies,
16 as a percentage of the target company's sales, were 3 percent
17 and 3.2 percent respectively.

18 So if I took the 3 and 3.2 percent -- and this is in
19 the second bullet above the table -- and applied it to ACI's
20 fiscal year's sales of just over 79 billion, that implies an
21 annual run rate of synergies of 2.4 to 2.5 billion. That's
22 higher than what I have characterized as cognizable
23 efficiencies.

24 Q Were there any other benchmarks you considered?

25 A There was a study by a consulting firm, McKinsey, who is

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1 well known, I suppose. But they studied 92 transactions, and
2 they found that 30 of the mergers actually achieved a hundred
3 percent of the expected synergies and that over 60 percent
4 achieved over 90 percent. So all this evidence, I think, is
5 consistent with the expectation that the parties will achieve
6 something much higher than what I've characterized as
7 cognizable efficiencies.

8 Q So I would like to talk more now about the individual
9 categories of efficiencies, and I think to do that we should
10 flip back to summary table. Look at the first row there, it is
11 labeled "goods for resale." As a starting point, again, trying
12 to mind confidentiality, is your bottom-line estimate for
13 cognizable efficiencies in that category set forth in the far
14 right of the table?

15 A Yes, it is.

16 Q How do cost savings fall into this category?

17 A In many of these, it is what the term says. So "terms for
18 goods resale" means if I, as a customer, walked into a grocery
19 store, this is what I can pick up and leave with. These are
20 often called center store products. That's the whole category.

21 Q So it includes national brands products?

22 A Yes.

23 Q Does it include fresh products?

24 A It does.

25 Q Private label or Own Brand products?

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1 A Yes.

2 Q Starting with national brands, what is the nature of the
3 parties' expected cost savings for national brands products?

4 A It goes back to what I described earlier. It's the price
5 discovery based on a head-to-head matching of product and
6 prices that the two parties receive from suppliers.

7 Q Did you prepare a slide to explain how the parties
8 calculated that price discovery between the parties?

9 A I have.

10 Q What do we see on this slide?

11 A This is one example of a product in national brands, and I
12 won't say out the product name out loud, but it says what it
13 is. To the right, there is a term "GTIN." That's Global Trade
14 Item Number. That's a number that suppliers assign. So if you
15 went to Kroger's or Albertsons' financial records in this case,
16 this product will have the same GTIN. So that's how in this
17 instance the products are matched. Below that, you see the
18 number of units that Kroger sold in 2023 and what Albertsons
19 did and the list price or -- I believe the term "base price."
20 You see the difference there between those two. Kroger has got
21 a slightly lower base price.

22 Q Is it this difference in list price or base price that
23 forms the basis for the parties' efficiencies estimate?

24 A No, there are other considerations.

25 Q And if we continue down your slide, can we see what those

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1 considerations are?

2 A There are a lot of numbers here, but let's start with the
3 two terms at the left, which are "base funding" and "promo
4 funding." Those are two components of trade funding and trade
5 funding is what suppliers provide to grocery store chains in
6 this instance. Base funding is an item that applies to all
7 units in the category. Promotional funding is generally leads
8 to some promotional activity, such as coupons or Fourth of July
9 sales and so on.

10 What it shows us, if we go to the lower half of the
11 table, base funding per unit and promotional funding per unit,
12 these were calculated by the consultants using what is called
13 the point of sales data. So from the financial records of each
14 company, they can extract this information. And if you then
15 subtract from the list price, the base funding and promotional
16 funding, you get to what is called unit double net cost or DNC.

17 In this instance you see that Albertsons has the
18 lower unit double net cost. That's why it is checkmarked for
19 being the advantaged party; i.e., the lower net cost, and you
20 see the math in the difference in the DNC.

21 Q Mr. Gokhale, is it this difference in the unit double net
22 cost that form the parties' efficiencies estimate for national
23 brands?

24 A We are not quite done yet. There are additional factors
25 considered.

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1 Q Have you prepared another slide?

2 A It is on the next slide, yeah.

3 Q Maybe as a follow-up with this slide, can you explain what
4 we see here.

5 A This is a slide that now presents numbers for the whole
6 category of national brands. And if we look at the bottom, the
7 left-hand side, it says "gross variance." So that would be the
8 combined total difference across products in this category
9 based on the DNC. But you will see over to the far right a
10 column called "net variance," which is what is characterized as
11 the efficiency. And you can see there are three subtractions
12 along the way to get from gross variance to net variance.

13 Q I would like to explore those adjustments. Maybe if we
14 could just start by looking at the gross variance column on the
15 far left and stepping over to addressable gross variance in the
16 middle. What are those first two adjustments?

17 A The first adjustment is for divestiture. So there is
18 approximately a 10 percent reduction -- not approximately --
19 exactly a 10 percent reduction in the gross variance. Then
20 something to the right is something called the two-year
21 feasible realization stage gate. What that means is that the
22 consultants looked at the slew of products in this category and
23 identified what they considered would be the most attractive to
24 go first as in trying to close the price gap. Some combination
25 of that choice of products and suppliers, with the top 30

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1 suppliers are, then they concluded that, to be conservative, I
2 guess, in this instance, they will only count efficiency -- the
3 efficiency they think they can realize in the first two years.
4 So that's why you see a deduction for something that they
5 likely think they will recognize, just not in the first two
6 years. So subtracting those two amounts gets to you
7 addressable gross variance.

8 Q And how do we move from addressable gross variance to the
9 net variance?

10 A These are the contingencies. There are two things that
11 are done here. One is there is an acknowledgment -- as I said,
12 base price applies to all products, and it is assumed that
13 therefore any differences in base price are more likely to be
14 captured or will have a higher realization rate than, say,
15 promotional funding.

16 The other thing that's done here is in order to
17 control for maybe differences in merchandising decisions by the
18 parties, the control for base funding by comparing how many
19 linear feet are dedicated to that product category in the store
20 and for promotional funding in the parties' point of sales
21 system sales are tagged as whether or not they are associated
22 with a promotion. So they also then can compare the percent of
23 sales that are tagged as being a promotional sale. So
24 comparing those two, if they are very similar, they get higher
25 realization rates. If they are more different, they get lower

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1 realization rates. But some combination of these two means
2 that there is a reduction of 316 million -- sorry --
3 300-something million. And that gets us to the net variance
4 number.

5 Q Again, if we compare the net variance number on the far
6 right to the gross variance number on the far left, how much
7 approximately of the gross variance do the parties's estimates
8 actually contemplate closing?

9 A It is about half and a little more than half if you
10 subtract the divestiture.

11 Q Before we move off this slide, why do we see a different
12 set of numbers at the bottom of the screen?

13 A So the numbers we have been discussing so far use fiscal
14 year 2023 data, or calendar year 2023 data. The numbers at the
15 bottom are from a prior analysis where the consultants had used
16 twelve months ending seventh period in 2023, so not quite the
17 same period. The numbers above have five additional months of
18 data or recent months of data. What's important is that the
19 estimate of efficiency has hardly changed.

20 Q Mr. Gokhale, have you reviewed declarations from
21 third-party suppliers about how they charge companies like
22 Kroger and Albertsons for their products?

23 A I have.

24 Q Do any of those suppliers claim that Kroger and Albertsons
25 currently pay the same price for the same product?

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1 A I read the declarations, and what I have taken away is
2 that -- especially with these subtractions that we described
3 the trade funding, the result with discussions between the
4 parties, and I did not get the sense that they were saying that
5 the parties all get the same price. Importantly, we have seen
6 the data that they do not.

7 Q To the extent that the suppliers who have submitted
8 declarations to suggest that price differences may be
9 attributable to the parties' merchandising decisions, did the
10 data say anything about that?

11 A That's what I discussed earlier. That's what the
12 consultants and the parties try to control part of it. It is
13 base funding activity and the relative levels of promotional
14 activity.

15 Q Is that in the column here labeled "portion reflecting
16 potential contingencies"?

17 A Yes.

18 Q Do the parties' estimated cost savings also include fresh
19 products?

20 A That's correct.

21 Q And what is the methodology for estimating fresh savings?

22 A I prepared a slide that perhaps we can look at. At the
23 top -- it is the same methodology, which is that it is also
24 based on price discovery and the expectation that you capture
25 some or all of the difference in price. The one difference I

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1 would point out is what you see in the title describing the
2 product, and because you don't have a GTIN, like we described
3 earlier, assigned by suppliers, in this instance now they ship
4 to product characteristics to match the product. So for
5 chicken you would match breast to breast, organic to organic,
6 and so on. So that's what is described. You see some of the
7 characteristics described in the title of the table, and it is
8 coming from one supplier.

9 Q And what are your conclusions with respect to fresh
10 efficiencies?

11 A That's in the top line. I find that the projected
12 synergies from the parties is cognizable. As I discussed
13 earlier, the parties have only analyzed up to 60 percent in 20
14 categories. So I haven't scaled up my estimate to say if the
15 same applies to the other 40 percent that, in fact, the
16 cognizable efficiencies will be higher.

17 Q Do the parties sourcing cost savings also include private
18 label or sometimes called Own Brands products?

19 A Yes.

20 Q What is the methodology for estimating Own Brand savings?

21 A Pretty much the same as what we are looking at here. I
22 think it is on the next slide.

23 Q What can we tell from this slide about your conclusions?

24 A Again, if we look at the first bullet, I have
25 characterized a portion of the parties' projected synergies as

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1 cognizable. In this instance, only 30 percent matched spend
2 has been analyzed so far, and you see the product, again, on
3 product characteristics that matched it. The one difference
4 from the earlier slide is that they are comparing different
5 suppliers, but you can see that Albertsons has a lower price
6 than does Kroger for this item per unit.

7 Q Just to be clear, when you say it is at 31 percent
8 analyzed, that was as of the date of your report in this case?

9 A That's correct.

10 Q So I would like to look back to your summary table and
11 just go one row below. I see a category labeled goods not for
12 resale. Again, to preserve confidentiality, is your estimate
13 of cognizable efficiencies in this category set forth on the
14 far right?

15 A Yes.

16 Q Have you prepared a slide that summarizes your conclusions
17 on goods not for resale?

18 A I have.

19 Q What did you find with respect for goods not for resale
20 cost savings?

21 A It is the number we saw earlier, but, again, the method is
22 very similar. In this case they have analyzed 75 percent of
23 spend. But if you look at the item I used to illustrate, the
24 "N" is important -- "not for resale" -- meaning these are items
25 that the parties purchase for use in the store themselves or in

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1 this instance ultimately used by the customer. It includes
2 professional services, janitorial, et cetera, but the example I
3 have here, again, it's the same concept, price matching and
4 discovery that won't happen without the transaction. And you
5 can see you can get a unit price for Kroger and Albertsons, and
6 in this instance Albertsons is lower.

7 Q So, Mr. Gokhale, for these last few category of cost
8 savings, fresh, Own Brands, and GNFR, do the efficiencies
9 estimates we have discussed include a divestiture adjustment?

10 A Yes. The same 10 percent that we discussed in national
11 brands --

12 Q Do Kroger and Albertsons --

13 A -- that I found reasonable.

14 Q Do Kroger and Albertsons have their own standalone plans
15 to save sourcing costs in these categories independent of the
16 merger?

17 A Yes. They have both focused on sourcing costs
18 historically, and I expect as standalone companies they would
19 continue to do so.

20 Q How does that affect your analysis here?

21 A What we are analyzing here is the incremental effect of
22 the merger. So this would be over and above what the parties
23 have or may continue to get as standalone companies, again,
24 because of the price discovery that they simply won't have
25 without a merger.

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1 Q Let's return to your summary slide. There is also a
2 category here listed as supply chain and manufacturing. Is
3 your opinion regarding cognizable supply chain manufacturing
4 efficiencies set forth in the far right column?

5 A Yes.

6 Q What types of efficiencies fall into this category?

7 A Again, it is a term -- I would break up the two terms. A
8 supply chain, which is network distribution, et cetera, and
9 manufacturing. Both parties have manufacturing facilities
10 where they produce products that they sell under their own
11 label. Again, a different form of network but a network of
12 manufacturing facilities.

13 Q Is it reasonable to expect the merger to result in cost
14 savings in this area?

15 A Absolutely. In merger after merger and even those outside
16 of mergers generally analyze networks, it is well accepted that
17 if you have two independent networks that are at least a little
18 bit overlapping or serve customers in each other's space, that
19 combining those two networks and then optimizing the network
20 will lead to a better network and will lead to an overall lower
21 cost network.

22 Q So I would like to discuss a couple of the projected
23 efficiencies that fall under the supply chain and manufacturing
24 category. Have you prepared a slide discussing manufacturing
25 cost savings?

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1 A I have.

2 Q Can you please tell us what you concluded with respect to
3 this category?

4 A If we looked on the -- at the text on the left. So Kroger
5 currently has food production plants, 33 of them, in which it
6 made about 30 percent of its Own Brand products in 2023.

7 Albertsons has 19 food production plants, and it made about
8 10 percent of its Own Brands products in fiscal year 2023.

9 Before we go to the third bullet, I draw your
10 attention to the map on the right. What that map shows is that
11 the dark blue symbols are where Kroger's manufacturing
12 facilities are located, and the lighter blue symbols show where
13 the Albertsons facilities are currently located.

14 So you can see that Kroger is more in the eastern
15 side of the country and Albertsons is on the western side. So
16 if you combine that network and start manufacturing products in
17 that post-transaction company, you can now start
18 manufacturing -- manufacturing products closer to the ultimate
19 destination of these stores and also have better scale; and
20 therefore, be more efficient with the manufacturing.

21 Then that's why on the bottom left, what the parties
22 did, they estimated synergies from having both manufacturing
23 plants, they can in-source; that is, their Own Brand products
24 that they currently have third parties manufacture, they can
25 make more of in their own facilities, and they can reallocate.

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1 That's what I said earlier. You can make products closer to
2 where they should be.

3 And the third category, re-purposing. All of this
4 optimization will free up space in their current manufacturing
5 facilities that in the future they can make products that they
6 currently don't make now.

7 Q Is it your conclusion regarding cognizable efficiencies in
8 this category set forth in the title of the slide?

9 A Yes. I should point out it is based on the first two,
10 in-sourcing and reallocating, and I don't include any estimated
11 number for re-purposing.

12 Q Mr. Yeater criticized your analysis for not accounting for
13 the fact C&S will be acquiring a dairy facilities as part of
14 the divestiture. Do you have a response to that criticism?

15 A He was correct in saying that a facility that is slated
16 for divestiture was included in this optimization. And if we
17 go back and look at how much efficiency is associated with that
18 facility, it is approximately one-and-a-half million. So you
19 could subtract one-and-a-half million from the estimates. It
20 is also possible that if you went back to that facility and
21 optimized the network again, you may get a little less or a
22 little more.

23 Q Do the parties' manufacturing and supply chain
24 efficiencies include "own more transportation"?

25 A Yes.

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1 Q And you have prepared a slide on those efficiencies?

2 A I have.

3 Q Can you explain what types of efficiencies fall into this
4 category?

5 A Again, as I said earlier, it is what the term suggests.
6 The simplest example I can think of, say for a national brand
7 supplier, instead of having the supplier transport the product
8 that the company is purchasing, the company's distribution
9 center or store, in this case Kroger or Albertsons, takes
10 control of the transportation process, and that's why it is
11 called "own more transportation," as the retailer in this
12 instance manages the transportation of product.

13 Q And what did you conclude in this category?

14 A So the data say the following: That is, only a few years
15 back, both Kroger and Albertsons were at relatively similar
16 levels, and Albertsons hasn't changed much. It is still about
17 that percent, and the percent means how much of the total
18 transportation is managed by the retailer. Kroger has made
19 dramatic strides. It is up to 47, and in some models 50s, but
20 in that range. In 2023, targets even more often increased.
21 But Kroger over time has built up the expertise and the ability
22 to actually manage more transportation and have it be cheaper.
23 So what this category of efficiency does is in the table.

24 Q Can you explain what's in the table here, please.

25 A It basically asks what's the current percent retailer

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1 managed in those three categories we are seeing Ambient,
2 frozen, and non-produce. For Albertsons, what is the target?
3 The target is about what Kroger is -- the levels that Kroger is
4 now. So if you simply took the difference, 1 percent going to
5 the target percent, and said what is the spend on
6 transportation right now, and you ask what has historically
7 Kroger saved by moving from third-party transportation to its
8 own, those three multiplied together give you the cognizable
9 efficiencies under each of those columns, and the sum is what I
10 have concluded as cognizable in this category.

11 Q Let's go back to your summary slide. Again, in cost
12 savings, there is another category of cost savings listed as
13 administrative labor. Is your conclusion regarding savings in
14 that category again set forth in the far right-hand side of the
15 slide?

16 A It is. You see there is a low and a high. In my opinion,
17 the high is the more reasonable number. I do have a slide for
18 that.

19 Q Let's take a look at your slide. What's your basis for
20 your conclusion with respect to administrative efficiencies?

21 A This category, again, like optimization I discussed
22 earlier, is well accepted -- and a technical term "low-hanging
23 fruit" -- it is well accepted that combining these two
24 companies and combining the administrative headcount leads to
25 what we would call scale efficiencies; that in order to do all

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1 the administrative work that the two firms do together, by
2 joining it and doing the same amount of work, you don't need
3 the sum of the headcount. You can do the same work with
4 fewer -- lesser headcount.

5 Q Why do you have a range of efficiencies set forth on this
6 slide?

7 A Let's start with the high end of my range, and the way it
8 has been determined is -- the estimate shows in the table on
9 the right. So you see by function. You see the description of
10 each -- it is called bucket -- G&A or general administrative
11 bucket. Lined up against that is the estimated expense that
12 ACI has in those buckets.

13 Then you see a column that says, "BCG efficiency
14 benchmark." Those are benchmarks from BCG's proprietary
15 database of past transactions in which BCG has been involved,
16 including transactions in the retail area. What BCG concluded
17 are -- the ranges we see here are the savings as estimated
18 based on the target company's spend. So you multiply those
19 two, and you see in the efficiency goal that's the higher end
20 of those benchmarks, and that's what at the bottom right adds
21 up to the high range.

22 Q How about the lower end estimate?

23 A The lower end I did in some sense to illustrate, which is
24 the easiest illustration, because we can go to the Kroger's
25 10-K, and we can go to Albertsons' 10-K and proxy, and they

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1 report how much their NEOs -- generally the top five executives
2 in each company earned in 2023. In one company, they
3 collectively earned 37 million last year. In another company,
4 they earned 40 million last year. Remember, these are the top
5 five NEOs.

6 So I used the 37 as the absolute minimum, because
7 there should be no debate that the post-merger company won't
8 need two CEOs, two CFOs. So that's the absolute minimum. So
9 it is a useful illustration to say from publicly available data
10 you can even estimate that number.

11 Q Do any of the efficiencies in this category derive from
12 reductions in store level labor?

13 A No. And that's an important point. That's what I say --
14 in the first bullet. These are all above-head store
15 reductions. None of this factors in, and the parties haven't
16 planned in any reduction in store level headcount.

17 Q Flipping back to your summary slide, there is one last
18 cost savings row. Just quickly, what does that last row listed
19 there refer to?

20 A Those are savings similarly estimated, again, for fuel
21 that the parties sell at fuel stations in the grocery stores.

22 Q What is the basis for the efficiency estimate in that
23 category?

24 A Same principle as we discussed earlier. It is what prices
25 do each of the parties get and what gap is available to close.

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1 Q Again, is your bottom-line conclusion about cognizable
2 efficiencies set forth at the far right of this slide?

3 A Yes.

4 Q Does Kroger also expect to gain incremental revenue
5 efficiencies from the deal?

6 A Yes. I have listed three of the categories here.

7 Q I would like to discuss each of these.

8 What conclusions -- what revenue efficiencies do the
9 parties expect in the merchandising category?

10 A There are two subsets to it. I think Mr. Maharroof
11 discussed some of this. I think of this as product or category
12 management, right. Each party does things slightly
13 differently. One is better at a certain segment of products.
14 One is better at another segment of products. So part of the
15 merchandising is that the parties can share that information,
16 learn from each other, and have a better combined slate of
17 products. So that would lead to higher revenues and higher
18 profits.

19 There is another component, which is the parties also
20 expect that over time they can increase their Own Brand
21 penetration, and that itself would also lead to higher profits,
22 because Own Brands can be more profitable than, say, national
23 brands.

24 Q Why haven't you concluded that these merchandising
25 efficiencies are cognizable?

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1 A I didn't have the data to validate or verify in the way
2 that I did the others as of the date of my report.

3 Q Did you conclude that they are unlikely to occur?

4 A No. As I have listed here, I think they are
5 merger-specific clearly, and I expect the parties will be able
6 to achieve it.

7 Q I'm going to skip over alt. profit for a moment and talk
8 about health and wellness. Can you tell us what sorts of
9 efficiencies fall into the health and wellness category?

10 A Both parties have pharmacies. Kroger has, from what I
11 read, about 20 years of experience and has developed a
12 system -- a pharmacy system that they call EPRN. That has been
13 very useful, as Mr. Maharooof said, with customer loyalty. But
14 the efficiency size, based on the difference in the number of
15 prescriptions per week per pharmacy, that happened. There is a
16 big difference in the two parties. Kroger is higher. ACI is
17 currently lower. And this efficiency is based on closing the
18 gap sort of halfway, not entirely.

19 Q And again, I see that you have determined that these
20 efficiencies are merger-specific but not cognizable. Did you
21 conclude that they are unlikely to occur?

22 A No. Like with merchandising, I just haven't validated
23 them as of the date of my report, but it is something that the
24 parties should be able to achieve.

25 Q Now, I do want to go back to alt. profit where you do find

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1 that a portion of the efficiencies are cognizable. Have you
2 prepared a slide on alt. profit?

3 A I have.

4 Q What did you find with respect to efficiencies in this
5 category?

6 A So maybe I'll define what alt. profit is first. Kroger
7 and Albertsons have data generated by its retail business. So
8 this is the digital side of the business. Kroger especially
9 has built a digital platform, and it says that Kroger has
10 actually generated profits of 1.3 billion in 2023 and disclosed
11 that in their 10-K.

12 But with this 20 years of data science capability,
13 Kroger has generated -- for example, on Kroger's website or
14 app, this enables Kroger to target or help CPGs or others list
15 ads or incentives on their websites or apps. That's what
16 generates incremental revenue.

17 Albertsons had a media performance initiative that
18 they launched in 2018. They've recently come in with something
19 called a media collective in 2022, which has replaced the 2018.
20 So it's a fair bit behind Kroger both in expertise and actual
21 implementation.

22 Q And what proportion do the parties' efficiencies in this
23 category did you determine were cognizable?

24 A I take a portion of the overall synergy that the parties
25 had sized, and in particular, if you see, I selected the two

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1 categories that is on-site media and in-store media. So these
2 are additional revenues the parties can generate on their own
3 properties that they control and that they can bring
4 Albertsons' data on to that platform.

5 So I added those two, I take a divestiture
6 adjustment, and I also applied a realization rate, sort of the
7 lower end of the realization rates that I have seen elsewhere
8 in the record, multiplying that first number by the other two
9 gets me to my estimate of cognizable efficiency.

10 Q Thank you, Mr. Gokhale.

11 So we said earlier in the discussion that we would
12 come back to the price investment piece. What did you conclude
13 regarding Kroger's plan regarding price investment?

14 A I actually have a slide on that too. But after having
15 reviewed the information, I have concluded that it is
16 reasonable to expect that Kroger will actually undertake a
17 billion-dollar price investment annually.

18 Q What is the basis for your conclusion?

19 A The first basis is what I discuss in the first report. As
20 Kroger has said publicly, and I believe in court here, that
21 price investment is designed to help them strengthen them as a
22 competitor. As you can see, it is to strengthen their ability
23 to compete with other firms. So it's an important element. As
24 I understand, it is a competitive industry, and being able to
25 pass through price reductions in order to be able to compete is

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1 a key element of their strategy, as I understand it.

2 The second bullet describes that. In fact, this is
3 what they have done historically. In their financial statement
4 year after year they will discuss their price investment in the
5 context of sometimes discussing what it has done to their gross
6 margin, but the estimate that it resulted in about a \$5 billion
7 price investment in customer savings over the last however many
8 years.

9 If you calculate Kroger's gross margins, which is
10 simply revenue minus product variable cost divided by revenue,
11 you see that their gross margins have declined over time, has
12 gone up slightly in recent years, but still lower than what it
13 used to be. Again, that's consistent with Kroger having
14 undertaken price investment historically.

15 Q How does the price investment relate to the efficiencies?

16 A It is the -- the 1 billion is lower than the cognizable
17 number that I have estimated. But again, it really shouldn't
18 be linked to the cognizable part, because the cognizable number
19 is lower because of my interpretation of how I apply the merger
20 guidelines. But if you look at the numbers in the middle
21 column that I characterize as merger-specific, the price
22 investment is lower than those numbers.

23 Q What is Kroger's plan to make the price investment?

24 A I believe the next slide has some discussion of that. So
25 the top panel -- and I draw your attention to the table under

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1 year one, there are two important categories. The first
2 category says "re-bannered stores." What that means is,
3 immediately following the transaction, ACI stores -- some ACI
4 stores will be re-bannered, and re-banner means the prices will
5 be lower to Kroger's banner, which generally has lower prices
6 than the current ACI banner. So that is all going into ACI
7 stores.

8 In the second component, which is then they expect
9 they would start rolling out lower prices into other
10 categories, and this is OB in year one followed by other
11 categories in years two to three. Again, the price investment
12 is targeted towards ACI stores. And what the chart at the
13 bottom shows with a lot of bars on it is where the parties have
14 targeted, they will undertake the price investment by state,
15 and you see the gray part is the re-bannering and the green
16 part is the overall rollout.

17 Q Thank you. You mentioned Mr. Yeater's reporter earlier
18 today, other than the dairy example we discussed earlier, did
19 he identify any specific errors in the analyses underlying the
20 efficiencies estimates?

21 A He has not.

22 Q When we discussed the fresh and Own Brand categories
23 earlier, and you described the matching process, did Mr. Yeater
24 raise any conceptual concerns about how that matching process
25 worked?

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1 A He expressed some concern about whether the matching
2 process has been adequate.

3 Q What is your reaction to that concern?

4 A Mr. Yeater himself in a slightly different context points
5 to an example with salsa. His particular criticism there was
6 that Kroger -- let me back up. In the manufacturing
7 optimization, the parties assumed that Kroger will make some of
8 the salsa it makes now in its own manufacturing facilities,
9 have it shipped to an Albertsons manufacturing facility, and
10 Mr. Yeater pointed out that it didn't make sense to him because
11 Kroger currently outsources salsa manufactured to a third party
12 at a cost that is lower than what the assumption is that
13 Albertsons would make it. So I think he says, well, that can't
14 be merger-specific, because you could have outsourced
15 everything.

16 There is a slight problem with it, because what
17 Kroger outsources is fire-roasted salsa to a company that's
18 Pacific -- I am sorry, I forgot -- there is a second part --
19 Pacific. And it is fire-roasted salsa. And if we go back to
20 the data, we find that Albertsons outsources also to the same
21 company. And if you go to the company's website, you find that
22 company only makes fire-roasted salsa, not other forms of
23 salsa. So what that tells me is if that is the standard that
24 Mr. Yeater is suggesting that should be applied, that all salsa
25 is the same, it's the same product. It doesn't matter if it is

R. Gokhale - X

1 fire-roasted or something else, where you chop tomatoes and add
2 ingredients, then the standard that has been employed to match
3 products here is far superior. And if that's the standard that
4 all salsa is salsa, then one can't have any criticism at all
5 about the product matching we have undertaken.

6 Q Beyond what we have discussed today, has anything else in
7 Mr. Yeater's report caused you to reconsider your estimate of
8 cognizable efficiencies?

9 A It has not.

10 MR. KIENZLE: I pass the witness.

11 THE COURT: All right.

12 CROSS-EXAMINATION

13 BY MS. DIXON:

14 Q Good afternoon, Mr. Gokhale. Nice to see you again.

15 A Good afternoon. Nice to see you again.

16 Q I would like to start by making sure I know exactly what
17 opinions you're offering and what opinions you aren't offering.
18 You aren't offering an opinion about whether the merger may
19 substantially lessen competition, right?

20 A All I'm saying is that the price investment is not
21 consistent with an assumption of lessening competition.

22 Q Did you do any analysis about whether efficiencies or
23 synergies in this matter would prevent a reduction in
24 competition?

25 A Again, I'll say what I did earlier. A reduction in prices

R. Gokhale - X

1 is inconsistent with an assumption of reduction in competition.

2 Q Your focus was on the financial and economic analysis
3 relating to synergies, right?

4 A That's fair.

5 Q And you have done no analysis relating to competition; is
6 that right?

7 A That's correct.

8 Q So you aren't offering an opinion about whether the merger
9 might substantially lessen competition; is that right?

10 A I believe that's within the purview of Dr. Israel. I
11 haven't specifically analyzed that question.

12 Q In the report you've calculated the amounts that you find
13 to be merger-specific and verifiable, correct?

14 A I'm sorry. I didn't catch the first part.

15 Q In your report you calculated the amounts that were
16 merger-specific and verifiable, right?

17 A That's correct.

18 Q But you haven't quantified or analyzed how those
19 efficiencies could offset any potential harm, right?

20 A Other than what I've discussed today, no.

21 Q And you're not offering any opinion that efficiencies
22 outweigh the harm in this matter, right?

23 A I haven't done that analysis.

24 Q And you testified earlier that you are using the merger
25 guidelines as the framework for your verification merger

R. Gokhale - X

1 specificity analysis, correct?

2 A Consistent with my understanding as a financial economist,
3 yes.

4 Q And you have applied the merger guidelines framework in
5 prior matters that you have worked on, right?

6 A Again, consistent with my understanding, yes.

7 Q You agree that the merger guidelines is the right
8 framework to use to evaluate merger-related efficiencies?

9 A Merger guidelines define cognizable efficiencies, and I
10 understand that's how one is supposed to work under those
11 guidelines to define cognizable efficiencies.

12 Q Earlier you discussed with my colleague the concepts of
13 efficiencies being merger-specific and verifiable, right?

14 A That was in one of my slides, correct.

15 Q And you agree those concepts are in the merger guidelines,
16 correct?

17 A I was quoting the merger guidelines, correct.

18 Q And you use those concepts -- merger, specificity, and
19 verifiability -- as a framework for analyzing efficiencies,
20 correct?

21 A My interpretation of that, yes.

22 Q When we say or -- when I say "merger specificity," would
23 it be fair to characterize that as a requirement that
24 efficiencies could not be achieved absent the proposed merger?

25 A That's how I've used that, correct.

R. Gokhale - X

1 Q And for verifiability, would it be fair to characterize
2 that as a requirement that efficiencies should be verified
3 using reliable methodology and not based on speculative
4 projections?

5 A That's what the 2023 guidelines say, and I think the '21
6 says "reasonable methodology," but you are right.

7 Q Would you agree that in identifying potential synergies
8 Kroger did not attempt to apply the merger guidelines?

9 A Kroger, the parties, all the consultants, want to attempt
10 to analyze what would be called cognizable efficiencies. But
11 we brought into question the merger specificity, and they are
12 trying to analyze what the merger revealed.

13 Q So is it your testimony that Kroger's internal work and
14 their consultants assessed merger specificity of potential
15 synergies?

16 A Again, not as it's discussed under the guidelines. That's
17 not my understanding that that's what they're doing. But my
18 review of what they have done, the methodologies they've used,
19 and the math they've done, they are attempting to estimate the
20 incremental effect the merger will have, which is incremental
21 cost savings and incremental revenues and profits.

22 Q But that incremental effect is not consistent with the
23 merger guideline framework; is that right?

24 A Interpretation of what "merger-specific" means, is,
25 again -- that's why say if it is incremental effect of the

R. Gokhale - X

1 merger, it is very similar. But if you move it to what is
2 cognizable under the merger guidelines, then the parties aren't
3 attempting to make it what we call cognizable under the
4 guidelines.

5 Q Meaning they weren't attempting to attempt merger-specific
6 efficiencies consistent with the merger guidelines, correct?

7 A Consistent with my interpretation of verification under
8 the guidelines means.

9 Q Maybe I can back up here. I'm just asking a simple
10 question, whether the merger -- whether Kroger or its
11 consultants assessed efficiencies consistent with the merger
12 specificity standard in the merger guidelines?

13 A I think I have answered this before, but I just want to be
14 careful, because their task or analysis isn't putting the
15 merger guidelines in front of them and asking what do the
16 guidelines say. But if we interpret merger specificity as
17 defined under the guidelines as what can be achieved because of
18 a merger and what cannot be achieved without a merger, in
19 essence, that's what the parties are trying to do. That's what
20 I mean by what is the incremental effect of the merger; i.e.,
21 what can be achieved without a merger?

22 Q Let's go back to your definition of "merger specificity"
23 as defined in the merger guideline. You agree with me that you
24 can characterize that as something -- "merger specificity"
25 means that efficiencies could not be achieved in the absence of

R. Gokhale - X

1 the proposed merger, right?

2 A Or some alternate means, yeah.

3 Q So what the parties have done, what Kroger has done, and
4 what consultants have done, is that consistent with the merger
5 specificity standard as we have just defined?

6 A That's what I think I answered earlier, as I have
7 interpreted merger specificity, and the parties have approached
8 it similar in their attempting to estimate what the benefit of
9 the merger is that they would not have without one. In that
10 sense, it's similar.

11 Q I'm not asking if they're similar, Mr. Gokhale. I'm
12 asking whether it is consistent with the merger guidelines;
13 it's the same as what's in the merger guidelines?

14 A In some sense, yes, similar/consistent, but I just want to
15 be clear again that they don't start with the merger guidelines
16 as a reference. They have defined "merger specificity" in
17 their own way, but it is consistent with the terms in the
18 merger guidelines.

19 Q Now, did Kroger's internal work assess whether claimed
20 efficiencies were verifiable?

21 A I think from their perspective they have verified them.
22 That's what they mean by granular work; we match product with
23 product. In that sense, they believe they are validated.
24 Maybe I'll use "validated" instead of "verified" to keep the
25 separation between the words in the guidelines versus how they

R. Gokhale - X

1 have done it. They believe -- and it seems to me that they
2 validated the work they have done today.

3 Q Now, I want to -- before we talk about specific categories
4 of efficiencies, I just want to make sure I understand your
5 top-line conclusion. Let's turn to table 3 of your report. It
6 should be in a binder.

7 A I have it on screen too. Thank you.

8 Q It is in binder DX2493, page 14.

9 A I'm with you.

10 Q And that's table 3 from your report, right?

11 A Yes.

12 Q This contains confidential information, so we will not
13 show this on the public screen.

14 Now, table 3, among other things, it shows the
15 efficiencies that you believe are merger specific and
16 verifiable, correct?

17 A Yes.

18 Q And just bear with me as we go through this table since I
19 can't mention the specific numbers, but we will work through
20 it. At the bottom of the page, the table identifies four
21 efficiency categories that you did not analyze, right?

22 A Yes. They add up to -- I don't want to say the number --
23 yes.

24 Q You are not offering an opinion whether those four
25 categories of efficiencies are merger specific and verifiable,

R. Gokhale - X

1 right?

2 A That's correct. That's why I put them under "not
3 analyzed."

4 Q Let's look at the "total" row of that second column where
5 it says, "IMO."

6 Do you see that?

7 A I'm with you.

8 Q "IMO" is that integration management office, right?

9 A Yes.

10 Q And that highlighted portion in column B at the bottom
11 there, the total, that's the total IMO goal for synergies,
12 right?

13 A Correct.

14 Q And next to that column C and D, those are the parties
15 projected synergies, correct?

16 A If I may, I want to point out one small mistake here. If
17 you see the row for fuel, the number that's under column B
18 should have been carried over into C and D. So if you look at
19 the bottom line, there should be another 37 added to that. But
20 with that caveat, yes.

21 Q Thank you for pointing that out.

22 So looking at the total of the bottom of table 3, the
23 last two columns, G and H, that's the range of the total
24 efficiencies that you find merger-specific and verifiable,
25 right?

R. Gokhale - X

1 A That's correct.

2 Q And that highlighted portion in column G and H, the total
3 row, that's less than 50 percent of the IMO goal of
4 efficiencies, right?

5 A What I have characterized as cognizable, that's correct.

6 Q So your opinion is that more than half of the efficiencies
7 calculated by Kroger cannot be considered merger-specific and
8 verifiable, right?

9 A That I haven't verified the difference as of the date of
10 my report. But as I discussed earlier, I think that doesn't
11 mean that the rest is not verifiable. It very well can and
12 will be when more data become available.

13 Q As of the date of your report, more than half of the
14 synergies that Kroger estimated they were not merger-specific
15 and verifiable, right?

16 A As of the date of the report, that's right.

17 Q Is that still true today?

18 A I haven't received or asked for any more data since the
19 date of the report, so yes.

20 Q Then following the merger guidelines framework, you find
21 that less than half are both merger-specific and verifiable,
22 right?

23 A In the manner I described earlier, that's correct.

24 Q So for the more than half of the claimed efficiencies, you
25 did not find them to be cognizable efficiencies even though

R. Gokhale - X

1 some were validated internally by Kroger, right?

2 A In some instances, yes.

3 THE COURT: I want to note that we are getting close
4 to the five o'clock hour. If you know you have a good place to
5 stop, let's do that.

6 MS. DIXON: We can stop now, Your Honor.

7 THE COURT: All right. We will stand in recess until
8 9:00 a.m. tomorrow morning.

9 (Court adjourned.)

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

/s/ Dennis W. Apodaca
DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

September 6, 2024
DATE

"ANSWER: [1] 2097/14
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