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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 10, 2024
ALBERTSONS COMPANIES, INC.,)	
)	
Defendants.)	Portland, Oregon
_____)	

PRELIMINARY INJUNCTION HEARING
DAY 11 - AFTERNOON SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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1 (September 10, 2024)

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

3 (Afternoon session; open court:)

4 THE COURT: Please be seated. You may continue your
5 examination.

6 MR. PERRY: Thank you, Your Honor.

7 DIRECT EXAMINATION (Resumed)

8 BY MR. PERRY:

9 Q Good afternoon, Mr. Cosset.

10 A Good afternoon.

11 Q We were going through the five categories of assets and
12 services in the APA and TSA. Two down; three to go. Ready to
13 march on?

14 A I am.

15 Q Very good. The next one is private labels, which is a
16 term we have heard a few times during this trial. Do you have
17 an example of the private label in the podium in front of you,
18 Mr. Cosset?

19 A I do, a Fred Meyer water bottle.

20 Q A Fred Meyer water bottle. Why is that private label?

21 A It's one of the products that our consumers have.
22 Obviously that's an essential item that they buy very
23 frequently, and we made the determination we wanted to have the
24 flexibility to bottle that product and sell that product, which
25 is a particularly important staple item for consumers.

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1 Q And Fred Meyer is a Kroger banner?

2 A That's correct.

3 Q Do you see any other private label water in the courtroom?

4 A I do. I noticed on the opening day statement that there
5 is also Kirkland water.

6 Q The FTC, at its counsel table, has multiple bottles of
7 Kirkland water?

8 A Yes, sir.

9 Q Who makes Kirkland water?

10 A Costco is the retailer. It is one of their private
11 brands, but their largest private brand they have.

12 Q So when FTC chose to spend its share of Government's
13 grocery wallet, it went to Costco rather than a Kroger or an
14 Albertsons store; is that right?

15 A It did. Either go to the store or order it from that
16 store, but it came from a Costco store, yes.

17 Q Do you know how close the closest Costco is to this
18 courtroom?

19 A I do. Maybe admitting, as a data geek, I did look it up.
20 The closest Costco is about nine miles from here. There are a
21 few more, but the closest was nine miles from the courthouse.

22 Q Do you know how many Kroger and Albertsons are closer to
23 the courthouse than that Costco?

24 A Yes.

25 Q How many?

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1 A Precisely 31.

2 Q All right. Thank you. Are private labels a subject that
3 is covered in the APA and TSA?

4 A Yes. They are both in the APA and TSA.

5 Q Does the APA identify those private labels that are
6 transferred?

7 A Yes, it does.

8 Q What private labels will C&S get?

9 A They are getting five private labels from Albertsons'
10 portfolio as well as two private label that will be
11 commercialized through C&S or licensed to C&S through a
12 commercial agreement for an extended period of time.

13 Q Does the TSA also address private label -- by the way, are
14 those private labels all listed out in a section or schedule to
15 the APA?

16 A Yes, they are. They are in Section 1.1.

17 Q 1.1?

18 A 1.1, yes.

19 Q Thank you, Mr. Cosset. Does the TSA also address private
20 labels?

21 A It does. Obviously not just the supply of some of the
22 product under the asset purchase agreement and the TSA for the
23 licensed product but also for the Kroger product that are also
24 going to be available for distribution to C&S.

25 Q Do you have an understanding as to the purpose of the TSA

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1 provisions providing various times for the private label
2 transition for C&S?

3 MR. MATHESON: I'm going to object, Your Honor, to
4 the extent he is asking about the purpose of any provision in
5 the TSA or the asset purchase agreement itself. He has been
6 repeatedly instructed not to answer any questions regarding his
7 involvement, his input, whether he reviewed any drafts, or any
8 of the business reasons that any of those terms are included.

9 MR. PERRY: May I ask a different question,
10 Your Honor?

11 THE COURT: Yes.

12 MR. PERRY: Thank you.

13 BY MR. PERRY:

14 Q Mr. Cosset, in your current role as head of the Kroger
15 transformation management office, is private label transition
16 one of the subjects that you address with C&S?

17 A Yes.

18 Q Since April 22, 2024, when these agreements were executed,
19 have you worked with C&S on the private label transition?

20 A As articulated in the TSA, yes, that's a key component of
21 the services that we will be rendering.

22 MR. MATHESON: Objection, again, Your Honor. He just
23 said "key component of the services." He has been repeatedly
24 instructed not to answer questions regarding the business
25 importance of any of the terms.

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1 MR. PERRY: That's just not true, Your Honor. I
2 asked him after the agreements were executed on April 22, 2024,
3 if he was working with C&S on the transition. There have been
4 no objections to those questions.

5 MR. MATHESON: I understand. I didn't object to your
6 question, Counsel. I objected to the answer to the extent that
7 he was testifying to the fact that it was a key component.
8 Counsel's question was perfectly fine.

9 THE COURT: If you need to have clarification, ask
10 that. Do you need him to ask the question again?

11 THE WITNESS: If you don't mind.

12 MR. MATHESON: Can we move to strike the last answer,
13 Your Honor?

14 THE COURT: It will be stricken.

15 BY MR. PERRY:

16 Q Mr. Cosset, in working with C&S on the -- is working with
17 C&S on the private label transmission one of your job
18 responsibilities inside of the transmission office since
19 April 22, 2024?

20 A Yes, it is.

21 Q Do you work with C&S and its employees on the transition
22 period for private label product?

23 A Yes, we are.

24 Q And do you have an understanding, based on that work, as
25 to the role that the transition periods for private label

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1 products are in connection with the divestiture package and the
2 transition services, including the functions of the
3 transformation office?

4 MR. MATHESON: Objection to the form of the question.
5 Compound. I'm not sure what the question is, Your Honor.

6 THE COURT: Let's break it down for him. That's a
7 lot.

8 MR. PERRY: I tried to get ahead of the objection,
9 Your Honor.

10 THE COURT: I understand. The look on his face was
11 like, "What?"

12 BY MR. PERRY:

13 Q Mr. Cosset, inside of the transformation office, how did
14 the transition provisions in the TSA after it was executed for
15 private labels work from the Kroger perspective?

16 A All the services related to the private label, as it
17 relates to a Kroger private brand, product private label,
18 Own Brand, all the services are captured in the TSA, and the
19 work that we perform is the planning of the distribution of
20 this product for the period considered or contemplated in the
21 TSA. So all the work that is taking place today is really
22 around the planning of the execution of what's been documented
23 in the TSA.

24 Q Thank you, Mr. Cosset. I believe you testified earlier
25 that the brands being conveyed and licensed are current

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1 Albertsons private label products, correct?

2 A The brands that are being conveyed are five brands from
3 the Albertsons portfolio, two brands are being licensed or
4 commercialized, made available to C&S, and then the Kroger
5 private label, private brand products are made available
6 through the TSA as well per the transition services agreement
7 as well.

8 Q Do you have an understanding from your role at the Kroger
9 management office as to the role of the TSA transition
10 provisions for private labels as to those five plus two plus
11 Albertsons brands?

12 A Yes. All the private labels, whether they are Albertsons
13 or Kroger, I do understand them, and I do have familiarity with
14 all the detailed terms.

15 Q Does your answer with respect to the Kroger brands
16 previously apply equally to the Albertsons brands, or do you
17 have anything else to add to it?

18 A The same terms, the same details are captured. They vary
19 by brands, but everything is captured in the TSA, and we are
20 working actively on the planning so we can execute that plan
21 post merger.

22 Q Thank you, Mr. Cosset.

23 Next, we have systems and data. If someone were to
24 come into this court and suggest that C&S is not getting the
25 systems and data it needs to operate the divestiture package,

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1 would you have a reaction to that suggestion?

2 MR. MATHESON: Objection as to foundation,
3 Your Honor. He can certainly testify what the package is,
4 whether it is getting what it needs, Your Honor. I'm not sure
5 if there is any foundation for that.

6 THE COURT: I'm going to sustain the objection.

7 BY MR. PERRY:

8 Q Mr. Cosset, what is your title?

9 A Senior vice president and chief information officer for
10 the Kroger Company.

11 Q As the chief information officer for the Kroger Company,
12 what do your job responsibilities include?

13 A I oversee everything related to technology, data and
14 digital capabilities, as well as our alternative profit
15 portfolio of businesses, and, in the context of this
16 discussion, our transformation office also oversees the
17 integration plan, which is the merger with Albertsons and the
18 separation plan, which is related to the divestiture.

19 Q Does that include computers?

20 A Anything that touches technology.

21 Q Does that include systems?

22 A Systems, data, application; the good, the bad.

23 Q If someone were to come into this court, Mr. Cosset, and
24 suggest that C&S is not getting the systems and data it needs
25 for the divestiture package, would you, in your capacity as

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1 chief information officer of Kroger who oversees all systems
2 and data at this company, have a reaction to that suggestion?

3 A I do. It is -- I would disagree. It is my responsibility
4 to have invested the energy and the detailed planning that goes
5 into the separation, and it will be my responsibility to
6 oversee the transition once the merger and divestiture are
7 effective. And I take my responsibilities, any of them,
8 including that one, very seriously.

9 Q Are systems and data a subject that's addressed in the APA
10 and the TSA?

11 A Yes, it is.

12 Q Are there in fact multiple provisions?

13 A Yes.

14 Q Can you explain to the Court the principal provisions you
15 work with personally in your capacity as chief technology
16 officer for Kroger.

17 A I would say there are probably two elements: One is
18 around the underlying technology, the backbone, the
19 infrastructure that will enable the overall divested business
20 to function. So all -- what we would refer to as technology
21 and systems. That would be contemplated and articulated in
22 7.12 in the TSA as well in an immense amount of details,
23 because it is complicated. Then there is a section around the
24 data, because that's also critical to continue to enable the
25 operation of the business. That would be captured in 7.7 in

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1 the APA, but also reflected in many sections in the TSA.

2 Q And did you provide for us some of the principal sections
3 and provisions of the APA and TSA that are listed in the
4 appropriate boxes on DDX20, slide 5?

5 A That's correct.

6 Q Thank you, Mr. Cosset. At a high level, could you explain
7 to the Court what solution the TSA and APA include or provide
8 for in ensuring that C&S has the technological capabilities it
9 needs to run the divestiture package.

10 A Yes. We effectively approached it to simplify and de-risk
11 the transition by conveying to C&S what we refer to as a tech
12 stack. That is a clone.

13 MR. MATHESON: Your Honor, I object and move to
14 strike. He has repeatedly been told not to state what business
15 considerations Kroger applied, and he just testified -- the
16 question was fine. But then he testified what the -- they
17 approached it to simplify and de-risk the transition. He is
18 now, again, attempting to testify to the reasons that things
19 were instead of what is included.

20 THE COURT: Sustained.

21 BY MR. PERRY:

22 Q Mr. Cosset, the next several questions, including this
23 one, I'm going to focus on the agreement, the APA and TSA as
24 entered on April 22, 2024.

25 Do you understand that?

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1 A I do.

2 Q What does the agreement, as executed, how does it provide
3 for ensuring that C&S on day one has the technological
4 capabilities it needs to run the divestiture package?

5 A We are providing C&S with what is referred to as a tech
6 stack clone, which is -- for simplicity purposes -- a replica
7 of the tech stack that Albertsons currently uses to operate
8 their business.

9 Q And what is a "tech stack"?

10 A Again, I'm going to keep it at a high level.

11 Q Please keep it at a high level, for my sake, if
12 no one else's.

13 A It is all the elements that enable a company to take
14 advantage of technology or business processes and enablers.
15 That could be technology or data. So it is the hardware. It
16 could be as simple like the hardware that is in a store to
17 verify compliance with the pharmacy prescription. It could be
18 all the systems and application that monitor traffic on a
19 network to prevent a cybersecurity attack. It could be the
20 system that helped the team manage inventory forecasts to order
21 replenishment to a store. So all this solution goes on and are
22 defined and captured in a tech stack, which is then replicated
23 or built to hand over to C&S.

24 Q So does Kroger have a tech stack?

25 A We do, yes.

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1 Q And does Albertsons have a tech stack?

2 A That's correct. Yes.

3 Q Which tech stack, if either, is C&S receiving?

4 A We are conveying a tech stack, a clone of Albertsons'
5 technology ecosystem, architecture, tech stack.

6 Q Mr. Cosset, what does it mean to clone a tech stack in
7 this context? Is that a technological term?

8 A It's a simple term that is representing the exercise,
9 which is to replicate an almost identical copy, I'm being
10 specific about the word "almost," because it is really
11 everything that Albertsons has from the capability perspective,
12 with very few exceptions. One is our HR system, which Kroger
13 HR system configuration will be part of the tech stack, not the
14 Albertsons system, and then there are some exceptions around
15 what we would consider sensitive IP.

16 Q Does the Albertsons tech stack -- not the clone -- the
17 real Albertsons tech stack, if you will, is it running today?

18 A That is what operates -- what allows Albertsons to operate
19 its business today.

20 Q In your capacity as chief transformation officer at
21 Kroger, have you had opportunity to observe the operations of
22 the Albertsons tech stack?

23 A I have. Starting November -- end of November 2022, as
24 part of the integration efforts, my team and our external
25 experts have been actively engaged in performing what is called

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1 a detailed blueprint analysis, which analyzes everything that
2 is not sensitive, so excluding things like data science, but
3 analyzing every system Albertsons currently uses to operate
4 their business in the context of the integration.

5 Q Have you and your team reached a conclusion as to whether
6 the Albertsons tech stack clone works?

7 A Absolutely. Yes, we have. And, yes, it is functional and
8 operational, as demonstrated by the current business operation.

9 Q And have you and your team reached a conclusion as to
10 whether the Albertsons tech stack, once cloned, will work for
11 C&S in the divested stores from the Kroger perspective?

12 MR. MATHESON: Your Honor, I object and move to
13 strike. He was asked if the Albertsons tech stack works, and
14 he answered a different question and said there is one that is
15 currently operational. Then Mr. Perry asked him a different
16 question about a clone that has not been created.

17 MR. PERRY: That was neither my question nor the
18 answer, but I'm happy to clarify any conclusion.

19 THE COURT: You can clarify so he can make sure he is
20 answering.

21 MR. PERRY: Absolutely. I like to be clear here.

22 BY MR. PERRY:

23 Q Let me ask you, first, Mr. Cosset, about today's
24 Albertsons tech stack. Do you understand that? Is there an
25 existing Albertsons tech stack?

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1 A Yes. That is the tech stack, technology assets, that
2 currently run their company.

3 Q And have you and your team analyzed that, the currently
4 existing Albertsons tech stack?

5 A Entirely, comprehensively. We and our outside expert,
6 augmenting our capacity, have validated what competence exists
7 in that tech stack.

8 Q And have you and your team reached a conclusion as to
9 whether the Albertsons -- the currently existing Albertsons
10 tech stack works?

11 A Yes, it is. Yes, we have reached a conclusion. Yes, the
12 conclusion was it was functional and operational, as
13 demonstrated by the business.

14 Q Now I'm changing subjects, Mr. Cosset, to the tech clone.
15 Do you understand?

16 A I do.

17 Q First, do you have a day-to-day example of how a clone is
18 created in computing environment?

19 A Yes.

20 Q Can you offer it?

21 A I can use an example that would have been flagged as green
22 when we were talking about the transition readiness earlier.
23 Network infrastructure has to be segregated so that two
24 companies don't get to see each other's accounts or corrupt
25 each other's accounts and data. That has been completed and

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1 replicated. So effectively you look at the configuration files
2 for network system design, just like the one that exists in the
3 court, and you make a clone of that configuration, that design
4 so that it's ready to copy/paste, if you will, and hand over to
5 C&S.

6 Q Who is creating the clone of the Albertsons tech stack?

7 A A mix of associates, experts that are familiar with the
8 technology assets at Albertsons as well as third parties who
9 are either familiar with the technology or have the historical
10 experience with that technology.

11 Q And have you and your team at Kroger reached a conclusion
12 as to whether the tech stack clone will be sufficient to
13 operate the divested business once it is operational at C&S?

14 A Yes, we have, and we are confident that it will be.

15 Q Mr. Cosset, the Government has argued previously in this
16 case that C&S will have to build out its own loyalty pricing
17 and optimization systems.

18 Do you agree with that suggestion?

19 A That is correct in some aspects, yes.

20 Q "In some aspects." What do you mean by that?

21 A C&S will be in a position, after the merger and
22 divestiture are effective, to build and establish their own
23 loyalty strategy; for example, to use one, and operate the
24 loyalty platform when they decide to no longer take advantage
25 of the services that are contemplated in the TSA.

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1 MR. MATHESON: Your Honor, I hate to object again,
2 but he just testified C&S will be in a position. To the extent
3 he is testifying about C&S' capabilities to do anything of
4 these post-merger, I think we need to have a foundation laid.
5 He was not asked the question of whether they were able to do
6 it, and the way he answered means -- suggests he is offering
7 the opinion they will be able to do so.

8 THE COURT: Sustained.

9 BY MR. PERRY:

10 Q Mr. Cosset, how do you know is that C&S will be in a
11 position to stand up their own loyalty pricing and optimization
12 systems?

13 A I don't know if I'm understanding the objection, so I'm
14 going to try to answer the question.

15 THE COURT: So what he is asking you is, based on
16 your personal knowledge, do you know that C&S can implement
17 this loyalty program? Not what you assume. Do you know this?

18 THE WITNESS: I do know, because if I were starting
19 from scratch myself with a team, I would only require one
20 thing, which is the time and money to select the loyalty
21 platform, and I would need the data, which can take many, many
22 years to build, and that's not the case for C&S. A company who
23 would get that data on day one would just have to select a
24 vendor that would provide capability. Therefore, I can
25 conclude that by getting the data, which I know they'd get,

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1 because we are giving it, they would get to a standard loyalty
2 platform.

3 BY MR. PERRY:

4 Q Has Kroger ever hired vendors or retained vendors to
5 provide loyalty program services?

6 A Yes, we have, and we do.

7 Q And are there vendors, based on your knowledge as chief
8 technology officer of Kroger, are there vendors in the
9 marketplace to provide loyalty services to retailers on a
10 contract basis?

11 A Many.

12 Q You said that the most important thing they need is the
13 data. Do I understand that correctly?

14 A That's correct.

15 Q Could you explain that a little bit.

16 A The most important asset when you're establishing or
17 building a system that requires understanding -- and so that's
18 true for many things -- forecasting system, personalization,
19 loyalty -- is the underlying data that provides you with a
20 historical view of what has happened and what happens when
21 things change. That data is being conveyed to C&S, not just
22 the ability to get that data after day one, but the historical
23 data, which effective is a proxy for the history, which is a
24 shortcut for anybody who would want to leverage such system or
25 capability. It's an accelerator, if you will, to establish

Y. Cosset - D

1 that solution.

2 Q Do you personally know, Mr. Cosset, what data C&S will be
3 receiving?

4 A I do.

5 Q If someone were to come in and suggest in this court that
6 C&S is not receiving the data that it needs to operate the
7 divestiture package, would you have a response to that
8 suggestion?

9 A I would. I do. That's not correct.

10 Q The Government has suggested in this case, Mr. Cosset,
11 that C&S will be "dependent" on Kroger for pricing and promo
12 decisions. Do you have a reaction to that in your capacity as
13 chief transformation officer?

14 A Yes. I do have an opinion. It's not correct that C&S
15 would be dependent on us to perform their pricing and
16 promotion.

17 Q Could you explain for the Court's benefit how pricing and
18 promotion will work under the TSA following the closing of this
19 transaction?

20 A They would have the ability to understand what goes on
21 in -- let's use a store as an example -- in a category or a
22 segment. They would have the ability to understand how they
23 are performing, and they can decide. So you need to understand
24 the data. You need to decide the brain. The leaders in the
25 organization get to decide how they want to show up for a

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1 customer; how they want to go to market. And then they need to
2 input that decision into a system. That last step is really
3 the service that we provide, and I say "we," but a third party
4 or individual that would be segregated would provide. But the
5 most important part, which is do I understand, do I get the
6 data, do I have the capacity to decide what I want to do for my
7 customers is what C&S gets to do from day one.

8 MR. MATHESON: Your Honor, I object and move to
9 strike. Again, he was asked how it works, and now he is
10 testifying to C&S's business capability to effectively use
11 these assets.

12 MR. PERRY: Your Honor, he is explaining exactly the
13 black-and-white terms with the TSA that he works with every
14 day. This is set forth in the contract.

15 MR. MATHESON: Your Honor, the way I'm reading this
16 transcript, it seems that he is testifying that C&S will be
17 able to effectively use these assets to compete. He is not
18 saying the assets and information they will receive. Those are
19 different. I'm objecting not to the question asked, but to the
20 answer, which puts him out to be an expert on competition and
21 the effective use of these programs, not what's in the program.

22 THE COURT: I would agree. Maybe break the questions
23 down.

24 MR. PERRY: I'll certainly break it down.

25 MR. MATHESON: I will move to strike.

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1 THE COURT: Those will be stricken.

2 MR. MATHESON: Thank you, Your Honor.

3 BY MR. PERRY:

4 Q We will take it in pieces, Mr. Cosset. I believe you
5 testified that you disagree with the Government's suggestion
6 that C&S will not receive all the data it needs to be
7 successful, correct? You can answer.

8 A I disagree with that representation.

9 Q Can you explain to the Court why you disagree with that
10 suggestion based on the provisions in the APA and TSA that you
11 are familiar with?

12 A I know unequivocally that the TSA and the APA properly
13 capture and govern the data, which ultimately drives the
14 understanding of what goes on in the business operation. C&S
15 is getting that understanding that data.

16 Q Second, as to promo and pricing specifically, the
17 Government has suggested that C&S will be dependent on Kroger.

18 Do you agree with that?

19 A I also disagree with that representation.

20 Q Can you explain why -- the basis for that disagreement
21 based on the provisions of the TSA and APA that you work with
22 every day?

23 A If I considered myself dependent on somebody else to run
24 my price and promotion in a business, in a retailer, that would
25 mean I could not operate and make business decisions and

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1 ultimately execute business decisions independently, which is
2 not the case.

3 Q Now, does the TSA and APA authorize C&S to independently
4 set its own pricing decisions following the transition?

5 A The APA and the TSA not only authorize but actually set
6 up, configure, or organize processes that enable C&S to do
7 exactly that, which is to set up and decide how they want to
8 run their pricing promotion plans.

9 Q Does the APA -- you just answered the last one. Let me be
10 clear. Do the APA and TSA authorize C&S to establish and run
11 their own promotion plans following the closing of the
12 transaction?

13 A Yes. Both pricing and promotion.

14 Q Last bit on data, Mr. Cosset. The Government has
15 suggested that there may be some confusion regarding which
16 company gets which data or has to delete which data, depending
17 on the banners of the stores. Is that a subject that is
18 addressed in the TSA?

19 MR. MATHESON: I object to the foundation,
20 Your Honor. I don't know what he is referring to.

21 MR. PERRY: I'm referring to Ms. Hall's argument on
22 Friday, the first day before trial, as well as the
23 cross-examination of the C&S witnesses regarding 7.7B3 of the
24 APA.

25 MR. MATHESON: Your Honor, if there is a cite in the

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1 record, that's fine. I just don't understand why he has
2 characterized our position that way. I have no objection, if
3 you understand, Your Honor.

4 THE COURT: I understand. Overruled.

5 You can answer that question.

6 THE WITNESS: Would you mind -- there was a lot of
7 back and forth, and I lost it.

8 BY MR. PERRY:

9 Q Does the TSA and APA speak to which company gets what data
10 where they may share banners in a geography?

11 A Yes. 7.7 has the data scope and the certain terms
12 around -- 7.7, terms around data governance, and the TSA itself
13 has a lot of details that could be in the system or process
14 level.

15 Q And can you give an example if a shopper were to -- a
16 person -- a consumer were to shop at a divested store and a
17 retained store in the same geography, how the data allocation
18 worked under the TSA and APA?

19 A The simplest way to articulate it, that the data goes with
20 the business, meaning -- and therefore, the store, the
21 customer. So if I were to go shop to a store that has been
22 divested, the data associated with that interaction goes to
23 C&S.

24 Q And what about -- what does Kroger get to keep in that
25 scenario?

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1 A In that specific scenario, Kroger, through the TSA, would
2 have operational responsibilities. So there is a system and a
3 process that is completely segregated from Kroger's systems,
4 meaning I, as a Kroger employee, am no longer the shopper in my
5 example. I, as a Kroger employee, would not have visibility to
6 that data. You're the shopper. But C&S has access to the
7 data, retains the data, Kroger may have a copy of the data to
8 perform services on behalf of C&S, but never has visible access
9 to that data, and ultimately, as soon as the service is
10 rendered, deletes that data.

11 Q Is all of that set forth in 7.7B3 of the TSA --

12 A It is.

13 Q -- of the APA? Excuse me.

14 A It is for data related to transactions, and then there are
15 many other data that would fall under the same principle of
16 going with the business that are contemplated in the TSA as
17 well.

18 Q Can Kroger target C&S's customers after the transaction?

19 A It cannot.

20 Q Thank you, Mr. Cosset. Let's move on to the last
21 category. Is talent another subject addressed in the APA and
22 TSA?

23 A It is. It is a critical component of the divestiture
24 package.

25 Q Does the TSA prohibit C&S from hiring Kroger employees?

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1 A It doesn't.

2 Q The Government -- well, the Government has suggested that
3 C&S may not be receiving a sufficient number of employees. If
4 there were a suggestion like that made, would you have a
5 reaction?

6 A I would disagree. The TSA and the APA structure the
7 talent transition process and framework, and as part of that
8 process, C&S is -- we are transitioning the right number of
9 associates by category to allow them -- to enable them to
10 operate the business.

11 MR. MATHESON: I object, Your Honor. He is
12 testifying to the purpose. He said, "We are transitioning the
13 right number of associates to allow them to operate the
14 business." He has been repeatedly instructed not to address
15 the business considerations regarding any of the terms in these
16 contracts.

17 THE COURT: I'm going to let that answer stand.

18 BY MR. PERRY:

19 Q I think we have discussed, Mr. Cosset, that you oversee
20 the transformation management office at Kroger?

21 A That's correct.

22 Q Is one of the responsibilities of the TMO interacting with
23 C&S about personnel requests?

24 A Yes.

25 Q Are those interactions ongoing at this very moment?

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1 A They are, yes.

2 Q Do you get periodic reports on the number of employees
3 that C&S has requested?

4 A Absolutely.

5 Q Do you get periodic reports on the number of employees
6 that have been transferred or asked to transfer?

7 A Yes, I do.

8 Q In preparation for testimony today, did you ask for the
9 most recent status of those numbers?

10 A I did, yes.

11 Q Did you personally prepare a slide showing the status as
12 of last Friday of the numbers of employees that would be
13 involved in the transition?

14 A I did, yes.

15 Q If we show this, Mr. Rennick, only on the private screen,
16 please.

17 This is DDX20-6. What did you create on this slide,
18 Mr. Cosset? Start with the box on the left. Please don't say
19 the numbers out loud, as this is the subject of ongoing
20 commercially sensitive transactions, but just what the
21 categories are.

22 A The purpose of this was to simplify what is otherwise a
23 very detailed and complex process, showing on the left the
24 circles and the big square what has already been confirmed as
25 transferring associates by category.

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1 Q So let me stop you there. On the left, the number in the
2 big blue circle, that's the total number of employees as of
3 September 6th, 2024, have been transferred to C&S, assuming the
4 transaction closes, correct?

5 A Yes. That's correct. Even one step further, for example,
6 the black circle, the associates have been notified. So it's
7 not just a paper exercise is the point of this.

8 Q So the number at the circle at twelve o'clock, that number
9 of associates have already been notified they will be going to
10 C&S once this transaction closes?

11 A That's correct.

12 Q What is in that top circle at twelve o'clock?

13 A This would be the associates that currently operate and
14 run the stores in various capacities.

15 Q And if we go down to two o'clock, what does that circle
16 represent?

17 A This represents what we would call a managerial layer or
18 supporting teams that exist in district or in division, which
19 are an aggregation of stores. So the staff -- the teams that
20 are expert in various areas supporting all the store
21 operations.

22 Q The next circle at four o'clock, what does that represent?

23 A These are the associates who work and operate in the
24 distribution facility and the manufacturing plant.

25 Q And the bottom one at six o'clock, who are the associates

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1 in that circle?

2 A These are all corporate SMEs that have been identified for
3 transition to C&S.

4 Q We haven't heard that term yet, SMEs. What is an SME?

5 A Another acronym: Subject matter expert. So all the
6 functional subject matter experts that are being transitioned
7 to C&S.

8 Q Is there a relationship between the circle at the bottom
9 at six o'clock on the left-hand slide and the boxes on the
10 right-hand part of the slide?

11 A Yes. The subject matter expert number is directly
12 correlated to the boxes on the right side. The right side is
13 intended -- with all the rectangles -- is intended to represent
14 the list of functions and experts that have been identified and
15 requested by C&S in the process that's documented -- as part of
16 the process that is documented in the APA and TSA.

17 Q We heard from Susan Morris earlier in the trial. She will
18 be the CEO of the retail operation; is that correct?

19 A That's correct.

20 Q Is it your understanding there will be a certain number of
21 leadership members as well?

22 A That's correct, yes.

23 Q Under that, just for clarity, it reads "IT, store-ops,
24 finance, HR, supply chain, labor relations, merchandise,
25 pharmacy, legal, procurement, marketing/loyalty, and fuel."

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1 Does the number next to each of those categories
2 represent the number of subject matter experts that C&S has
3 requested as of September 6th, 2024?

4 A Yes, it is.

5 Q Were the numbers on this demonstrative, DDX20-6, provided
6 to you on -- right after September 6th by the responsible
7 member of your team?

8 A Yes.

9 Q Do you believe them to be correct and accurate as of
10 September 6th, 2024?

11 A Yes, I do.

12 Q Were they generated from the business records of Kroger
13 and its consultants?

14 A Yes.

15 MR. PERRY: Your Honor, because this is new
16 information that is not otherwise in the record, we would move
17 to admit DDX20-6 into substantive evidence for the limited
18 purpose of establishing the numbers that we've asked Mr. Cosset
19 to collect but didn't want to say out loud for competitive
20 purposes, similar to the way certain deposition transcript
21 excerpts and information have been read into the record to
22 establish basic facts.

23 MR. MATHESON: Your Honor, we object. We don't have
24 any ability to have any discovery as to whether these people
25 are competent to exercise the functions. The mere fact that

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1 these words appear on the page doesn't actually establish
2 they're subject matter experts. We have had no ability to
3 explore whether, in fact, any of the procurement are properly
4 qualified. We have no objection to the statement that certain
5 numbers of employees are requested. It is not clear why this
6 information is relevant or why the categorization is
7 appropriate, considering the fact that this is entirely new
8 information that should have been produced on discovery, if at
9 all.

10 MR. PERRY: Your Honor --

11 THE COURT: Go ahead.

12 MR. PERRY: Your Honor, at the close of discovery, I
13 believe the number was zero, because as the Government knows
14 very well, the process is ongoing, and the TSA itself
15 establishes a timeline for identifying the associates that is
16 rolling out in realtime. Susan Morris was the first to be
17 identified. We heard testimony about that. She is then
18 working to identify her senior leadership team and the other
19 subject matter experts.

20 The store-level associates were identified and
21 announced, and we could certainly put in -- there was a public
22 press release about this very recently, because it is a
23 life-altering change for them to find out they will have a new
24 employer. This has all happened very recently. Mr. Cosset's
25 office runs it. He is here to testify about it. The

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1 Government is free to ask him any questions about it. These
2 are the facts on the ground in this merger that evolve
3 literally as we stand in the courtroom today.

4 MR. MATHESON: Your Honor, we sought post close of
5 discovery from C&S. If someone is going to testify that the
6 appropriate people are being acquired by C&S to allow them to
7 run their business and people they've requested, it should be a
8 witness who is capable of knowing who these people are, not
9 someone who is reading numbers off a slide.

10 THE COURT: Let me ask you something: It was my
11 understanding to your earlier objection that it wasn't to the
12 first three bubbles but to the fourth bubble, because you said
13 the subject matter experts. Am I understanding your objection
14 correctly?

15 MR. MATHESON: It is the categorization, Your Honor,
16 that suggests that these people are qualified to perform their
17 jobs.

18 THE COURT: Is it the last one or all of them?

19 MR. MATHESON: I was referring to the entire -- other
20 than Susan Morris we have heard direct testimony about, the
21 entire right-hand side of the slide seems to categorize people
22 without the basis to do so.

23 THE COURT: Understand. Beyond the first tier up
24 under her?

25 MR. MATHESON: Yes. All of them, Your Honor. We

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1 have had no discovery whether any of these people are qualified
2 to do anything.

3 THE COURT: Do you object to the other side? That's
4 what I'll say.

5 MR. MATHESON: The total headcount?

6 THE COURT: Yes.

7 MR. MATHESON: No, Your Honor. That seems fine. It
8 seems uncontroversial.

9 THE COURT: That portion will come in but not the
10 other.

11 MR. MATHESON: Thank you, Your Honor.

12 MR. PERRY: Thank you, Your Honor.

13 BY MR. PERRY:

14 Q Mr. Rennick, if we could have the base slide back up,
15 please.

16 We have addressed these five pillars or five
17 categories or five subjects separately. Is that how they work
18 in practice?

19 A No. The visual here is intended to simplify the content
20 of the TSA and the APA. That is not how one would look at the
21 overall package. They are all interconnected, interdependent
22 in a way to form kind of a comprehensive and cohesive package.

23 Q You were here during the FTC's opening, I believe,
24 correct?

25 A I was.

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1 Q Did you hear them call this divestiture a "hodgepodge of
2 assets"?

3 A I did.

4 Q Do you agree with that characterization as somebody that
5 works with these agreements every day?

6 MR. MATHESON: Your Honor, I object. He was asked
7 whether he was consulted in selecting the stores that appear in
8 the package, which would be the most consideration, in
9 describing these as a "hodgepodge." He was instructed not to
10 answer that question, and he was also instructed not to answer
11 the question what factors did Kroger consider in selecting the
12 stores. By referring to a "hodgepodge," Your Honor, we are
13 referring to the fact that the stores are not properly
14 positioned to be a business, and I don't think it is
15 appropriate to ask the witness to comment on that when we have
16 been prevented from examining him on the sufficiency of
17 "hodgepodge" of the stores.

18 MR. PERRY: That wasn't my question, Your Honor, but
19 I'm happy to ask a different question?

20 THE COURT: You can ask a different question.

21 BY MR. PERRY:

22 Q Mr. Cosset, you are not a native English speaker?

23 A I am not, sir. That's correct.

24 Q But you are a careful English speaker?

25 A I was taught pretty aggressively by my teachers to be very

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1 precise with my words.

2 Q When you heard that term "hodgepodge," do you know what it
3 meant?

4 A I absolutely did.

5 Q Did you look it up in a dictionary?

6 A No. I knew what it meant.

7 Q What does a "hodgepodge" mean?

8 A It as mismatch. It is the exact opposite -- to use a
9 different word -- of a mosaic, which is a cohesive assembly of
10 a bunch of maybe different colors, different shaped forms, but
11 they ultimately form a nice picture. A hodgepodge the
12 opposite. It is mismatched, confusing pieces that don't fit
13 together.

14 Q As you sit in your seat as the chief transformation
15 officer of the Kroger company, working every day with the APA
16 and TSA, do you view this package as a mosaic or a hodgepodge?

17 MR. MATHESON: Your Honor, I object for the same
18 reason. We have been prevented from examining this witness
19 about the sufficiency of the stores included in the package.
20 There are random stores included in Delaware. There are random
21 stores included in California. We have been prevented from
22 examining this witness on any of these topics. It is
23 inappropriate to then ask him to come around and testify that
24 they form a cohesive mosaic. We have been unable to explore
25 the basis for any statement he might make about the sufficiency

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1 of the stores. He can address the IT aspects, if that is
2 something he is able to do. But when we are talking about the
3 "hodgepodge" of assets, we mean stores that don't make sense
4 and won't allow C&S to stand up a business. He has been
5 prevented from answering any questions on that until now. We
6 believe that's inappropriate to elicit that testimony,
7 Your Honor.

8 MR. PERRY: Your Honor, I asked a very different
9 question, to be clear.

10 THE COURT: It sounded like the same question.

11 BY MR. PERRY:

12 Q Let me ask you this, Mr. Cosset --

13 THE COURT: I'm going to sustain his objection.

14 MR. PERRY: I'm sorry, Your Honor.

15 BY MR. PERRY:

16 Q -- in light of my friend's objection.

17 Would you, in analyzing whether something is a
18 hodgepodge or mosaic, would you look only at the stores or
19 would you look at all rest of the assets and services provided
20 in the contracts in your capacity as chief transformation
21 officer of Kroger?

22 MR. MATHESON: Objection, Your Honor. He was
23 instructed expressly not to ask the precise question: What
24 business considerations did Kroger apply in deciding which
25 assets to include the package as oppose to legal

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1 considerations?

2 THE COURT: I'm going to sustain the objection. I
3 think you need to move on.

4 MR. PERRY: Thank you, Your Honor.

5 BY MR. PERRY:

6 Q Mr. Cosset, in your role as chief transformation officer,
7 you testified earlier you were overseeing the integration of
8 assets from Albertsons into Kroger; is that right?

9 A Yes, I am.

10 Q Let me show a document. This is for the private screen.
11 It is DX807. This is a June 2023 board of directors deck.

12 Mr. Cosset, did you attend this board meeting?

13 A I do not see the document.

14 THE COURT: It is not up yet.

15 THE WITNESS: Yes, I do.

16 BY MR. PERRY:

17 Q Did you review the materials provided to the board?

18 A I did.

19 Q Did Kroger's officers and employees make every effort to
20 make ensure that board documents are accurate at the time they
21 are presented?

22 A We always do.

23 MR. PERRY: Your Honor, I move admission of DX807
24 into evidence.

25 MR. MATHESON: No objection, Your Honor.

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1 THE COURT: It will be received.

2 BY MR. PERRY:

3 Q Mr. Rennick, on the private screen, if we could turn to
4 page 26.

5 Could you tell the Court at a high level, Mr. Cosset,
6 what's happening here?

7 A Yes. This represents the old design or structure of the
8 integration office that has been put in place shortly after the
9 merger to govern all merger and integration-related matters.

10 Q This is the integration office at Kroger, right, for the
11 integration of assets from Albertsons?

12 A That's correct.

13 Q So if we look here, there is a box that says, "Store
14 process, efficiency, and appearance." Do you know what that
15 includes under "store operations"?

16 A Yes. So this would be all the matters -- the team that
17 looks into this would look into all the matters related to
18 store operation post-merger as in coming -- in bringing
19 together the Kroger and Albertsons stores and the operations.

20 Q Does that include re-bannering?

21 A That's correct.

22 Q And under that is "supply chain." What does that include?

23 A Any matters related to distribution of goods and products
24 through the network once the company -- the two companies
25 merge.

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1 Q On the left-hand side is "Own Brands." What's in there?

2 A "Own Brands" is the Kroger term when we refer to private
3 label, so products that are manufactured or licensed by the
4 Kroger company.

5 Q Over on the right you have got "operational technology."
6 Do you know what that is?

7 A That would reflect -- that relates to about a third -- a
8 fourth -- a large portion of our technology asset intended to
9 assume operation of the company.

10 Q A little bit further down is people and HR; is that right?

11 A Yes.

12 Q Is that talent?

13 A All the talent-related matters.

14 Q So you're dealing with the same things in the integration
15 office that C&S is on the other side?

16 MR. MATHESON: Objection, Your Honor. Leading and
17 also foundation.

18 THE COURT: It is leading. I will sustain that. You
19 can restate it.

20 MR. PERRY: Thank you, Your Honor.

21 BY MR. PERRY:

22 Q Mr. Cosset, we discussed earlier that the TSA and APA
23 discuss -- address in broad categories stores and banners,
24 distribution, private label, IT and data, and talent. Are
25 those things also being addressed by the Kroger integration

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1 management office?

2 A Yes, they are.

3 Q And are you responsible for all of those things?

4 A Yes, I am.

5 Q Based on your experience running that office, if you were
6 the buyer rather than the seller of the divestiture package, is
7 there anything you would need that is not in the APA and TSA?

8 MR. MATHESON: I have to object to the foundation,
9 Your Honor. There has been no foundation laid that he has ever
10 been the buyer of any divestiture package or is in the position
11 to offer any expert testimony regarding what a buyer --

12 THE COURT: That's not expert testimony. Overruled.

13 MR. MATHESON: Got you, Your Honor.

14 BY MR. PERRY:

15 Q Let me ask it again, Mr. Cosset. If you were the buyer
16 rather than the seller, is there anything that you would need
17 to run the divestiture package that is not in the APA and the
18 TSA?

19 A No.

20 Q Nothing at all?

21 A No. We architected the APA and TSA in order to achieve
22 exactly that.

23 MR. PERRY: Thank you.

24 MR. MATHESON: Objection, Your Honor. Yet again, he
25 is slipping in testimony regarding the purpose for which things

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1 were included when that is not the question that was asked. I
2 have to object and move to strike when he said, "It was
3 architected to achieve that." He was instructed not to answer
4 any of the reasons that anything included in the APA or TSA.

5 MR. PERRY: Your Honor, I've tolerated some of these
6 objections because they were fair. "Architected" means it was
7 built. He literally is the architect of APA and TSA, and he is
8 explaining how the contracts work, which is why he is here. He
9 is the leading expert on this subject, and he is certainly
10 qualified to offer his view --

11 THE COURT: But he has not been established as an
12 expert.

13 MR. PERRY: He is not an expert.

14 MR. MATHESON: Your Honor, that wasn't the question
15 asked.

16 THE COURT: I'm going to overrule the objection.

17 MR. MATHESON: Thank you, Your Honor.

18 MR. PERRY: Thank you, Your Honor.

19 THE WITNESS: Do I have to answer?

20 MR. PERRY: There is nothing to answer.

21 THE COURT: Let me explain: They asked for your
22 answer to not be part of the record, and I said, no, it will be
23 part of the record.

24 THE WITNESS: Thank you.

25

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1 BY MR. PERRY:

2 Q The journey through the APA and TSA, Mr. Cosset, is almost
3 at its end. We will all be relieved to know, for sure.

4 Last bit: Do you recall in the opening statement
5 when the Government lawyer referred to a butcher shop?

6 A I do. I do recall, yes.

7 Q You have a smile on your face. Does it bring something to
8 mind?

9 A Yes, it does. This is a picture that I use in most of my
10 internal and external presentation, whether it is a conference
11 or internal meetings.

12 Q What does this picture convey to you and how do you use it
13 to explain the grocery retail industry to conferences?

14 A I suspect similar to what was implied in the opening
15 statement. I remind my teams, when it is internal, or peers,
16 when it is an industry conference, this is what chopping used
17 to be like, and part of our responsibility and in a way
18 obligation is to find ways in food technology and data, which
19 is something I have already been extremely passionate about, to
20 bring back that personal touch, that connection, and that's
21 what we have endeavored to really bring that personalized
22 experience to all consumers who shop with us.

23 Q Mr. Cosset, we have covered a lot of ground here today.

24 Last question: Why do you care in your role as a senior
25 officer of Kroger that this merger be concluded by the closing

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1 date of October 9th, 2024?

2 A Professionally, I care because, as we discussed, that's an
3 opportunity for us, as a team, as a company, to continue and
4 accelerate our transformation journey to totally bring an
5 experience that is differentiated for all the shoppers that
6 shop Albertsons and Kroger today and beyond, and that merger
7 will be a huge enabler for us to compete effectively.

8 On a personal level, I just believe it's right.
9 Fundamentally, I believe in the opportunity we have and the
10 responsibility we have. I grew up in a culture where having
11 access to affordable, quality food was not a luxury or a
12 privilege, and that's been my focus at Kroger, and I want to
13 continue that journey, and the merger will enable us to do
14 that.

15 MR. PERRY: Thank you, Mr. Cosset. I pass the
16 witness, Your Honor.

17 THE COURT: All right.

18 You may begin your cross-examination.

19 MR. MATHESON: Could we approach and pass out some
20 examination materials, Your Honor?

21 THE COURT: Yes.

22 CROSS-EXAMINATION

23 BY MR. MATHESON:

24 Q Mr. Cosset, my name is Dan Matheson. Very nice to meet
25 you.

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1 A Good afternoon.

2 Q You left off on the question of closing by October 9th,
3 and you were previously asked whether that was important. It's
4 not your testimony today that if this deal fails to close by
5 October 9th, Kroger will abandon the transaction, is it?

6 A That is not my prerogative, so, no, that's correct.

7 Q In fact, as one of the top six executives of Kroger,
8 surely you are aware that there is currently an injunction
9 issued by a Colorado court that prevents the merger from
10 closing, correct?

11 A That's correct.

12 Q And that injunction cannot dissolve until five business
13 days after that court issues its ruling, right?

14 A That's my recollection.

15 Q And you know that that hearing doesn't expire -- doesn't
16 conclude until October 18th, 2024, right?

17 A You have more details than I recall.

18 Q So as you sit here today, as far as you know, there is no
19 way that Kroger and Albertsons can close this transaction by
20 October 9th, 2024, without violating the injunction that's
21 currently in place from the Colorado court, right?

22 MR. PERRY: Objection. Calls for a legal conclusion.

23 THE COURT: Sustained.

24 MR. MATHESON: Thank you, Your Honor.

25

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1 BY MR. MATHESON:

2 Q I would like to address the tech stack that you discussed
3 with my colleague. Your demonstrative called it a "clone," and
4 then you referred to as a "replica" in your testimony, but you
5 now admit that there are exceptions to what's included in the
6 tech stack, right?

7 A That's correct.

8 Q And those exceptions are designed to prevent what you
9 called "sensitive intellectual property," right?

10 A That's correct.

11 Q And do you have an understanding, as you sit here today,
12 of what is excluded from the tech stack?

13 A I have an understanding of the key themes or principles
14 that govern what is excluded, yes.

15 Q And one of the things that is included from the tech stack
16 is the critical IP that Albertsons uses for its loyalty
17 programs, right?

18 A I would disagree with that assessment.

19 Q Well, you would agree that one of the things that is
20 included from the tech stack are Albertsons' current loyalty
21 program and customer support tools, elements of those tools are
22 excluded from the tech stack, right?

23 A That's correct, yes.

24 Q You would agree that the tech stack provides the
25 interfaces but fails to provide the associated data algorithms

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1 or configurations for other elements of the tech stack that are
2 not completely excluded, right?

3 A That's correct.

4 Q And one of the elements for which C&S will receive the
5 interface, but will not receive associated data algorithms or
6 configurations, is Albertsons' e-commerce item catalog
7 management, right?

8 A Can you repeat the beginning of your question.

9 Q One of the elements of the current Albertsons' tech stack
10 that C&S will not receive, it will not receive the data
11 algorithms or configurations that are involved in Albertsons'
12 current e-commerce item catalog management, right?

13 A That's correct, yes.

14 Q Now, you have testified that the alternative profit
15 business of Kroger is an important element of your competitive
16 efforts, and that's one you're responsible for, right?

17 A Yes, it is.

18 Q You testified during your direct examination regarding an
19 exhibit that I would like to display. This is a public
20 document. It is DX1254. Please display page 18 of this
21 document.

22 A I don't have -- there are no Ds. It is all Ps in my
23 binder.

24 Q This is the binder you discussed with your counsel
25 yesterday morning. You should have that in front of you and

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1 available to you, sir.

2 THE COURT: It is not there.

3 THE WITNESS: I don't have it.

4 THE COURT: It is not there. I have four; he has
5 three. I brought mine from yesterday.

6 MR. MATHESON: Apologies for that, Your Honor. As we
7 were referring to some of the same ones, I assumed he had the
8 same binder from yesterday.

9 THE WITNESS: Would you mind repeating the number?

10 BY MR. MATHESON:

11 Q DX1254. We can put up the cover page.

12 And this is the October 14th, 2022, presentation that
13 relates to this transaction, right?

14 A That's correct. Yes.

15 Q Turning to page 18 -- again, this is public, I think we
16 need to be given control -- Mr. Dunkin needs control.

17 Thank you.

18 So this is a public slide that appears at DX1254-18
19 that you discussed in your direct exam, right?

20 A Yes.

21 Q You indicated at that time that Kroger had \$1 billion
22 annual alternative profits and perceived an opportunity
23 following the transaction to increase that from 1- to
24 1.5 billion, right?

25 A That's correct.

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1 Q And as far as you can recall during your direct
2 examination, the most recently publicly disclosed figure for
3 the actual annual alternative profits Kroger realizes was
4 around a billion dollars and was probably a few years old,
5 right?

6 A I think you used a double negative. Can you repeat?

7 Q Well, you testified during your direct examination that,
8 as far as you could recall, the most recent publicly disclosed
9 figure for Kroger's annual alternative profits was around a
10 billion dollars, right?

11 A Just slightly north of that. That's correct.

12 Q As one of the top six executives at Kroger, you are surely
13 aware of the figures publicly reported in Kroger's 10-K filing?

14 A Yes.

15 Q For fiscal year 2023, it's a fact that Kroger publicly
16 reported that the alternative profit business delivered
17 \$1.3 billion in operating profit, correct?

18 A Yes.

19 Q And that publicly reported information is larger than the
20 \$1 billion you presented on this slide, right?

21 A That's correct. They're different timing obviously.

22 Q So when you testified that the difference between the
23 \$1 billion in annual alternative profits indicated on this
24 slide and the 1.5 billion in annual alternative profit
25 opportunity you could achieve post-merger could be invested in

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1 pricing investments and salaries, you were using 1 billion
2 instead of 1.3 billion, right?

3 A Yes. I was absolutely using the slide, which in
4 October of 2022, the number on the slide would reflect the
5 opportunity and efficiency. If I showed you the numbers today,
6 they are obviously different. We have continued to grow over
7 the last two years.

8 Q So the alternative profits that Kroger is getting today
9 are bigger, and you have also reduced over the course of your
10 due diligence process the annual alternative profit increase
11 opportunity you perceive, right?

12 A Not correct.

13 Q Okay. Let me please turn to -- this, we are going to have
14 to display -- this particular slide, this is DX1727. It has
15 been already admitted into evidence. If we could please
16 display slide 15 but only the private screens. There is a
17 public redacted version of this document, but the one that has
18 the actual numbers, for the alternative profit stream increase,
19 is confidential.

20 Do you have that slide in front of you, sir?

21 A I do.

22 Q Here, the efficiency range as of April 29th, 2024, from
23 the merger is -- and I won't say the numbers out loud -- but
24 can see it on the second row. That's less than \$500 million,
25 right?

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1 A The range is, but you're referring to 500-. I'm trying to
2 find the page to help you navigate all the numbers and the time
3 difference. I can't remember where the numbers were on the
4 previous slide.

5 Q Regardless of that, sir --

6 MR. PERRY: Your Honor, he should be allowed to
7 finish his answer, which I believe he was trying to help.

8 THE COURT: That is true, so give him a chance.

9 THE WITNESS: I mean, I put all these numbers
10 together, so I am very familiar with them. And if we are
11 implying a change, trust me. The numbers in October '22 is a
12 billion-plus, as is showing on the slide, because we at the
13 time in October of '22 had not disclosed our full number for
14 the year. The year was not complete. And we were saying that
15 we see a range of efficiency that takes us from a billion-plus,
16 which is on slide 18 in the previous appendix, to a
17 billion-five. So the range that I'm not going to quote, but
18 you can see now on slide 15 of the second document, is showing
19 the range of efficiency that is consistent with what was
20 identified in October 2022.

21 BY MR. MATHESON:

22 Q So is it your testimony that the number after "alternative
23 profit streams" in DX1727 at 15 is \$500 million? Because it
24 doesn't look like it to me.

25 MR. PERRY: Objection, Your Honor.

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1 THE WITNESS: That's not what I said, and that is
2 also what is not written.

3 BY MR. MATHESON:

4 Q So the alternative profits stream number that appear at
5 DX1727 at slide 15, that's a range, right?

6 A The same range as of October 22, which is on page 18 of
7 the previous exhibit.

8 Q The range in October 2022 was publicly disclosed as
9 \$500 million, right?

10 A Yeah.

11 Q And that's the same number we are looking at here?

12 A The efficiency opportunity was 500-. There is a timing
13 element, like with all of these things, that play into the
14 numbers over time.

15 Q Okay. Thank you. Now, you'd agree that this alternative
16 profit stream is calculated as a revenue efficiency? Just to
17 make sure I'm looking at the right slide DX1727, page 15, the
18 second row, which is alternative profit streams, that's
19 calculated as a revenue efficiency, right?

20 A No. It is calculated as a profit. It is showing in the
21 revenue to contrast with cost efficiencies.

22 Q So it is not a reduction in cost. It's a revenue synergy?

23 A A net operating profit, yes.

24 Q All right. Let's return to the contracts themselves. We
25 have provided to you, sir, in the binder that we have handed up

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1 to you, PX1654A and 1654B. These are a little more hopefully
2 manageable for you than the rather larger documents.

3 Now, reviewing 1654A, can you identify this, sir, as
4 a copy of the amended asset purchase agreement that you signed
5 on behalf of Kroger on April 22nd, 2024?

6 A Based on the cover page, that seems to be the case, yes.
7 I haven't flipped through the document.

8 Q If you flip, sir, to PX1654A-142, you'll find your
9 signature on that page. Does that provide you with an
10 assurance, sir, this is a copy of the document?

11 A I assume that's the case, yes.

12 MR. MATHESON: Your Honor, we would like to admit
13 1654A. It is a subset of the larger document previously
14 admitted by defendants. We think it might be even more
15 manageable.

16 MR. PERRY: As long as it is clear it is a subset,
17 and there is a larger set of documents of which it is part, no
18 objection.

19 THE COURT: Sustained -- not sustained. I'm
20 listening to you, and it will be received.

21 MR. MATHESON: Thank you, Your Honor.

22 BY MR. MATHESON:

23 Q Now, you were the chief business negotiator for the asset
24 purchase agreement, correct, sir?

25 A That's correct.

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1 Q And you agree that the negotiation of this agreement was
2 nothing like any other negotiation --

3 MR. PERRY: Objection, Your Honor.

4 MR. MATHESON: -- you have ever been involved in your
5 business career, right?

6 MR. PERRY: Is the question finished? Are you done?

7 MR. MATHESON: I can repeat it for you.

8 BY MR. MATHESON:

9 Q You would agree that the negotiation of this agreement was
10 nothing like any other negotiation in which you have been
11 involved in your business career; is that correct?

12 THE COURT: You can answer it.

13 THE WITNESS: I don't know. I don't know. I mean,
14 it is different in scope; different in size. Like what
15 specific element, when you say "nothing"?

16 BY MR. MATHESON:

17 Q Well, among other elements that might be different, you
18 would agree that business personnel typically drive a
19 negotiation process, but in this case lawyers were involved at
20 every step of the negotiations, and the positions you took were
21 influenced by antitrust considerations, right?

22 A Oddly, that's correct.

23 Q Now, due to the fact that lawyers were involved in every
24 step of the process, you were instructed by your counsel at
25 your deposition not to answer certain questions regarding the

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1 divestiture package.

2 Do you recall that, sir?

3 A Yes, I do.

4 Q Do you recall that during your deposition you were
5 instructed not to answer the question: "What business
6 considerations as opposed to legal considerations did Kroger
7 apply in deciding what assets to include within the 2024
8 divestiture package?"

9 MR. PERRY: Your Honor, I object to this question.
10 There is no question to the witness that -- there was no
11 objection or motion to compel brought by the Government, as we
12 pointed out before trial, to any of these instructions. These
13 privilege determinations were valid and not challenged by the
14 Government, and there is no re reason to revisit them in court,
15 as I believe we had a ruling the first week on a similar issue.

16 MR. MATHESON: To be clear, Your Honor, we are not
17 challenging the privilege assertion. And we are not
18 challenging Your Honor's previous ruling. As we understand it,
19 Your Honor expressly stated that the FTC could object during or
20 after trial from the extent we were prevented from obtaining
21 discovery into certain issues about privilege objections. I'm
22 simply making the record regarding what questions were asked
23 and what questions he refused to answer, in the event we need
24 to make the record that we are prevented from achieving that
25 discovery.

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1 MR. PERRY: Your Honor, that record was made by a
2 motion they filed before trial that included as an appendix all
3 of the questions that were not answered. It is in the record,
4 and they can refer to it for any purpose. There is no reason
5 to do this in open court, and certainly this witness has
6 nothing to add to the subject, because it is a legal question.

7 THE COURT: Sustained.

8 MR. MATHESON: Thank you, Your Honor.

9 BY MR. MATHESON:

10 Q Please turn to the next tab in the binder, which is
11 PX1654D. You recognize this, sir, as, again, a subset of a
12 larger document that was introduced by defendants, and it
13 constitutes the transition services agreement for which you
14 served as the chief business negotiator, right?

15 A That's correct.

16 Q Now, you would agree that the TSA is a key component of
17 the overall package, right?

18 A I think you asked me not to say "key" when you asked --
19 when counsel asked me. I don't know if you want me to say
20 "key" or not. It's a component.

21 Q Well, at your deposition, sir, you were asked: "And when
22 you say it's an intimate part, what do you mean by that?"

23 You said: "Answer: That is a key component of the
24 overall divestiture package."

25 Do you recall that testimony, sir?

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1 MR. PERRY: Objection. He is reading the deposition.
2 He could ask a question.

3 THE COURT: Sustained.

4 MR. MATHESON: I was asking if he recalled that,
5 Your Honor.

6 THE COURT: That's not how you refresh memory.

7 BY MR. MATHESON:

8 Q Do you recall one way or another whether you testified at
9 your deposition --

10 MR. PERRY: Objection, Your Honor.

11 MR. MATHESON: -- that it is a key component of the
12 divestiture --

13 THE COURT: I'm going to sustain the objection.
14 That's not how you properly refresh recollection.

15 MR. MATHESON: I'm sorry, Your Honor. I was
16 attempting to ask the witness whether he recalled.

17 THE COURT: That's not how you do it.

18 MR. MATHESON: Understood.

19 BY MR. MATHESON:

20 Q Now, Kroger has never previously provided TSA services to
21 a purchaser who has acquired this many stores, right?

22 A That's correct.

23 Q And Kroger has never previously provided TSA services to a
24 purchaser for the duration that's prescribed by the TSA; is
25 that correct?

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1 A Would you mind repeating the beginning?

2 Q Kroger has never previously provided TSA services to a
3 purchaser for the duration that's prescribed by the TSA; is
4 that correct?

5 A That's correct.

6 Q Now, could you please turn, sir, to PX1654B.

7 MR. MATHESON: Your Honor, we move to admit PX1654B
8 into evidence.

9 MR. PERRY: With the same understanding, Your Honor,
10 that it is a subset, no objection.

11 THE COURT: It will be received.

12 BY MR. MATHESON:

13 Q Could you please turn, sir, to PX1654B-058.

14 Do you see that, sir?

15 A Yes.

16 Q And this begins -- is where, within the TSA, there is
17 provided a schedule of the various services that the TSA calls
18 for, right?

19 A That's correct.

20 Q And if we were to flip from PX1654B-059 all the way to
21 PX1654B-223, would you see set before us categories of
22 functions, descriptions of services, and durations of terms,
23 right?

24 A That's correct.

25 Q Now, you would agree that you can't recall any occasion on

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1 which Kroger has provided as many services and functions as are
2 contained on the approximately 180 pages of the transition
3 services agreement, correct?

4 A Yeah. That's correct and partly why we hired experts with
5 experience in each of these areas.

6 Q Now, Kroger is charging C&S a per store service fee for
7 each of the services it's going to provide, correct?

8 A I do not recall the details behind the service fee or the
9 cross-charging, but it is documented in the document.

10 Q Okay. Could you please turn to the next tab of your
11 binder, sir, which is PX1654, pages 387 through 396.

12 A Sorry. Could you repeat the number?

13 Q The tab you are going to read says PX1654, pages 387
14 through 396.

15 A Yes.

16 Q And can you identify the material that appears behind this
17 tab as an appendix to the transition services agreement that
18 provides the information you were just referencing regarding
19 the service fees?

20 A Sorry. You're saying 395 or -- 392.

21 Q I just want to know if you can identify what this appendix
22 A service fees document is.

23 A That is correct. That is reflecting the various service
24 fees consideration for the services being provided to C&S
25 during their transition.

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1 MR. MATHESON: Your Honor, I move to admit PX1654-375
2 through PX1654-396, which is appendix A, service fees.

3 MR. PERRY: Your Honor, on the representation of
4 counsel that this is the same as in the larger document, when
5 it was all put together, no objection. I don't want to pull
6 out the documents and compare them. On that basis, no
7 objection.

8 THE COURT: It will be received.

9 MR. MATHESON: Thank you, Your Honor.

10 BY MR. MATHESON:

11 Q So in order to mitigate any confidentiality concerns, I'm
12 going to ask Mr. Dunkin not to display this on the public
13 screen. Can we please display PX1654-390 so it's visible to
14 the witness and the Court.

15 Sir, are you addressing your attention to PX1654-390?

16 A I'm looking at it, yes.

17 Q Sir, this table identifies at a category level the
18 services that the post-merger entity will employ to C&S in
19 connection with the divested stores, right?

20 A That is correct.

21 Q This table lists an estimate, which was provided in August
22 of 2023, of the per store per month fee for each service; is
23 that right?

24 A That's correct. Yes.

25 Q So under the original divestiture package, C&S agreed to

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1 provide this per store per month fee for 413 stores, right?

2 MR. PERRY: I'm sorry, Your Honor. Point of
3 clarification: You said "the original divestiture package"?

4 MR. MATHESON: Well, why don't I look at the first
5 page of the document.

6 BY MR. MATHESON:

7 Q So this is appendix A, service fees, correct? And this
8 provides a good-faith estimate of the service fees that C&S
9 will be charged after it acquires the divested stores, right?

10 A That is correct.

11 MR. PERRY: Your Honor, objection. This is an
12 appendix to the September 2023 divestiture agreement, not the
13 one about which Mr. Cosset has been testifying.

14 Is that correct, Mr. Matheson?

15 MR. MATHESON: That is not correct. The document I
16 have labeled PX1654 unquestionably is April 2024, and this is
17 material we have extracted from that document that appears at
18 pages 390. So perhaps -- if it would be convenient, perhaps we
19 can take a quick break and take a look at your document.

20 MR. PERRY: I apologize, Your Honor, for having
21 cross-talk. He asked about the original divestiture package.
22 There were two divestiture packages. I asked Mr. Cosset zero
23 questions about the first one, because it was superseded and is
24 irrelevant. I was only seeking clarification, to be clear,
25 that we were talking about the April 22nd, 2024, divestiture

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1 package.

2 Thank you, Mr. Matheson.

3 MR. MATHESON: I'll get to the point quickly,

4 Your Honor.

5 BY MR. MATHESON:

6 Q This is the good-faith estimate of the C&S fees -- the
7 fees that C&S will provide for the services it will be provided
8 under the April 2024 agreement, right?

9 A I would have to reconcile, because it has a date on that
10 page of August 23, 2023. So assuming it is the same document
11 in the -- assuming that's the case, the structure of the
12 document, yes, is consistent with a blended estimate of --
13 "good-faith estimate" I think is the word you used for the
14 services that would be rendered to C&S.

15 Q You are familiar with all the provisions of the amended
16 asset purchase agreement in the TSA, right?

17 A I am.

18 Q The TSA calls this schedule a "good-faith estimate,"
19 right?

20 A That's correct.

21 Q And I think you anticipated my point, which is in fact the
22 good-faith estimate within the April 2024 divestiture package
23 is based on costs from August 2023, right?

24 A That's correct. The team of experts would have used that.

25 Q Well, the reason it's based on August 2023 is not because

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1 the experts decided it was appropriate. That's because this
2 was the original estimate provided when the original
3 divestiture package was negotiated in August of 2023, right?

4 A That is correct. The estimates -- these costs are based
5 on basic technology, commodity, and cost of our talent, which
6 don't necessarily vary over that period of time -- over that
7 six-month period of time.

8 Q They don't necessarily vary, but you don't know one way or
9 another, for example, whether supply chain sourcing costs might
10 have changed from the August 2023 good-faith estimate and the
11 April 2024 good-faith estimate, right?

12 A I don't know -- that's not the level of details I have
13 reviewed.

14 Q And it is certainly true there were more stores in the
15 April 2024 package that you were responsible for negotiating
16 compared to the package that was negotiated in August of 2023,
17 right?

18 MR. PERRY: Objection, Your Honor. Scope.

19 MR. MATHESON: Your Honor, I'm simply asking about
20 the package he negotiated and whether he is aware there is a
21 package with fewer stores in it.

22 MR. PERRY: Same objection.

23 THE COURT: Sustained.

24 BY MR. MATHESON:

25 Q How many stores are in the April 2024 package that you

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1 negotiated?

2 A 579.

3 Q And you took over responsibility for negotiating the
4 divestiture package in February of 2024, right?

5 A That's correct.

6 Q And the reason you took over responsibility for
7 negotiating was that a package had originally been proposed to
8 antitrust regulators that was deemed insufficient, right?

9 MR. PERRY: Objection.

10 MR. MATHESON: I'll lay a foundation, Your Honor.

11 THE COURT: Okay.

12 BY MR. MATHESON:

13 Q Would you please turn your attention, sir, to PX1603. We
14 don't need to admit it into evidence. Please direct your
15 attention, sir, to -- sorry -- to PX6103-016 through 022 .

16 Do you recognize this document, sir, as declaration
17 you executed under penalty of perjury in connection with one of
18 the litigation filings that your counsel made in this case?

19 A That's correct.

20 Q Directing your attention to paragraph 9, you're aware that
21 there was a 413-store divestiture package proposed by Kroger
22 and Albertsons in 2023, right?

23 MR. PERRY: Objection, Your Honor. Scope.

24 THE COURT: Overruled. He can answer that question.

25 THE WITNESS: Can you repeat the question?

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1 BY MR. MATHESON:

2 Q You're aware that there was a divestiture package of 413
3 stores proposed by Kroger and Albertsons in 2023 prior to the
4 time you became responsible for negotiating the divestiture
5 package, right?

6 A There was a divestiture agreement in which 413 stores were
7 included, that's correct.

8 Q So whatever the good-faith estimate provided in PX1654,
9 pages 387 -- let's turn back. We will make this easy. Let's
10 turn back to PX1654, that tab in your binder, and look at
11 PX1654-390.

12 Do you see that page, sir?

13 A Yeah, I do.

14 Q So the second -- the third row from the bottom reflects a
15 number, and that number is the per store per month cost that
16 C&S will pay to the post merger entity for transition services,
17 right?

18 A That is the blended estimate of the per store cost.

19 Q And when C&S originally agreed to pay that, that was based
20 on the understanding they would be taking 413 stores, right?

21 MR. PERRY: Objection, Your Honor.

22 THE COURT: Sustained.

23 MR. MATHESON: Okay.

24 BY MR. MATHESON:

25 Q In the April 2024 package that you personally negotiated,

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1 C&S agreed that it would pay this good-faith estimate, unless
2 that number changed, for 579 stores, right?

3 A That's correct.

4 Q Every month they will pay that number times 579 to the
5 post-merger entity to perform TSA services, right?

6 A To the extent the services would be active, that's
7 correct.

8 Q And to the extent this estimate didn't increase between
9 August 2023 and April 2024, right?

10 A That's correct.

11 Q Now, I understand you can't testify about whether you were
12 consulted regarding the stores included in the divestiture
13 package. So I'll leave that aside and make that clear.

14 In the April 2024 divestiture package, C&S was not
15 consulted regarding the stores Kroger and Albertsons chose to
16 include in that package, right?

17 A That is -- that was known by outside counsel and the
18 experts.

19 Q So the package was presented to C&S on a
20 take-it-or-leave-it basis, even though they had to pay a per
21 store per month fee for all the transition services agreements
22 that you're going to provide them, right?

23 A I'm hesitating to answer because of the technical part of
24 your question. The package had 579 stores. The scope of
25 services and the estimated cost to support each store on an

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1 individual basis, again, an estimate, is what's reflected in
2 that document.

3 Q So when you say the package had 579 stores, C&S had no
4 ability to say, "I don't want that store. It is not worth what
5 I have to pay in transition service agreements. And it is in
6 the wrong part of the country," right? They had to take the
7 package on a take-it-or-leave-it basis, right?

8 A Except for the take-it-or-leave-it part, if you are
9 referring to what was the package, that was contemplated and
10 documented in the April 22, 2024 document -- that's the 579
11 stores -- and that's the estimate for the services.

12 Q I'm not asking about the estimate for the services, sir.
13 C&S's option was either to take the entire package of 579
14 stores or not, correct?

15 A That is the package that was documented and contemplated.

16 Q So C&S did not have the option to carve out one store that
17 was in the wrong spot in Delaware and say, "I don't want that
18 store," right?

19 A That was the package. There was no contemplated
20 alternative, if you will, if that's what you're implying.

21 Q Now, the reason that -- strike that. C&S cannot operate
22 the divested stores in the same manner that Albertsons or
23 Kroger currently operates divested stores unless C&S receives
24 these transition services from the merging entity, right?

25 A It depends on the services.

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1 Q Now, let's keep looking at -- not on the public screen --
2 PX1654-390. Do you have that in front of you, sir?

3 A Yes.

4 Q And you see this identifies 10 functions or categories of
5 functions, correct?

6 A Yes.

7 Q Now, one of the ten major categories that is not
8 identified here is retail media services, right?

9 A That is correct.

10 Q And the reason that -- strike that. As you discussed with
11 Mr. Perry during your direct examination, retail media services
12 is one of Kroger's alternative profit businesses, right?

13 A That is correct.

14 Q And retail media services, in fact, in 2022, represented
15 one of Kroger's fastest alternative profit business, right?

16 A That is correct.

17 Q Now, can you take a look, sir, at PX6016. Do you
18 recognize this, sir, as a transcript of a call that you took
19 part in in March of 2022?

20 A Yes. I'm trying to remember if it was a call or
21 presentation.

22 Q Well, I guess I didn't know whether this was a call or a
23 presentation. This was a presentation you participated in in
24 March of 2022; is that fair?

25 A Yes.

Y. Cosset - X

1 Q Directing your attention to PX6016-012, at the bottom of
2 that page, the document purports to begin remarks attributed to
3 yourself.

4 Do you recall participating in this presentation and
5 making those remarks?

6 A I do.

7 Q Directing your attention, sir, to PX6016-014, I would like
8 to explore the comments attributed to you regarding retail
9 media services, the second full paragraph on that page, sir. I
10 want to ask -- I'm going to ask you to view that paragraph.

11 A So the one that starts with, "Lastly"?

12 Q Yes. I will read it publicly and ask if I read it
13 correctly. "Lastly, completing our flywheel with retail media,
14 our fastest growing alternative profit business, capitalizing
15 on our assets, digital growth, and personalization nearly
16 doubled revenue per ordering over the course of last year."

17 Do you see that, sir?

18 A Yes.

19 Q It's a true statement that Kroger's retail media business
20 capitalizing on assets including personalization, in fact,
21 doubled revenue per ordering in 2021, right?

22 A That's correct.

23 Q Now, the reason that C&S is not receiving retail media
24 services from Kroger is that C&S asked for those services and
25 Kroger said no, right?

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1 MR. PERRY: Objection, Your Honor. This is the goose
2 and gander rule. They objected to every question about this
3 subject, and we do too.

4 MR. MATHESON: Your Honor, as I read your ruling, we
5 are not supposed to get into anything for which we don't have a
6 document to establish a foundation. We have multiple such
7 documents. I would be happy to point the witness to PX13044.

8 THE COURT: Then do that.

9 MR. PERRY: Your Honor, this is not a document
10 issue --

11 THE COURT: I understand. So the ruling is for both
12 sides.

13 MR. MATHESON: Understood, Your Honor.

14 BY MR. MATHESON:

15 Q Can I direct your attention, sir, to PX13004-0 and look at
16 the first page of the binder. There is a email on the lower
17 part of the page?

18 A One second. 13044?

19 Q Correct.

20 A And page 1?

21 Q Correct. Now, I want you to be clear. I'm not asking you
22 about the business reasons that Kroger had for including or
23 excluding any services. My question is limited to a question
24 we never asked in your deposition, which is the reason that
25 Kroger is not providing TSA services is that C&S asked for

Y. Cosset - X

1 retail media services, and Kroger and Albertsons declined,
2 right?

3 MR. PERRY: Objection, Your Honor. The witness is
4 not on this document.

5 THE COURT: Sustained.

6 MR. MATHESON: Your Honor, I'm not seeking to admit
7 the document. I'll try to lay a foundation.

8 BY MR. MATHESON:

9 Q Sir, you are familiar with Lauren Hayes as a managing
10 director at Deloitte, right?

11 A I am.

12 Q You worked closely with Ms. Hayes on your work during the
13 transition services agreement, right?

14 A Not correct.

15 Q You did not work closely with her?

16 A She did not with work on negotiating the transition
17 services agreement, which is the word you used.

18 Q Did she work with you in negotiating the divestiture
19 package?

20 A She did not.

21 Q She did not at all. Okay. Did -- okay. Did any of the
22 individuals copied or addressed on this document work with you
23 on negotiating the divestiture package?

24 A I think the word "negotiating" is the challenge, Counsel.
25 It is like, did these individuals contribute to helping

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1 document and track scopes? Absolutely. They did not get
2 involved in the negotiation.

3 Q Without being that precise, during your work on the asset
4 purchase agreement transition services agreement, did you have
5 occasion to work with Lauren Hayes?

6 A I did.

7 Q When she wrote, "TSA recap for tomorrow a.m.," on the day
8 you signed the asset purchase agreement, was she acting within
9 the scope of her responsibilities in assisting Kroger in
10 negotiating the divestiture agreement?

11 A No.

12 Q She was not acting on behalf of Deloitte -- I'm sorry --
13 did Deloitte act on behalf of Kroger or Albertsons in
14 negotiating -- in their work negotiating the divestiture
15 agreement?

16 A No.

17 Q They were not consultants hired by Kroger and Albertsons?

18 A You are using the word "negotiating." I'm trying to
19 help -- to be absolutely precise. They are collaborating.
20 They are supporting Kroger in its capacity as experts. They
21 are not negotiating.

22 Q All right. But they contributed in their capacity as
23 experts to the development of the divestiture package; is that
24 fair? In some capacity?

25 A Documentation of the plans, yes.

Y. Cosset - X

1 Q Okay. And so when Ms. Hayes is documenting the "TSA recap
2 for tomorrow and the headlines," was she acting in her capacity
3 on behalf of Deloitte, who is assisting the parties, in
4 documenting the headline issues as the TSA was being finalized?

5 A That's correct.

6 MR. MATHESON: I move to admit PX13044, understanding
7 that the witness is not on this document. There has been no
8 objection raised to it, and these are admissible statements of
9 the agent of party-opponent made while the relationship lasted
10 in the course of their business responsibilities and should be
11 considered by the Court.

12 MR. PERRY: Two separate objections to this document,
13 Your Honor: First, it is hearsay as to this witness. He
14 hasn't laid the foundation for the basis he just offered it.
15 More importantly, though, he is trying to get in the question
16 of pre-execution negotiations over which we have asserted
17 privilege, and the Government has not challenged in this court
18 the privilege and lost that challenge in the administrative
19 tribunal. He is about to ask a privilege question. This
20 document doesn't allow him to ask that question. And I did not
21 ask any such questions, to be clear, during my examination.

22 When Mr. Cosset volunteered information that might
23 have gone into the pre-execution period, the Government
24 objected every single time, and the Court sustained those
25 objections every time. We are not challenging those rulings.

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1 We actually agree with those rulings. The same has to apply to
2 the Government. The period of negotiations before execution of
3 the APA and TSA, we have asserted privilege over, and this
4 document is one of those. The document is not admissible. But
5 the question that's about to come, I am objecting to, so I'm
6 getting it all out at once.

7 MR. MATHESON: This document has been on exhibit
8 lists for weeks. If there was any assertion of privilege, it
9 has been waived, and we are not attempting to get in any of the
10 actual questions that Mr. Cosset has been asked and refused to
11 answer, which relates to Kroger's reasons for including assets
12 in the package.

13 THE COURT: I'm sustaining the objection.

14 MR. MATHESON: Thank you, Your Honor.

15 BY MR. MATHESON:

16 Q Sir, Kroger's alternative profit business is supported by
17 Kroger's 84.5lteam, right?

18 A That's correct.

19 Q And that's a data science team within Kroger that you have
20 oversight over?

21 A It's a data science and commercial team that I do have
22 oversight over, correct.

23 Q And that team has more than a thousand full-time
24 employees; is that right?

25 A That's correct.

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1 Q C&S has at most a few dozen employees devoted to retail
2 science, right?

3 A I do not know.

4 Q So you don't know one way or the other the extent which
5 Kroger's retail data sciences capabilities outstrip those of
6 C&S?

7 A I'm pretty confident we have very strong, one would argue,
8 great capabilities in that field.

9 Q To address, again, the tech stack we were discussing
10 previously and you discussed on direct examination, so it is
11 true that the stores C&S is acquiring currently operate under
12 four different information infrastructures, right?

13 A That's correct.

14 Q Those are Kroger's, Albertsons', and the independent
15 infrastructures currently in place at Kroger's Harris Teeter
16 stores and Albertsons' United supermarket stores?

17 A That is correct.

18 Q And the plan is for C&S to replace these four different
19 information infrastructures with a single infrastructure
20 system, correct?

21 A That is correct.

22 Q And you referred to that as a clone of the Albertsons tech
23 stack, but it includes only certain portions of the Albertsons
24 tech stack, right?

25 A That is correct.

Y. Cosset - X

1 Q Now, at the time of your deposition in June of 2024, C&S
2 had not yet obtained a technology stack license agreement from
3 Kroger, right?

4 A That is correct.

5 Q And even if C&S obtains a technology stack license from
6 Kroger, that license will be limited in time, right?

7 A That is correct. Yes.

8 Q And in addition to obtaining a license from Kroger, before
9 C&S can actually receive and use a copy of a tech stack, it
10 must also receive licenses from certain necessary third-party
11 vendors, right?

12 A That's correct.

13 Q And you have not personally participated in any
14 negotiations between C&S and third-party vendors that has
15 actually resulted in C&S obtaining the required necessary
16 third-party licenses, right?

17 A I have not personally been involved, that's correct.

18 MR. MATHESON: Pass the witness. Thank you.

19 Thank you for your time, sir.

20 MR. PERRY: No redirect.

21 THE COURT: All right. You get to step down.

22 THE WITNESS: Am I done?

23 THE COURT: You are finished. You are. You can
24 leave all of that up there. You can leave everything.

25 MS. MAINIGI: Your Honor, would it make sense to take

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1 a break?

2 THE COURT: I think so. We are going to take a
3 break.

4 All right. We will be in recess for 15 minutes.

5 (Recess.)

6 (Proceedings resumed:)

7 MR. PITT: Good afternoon, Your Honor. Defendants
8 call Dan Dosenbach.

9 THE COURT: All right.

10 I saw you standing.

11 MS. MUSSER: I just wanted to introduce another
12 expert, Professor Orley Ashenfelter.

13 THE COURT: All right. Good afternoon.

14 (The witness was duly sworn.)

15 THE CLERK: Would you please state your name for the
16 record, spelling your last.

17 THE WITNESS: First name Dan. Last name Dosenbach.
18 D-O-S-E-N-B-A-C-H.

19 MR. PITT: Your Honor, one thing we may have
20 neglected to do is introduce Your Honor to defendants' expert
21 Dr. Justin McCrary, who is also in the jury box there. I
22 wanted to make sure we didn't forget that.

23 My colleague pass out binders?

24 THE COURT: Yes.

25 MR. PITT: Thank you, Your Honor.

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1 May I proceed?

2 THE COURT: Yes.

3 DIRECT EXAMINATION

4 BY MR. PITT:

5 Q Good afternoon, Mr. Dosenbach.

6 A Good afternoon.

7 Q Could you -- first of all, what is your role at
8 Albertsons?

9 A I am a senior vice president of labor relations.

10 Q And how long have you been in that role?

11 A Since May of 2020.

12 Q How long have you been in the field of labor relations?

13 A Since I graduated in law school, but going back to August
14 of 1996, so approximately 28 years.

15 Q How did you get into that field?

16 A You know, coming out of law school, I interned at a large
17 international law firm. It wasn't for me. Throughout law
18 school, I had made some connections with UFCW, United Food &
19 Commercial Workers Local 100A out of Chicago. We shared a
20 philosophy of taking care of associates/members and rewarding
21 them with great contracts and positions in the company for
22 growth. So we found common ground, so I joined them out of law
23 school.

24 Q Mr. Simmons, I would ask if you would put DX22 on the
25 screen?

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1 MR. PITT: Your Honor and Mr. Dosenbach, that should
2 be the first tab in your binder.

3 BY MR. PITT:

4 Q Mr. Dosenbach, does this demonstrative here accurately
5 reflect the positions that you have held since graduating law
6 school?

7 A Yes, it does.

8 Q And starting first with your roles prior to coming to
9 SuperValu or Albertsons, can you describe what roles you have
10 had?

11 A From 1996 through 2006, I was general counsel for three
12 UFCW locals that had merged. I started at UFCW Local 100A, and
13 I was there from 1996 through 2000. Then in 2000, we merged
14 Local 100A with UFCW Local 546 to form UFCW Local 546A, and it
15 was always the plan to put the three locals together, and so
16 immediately thereafter we started the process of merging UFCW
17 546A with UFCW 1540 to form UFCW Local 1546.

18 Q Were you personally involved in the union mergers that
19 you've just described?

20 A Yes. I not only handled all aspects of the merger, but I
21 was part of the planning for the reasons why and then rolling
22 out the communication plan to members who have to vote to
23 approve those mergers.

24 Q Do you have an understanding then of why these unions
25 wanted to merge?

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1 A Yes, I do. They wanted to become an overall stronger
2 union, gain their market share, and so greater opportunities
3 and greater strength in organizing, greater productivity and
4 efficiencies, and it was a critical aspect of the merger,
5 greater leverage at the bargaining table.

6 By turning around and merging bargaining units, they
7 created larger bargaining units, and having those larger
8 bargaining units gave more leverage to the union in
9 negotiations. They had the ability to threaten strikes against
10 larger unions and actually take strikes against larger unions,
11 and that created more leverage in the negotiation process.

12 Q And when you said "strikes against larger unions," am I
13 right that you meant to say "larger bargaining units" or
14 "employers"?

15 A Larger bargaining unit employers. I apologize.

16 Q Thank you. How, if at all, did your work as general
17 counsel of union locals affect your outlook on labor relations?

18 A It framed up my core principles that I've had throughout
19 my entire labor career. Going in, it was with the mindset of
20 we're there to negotiate contracts that reward great
21 associates/members, protect job security, both the short-term
22 job security and the long-term job security, and we wanted the
23 companies that we represented -- the companies whose associates
24 we represented -- we wanted them to be successful, and we
25 wanted them to grow. So that reinforced that core principle,

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1 and that's something that I carried on throughout my entire
2 28-year career in labor relations.

3 Q And has that been your view regardless of which side of
4 the table you've been on?

5 A It is my view of regardless of which side of the table.
6 We want to bargain great contracts that take care of the people
7 and see organized companies grow and prosper.

8 Q Mr. Dosenbach, looking back now at DX22, can you tell us
9 when did you leave that role as general counsel of UFCW
10 Local 1546?

11 A In November of 2006.

12 Q Why did you decide to leave?

13 A I had been with the union for ten years. There was no
14 room for further advancement. I wanted to continue and
15 develop, and an opportunity with a company called Jewel-Osco,
16 which was owned by SuperValu and is an Albertsons company, they
17 approached me about joining their organization. They put me in
18 touch with somebody who I had bargained with from Jewel for a
19 long time for an interview. We had a very contentious, very
20 adversarial, and at times nasty relationship, and I was
21 wondering how it was going, because of our history. And we sat
22 down, and I learned that he had tremendous respect for me. And
23 I learned that the core principles that I value -- taking care
24 of people, positioning companies for growth was something that
25 he and his company valued, and they provided me with the

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1 opportunity to continue that mission on a go-forward basis.

2 Q So what have your roles with SuperValu and the Albertsons
3 family of companies been since that time?

4 A So I started under SuperValu as the director of labor
5 relations for ACME Markets, which is based out of Philadelphia.
6 I was in that position from 2006 through 2011. In 2011, I was
7 promoted to the VP of labor relations, and my responsibilities
8 not only included handling all labor relations for ACME, but
9 also all of the labor relations for SuperValu supply chain side
10 of the business. And I was in that role from 2011 to 2013.

11 At that time SuperValu sold off its retail side of
12 the business and the underlying supply chain portions that
13 right supported that retail side of the business to a private
14 equity group that created the new Albertsons Companies, and I
15 went with that group. I was the vice president of human
16 resources and labor relations for ACME Markets from 2011
17 through -- excuse me -- from 2013 through 2015, at which point
18 Albertsons merged with Safeway, and the Safeway Eastern
19 Division was added to ACME to create the new Mid-Atlantic
20 Division, and I was the VP of human resources and labor
21 resources for the Mid-Atlantic Division from 2015 through 2020,
22 at which point I was promoted up into my current role of senior
23 vice president handling labor relations for all of Albertsons.

24 Q Thank you, Mr. Dosenbach. Can you just give us a brief
25 sense of your responsibilities in your current role as SVP of

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1 labor relations?

2 A Yes. So the first thing is I oversee the negotiation of
3 contracts. So at Albertsons, we have -- when I say
4 "contracts," I mean collective bargaining agreements. So at
5 Albertsons we have 422 collective bargaining agreements with
6 our union partners, so I oversee those negotiations, and a
7 significant number of those negotiations I first-chair as the
8 chief spokesperson for those negotiations. So that's my first
9 area of responsibility.

10 Secondly, I oversee the day-to-day administration of
11 those collective bargaining agreements. So the underlying
12 grievances, arbitrations, or labor disputes that arise under
13 those 422 contracts, I oversee. For a number of them I handle
14 them directly; for others, I have individuals who report up to
15 me and will handle them, and I will oversee that
16 administration.

17 Thirdly, Albertsons participates in approximately 50
18 Taft-Hartley health and welfare funds and 28 Taft-Hartley
19 multi-employer pension plans, and I oversee the administration
20 of them from an employer's standpoint and also as a trustee
21 acting as a fiduciary in the best interest of the fund and its
22 participants, and so I sit as a trustee on a number of those
23 funds.

24 Then finally, a very important part of my role is
25 working with our union partners to spread our Albertsons

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1 culture across our entire workforce.

2 Q Thank you.

3 Mr. Simmons, I think we can take that demonstrative
4 down.

5 Thanks.

6 So, I would like to talk to you, Mr. Dosenbach, a
7 little bit about how labor relations works at Albertsons. To
8 start, could you tell us how much of Albertsons' workforce is
9 unionized?

10 A So we have divisions that are completely unionized. When
11 I say "completely," all the stores in the supply chain centers
12 are unionized. We have other divisions that they're partly
13 unionized and then certain divisions that are completely
14 nonunion.

15 When you break it down, you look at the fact that we
16 have overall a total of 300,000 associates. Of those 300,000
17 associates, 200,000 of those associates are unionized, covered
18 by union collective bargaining agreements.

19 When you further break that down, you look at it and
20 180 of those associates that are covered by contracts with the
21 United Food & Commercial Worker union locals, and those would
22 cover the retail stores.

23 We have 18,000 that are covered by Teamster
24 contracts, and those Teamster contracts cover our supply chain
25 side of the business, our distribution centers, our

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1 manufacturing plans.

2 And then finally, we have about 2,000 associates who
3 are covered by some contracts with bakers, carpenters, steel
4 workers, pipefitters that make up the entire 200,000 associates
5 represented by union contract.

6 As it all shakes out, about two-thirds of our
7 workforce is unionized.

8 Q I was not a mathematics major, but perhaps I think you
9 meant to say 180,000 UFCW as opposed to -- you may have said
10 "180."

11 A Yes. Thank you for that correction. 180,000 associates
12 covered by UFCW contracts.

13 Q Thank you. Could you give us a general sense, what kinds
14 of positions are included within that unionized workforce?

15 A So on the retail side of it, you look at courtesy clerks.
16 You look at cashiers. You look at produce clerks, deli clerks,
17 bakery clerks, a small percentage of pharmacists, meat cutters.
18 And that's kind of the retail side of it. When you go to the
19 supply chain distribution side of it, our warehouses, you will
20 look at selectors, you will look at forklift operators, and
21 you'll look at truck drivers.

22 Q Could you explain how your labor relations group at the
23 company interacts with the divisions?

24 A Yes. So our labor relations team is -- we are part of
25 corporate. So myself and everyone working for me is part of

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1 corporate, but we work very closely with the division -- the
2 division presidents, the division HR team, who we view as our
3 client. We, as corporate, will set the overarching principles,
4 the overarching goals that we're negotiating for. We will also
5 set the style and the tactics that we will go to the bargaining
6 table with. But we work very closely with having the division
7 review the underlying collective bargaining agreement and
8 outline their needs within the overarching goals and principles
9 that we have set forth as a corporate labor relations team.

10 Q How often are you engaged in collective bargaining
11 agreement negotiations?

12 A All the time. When I say "all the time," if you look at
13 it, we have 422 collective bargaining agreements. Those
14 contracts range in duration from three to five years. So we're
15 typically negotiating 60 to 100 contracts in any one year. A
16 slow year would be 60; a big year would be approximately 100.

17 Q What does this negotiation process involve?

18 A Tough. It's contentious. It's argumentative. It's back
19 and forth. For us, it is principled around that overarching
20 goal of bargaining contracts that reward our associates and
21 positioning the company for growth. But we have back-and-forth
22 arguments about what is needed to do that. It is tough, it's
23 adversarial, and it's contentious.

24 Q So how do you prepare for those negotiations?

25 A We start with the financials. So we look at the

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1 financials and the trends and what's going on with sales,
2 what's going on with profits. Are we gaining share? Are we
3 losing share? If we are losing share, who is it to?

4 Next, we will then look at the labor pool in the
5 marketplace we are looking at and what are they paying from a
6 wage-and-benefit perspective. So we will go out there and look
7 at what other retailers are doing. So what Whole Foods is
8 doing, what Costco is doing, what Walmart is doing, what Amazon
9 is doing; other sectors that we compete with, so fast food,
10 McDonald's, Chipolte, Subway, what they're doing, what the
11 restaurants are doing to get a sense of the labor pool that we
12 are competing with and what they are paying for wages and
13 benefits.

14 Then next, we will go and look at the underlying
15 contracts and say, "Are there restrictions in those contracts
16 which prevent efficiencies, which prevent productivities, which
17 limit the opportunity to grow?" And we will look at all of
18 those.

19 Then finally, we will look at grievances and
20 arbitrations that we've had during the contract term. And we
21 put all of that together and do an analysis and work closely
22 with the divisions to set forth the proposal and then the
23 bargaining process begins.

24 Q How would you describe your relationship with the union
25 leaders that you deal with?

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1 A It's strong. It's a strong relation. It's built upon
2 trust, credibility, transparency, sharing of information.
3 These are individuals, many of them who are my friends. And
4 although we fight and we fight hard at the bargaining table,
5 they are my friends, and they will be my friends long after we
6 stop fighting at the bargaining table.

7 Q Do you spend time talking with union leaders about what
8 they are seeing in the labor market?

9 A All the time. Every single week we're having
10 conversations about what we're seeing, what they're seeing, and
11 trying to predict what's coming down the road.

12 Q So I would like to talk to you a little bit about that
13 labor market. We have -- first, we've talked about your
14 involvement with collective bargaining, but as part of your job
15 responsibilities, both past and present, do you also have
16 insight into the hiring process at Albertsons?

17 A I do. From 2013 through 2020, I was heading up -- I was
18 the VP of HR for the Mid-Atlantic Division. So I was directly
19 involved in overseeing the hiring practices.

20 Then from 2020 through the present, in my capacity as
21 heading up labor relations, these issues come up at the
22 bargaining table all the time, so I have an understanding of
23 what our practices are.

24 Q Okay. How would you describe the pool of potential
25 frontline hires?

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1 A It's very broad. It's quite broad. We are looking at
2 people with all types of background. When you look at it, we
3 are hiring entry-level positions. So we're not looking for any
4 specific experience. We're really more looking for a skill
5 set. So one of the important pieces are showing up, being
6 dependable, being reliable, a thirst for knowledge, a thirst to
7 come into our environment and wanting to learn, and people who
8 are personable and have demonstrated an aptitude towards
9 service.

10 Q Do a lot of your employees start working at Albertsons as
11 their first job at a young age?

12 A Yes. So you will see a lot of our employees, it's their
13 first job. They will come to us at 16 years old, and it is
14 something that I'm quite proud of. You see people who start at
15 a young age, first job, and they go. They become district
16 managers. They move on to roles as vice presidents, as senior
17 vice presidents, chief operating officers. It is really
18 exciting, the opportunities for growth within our organization
19 that people have.

20 Q Are there ever times when Albertsons looks to experience
21 that potential hires might have? Potential frontline hires?

22 A Yes. Again, the aptitudes that I just outlined are
23 important, but we also look towards people with a service
24 background. So that's the industry that we're in. So if you
25 work at a Best Buy, if you work at Home Depot, if you work at

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1 Lowe's, if you work at McDonald's, those are the types of
2 skills -- Kohl's, JC Penney, that service background is helpful
3 in coming to work for our company.

4 Q What about grocery experience?

5 A If they have grocery experience, we look at it, but it is
6 not critical. These are entry-level jobs. We largely promote
7 from within, so we hire somebody into a entry-level job. We
8 turn around and give them training and give them opportunities
9 to grow within our organization. That's why the thirst for
10 knowledge and wanting to learn becomes more important than
11 previously having worked at a grocery store.

12 Q Now, a little earlier you mentioned meat cutters, and I
13 think we have heard a little bit about meat cutters. Let me
14 ask you in relative terms, how many of Albertsons' employees
15 are meat cutters?

16 A It is a very, very small percentage. It's less than
17 1 percent, you know, and I guess I will explain it in these
18 terms: In a small-volume store, which would employ
19 approximately 75 associates, you would see at most one to two
20 meat cutters working in that store. If you were to look at a
21 medium-volume store, which typically would have 100 to 125
22 associates, at most you would have two meat cutters working in
23 that store. If you got to a large-volume store, 150 to 200
24 associates, you would have at most three to four associates.
25 That's just on the retail side. When you look at our 300,000

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1 associates, it is a very small percentage of our total
2 workforce.

3 Q As part of your job responsibilities, have you had an
4 opportunity to observe industry hiring trends as to meat
5 cutters?

6 A Yes. I've been in the industry for a long time. I talk
7 about it a long time with my union partners. I have
8 experienced it in my position of heading up HR, and, quite
9 frankly, I have seen it as a consumer. And what we have seen
10 is the explosion of pre-pack meat. It continues to get bigger
11 every single year, and that has resulted in a decline of
12 overall meat cutters. There is fewer and fewer meat cutters.
13 In fact, I am familiar with Ahold, which operates Giant on the
14 East Coast and Stop & Shop, a very prominent supermarket, who
15 has completely eliminated meat cutters out of their business.
16 It is a position that is eroding over time.

17 Q Speaking again about hiring, over the time since you left
18 your HR position, have you yourself ever asked someone to apply
19 to work at Albertsons?

20 A Yes, I have. So, you know, I have been in a taxi cab, and
21 I was sitting there riding with an individual. It was a longer
22 ride. We had a great conversation. He clearly had an aptitude
23 for service. He clearly had a thirst for learning. He was
24 dependable and reliable. And at the end of the ride, I turned
25 around and said, "Hey, you need to come work for us. You need

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1 to apply and work for us." And I gave him contact information
2 to apply. I travel quite a bit in my job, so I spend a lot of
3 time in hotels, and I run across people who are outstanding at
4 hotels in the service industry. I have encouraged them to
5 apply with us.

6 My neighbor runs a cake decorating business out of
7 her house, and she is terrific. And I told her to come and
8 apply. So it is from all different walks of life.

9 Q On the flip side, where do you lose employees to?

10 A We primarily lose them to companies like Amazon, Walmart,
11 Target, Costco, Burger King, Subway, Raising Cane's, Kohl's.
12 So other retailers, other companies in the service industry.
13 One place we generally do not lose our associates to are
14 unionized companies.

15 Q Why is that?

16 A You have collective bargaining agreements. And under
17 those collective bargaining agreements, one of the core
18 principles in those agreements is the principle of seniority,
19 and so as you gain seniority, things improve -- terms and
20 conditions improve under that collective bargaining agreement.
21 Those contracts generally prevent those unionized employers
22 from giving industry credit or doing something to somebody off
23 the street that would be attractive or more to a more senior,
24 existing employee.

25 We have bargained some industry credit into our

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1 collective bargaining agreements, but those are largely capped
2 at two years. So you can imagine if you were a unionized
3 Albertsons employee with ten years of service, and you had the
4 opportunity to go to another union employer and were told that
5 you had to start from scratch, or alternatively, at max, give
6 them two years of credit, that's not going to be attractive to
7 you, where non-union operator, your Costcos, your Walmarts,
8 they can turn around and have the flexibility, because they're
9 not under a union contract, to offer whatever they want to
10 attract and take our associates from us.

11 Q Do you get a lot of your employees from Kroger?

12 A No, for that very reason of the industry product. People
13 don't want to come over from Kroger and come to work for us and
14 start all over.

15 Q Do you lose a lot of your employees to Kroger?

16 A No, for the same rationale.

17 Q Are you familiar with the term "collective bargaining
18 agreement area" or "CBA area"?

19 A No. That's not a term that I've used.

20 Q Can you give us a sense of the sizes of the geographic
21 areas that are covered by individual collective bargaining
22 agreements?

23 A Huge variances. So it varies greatly. So you can look in
24 an area like Southern California that can be 500 miles wide.
25 You can look at an area Jewel-Osco in the Chicagoland market,

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1 which is 200 to 250 areas. Or you can go to an area on the
2 East Coast that could be 25 to 30 miles, and everything in
3 between.

4 Q Now, in your experience, what role, if any, do union
5 benefits play in employment decisions of Albertsons associates
6 and prospective associates when deciding whether they're going
7 to work at Albertsons or another employer?

8 A So I'll explain it this way: For entry-level employees,
9 it's all about wages. They're taking their job, and they want
10 to put some extra money into their pocket. So it's all about
11 those wages and the wages that they're putting in. Benefits
12 don't tend to be very important. Quite frankly, when you look
13 at it from the first -- zero to two, three years, there is a
14 significant turnover as people are looking for the overall best
15 wages. So our turnover during those first three years is
16 90 percent. As you stay longer with the company, the
17 benefits that we provide become more and more important, and
18 the longer you stay, those benefits become attractive to
19 retention.

20 Q Switching topics a little bit, could you explain how
21 Albertsons determines its compensation for frontline
22 associates?

23 A Yes. So, you know, we are looking at the overall retail
24 market, the retail sector. When we are doing it for a
25 particular contract negotiations, we are going to look at the

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1 retail sector in the market that we're operating. So we will
2 first start by looking at the Bureau of Labor Standards
3 statistics provided by the Government, and we will look at the
4 retail sector and get a sense of what is being paid in the
5 retail sector for wages and benefits.

6 We then go out there and do surveys across the retail
7 sector and do our own internal surveys.

8 Then finally, I do my own investigative work. If I'm
9 bargaining a contract, I'm going to go up to the local Costco,
10 and I'm going to talk to the associates and say, "Hey, if I
11 come up here" -- these are the hours of the associates. "Hey,
12 if I come work here, what will my wages be? What will the
13 benefits be?" So I will talk to the people while they are out
14 there taking a break.

15 Q You mentioned wage surveys. I would like to take a look
16 at a document on that topic. So if I could ask you to turn to
17 DX2361 in your binder.

18 Mr. Simmons, if we could put that up.

19 Mr. Dosenbach, when you've had a chance to review it,
20 do you recognize this document?

21 A Yes, I do.

22 Q What is it?

23 A This is an email from Renee Entzminger, who was the human
24 resource manager at the Lancaster Distribution Center based
25 just outside of Philadelphia; to myself; Chris Preli, who was

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1 the VP operating the Lancaster Distribution Center; and
2 John Busboom, who headed up operations for Chris.

3 Q And was this prepared in the regular course of Albertsons'
4 business?

5 A Yes, it was.

6 MR. PITT: Your Honor, I move to admit DX2361.

7 MR. DICKINSON: No objection, Your Honor.

8 THE COURT: It will be received.

9 BY MR. PITT:

10 Q Mr. Dosenbach, is it common for you to receive these sorts
11 of wage surveys?

12 A Yes. It is common for both the supply chain side of the
13 business, the warehouses, and the retail side.

14 Q By "retail side," do you mean in-store employee positions?

15 A Yes. My apologies. When I say "retail," it means stores.

16 Q Good. What kinds of employers are being surveyed here?

17 A In this survey, they were surveying Amazon, SuperValu,
18 Walmart, and Target.

19 Q And in your experience, is it common for Albertsons to
20 perform wage surveys using those companies as comparators?

21 A It is very common. You know, we are looking at the
22 geographic area. It shouldn't come to anyone's surprise that
23 across the country the larger employers in any geographic
24 market is Amazon, Walmart, and Target. So if they are in the
25 target, we are fighting with them for employees or trying to

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1 prevent our employees to go for them, and so we want to know
2 what they are paying for wages and benefits.

3 Q Now, you touched on this before, but I want the record to
4 be clear. This particular document discusses distribution
5 center employees, but does the same hold true in terms of what
6 comparator companies you're looking at as for in-store retail
7 positions?

8 A Yes. If we were looking at retail in this marketplace, we
9 would be looking at Amazon SuperValu, Walmart, and Target.

10 Q And are Amazon, Walmart, and Target union employers?

11 A No. They are non-union.

12 Q But do you nevertheless look to those companies in
13 assessing where wages for Albertsons' employees need to be?

14 A Of course we look at it. We are looking at who we are
15 competing with for the labor pool. So it doesn't matter
16 whether they're nonunion or union. We want to know who are the
17 companies that we are competing with for applicants, and for
18 the companies that are trying to take our existing employees,
19 what are they paying? I'll say -- I said it's not really
20 relevant whether they are non-union or union. That's actually
21 not true. It is more relevant when they are non-union, because
22 our workforce is more likely to go to a non-union operator
23 because of the industry credit issue than a union operator
24 where they would have to start from scratch.

25 Q Okay. Thanks. You can put that away.

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1 Mr. Simmons, take that down.

2 Could you explain generally how union and non-union
3 compensation differ in your experience?

4 A In my experience, what I've seen in general, for entry
5 level positions, non-union wages are better than our wages, but
6 our benefits are better than the non-union operators'.

7 Q I'm going to ask you now to look at DX39, which should
8 also be in your binder. When you have had a chance to review
9 it, Mr. Dosenbach, can you tell us, do you recognize that
10 document?

11 A I do.

12 Q What is it?

13 A This is an email chain starting with Andy Scoggin, who was
14 my predecessor, who previously was the SVP, who handled labor
15 relations for all of Albertsons to Mike Theilmann, who was the
16 CHRO and remains the CHRO for Albertsons, which he then
17 forwarded to me.

18 Q So we have so many acronyms. CHRO. Could you explain
19 what that is?

20 A Chief human resource officer.

21 Q Thank you. Did you receive this document in the regular
22 course of Albertsons business?

23 A Yes, I did.

24 MR. PITT: Your Honor, we move to admit DX39 into
25 evidence.

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1 MR. DICKINSON: No objection, Your Honor.

2 THE COURT: It will be received.

3 MR. PITT: Thank you.

4 BY MR. PITT:

5 Q Mr. Dosenbach, could you explain the context of this
6 email.

7 A UFCW, the union -- this was during the start of the
8 pandemic, and UFCW had made a request to increase wages for our
9 distribution center. There was also a request across retail.
10 And when we got this request, this request was up in the
11 Northeast, in the Boston area. When we got this request,
12 Mr. Scoggin wanted to benchmark against what others were paying
13 in the marketplace -- other employers that we were competing
14 with to attract, entertain employees. So he went and looked at
15 Stop & Shop, Hannaford, Whole Foods, Trader Joe's, Roche
16 Brothers, Big Y, Price Chopper, Market Basket, Target, Walmart,
17 and BJ to get a sense of what wages they were providing to
18 analyze what risk we were to lose employees to those associates
19 and what we should be doing with our pay.

20 Q Thank you. You can put that one away.

21 Mr. Simmons, thanks.

22 So I would like to talk now just a little bit more
23 about the collective bargaining process. Is it fair to say
24 that you're familiar with that process as it relates to
25 Albertsons and the unions that Albertsons bargains with?

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1 A It's fair to say, yes.

2 Q Okay. Can you explain what coordinated bargaining is.

3 A As provided under the National Labor Relations Act,
4 coordinated bargaining is where two or more employers, or
5 alternatively, two or more unions sit together at the table,
6 share information, but then provide separate proposals to the
7 other side.

8 Q And how does that differ from multi-employer bargaining?

9 A In two distinct ways: First, again, it is provided under
10 the National Labor Relations Act. In this case you say
11 multi-employer as opposed to multiunion, so I'll talk about
12 multi-employer. But in this case two or more employers will
13 sit together. They will share information, but instead of
14 setting forth separate proposals, we will work together to
15 present a single proposal to the union for their consideration.
16 So that's one different of a single joint proposal as opposed
17 to separate proposals.

18 And then the second way it's different is
19 multi-employer bargaining must be approved by the other side,
20 where coordinated bargaining does not.

21 Q Notwithstanding what you just said about the need or not
22 to get approval from the union, is it your practice to ask the
23 unions that you bargain with whether they object to your
24 engaging in coordinated bargaining?

25 A Yes. It's our practice to request, let them know, and we

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1 have never had an objection.

2 Q Why does Albertsons sometimes do coordinated bargaining
3 with other employers?

4 A In negotiations, any negotiations, it doesn't matter
5 whether you're negotiating a collective bargaining agreement,
6 negotiating for a house, negotiating for a car, in any
7 negotiations, timely information, accurate information, full
8 information is important to the process. The better
9 information you have, the better decision making -- the better
10 decisions you can make as part of that overall process.

11 So when we engage in coordinated bargaining, we have
12 better access to information. It's better access to it. It's
13 more timely, and it's more accurate, and that helps us to
14 better position us as part of the negotiation process to reach
15 our overall goal of bargaining contracts that take care of our
16 people and allow the company to grow.

17 Q Thinking about Kroger in particular, when Albertsons
18 negotiates with unions, is it ever trying to beat Kroger by
19 getting a better deal than Kroger gets?

20 A No. That's not our thing. That's not what we do. That's
21 not how we look at it. We are trying to bargain the right deal
22 for us consistent with our overarching principles.

23 Q Have you ever experienced unions wanting you to do
24 multi-employer bargaining?

25 A Yes.

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1 Q And did you have an understanding why?

2 A Well, when you look -- negotiations are very, very
3 complex. There are a lot of issues. And if you can have some
4 commonality with another employer amongst those -- amongst
5 employers on these issues, it expedites the process for the
6 unions. It make them more efficient. So I have seen unions
7 ask us for that reason.

8 I have also been around the block, and so I fully
9 understand that the larger the group they're bargaining with,
10 the greater the leverage the union has. So if they are
11 bargaining with a group twice the size, because they have
12 engaged in multi-employer bargaining, they now have the ability
13 to take a strike and impose economic harm on twice the size.
14 So it's a leverage play for them as well.

15 Q Are you familiar with the concept of a mutual strike
16 assistance agreement?

17 A Yes.

18 Q What is -- to your understanding, what is a mutual strike
19 assistance agreement?

20 A It is an agreement between two or more employers in which
21 they commit to doing certain things if a strike happens against
22 one of the employers. So if a strike occurs against one
23 employer, the other employers agree to share any sales or
24 profit increase, and it is spelled out in the mutual strike
25 agreement how we calculate it, but any sales or profit increase

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1 those other employers receive will be shared with the other
2 employer who strike -- who struck. And also they agree to lock
3 out its employees if the other employer is struck.

4 Q In your experience, is it common for Kroger to ask
5 Albertsons to enter into a mutual strike assistance agreement?

6 A No. It's not common, but it happens. I have been
7 involved in 1,500 negotiations in my career, and I think
8 throughout my entire career I can count on my hands the number
9 of times somebody has asked me to enter into a mutual strike
10 assistance agreement.

11 Q And have you ever entered into a mutual strike assistance
12 agreement?

13 A We have not.

14 Q Why not?

15 A We determined in the particular negotiations -- in
16 particular negotiations, it wasn't in our best interest. So
17 when we look at negotiations, there are three outcomes: One
18 outcome is a win-win situation, where both sides walk away from
19 the table feeling it as a win-win. Another outcome is -- in
20 negotiations -- one side is the winner, and the other side is a
21 loser. And then there are outcomes in which both sides are
22 losers. When we look at mutual strike assistance agreements,
23 we -- from our perspective, it increases the likelihood that
24 you will have a lose-lose situation while decreasing the
25 probability that you can bargain a win-win. So as we've looked

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1 at it under the circumstances that we have considered it, we
2 have decided not to enter into it.

3 Q From your perspective, do mutual strike assistance
4 agreements help employers more than they help unions?

5 A No. They up the ante for both sides. They up the risks
6 for both sides. Again, it's now -- there is more probability
7 you will have a lose-lose outcome and less probability that you
8 will have a win-win. On the one hand, if one employer is
9 struck, the other employer is going to have to lock out its
10 employees that it did not want to do. On the other hand, the
11 union is at risk of more employees going out.

12 Q Could you give us a sense of how common it is for a UFCW
13 to strike Albertsons?

14 A I've been with SuperValu/Albertsons in their divisions
15 since 2006. I have seen 1,500 negotiations. I have only
16 first-chaired hundreds, but I have overseen all of them.
17 During that period of time I can only recall one strike by UFCW
18 against Albertsons.

19 Q I would like to switch topics a bit and ask you just a
20 little bit about the merger that brings us all here today. Is
21 it your understanding that one of the results of this merger
22 would be that some of the union locals would be bargaining on
23 behalf of larger bargaining units?

24 A Yes.

25 Q Do you have experience that leads you to understand how

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1 the balance of bargaining leverage may shift when unions start
2 bargaining with larger bargaining units?

3 A I do. I have been in labor relations for 28 years. I
4 have participated in three mergers. The management side of the
5 business, I've participated in two unions, on the union side of
6 the business, plus I have regular open and transparent
7 conversations with my union partners. So I have a lot of
8 experience to analyze the impact of larger bargaining units.

9 Q In your experience, how, if at all, has the unions
10 bargaining leverage changed after a merger?

11 A It increases. When you have a larger bargaining unit, you
12 have more leverage. I have been told by unions repeatedly from
13 the highest levels their greatest lever to pull is their
14 ability to withhold their workforce. Their ability to take a
15 strike against an employer is their greatest lever. And the
16 larger the union -- excuse me -- the larger employer bargaining
17 unit, the greater the economic impact on that employer. So,
18 for example, a bargaining unit of a thousand associates, if you
19 were to double that to 2,000, the economic risk to the employer
20 of a strike is now double, because they can take twice as many
21 people out.

22 If it increases to 10,000 -- from 2,000 to 10,000,
23 it's now five times the risk in economic harm that they can
24 impose upon an employer, and the advantage the union has is
25 they get to decide the size of the strike. So they could

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1 impose significant, significant economic harm, taking all
2 10,000 people out; or alternatively, they could do rolling
3 strikes in which they take a thousand people out, go back to
4 the bargaining table and say, "We just took a thousand members
5 out. You need to get serious and improve your proposal; and if
6 not, next Friday we are taking another thousand people out" and
7 play that out over time.

8 So they gain leverage with larger bargaining units.
9 It's the reason why we saw the historic UPS settlement back in
10 August of 2023. It's the reason we saw the historic auto
11 workers settlement with the rolling strikes. The larger the
12 bargaining unit, the larger the leverage they have.

13 Q Have you heard the expression "whipsaw bargaining"?

14 A I have.

15 Q What does it mean to you?

16 A Well, it's when a union bargains term X with employer A,
17 and then goes to employer B and says, "Employer A just agreed
18 to term X. You need to do the same." It is an inappropriate
19 title. It's just bargaining. It's just negotiating. I always
20 do a head-scratch when the people put the term "whipsaw" on it.
21 It happens in every single negotiation that I have ever been
22 involved in which the union will point to an employer and say,
23 "They did X; you should do Y." It will happen in every single
24 negotiation that I'm involved in the future, with or without
25 this merger. And by the way, we, as employers, do it too. We

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1 will turn around and point to something that we got from union
2 A and say, "Hey, union B, you should do the same thing." This
3 has been labor relations negotiations/collective bargaining
4 unit from the start of time. It is just negotiations. It is
5 just part of the process, and somebody chose to add the term
6 "whipsaw" to it.

7 Q Now, in negotiations, in your experience, do unions also
8 bring up the compensation being offered by non-union employers?

9 A All the time.

10 Q Do unions bring up non-wage terms of compensation as
11 points of comparison?

12 A Every negotiations.

13 Q In your experience, when unions try to play Albertsons and
14 Kroger off against one another in negotiations, do they tend to
15 be successful in getting more favorable deals?

16 A No. It's common. It's a common point, "Kroger did X;
17 you, Albertsons, did Y." We will respond. We will
18 counter-propose. We will turn and point out, "Well, union A
19 did something. We want that." And we will go back and forth
20 and say, "We will do that if you are willing to give us
21 something in return." It's negotiations.

22 Q Based on your experience, will the unions that negotiate
23 with Albertsons still be able to engage in a whipsaw bargaining
24 if they lose the ability to play Kroger and Albertsons off
25 against one another?

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1 A Absolutely. They will be able to continue to do forward.
2 They will be able to point to other things that old employer
3 does, which happens all the time now. People point to me all
4 the time and say, "Hey, Dan, you need to do this at ACME
5 because you did it at Jewel." They will continue to do that.
6 They will continue to be able to point to other unionized
7 employers and say, "They did X; you should also do that." They
8 will point to employers outside our industry. Just last week,
9 I had someone point to me on what the City of Chicago did. And
10 because the City of Chicago did it, we should be able to do it.
11 They will be able to point to what non-union employers do
12 beyond what we do and say, "Gosh, they are non-union. You
13 should do it." It's negotiations.

14 Q Switching topics again a little bit. What will happen to
15 the collective bargaining agreements at the stores that are
16 being divested if the merger goes through?

17 A They will be assumed by C&S.

18 Q And do the unions now or will they have the opportunity to
19 engage effects bargaining with Kroger and Albertsons with
20 relation to those stores?

21 A Yes.

22 Q What is effects bargaining?

23 A So when there is a store impacted -- it's sold, it's
24 closed or something happens to a store, the union and the
25 employer sit down and bargain the effects on those employees in

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1 the impacted stores.

2 Q What types of things are negotiated in effects bargaining?

3 A It could be a vacation payout. It could be how a 401(k)
4 is matched. It could be transfer rights. A significant one
5 that comes up is bumping rights.

6 Q What are bumping rights?

7 A So bumping rights are where an employee -- a senior
8 employee in an impacted store, in this case a divested store,
9 would have the right to bump a junior employee and take their
10 position in a non-impacted store.

11 Q Now, have you engaged in effects bargaining with the
12 unions yet as related to this transaction?

13 A When the store divestiture list -- when the 579 list was
14 shared, we offered to start effects bargaining with all of the
15 unions who had impacted stores, and at the present time they've
16 declined.

17 Q Notwithstanding that they've declined, have you had the
18 opportunity to discuss with unions how bumping rights would
19 work with this divestiture?

20 A We told them that once effects bargaining starts, one of
21 the proposals we would make would be the following. And so I'm
22 not engaging in any direct dealing here. I'm just sharing what
23 we told them we would offer. We turned around and told them
24 that any employee who went to C&S -- we would propose that any
25 employee who went to C&S and later their store closed, or they

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1 were laid off, that we would -- during a specified period of
2 time, we would allow them to return to -- to the original
3 division, and they wouldn't even have to displace somebody. So
4 it eliminated the risk that went going to C&S, because you can
5 go in C&S. You can stay with the store that you have worked
6 with for a long time. You can follow Susan Morris and her
7 leadership and go to work in that store, and if it later closes
8 or you're laid off, you can return back to where you came from,
9 and you would have no loss in seniority, wages, benefits.
10 We're proposing that you could just return, and you would be
11 where you were.

12 Q You mentioned earlier you're a trustee in many of the
13 multi-employer pension plans that Albertsons participates in;
14 is that correct?

15 A Yes.

16 Q If the merger occurs, will C&S have to disproportionately
17 contribute to multi-employer pension funds that may be
18 underfunded today?

19 A No.

20 MR. DICKINSON: Objection, Your Honor. This lacks
21 foundation. He is asking about what C&S might do in the
22 future. This witness can't testify to that.

23 MR. PITT: Your Honor, respectfully, I'm not asking
24 him about what C&S might do. I'm asking about how the unfunded
25 pension liability will be divided, which is something he is

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1 eminently qualified to answer.

2 THE COURT: He can answer that question. Overruled.

3 THE WITNESS: So the unfunded liability will be
4 divided proportionally amongst the employers. So the share of
5 stores that C&S will take, they will take that proportional
6 share, and the remaining share of unfunded liability will
7 remain with Albertsons and Kroger.

8 In addition, the collective -- the underlying
9 collective bargaining agreements are being assumed, and the
10 contribution rates in those collective bargaining agreements
11 will remain the same. And the annualized contribution rates
12 will remain the same unless C&S grows sales and adds more
13 headcount and hours. In that case it's simply their
14 contribution will grow because they have more heads that
15 they're making contributions on; otherwise, their contributions
16 will remain the same.

17 BY MR. PITT:

18 Q Mr. Dosenbach, to your understanding, what benefits, if
19 any, will this merger have for unionized grocery labor?

20 A It's critically important for unionized grocery labor. If
21 you look at the last 10, 15 years, we've seen the unionized
22 workforce decline, as Walmart, Target, Costco, and Amazon has
23 taken the sales from the unionized groceries. And the large
24 driver of the loss of sales is the cost disadvantage that
25 Albertsons and Kroger are at relative to Costco, Amazon,

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1 Walmart, and Target.

2 The two biggest cost drivers in the business is the
3 cost of goods and then labor. This merger allows Kroger and
4 Albertsons to close that competitive gap on the cost of goods.
5 If the merger doesn't happen, one of two things will happen for
6 unionized labor: One, sales will still continue to be taken by
7 these companies who have a competitive advantage, which will
8 reduce in fewer union members; or alternatively, Kroger and
9 Albertsons will have to pull the labor lever and have to reduce
10 their labor costs, which, again, will result in fewer union
11 members.

12 MR. PITT: Thank you.

13 Your Honor, I pass the witness.

14 MR. DICKINSON: Charles Dickinson for the FTC,
15 Your Honor. May I proceed?

16 THE COURT: Yes.

17 CROSS-EXAMINATION

18 BY MR. DICKINSON:

19 Q Good afternoon, Mr. Dosenbach. How are you? Good to see
20 you again.

21 A Good afternoon, Mr. Dickinson.

22 Q So, first, I want to ask you, you're the senior vice
23 president of labor relations at Albertsons; is that right?

24 A Yes, sir.

25 Q And today you do not have responsibility for the non-union

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1 side of the Albertsons business, correct?

2 A I do not.

3 Q A different team within Albertsons would handle non-union
4 employee matters?

5 A That's correct.

6 Q You talked with your counsel, Mr. Pitt, about Albertsons
7 competition, correct?

8 A Yes.

9 Q And in your work you have used the term "bargaining
10 competitors" to refer to Kroger before.

11 Do you recall that?

12 A I recall when I used it. I was referring to -- and that
13 was in Mr. Bohn's evaluation, and I was referring to it as
14 Kroger is a sales competitor that we bargain with.

15 Q You anticipated my next question. That's what I was just
16 going to ask, Mr. Dosenbach. Just to be clear, you would agree
17 that Albertsons and Kroger compete for sales, right?

18 A That's correct.

19 Q And you would also agree that Albertsons and Kroger
20 certainly compete for talent too, correct?

21 A Along with a very, very broad pool of employers, yes.

22 Q Right. So you'd agree that Kroger and Albertsons compete
23 for workers?

24 A Along with a very broad group of employers, such as
25 Walmart, Costco, Target, Amazon.

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1 Q And you were asked some questions on direct about how you
2 go about preparing for union negotiations.

3 Do you recall that?

4 A I do.

5 Q Now, when you're preparing for negotiating with unions,
6 you try to get a sense of the pay of other competitor employers
7 in the geographical area where you're negotiating, right?

8 A Could you repeat the question. I apologize.

9 Q Sure. When you are preparing for negotiations with the
10 unions, okay?

11 A Yes.

12 Q You try to get a sense of the pay at other competitor
13 employers in the geographical area where you are negotiating,
14 right?

15 A I what want to be clear here, because sometimes it gets
16 blurred when we use "competitor/competitive employers." So we
17 previously used the term "competitor" from a sales perspective.
18 In this case, when I'm preparing for negotiations, I'm trying
19 to get a sense of what the pay is for people we're competing
20 with for a talent perspective. So, for example, McDonald's is
21 not a competitor for grocery sales, but we are competing with
22 them for talent, so we would look at what they're paying.

23 Q Okay. Let me just go back to my question. When you are
24 looking at the -- when you are preparing for negotiations with
25 unions, you are looking at -- you try to get a sense of the pay

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1 at other employers in the geographical area where you are
2 negotiating; is that correct?

3 A The pay of other employers in the geographical area, yes.

4 Q Okay. You mentioned, I think, 60 to 100 contracts per
5 year you negotiate. Not all of those contracts are in areas
6 where Kroger operates, correct?

7 A That's correct. When I say 60 to 100, that's the overall
8 labor team. That's what Albertsons, as a team, negotiates, not
9 what I negotiate individually.

10 Q When you think about the market or the geographical area
11 that you look at to figure out what others are paying, the
12 market you're looking at is focused on the geography that
13 covers the collective bargaining agreement, right?

14 A And -- and the adjacent area. I'm looking at where a
15 store is within the collective bargaining agreement and what is
16 the applicant pool relative to that -- relative to that store.

17 Q Okay.

18 A Now, you could have -- I'll give an example. You could
19 have one collective bargaining agreement in a certain
20 territory, and two miles away another collective bargaining
21 agreement. We would still look at what other employers in that
22 two miles away under a separate collective bargaining agreement
23 would pay because that applicant could go to work for us or
24 another employer in that area.

25 Q Okay. I want to make sure I understand your answer there

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1 to my question, which was, when you think about the market that
2 you are focused on in preparing for negotiations, you are
3 looking at where the geography that the collective bargaining
4 agreement covers; is that true?

5 A It is broader than that.

6 Q Okay. Now, Mr. Dosenbach, do you recall giving sworn
7 testimony in this matter a couple of times?

8 A I do.

9 Q You were deposed in an investigational hearing by the
10 Federal Trade Commission on October 5th, 2023?

11 A Yes.

12 Q You told the truth during that investigational hearing?

13 A I did.

14 Q Let's take a look at the transcript of that, sir, which
15 was PX4014. It should be in your binder. It will show up on
16 the screen as well.

17 A PX4014?

18 Q Yes, sir.

19 A I have it.

20 Q Great. If you could turn to page 86, line 4. Tell me
21 when you are there.

22 A I have it.

23 Q You were asked the question:

24 "QUESTION: When looking at these other
25 competitors" --

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1 MR. PITT: Your Honor, I object. I think this is
2 improper impeachment. This is not inconsistent with what the
3 witness just testified to.

4 THE COURT: What is the purpose is on the screen?
5 Take it down.

6 MR. DICKINSON: Take it down, Mr. Dunkin.

7 That is the exact question I asked just now, and the
8 answer he gave in court today is that that he looks at
9 something broader than the CBA area.

10 THE COURT: So we have been having this challenge the
11 entire hearing. That's not how you impeach someone, just by
12 putting it up on the screen and reading it.

13 MR. DICKINSON: Okay. How would you like me to do
14 it?

15 THE COURT: I want you to refer to the Rules of
16 Evidence and figure out how to do that.

17 BY MR. DICKINSON:

18 Q Let's move on from that question, Mr. Dosenbach. When you
19 are looking at the CBA area, you are looking not just at wages
20 paid by competitors but, rather, the total package, correct?

21 A Could you tell me what you mean by "CBA area"?

22 Q The geography covered by a collective bargaining
23 agreement?

24 A What's the question? I apologize.

25 Q When you look at that CBA area, you are looking at not

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1 just wages paid by competitors but, rather, the total package?

2 A We are looking at the total package, correct, not only
3 from an economic standpoint, but also other ability to have
4 operational flexibility, grow, product offerings, things of
5 that nature.

6 Q Okay. So you would agree that Albertsons compares its
7 wages to Kroger's wages in the markets where you both operate?

8 A Along with many, many, many other employers, yes.

9 Q As a union grocer, you would agree that Albertsons
10 embraces paying a premium and standing out from non-union
11 employers in total compensation, correct?

12 A We are proud of the wages we pay, and we want to pay our
13 employees well, and in return, that they provide great service,
14 so yes.

15 Q And just to be clear, you would agree that you embrace
16 paying a premium compared to your non- -- compared to non-union
17 employers?

18 A Again, yes. We want to pay a premium to attract great
19 talent and reward our associates and position our company for
20 growth, so yes.

21 Q And I think -- in fact, that's a statement that you have
22 made at virtually every bargaining negotiation you have had,
23 right, specifically that you outline that Albertsons pays more
24 than, for example, non-union employers in the area; is that
25 right?

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1 A Yes. That is something I say in the vast majority of
2 negotiations that I first-chair.

3 Q And by "total compensation" or "total package," to use
4 that term, you're talking about both wages and benefits?

5 A And fringe benefits.

6 Q And benefits would include things like health and welfare?

7 A Yes.

8 Q And retirement plans?

9 A Yes.

10 Q And vacation, paid time off?

11 A Yes.

12 Q And are there other benefits as well that you would
13 include in that?

14 A There could be disability. There could be what I'll call
15 premium pay for holidays. There could be premium pay for times
16 worked during certain periods of time. Quite frankly,
17 depending on the contract, there could be a number of other
18 items added to that list.

19 Q And when you look at wages in the context of total
20 compensation, to try to get a true wage rate, you are not
21 simply looking at the hourly rate number in the contract,
22 right?

23 A No.

24 Q So you would -- to get a true wage rate, you would
25 actually look at the total wages paid, including overtime and

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1 premium pay, and you would divide that by the total hours
2 worked?

3 A That's correct.

4 Q And the true wage rate is going to be higher than the
5 hourly wage rate in the contract?

6 A Yes.

7 Q And you would agree with me that, on average, wages at
8 Albertsons' union workers are higher than wages at Albertsons'
9 non-union workers?

10 A It depends from location to location. The last time I
11 looked at data from that, I saw -- that's what I saw. I'm not
12 certain that it's still true as I sit here today.

13 Q Do you agree that on average it is going to be higher?

14 A When I looked at it, the last data that I had, which is
15 what I testified to in my IH, which was the data from couple of
16 years ago, it was higher. As I sit here today, I don't know
17 that still to be true.

18 Q To be clear, you don't know one way or the other today?

19 A I don't know one way or the other today.

20 Q With respect to benefits, would you agree on average the
21 benefits offered to union workers are higher than benefits of
22 non-union workers at Albertsons?

23 A Repeat the question. Sorry.

24 Q Would you agree on average the benefits offered to union
25 workers are higher than the benefits offered to non-union

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1 workers at Albertsons?

2 A It varies from location to location. But, yes, on
3 average, it's higher.

4 Q Okay. Now, when -- again, when preparing for a
5 negotiation with unions, you typically ask the unions for their
6 contracts with other union employers to get a sense of what the
7 union's expectations will be for that contract, right?

8 A Yes.

9 Q Specifically the contracts that you ask for are those of
10 other union employers in the geographical area where you're
11 negotiating with that union?

12 A Or other contracts that they may bring up, which are
13 frequently outside the geographic area.

14 Q Okay. You would agree that Albertsons monitors Kroger's
15 wage increases to best position yourself to attract and retain
16 talent?

17 A We monitor all the employers that we are competing with,
18 including Walmart, Costco, Target, fast food, clothing
19 retailers, and so, yes.

20 Q Just to be clear, I was asking specifically about Kroger.
21 Is your answer "yes" to my question about whether you monitor
22 Kroger's wage increases?

23 A Yes, along with the others I outlined.

24 Q And wages are not the only term raised by unions in your
25 negotiations, right?

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1 A No.

2 Q Certainly in the majority of your negotiations, the unions
3 raise health insurance?

4 A Yes.

5 Q And retirement?

6 A Yes.

7 Q And vacation?

8 A Yes.

9 Q And seniority?

10 A Yes.

11 Q And a number of other non-wage issues, right?

12 A Yes.

13 Q Okay. You testified about how mergers of unions that you
14 have been involved in may increase the leverage at the
15 bargaining table.

16 Do you recall that?

17 A Yes.

18 Q This case is about a merger of an employer, so I want to
19 ask -- well, you also testified about a variety of mergers and
20 transactions on the employer side you've been involved in,
21 right?

22 A Yes.

23 Q Including the Albertsons-Safeway merger, for example?

24 A Yes.

25 Q At least of the time in your deposition in May, you did

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1 not know of any contract settlement that you ever seen that was
2 more expensive for Albertsons based on the size of Albertsons,
3 right?

4 A That's correct.

5 Q You testified on direct about how mergers can shift the
6 balance of bargaining leverage.

7 Do you recall that?

8 A I do.

9 Q And you talked about how the economic risks can be
10 increased when there is a merger of employers.

11 Do you recall using that term?

12 A I do. I don't think there is any doubt of that.

13 Q To be clear, in your history, with all the mergers you
14 have been involved in, including Safeway-Albertsons, you have
15 never seen a more expensive contract for Albertsons as a result
16 of Albertsons getting bigger, right?

17 A Again, we have the contracts that were bargained. We
18 don't know what would have been bargained with a smaller group.
19 What I do know is in those negotiations with larger groups, as
20 we were sitting there at the table, and we were twice the size
21 that we were before, and the union was threatening a strike to
22 us, the risk that we were taking as we were going down that
23 path was twice as much. I know the contingency planning and
24 the expenses that we paid in contingency planning was twice as
25 much as when we were -- as when we were threatened with a

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1 strike half the size.

2 Q And despite all of that risk, though, you have never seen
3 a more expensive contract as a result?

4 A Again, you don't know what the contract would have been if
5 we bargained smaller -- with a smaller group.

6 Q Now, you talked about strikes on direct, and I want to
7 make sure I understand a few things on that topic. In your
8 experience, it is very, very common in the vast majority of
9 negotiations that Albertsons will get threatened with a strike
10 by the union, correct?

11 A That's correct.

12 Q Okay. And you would agree that strikes are a source of
13 the union's leverage during negotiations with Albertsons?

14 A Yes.

15 Q I would like to look at a couple of documents. They
16 should be in your binder, and it will be pulled up on your
17 screen as well. PX2151 and PX2251. We can start with PX2151
18 if you would like.

19 A Yes, I have it.

20 Q This is an email to you from Susan Morris and Mike
21 Theilmann, with the subject, "Background on Kroger
22 negotiations."

23 Do you see that?

24 A Yes, I do see it.

25 Q And you sent this in your capacity as a labor relations

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1 executive at Albertsons, right?

2 A Yes.

3 Q And you are updating senior Albertsons executives about
4 union negotiations involving Kroger in Portland, Oregon, and
5 Denver, Colorado, right?

6 A Yes.

7 MR. DICKINSON: Your Honor, I move to admit 2151 into
8 evidence.

9 MR. PITT: No objection, Your Honor.

10 THE COURT: It will be received.

11 BY MR. DICKINSON:

12 Q Look at 2151. We will come back to this. Looking at
13 2251, this is an email from you to the Albertsons CEO senior
14 leadership team about a strike threat situation in Portland,
15 Oregon, around the December holidays in 2021?

16 A Yes.

17 MR. DICKINSON: Your Honor, I move to admit PX2251 as
18 well.

19 MR. PITT: No objection, Your Honor.

20 THE COURT: It will be received.

21 MR. DICKINSON: Thank you.

22 BY MR. DICKINSON:

23 Q Let's actually start with this, Mr. Dosenbach, PX2251.
24 You will recall at this time, in late 2021, Albertsons was in
25 coordinated bargaining with Kroger here in Portland, but the

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1 two employers were taking very different approaches to the
2 bargaining style, right?

3 A I don't think -- you're talking PX2151?

4 Q Sorry? 2251.

5 A Yes. Sorry. I was looking at 2151. My bad.

6 Q Should I ask that question again?

7 A Yes. Sorry.

8 Q Sir, at this time, in 2021, Albertsons was engaged in
9 coordinated bargaining with Kroger here in Portland; is that
10 right?

11 A That's correct.

12 Q You will recall that the two employers, Albertsons and
13 Kroger, were taking very different approaches to bargaining,
14 right?

15 A I think that's a fair characterization.

16 Q For example, in the third paragraph, you will see where
17 you write about how Kroger had engaged in inflammatory conduct
18 towards the union?

19 A That's what I wrote.

20 Q And a couple of paragraphs later you note that "all our
21 negotiations at Albertsons with Kroger have been slow but
22 professional"?

23 A Yes.

24 Q In the past actually you've noted that unions sometimes
25 have had trust issues with Kroger in negotiations, right?

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1 A I have been told that.

2 Q Towards the bottom of this email here, you note, "I'm in
3 daily communications with my counterpart from Kroger."

4 Do you see that?

5 A I do.

6 Q That would be John McPherson?

7 A Right.

8 Q You write, "His ask is that we cancel our extension
9 agreement so there is a risk of a lockout by us to put pressure
10 on the local union."

11 Do you see that?

12 A That's what he wrote.

13 Q That's what you wrote?

14 A Yes. Sorry. That's what I wrote.

15 Q And a lockout together with a strike would put more
16 pressure on the union because of all the additional workers
17 they would have to manage; is that right?

18 A It ups the risk for all involved, yes.

19 Q Specifically on the union because of all the additional
20 workers they would have to manage, correct?

21 A I don't know that it is any more of a risk to the union
22 than it is to us as an employer.

23 Q It would result in a bigger work stoppage, right?

24 A It could result in the lose-lose outcome that I outlined.
25 It ups the risk for all involved.

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1 Q Would it result in a bigger work stoppage?

2 A Well, where we had an extension agreement, which would
3 result in zero work stoppage, and we were increasing, yes. So,
4 yes, we would be facing a bigger work stoppage.

5 Q Now, Albertsons, as an independent company at this time,
6 refused Mr. McPherson's request and ultimately the union just
7 struck Kroger, right?

8 A We did not cancel your extension agreement and Kroger was
9 struck.

10 Q And you'll recall that Kroger ultimately reached an
11 agreement with Local 555 and the union then brought back
12 settlement to Albertsons?

13 A Yes.

14 Q And Albertsons then agreed to a settlement with Local 555
15 here in Portland that was more expensive than you projected
16 before the strike, right?

17 A It was more expensive than what we had predicted, but
18 every single settlement in that particular year, because of
19 what was going on with the great resignation and work stoppage,
20 was greater than what we settled, and the Bureau of Labor
21 Statistics were 9 percent increase in retail, and this
22 settlement fell significantly under that settlement.

23 Q Okay. Let's look at PX2151. Are you there,
24 Mr. Dosenbach?

25 A Yes.

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1 Q If you look in the last bullet under "Portland
2 negotiations" -- actually the last sentence there, you wrote,
3 "In our mind, their all-or-nothing strategy" -- and "their" is
4 referring to Kroger?

5 A That's correct.

6 Q "Their all-or-nothing strategy that they subsequently
7 backed down from when the strike commenced, resulted in a much
8 more expensive settlement than it should have been."

9 Did I read that correctly?

10 A I believe -- yes, that's what it read.

11 Q Do you recall that the wage increases following the strike
12 were the biggest wage increases that Local 555 had ever
13 negotiated with Albertsons or Kroger?

14 A I believe that to be the case, which is what we saw also
15 in our non-union areas across, quite frankly, retail, industry,
16 and all of the U.S.

17 Q Okay. And in your message to your senior leadership team
18 here, you noted that Albertsons would need to ramp up
19 preparations for its stores in the event of a strike at
20 Kroger's Fred Meyer; is that right?

21 A Yes.

22 Q Actually that's in the other document, 2251. But you
23 recall that message to your senior leadership, correct?

24 A Yes.

25 Q And that's because if a strike were to occur against

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1 Kroger here in Portland, there is a significant potential that
2 shoppers would switch to other stores like Safeway, correct?

3 MR. PITT: Objection, Your Honor. Beyond the scope.
4 He is asking about the effect on the retail side of a strike,
5 which is not something that Mr. Dosenbach testified in direct.

6 MR. DICKINSON: This is talking about the effect on
7 the negotiations and the outcome of the negotiations that the
8 increased retail sales --

9 THE COURT: Rephrase it. It sounded as if it was
10 about retail.

11 BY MR. DICKINSON:

12 Q Actually I think we can move on from that.

13 Do you recall, Mr. Dosenbach, there was also a strike
14 against Kroger in Denver in 2022?

15 A Yes.

16 Q The result of that strike was an increase of \$2 increase
17 per hour in top-of-scale journeyperson wage rate, correct?

18 A For who?

19 Q First, for Kroger.

20 A Yeah.

21 Q And then Albertsons agreed to the exact same \$2 per hour
22 increase that the union got from Kroger following that strike,
23 right?

24 A It wasn't the exact same overall collective bargaining
25 agreement. The wages were the same. There were a number of

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1 other areas that we negotiated that were favorable to us to
2 help fund those increases.

3 Q Okay. Thank you for clarifying. I was just talking about
4 the wage increase. So Albertsons agreed to the exact same wage
5 increase that the union got out of Kroger in that strike in
6 Denver, right?

7 A Well, it's telling half the story. We don't bargain only
8 wages in a contract. We bargain an entire contract, and we
9 provide other relief to help fund the wage increase.

10 Q And that wage increase, though, was more than you had been
11 modeling for your Denver workers?

12 A Yes, but in line with what was outlined by the Bureau of
13 Labor Statistics and the Department of Labor for increases
14 across retail for the entire retail industry for that year.

15 Q Okay. I want to ask a few questions about MSAAs. Do you
16 recall being asked about that on direct?

17 A Mutual strike assistance agreements?

18 Q Thank you. Yes. You would agree with me that when there
19 is a mutual strike assistance agreement -- let me start back.
20 You would agree that when a company that is not struck, among
21 two companies that are considering an MSAA, the company that's
22 not struck would typically receive a sales increase because the
23 struck company's customers still need to shop, right?

24 A All grocery retailers in the market who aren't facing a
25 strike, including Walmart, Amazon, Costco are likely to see a

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1 sales increase as customers go away from the struck store to
2 other retailers selling groceries.

3 Q Okay. And if Albertsons is the target of a strike, you
4 would want to enter into a mutual strike assistance agreement
5 with your union competitors too, correct?

6 A You have to analyze target of a strike. We are a target
7 of a strike in the vast majority of our contract negotiations.
8 It's very common for the unions to threaten to strike us, but
9 it is uncommon for us to be struck. So it's a risk analysis.

10 Q And when you are the target of a strike, you want to enter
11 into a mutual strike assistance agreement with the union
12 competitors?

13 A Again, it a risk analysis of what is the likelihood of a
14 strike actually happening. It's not simply that there is a
15 threat or a target of a strike. It's what is the probability,
16 and then we do an analysis based on that.

17 Q Okay. I would like to take a look at an example of a
18 mutual strike assistance agreement. This is PX2148.

19 Are you there, Mr. Dosenbach?

20 A I am.

21 Q Now, this is an email from Kroger's Jon McPherson to you,
22 correct?

23 A Yes, it is.

24 Q And the email is about entering into a mutual strike
25 assistance agreement in the context of a strike threat

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1 situation in Denver in late 2021, early 2022?

2 A That's correct.

3 Q And you received this email in the course of your duties
4 as Albertsons' senior vice president of labor relations?

5 A I did.

6 MR. DICKINSON: Your Honor, I move to admit PX2148.

7 MR. PITT: No objection, Your Honor.

8 THE COURT: It will be received.

9 BY MR. DICKINSON:

10 Q In the second paragraph, Mr. McPherson notes that he had
11 attached a comprehensive draft of a mutual strike assistance
12 agreement that "we should enter into by January 7th in order to
13 show the union that we are aligned in our effort to achieve an
14 agreement without a work stoppage and that failure to reach
15 such an agreement, the companies are aligned to avoid the
16 whipsaw tactics of the union."

17 Do you see that?

18 A I do.

19 Q Now, with respect to the whipsaw tactics referenced here,
20 you would agree that in almost every negotiation, the union has
21 used these tactics with Albertsons and Kroger specifically?

22 A They have used it in every negotiations that I have ever
23 been involved with, including Kroger.

24 Q Okay. And you know that if Kroger enters into a bad deal
25 within the same geographical area, the union is going to

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1 present that argument -- an argument that Kroger did this and
2 therefore Albertsons should do it as well, right?

3 A That's correct.

4 Q Now, you can put that -- sorry. One more question on
5 that. If you could turn to the actual agreement, I would like
6 to look at page 3. This is going to be the end of -004?

7 A Yes.

8 Q There are definitions there.

9 Do you see that?

10 A Yes.

11 Q The second definition is called "geographic area."

12 Do you see that?

13 A I do.

14 Q So in mutual strike assistance agreements, you define the
15 geographic area as the geographic area covered by the labor
16 agreements listed in the schedules.

17 Is that fair?

18 A That's what was drafted in this mutual strike --

19 MR. PITT: Objection, Your Honor. He didn't draft
20 this, and I don't believe he has the foundation to answer
21 questions on it. He didn't draft it or agree to it.

22 THE COURT: I'm going to overrule it. He stated his
23 experience.

24 MR. PITT: Okay. Thank you, Your Honor.

25 THE COURT: So you can answer that question.

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1 THE WITNESS: I did not draft this agreement. That
2 was defined by whoever drafted it from Kroger. This is
3 embarrassing to say, but I have been sworn to tell the truth, I
4 didn't read it. I forwarded it to my general counsel, because
5 these mutual strike assistance agreements are super, super
6 complicated and very detailed, so I forwarded it to her for her
7 review, but I had conversations about whether we should or
8 should not be entering into a mutual strike assistance
9 agreement.

10 BY MR. DICKINSON:

11 Q You can put that document aside. Now, your counsel,
12 Mr. Pitt, showed you two documents, I believe, and you
13 testified about wage comparisons in those documents.

14 Do you recall that?

15 A I do.

16 Q Okay. You testified about the market at issue in each of
17 those documents, right?

18 A Yes.

19 Q To be clear, the market there -- let's take a look at
20 them. In one of them -- let's look at the DX2361.

21 A Yes.

22 Q Now, this one relates to Lancaster, Pennsylvania?

23 A That's correct.

24 Q Kroger doesn't operate in Lancaster, Pennsylvania, does
25 it?

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1 A No.

2 Q This document represents two wage surveys related to
3 warehouse workers, right?

4 A Actually it was for the Lancaster warehouse. We were
5 looking at workers who -- at other companies, not limited to
6 warehouses, but rather who we were competing with to attract
7 talent from and competing with to retain our talent so they
8 weren't going to us -- or going away from us.

9 Q But you were looking at market data for warehouse workers
10 in the Lancaster Distribution Center specifically, right?

11 A No.

12 Q So where it says "attached is the market data for
13 warehouse workers in Lancaster DC," what does that mean?

14 A That was for the comparison -- the warehouse employees we
15 were comparing. We weren't simply looking at warehouse workers
16 only. We were more broadly looking at people with Amazon,
17 SuperValu, Walmart, and Target.

18 Q And the other document that you were shown that was
19 related to UFCW Local 791, that's a UFCW in New England, right?

20 A That's correct.

21 Q And Kroger doesn't operate in that area either. Does it?

22 A No, they do not.

23 Q To be clear, you were not shown any documents about wage
24 comparisons in any areas where Kroger competes with Albertsons,
25 correct?

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1 A That's correct.

2 MR. DICKINSON: No further questions.

3 THE COURT: Any redirect?

4 MR. PITT: One question on redirect, Your Honor.

5 Thank you.

6 THE COURT: Okay.

7 REDIRECT EXAMINATION

8 BY MR. PITT:

9 Q Mr. Dosenbach, I just want to follow up on the last
10 question that you were just asked. You were asked about the
11 two documents that I had shown you during your direct exam, and
12 I believe my colleague pointed out that in those two areas
13 Kroger is not a competitor.

14 My question for you, sir, is, does Albertsons look at
15 that same broad group of competitors that we saw in doing its
16 wage surveys in areas where Kroger is present?

17 A Absolutely, because we're at the same risk in those areas
18 of losing associates to those employers who are not being able
19 to attract applicants who apply to both us and them.

20 MR. PITT: Thank you. No further questions, Your
21 Honor.

22 THE COURT: You can step down.

23 THE WITNESS: Just leave these here?

24 THE COURT: Yes.

25 MS. MUSSER: Your Honor, I'm not sure how much time

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1 we have, but I think the FTC, with consultation with
2 defendants, would like to call a witness that we believe we can
3 get on and off in 20 minutes or so.

4 THE COURT: Is that the person that we had remote?

5 MS. MUSSER: Yes.

6 THE COURT: That's fine, because I said we would go
7 into 5:15. We need to be able to get people out of here
8 timely, because the building closes at 5:30.

9 MS. MUSSER: Yes. I think we can -- my understanding
10 is we can both accomplish that.

11 THE COURT: Let's go. Maybe you should all pass out
12 your binders right now as everybody is moving around.

13 MS. DIXON: Good afternoon, Your Honor. Guia Dixon.

14 THE COURT: He is virtual. Let's get him on the
15 screen.

16 MS. DIXON: While we are waiting, Your Honor, can I
17 have counsel introduce himself?

18 MR. GRUBE: Brian Grube for the witness, Mr. Crane,
19 and the J.M. Smucker Company.

20 THE COURT: Good afternoon.

21 Let's swear him in.

22 (The witness was duly sworn.)

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

25 THE WITNESS: Yes. Robert Crane. R-O-B-E-R-T,

R. Crane - D

1 C-R-A-N-E.

2 DIRECT EXAMINATION

3 BY MS. DIXON:

4 Q Good afternoon, Mr. Crane, can you hear me okay?

5 A I can. Yes.

6 Q Mr. Crane, where do you currently work?

7 A At the J.M. Smucker Company.

8 Q How long have you worked at Smucker?

9 A 21 years.

10 Q What is your current position?

11 A Senior vice president, sales and sales commercialization.

12 Q And how long have you held that position?

13 A A year-and-a-half.

14 Q Prior to that current role, what position did you hold?

15 A Vice president of sales for our pet division.

16 Q In your current role, what are your responsibilities?

17 A I have responsibilities for overseeing our field sales
18 team that calls directly on our retail customers as well as our
19 internal sales commercialization teams.

20 Q What are the major product categories that Smucker sells?

21 A We sell peanut butter, jelly, frozen, coffee, pet food,
22 and pet snacks.

23 Q How many different products or SKUs does Smucker sell?

24 A I don't know the total amount of products we offer. I
25 would say for any individual customer, we would distribute to

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1 them about 300 to 400 products.

2 Q How many customers does Smucker have?

3 A I don't know an exact number, but I would say around
4 300-ish.

5 Q Just at a very high level, who are Smucker's customers?

6 A Grocery customers that basically sell grocery products to
7 shoppers.

8 Q Is Kroger a Smucker customer?

9 A They are.

10 Q What about Albertsons?

11 A They are.

12 Q Would you consider Kroger and Albertsons to be some of
13 your largest customers?

14 A Yes. I would consider them to be some of our largest
15 customers.

16 Q Let's turn to discussing pricing of products. Let's be
17 careful to not discuss specifics here, so we don't get into
18 confidential information. With that in mind, how does Smucker
19 price its products to retailers?

20 A We offer all retailers a list cost price for each of our
21 products.

22 Q What is list cost price?

23 A List cost price would be a published price that any
24 customer can buy our products at. Those prices are broken up
25 into three separate brackets. The brackets are based on weight

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1 of amount of item ordered on any given order.

2 Q How do list prices compare between the different brackets?

3 A They would compare by weight. So if a customer is able to
4 order more weight on an order, then they would get a better
5 list cost. If they are ordering less than a full truckload of
6 product, then the price would increase based on that weight.

7 Q And which bracket offers the lowest list price?

8 A The full truckload bracket.

9 Q Are the same list prices available to all of Smucker's
10 customers?

11 A Yes, they are.

12 Q Now, does the list price change if the customer buys more
13 than a truckload?

14 A It does not.

15 Q Do all of Smucker's customers have the same opportunity to
16 purchase at the truckload bracket if that's what they choose to
17 do?

18 A Yes, they do.

19 Q Do Kroger and Albertsons purchase today in the truckload
20 bracket?

21 A Yes, they do.

22 Q So we covered list prices. I want to shift gears and talk
23 about promotional programs. What are promotional programs?

24 A So promotional programs are programs that we partner with
25 our customers to sell more of our products. Examples of

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1 promotional programs could be advertising in the flyers that
2 are distributed to their shoppers. It could be displays in
3 their stores with our products on end caps within the store, or
4 they could be temporary price reductions at shelf of our
5 products.

6 Q In your role, do you have responsibilities relating to
7 promotional programs?

8 A I do, yes.

9 Q Can you walk us through at a very general high level how
10 those promotional programs work.

11 A So the promotional programs work, we align with the
12 customer on a promotional opportunity. Then that is then
13 executed by the customer at either their store or through their
14 flyer on those promotional activities.

15 Q When you say "align with a customer," what do you mean by
16 that?

17 A So we would -- each customer has promotional opportunities
18 that we can support. And we offer a promotional opportunity --
19 we offer a promotional opportunity to them based on what they
20 have available, and they would agree to promote our products,
21 and we would agree to promote our products within their store.

22 Q I think I heard you make a reference to aligning with the
23 customer and having the customer execute on that alignment.
24 Can you explain what you mean by "execute."

25 A So actually physically put the advertisement in their

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1 flyer, actually put a display in their store of our products,
2 or reduce the price of our products on their shelf.

3 Q And does the customer get something in return for agreeing
4 to promote Smucker's products?

5 A Yes. To do that, we offer them trade funds to reduce the
6 list cost to a level of promotional -- that would allow for the
7 promotion.

8 Q How would a customer earn trade funds?

9 A So they would accrue trade funds by buying a case of our
10 products, and then they would earn those trade funds that they
11 have accrued through the execution of those promotional
12 programs that we have aligned to.

13 Q Are promotional programs offered to all of Smucker's
14 customers?

15 A Yes, they are.

16 Q And do all customers have the same opportunities to earn
17 the same trade funds?

18 A They would not earn -- they would have the opportunity to,
19 yes. They would not earn the same amount of absolute trade
20 funds. There could be differences in the amount of product
21 that they buy, so the more product, then the more trade funds
22 they would accrue, or trade funds are accrued at a different
23 rate based on different products. So a mix of products that
24 they'd buy. If it is different by customer, it could be a
25 different amount of trade funds they accrue and earn.

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1 Q I think you have kind of talked us through this. I want
2 to ask you, how does the volume of product that a retailer is
3 buying affect the rate of trade fund that that customer might
4 get back from Smucker?

5 A It would not affect the rate. It would affect the
6 absolute. So the rate would not change based on volume bought.
7 It would just be more accrued trade funds, because they bought
8 more cases. So it would be the same rate, but they would buy
9 more cases that would lead to more trade funds.

10 Q Is there an example you can walk us through?

11 A Sure. If they were to buy one case of our Folgers item, a
12 Folgers coffee item, they would earn -- if it was a dollar a
13 case they would accrue, then would earn \$1. If they were to
14 buy five cases, then they would accrue \$5.

15 Q And I think I heard you say earlier that trade funds
16 reduce list cost. Did I hear that correctly?

17 A So the invoiced list cost would then be reduced to a net
18 cost based on the trade funds they've earned based on executing
19 the promotional activity.

20 Q And I just want to make sure I understand the mechanics of
21 that. It sounds like the trade funds that they earn might be
22 offsetting the list cost; is that right?

23 A That's correct. Yes.

24 Q It is not changing the list cost?

25 A It is not changing the list cost. That is correct.

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1 Q Does Smucker provide trade funds to both Kroger and
2 Albertsons today?

3 A Yes, we do.

4 Q And does Kroger and Albertsons participate in similar
5 promotional programs with Smucker?

6 A Well, generally, yes, they do.

7 Q Does Kroger and Albertsons have the same opportunity to
8 participate in Smucker's promotional program?

9 A Yes, they do.

10 Q So let's turn to the Kroger and Albertsons proposed
11 merger. When did you first learn of the merger?

12 A When it was first communicated through media.

13 Q What conversations have you had with Kroger or Albertsons
14 about the list prices that they would get if they merged?

15 A I have not had any conversations with either on list price
16 if they merged.

17 Q And what conversations have you had with Kroger or
18 Albertsons about the promotional programs that would be
19 available to them if they merged?

20 A I have not had any conversations with either on the
21 promotional funding they would accrue if they were to merge.

22 Q After the merger, how would the merged entities' access to
23 Smucker's list prices be different than Kroger and Albertsons'
24 access today?

25 A Sorry. There was a noise in the room. Could you repeat

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1 the question.

2 Q Of course. After the merger, how would the merged
3 entities' access to Smucker's list prices be different from
4 Kroger and Albertsons today?

5 A They would not change.

6 Q And after the merger, how would the merged entities'
7 opportunities to participate in Smucker's promotional programs
8 be different from Kroger and Albertsons today?

9 A It would not change.

10 Q And then I have one last question for you, Mr. Crane:
11 Given everything we have discussed, what additional pricing or
12 promotional programs could Kroger and Albertsons take advantage
13 of if they merged?

14 A There would be no additional programs that would be
15 available to them if they merged.

16 MS. DIXON: Thank you, Mr. Crane.

17 I pass the witness, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. KIENTZLE:

20 Q Good afternoon, Mr. Crane.

21 A Good afternoon.

22 Q I am Michael Kientzle. I represent Kroger. Given the
23 hour, I'll try to keep this as brief as possible.

24 A Thank you.

25 Q Does any of the testimony you just provided concern any

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1 company other than Smucker's pricing, policies, or programs,
2 right?

3 A That is correct.

4 Q And in the testimony you just provided, you didn't compare
5 Smucker's pricing, policies or programs to any other company,
6 did you?

7 A I did not.

8 Q My colleague asked you if Kroger and Albertsons are among
9 Smucker's largest customers.

10 Do you remember that?

11 A Yes.

12 Q Who is your largest customer?

13 MS. DIXON: Objection, Your Honor. I didn't ask any
14 questions about any other customers.

15 THE COURT: Overruled.

16 MR. GRUBE: Objection, Your Honor.

17 THE COURT: Hold on. Don't answer. Your counsel
18 just stood up.

19 MR. GRUBE: Smucker has concerns about entering the
20 precise rankings of its customers.

21 THE COURT: Understood. I'm going to sustain the
22 objection. There is confidentiality.

23 MR. KIENZLE: Your Honor, I believe I'm only asking
24 the question --

25 THE COURT: I sustained the objection.

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1 MR. KIENTZLE: I'll move on.

2 BY MR. KIENTZLE:

3 Q You also spoke with my colleague about Smucker's pricing
4 and promotional programs, right?

5 A Correct. Yes.

6 Q And my colleague cautioned you to be careful not to
7 discuss specifics so we don't get into confidential
8 information.

9 Do you remember that?

10 A Yes.

11 Q Smucker's pricing and promotional programs are
12 competitively sensitive information, correct?

13 A Yes.

14 Q And that includes Smucker's pricing to specific customers,
15 right?

16 A Correct.

17 Q Including specifically, but not limited to, Kroger and
18 Albertsons, right?

19 A Correct.

20 Q And how Smucker's prices are set is competitively
21 sensitive information, right?

22 A Yes.

23 Q Likewise, Smucker's promotional and trade funding programs
24 and policies are competitively sensitive information as well?

25 A Yes.

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1 Q And there is a high likelihood that public disclosure of
2 that information would seriously injure Smucker's business and
3 its ability to compete, right?

4 A Correct.

5 Q And that's because Smucker's customers could use this
6 information as it relates to other Smucker's customers to
7 disadvantage Smucker's in negotiations, right?

8 A Yes.

9 Q Indeed, disclosure of the information would give Smucker's
10 current and future customers a significant advantage in
11 negotiating future agreements with Smucker's, right?

12 A Correct.

13 MR. KIENZLE: No further questions.

14 THE COURT: Any redirect?

15 MS. DIXON: No, Your Honor.

16 THE COURT: All right. Thank you, Mr. Crane.

17 No more questions.

18 THE WITNESS: Thank you.

19 THE COURT: We will end for today. We will continue
20 the hearing at 9:00 a.m. in the morning.

21 Thank you.

22 Good evening, everyone.

23 (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 10, 2024
DATE

"QUESTION: [1] 2541/23
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BY MR. KIENTZLE: [2]
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BY MR. MATHESON: [22]
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