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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION,)	
et al.,)	
)	
Plaintiffs,)	Case No. 3:24-cv-00347-AN
)	
v.)	
)	
THE KROGER COMPANY and)	September 6, 2024
ALBERTSONS COMPANIES, INC.,)	
)	
Defendants.)	Portland, Oregon
)	

PRELIMINARY INJUNCTION HEARING

DAY 9

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
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. Paul Frangie
Ms. Jeanine Balbach
Ms. Trisha Grant
Ms. Guia Dixon
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

FOR PLAINTIFF STATE
OF OREGON:

Mr. Christopher J. Kayser

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25

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

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

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

1 FOR DEFENDANT KROGER
2 COMPANY:

3 Mr. B. John Casey
4 Stoel Rives LLP
5 760 S.W. Ninth Avenue, Suite 3000
6 Portland, OR 97205

7 Mr. Bambo Obaro
8 Weil, Gotshal & Manges LLP
9 201 Redwood Shores Parkway
10 Redwood Shores, CA 94065

11 Ms. Luna Ngan Barrington
12 Weil, Gotshal & Manges LLP
13 767 Fifth Avenue
14 New York, NY 10153

15 Mr. Matthew M. Wolf
16 Ms. Sonia Kuester Pfaffenroth
17 Mr. Christian Schultz
18 Mr. Joshua Davis
19 Mr. Michael Kientzle
20 Arnold & Porter Kaye Scholer LLP
21 601 Massachusetts Avenue, N.W.
22 Washington, DC 20001

23 Mr. John Holler
24 Arnold & Porter Kaye Scholer LLP
25 250 West 55th Street
New York, NY 10019

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

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

Ms. Christine Wheatley
Kroger General Counsel
The Kroger Company
1014 Vine Street
Cincinnati, OH 45202

Antonio Matthews
In-house counsel with Kroger

- 1
- 2
- 3
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- 6
- 7
- 8
- 9
- 10
- 11
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- 20
- 21
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- 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
Mr. Jonathan Bradley Pitt
6 Mr. Adam Joshua Podoll
Ms. Beth A. Stewart
7 Mr. Michael Cowie
Mr. Tyler Infinger
8 Ms. Adwoa Seymour
Mr. Thomas Moriarty
9 Mr. Thomas Ryan
Williams & Connolly
10 680 Maine Avenue S.W.
Washington, DC 20024

11
12 Mr. James Andrew Fishkin
Dechert, LLP
1900 K Street NW
13 Washington, DC 20006

14 Jon-Peter Kelly
15 Senior Vice President - Head of
Litigation at Albertsons Companies

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

19 Attorney for Witness Matthew Yates:

20 Kevin Hahm, Hunton Andrews Kurth LLP

21
22
23 COURT REPORTER:

Jill L. Jessup, RMR, RDR, CRR, CRC
United States District Courthouse
24 1000 S.W. Third Avenue, Room 301
Portland, OR 97204
25 jill_jessup@ord.uscourts.gov

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TRANSCRIPT OF PROCEEDINGS

(September 6, 2024)

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Please be seated.

Good morning. We are continuing the preliminary injunction hearing in Case No. 3:24-cv-00347. Federal Trade Commission, et al. v. the Kroger Company and Albertsons Companies, Incorporated. This is day nine of the hearing.

And if there are new attorneys to state their appearances on the record, we'll have them do so. Otherwise, every other attorney who has previously entered their appearances, we will note their continued appearances, and we can then continue with the cross-examination of the witness that we ended yesterday with.

So are there new appearances?

MS. PFAFFENROTH: Yes, Your Honor. We have John Holler from Kroger.

THE COURT: Good morning.

MS. STEWART: None from Albertsons, Your Honor.

MS. MUSSER: No new faces for plaintiffs.

THE COURT: All right.

MS. DIXON: Good morning, Your Honor.

THE COURT: Good morning.

MS. DIXON: Federal Trade Commission on behalf of

Gokhale - X

1 plaintiffs.

2 THE COURT: We're going to swear him in again.

3

4 RAJIV GOKHALE,

5 called as a witness in behalf of the Defendants, being first
6 duly sworn, is examined and testified as follows:

7

8 THE WITNESS: I do.

9 DEPUTY COURTROOM CLERK: Please state and spell
10 your name for the record.

11 THE WITNESS: First name is Rajiv, R-a-j-i-v.
12 Last name is Gokhale, G-o-k-h-a-l-e.

13

14 CROSS-EXAMINATION

15 (Continuing)

16 BY MS. DIXON:

17 Q. Good morning, Mr. Gokhale.

18 A. Good morning.

19 Q. Yesterday we were discussing the efficiencies you found
20 to be merger-specific and verifiable. So let's go back to
21 that discussion.

22 So we have Table 3 up.

23 Again, this is confidential information, so it's not to
24 be shown on the public display. This is also in your
25 report -- DX2493 at page 14 -- if you want to take a look at

Gokhale - X

1 that.

2 I think we discussed the range of efficiencies that you
3 found to be cognizable yesterday, and I just wanted to
4 confirm that following the merger guidelines framework, you
5 find that less than half of Kroger's projected synergies are
6 merger-specific and verifiable; right?

7 A. That's correct.

8 My cognizable estimate is what you said.

9 Q. And for more than half of Kroger's projected synergies,
10 you did not find them to be merger-specific or verifiable,
11 even though Kroger claims it will achieve those
12 efficiencies; right?

13 A. I found a substantial portion to be merger-specific;
14 but, you're right, I didn't find all of the rest verifiable.

15 Q. Now, looking at the table, category one and two on
16 Table 3, those two cost savings relate to sourcing; right?

17 A. Correct.

18 Q. Okay. So over half of the efficiencies you found to be
19 cognizable relate to sourcing of products; is that right?

20 A. Correct.

21 Q. Okay. So let's talk about those sourcing efficiencies.

22 Now, sourcing savings are attributable to two types of
23 sourcing efforts; right? You have goods for resale and
24 goods not for resale; correct?

25 A. Those are the two categories here.

Gokhale - X

1 Q. And goods for resale are products that are purchased
2 with the intention of being sold to customers in an
3 Albertsons store or Kroger store; right?

4 A. Correct.

5 Q. And an example of that would be a jar of peanut butter;
6 correct?

7 A. Yes.

8 Q. And goods not for resale are items that Kroger or
9 Albertsons purchases for its own use rather than selling to
10 a customer. Is that fair?

11 A. It's not sold to a customer. That's correct.

12 Q. Okay. And one example there would be packaging that
13 they use for goods that are not sold for resale; is that
14 right?

15 A. Yes.

16 Q. So let's talk about a specific example, the goods not
17 for resale, from your report.

18 If you can go to your report. DX2493, paragraph 142.
19 And let me know when you're there.

20 A. I am.

21 Q. Now, paragraph 142 is talking about Bain's analysis on
22 what the defendants spend on standard cans; right?

23 A. That's right.

24 Q. And that would be a type of packaging used for goods
25 for not resale; is that right?

Gokhale - X

1 A. Yes.

2 Q. Now, the synergy estimate in paragraph 142, that's
3 based on the difference between Kroger's lower rate from its
4 supplier and Albertsons' higher rate from its supplier;
5 right?

6 A. Correct.

7 Q. And you don't know why Kroger uses its current supplier
8 for sourcing its standard cans; right?

9 A. I haven't investigated that. Correct. I have not
10 investigated it.

11 Q. You don't know why Albertsons uses its current
12 supplier; right?

13 A. I haven't investigated that either.

14 Q. You did not analyze whether Albertsons could switch to
15 a Kroger supplier and get a lower rate without the merger;
16 right?

17 A. Correct.

18 Q. Now let's go back to the discussing sourcing goods for
19 resale.

20 Now, we've heard a lot about scale in this case, but
21 just to be clear, you have not verified any savings that
22 would result from consolidating the parties' volume of
23 purchases; correct?

24 A. In a sense that -- to the extent combined volume will
25 in the future allow the parties to negotiate a lower rate on

Gokhale - X

1 the combined volume, I have not.

2 Q. And Kroger did not estimate any savings from
3 consolidating Kroger's national brands purchases together
4 with Albertsons' national brands purchases; is that right?

5 A. In the sense I just described earlier, that's correct.

6 Q. You testified in direct about the methodology used
7 behind sourcing efficiencies.

8 Do you remember that?

9 A. I do.

10 Q. And that methodology involves comparing prices between
11 Kroger and Albertsons; right?

12 A. Yes.

13 Q. Now, that methodology of comparing costs between Kroger
14 and Albertsons, that's also called the "best of both"
15 pricing approach; right?

16 A. That's a fair term.

17 Q. And the "best of both" pricing approach, that assumes
18 that the merged entity would get the lower -- will get the
19 lower or the best of the two costs between them; right?

20 A. That's not correct.

21 As we discussed in my direct testimony yesterday, it's
22 a portion of in most categories. It's not simply the lower
23 of the two costs.

24 Q. Okay. So they would get -- okay. So not necessarily
25 getting the lower or the best two costs, but they would get

Gokhale - X

1 the -- the savings results from the gap between the parties'
2 costs. Is that fair to say?

3 A. Some portion of that gap.

4 Q. But to get -- to be able to realize that portion of
5 that gap, the merged entity would still negotiate with
6 suppliers; correct?

7 A. Yes. They would discuss with their supplies as they do
8 in the normal course of business.

9 Q. And you're not aware of any discussions that Albertsons
10 or Kroger has had with suppliers about post-merging pricing;
11 right?

12 A. I'm not, and I think Mr. Maharroof testified yesterday
13 they have not.

14 Q. And you're not aware of any commitments by suppliers to
15 provide -- to provide Kroger and Albertsons lower cost
16 post-merger; right?

17 A. I'm not; but -- no, I'm not.

18 Q. And you didn't conduct any interviews of suppliers;
19 correct?

20 A. I did not; but, in my opinion, it would a lot for
21 suppliers to commit now to lower prices in the future
22 post-merger.

23 Q. Now, you testified on direct about some prior cases
24 where you testified as an expert.

25 Do you remember that?

Gokhale - X

1 A. I do.

2 Q. Now, you've testified twice before in court about
3 merger-related efficiencies; right?

4 A. I have.

5 Q. One of those cases is about Sysco-US Foods merger?

6 A. Correct.

7 Q. And the other is about the Aetna-Humana merger?

8 A. Yes.

9 Q. Now I'd like to address the testimony you offered in
10 Aetna-Humana.

11 In that case, you testified on behalf of the
12 defendants; correct?

13 A. Yes.

14 Q. And in Aetna-Humana, you analyzed efficiencies that
15 were calculated using the "best of two contracts" approach;
16 right?

17 A. In parts, yes.

18 Q. Now, the "best of two contracts" approach that you --
19 that were used in Aetna-Humana, that's a -- similar to the
20 "best of both pricing" approach used by defendants in this
21 case to estimate synergies; correct?

22 A. It's a different business segment, different industry,
23 but the idea is similar, that you would compare the terms
24 and/or prices and -- under the two contracts.

25 Q. So you would agree that in Aetna-Humana, and in this

Gokhale - X

1 instance, the price that one party is paying -- the price
2 that one or the other party is receiving is a basis for
3 estimating efficiencies; right?

4 A. That's information that can be used post-merger.
5 That's right.

6 Q. Now, in Aetna-Humana, you argued that the merger would
7 result in efficiencies -- excuse me. Let me back up.

8 In Aetna-Humana, you argue that, quote, "The merger
9 would result in efficiencies because the merged entity could
10 use the lower of the two contracts," end quote. Isn't that
11 right?

12 A. I assume you're quoting correctly. I don't recall the
13 exact wording, but --

14 Q. Would the opinion refresh your memory?

15 A. I'll take your word for it.

16 Q. Now, the court in Aetna-Humana disregarded your opinion
17 and found that the "best of two contracts" approach here
18 simply showed that there were different -- differences in
19 rates and nothing more; right?

20 A. Again, I don't remember the exact wording; but, in
21 part, if I recollect correctly, yes.

22 Q. And the Aetna-Humana court also found that some
23 efficiencies that you found to be verified were, in fact,
24 not verifiable; correct?

25 A. If I recall correctly, for some part, yes, that's

Gokhale - X

1 correct.

2 Q. And the court held that those cost savings you claimed
3 were verified, were, in fact, not verifiable, because you
4 simply noted what the consultants had done and, without much
5 analysis, concluded that cost savings were verifiable; is
6 that right?

7 A. Again, I don't recall the exact wording, but I'll take
8 your word for it on that.

9 Q. Now, turning to your work in Sysco-US Foods, in that
10 case, you --

11 A. If I may add to my previous answer?

12 I think it's worth noting that, in that instance, the
13 court, if I recollect correctly, again, did not find that
14 there were zero or de minimis cognizable efficiencies. If I
15 remember correctly, the court found that the parties didn't
16 prove enough cognizable efficiencies to overcome the court's
17 concerns about competition.

18 Q. You are talking about Aetna-Humana, Mr. Gokhale?

19 A. Yes.

20 Q. Was that merger ultimately blocked by the court?

21 A. It was.

22 Q. Now, turning to your work in Sysco-US Foods. In that
23 case, you testified on behalf of the plaintiff; right?

24 A. Yes.

25 Q. And when you testified on behalf of the plaintiffs in

Gokhale - X

1 Sysco-US Foods, you found a portion of cost savings
2 estimates as not verifiable, in part, because the
3 defendant's expert accepted the consultant's estimates at
4 face value; right?

5 A. I think it was more specific than that.

6 If I recall correctly, in the Sysco and US Foods
7 matter, the expert for the defense had not done any
8 independent analysis and had simply quoted what the
9 consultant at the time had estimated.

10 Q. And when you testified on behalf of the plaintiffs, you
11 found that a portion of efficiencies were not
12 merger-specific because there were cost-saving initiatives
13 that defendants had undertaken -- could have taken absent
14 the merger; right?

15 A. Again, if I recall correctly, there were specific
16 instances of plans the parties had to undertake initiatives
17 that would have led to cost savings in the exact manner that
18 the consultants projected the parties would have as combined
19 entities.

20 Q. Now, you testified on direct about price investments;
21 correct?

22 A. I did.

23 Q. But to be clear, you did not do any econometric or
24 financial analysis of what portion of efficiencies are
25 likely to be passed through to consumers; right?

Gokhale - X

1 A. I did not do any econometric analysis. That's correct.

2 Q. You also did not do any financial analysis; is that
3 correct?

4 A. Other than the price investment, that's correct.

5 Q. What price -- I'm sorry. Can you clarify?

6 A. If you're isolating financial analysis, the price
7 investment is a financial reduction in what the prices would
8 be.

9 Q. So what financial analysis did you do relating to price
10 investments?

11 A. I'm just saying that's a financial component. I'm not
12 saying I've done any analysis. I'm just trying to separate
13 it from econometric analysis.

14 Q. Did you do any econometric or financial analysis of
15 what portion of efficiency -- efficiencies are likely to be
16 passed through to consumers as price investments?

17 A. I've noted that the parties have committed to a billion
18 dollars a year.

19 Q. But did you do any econometric analysis?

20 A. I did not.

21 Q. Did you do any financial analysis?

22 A. I did not.

23 Q. Now, the 1 billion price investment, that is a number
24 that Kroger provided; correct?

25 A. Provided as in the -- they've committed it publicly,

Gokhale - X

1 they've told it to their board, so yes.

2 Q. But you did not quantify a price investment amount; is
3 that correct?

4 A. One billion is a quantification. I'm not sure what
5 you're asking me.

6 Q. You did not come up with the one billion amount; is
7 that right?

8 A. No. As I said, that's what the parties have said they
9 will commit.

10 Q. Now, I believe in direct you testified about interviews
11 that you've conducted in writing your expert report; is that
12 right?

13 A. I'm sorry. In my deposition, you said?

14 Q. No. On direct.

15 A. Yes, I -- I did say we conducted interviews. That's
16 right.

17 Q. So in preparing your opinions in this matter, you
18 personally interviewed Kroger -- Kroger employees and
19 consultants; right?

20 A. That's right.

21 Q. And you used the information you learned in those
22 interviews to inform the opinions in your expert report;
23 correct?

24 A. In the manner I described, yes.

25 Q. And you found those interviews useful in understanding

Gokhale - X

1 the cost savings analyses that were done by Kroger and its
2 consultants; right?

3 A. I think I stated it slightly differently. We were able
4 to use the fact packs and the underlying models.

5 Understanding the methodology, I found those to be
6 reasonable. We were able to look at the models to
7 understand the math, and I was able to go back and confirm
8 that our understanding was correct.

9 Q. So is it fair to say that you found them helpful in
10 understanding the assumptions and the work that the
11 consultants have done?

12 A. In confirming that our understanding of the assumptions
13 and methodology was -- was correct.

14 Q. Let's look at an exhibit in your binder. It's PX7014.

15 Have you seen this document before, Mr. Gokhale?

16 A. I have.

17 If I recall correctly, it was turned over after I filed
18 the report.

19 Q. Now, PX7014 contains a list of the individuals that you
20 personally interviewed; is that right?

21 A. Yes. That I -- my team and I were present for these
22 interviews.

23 Q. And also lists the dates of those interviews; right?

24 A. Yes.

25 Q. Now, you interviewed Kroger employees and consultants

Gokhale - X

1 19 different times; right?

2 A. That's what this says.

3 Q. And each one of those interviews lasted about an hour,
4 hour and a half? Does that sound about right?

5 A. That sounds about right.

6 Q. And you took notes twice with respect to those
7 interviews; right?

8 A. I myself did, yes.

9 Q. Now, besides the two notes that you took and your
10 characterizations in your report, there's no documentation
11 of what was said in those 19 interviews; correct?

12 A. I did not document it.

13 Q. So besides those two notes, there's no way for
14 plaintiffs or the Court to explore any of the conversations
15 you've had with Kroger employees or consultants; right?

16 A. That's correct. I didn't document it.

17 Q. Now, you can't identify the facts you learned from
18 those interviews that you relied upon in your report; is
19 that correct?

20 A. Not with any specificity, no; other than what I
21 described earlier.

22 Q. Now, you do not cite anywhere in your report any of the
23 interviews that you conducted during your work in this
24 matter; is that correct?

25 A. I believe that's correct.

Gokhale - X

1 Q. And then as of your deposition this past July, you have
2 not interviewed any Kroger or Albertsons suppliers; correct?

3 A. That's correct.

4 Q. So your July expert report in this case was not based
5 on having personally conducted any interviews of any Kroger
6 or Albertsons suppliers; correct?

7 A. I did not interview any suppliers, that's correct.

8 Q. Okay. And you don't cite to any supplier or vendor
9 contracts in your report; correct?

10 A. That's correct.

11 Q. And in your materials relied upon, this, and your
12 expert report, it does not show any contracts or vendor
13 supplier or -- excuse me -- any vendor or supplier
14 contracts; correct?

15 A. That's correct.

16 Q. As of your deposition this past July, you have not
17 interviewed any Albertsons employees; correct?

18 A. That's correct.

19 Q. So your July 2024 expert report in this case was not
20 based on having personally conducted any interviews with
21 Albertsons employees; correct?

22 A. Yes.

23 Q. And you don't cite to any Albertsons internal documents
24 in your report; right?

25 A. I don't believe I do.

Gokhale - X

1 Q. And what would those be?

2 A. I said, "I don't believe."

3 Q. Oh, okay.

4 And you cite to the deposition testimony of just two
5 Albertsons employees; right? Susan Morris and Anuj Danda;
6 is that right?

7 A. That's right.

8 Q. You don't cite to testimony from Mr. Sankaran,
9 Albertsons' CEO; correct?

10 A. I don't.

11 Q. Now, you testified on direct about cost savings
12 potentially achievable in the area of transportation costs.

13 Do you -- do you recall that?

14 A. I do.

15 Q. But given that you have not cited the testimony of
16 Albertsons' CEO, Mr. Sankaran, is it fair to say that you
17 have not considered the testimony of Mr. Sankaran about the
18 efforts Albertsons has underway to optimize its own
19 transportation costs?

20 A. I haven't cited Mr. Sankaran's testimony specifically,
21 but as I discussed, I understand and I fully expect that
22 both parties have historically focused on cost reductions
23 and will continue to do so.

24 And I do understand that Mr. Sankaran discussed
25 something about cost reductions in his testimony in court.

Gokhale - ReD

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

2 THE COURT: Any redirect?

3 MR. KIENTZLE: Just briefly, Your Honor.

4

5

REDIRECT EXAMINATION

6 BY MR. KIENTZLE:

7 Q. Good morning, Mr. Gokhale.

8 A. Good morning.

9 Q. My colleague talked to you a moment ago about your
10 testimony in the Sysco matter and in the Aetna-Humana
11 matter.

12 Do you recall that?

13 A. I do.

14 Q. Did the Sysco case involve the retail industry?

15 A. Maybe. Because they were suppliers to restaurants and
16 food establishments, but they didn't directly sell to
17 customers.

18 Q. Right. Were the merging parties in that case
19 retailers?

20 A. No.

21 Q. And in the Aetna-Humana case, were the merging parties
22 retailers?

23 A. Not in the sense Kroger and Albertsons are, no.

24 Q. My colleague also asked you about your review of
25 certain materials from Albertsons.

Gokhale - ReD

1 Do you recall that?

2 A. I do.

3 Q. When we spoke yesterday about the various models you
4 considered and the data, did that include data that was
5 derived from Albertsons?

6 A. Yes. That's what has been gathered in the clean room.
7 It's data gathered from both parties, which I understand
8 both parties' representatives are able to see what data are
9 being collected.

10 Q. So, for example, when we spoke about national brands
11 cost savings, the analysis that you reviewed relies upon
12 cost data from Albertsons; correct?

13 A. Correct.

14 Q. Yesterday Ms. Dixon asked you some questions about the
15 merger guidelines and whether the parties themselves had
16 applied the merger guidelines.

17 Do you recall that?

18 A. I do.

19 Q. I just want to make sure the record is clear on this
20 point: Was applying the merger guidelines part of your
21 assignment as an expert witness in this case?

22 A. Yes. I estimate cognizable efficiencies under the
23 merger guidelines.

24 Q. As an expert witness, would you expect that the parties
25 themselves would apply the merger guidelines?

Gokhale - ReD

1 A. Not in my experience, no. They are undertaking a very
2 different exercise.

3 MR. KIENTZLE: No further questions.

4 THE COURT: All right. You can step down.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 You may call your next witness.

8 MR. COWIE: Your Honor, defendants calls
9 Matthew Yates via video.

10 Your Honor, the witness's counsel is here in the
11 courtroom available to introduce himself to you and the
12 Court.

13 MR. HAHM: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. HAHM: Kevin Hahm, with Hunton Andrews Kurth,
16 on behalf of Ahold Delhaize USA.

17 THE COURT: Come on into the well.

18 MR. COWIE: Your Honor, Michael Cowie for
19 Albertsons.

20 THE COURT: All right.

21 DEPUTY COURTROOM CLERK: Please raise your right
22 hand, Mr. Yates.

23 ///

24 ///

25 ///

Yates - D

1 MATTHEW YATES,
2 called as a witness in behalf of the Defendants, being first
3 duly sworn, is examined and testified as follows:

4

5 THE WITNESS: Yes, I do.

6 DEPUTY COURTROOM CLERK: Thank you.

7 Please state and spell your first and last name for the
8 record.

9 THE WITNESS: Matthew Yates. M-a-t-t-h-e-w,
10 Y-a-t-e-s.

11

12 DIRECT EXAMINATION

13 BY MR. COWIE:

14 Q. Mr. Yates, thank you for taking time to do this.

15 Where are you located today?

16 A. I'm in Salisbury, North Carolina.

17 Q. Mr. Yates who is your employer?

18 A. Food Lion.

19 Q. How long have you been working at Food Lion?

20 A. Since 1998.

21 Q. What is your position at Food Lion?

22 A. I'm currently the vice president of brand strategy.

23 Q. For about how long have you been vice president of
24 brand strategy?

25 A. In this role, since 2018.

Yates - D

1 Q. What are your job duties?

2 A. I'm currently responsible for strategy and innovation
3 for Food Lion, strategy implementation, business planning,
4 and real estate development.

5 Q. Who do you report to, Mr. Yates? And I'm really
6 focused on the position rather than the name.

7 A. I report directly to the president of Food Lion.

8 Q. About how many stores does Food Lion operate in the
9 U.S.?

10 A. Food Lion operates 1,109 stores.

11 Q. Would you mind listing the states in which Food Lion
12 operates?

13 A. Yes. I may not get these in the -- in the right order,
14 but Georgia, Tennessee, Kentucky, South Carolina,
15 North Carolina, Virginia, Maryland, Delaware, and
16 Pennsylvania.

17 Q. Thank you.

18 Does Food Lion have a parent company?

19 A. Food Lion does have a parent company.

20 Q. Who's the parent company?

21 A. Ahold Delhaize USA.

22 Q. Does Ahold own or operate other grocery banners in the
23 U.S.?

24 A. They do, yes.

25 Q. And please identify those other banners.

Yates - D

1 A. Hannaford, Stop & Shop, Giant Company, and Giant Food.

2 Q. Mr. Yates, I have some questions about the types of
3 marketplace information you and your team use to make
4 decisions.

5 Do you use third-party databases?

6 A. We do, yes.

7 Q. Can you describe some of the third-party databases?
8 And this can be a high level.

9 A. I would say the most prominent that we use on a normal
10 basis would be Circana, Nielsen, Kantar, and Ipsos.

11 Q. Okay. Are you able to briefly describe the types of
12 information those third-party databases provide?

13 A. Yes. At the highest level, Ipsos and Kantar both
14 provide customer research, customer survey data for us, and
15 Circana and Nielsen provide what I would call market data,
16 product information, share information.

17 Q. Mr. Yates, do you and your team also use third-party
18 consultants at times?

19 A. Our -- I would say our broader organization uses
20 third-party consultants. Food Lion at a -- at a much lower
21 level. Our consultants, from a Food Lion perspective, would
22 be more on a project-by-project-type basis.

23 Q. Are you able to describe some of the projects that
24 either Food Lion or Ahold undertake with third parties that
25 impact Food Lion?

Yates - D

1 And we're not -- I'm not asking you to get into
2 confidential information, just at a high level.

3 A. I would say one great example is recently we did a body
4 of work around positioning for the Food Lion brand, and we
5 leveraged a third party to help facilitate that work, which
6 I would say also included our Ipsos and Kantar partners. So
7 that's one example.

8 Q. In terms of marketplace information, do you and your
9 team also consider competitors' public announcements of
10 expansion plans?

11 A. We do. I would say that's much more in an organic
12 nature and an "if we find it/if we see it" nature. So less
13 structured I would say, but certainly know that's important.

14 Q. And why do you track or use competitor announcements on
15 expansions or strategy?

16 A. I think in a general-course-of-business perspective,
17 it's important for any retailer to understand what else is
18 happening in the marketplace and moves that are being made
19 and other changes that can impact our industry and/or our
20 customers.

21 Q. Mr. Yates, does the company also consider competitors'
22 publicly available pricing information?

23 A. Yes. That -- that would be a data point that we
24 would -- that we would look at if it were available to us.

25 Q. Mr. Yates, do you or your team also conduct your own

Yates - D

1 internal research on -- on customers or competitors?

2 I know I asked about third party. Now I'm asking about
3 internal research.

4 A. I would say, from a research perspective, we -- we
5 almost exclusively leverage the third parties. From a --
6 what was the second part of your question? I'm sorry.

7 Q. The question is whether you or your team also conduct
8 your own research on consumers or competitors that you may
9 use in your decision-making.

10 A. Yes. So the -- the research piece we typically would
11 rely heavily on the third parties. Research that we might
12 do ourselves would be more on the ground, in stores, taking
13 a look at what's happening, and as you mentioned, publicly
14 available, publicly announced information, so that we could
15 have a good understanding of what is happening around us and
16 what is happening in the marketplace.

17 Q. Mr. Yates, are you familiar with the phrase "share of
18 wallet"?

19 A. I am, yes.

20 Q. What is share of wallet?

21 A. Share of wallet generally is a term that refers to how
22 much a customer spends in any specific category across
23 retailers.

24 Q. Does Food Lion consider the share of wallet it has for
25 its customers?

Yates - D

1 A. We do consider that, yes.

2 Q. And does Food Lion use a third party to help with those
3 estimates or measures?

4 A. Yes, we do.

5 MR. COWIE: Mr. Simmons, would you please open
6 DX2500, which is Mr. Yates' deposition transcript?

7 And this is on the private screen, please.

8 BY MR. COWIE: (Continuing):

9 Q. And, Mr. Yates, you should have with you your
10 deposition transcript.

11 Are you able to view either a paper copy or an
12 electronic copy?

13 A. Yes. I have it here in paper copy.

14 Q. Would you please turn to page 23.

15 A. I am on page 23.

16 Q. Mr. Yates, do you recall you were deposed last May?

17 A. Yes, I do.

18 Q. Do you recall that you testified about Food Lion's
19 share of wallet?

20 A. I do.

21 Q. Please don't mention the sum on page 23, for
22 confidentiality reasons. Is that sum on page 23 your
23 understanding or your best understanding of Food Lion's
24 share of wallet?

25 A. On page 23, line 8, yes, that is my understanding of

Yates - D

1 Food Lion's share of wallet.

2 MR. COWIE: Your Honor, to make the record clear
3 and maintain Ahold's confidentiality, I'd like to admit a
4 portion of Mr. Yates' deposition transcript. That is page
5 23, lines 4 through 8, which is DX2500.

6 MS. BLACKBURN: No objection.

7 THE COURT: It will be received.

8 BY MR. COWIE: (Continuing):

9 Q. From your 26 years in the -- in the industry, are you
10 familiar with the term "traditional supermarkets"?

11 A. I am, yes.

12 Q. Is Food Lion sometimes considered a traditional
13 supermarket?

14 A. Yes, Food Lion would be.

15 Q. Based on the marketplace information you see as part of
16 your job duties, please identify some of the competitors of
17 Food Lion.

18 A. Yes. It's certainly not an exhaustive list, but
19 competitors of Food Lion I would list as Publix,
20 Harris Teeter, Walmart, Aldi, Costco, Sam's Club, Lidl,
21 Piggly Wiggly, Wegmans, Amazon. Those are the key ones that
22 would be top of mind.

23 Q. Does Food Lion compete with online grocery retailers
24 such as Amazon.com?

25 A. Yes, Food Lion does.

Yates - D

1 Q. Would that include competition for perishables as well
2 as non-perishables?

3 A. Yes, it would.

4 Q. And the companies you listed as competitors, would
5 those include companies that, in your experience, are not
6 typically described as traditional supermarkets?

7 A. For --

8 Q. Would you like me to restate that? Is that clear?

9 A. It is clear.

10 Certain competitors that I just listed would -- would
11 sometimes be referred to as "other than traditional," yes.

12 Q. You mentioned Aldi. Have you seen Aldi expanding in
13 your region?

14 A. We have seen Aldi expanding, yes.

15 Q. And over the years, have you seen Costco expanding in
16 your region?

17 A. We have seen Costco expand, yes.

18 Q. And do you also track Walmart's presence and
19 significance in your region?

20 A. I think we would have to define the term "track"; but,
21 yes, Walmart would be in the same line as the others you
22 just mentioned.

23 MR. COWIE: Mr. Simmons, would you please open
24 DX0240 on the private screen and just the cover page for
25 now?

Yates - D

1 BY MR. COWIE: (Continuing):

2 Q. Mr. Yates, I believe you have a document that's
3 entitled, "Driving the Corporate Reputation of Food Lion."

4 A. Yes, I do.

5 Q. Are you familiar with this document?

6 A. I'm familiar with the document, yes.

7 Q. Does this document report the results of a study that
8 Food Lion and a consultant prepared?

9 A. Yes, it does.

10 Q. Do you have an understanding of the purpose of the
11 study?

12 Again, you can keep this at a high level.

13 A. Yes. The purpose of the study, and generally for Food
14 Lion and other retailers as well, is to understand broad
15 perceptions in the marketplace.

16 Q. And did you review this study as part of your regular
17 job duties?

18 A. Yes. We do review this on the normal basis.

19 MR. COWIE: Your Honor, I move to admit DX0240
20 into evidence.

21 MS. BLACKBURN: No objection.

22 THE COURT: It will be received.

23 BY MR. COWIE: (Continuing):

24 Q. Mr. Yates, would you turn to page 7? This is also
25 marked with the last four digits -1850. It's hard to read.

Yates - D

1 But you see page 7, Mr. Yates?

2 A. I do.

3 Q. Does this slide show retailers that were selected for
4 this study?

5 A. Yes, it does.

6 Q. And do you have an understanding or recollection of how
7 these retailers were selected for this Food Lion study?

8 A. Yes, I do.

9 This -- in my mind, this represents a wide range of
10 competitors that Food Lion has inside of its marketplace
11 that is -- is relevant for us to understand the perceptions
12 of consumers.

13 Q. Is this an exhaustive listing of Food Lion's
14 competitors?

15 A. No, it is not.

16 Q. And do these companies listed on slide 7 include
17 retailers that are not typically described as traditional
18 supermarkets?

19 A. Yes, it does.

20 Q. Mr. Yates, you testified that you track competitor
21 announcements, and I think we talked about Aldi and Costco
22 and Walmart.

23 Do competitor announcements about their strategy
24 expansions help your team in decision-making?

25 A. I think it depends on the level of information that's

Yates - D

1 in the announcements, so certainly it could help in
2 decision-making. It could be an input to decision-making.

3 Q. And what would be an example where it would be a
4 helpful input?

5 A. If any retailer were to know where another were to
6 announce a store opening in the -- in the coming future,
7 that would be important information to understand.

8 MR. COWIE: Mr. Simmons, would you please show
9 demonstrative DDX19?

10 And this could be on the public screen.

11 BY MR. COWIE: (Continuing):

12 Q. Mr. Yates, you should have a PowerPoint slide.

13 A. Yes, I do.

14 Q. Let's start with Aldi.

15 Have you observed Aldi expanding in your region?

16 A. Yes, I have.

17 Q. And based on your work for Food Lion, do you view Aldi
18 as a growing competitor?

19 A. I do -- I do view Aldi as a growing competitor, yes.

20 Q. And, Mr. Yates, have you, in your -- in your job
21 duties, observed Costco expanding in your region?

22 A. Yes, I have.

23 Q. And do you view Costco as a growing significant
24 competitor?

25 A. Yes, I do.

Yates - D/X

1 Q. The same for Walmart.

2 Have you observed Walmart over the years growing in
3 your region and continuing to compete and grow?

4 A. Yes, I have.

5 Q. Mr. Yates, based on the work you do today for Food
6 Lion, would you describe the grocery industry as
7 competitive?

8 A. I would describe the grocery industry as very
9 competitive, yes.

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

11 MS. BLACKBURN: Emily Blackburn for plaintiff,
12 Federal Trade Commission.

13

14

CROSS-EXAMINATION

15 BY MS. BLACKBURN:

16 Q. Good afternoon, Mr. Yates. How are you?

17 A. I'm well. Thank you.

18 Q. My colleague asked you about traditional supermarkets
19 just now.

20 Do you recall that?

21 A. I do.

22 Q. "Traditional supermarket" is a term with a common
23 meaning in the food industry; right?

24 A. I believe it -- I struggle with the term "common," but
25 I think when many in the industry would say "traditional,"

Yates - X

1 there are certain retailers that would come to mind, yes.

2 Q. Mr. Yates, do you recall you testified in your
3 deposition that "traditional supermarket" is a term with a
4 common meaning in the retail food industry?

5 A. I don't recall the word "common," but I believe that
6 that -- that would make sense, if I said that, yes.

7 Q. Thank you, Mr. Yates.

8 And is it correct that you used the term "traditional
9 supermarket" in the ordinary course sometimes to distinguish
10 your stores from other food retailers?

11 A. Yes, I do.

12 Q. And I believe you testified that Ahold's Food Lion
13 stores are traditional supermarkets; right?

14 A. Yes, they are.

15 Q. Are Ahold's Giant Stores also traditional supermarkets?

16 A. They would be.

17 Q. On the streets -- I want to ask you about some features
18 of a traditional supermarket, just so we understand what
19 we're talking about when we say that term. Is that all
20 right?

21 A. It is.

22 Q. So Food Lion stores, they range from an average of
23 about 30,000 to about 60,000 square feet; is that right?

24 A. Generally, yes. There are some exceptions; but,
25 generally, yes.

Yates - X

1 Q. And is it accurate to say that the typical Food Lion
2 store would have dry grocery products, like canned goods, in
3 the center store area?

4 A. Yes, that's correct.

5 Q. And then the perimeter of the store has the fresh
6 department and the service counters; right?

7 A. That's correct.

8 Q. And Ahold's Food Lion stores typically carry about
9 24,000 SKUs; right?

10 A. Food Lion stores? Yes.

11 Q. And I believe that my colleague asked you some
12 questions about Costco.

13 Do you recall that?

14 A. I do.

15 Q. And do Costcos and other club stores carry fewer SKUs
16 compared to traditional supermarkets?

17 A. They would, yes.

18 Q. And, for instance, a club store may offer only a few
19 flavors or brands within each product category; right?

20 A. That's correct, yes.

21 Q. And is it fair to say also that the assortment at the
22 club store may vary over time so a customer might not be
23 able to find the product they came to buy even if it was in
24 stock last week or last month?

25 A. That's been my experience, yes.

Yates - X

1 Q. And I believe my colleague asked you also about the
2 food retailer called Aldi.

3 Do you recall that?

4 A. I do.

5 Q. And Aldi is a format that is commonly referred to as a
6 limited assortment store; right?

7 A. It would be, yes.

8 Q. And limited assortment stores, like Aldi, also carry a
9 narrower assortment compared to traditional supermarkets;
10 right?

11 A. "Fewer SKUs" is how I would describe that, yes.

12 Q. And a limited assortment store, like Aldi, would also
13 carry a narrower assortment in terms of the variety of
14 package sizes a customer can find; correct?

15 A. Yes, that's correct.

16 Q. And club stores also carry a smaller variety of package
17 sizes; right?

18 A. That is correct.

19 Q. And you testified earlier about the location of the
20 service counters in Food Lion stores.

21 Do you recall that?

22 A. In my deposition, yes.

23 Q. And so Food Lion stores typically have a staffed
24 service counter, such as a deli, where customers could get
25 the quantity of meat or cheese that they desire; correct?

Yates - X

1 A. Yes, that's correct.

2 Q. And Food Lion stores also typically have an in-store
3 bakery where a customer might call ahead and have a cake
4 decorated; right?

5 A. Yes.

6 Q. Limited assortment stores, like Aldi, don't have staff
7 service counters, do they?

8 A. I have not experienced that.

9 Q. And club stores don't typically have staff service
10 counters either; right?

11 A. Club stores would have a staffed meat service counter.
12 I'm not aware of others.

13 Q. And having staff service counters helps Food Lion
14 compete for customers; right?

15 A. We believe so, yes.

16 Q. And my colleague also asked you some questions about
17 trying to understand reasons that customers shop at certain
18 retail stores and share of wallet; is that right?

19 A. Yes.

20 Q. Do you recall testifying in your deposition about
21 customer need states?

22 A. I do, yes.

23 Q. And just for clarity, a customer need state essentially
24 refers to what the customer is trying to find when they're
25 on a particular shopping trip; right?

Yates - X

1 A. Yes. That's right.

2 Q. And you describe the customer need state for a club
3 store as different compared to the customer who wants to
4 visit a traditional supermarket, like Food Lion; right?

5 A. Yes. It generally would be.

6 Q. And, in particular, the customer need state for a club
7 shop is somebody who's looking for a larger package size;
8 right?

9 A. Generally, yes.

10 Q. And the customer need state for a club shop would also
11 be someone who isn't deterred by the requirement to have a
12 paid membership; right?

13 A. By definition, yes.

14 Q. Do you also recall testifying in your deposition about
15 how a limited assortment store may not meet the need state
16 of a customer shopping at a traditional supermarket?

17 A. Depending on what the need state is in any moment, yes,
18 that would be true.

19 Q. And that's because a customer seeking the services
20 offered at a Food Lion service counter, for instance,
21 couldn't have that need met at a limited assortment store,
22 could they?

23 A. They could not.

24 Q. Is it your understanding that the same person may
25 sometimes shop at a Food Lion, sometimes shop at a club

Yates - X

1 store, and sometimes shop at another store, such as a
2 limited assortment store?

3 A. Yes.

4 Q. And is it fair to say that when that person steps out
5 the door to go on their shopping trip, the stores they see
6 as a good option for that specific trip will be determined,
7 in part, by their need state at the time and which store
8 meets that need state?

9 A. Yes, that's true.

10 Q. My colleague asked you a few questions about
11 competition with online retailers like Amazon.

12 Do you remember that?

13 A. I do.

14 Q. Shopping online for groceries is a different customer
15 experience compared to shopping in a store.

16 Would you agree?

17 A. Yes, it is.

18 Q. And the in-store shopping experience is important to
19 some customers; right?

20 A. To some customers, it is, yes.

21 Q. And, in fact, you can't think of any examples of
22 traditional supermarkets that don't have brick-and-mortar
23 stores; right?

24 A. I cannot.

25 Q. Is it correct that Food Lion's entire go-to-market

Yates - X

1 strategy is designed to attract customers to shop at its
2 brick-and-mortar stores?

3 A. I would say it's a significant part of our go-to-market
4 strategy. Yes.

5 Q. And you're also familiar with ecommerce delivery
6 companies, like Instacart and DoorDash; right?

7 A. I am.

8 Q. Food Lion considers companies like ecommerce and
9 DoorDash to be partners, not competitors; right?

10 A. That is correct. That's what I consider them to be,
11 yes.

12 Q. And that's because Food Lion leverages these companies
13 to provide delivery services from its brick-and-mortar
14 stores; is that right?

15 A. Yes, that's correct.

16 Q. My colleague asked you some questions about tracking
17 competitor openings.

18 Do you recall that?

19 A. I do.

20 Q. Is it fair to say, Mr. Yates, that you would be
21 interested in a competitor's opening when that opening is
22 occurring nearby to one of your stores?

23 A. Yes. Certainly.

24 Q. Sir, you're familiar with the term "trade area";
25 correct?

Yates - X

1 A. I am.

2 Q. A trade area refers to the geographic area from which a
3 store draws its customers; right?

4 A. That's correct.

5 Q. And Food Lion tracks its stores' trade area in the
6 ordinary course to help and understand nearby competitive
7 conditions; right?

8 A. That's one of the reasons we track, yes.

9 Q. And that's because stores nearby your trade areas might
10 be competing for the same customers; right?

11 A. Certainly they would be, yes.

12 Q. And in the ordinary course, Food Lion uses its loyalty
13 card shopper data to know where the stores' customers live
14 relative to where they're shopping; right?

15 A. That's one of the ways that we can leverage that
16 information, yes.

17 Q. And, in fact, Food Lion's trade areas are based on the
18 geographic area from which each store draws 75 percent of
19 its sales; right?

20 A. That is true. Yes.

21 Q. So is it fair to say that the trade area of each store
22 is localized around that store?

23 A. Generally speaking, yes, it would be localized.

24 Q. And is it also fair to say that the trade area of each
25 store can vary based on the local conditions around the

Yates - X

1 store that can influence where people choose to shop?

2 A. No two trade areas are alike. That's correct.

3 Q. My colleague also asked you about publically available
4 pricing information.

5 Do you recall that?

6 A. I do.

7 Q. As part of its strategy to offer competitor prices,
8 Food Lion price-checks various competitors. True?

9 A. We do.

10 Q. I'm going to ask you some questions about Food Lion's
11 price-checking, but in order to respect confidentiality, I'm
12 going to ask Mr. Duncan to kindly display on the nonpublic
13 screens PX4071, which is your deposition transcript, and
14 please turn to page 142, lines 1 through 4, to begin with.

15 Now, Mr. Yates, looking at pages 142, lines 1 through 4
16 of your deposition, is this testimony accurate?

17 THE COURT: He's not there yet.

18 MS. BLACKBURN: I'm sorry. It's up on my screen.
19 My apologies. Mr. Yates, let me know when you're there.

20 THE WITNESS: Yes. I'm there. I'm ready. I
21 apologize.

22 BY MS. BLACKBURN: (Continuing):

23 Q. Thank you, sir.

24 To repeat my question, looking at Page 142, lines 1
25 through 4 of your deposition, is this testimony accurate as

Yates - X

1 to what Food Lion does with the results of its
2 price-checking?

3 A. Yes, it is accurate.

4 MS. BLACKBURN: And, Mr. Duncan, if you can
5 please, again, on the private screen display page 142, line
6 23 through line 143, 13.

7 I'm sorry. Your Honor, move to request that page 142,
8 lines 1 through 4 be entered into evidence?

9 THE COURT: Any objection?

10 MR. COWIE: No objection, Your Honor.

11 THE COURT: It will be received.

12 MS. BLACKBURN: Thank you, Your Honor.

13 BY MS. BLACKBURN: (Continuing):

14 Q. Mr. Yates, are you at that second passage that I
15 directed you to?

16 A. I am, yes.

17 Q. Thank you, sir.

18 And reading this testimony, is it accurate that
19 Food Lion checks the following retailer and the following
20 store format listed in each of its price zones?

21 A. Yes, that's correct.

22 MS. BLACKBURN: Your Honor, we would request this
23 testimony be moved into evidence.

24 MR. COWIE: No objection.

25 THE COURT: It will be received.

Yates - X

1 BY MS. BLACKBURN: (Continuing):

2 Q. These different price-checks give Food Lion a view into
3 different sides of the pricing dynamic; right?

4 A. Yes, that's correct.

5 MS. BLACKBURN: Mr. Duncan, if you can please
6 display on the private screen page 144, 2 through 13, and
7 page 144, 22 through 145, 7, and these are going to be side
8 by side.

9 BY MS. BLACKBURN: (Continuing):

10 Q. And, Mr. Yates, since you're using your paper copy,
11 let's look at page 144, 2 through 13, first, sir?

12 A. Okay. I'm there.

13 Q. Thank you.

14 Mr. Yates, does this testimony accurately describe
15 Food Lion's reasons for price-checking the particular store
16 formats that it does?

17 A. Yes. That's an accurate depiction.

18 MS. BLACKBURN: Mr. Duncan, if you can please
19 display page 149, 5, through 152.

20 THE WITNESS: I'm at 149, row five.

21 BY MS. BLACKBURN: (Continuing):

22 Q. Thank you, sir.

23 And this testimony accurately describes the store
24 format for which Food Lion monitors the weekly ad fliers in
25 each of its price zones; right?

Yates - X

1 A. Yes, that's correct.

2 MS. BLACKBURN: I would request that lines 144, 2
3 through 13, as well as line 149, 5 through 152, be moved
4 into evidence.

5 MR. COWIE: No objection.

6 BY MS. BLACKBURN: (Continuing):

7 Q. And now --

8 THE COURT: It will be received.

9 Now you can continue.

10 MS. BLACKBURN: Thank you, Your Honor.

11 And now, if you could please display page 146, 14,
12 through 147, 7.

13 THE WITNESS: I'm at 146, line 14.

14 BY MS. BLACKBURN: (Continuing):

15 Q. Is it correct that Food Lion doesn't price-check the
16 store formats mentioned here?

17 A. That's correct.

18 MS. BLACKBURN: I would request that lines 146, 14
19 through 147, 7 be moved into evidence.

20 MR. COWIE: No objection.

21 THE COURT: It will be received.

22 MS. BLACKBURN: And now if we can display 147, 13
23 through 18.

24 BY MS. BLACKBURN: (Continuing):

25 Q. Food Lion also doesn't typically check prices at the

Yates - X

1 store format you testified about here either; right?

2 A. In the general course of business, that's correct.

3 MS. BLACKBURN: We would request that this passage
4 be moved into evidence.

5 MR. COWIE: No objection.

6 THE COURT: It will be received.

7 MS. BLACKBURN: Now if we can display 147, lines 8
8 through 12.

9 BY MS. BLACKBURN: (Continuing):

10 Q. Mr. Yates, Food Lion doesn't check prices at this store
11 format either; right?

12 A. That's correct.

13 MS. BLACKBURN: We would move this passage into
14 evidence, please.

15 THE COURT: Any objection?

16 MR. COWIE: No objection.

17 THE COURT: It will be received.

18 BY MS. BLACKBURN: (Continuing):

19 Q. And, finally, if we can look at page 148, lines 8
20 through 20.

21 A. I'm there.

22 Q. Food Lion doesn't check the prices at this retailer
23 either; right?

24 A. Not on a normal basis. With -- with limited
25 exceptions.

Yates - X

1 MS. BLACKBURN: We would request this passage be
2 moved into evidence.

3 MR. COWIE: No objection.

4 THE COURT: It will be received.

5 BY MS. BLACKBURN: (Continuing):

6 Q. My colleague asked you about the states where Ahold
7 operates stores.

8 Do you recall that?

9 A. The states where Food Lion operates stores, yes.

10 Q. I'm sorry, sir.

11 And Food Lion does not currently operate any stores in
12 the western half of the United States; is that right?

13 A. We do not.

14 Q. Are you familiar with where Ahold's Giant Stores are
15 located?

16 A. Generally, yes.

17 Q. Giant does not operate any stores in the western half
18 of the United States either; right?

19 A. Giant does not.

20 Q. And on the topic of expansion, you're familiar with the
21 process of opening a new supermarket; right, sir?

22 A. Yes, I am.

23 MS. BLACKBURN: Mr. Duncan, if you can please
24 display page 165, line 18 through 166, 3.

25 Again, on the private screen, please.

Yates - ReD

1 THE WITNESS: 165, line 18?

2 BY MS. BLACKBURN: (Continuing):

3 Q. Through 166, 3, sir, yes.

4 A. Yes.

5 Q. Mr. Yates, does this testimony accurately characterize
6 the amount of time it takes to build a new supermarket from
7 the ground up?

8 MR. COWIE: Your Honor, objection. Beyond the
9 scope. We didn't cover supermarket construction.

10 THE COURT: That's sustained.

11 MS. BLACKBURN: Thank you, Your Honor.

12 No further questions. I pass the witness.

13 THE COURT: Any --

14 MR. COWIE: Your Honor, I have a few.

15

16 REDIRECT EXAMINATION

17 BY MR. COWIE:

18 Q. Mr. Yates, do you recall Ms. Blackburn asked you about
19 differences between SKUs among retailers?

20 A. Yes, I do.

21 Q. Does Food Lion compete with food retailers that have
22 variation or differences in the number of SKUs?

23 A. Yes, we do.

24 Q. Ms. Blackburn -- do you recall Ms. Blackburn also asked
25 you about differences in services, such as bakeries?

Yates - ReD

1 A. Yes, I do.

2 Q. Does Food Lion compete with food retailers that have a
3 variation and variety of services?

4 A. Yes, we do.

5 Q. And do you recall Ms. Blackburn showed you
6 confidentially the identity of some food retailers that you
7 do not price-check?

8 Do you recall that?

9 A. I do recall.

10 Q. Does Food Lion compete with food retailers that you do
11 not price-check?

12 A. Yes, we do.

13 Q. Sir, you earlier identified competitors, and do you
14 recall you said that was a non-exhaustive list?

15 A. I do.

16 Q. Just to clarify, does Food Lion compete with
17 Dollar General?

18 A. Food Lion would compete with Dollar General, yes.

19 Q. Does Food Lion compete with ethnic format food
20 retailers?

21 A. Where they exist within our footprint, we would, yes.

22 Q. Does Food Lion compete with Whole Foods and Sprouts?

23 A. Where they exist within our footprint, we would.

24 Q. Mr. Yates, what food retailer is Food Lion's most
25 significant competitor?

Yates - ReD

1 A. Might I ask that we answer that from my deposition?

2 Q. Yes.

3 MR. COWIE: Your Honor, it may take just a second.

4 BY MR. COWIE: (Continuing):

5 Q. Mr. Yates, is your biggest competitor one of the
6 companies you identified as one that you price-check?

7 A. Yes, it is.

8 MR. COWIE: Thank you, Mr. Yates.

9 THE COURT: Any --

10 MR. COWIE: We're done, Mr. Yates. I appreciate
11 your time.

12 THE COURT: You can turn off the screen and go
13 back to your day.

14 Thank you.

15 THE WITNESS: Thank you.

16 Have a good day.

17 MR. PERRY: As previewed yesterday, Mr. Yates is
18 the last witness for defense this week. We'll have the rest
19 of them lined up for next week.

20 THE COURT: All right. Can you give the Court an
21 estimate of when you think that -- how we're going to --
22 because, you know, next week is the last week.

23 MR. PERRY: Yes, Your Honor.

24 THE COURT: Just trying to see how everybody is
25 doing with time.

1 MR. PERRY: Well, this week went a little faster
2 than we expected, which is why having the discussion at
3 10:20 rather than 11:50.

4 Subject, of course, to the Government's crosses, which
5 we are meeting and conferring with them on timing and so
6 forth, our current calendar shows us finishing the defense
7 presentations either Wednesday evening or Friday or --
8 excuse me -- Thursday morning, depending, again, on the
9 length, and leaving the Thursday or at least most or much of
10 Thursday for the Government's rebuttal case. We understood
11 they have some on that.

12 And then I believe the Court has Friday set aside for
13 the closing argument.

14 THE COURT: I have Friday afternoon.

15 MR. PERRY: Well, if we need to do evidence --

16 THE COURT: I can move it up. I can move it up.
17 I'm just trying to make it clear. I mean, based on my time
18 frame, I was thinking it would be Friday afternoon.

19 But, of course, if you finish earlier and you want to
20 move it up, I'm flexible. That's why I wanted to have this
21 conversation.

22 MR. PERRY: We appreciate the guidance from the
23 Court, which gives a little more flexibility, I think. Part
24 of the issue is scheduling the third-party witnesses who
25 have constraints, and so we are working on that.

1 THE COURT: I understand that.

2 MR. PERRY: If we have to have evidence on Friday
3 morning, we'll work it out. If we can get to closings
4 quicker, I think we'll work that out too.

5 But I think we are on track, in other words, to Friday.

6 THE COURT: The Court has no more time. Friday is
7 it.

8 MR. PERRY: I understand.

9 MS. MUSSER: Your Honor, just on behalf of the
10 Government and for transparency both for the Court and, of
11 course, defendants, we have set aside for about five hours
12 for rebuttal.

13 Obviously, our rebuttal needs are going to depend on
14 the case. So the sooner the contours of that case are
15 communicated to us, the sooner we can update the Court, but
16 I assume we'll continue to work in good faith and, as things
17 shift, we'll be notified promptly.

18 THE COURT: And I want to be clear with both
19 sides. This is just an estimate. I understand that. I'm
20 just trying to make sure that I'm keeping everything on
21 track, as well, because, ultimately, it's my responsibility.

22 MS. MUSSER: Absolutely, Your Honor. I just
23 wanted to be transparent, and I know Mr. Perry does as well.

24 THE COURT: I appreciate it. I appreciate the
25 transparency on both sides. Thank you.

1 MR. PERRY: Thank you, Your Honor. We will be
2 talking this afternoon and try to -- we've been trying to
3 keep the Court apprised of the process.

4 THE COURT: I appreciate it. You have. You have
5 done a very good job of keeping the Court apprised, and I
6 know sometimes the Court throws you off by asking you
7 questions that you didn't anticipate, and you respond
8 appropriately and quickly. Thank you for that.

9 And if there's -- is there anything else?

10 MS. MUSSER: Nothing else.

11 THE COURT: Court will be adjourned until
12 9:00 a.m. Monday.

13 MR. PERRY: Thank you, Your Honor.

14 (Morning session concluded at 10:25 AM)

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C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 9

September 6, 2024

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

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

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 9/6/2024
CSR Expiration Date: 9/30/2026

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