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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

BEFORE THE HONORABLE ADRIENNE NELSON

UNITED STATES DISTRICT COURT JUDGE

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TRANSCRIPT OF PROCEEDINGS

(September 10, 2024)

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Please be seated. Good morning. We are continuing the three-week preliminary injunction hearing in the Federal Trade Commission, et al. v. Albertsons and Kroger. The Court has lost count of the day. Actually, it has not. It is actually day ten, and we're going to extend the hearing by a day because of the Court's need to take a break yesterday.

I do understand that the parties have communicated and have a closing argument date into next week that they need to address.

MR. WOLF: Your Honor, thank you very much.

Matt Wolf for Kroger.

THE COURT: Yes.

MR. WOLF: What the parties have consulted and agreed to, subject to Your Honor's approval, is a closing date of next Tuesday. Monday is the day for openings in the Washington state proceeding.

THE COURT: Yes. I did know that those were following. I just didn't know the time. We had never spoken about that.

MR. WOLF: Yes. So we communicated with the Court

1 last night.

2 THE COURT: Yes.

3 MR. WOLF: And if it pleases Your Honor, we
4 would -- whatever start time on Tuesday works for you, works
5 for us.

6 THE COURT: It works for me at whatever time you
7 would like in the morning. It may be easier for you to do
8 it in the morning. That way it gives you some travel time
9 up to Washington state. Luckily, that's not far.

10 So what did you talk about?

11 MR. WOLF: 9:00 works for us, and I'm sure the
12 Government would -- some of their folks would like to get
13 home on Tuesday.

14 MS. MUSSER: 9:00 also works for us too.

15 THE COURT: That's what we'll do.

16 MR. WOLF: Your Honor, the parties have also
17 committed to doing everything we can, and we have
18 expectation that we will finish evidence close of business
19 Friday.

20 THE COURT: That's fine. We had the whole day. I
21 have some flexibility.

22 I also understood you had some scheduling of witnesses,
23 and hopefully those adjustments can be made to have it occur
24 within this week.

25 MR. WOLF: Yes. And to that end, Your Honor,

1 we're going to start this morning, with Your Honor's
2 permission, with two third-parties --

3 THE COURT: Yes, I saw that.

4 MR. WOLF: -- who needed to go at this particular
5 time.

6 THE COURT: Yes.

7 MR. WOLF: And when they're done, Mr. Perry will
8 resume where we left off with the testimony of Mr. Cosset.

9 THE COURT: That's fine.

10 With that, there are some motions that the Court needs
11 to rule on from the record involving the two witnesses that
12 will provide testimony remotely this morning, because we
13 received some motions that came in yesterday.

14 So I'll start with the one involving your first
15 witness.

16 MR. WOLF: Your Honor, before we get into
17 substance, I have one introduction also for you.

18 THE COURT: Oh, yes, yes.

19 MR. WOLF: I'd like to introduce from Weil,
20 Joseph Ehrenkrantz.

21 MR. ERENKRANTZ: Good morning.

22 THE COURT: Good morning.

23 And I'm hoping that counsel for Whole Foods-Amazon is
24 in the courtroom.

25 Yes.

1 MR. ENSON: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. ENSON: Eric Enson with Crowell & Moring, for
4 Amazon, Whole Foods Market, and the witness this morning.

5 THE COURT: Yes. So you had filed a nonparty
6 unopposed supplemental motion to seal. It is unopposed, and
7 I will grant that motion.

8 MR. ENSON: Wonderful. Thank you, Your Honor.

9 THE COURT: So hopefully you had anticipated the
10 Court making such a ruling so that you could plan
11 accordingly.

12 We also have one for Walmart, but I don't know if
13 counsel is -- oh.

14 MS. RACINE: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MS. RACINE: Rachel Racine here from
17 Wilson Sonsini on behalf of nonparty Walmart and the
18 witness, Mr. Lieberman, who will be testifying today.

19 THE COURT: Yes.

20 So I understand that you have an unopposed motion to
21 seal the deposition transcript --

22 MS. RACINE: Correct, Your Honor.

23 THE COURT: -- of Marc Lieberman.

24 And that motion will be granted, as it is unopposed.

25 MS. RACINE: Thank you very much, Your Honor.

1 Just so the Court knows, we have met and conferred with
2 the parties, and they are participating to protect the
3 confidentiality of the transcript accordingly.

4 THE COURT: I would think nothing less. I mean,
5 the level of lawyering of -- in this case has been very high
6 and it's very appreciative because, you know, we don't
7 always have that in court. There's a wide variety of
8 lawyering, and that's great. That's what we're here to do.
9 You have to have your first trial. You have to have one
10 that you've done for a long, long time. So we have a wide
11 variety, but I'm on the higher end of the range in this
12 hearing, and it's been very enjoyable as a judicial officer.

13 MS. RACINE: Thank you, Your Honor.

14 THE COURT: Thank you.

15 And with that, you may call your next witness.

16 THE COURT REPORTER: Your Honor, is this a sealed
17 transcript now?

18 THE COURT: No. This is not a sealed transcript.

19 The court reporter was asking.

20 No. Parts of the deposition of one of -- the Walmart
21 representative will be sealed, and I'm sure counsel will
22 identify when it's sealed, and they'll let you know so that
23 we make sure that the record -- the transcript is correct.

24 If we can remember to do that, we have been working
25 very hard to adhere to all of your agreements that have been

1 made throughout this hearing so nothing is inadvertently
2 leaked, because you know this is of great interest of a
3 number of people and there have been a lot of requests that
4 have been denied, much to the chagrin and dismay and
5 frustration and anger of a number of parties who were not a
6 part of this, but we have to adhere to what happens in most
7 antitrust cases and preliminary -- I mean, preliminary
8 injunction cases regarding merger. That is extremely
9 important to a lot of people, and we just want to keep
10 everything going.

11 MS. PFAFFENROTH: Thank you, Your Honor.

12 THE COURT: All right.

13 MS. PFAFFENROTH: Your Honor, Sonia Pfaffenroth
14 for Kroger. We call -- the defendants call Sonya Oblisk
15 from Whole Foods.

16 THE COURT: All right. You can start coming
17 forward with the -- uh-huh.

18 Swear her in.

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

21
22 SONYA GAFSI OBLISK,
23 called as a witness in behalf of the Defendants, being first
24 duly sworn, is examined and testified as follows:
25

Oblisk - D

1 THE WITNESS: I do.

2 DEPUTY COURTROOM CLERK: Thank you.

3 Please state and spell your first and last name for the
4 record.

5 THE WITNESS: Sonya Gafsi. S-o-n-y-a. G-a-f-s-i.

6 THE COURT: We have a different name.

7 THE WITNESS: Sonya Gafsi Oblisk. I go by -- I
8 use my married name, although it's not my legal name.

9 THE COURT: Okay. So can you spell Oblisk for us?
10 Because we have you down as that name.

11 THE WITNESS: O-b-l-i-s-k.

12 THE COURT: All right. Thank you.

13 MS. PFAFFENROTH: Thank you.

14

15 DIRECT EXAMINATION

16 BY MS. PFAFFENROTH:

17 Q. So I call you by the name you prefer, how would you
18 prefer I address you?

19 A. Either is fine.

20 Q. Okay. Thank you.

21 Ms. Oblisk, where are you currently employed?

22 A. I'm currently employed by Whole Foods Market Services,
23 Inc.

24 Q. And what's your current position?

25 A. My current position is Chief Merchandising and

Oblisk - D

1 Marketing Officer.

2 Q. And how long have you been with Whole Foods?

3 A. I've been with Whole Foods just over eight years.

4 Q. And could you just briefly explain to the Court the
5 various positions that you've held over your time at Whole
6 Foods?

7 A. Sure. I joined Whole Foods as the global vice
8 president of marketing back in 2016, so I led our entire
9 marketing organization; and subsequent to that, I also took
10 responsibility for our communications team, and then our
11 ecommerce business, and then ultimately our total
12 merchandise organization, as well as our digital product
13 management team.

14 Q. And were you already employed by Whole Foods at the
15 time that Whole Foods was acquired by Amazon?

16 A. I was.

17 Q. And could you state for us how many -- approximately
18 how many Whole Foods stores are currently operating in the
19 U.S.?

20 A. There are slightly over 500.

21 Q. And does -- has Whole Foods opened new stores this
22 year?

23 A. We have.

24 Q. And does Whole Foods plan to open new stores next year,
25 and just approximately how many are in your pipeline?

Oblisk - D

1 A. We do plan to open new stores next year, and we have
2 about 75 sites under development right now. So those would
3 be new stores that will open in the coming few years.

4 Q. Okay. And does Whole Foods sell both organic and
5 nonorganic products?

6 A. We do.

7 Q. And are you familiar with national brands like
8 Campbell's Soup and PepsiCo?

9 A. I am.

10 Q. And does Whole Foods sell products from those national
11 brands?

12 A. We sell products from PepsiCo Company. We sell
13 products from the Campbell's Soup Company. We sell a range
14 of brands, national brands, but all of which meet our
15 quality standards.

16 Q. And does Whole Foods sell Lay's brand potato chips?

17 A. We do not sell Lay's brand, but we do sell a lot of
18 potato chips of various brands, including our own private
19 label brand, 365.

20 Q. And, similarly, does Whole Foods sell Doritos?

21 A. Same response. We don't sell the Doritos brand, but we
22 do sell flavored tortilla chips in a range of different
23 brands.

24 Q. And, similarly, does Whole Foods sell Gatorade?

25 A. We do not sell Gatorade, but we do sell isotonic sports

Oblisk - D

1 drinks.

2 Q. And does Whole Foods sell sustainably caught fish?

3 A. We do.

4 Q. And do you -- some of your competitors also sell
5 sustainably caught fish?

6 A. We do.

7 Q. And does Whole Foods sell grass-fed beef?

8 A. We do.

9 Q. And do some of your competitors also sell grass-fed
10 beef?

11 A. They do.

12 Q. And does Whole Foods, as you -- you mentioned before,
13 Whole Foods has a line of private label products as well;
14 correct?

15 A. We do.

16 Q. And so as part of your responsibilities, do you have an
17 understanding, generally, of the competitive landscape of
18 the grocery industry today?

19 A. I would say I have a general understanding, yes.

20 Q. So at a high level, how would you describe the
21 competitiveness of the grocery industry that Whole Foods is
22 facing?

23 A. So if I had to describe the competitiveness of the
24 grocery industry, I would probably say the grocery industry
25 is very broad and dynamic and really operates at a local

Oblisk - D

1 level. So customers have a myriad of choices in any given
2 market about where to shop, and they're very fluid about how
3 they choose to shop across those various options that they
4 have.

5 They tend to, based on whatever their occasion or need
6 is, choose a range of retailers. We know at Whole Foods our
7 customers tend to shop four to seven different grocery
8 retailers in any given month; so we work really hard, as we
9 think about values, selection, convenience, and customer
10 service, to continue to win trips from our customers and
11 grow our customer base at the same time.

12 Q. And if you were describing just at a high level who you
13 would conclude -- include in Whole Foods' competitors, who
14 would you include?

15 A. So if I think about our competitive set, I would think
16 about other grocery retailers within a trading area that any
17 of our stores do business, both in-store and online.

18 Q. And would that include both brick-and-mortar stores and
19 online delivery into that area?

20 A. Correct.

21 Q. And would it include what the FTC would call
22 "traditional" -- quote/unquote, "traditional grocery
23 stores"?

24 A. It would.

25 Q. And would it include club stores?

Oblisk - D

1 A. It would.

2 Q. And dollar stores?

3 A. It would.

4 Q. And value or discount stores?

5 A. It would.

6 Again, if they're in our trading area, I would include
7 all of those types of stores as a competitor.

8 Q. And from your perspective, has the sale of organic
9 grocery products been increasing in recent years?

10 A. It has.

11 Q. And, to your knowledge, which grocery retailer sells
12 the most organic grocery products?

13 A. Well, I believe, total -- if I look across all grocery
14 retailers, I believe Costco sells the most grocery --
15 organic grocery products overall.

16 I know that Whole Foods, just within the specific
17 grocery store market segment, sells less than 30 percent of
18 all organic groceries.

19 Q. And based on that, do a number of other retailers also
20 sell natural and organic products?

21 A. Absolutely.

22 Q. And so recognizing that Whole Foods has designated as
23 confidential information regarding specific competitors and,
24 to respect that, I would like you to turn to your deposition
25 transcript, which should be at the very back of the binder

Oblisk - D

1 that you have, and for reference, the deposition
2 transcript -- and the binder is labeled deposition -- the DX
3 number that's associated with it is DX2531.

4 And could you turn to page 13.

5 MS. PFAFFENROTH: And I'm going to ask Mr. Rennick
6 to pull it up on the nonpublic screens only Ms. Oblisk's
7 deposition testimony.

8 THE WITNESS: Do you mind turning up the volume?

9 THE COURT: Can you hear us better now?

10 THE WITNESS: Yes. Thank you.

11 BY MS. PFAFFENROTH: (Continuing):

12 Q. Could you turn to page 13.

13 A. Yes.

14 Q. And I would just ask you to read to yourself pages 13,
15 line 10, through the first line on page 17.

16 A. Okay.

17 Q. Is that testimony accurate?

18 A. It is.

19 MS. PFAFFENROTH: Your Honor, I would move to
20 admit, from DX2531, page 13, line 10, through page 17,
21 line 1 into evidence.

22 MR. MATHESON: No objection, Your Honor.

23 THE COURT: It will be received.

24 BY MS. PFAFFENROTH: (Continuing):

25 Q. And, Ms. Oblisk, when you say a company is a

Oblisk - D

1 competitor, could that mean competition on price?

2 A. It could.

3 Q. And could it mean competition on service offerings?

4 A. It could.

5 Q. And could it mean competition with respect to quality?

6 A. It could.

7 Q. Okay. And you mentioned online sales earlier, are
8 online sales generally increasing in the industry, from your
9 perspective?

10 A. Yes.

11 Q. And has the increase in online grocery shopping changed
12 the way that Whole Foods, in particular, thinks about the
13 competitive landscape for grocery?

14 A. I would say that, yes, in general, the growth of online
15 basically widens the aperture of how we think about
16 competitors.

17 Also, in any given market, depending on what a
18 retailer's engagement is in-store and online, it makes us
19 think differently about how we go to market and the relative
20 importance of how we show up across all channels in that
21 given market.

22 Q. Thank you.

23 And to just switch gears a little bit to Amazon Fresh,
24 could you, just at a high level, explain what your
25 responsibilities are as they relate to Amazon Fresh?

Oblisk - D

1 A. So I'm a member of the Amazon Worldwide Grocery Stores'
2 leadership team, which includes executives that support the
3 businesses of Whole Foods Market, Amazon Fresh in the U.S.,
4 and Amazon Fresh internationally.

5 Additionally, I have, under my scope of responsibility,
6 a couple teams that have shared responsibility. They work
7 as a shared service center supporting both the Whole Foods
8 Market businesses and the Amazon Fresh businesses. Those
9 include a consumer insights team as well as a creative team.

10 Q. And approximately how many stores operate under the
11 Amazon Fresh banner today in the United States?

12 A. I believe there are approximately 50 now. They just
13 opened a bunch of new stores in the last couple of months.

14 Q. And could you just briefly describe the sort of
15 offerings of a typical Amazon Fresh?

16 A. Sure. Amazon Fresh is a full-service grocery store
17 that would have the departments consistent with what you
18 would find in any, quote/unquote, traditional grocery
19 stores. So produce, meat, seafood, dry grocery, chilled
20 grocery, frozen grocery, bakery, deli; and depending on the
21 municipality, adult beverage, and then also specialty.

22 Q. And how would you describe who's included in the
23 competitive set for Amazon Fresh?

24 A. So I would generally describe it the same way as I
25 would describe the competitive set for Whole Foods, which

Oblisk - D

1 would be other grocery retailers that operate physical
2 stores and online within the trading area for which
3 Amazon Fresh does business for any given store.

4 Q. And, again. Would that include both brick-and-mortar
5 and online available options?

6 A. It would.

7 Q. And it would -- and it would include what the FTC calls
8 traditional grocery stores?

9 A. It would.

10 Q. And club stores?

11 A. It would.

12 Q. And dollar stores?

13 A. Yes.

14 Q. And value discount stores?

15 A. Yes.

16 Q. And so, once again, I'm going to ask you to turn back
17 to your deposition transcript.

18 So this is now beginning on page 21, line 10, and I'll
19 ask you to read to yourself from page 21, line 10, through
20 page 26, line 24.

21 A. I'm finished.

22 Q. Thank you.

23 Does that -- that passage in your deposition
24 transcript -- is that accurate and accurately reflect
25 competitors to Amazon Fresh?

Oblisk - D

1 A. It does.

2 MS. PFAFFENROTH: Thank you. I'd move, again,
3 from DX2531, from page 21, line 10, through page 26, line 24
4 into evidence.

5 MR. MATHESON: No objection, Your Honor.

6 THE COURT: It will be received.

7 BY MS. PFAFFENROTH: (Continuing):

8 Q. And continuing on with Amazon Fresh for just a few more
9 minutes.

10 Are you familiar with the Amazon Fresh V2 format?

11 A. I am.

12 Q. And could you just briefly describe what the Amazon
13 Fresh V2 format is?

14 A. The Amazon Fresh V2 format is an optimized version of
15 Amazon Fresh Stores, which includes an expanded assortment,
16 lower prices, the addition of self-checkout registers, as
17 well as an updated signage and store decor package.

18 Q. And so far have the V2 format stores been more
19 successful?

20 A. They have.

21 Q. And does -- excuse me. Does Amazon plan to convert its
22 existing V1 stores to the V2 format?

23 A. They do.

24 Q. And recognizing that -- that you've designated as
25 confidential information regarding the pipeline, I'd like

Oblisk - D

1 you to turn just once again to your transcript of your
2 deposition, and this time page 73, line 12.

3 A. I'm there.

4 Q. Great.

5 Can you read to yourself lines 12 through 19?

6 A. Okay.

7 Q. And is that testimony accurate with respect to the
8 planned pipeline for Amazon Fresh?

9 A. It is.

10 Q. Okay.

11 MS. PFAFFENROTH: Your Honor -- thank you -- I
12 would move, again, from DX2531, pages 73, lines 12 through
13 19, into evidence.

14 MR. MATHESON: No objection, Your Honor.

15 THE COURT: It will be received.

16 BY MS. PFAFFENROTH: (Continuing):

17 Q. Now shifting back to Whole Foods again. I would like
18 to pull up a document. This is DX270. This will be only on
19 the private screens, but it should be in your binder.

20 A. All right. I'm there.

21 Q. Thank you.

22 And this is a document entitled, "2024 Whole Foods
23 Market Pricing Outlook."

24 Are you familiar with this document?

25 A. I am.

Oblisk - D

1 Q. And is it prepared in the ordinary course by
2 Whole Foods?

3 A. I'm sorry?

4 Q. I'm sorry.

5 It's prepared in the ordinary course of business by
6 Whole Foods?

7 A. It is.

8 MS. PFAFFENROTH: I'd move to admit DX270 into
9 evidence.

10 MR. MATHESON: No objection, Your Honor.

11 THE COURT: It will be received.

12 BY MS. PFAFFENROTH: (Continuing):

13 Q. And, Ms. Oblisk, could you turn to page 12 of this
14 document? The very bottom of page 12.

15 Again, this is going to be on the private screen in the
16 courtroom, and the Bates label is -- it ends in -678 of that
17 page.

18 A. I'm there.

19 Q. And at the very bottom of page 12, there is a -- sort
20 of the top of a table that carries over to the next page.

21 And there it reads, "Appendix 6. WFM" --

22 That's Whole Foods Market?

23 A. That is correct.

24 Q. -- Competitor Landscape. Nielson Leakage Report."

25 And we're actually going to take a look at the chart

Oblisk - D

1 that's on the next page relating to that.

2 A. Okay.

3 Q. And you see in the upper corner there, the upper left
4 corner, there's a -- there's a number that is following an
5 "all outlets."

6 So taking a look at that number, could you just explain
7 to the Court, at a high level, what this chart refers to
8 without reference to any specific competitors or any
9 specific numbers on the chart?

10 A. Sure. So this is a leakage report which basically
11 states with -- for customers who have shopped at Whole Foods
12 Market, the dollars that they're spending with other
13 retailers on items that they could be buying at Whole Foods.

14 Q. And so for all of the retailers listed in the left-hand
15 column, would all of those compete with Whole Foods, or
16 would you consider all of them to be competitors?

17 A. I would.

18 Q. And then, further down on that same page, there is --
19 there's a paragraph of text and then a smaller chart below
20 it, the very bottom of the page, and it's entitled,
21 "Competitor Shop by Zone Region."

22 Do you see that?

23 A. I do.

24 Q. And, again, at just a high level, could you explain
25 what this is without reference to any specific competitors?

Oblisk - D

1 A. Sure. This is a list of competitors that we use in our
2 pricing comparisons, and the list varies by department
3 within store, as well as by pricing zone.

4 Q. Okay. Great.

5 So, again, all of the -- all of the banners or the
6 competitors listed there, those would all be considered
7 competitors of Whole Foods?

8 A. Yes. And it --

9 MR. MATHESON: Your Honor, could I make one
10 objection? This table continues onto the next page.

11 THE COURT: Oh.

12 MR. MATHESON: There are a number of additional
13 so-called competitors listed. If we're going to display the
14 table, can we display the whole table, please?

15 MS. PFAFFENROTH: Yeah. Absolutely.

16 THE COURT: So you're going to include the next
17 page as well?

18 MS. PFAFFENROTH: Yes, I'll include the next page.

19 BY MS. PFAFFENROTH: (Continuing):

20 Q. So I'll reiterate the question.

21 Does that include -- the competitors include all of the
22 competitors on that first page and then the next page as
23 well?

24 MS. PFAFFENROTH: Thank you.

25 THE WITNESS: It does.

Oblisk - D

1 MS. PFAFFENROTH: Okay. We can take that one
2 down.

3 BY MS. PFAFFENROTH: (Continuing):

4 Q. Okay. So now I'd like to pull up DX271. Again, this
5 is on the private screen only.

6 A. I'm there.

7 Q. Okay. Great. And is this document a review of
8 Whole Foods operations in California, dating from this
9 spring?

10 A. It is.

11 Q. And are you familiar with this document?

12 A. I am.

13 Q. And is it prepared in the ordinary course of business?

14 A. It is.

15 MS. PFAFFENROTH: I move to admit DX271 into
16 evidence.

17 MR. MATHESON: No objection, Your Honor.

18 THE COURT: It will be received.

19 BY MS. PFAFFENROTH: (Continuing):

20 Q. And I would like to direct you to slide 22 of this
21 document. The Bates label ends in -704.

22 A. I'm there.

23 Q. Okay. Great.

24 And up in the very top left corner, it says
25 "Nationals."

Oblisk - D

1 Is this an overview on a national level, in terms
2 the -- what's displayed here for Whole Foods?

3 A. It is.

4 Q. And here, does this slide contain a record of, sort of,
5 quarterly financials for Whole Foods itself and then five of
6 its largest competitors?

7 A. It does.

8 Q. And so just highlighting all of the stores listed,
9 the -- across the top would all be competitors to
10 Whole Foods that you'd track?

11 A. That's correct.

12 Q. And so moving to the next slide -- so this slide is --
13 it's entitled, "P52W In-store 2+ SOW: All WFM."

14 Could you just explain to the Court to what that
15 infers?

16 A. Sure. So "P52W" is past 52 weeks. So this is a
17 rolling annualized cut of data.

18 "In-store 2+" means Whole Foods customers that shopped
19 Whole Foods at least two times during that time period.

20 "SOW" is share of wallet.

21 And then "All WFM" refers to it's all Whole Foods
22 Market, national in scope.

23 Q. When you say "share of wallet" there, what do you mean?

24 A. Share of wallet -- so the way we think about it is, if
25 you think about every customer has a grocery budget or a

Oblisk - D

1 grocery wallet, we like to measure how their grocery dollars
2 are flowing, both to Whole Foods and to our key competitors,
3 just to understand where we have opportunities, where we're
4 winning, what competitive dynamics are happening between
5 other competitors, and any other insights that will help us
6 to better serve our customers.

7 Q. And for each of the competitors that's listed here,
8 they're numbered going down the columns. So -- so is it
9 correct that, for example, the largest share of wallet loss
10 is to number one, second to number two, et cetera, going --
11 with the exception of Whole Foods itself -- going down those
12 numbers?

13 A. It's not a share of wallet loss. It's actually the
14 absolute share of wallet.

15 So the retailer that's listed as number one, the
16 percentage listed under them is their share of wallet among
17 Whole Foods two-plus trip shoppers.

18 Likewise, for number two, three, four, five, six,
19 seven, and eight.

20 Q. Great. Thank you for the clarification.

21 And turning to then the next slide, is this essentially
22 the same information but for California, specifically?

23 A. It is.

24 Q. Okay. And we see -- I'll just represent a number of
25 the same competitors, say, in the top six there. Is that

Oblisk - D

1 accurate?

2 A. Yes, that's accurate.

3 Q. Okay. Then just turning quickly to slide 28 from the
4 same deck, and this is ending in Bates label -710.

5 A. I'm there.

6 Q. And this is a slide -- again, without at any point
7 saying specific retailer names or percentages -- this is for
8 Los Angeles, specifically. Could you just explain briefly
9 what this chart represents?

10 A. So this chart represents the percent of Whole Foods
11 customers in the past 12 months who have visited any of the
12 competitors that are listed in this chart.

13 They're ranked in order of penetration; i.e., the
14 competitor in number one, the highest penetration of
15 cross-visits, and then the percent of customers who have
16 visited -- of Whole Foods customers who have visited that
17 competitor is the percentage that's represented in that
18 chart.

19 MS. PFAFFENROTH: And I'm just going to ask, for
20 the benefit of the Court, Mr. Rennick, to highlight line 4,
21 line 6, and line 9.

22 BY MS. PFAFFENROTH: (Continuing):

23 Q. And I'll ask you, Ms. Oblisk, including those is --
24 would you consider all 30 of the -- of the retailers here to
25 be competitors to Whole Foods?

Oblisk - D

1 A. We would.

2 Q. Okay. And then one more slide in this document.

3 Can we go to slide 30, which is ending in -712? And
4 it's entitled "Competitive Deep Dive." I'm not going to
5 name the retailers that are listed there.

6 A. Yes.

7 Q. And I'll ask you: Whole Foods chose to do a
8 competitive deep dive into these two retailers, in
9 particular, for this -- for this exercise?

10 A. We did.

11 Q. And would both of those be considered by you to be key
12 competitors to Whole Foods?

13 A. For this operating area, yes.

14 Q. Great.

15 MS. PFAFFENROTH: We can take that one down.

16 Let's do one more. Can we pull up DX272, please.

17 THE WITNESS: I'm there.

18 BY MS. PFAFFENROTH: (Continuing):

19 Q. Is this essentially the same document for a different
20 region of the country?

21 A. It is.

22 Q. And, again, are you familiar with this document?

23 A. I am.

24 Q. And this one is entitled, "The Central West OA Review"?

25 A. Correct.

Oblisk - D

1 MS. PFAFFENROTH: I'd move to admit DX272 into
2 evidence.

3 MR. MATHESON: No objection, your Honor.

4 THE COURT: It will be received.

5 BY MS. PFAFFENROTH: (Continuing):

6 Q. And for this one, I'd just direct your attention to
7 slide 28, which is -- and, again, this is on the private
8 screen only -- Bates ending in -785.

9 A. I'm there.

10 Q. Okay. And we were previously looking at a chart that
11 was for Los Angeles. This is for Denver.

12 Is this the same analysis but for Denver?

13 A. It is.

14 Q. And, again, you would consider all of the stores listed
15 on this page to be competitors to Whole Foods?

16 A. We would.

17 Q. And going forward to the slide ending -788, this is,
18 again, the same chart for Seattle, and the same question.

19 Would Whole Foods consider all of the stores listed on
20 this chart to be competitors to Whole Foods?

21 A. We would.

22 MS. PFAFFENROTH: And I will ask for -- just for
23 the benefit of the Court, Mr. Rennick, could you highlight
24 number 1 and number 4 on this list?

25 And we can take that one down now too.

Oblisk - D

1 And can we pull up DX273?

2 THE WITNESS: I'm there.

3 BY MS. PFAFFENROTH: (Continuing):

4 Q. Okay. Great.

5 And, again, this is the same document but for the
6 Midwest from the same time frame. Is that correct?

7 A. That's correct.

8 Q. And you're familiar with this document as well?

9 A. I am.

10 MS. PFAFFENROTH: Would like to move DX273 into
11 evidence.

12 MR. MATHESON: No objection, Your Honor.

13 THE COURT: It will be received.

14 BY MS. PFAFFENROTH: (Continuing):

15 Q. And turning here to the -- to slide 28, which is the
16 Bates label ending in -945. And, again, is this the --

17 Oh, sorry.

18 A. I'm there.

19 Q. Is this the same slide again for Chicago that we were
20 looking at for the other cities?

21 A. It is.

22 Q. And, again, would Whole Foods consider all of the --
23 all of the retailers here to be competitors to Whole Foods
24 for the Chicago area?

25 A. We would.

Oblisk - D

1 MS. PFAFFENROTH: Okay. We can take that one
2 down.

3 One more, can we pull up DX275 on the public -- the
4 nonpublic screen?

5 THE WITNESS: I'm there.

6 BY MS. PFAFFENROTH: (Continuing):

7 Q. Great.

8 And do you recognize this document?

9 A. I do.

10 Q. For the benefit of the record, the document is entitled
11 "Perishables Q4 2023 QAR."

12 What's a QAR?

13 A. It's a quarterly analytics review.

14 Q. And are you familiar with this document as well?

15 A. I am.

16 Q. And is this prepared in the ordinary course of
17 business?

18 A. It is.

19 MS. PFAFFENROTH: I'd like to move to admit DX275
20 into evidence.

21 MR. MATHESON: No objection, Your Honor.

22 THE COURT: It will be received.

23 BY MS. PFAFFENROTH: (Continuing):

24 Q. And for this one, could you flip to slide 55, please.

25 A. I'm there.

Oblisk - D

1 Q. Okay. Great.

2 This one is entitled, "The Perishable Share of Wallet
3 Comparisons"?

4 A. Yes.

5 Q. And I'd like you to read to yourself, not to the public
6 record -- and I would ask Mr. Rennick to highlight the
7 subheading here.

8 And, Ms. Oblisk, do you agree with this -- the
9 statements here regarding various different competitors, in
10 terms of threats and who to focus on?

11 A. I do.

12 Q. Okay. Great.

13 And looking at the top line, there are a number of
14 different retailers listed along the top line, and would all
15 of those be competitors to Whole Foods?

16 A. They would.

17 Q. And could you explain, again, just briefly for the
18 Court, what -- without reference to any competitors or
19 numbers, what this chart is representing?

20 A. So this chart, again, speaks to share of wallet data.

21 Share of wallet, again, is how we think about how
22 customers split their grocery budget across a range of
23 retailers.

24 What this chart maps out, it's -- I can't read the
25 footnote. Give me one second.

Oblisk - D

1 This is using Whole Foods two-plus trip shoppers over
2 the last 52 weeks is the scope of the data, and so it's
3 reporting on what share of wallet Whole Foods has among that
4 customer group in the last 52 weeks, as well as what share
5 of grocery wallet is going to Whole Foods competitors.

6 Q. Okay. Terrific.

7 And this slide is broken down into total perishables,
8 seafood, meat, and produce; is that correct?

9 A. That is correct.

10 Q. And so focusing on the seafood line -- so if we look --
11 if we look -- so Whole Foods is listed first. I'm not going
12 to say any other names on the record, but then if we look
13 one to the left, would that be -- following down from the
14 retailer who's second to -- from the left at the top, would
15 that be the retailer with the second highest share of wallet
16 in seafood?

17 A. Sorry. You want me to look at second --

18 Q. Oh, sorry. I know this is -- and so looking along the
19 top of the banners, looking at the second banner over and
20 then following that down to the share of wallet on seafood,
21 in particular, is that the second highest share of wallet
22 that's listed for seafood?

23 A. So let me just ask this: In columns, column 1, column
24 2 -- you want me to look at column 3?

25 Q. Yes. Yes. Column 3.

Oblisk - D

1 A. Column 3 actually has the third highest share of
2 wallet. So column 1 has the highest, column 2 has the
3 second highest, and then column 3 has the third highest
4 share of wallet for seafood.

5 Q. Sorry. I'm going to state -- I'm going to try to state
6 this a little more clearly for the record. I know it's very
7 hard doing this.

8 So, essentially, for seafood, if I follow the banners
9 across the top, I'm going one, two, three, in descending
10 order, in terms of share of wallet.

11 Is that accurate?

12 A. No, it's not accurate.

13 It is accurate for total perishables. You're going
14 one, two, three, four, in descending order, and then what
15 the subsequent breakouts, looking at seafood, meat, and
16 produce, are doing, are showing the derivation for those
17 specific departments versus total perishables, and that's
18 what the rank versus perishables is telling us versus total
19 perishables.

20 So, for example, in seafood, the columns 1, 2, 3, and
21 4, they're all ranked the same as total perishables; but
22 when you get to column 5, their share of wallet is
23 significantly less in seafood than it is in total
24 perishables.

25 Q. Understood.

Oblisk - D

1 A. Is that clear?

2 Q. Apologies. Sorry to interrupt. Understood.

3 And so for the share of wallet line, in particular, the
4 share of wallet line is decreasing as you go across that
5 line -- correct? -- for seafood?

6 A. Not totally.

7 Q. Okay.

8 A. Because it decreases and then it increases and then it
9 decreases. It is decreasing if you look at total
10 perishables, yes.

11 Q. Got it.

12 So why don't we just move on.

13 But, basically, what this chart shows is the share of
14 wallet comparisons for these individual categories of
15 perishables across different retailers; correct?

16 A. That is correct.

17 Q. All right. All of which compete with Whole Foods?

18 A. Correct.

19 Q. So we can take that one down.

20 Turning to -- back to a bigger picture.

21 Since Amazon acquired Whole Foods, has Amazon made
22 improvements to Whole Foods, from your perspective?

23 A. Generally, I would say yes.

24 There have been lots of improvements to the Whole Foods
25 Market business since the acquisition, including many things

Oblisk - D

1 about our customer proposition.

2 Q. And could you just describe, at a high level, some of
3 the improvements that have been made?

4 A. Probably the most meaningful improvement that's been
5 made is our ability to invest broadly in lowering prices.

6 So this has been a subsequent series of actions that
7 have happened over the last seven years. Starting with the
8 acquisition itself, we had our first round of price
9 investments, continuing through to today.

10 This year alone we've lowered prices on over 25 percent
11 of the items that we sell, including nearly 900 private
12 label items, but that's been really important to us, in
13 terms of being able to attract more customers and compete
14 more directly against traditional grocers, and in club
15 channel, discount, as well as drugstores.

16 So our goal, like, every day, is to ensure that we have
17 an affordable option in every category so that every
18 customer that walks through our doors feels like we have an
19 accessible and inclusive assortment. And pricing has been a
20 huge lever to unlocking that.

21 And what we've seen, at least this year, is that we're
22 outpacing the overall grocery market, both in terms of our
23 wallet share, the segment share, as well as in terms of our
24 unit segment share, which means that customers are really
25 voting with their feet and their trips, and they're buying

Oblisk - D

1 more from Whole Foods.

2 Q. And do you believe that these price investments have
3 improved Whole Foods' ability to attract a broader range of
4 customers?

5 A. Absolutely.

6 Q. And do you believe --

7 A. In particular --

8 Q. Sorry. Apologies. Go ahead.

9 A. That's okay. No. No.

10 In particular, we've seen a lot of growth among our
11 occasional customers, and so that's a group of customers
12 that tends to use -- make special trips to Whole Foods,
13 maybe because a store isn't nearby or maybe they're just
14 less familiar with our brand, but as we've lowered prices,
15 we've seen that those occasional customers make more and
16 more trips to Whole Foods and buy more and more items, which
17 is very exciting to us.

18 Again, it shows that we're more -- making ourselves
19 more relevant to them, and we're better serving their needs.

20 Q. And, just generally, do you believe that these price
21 investments have enabled Whole Foods to be more competitive
22 to its rivals in the grocery industry?

23 A. Absolutely.

24 And, I mean, the data will support that, again, by
25 showing how we've been able to grow both our unit segment

Oblisk - D/X

1 share and our market segment share.

2 MS. PFAFFENROTH: Great. Thank you. I pass the
3 witness.

4 THE COURT: All right.

5

6 CROSS-EXAMINATION

7 BY MR. MATHESON:

8 Q. Hi. Good morning, ma'am.

9 MR. MATHESON: Your Honor, Daniel Matheson on
10 behalf of the Federal Trade Commission. May I proceed?

11 THE COURT: Yes.

12 BY MR. MATHESON: (Continuing):

13 Q. Good morning, ma'am. My name is Daniel Matheson. It's
14 nice to make your acquaintance.

15 During direct examination you used the term "grocery
16 store market segment."

17 Do you recall responding to a question with that term?

18 A. I recall saying "grocery market segment share," yes.

19 Q. And you would agree that "traditional grocery stores"
20 and "supermarkets" are terms you use in the ordinary course
21 of business; is that right?

22 A. I would.

23 Q. And you would agree that dollar stores are not
24 traditional grocery stores. Is that fair?

25 A. That is fair.

Oblisk - X

1 Q. So despite the fact that Whole Foods, in some sense,
2 competes with dollar stores, you would view them in a
3 separate market segment from traditional grocery stores. Is
4 that fair?

5 A. What I would say is we would view competitors, and when
6 we look at what our customer behavior is, we look at all the
7 channels through which customers source their food and
8 grocery needs.

9 Q. So some of the competitors through which a customer
10 might source their food and grocery needs, can't serve a
11 full customer shop in the sense of a week's worth of
12 groceries; right?

13 A. That is correct.

14 Q. Some of the competitors that you've referred to sell a
15 narrower specialized range of products that are only
16 suitable for certain customer needs; right?

17 A. That is correct.

18 Q. And so those formats cannot offer a one-stop shopping
19 experience to a customer looking for a full week's worth of
20 groceries. Is that fair?

21 A. That is correct.

22 Q. So, for example, you discussed with my colleague,
23 during direct examination, DX270 -- or sorry -- DX2071, at
24 slide -710.

25 MR. MATHESON: Mr. Duncan, can we call this up but

Oblisk - X

1 only on the private screen, please.

2 BY MR. MATHESON: (Continuing):

3 Q. Sorry. That is DX0271 at- -- at the Bates number
4 ending in -710.

5 A. I'm sorry. Can you say that one more time?

6 Q. DX0271.

7 A. Okay.

8 Q. And Bates number in the lower right end in -710. Do
9 you see that slide that you discussed with my colleague
10 during direct examination, ma'am?

11 A. Right. Slide number 28 I do.

12 Q. And so these are all grocery competitors, including the
13 competitor listed in spot number 20; right?

14 A. Correct.

15 Q. And you wouldn't say you could do a full week's worth
16 of shopping at the competitor listed in spot number 20 if
17 you had any sort of a healthy diet, could you?

18 A. I hope not, but I would also say that that's an
19 important competitor to us, when I think about that category
20 within our stores and when we measure share of wallet and
21 leakage and the actual customer behavior and
22 decision-making, again, if you start from the customer and
23 work backwards, is they're deciding to buy that category
24 where; and despite not being able to fulfill a full grocery
25 shop there, it actually is a very, very important competitor

Oblisk - X

1 as we think about our assortment, our pricing strategy, and
2 our quality for that given category.

3 Q. That category, but not for your pricing on, say, fresh
4 perishables; right?

5 A. Correct.

6 Q. And you mentioned share of wallet. You'd say that
7 share of wallet is only one of many inputs that Whole Foods
8 considers when setting pricing; right?

9 A. That is correct.

10 Q. You were asked at your deposition if it was a key
11 input, and you responded, "It is only one of many."

12 Is that a fair assessment the importance of share of
13 wallet?

14 A. We have many data sources that we use, and what we do
15 is triangulate those. So whether it's looking at market
16 segment share, share of wallet, leakage data, we have a
17 whole range of tools at our disposal, and how we mine and
18 look for insights is to look for trend and consistency and
19 validation across observations from each of those reporting
20 metrics.

21 Q. Okay. That's fair.

22 Returning to the grocery store segment, is it fair to
23 say that when you use the term "supermarkets" or "grocery
24 stores" in the ordinary course, you mean a retailer that
25 sells a full assortment of food and household consumables?

Oblisk - X

1 A. Correct.

2 It's a store where a customer would go and be able to
3 shop a full basket to fulfill their weekly household grocery
4 needs.

5 Q. And that full basket would include produce, meat, and
6 seafood; correct?

7 A. Generally, yes.

8 Q. And so you'd call CVS, for example, a drugstore and not
9 a traditional grocery store; right?

10 A. That is correct.

11 And, again, for certain categories, drugstores are key
12 competitors, depending upon what items you're looking at.

13 Again, it goes back to the customer behavior and the
14 customer's mind. Every week, every day they're making
15 decisions based on price, quality, convenience, selection,
16 value, and customer service as to where to choose to spend
17 their money across all channels in-store and online.

18 Q. There are other examples of formats that sell groceries
19 that are not supermarkets, and you would consider some of
20 those formats that sell groceries but are not supermarkets
21 to be Target, Walmart, Sam's Club, and Costco. Is that
22 fair?

23 A. What I would say is the data that we source through a
24 third party looks at what we call "all outlet combined
25 expanded view," which would include both grocery stores,

Oblisk - X

1 club channel, drug channel, and the discount channel.

2 Q. Could I direct your attention, ma'am, to your
3 deposition transcript at page 103.

4 MR. MATHESON: And we don't need to call this up
5 on the screen, Mr. Duncan. This may be confidential.

6 At page 103, lines 19 to 22.

7 Actually, page 103, lines 16 through 22.

8 Please let me know when you've had a chance to review
9 that.

10 Can we call it up on the private screen, Mr. Duncan,
11 but not the public?

12 THE WITNESS: I have read it.

13 BY MR. MATHESON: (Continuing):

14 Q. Do you agree with the testimony -- you still agree with
15 the testimony you offered in your deposition regarding that
16 matter?

17 A. Correct. Yes.

18 Q. And continuing to review line 22, on page 103, through
19 the end of page 103, do you continue to agree with the
20 categorizations you gave to those two retailers you
21 mentioned there?

22 A. I do.

23 MR. MATHESON: Your Honor, we'd move to admit the
24 deposition transcript at page 103, lines 16 through 25.

25 MS. PFAFFENROTH: No objection.

Oblisk - X

1 THE COURT: It will be received.

2 BY MR. MATHESON: (Continuing):

3 Q. You were asked, during your direct examination, certain
4 questions regarding plans to open Amazon Fresh stores.

5 Do you recall that?

6 A. Generally, yes.

7 Q. Now, you would agree that you're not involved in
8 Amazon's strategy for its Version 2 of the Amazon Fresh
9 stores; correct?

10 A. I'm not directly involved in developing the strategy,
11 but my team was involved in supporting the implementation of
12 it.

13 Q. And it's fair to say you're not involved in Amazon
14 Fresh's strategies for store openings or closings; right?

15 A. That is correct.

16 Q. And Amazon, in fact, closed a number of Amazon Fresh
17 stores in the past 12 months?

18 A. I believe there were a few stores that did close in the
19 last 12 months.

20 Q. And in 2023 Amazon publicly announced it would pause
21 the construction of new Amazon Fresh stores while it
22 attempted to improve its offering. Is that fair?

23 A. It's fair to say that in 2023 Amazon Fresh paused
24 openings, as they wanted to apply learnings that they had
25 from their first tranche of stores and ensure that any

Oblisk - X

1 future builds were optimized and reflecting those learnings
2 so that they could better serve customer needs.

3 Q. And there are certain considerations that Amazon takes
4 into account, when it's opening Amazon Fresh locations,
5 including population density; right?

6 A. I don't sit on their real estate committee, but it
7 would make sense almost every retailer would look at
8 population density as an input when they're doing site
9 location selection.

10 Q. And you were asked if you could provide examples of
11 locations in which you were aware Amazon Fresh stores might
12 open, during your deposition.

13 Do you recall that testimony?

14 A. Generally, yes.

15 Q. Is it fair to say, without revealing the specific
16 areas, that you could identify only major metropolitan areas
17 in which Amazon Fresh stores might open?

18 A. I believe that to be true.

19 Q. There are also considerations that Whole Foods takes
20 into account when it's considering where to open stores; is
21 that right?

22 A. That is correct.

23 Q. What are some of those considerations?

24 A. There's a range of inputs. Again, I think there's a
25 similar set of tools that most retailers use. It would

Oblisk - X

1 include things like population density, daytime traffic,
2 demographics, drive time, growth rate for a given
3 metropolitan area, and anything else that would help define
4 and scope the -- oh, also, I should say competitive
5 penetration. So anything that would help define where there
6 may be white space and an opportunity to open what could be
7 a successful store.

8 Q. Okay. You mentioned demographics. This testimony,
9 some of it has been designated confidential.

10 Could I please direct you to your deposition transcript
11 at page 98, line 20, through page 99, line 4.

12 MR. MATHESON: And, Mr. Duncan, can we bring that
13 up on the private screen only?

14 BY MR. MATHESON: (Continuing):

15 Q. Page 98, line 20, through page 99, line 4.

16 Please let me know when you have had an opportunity to
17 assess that testimony, ma'am.

18 A. I did.

19 Q. And is that --

20 MR. MATHESON: Your Honor, we'd move to admit the
21 transcript page -- deposition transcript page 98, line 20,
22 through 99, line 4, as something that's been designated
23 confidential.

24 MS. PFAFFENROTH: No objection.

25 THE COURT: It will be received.

Oblisk - X

1 BY MR. MATHESON: (Continuing):

2 Q. When you were asked by my colleague, quote, "What the
3 FTC would call 'traditional grocery stores,'" what did you
4 understand that to refer to?

5 A. I'm not sure I have the context for the question.

6 Q. Okay. We'll skip that and move on.

7 You stated that Whole Foods has 75 sites identified in
8 which it may open stores in the next several years; correct?

9 A. I would say more than "may."

10 It's that we have 75 sites for which we have some type
11 of signed lease.

12 Q. And you testified at your deposition that over the
13 previous two years Amazon had only opened -- strike that --
14 you testified that Whole Foods had only opened 15 to 20 new
15 locations in the two years prior to your deposition.

16 Is that accurate and consistent with your recollection
17 today?

18 A. I believe so. I would have to look at the deposition.
19 If you can direct me to it?

20 Q. Well, is it consistent with your recollection that
21 Amazon -- Whole Foods has opened something like 20 stores in
22 the past two years, bearing the Whole Foods banner?

23 A. Plus or minus.

24 Q. And you'd agree it's a multi-year process to get from
25 site selection to actually opening a store; right?

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1 A. Of course.

2 Q. You mentioned the quality standards, during your direct
3 examination, that Whole Foods applies that result in it not
4 selling certain products.

5 Do you recall that testimony?

6 A. I do.

7 Q. One of the products Whole Foods does not sell is
8 Kraft Macaroni & Cheese; correct?

9 A. That is correct, but we do sell a lot of macaroni and
10 cheese under the Annie's brand, under the 365 brand, and
11 several other brands.

12 Q. You mentioned trading areas and the retail competition
13 you perceive within trading areas around your stores;
14 correct?

15 A. I did.

16 Q. It's fair to say that, even if a retailer can offer
17 home delivery, it is a stronger presence in any trading area
18 if it has a physical store there; right?

19 A. I'm not sure that I would say that directly. It
20 depends on the customer again. There's customers that
21 prefer in-store shopping, customers that prefer online
22 shopping. Most customers have some type of hybrid behavior
23 in-store and online; so, ideally, you would want to be able
24 to serve as many needs as possible, but having exclusively
25 an in-store presence or an online presence doesn't

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1 necessarily mean that you're less competitive.

2 Q. Well, Whole Foods, to the extent that any perishables
3 are delivered for Whole Foods, those are all done from Whole
4 Foods stores; right?

5 A. Currently, our business model for Whole Foods, if you
6 order online on our Whole Foods storefront on Amazon.com,
7 those orders are directly out of our stores. We actually do
8 have one store that is exclusively just to service our
9 online business.

10 Q. So to the extent that Whole Foods does not have a
11 physical store in a location, you can't get perishables
12 delivered from Whole Foods. Is that fair?

13 A. That is a fair statement.

14 Q. You mentioned that the Amazon Fresh Version 2 format is
15 optimized and it has an expanded assortment; right?

16 A. I did.

17 Q. And that's compared to the previous versions of Amazon
18 Fresh stores which carried a more limited assortment; right?

19 A. I wouldn't describe the assortment as limited.

20 What I would just say is that the merchandising team at
21 Fresh sought to extend the assortment that they had. They
22 previously had a full shop experience. They currently have
23 a full shop experience, but they've refined their
24 merchandising strategy to make sure that they've optimized
25 their selection and product tiering within each category.

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1 Q. Well, you'd agree that Amazon Fresh Version 2 stores
2 carry more SKUs and a broader assortment of products than
3 was the case at Amazon Fresh Version 1 stores; right?

4 A. That is correct.

5 Q. Now, Amazon, at one point in time, operated a retail
6 format in the United States that sold primarily food
7 products known as Amazon Go; is that right?

8 MS. PFAFFENROTH: Objection, Your Honor. Outside
9 the scope. I didn't ask the witness any questions about
10 Amazon Go.

11 MR. MATHESON: Your Honor --

12 BY MR. MATHESON: (Continuing):

13 Q. Okay. You've answered questions about Amazon Fresh
14 stores; correct?

15 A. I'm sorry?

16 Q. You've answered questions regarding Amazon Fresh
17 stores?

18 A. I believe you just asked me questions about Amazon
19 Fresh stores, yes.

20 Q. Right. Including Amazon Fresh stores that were closed?

21 A. You asked me if we had closed Amazon Fresh stores; and,
22 yes, the answer was we did close a few Amazon Fresh stores.

23 Q. Some of those few Amazon Fresh stores that were closed
24 were previously bannered Amazon Go stores; right?

25 A. That is correct.

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1 Q. The Amazon Go format was a smaller, more limited format
2 than Amazon is currently attempting to succeed in with
3 Amazon Fresh Version 2 stores; right?

4 A. That is correct.

5 Q. It was something more like a convenience store than a
6 traditional grocery store; right?

7 I'm referring to Amazon -- the Amazon Go format.

8 MS. PFAFFENROTH: Your Honor, I would renew the
9 objection. Counsel is asking details about Amazon Go and
10 previous formats, and that was not included in the direct
11 examination.

12 MR. MATHESON: Your Honor, if I could respond to
13 that? What I'm attempting to explore are the reasons that
14 Amazon Fresh stores have opened or closed. That was
15 clearly --

16 THE COURT: So ask that question. Because they
17 gave a number, and she talked about what they -- what
18 they -- she gave a response.

19 MR. MATHESON: Okay. I appreciate that,
20 Your Honor.

21 BY MR. MATHESON: (Continuing):

22 Q. You would agree that -- strike that.

23 Now, this has been designated confidential, regarding
24 Amazon Fresh, but can I please direct your attention to
25 page 126 in your deposition transcript, lines 17, through

Oblisk - X

1 page 127, line 8.

2 MR. MATHESON: If we can please display this only
3 on the private screen, Mr. Duncan.

4 BY MR. MATHESON: (Continuing):

5 Q. I just want to ask you if this testimony is correct
6 regarding the Amazon Fresh stores.

7 A. That's correct.

8 MR. MATHESON: Your Honor, we move to admit the
9 deposition transcript, page 126, line 17, through 127,
10 line 8, to deal with confidentiality concerns.

11 MS. PFAFFENROTH: No objection.

12 THE COURT: It will be received.

13 BY MR. MATHESON: (Continuing):

14 Q. Now, at the present time, you've discussed both
15 Amazon Fresh and Whole Foods and Amazon's delivery. At the
16 present time, you would agree that Amazon Fresh,
17 Whole Foods, and Amazon consumables business operate as
18 autonomous business units, for the most part; right?

19 A. What I would say is that we have three businesses that
20 have a shared customer, and the galvanizing force of that is
21 our Prime customer that we're very focused on serving, and
22 we have distinct value propositions and operate across a
23 range of channels.

24 So while we operate different businesses, we also have
25 a lot of interdependency, and we work together on many

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1 initiatives across all three teams.

2 Q. Now, it costs people a yearly fee to become Prime
3 members; right?

4 A. It does.

5 Q. And approximately how much is that yearly fee?

6 A. Gosh, I think it's like \$120 or \$130.

7 Q. And those individuals who can afford the \$120 or \$130
8 yearly fee, you describe them as the core customers for all
9 three businesses? I might have missed the word. How would
10 you describe those customers? Did you say "core"?

11 A. So --

12 Q. Did you say "prime"?

13 Sorry. I don't mean to cut you off.

14 A. That's okay.

15 I would just say two things. So one is -- I mean, that
16 is the standard pricing for Amazon Prime membership. We
17 also have several discounted memberships, both supporting
18 students, as well as we have an access membership that
19 allows customers who are paying with government programs to
20 have a discounted membership.

21 In terms of your direct question about how we think
22 about our customers is we know we have a lot of
23 cross-shopping from our Prime customers across all three of
24 the businesses. So we -- and we have a high penetration of
25 Prime customers shopping all three of the businesses, so it

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1 is -- a focus for us is on supporting our Prime customers.

2 Q. Okay. And when you're -- when each business unit is
3 focused on supporting its Prime customers, it's fair to say
4 that Amazon.com consumables business, Amazon Fresh, and
5 Whole Foods Market operate autonomously, although you have
6 inter-connectivity in certain programs and areas of the
7 business; right?

8 A. That's a fair statement.

9 Q. And there's different senior leadership for
10 Amazon Fresh, Whole Foods, and the Amazon consumables
11 business. Right?

12 A. In some cases, that is correct. But we have a
13 worldwide grocery store leadership team for our physical
14 stores as well as for our online business supported through
15 Amazon Fresh and Whole Foods, and we have a distinct
16 leadership team for our core Amazon core consumables team.

17 Q. So the senior leadership teams are largely distinct --
18 correct? -- for each line of business?

19 A. No. Not for Amazon Fresh and Whole Foods Market.

20 Q. Okay. Amazon Fresh and Whole Foods Market do not
21 jointly price-check; is that correct?

22 A. That is correct.

23 Q. Can I direct your attention, ma'am, to your deposition
24 transcript, line -- page 30, lines 22 to 24.

25 Now, in reference to Amazon Fresh and Whole Foods, at

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1 your deposition you were asked, "Does each entity have
2 separate senior management?"

3 You answered, "We do."

4 In what way did you understand my question regarding
5 the senior leadership teams of Amazon Fresh and Whole Foods
6 to be different than the senior management you referred to
7 in your deposition?

8 A. Well, the management, I would consider the level under.
9 We have one single leader as a -- a senior vice president
10 that oversees both our Whole Foods Market and our Amazon
11 Fresh business.

12 So when you were asking me, "Do we have a distinct
13 senior leader?" I think about who that person is. It is
14 not distinct.

15 Do we have distinct people running each of the
16 businesses? That is correct. And we also have a few shared
17 teams. I just spoke to, like, through our customer insights
18 team, our creative team, our real estate team.

19 Q. Pricing is done separately at Amazon Fresh and Whole
20 Foods Market; correct?

21 A. That is correct.

22 Q. Store-opening decisions are made independently by
23 Amazon Fresh and Whole Foods Market; correct?

24 A. That is generally correct.

25 But, again, we have one shared senior leader, and we

Oblisk - X

1 have one shared real estate team. So they're able to have
2 full purview of plans across both businesses.

3 MR. MATHESON: Thank you so much for your time.

4 I'll pass the witness.

5 THE WITNESS: Thank you.

6 MS. PFAFFENROTH: I have no redirect, Your Honor.

7 THE COURT: All right. There's no redirect, so we
8 are finished with your testimony.

9 Thank you.

10 THE WITNESS: Thank you.

11 THE COURT: We're at 10:30. I don't know if this
12 is a good time or if you want to go ahead because we had --
13 we didn't say this on the record earlier, but there had been
14 a request to go to 5:15 today. So I don't know how you want
15 to optimize the time.

16 MS. PFAFFENROTH: I'm happy to call our next
17 witness, Your Honor. I would estimate it would be maybe a
18 half an hour on direct.

19 THE COURT: It's really up to everyone. I'm
20 flexible.

21 MS. PFAFFENROTH: Oh, okay. We're also happy to
22 take a break now.

23 THE COURT: We're going to take a break. I
24 understand. I'm trying to read the tea leaves. All right.

25 (Recess taken.)

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1 DEPUTY COURTROOM CLERK: All rise.

2 THE COURT: Please be seated.

3 MS. PFAFFENROTH: Thank you, Your Honor.

4 Defendants call Marc Lieberman from Walmart.

5 THE COURT: All right. So we have you on the
6 screen, Mr. Lieberman.

7 THE WITNESS: Hello.

8 THE COURT: Hello.

9 And we'll swear him in.

10 DEPUTY COURTROOM CLERK: Please raise your right
11 hand.

12
13 MARC LIEBERMAN,
14 called as a witness in behalf of the Defendants, being first
15 duly sworn, is examined and testified as follows:

16
17 THE WITNESS: I do.

18 DEPUTY COURTROOM CLERK: Thank you.

19 Please state and spell your first and last name for the
20 record.

21 THE WITNESS: Lieberman, L-i-e-b-e-r-m-a-n.

22 THE COURT: And you cut off when you were spelling
23 your first name. I think we know it, but would you spell it
24 again?

25 THE WITNESS: Sure. M-a-r-c.

Lieberman - D

1 THE COURT: All right. Thank you.

2 MS. PFAFFENROTH: Your Honor, may we approach with
3 binders?

4 THE COURT: Yes.

5

6 DIRECT EXAMINATION

7 BY MS. PFAFFENROTH:

8 Q. Good morning, Mr. Lieberman.

9 A. Good morning.

10 Q. For whom do you work?

11 A. Walmart, United States.

12 Q. And what's your current position with Walmart?

13 A. Sure. I'm the first -- the vice president of
14 merchandising operations. I have responsibility for layout
15 and design, office facilities, retail facilities in the
16 United States.

17 Q. And how long have you been with Walmart?

18 A. Just over 31 years.

19 Q. And could you just briefly for the Court explain, at a
20 high level, sort of the positions that you've held
21 throughout your time at Walmart?

22 A. Sure. I've done many jobs throughout my career.

23 Starting in stores, store operations, and merchandising,
24 operations, real estate, real estate strategy, through --
25 back to merchandising, marketing, and then this latest

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1 position.

2 Q. Okay. Great. Just for background, how many locations
3 does Walmart currently have in the U.S., approximately, for
4 its different formats?

5 A. Sure. For our Supercenters, it's roughly 3,600 units.
6 For our Neighborhood Markets, I believe it's 695, give or
7 take one or two, and then our Division 1, our legacy
8 discount stores, approximately 350 --

9 Q. Great.

10 And from the perspective of sales, is Walmart the
11 biggest grocery retailer in the U.S.?

12 A. I believe -- I believe so.

13 Q. And does Walmart have plan to -- plans to open new
14 stores over, say, the next five years?

15 A. Yes, we do.

16 Q. And have you publicly announced an amount, a number of
17 stores that you're planning to open?

18 A. Yes. Earlier this year, we have announced that our
19 goal is to open 150 new retail locations over a period of
20 five years.

21 Q. And does Walmart anticipate that its grocery sales will
22 continue to increase over time?

23 A. That would be our desire, as well as other categories
24 throughout the store and --

25 Q. And -- oh, apologies for cutting you off.

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1 And who does Walmart view as competitors to Walmart,
2 specifically in the sale of grocery products?

3 A. Generally, we would view anyone who offers similar
4 products or services that we would offer as a competitor in
5 the United States.

6 Q. And would that include stores with the defendants'
7 banners? So Kroger and Albertsons stores?

8 A. Yes, it would.

9 Q. And would it include stores like Aldi and Lidl?

10 A. Yes, it would.

11 Q. And would it include club stores, such as Costco and
12 BJ's?

13 A. Yes, it would.

14 Q. And would it include stores such as Whole Foods or
15 Sprouts?

16 A. Yes, it would.

17 Q. And would it include stores such as H Mart, 99 Ranch,
18 Fiesta Mart, Cardenas, what are sometimes called ethnic
19 category stores?

20 A. Yes, it would.

21 Q. And does Walmart view Amazon.com as a competitor in
22 selling grocery products?

23 A. Yes, we do.

24 Q. So I would like to -- I'll ask you to turn in your
25 binder, and I'll ask Mr. Rennick in the courtroom to pull

Lieberman - D

1 up, but on the private screens only, a document that is
2 DX1314.

3 And just let me know when you have it, Mr. Lieberman.

4 A. Okay. I have that page open.

5 Q. Okay. Great.

6 And this document has been designated as confidential,
7 so I'm not going to say the title and the date out loud for
8 those reasons, but at a high level, is this a relatively
9 recent share update relating to food and consumables?

10 A. This document is dated --

11 Q. Yeah, I think your counsel would prefer you not to say
12 the date out loud. So if you -- is it correct that it is a
13 recently -- a relatively recent share update relating to
14 food and consumables?

15 A. This document is more than a year old.

16 Q. Oh, all right. Is it -- is it as of the date listed on
17 the front of the document? Shall we do that? Is that
18 accurate?

19 A. Yes.

20 Q. Okay. And is this a document that was regularly
21 prepared in the ordinary course of business?

22 A. (No audible response.)

23 Q. I'm sorry, you froze for a minute.

24 Could you hear me?

25 A. Yes, this document is regularly prepared.

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1 Q. Okay. And you're familiar with this document?

2 A. Yes, I am.

3 Q. All right.

4 MS. PFAFFENROTH: I'd move to admit DX1340 into
5 evidence.

6 MS. HOUGH: No objection.

7 THE COURT: It will be received.

8 MS. PFAFFENROTH: Thank you.

9 BY MS. PFAFFENROTH: (Continuing):

10 Q. And does Walmart track its market share in food and
11 consumables in the ordinary course of business?

12 A. Yes, we do.

13 Q. And could you turn to slide 8 of this document.

14 A. Yes, I can see slide 8.

15 Q. Okay. And for purposes of this, again, I'm going to
16 describe, rather than say details on the public record, but
17 could you take a look at -- there is to the -- on the
18 right-hand side of the document, there are a number of
19 bullet points, but to the left of that there is a sort of a
20 rectangular shape.

21 Do you see that?

22 A. I do.

23 Q. And I'm going to ask you specifically about the top
24 half of that relating to food.

25 A. You froze.

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1 Q. Do you see that?

2 MS. PFAFFENROTH: Oh.

3 THE COURT: Can you still hear us, Mr. Lieberman?

4 THE WITNESS: I can. The -- the connection may
5 have frozen.

6 THE COURT: We can't -- now we can see you. All
7 right.

8 THE WITNESS: Thank you.

9 MS. PFAFFENROTH: Thank you.

10 BY MS. PFAFFENROTH: (Continuing):

11 Q. Mr. Lieberman, do you have that portion of the slide?

12 A. I do.

13 Q. Okay. Great.

14 And without saying any names or numbers out loud, does
15 that list of retailers there, does that represent top
16 competitors for Walmart for this time frame?

17 A. Yes. This -- this report is highlighting several of
18 our top competitors.

19 Q. Okay. And I'm counting down from the top. So the
20 third -- the third down there is a category rather than a
21 specific retailer.

22 Do you see that?

23 A. Yes, I do.

24 Q. Okay. I'm going to ask you to turn for one minute to
25 your deposition testimony, which is at the tab at the very

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1 back of your binder, but keep that page, because we're going
2 to come back to it.

3 And I'm going to ask you to turn to -- I'm going to ask
4 you to turn to page 38 of your deposition transcript.

5 MS. PFAFFENROTH: And, Mr. Rennick, can you put
6 that up but only on the private screen here?

7 MR. RENNICK: Can you remind me of the exhibit?

8 MS. PFAFFENROTH: Oh, I'm sorry. The exhibit
9 number is DX2530, and it's page 38.

10 THE WITNESS: Okay, I can see that.

11 BY MS. PFAFFENROTH: (Continuing):

12 Q. Okay. Great.

13 Could you just read to yourself lines 2 through 5 on
14 that page?

15 A. Yes.

16 Q. And do you agree that that is accurate testimony?

17 A. Yes, it is.

18 Q. Okay. Great.

19 MS. PFAFFENROTH: I would move to admit from
20 DX1340, the deposition transcript, page 38, lines 2 through
21 5 into evidence.

22 MS. HOUGH: No objection.

23 THE COURT: It will be received.

24 MS. PFAFFENROTH: Thank you.

25 ///

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1 BY MS. PFAFFENROTH: (Continuing):

2 Q. You can set your deposition transcript aside, and I'll
3 just ask you to go back to that slide 8 that we were taking
4 a look at a minute ago in DX1340.

5 A. And it was slide 8.

6 Q. Slide 8, yes.

7 A. Okay. Yes.

8 Q. Okay. Great. Just while we're looking at the same box
9 as before, so just walking down that list, you would
10 consider the second -- the second retailer listed to be a
11 competitor, a top competitor to Walmart?

12 A. Yes, that's correct.

13 Q. And jumping down the fourth from the top, you would
14 consider that retailer to be a competitor of Walmart?

15 A. Yes, that's correct?

16 Q. And the same from the fifth from the top.

17 A. Yes, that's correct.

18 Q. And the sixth?

19 A. Yes.

20 Q. And the seventh?

21 A. Yes, that's correct.

22 Q. Okay. Terrific.

23 Could we turn to slide 19 in the same document.

24 Again, without saying any of the details on the public
25 record, this is -- is it correct that this slide is

Lieberman - D

1 discussing share of wallet or SOW?

2 A. Yes, that's correct.

3 Q. Okay. And does this slide for this time frame
4 accurately reflect share of wallet in various regions? It's
5 showing various regions in the U.S.

6 A. Yes, that's correct.

7 Q. And without any specificity, there's a portion of the
8 country that would include Portland, that's in dark teal?

9 A. Yes.

10 Q. And I'm looking at the box that's associated with that
11 portion of the map.

12 And, once again, with respect to descending percentages
13 of share of wallet, each of those retailers listed there,
14 going down the line in that box, those would all be
15 considered competitors to Walmart; correct?

16 A. Yes, that's correct.

17 Q. And the share of wallet percentages for the ones that
18 are listed second, third, and fourth in the box are fairly
19 similar. Is that accurate?

20 A. That is correct.

21 Q. Okay. Great.

22 We can -- you can set that one aside.

23 MS. PFAFFENROTH: We'll take that document down.

24 BY MS. PFAFFENROTH: (Continuing):

25 Q. Mr. Lieberman, does Walmart carry private label

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1 products?

2 A. Yes, we do.

3 Q. And does that include the Great Value brand?

4 A. That is one of our private labels.

5 Q. And did Walmart recently launch a new private label
6 brand called bettergoods?

7 A. That's correct.

8 Q. And why did Walmart launch bettergoods as a new private
9 label brand?

10 A. The new private label bettergoods was introduced as a
11 gap in our private label portfolio that would help us to
12 highlight products that are considered higher quality
13 culinary experiences, better-for-you items, and that's
14 the -- that's the reason we created that private label.

15 Q. And does Walmart view the launch of the bettergoods
16 private label as an opportunity to add -- to offer
17 additional customer choice in its private label range?

18 A. Yes, it would.

19 Q. And are you familiar with the term Every Day Low Price
20 or EDLP?

21 A. Yes, I am.

22 Q. And does Walmart have an EDLP or Every Day Low Price
23 strategy?

24 A. We do have an Every Day Low Price strategy, and it's
25 really a core -- core to our philosophy and culture.

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1 Q. And so how would you describe Walmart's core philosophy
2 and its EDLP strategy?

3 A. In the simplest terms, we want to ensure customer
4 trust. We want price stability. We want channel parity.
5 We want the customers to see the same prices frequently.

6 We don't want to respond to high-low promotions, things
7 of that nature, and we don't want to restrict sales and only
8 offer prices to certain customers. We want them to be
9 available for all customers, and that's the foundation of
10 our Every Day Low Price culture.

11 Q. And that -- is that the strategy that Walmart follows
12 with respect to pricing its grocery products?

13 A. Yes, we do.

14 Q. And you said it was -- you characterized it as a
15 philosophy. Is this a longstanding strategy for Walmart?

16 A. Yes, it is.

17 Q. And are you also familiar with the term Every Day Low
18 Cost as it relates to Walmart?

19 A. Yes, I am.

20 Q. And to what does that refer?

21 A. Every Day Low Cost is instilled in every Walmart
22 associate to look for ways to take out any unnecessary costs
23 of our business and be able to then enable Every Day Low
24 Prices by passing that cost-saving or cost-reduction on to
25 the consumer to offer the lowest prices possible.

Lieberman - D

1 Q. So -- so based on the answer that you just gave, so the
2 Every Day Low Cost strategy, is it correct to say it enables
3 Walmart's Every Day Low Price strategy?

4 A. That's correct.

5 MS. PFAFFENROTH: Okay. I'd like to pull up
6 another document. This is, again, on the private screens
7 only. This is DX2884.

8 BY MS. PFAFFENROTH: (Continuing):

9 Q. And just let me know when you have it, Mr. Lieberman.

10 A. Okay. I do have that document.

11 Q. Okay. And this document is a letter from Walmart's
12 counsel to the Federal Trade Commission in response to a
13 request relating to this -- the investigation of this
14 transaction; is that correct?

15 A. That's correct.

16 Q. And are you familiar with this document?

17 A. Yes, I am.

18 Q. Okay. And it relates to Walmart's pricing strategy?

19 A. Yes, it does.

20 MS. PFAFFENROTH: Okay. I'd move into evidence
21 DX2884.

22 MS. HOUGH: No objection.

23 THE COURT: It will be received.

24 MS. PFAFFENROTH: Thank you.

25 ///

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1 BY MS. PFAFFENROTH: (Continuing):

2 Q. For confidentiality purposes, I'm going to direct you
3 to specific paragraphs. I'm going to ask you to read them,
4 but only to yourself, not into the public record, given the
5 confidential nature of the material contained within.

6 MS. PFAFFENROTH: I'll ask Mr. Rennick to
7 highlight, on the nonpublic screen, again, the same
8 paragraphs that you're taking a look at, for the Court.

9 BY MS. PFAFFENROTH: (Continuing):

10 Q. So could you start by looking at the bottom of the
11 first page, the final paragraph that carries over onto the
12 next page, and could you read the first two sentences of
13 that paragraph to yourself?

14 Well, the whole paragraph to yourself.

15 That would be great.

16 A. Yes, I've read that.

17 Q. Does that paragraph accurately reflect Walmart's
18 pricing strategy?

19 A. Yes, it does.

20 Q. And moving on to the second page, and I'll direct you
21 to the first paragraph below the bolded text, could you read
22 that paragraph? Again, just to yourself.

23 A. Okay.

24 Q. And does that paragraph accurately reflect Walmart's
25 pricing strategy as it relates to competitors?

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1 A. Yes, it does.

2 Q. And looking specifically at the final sentence,
3 without -- again, of that same paragraph, but without saying
4 any aspect of it out loud, does that accurately reflect
5 Walmart's goals with respect to price spreads between
6 Walmart and its competition?

7 A. Generally, it's accurate, yes.

8 Q. Okay. Great.

9 And then I'm going to ask you to read the next
10 paragraph -- the next two paragraphs to yourself as well.

11 A. Okay.

12 Q. Okay. And, once again, do those paragraphs explain how
13 Walmart measures competitive pricing and generally provide
14 more detail about Walmart's pricing strategy relative to the
15 competition?

16 A. Yes, it does.

17 Q. Okay. Great.

18 You can set that one aside.

19 MS. PFAFFENROTH: Could we pull up DX156? Again,
20 this is on the private screens only.

21 BY MS. PFAFFENROTH: (Continuing):

22 Q. And, once again, I'm not going to read the title of the
23 document, but this is a strategy overview.

24 Do you recognize this document?

25 A. Yes, I do.

Lieberman - D

1 Q. And is this a strategy overview that was prepared in
2 the ordinary course of business?

3 A. Yes, it is.

4 MS. PFAFFENROTH: I'd like to introduce --
5 admit -- move to admit DX156 into evidence.

6 MS. HOUGH: No objection.

7 THE COURT: It will be received.

8 BY MS. PFAFFENROTH: (Continuing):

9 Q. I'd like to ask you to turn to the slide that ends in
10 the Bates number -242.

11 A. Okay.

12 Q. And, specifically -- and, again, this is to -- to read
13 to yourself, not on the public record, but can you take a
14 look at the first box? There's, like, a price tag in the
15 corner of it and a little circle, but the box that's on the
16 upper left.

17 A. Yes.

18 Q. And there are three bullet points in that -- in that
19 box.

20 Do you see those?

21 A. Yes, I do.

22 Q. And do you agree that that box articulates Walmart's
23 strategy with respect to its pricing?

24 A. It's one of the elements; but, yes, that's accurate.

25 Q. Okay. Great.

Lieberman - D

1 And could you turn to the next slide, which ends in
2 -243?

3 A. Okay.

4 Q. Again, I'll ask you not to read anything into the
5 record, but at a high level, does this also relate to
6 pricing strategy?

7 A. Yes, it does.

8 Q. And I direct you to the -- the yellow box on the right.
9 It's in the middle of three boxes?

10 A. Yes.

11 Q. Okay. And does that accurately reflect Walmart's
12 strategy with respect to the specific price point of
13 products that are described there?

14 A. Yes, it does.

15 Q. And moving down one, to the final box that's on the
16 lower right, and does that accurately reflect -- oh,
17 apologies.

18 Do you have it?

19 A. Yes, I do.

20 Q. Does that accurately reflect Walmart's strategy with
21 respect to the type of retailer that's listed in bold blue
22 type on that box?

23 A. Yes, it does.

24 Q. Okay. Great.

25 MS. PFAFFENROTH: We can take that one down.

Lieberman - D

1 BY MS. PFAFFENROTH: (Continuing):

2 Q. I'd like to ask just a couple of questions about
3 Walmart's trade areas.

4 To your understanding, what is a trade area?

5 A. Sure. My understanding of a trade area is a
6 geographical boundary that is defining where the majority of
7 customers originate that would shop a brick-and-mortar
8 store.

9 Q. And is a trade area a circle?

10 A. It is not a circle, not a square. It's -- it's a --
11 may depend on roads, geographical features, et cetera, but
12 it's different in every case.

13 Q. Just on a high level, is the trade area for Walmart
14 Supercenter typically larger than that of a Walmart
15 Neighborhood Market?

16 A. I think, generally, that's true.

17 Q. Okay. Switching gears, just a couple of questions
18 about hiring.

19 When Walmart hires employees to work in a Walmart
20 Supercenter, does the company -- does Walmart hire
21 candidates specifically for the grocery department of the
22 Supercenter?

23 MS. HOUGH: Your Honor, I am going to object here
24 on lack of foundation.

25 Mr. Lieberman did not testify that he had any

Lieberman - D

1 involvement in hiring decisions.

2 MS. PFAFFENROTH: Your Honor, Mr. Lieberman did
3 testify at his deposition as a corporate designee, and he
4 answered questions regarding to the hiring practices that
5 I'm going to ask him about here. I'm not going outside of
6 the scope of what he testified to as a corporate
7 representative.

8 MS. HOUGH: And, respectfully, he's testifying
9 today in his personal capacity, and so when he testified
10 that he didn't have personal knowledge of hiring decisions,
11 I would submit that he has a lack of foundation to testify
12 on that topic.

13 THE COURT: Overruled.

14 MS. PFAFFENROTH: Thank you, Your Honor.

15 BY MS. PFAFFENROTH: (Continuing):

16 Q. I'm just going to say the question again,
17 Mr. Lieberman.

18 So when Walmart hires employees to work in a
19 Supercenter, does Walmart hire candidates to work
20 specifically in the grocery department?

21 A. We would -- we have a team environment in the stores
22 where associates can work in any area of the store. It's a
23 preferred but not required prerequisite for a job.

24 Q. But does Walmart require associates in the grocery
25 department to have prior retail experience or grocery

Lieberman - D/X

1 experience?

2 A. Not necessarily.

3 Q. And just turning back to pricing briefly, you testified
4 regarding Walmart's EDLP, or Every Day Low Price, strategy.

5 Does Walmart have any plans to change that longstanding
6 strategy?

7 A. Not that I'm aware of. It's the foundation of our
8 culture, and I'm not aware of any plans to change that any
9 time.

10 Q. And would the closing of the Kroger-Albertsons merger
11 affect Walmart's pricing strategy?

12 A. It would not.

13 MS. PFAFFENROTH: Thank you, Your Honor. I pass
14 the witness.

15 THE COURT: You may inquire.

16

17 CROSS-EXAMINATION

18 BY MS. HOUGH:

19 Q. Good morning, Mr. Lieberman. My name is Lily Hough.
20 We met earlier this summer at your deposition.

21 Thanks for joining us again today.

22 You testified previously about different store formats
23 that Walmart operates. So I wanted to circle back and
24 clarify that for a moment.

25 You're familiar with the concept of a traditional

Lieberman - X

1 supermarket; right?

2 A. Yes.

3 Q. Does Kroger, for example, operate traditional
4 supermarkets?

5 A. Yes, they do.

6 Q. And Walmart operates some traditional supermarkets as
7 well; right?

8 A. Yes. That's -- that's true.

9 Q. That's the Walmart Neighborhood Market format?

10 A. Yes, that's right.

11 Q. And in addition to your Neighborhood Market stores,
12 Walmart also operates Supercenters; correct?

13 A. That's correct.

14 Q. Now, I understand Walmart operates additional formats.
15 You mentioned the legacy discount stores and there's also
16 club stores. I'll come back to those. But for now, when I
17 use the term "Walmart stores," I'm going to just be
18 referring to your supermarkets and Supercenters. Okay?

19 A. Okay.

20 Q. Now, I have some questions about the assortment Walmart
21 stores offer for grocery shoppers.

22 Walmart stores carry a broad assortment of both
23 national and private label brands; right?

24 A. That's correct.

25 Q. What are some examples of popular national brands

Lieberman - X

1 Walmart carries?

2 A. It could be -- we -- in the Supercenter we have over
3 100,000 SKUs. Maybe you could get me some to confirm.

4 Q. For example, Kraft, Doritos, Heinz, are those examples
5 of national brands?

6 A. Sure. Yes, those would be -- those would be good
7 examples.

8 Q. And you mentioned Walmart's Great Value brand. Is that
9 one of Walmart's private label options?

10 A. Yes. It's one in our private label portfolio.

11 Q. Now, having national brands helps Walmart compete
12 because customers can be very brand loyal to certain
13 categories; is that right?

14 A. That's correct.

15 Q. So, for example, in the Macaroni & Cheese category,
16 many customers are looking specifically for the Kraft brand;
17 right?

18 A. I would assume so.

19 Q. And in the sports drink category, many customers are
20 looking for Gatorade brand; right?

21 A. I think that's right.

22 Q. On the other hand, having private label brands, like
23 Great Value, allows Walmart to offer products at lower price
24 points than national brands; right?

25 A. That's generally right.

Lieberman - X

1 Q. So would you agree that having both national and
2 private brands helps Walmart offer different price points to
3 appeal to customers of different incomes?

4 A. I believe that's right. I think we would -- we -- we
5 serve a wide swath of America, and so we have customers at
6 high and low incomes that are very brand loyal in certain
7 categories and customers that are very value-oriented at all
8 income levels.

9 Q. Now, grocery shoppers also rely on Walmart to provide
10 options and package sizes; right?

11 A. That's true.

12 Q. For instance, there are meals or recipes that call for
13 different amounts of different ingredients, and that's a
14 need Walmart wants to serve; right?

15 A. Now, we would offer different sizes based on a customer
16 shopping occasion. A good example is an empty nester may
17 want a smaller pack size, where a growing family may want a
18 larger pack size.

19 Q. So you would agree that customers have different pack
20 size needs, depending on their circumstances; right?

21 A. I would agree with that.

22 Q. Would you also agree that by providing a variety of
23 brand and package sizes, Walmart can serve a customer's
24 various needs in one shopping visit?

25 A. I would agree with that.

Lieberman - X

1 Q. Now I want to ask a little more about how Walmart
2 thinks about the different needs you've just identified.

3 Do you recall at your deposition using the term "need
4 state"?

5 A. I do.

6 Q. And that term reflects what the customer expects to
7 find at the store they've chosen to travel to; right?

8 A. That's correct.

9 Q. Walmart performs research to understand your customer's
10 need states and trip types; right?

11 A. We measure the basket size to try to assume what the
12 need state is per customer.

13 Q. Now I want to break down the kinds of need states
14 you've identified at Walmart.

15 You've used the term "fill-in trip"; right?

16 A. That's correct.

17 Q. And a fill-in trip reflects a certain kind of need
18 state; is that right?

19 A. That's correct.

20 Q. So a customer is on her way home. She realizes she's
21 missing a few things for dinner, maybe milk to drink with
22 dinner, and she stops at the store, quickly grabs a few
23 items. Is that an example of a fill-in trip?

24 A. It may be a quick trip, depending on how many items, or
25 a fill-in trip.

Lieberman - X

1 Q. What's the difference between a quick trip in a fill-in
2 trip?

3 A. We would set a dollar threshold to try to assume -- a
4 quick trip may be limited to just a very few amount of
5 items. A fill-in trip tends to be a little bit larger.

6 Q. Do you agree, though, that there's an alternative to a
7 fill-in trip, and that's a fuller, more pre-planned, more
8 routine shop?

9 A. Sure. We would call that a routine visit or a stock-up
10 mission.

11 Q. Now, the kind of trip the shopper has in mind, or the
12 needs state, will determine what kind of store the shopper
13 will travel to; right?

14 A. That's correct.

15 Q. For example, if I have a list of ingredients I need to
16 cook a meal, I'm looking for a store that can satisfy that
17 need; right?

18 A. That's correct.

19 Q. A traditional supermarket, like Walmart Neighborhood
20 Market, could satisfy that need; right?

21 A. Yes, that's right.

22 Q. And a Walmart Supercenter could also satisfy that need;
23 right?

24 A. Yes, that's correct.

25 Q. And that's considered a more routine visit; right?

Lieberman - X

1 A. It would be -- we would classify if it was a routine
2 visit or fill-in or stock-up based on the dollar threshold
3 of what -- how many items are in a basket.

4 Q. If I have a long list of ingredients, I want to cook a
5 big meal for my family, that may be more of a routine visit;
6 is that right?

7 A. Routine visits would be more, I would think, things
8 that a customer would buy regularly; maybe, perhaps, weekly.
9 A stock-up trip would be a large, full basket.

10 Q. So can I refer to the routine visit as a weekly shop?
11 Is that fair?

12 A. Sure. That's fair.

13 Q. Now, not all stores that sell groceries satisfy that
14 need for a weekly shop; right?

15 A. I think that's generally true.

16 Q. So let me ask about some other formats.

17 And in your role as vice president of merchandising and
18 operations, you have some understanding of the layout, the
19 assortment, the offering of other store formats; right?

20 A. Generally.

21 Q. You're familiar with dollar stores?

22 A. I am generally familiar with the channel.

23 Q. Dollar stores offer less SKUs, or stock keeping units,
24 than Walmart stores; right?

25 A. That's correct.

Lieberman - X

1 Q. Dollar stores also tend to have much more limited shelf
2 space and a significantly smaller assortment of grocery
3 products than Walmart stores; correct?

4 A. That's correct.

5 Q. And you agree that dollar stores generally do not offer
6 the pre-planned, routine or weekly shop that we just
7 discussed; right?

8 A. That's correct.

9 Q. In fact, a dollar store might offer such a different
10 customer experience than a Walmart store that it makes sense
11 for a customer to make trips at both stores: a Walmart and a
12 dollar store in the same day; right?

13 A. That's correct.

14 Q. Because while customers may be able to perform a quick
15 fill-in trip at a dollar store, most would also need to
16 visit a supermarket or Supercenter to complete the rest of
17 their shopping list; correct?

18 A. That's my assumption, yes.

19 Q. At your deposition, you also referred to some other
20 no-frills limited assortment stores.

21 Do you recall that format?

22 A. Yes, I do.

23 Q. I believe you used Aldi as an example of a no-frills
24 limited assortment store. Is that fair to say?

25 A. Yes. We would consider it a hard discount or channel.

Lieberman - X

1 Q. So these limited assortment stores, like Aldi, have a
2 smaller store size than Walmart stores; right?

3 A. That's correct.

4 Q. And a no-frills shopping experience means they've cut
5 services, like staff counters or associates throughout the
6 store to help you find items; is that right?

7 A. That's generally correct.

8 Q. And limited assortment stores, like Aldi, carry less
9 national brands than Walmart carries; correct?

10 A. I believe that to be true.

11 Q. My colleague asked you today about share of wallet
12 data.

13 That's related to cross-shopping; right?

14 A. That's correct.

15 Q. Do you recall testifying at your deposition about
16 cross-shopping? We used that term?

17 A. Yes, I do.

18 Q. And cross-shopping refers to customers spending a share
19 of their wallet or money across different store formats;
20 right?

21 A. That would be correct.

22 Q. And you've seen evidence of cross-shopping between
23 Walmart stores and dollar stores or limited assortment
24 stores; right?

25 A. Yes, that's true.

Lieberman - X

1 Q. In fact, your cross-shopping data shows customers
2 shopping those different formats in the same geographic
3 market in the same day; right?

4 A. That's often true, yes.

5 Q. And when you see cross-shopping between a Walmart and a
6 dollar-limited assortment store, you interpret that to mean
7 the customer who shops the dollar or limited assortment
8 store will then visit a supermarket or super -- Supercenter
9 to complete their shopping list; right?

10 A. That's true.

11 Q. So, in other words, the offering a customer finds at a
12 dollar store or a limited assortment store, is often
13 complementary to what the customer finds at a supermarket or
14 Supercenter; right?

15 A. That's true.

16 Q. Now I want to go back to the other formats that Walmart
17 operates: The legacy discount stores and then there's Sam's
18 Club stores; is that right?

19 A. Yes, that's true.

20 Q. Neither of those formats are traditional supermarkets;
21 right?

22 A. That would be -- that would be generally true.

23 Our Division 1 legacy stores have some food. They
24 don't have nearly the assortment that a Neighborhood Market
25 or Supercenter would have, generally.

Lieberman - X

1 Q. So you wouldn't classify the legacy discount stores as
2 traditional supermarkets, would you?

3 A. I would not.

4 Q. Now, in your role as vice president of merchandising
5 operations at Walmart, you don't have any responsibility for
6 merchandising at Sam's Club stores; correct?

7 THE WITNESS: That's correct.

8 MS. PFAFFENROTH: Objection, Your Honor. I didn't
9 ask any questions. This is out -- about Sam's Club,
10 specifically. This is outside of the scope of direct.

11 MS. HOUGH: I can ask a different question.

12 BY MS. HOUGH: (Continuing):

13 Q. Now, you testified --

14 THE COURT: Hold on. We'll strike the answer,
15 because he answered.

16 MS. HOUGH: Thank you.

17 BY MS. HOUGH: (Continuing):

18 Q. You testified about club stores today. Is Sam's Club a
19 club store?

20 A. Yes, it is.

21 Q. So you have some familiarity with the store's format
22 and business model; right?

23 A. Generally. Generally aware of the club channel, in
24 general.

25 Q. And the club channel is a distinct channel that your

Lieberman - X

1 industry recognizes separately from traditional
2 supermarkets; right?

3 A. I really don't have any knowledge of Sam's Club or the
4 club channel operations or how they're positioned.

5 Q. Well, you receive industry reports that separate out
6 club stores from the stores that you would consider
7 traditional supermarkets; right?

8 A. Yes, that's correct.

9 Q. Why is it that Walmart's Vice President of
10 Merchandising Operations oversees merchandising for Walmart
11 Supercenters and supermarkets but not Sam's Club stores?

12 A. My responsibility -- the boundaries of my
13 responsibility are the Walmart United States business, but
14 not -- not anything to do with a club or Sam's Club channel.

15 Q. And why is that?

16 A. They're -- we're two separate operations. We have two
17 separate offices. There's very -- there's very little, if
18 any, crossover between the two.

19 Q. In fact --

20 A. They operate --

21 Q. I'm sorry. Let me have you complete that thought?

22 A. We operate almost as two separate segments.

23 Q. You consider club stores to be an entirely different
24 business model than Walmart Supercenters and supermarkets;
25 correct?

Lieberman - X

1 A. Yes. Driven by a membership fee and a narrow
2 assortment and larger pack sizes.

3 Q. Now I have a few questions about how Walmart competes
4 on price.

5 Walmart competes to provide customers with the best
6 value; right?

7 A. That would be our goal.

8 Q. So Walmart will compare its prices to competitors';
9 right?

10 A. Yes. That would be accurate.

11 Q. And doing those comparisons, Walmart is focusing on
12 retailers that provide comparable products that match what's
13 on Walmart's shelves; right?

14 A. That's generally right.

15 Q. So looking at a club store, there are very few, if any,
16 like items that match Walmart's products; right?

17 A. In the same -- the same size pack, the same quantity,
18 those type of things, it would be difficult to compare.

19 Q. And when you say "difficult to compare," you mean it's
20 difficult to compare the value of items from a Walmart store
21 to a Sam's Club store; right?

22 A. That would be true, as well as it would be difficult to
23 look at perhaps the dollar channel and different pack sizes
24 there as well.

25 If it's not a like-for-like, same-item/same-size, it's

Lieberman - X

1 difficult to compare.

2 Q. So you testified today that Walmart's pricing strategy
3 is, to some extent, concerned about ensuring that customers
4 see the same prices at Walmart store they're likely to
5 visit; right?

6 A. Right. Through the -- through our discount store,
7 Neighborhood Market, and Supercenters, that's correct.

8 Q. But for the reasons you've explained, Walmart generally
9 isn't concerned about ensuring that customers see the same
10 prices at Walmart and Sam's Club stores; right?

11 A. That's correct.

12 Q. And, moreover, Walmart generally isn't concerned about
13 ensuring that customers see similar prices at Walmart and
14 dollar stores; right?

15 A. Could you -- you broke up just for a second. Could you
16 repeat that?

17 Q. That's okay. I can move on.

18 A. Okay.

19 Q. Now, you testified about Walmart's Every Day Low Cost
20 strategy which involves some scale and density, and you also
21 testified about Walmart's plans to open stores. I just want
22 to follow up on that briefly.

23 Are you aware that last year Walmart decided to close
24 all of its locations within the city of Portland?

25 A. I believe that's true within the city limits, and I

Lieberman - X

1 believe we had a handful of stores, two or three stores.

2 Q. So you're generally aware of the fact that Walmart
3 sometimes needs to make tough decisions to close stores that
4 don't meet financial expectations; is that right?

5 A. That's true.

6 Q. So you would agree, then, that even with Walmart's size
7 and scale, it's still not immune from having to make those
8 tough decisions to close stores; right?

9 A. That's correct.

10 Q. My colleague also showed you a list of competitors that
11 you testified Walmart competes with.

12 Do you recall that?

13 A. Yes, I do.

14 Q. And you would agree that you were taking a broad view
15 of Walmart's competition there; right?

16 A. I believe there was a list presented with five or six,
17 and I believe that would be viewed as several of our top
18 competitors but not an exhaustive list of all competitors we
19 would consider.

20 Q. For example, you described a competitor as anyone who
21 offers similar products or services that we would offer.
22 And I'm paraphrasing there, but does that sound right to
23 you?

24 A. That's correct.

25 Q. So that would include entities, like, for example,

Lieberman - X

1 Dick's Sporting Goods. They sell mostly non-food items, but
2 they may have some limited food offerings that overlap with
3 Walmart; right?

4 A. Sure. I think our focus would be more on like-for-like
5 items than the sporting and general merchandise categories
6 in that example.

7 Q. But when you look at who Walmart's competitors are
8 generally, that also includes entities that sell apparel,
9 housewares, toys, among other departments; right?

10 A. That's correct.

11 Q. You also testified about the growth of Walmart's
12 digital business. So I have a few questions on that topic.

13 Now, it's your understanding, based on customer
14 feedback, that there are still customers that prefer to shop
15 in brick-and-mortar stores only; correct?

16 A. That's correct.

17 Q. For one thing, shopping in stores can be a social
18 activity; right?

19 A. That's absolutely true.

20 Q. And customers enjoy the experience perusing the store
21 to find out what's available; right?

22 A. That's correct.

23 Q. Customers can't inspect their produce online before
24 purchasing it; right?

25 A. That's correct.

Lieberman - X

1 Q. And customers shopping online typically place their
2 orders several hours in advance, and they need to schedule
3 an available time slot to receive their order; correct?

4 A. That's correct.

5 Q. And, in fact, some online deliveries arrive the next
6 day or in two- or three-plus days; right?

7 A. At the customer's choice, that would be correct.

8 Q. And without some additional subscription or membership,
9 there are typically additional fees associated with shopping
10 for groceries online; right?

11 A. That is correct.

12 Q. And the subscription or membership would also charge
13 fees; right?

14 A. Are you referring to, in our case, Walmart+?

15 Q. Is that an example of a subscription that one might use
16 to shop Walmart -- Walmart's groceries online?

17 A. It's a -- it's a package with an annual fee that would
18 enable frequent purchases without the additional fees on
19 each transaction.

20 Q. But that subscription also requires --

21 I'm sorry, Mr. Lieberman. Could you finish your last
22 sentence? I think you cut out of the audio there.

23 A. Sure. As well as other -- as well as other benefits
24 that go along with that Walmart+ membership.

25 Q. That membership also charges a fee, though; correct?

Lieberman - X

1 A. That's correct.

2 Q. So for the customer who does not want to plan in
3 advance or pay additional fees and has an immediate need,
4 that customer needs to visit a brick-and-mortar store;
5 correct?

6 A. Yes. With one exception is we do have a fulfillment
7 option for customers, with yet an additional fee, where they
8 could receive merchandise under two hours, which is a
9 growing piece of our business.

10 Q. Walmart has observed that the popularity of online
11 shopping actually varies considerably, depending on the
12 category; right?

13 A. That's correct.

14 Q. For example, bakery is a category where there's
15 significantly less purchased online versus in the store;
16 right?

17 A. That's correct.

18 Q. Why do you think bakery is a less popular category to
19 shop online?

20 A. Bakery seems to be very impulse-driven.

21 Outside of a destination or preplanned of -- going to a
22 store specifically to purchase a cake, for example, for a
23 birthday, the impulse of walking by a compelling display,
24 looking for something that catches a customer's eye, it's
25 much more impulse-driven.

Lieberman - X

1 Q. You also testified earlier that Walmart strives to have
2 the same prices in-store and online, but to be clear,
3 Walmart does not in every single case achieve that price
4 parity today; correct?

5 A. Yes. The vast majority of cases, we would -- we would
6 strive to have parity across all channels.

7 Q. My colleague asked a few questions about Walmart's
8 competition for labor, so I just wanted to follow up briefly
9 on those.

10 To be clear, as vice president of merchandising
11 operations, you do not have any responsibilities for hiring
12 workers at Walmart stores; correct?

13 A. Limited. Limited to my area of responsibility within
14 the corporate office, where I would have that
15 responsibility, but not outside of that responsibility.

16 Q. So you do not have responsibilities for hiring workers
17 in the actual retail stores; correct? The store associates?

18 A. That's correct.

19 Q. You don't have any role in setting Walmart's labor
20 strategy; correct?

21 A. That's correct.

22 Q. Or a union strategy; correct?

23 A. That's correct.

24 Q. You've never worked in human resources or labor
25 relations; correct?

Lieberman - X

1 A. I have not.

2 Q. You also testified that you consider Amazon.com to be a
3 competitor. So I wanted to briefly follow up on that.

4 For food and beverages or grocery, Amazon considers --
5 I'm sorry. Let me start the question over.

6 For food and beverages or grocery, Walmart considers
7 Amazon.com to be a competitor more so with respect to
8 nonperishable products; right?

9 A. That's correct.

10 Q. Because perishable items are very hard to fulfill as
11 far as an ecommerce operation goes; right?

12 A. That's correct. Unless there's a brick-and-mortar
13 location or a means to deliver from a dispense point to a
14 customer's home in a very short period of time, due to the
15 nature of refrigeration and frozen goods and things like
16 that.

17 Q. In fact, Walmart fulfills online grocery orders for
18 perishable foods from its stores, not warehouses; correct?

19 A. That's correct.

20 Q. And that's because, as you've described, the
21 infrastructure to fulfill in order for perishable foods is
22 different and not necessarily compatible with the
23 infrastructure to fulfill nonperishable items; right?

24 A. That's correct.

25 Q. And Walmart doesn't have that infrastructure to fulfill

Lieberman - X

1 perishable items in its other warehouse buildings as it does
2 in its stores; correct?

3 A. That's correct.

4 Q. So, generally, would you agree that Walmart competes
5 more closely with Amazon in the online space than in the
6 brick-and-mortar space?

7 A. Again, the difference between perishable and
8 nonperishable goods, but nonperishable goods we would view
9 as a -- as a higher competitive area.

10 Q. Do you recall at your deposition, when we discussed
11 whether or not Walmart competes more closely with Amazon in
12 the online space than in the brick-and-mortar space?

13 A. Yes, I do.

14 Q. So I just want to ask one more time for clarity: Is it
15 fair to say that Walmart competes more closely with Amazon
16 in the online space than in the brick-and-mortar space?

17 A. That's accurate.

18 Q. In fact, Walmart tracks its market share for
19 brick-and-mortar grocery sales separately from its market
20 share for online grocery sales; right?

21 A. That's correct.

22 Q. Just a couple more questions.

23 Notwithstanding the growth of Walmart's digital
24 business, you'd agree that Walmart's brick-and-mortar stores
25 remain an essential piece of its grocery business; right?

Lieberman - X

1 A. Yes.

2 Q. The majority of Walmart's grocery business is still
3 done in brick-and-mortar stores; correct?

4 A. That's correct.

5 Q. Walmart continues investing in its physical stores;
6 correct?

7 A. That's correct.

8 Q. Why does Walmart continue to invest in its physical
9 stores despite the growth of online grocery shopping?

10 A. Sure. We -- we want to ensure that we can present
11 customers with an exciting shopping experience; clean,
12 updated stores. We don't want to become dated, and we
13 really want to maintain relevance as a customer's top choice
14 to visit a store.

15 Q. And in order to maintain relevance generally, you need
16 to maintain well-kept physical stores; is that right?

17 A. That's correct.

18 MS. HOUGH: Thank you, Mr. Lieberman.

19 I pass the witness.

20 MS. PFAFFENROTH: Just very briefly, Your Honor.

21 THE COURT: All right.

22

23 ///

24 ///

25 ///

Lieberman - ReD

1 REDIRECT EXAMINATION

2 BY MS. PFAFFENROTH:

3 Q. Hello, Mr. Lieberman.

4 My colleague asked you a question relating to Dick's
5 Sporting Goods and competition there.

6 At the beginning of your testimony, I asked you who
7 Walmart viewed specifically as a competitor in grocery.

8 Do you recall that?

9 A. Yes, I do.

10 Q. And you testified that stores like Costco are
11 competitors to Walmart in grocery; correct?

12 A. Yes.

13 Q. And hard discounters, like Aldi?

14 A. That's correct.

15 MS. PFAFFENROTH: No further questions,
16 Your Honor.

17 THE COURT: All right.

18 MS. PFAFFENROTH: I did have one clarification for
19 the record. I believe that I misspoke with respect to the
20 small portion of Mr. Lieberman's deposition transcript that
21 was entered into the record.

22 I think I said the exhibit number instead of the -- for
23 the previous exhibit. The Deposition Exhibit Number is
24 DX2530, and it was the transcript at page 37, lines 11
25 through -- oh, no. Sorry. Page 38, lines 1 through 5.

1 THE COURT: The record will be corrected.

2 Any objection to that portion?

3 MS. HOUGH: No objection.

4 THE COURT: All right.

5 MS. PFAFFENROTH: Thank you, Your Honor.

6 MR. PERRY: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. PERRY: At this time, the defendants would
9 re-call Mr. Yael Cosset for the resumption of his direct
10 examination.

11 DEPUTY COURTROOM CLERK: Raise your hand.

12

13

Yael Cosset,

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

16

17 THE WITNESS: I do.

18 DEPUTY COURTROOM CLERK: Thank you. Have a seat.

19 Please state and spell your first and last name for the
20 record.

21 THE WITNESS: My name is Yael Cosset. Y-a-e-l,
22 last name Cosset. C-o-s-s-e-t.

23 THE COURT REPORTER: One "T" or two "T"s?

24 THE WITNESS: One "T." Sorry.

25 THE COURT: You may continue.

Cosset - D

1 MR. PERRY: Thank you, Your Honor.

2

3

DIRECT EXAMINATION

4

(Continuing)

5 BY MR. PERRY:

6 Q. Good morning, Mr. Cosset, and welcome back.

7 A. Thank you.

8 Q. Yesterday we discussed your responsibility and history
9 with the Kroger Company.

10 Do you recall that?

11 A. Yes, I do.

12 Q. And we were just moving into the merger agreement and
13 related transaction documents.

14 Do you recall that?

15 A. I do.

16 Q. And I think you testified at the end of your testimony
17 yesterday that, as a senior officer of the company, you were
18 involved in the strategic planning of the merger from the
19 very outset; right?

20 A. That's correct.

21 Q. You participated in the due diligence process?

22 A. Yes, I did.

23 Q. And you regularly attended board and investor meetings
24 related to the merger?

25 A. Yes, I did.

Cosset - D

1 Q. And you were, in fact, the lead Kroger executive in
2 finalizing the asset purchase agreement and transition
3 services agreement; is that right?

4 A. That's correct.

5 Q. All right. That's where we left off.

6 Let's turn to those documents, Mr. Cosset.

7 A merger, of course, is a legal construct. It's a
8 little interesting that in the Government's case-in-chief
9 the Government did not introduce into evidence any of the
10 contracts or agreements that make up the merger.

11 I'd submit we should rectify that now.

12 Do you think, Mr. Cosset, having been involved with the
13 merger, that anybody can involve this -- understand this
14 transaction without reviewing the transaction documents?

15 A. I do not.

16 Q. Are you personally familiar with the transaction
17 documents?

18 A. I am, yes.

19 Q. How are you familiar with them?

20 A. Obviously, I spent quite a bit of time, in the
21 preparation of the merger agreement, discussing with the
22 rest of the team. You know, the construct of the merger
23 agreement. And I was closely involved in the appropriation
24 of the APA and TSA that were executed.

25 MR. PERRY: Let me -- Your Honor, may my colleague

Cosset - D

1 approach to present the transaction documents?

2 THE COURT: Yes.

3 MR. PERRY: Thank you.

4 THE COURT: I have one binder from yesterday. I'm
5 assuming this is in addition.

6 MR. PERRY: Your Honor, it's an additional two
7 binders. I apologize if the Court -- the Court has them
8 electronically, of course. They're a bit --

9 THE COURT: I just wanted to make sure that -- I
10 just wanted you to know I had retained the binder from
11 yesterday.

12 Okay. Thank you.

13 BY MR. PERRY: (Continuing):

14 Q. Mr. Cosset, I realize they're a bit unwieldy. We've
15 put up a demonstrative just showing the principal documents
16 as well.

17 Can you tell -- explain to the Court what is the
18 agreement and plan of merger?

19 A. The first document listed here is the document that
20 formalized the agreement between Kroger and Albertsons in
21 October 2022, signaling the structure and the approach to
22 the merger of the two companies.

23 Q. And the second document, what is the amended and
24 restated asset purchase agreement?

25 A. This reflects the -- the terms, the detailed terms that

Cosset - D

1 govern all the assets being conveyed to C&S under the
2 divestiture package.

3 Q. And what is the third document: The transition
4 services agreement?

5 A. This document articulates and governs all the services
6 that will be provided to C&S as part of the divestiture on a
7 transitional basis.

8 Q. Mr. Cosset, altogether, it's something north of 1,600
9 pages. Have you read, personally, all of these agreements?

10 A. I have, yes. Multiple times.

11 Specifically, for the APA and the TSA -- the asset
12 purchase agreement and transition services agreement.

13 Q. On behalf of the Kroger Company, did you sign any of
14 these documents?

15 A. I did sign and execute the asset purchase agreement and
16 transition services agreement.

17 MR. PERRY: Your Honor, these contracts are
18 under -- we have moved to keep them under seal and we'll
19 talk about the contents in a higher level, but we -- at this
20 time, defendants would move the introduction into evidence
21 of the merger agreement, which is DX2552, which is the
22 agreement itself, and 2553, which is an associated
23 disclosure letter; the amended and restated asset purchase
24 agreement, which is DX2238; the amended and restated
25 transition services agreement, which is actually Exhibit B

Cosset - D

1 to the asset purchase agreement -- it is found at DX2238,
2 beginning at page 164 -- and the additional disclosure
3 schedules to the APA and TSA, which is an associated
4 document, at DX2239.

5 All of these documents are in the two binders we have
6 passed out this morning.

7 MR. MATHESON: No objection, Your Honor.

8 THE COURT: They will be received.

9 MR. PERRY: Thank you, Your Honor.

10 BY MR. PERRY: (Continuing):

11 Q. Now, Mr. Cosset, you mentioned you read all of them.

12 Have you memorized everything that's in here?

13 A. No, I haven't. I haven't. There are probably a few
14 clauses that I'm not too familiar with; but, no, I have not
15 memorized all the documents.

16 Q. Could you give the Court an example or two of the
17 clauses you are familiar with and why?

18 A. Clauses that come to mind in the asset purchase
19 agreement, in particular, would be Section 1.1, which
20 defines all the key assets at a high level, Section 7.12,
21 which governs the terms associated with the technology
22 components of the assets, 7.7 that has the data, and I'm not
23 obviously mentioning this, because this would be clauses
24 that we refer to on a pretty frequent basis, as well in the
25 transition services agreement, 2.9 and 2.10 would be top of

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1 mind because they also govern things that we have referred
2 to extensively.

3 Q. And we'll come back to a few of those, Mr. Cosset.

4 But before we do, do you know whether the merger
5 agreement says anything about the timing of the transaction?

6 A. The timing clause that I would be familiar with is the
7 outside -- what's referred to as the outside date, which is
8 October 9th -- October 9, 2024.

9 Q. That's less than one month from today, Mr. Cosset?

10 A. That's correct.

11 Q. And what happens on the outside date of October 9,
12 2024, under the terms of the merger agreement that's been
13 introduced into evidence in this court as DX2552?

14 A. After October 9th, the merger agreement effectively can
15 be terminated, no longer in effect.

16 Q. Are there any other terms of this agreement, connected
17 to the outside date, that would be affected by a delay in
18 closing the transaction past October 9 2024?

19 A. Besides, obviously, not being effective, it would have
20 an impact on terms related to financing and a lot of
21 activities that are being performed today by our teams as it
22 relates to the integration and the divestiture preparation,
23 things around financing.

24 But licensing would be another area that would come to
25 mind. There are agreements with commercial parties that are

Cosset - D

1 planned to be effective by the time the merger is executed,
2 which would have an impact, commercial impact on these
3 companies and on our business.

4 Q. You mentioned financing. Is that your understanding,
5 Mr. Cosset, that there are financing commitments related to
6 the transaction that are tied to the October 9th date?

7 A. Yes. I would not know the exact details, but all the
8 financing that I'm aware of would have covenants tied to the
9 timing and expiration of some of the terms granted to --
10 granted by the lender to either parties in the -- in the
11 transaction.

12 Q. What about the associates of both Kroger and
13 Albertsons, Mr. Cosset? Do you know whether and how they
14 are affected by that October 9th outside date in the merger
15 agreement?

16 A. I would say the associates who have been notified of
17 their pending transition to C&S, you know that would have a
18 pretty significant impact on all the associates who are
19 currently actively working on getting ready for the merger.
20 So both on the integration and on the divestiture would be
21 greatly impacted as well, and we're talking about, you know,
22 obviously, tens of thousands of associates.

23 Q. Based on your role with the merger, including your
24 position as head of the Kroger transformation office,
25 Mr. Cosset, do you have a view as to whether the Kroger

Cosset - D

1 Company would be negatively impacted by a delay in closing
2 beyond October 9, 2024?

3 A. Yes. It would compromise the ability, obviously, to
4 execute the merger, which, for the reasons that we've stated
5 yesterday -- or I stated yesterday, but also publicly --
6 would affect our ongoing strategy and plan.

7 Q. Thank you, Mr. Cosset.

8 Let's shift gears.

9 Do you know -- and I'm still on the merger agreement,
10 which is -- and, by the way, I should have asked this: Who
11 are the parties to the merger agreement? The October 2022
12 original contract.

13 A. The two parties were Kroger and Albertsons Companies.

14 Q. And who are the parties to the amended and restated
15 asset purchase agreement on April 22, 2024?

16 A. Albertsons, Kroger, and C&S.

17 Q. And who are the parties to the transition services
18 agreement also entered into on April 22, 2024?

19 A. Albertsons, Kroger, and C&S as well.

20 Q. Okay. Thank you.

21 Going back to the original merger agreement between
22 Albertsons and Kroger in October of 2022, do you know
23 whether that contract contemplated a divestiture?

24 A. Absolutely.

25 This was a realization, before entering into the

Cosset - D

1 agreement, that there would be a requirement for us to
2 satisfy certain antitrust expectations, and therefore this
3 was contemplated and formally captured in the merger
4 agreement.

5 Q. Does the merger agreement contain provisions pertaining
6 to a future divestiture of stores and other assets in
7 connection with the transaction?

8 A. It does, yes.

9 MR. PERRY: Your Honor, I'm happy to refer to --
10 we can go to the binders.

11 BY MR. PERRY: (Continuing):

12 Q. But, Mr. Cosset, would it refresh your recollection if
13 it's Section 6.3(d)?

14 A. I would defer to -- unless I can flip through the
15 pages, I would defer to your reference.

16 Q. Thank you, Mr. Cosset.

17 Were you personally involved in selecting the
18 divestiture buyer after the merger agreement was entered
19 into?

20 A. Yes, I was. As well as a select number of officers and
21 executives in the company.

22 Q. Who actually ran the selection process for the
23 divestiture buyer for Kroger and Albertsons following entry
24 of the merger agreement in October of 2022?

25 A. The competitive process that was initiated immediately

Cosset - D

1 after the merger was executed was led and managed by our
2 bankers, so Citi and Wells Fargo, as well as there were
3 outside advisors and counsels and their economist and
4 antitrust experts.

5 Q. You mentioned in that answer, sir, the competitive
6 process. What do you mean by a "competitive process" in
7 selecting a divestiture buyer?

8 A. I referred to "competitive process" because there
9 was -- obviously, the beginning of the process had almost
10 100 bidders or interested parties; and, ultimately, there
11 were competitive bids issued to the Kroger Company as part
12 of that process, hence the competitive nature of the
13 process.

14 Q. During that competitive bidding process, did Kroger and
15 Albertsons make data available to the bidders?

16 A. Yes. Through our bankers and the bankers representing
17 the divestiture -- divestiture bidders. All necessary data
18 to assess the assets and the nature and quality or
19 performance of the business was provided through
20 intermediates.

21 Q. Did the bankers periodically report on the bidding
22 process to Kroger management and/or the board of directors?

23 A. Yes. On a rather frequent basis, as it was a pretty
24 dynamic process, depending on the phase you look at.

25 Q. I'd like to introduce a document.

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1 MR. PERRY: And, Your Honor, other than the
2 contract, all of the documents we'll be discussing today are
3 in the original binder, so the -- the first binder, if you
4 will.

5 THE COURT: All right.

6 MR. PERRY: And this is for the private screen
7 only, Mr. Rennick, as it's confidential. This is DX0813,
8 which is an August 7, 2023, presentation to the board of
9 directors.

10 BY MR. PERRY: (Continuing):

11 Q. Did you attend this meeting, Mr. Cosset?

12 A. Yes.

13 Q. And if we can turn -- was it typical of you to review
14 the materials provided to the board of directors, as we
15 discussed yesterday?

16 A. Yes.

17 MR. PERRY: Your Honor, we'd move the admission of
18 DX813.

19 MR. MATHESON: No objection.

20 THE COURT: It will be received.

21 MR. PERRY: And if we can turn to slide 2 on the
22 private screens only, Mr. Rennick. Thank you.

23 BY MR. PERRY: (Continuing):

24 Q. What are we looking at here, Mr. Cosset, in general?

25 A. This is an update provided to our board of directors on

Cosset - D

1 where we are in the process.

2 So this would be roughly a month before the end of the
3 process. So it reflects the key phases and the progress
4 through these phases and where we are at that point in
5 August.

6 Q. And starting from the top, the bankers are summarizing,
7 essentially, how many bidders there were and so forth?

8 A. Exactly.

9 So we started -- if you want, I can walk through the
10 steps. We started with 92 parties: 72 strategic and 20
11 financials that were solicited or engaged by our bankers, in
12 particular.

13 Through selection -- self-selection or selection from
14 our advisors, the numbers kept on shrinking each step of the
15 way. There was a confidential phase where the parties
16 committed or signed confidentiality agreements of a
17 different nature.

18 As we continued to refine, both the pool of bidders and
19 the scope of the divestiture business that was contemplated.
20 Again, the pool shrank, ultimately, to the -- what I would
21 refer to as the final bidding phase, which had a more
22 extensive due diligence -- two-way due diligence, if you
23 will -- and, ultimately, bids were submitted by the final
24 bidders.

25 Q. Thank you, Mr. Cosset.

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1 We're looking at one example from August 3, 2023. Was
2 there a series of presentations from the bankers regarding
3 this process?

4 A. Yes. They were frequent and even more frequent as we
5 approached the final phases of the process.

6 Q. Did you ask us to create a demonstrative that just
7 summarizes a little -- in a little easier fashion the
8 competitive bidding process that Kroger and Albertsons
9 oversaw?

10 A. Yes, I did.

11 MR. PERRY: Mr. Rennick, can we show DDX20, slide
12 3, please.

13 BY MR. PERRY: (Continuing):

14 Q. Mr. Cosset, what did you -- what are you trying to show
15 on this graphic regarding the selection of C&S?

16 A. Both the data and visual person, I found it simpler to
17 track the process and the progress in between each of the
18 phases, and ultimately the bottom of the intended
19 funnel-looking layers is where we had the bidding process
20 with the final -- the full final bidders, which ultimately
21 became three, which became two, and became one when we
22 ultimately, in August/September 2023, selected C&S as the
23 divestiture buyer.

24 Q. Mr. Cosset, when you were discussing the banker deck
25 and discussed the 90-plus original parties, you mentioned

Cosset - D

1 that there were 70-some strategic buyers and 20-some
2 financial buyers.

3 Did I have that correct?

4 A. 72 strategic and 20 financial buyers.

5 Q. Could you explain briefly the difference between a
6 strategic buyer and a financial buyer, in this -- in the
7 context of this divestiture?

8 A. Strategic bidders would be considered interested
9 parties who have an existing business and an existing
10 strategic commitment that would be amplified or augmented by
11 the divestiture package.

12 As opposed to financial bidders, who may have some
13 adjacent business but are not contemplating the divestiture
14 for strategic reason. They're doing so for financial
15 reasons exclusively.

16 Q. Now, your funnel chart also shows about how long this
17 process took.

18 Could you summarize that for the Court?

19 A. Yes. The process started immediately when -- after we
20 announced the merger with Albertsons in October of '22 and
21 completed in September. So, roughly, about a year, of which
22 several months -- the last three, four months were what I
23 would consider more detailed, intense due diligence cycles.

24 Q. Did the final bidders offer a price or value for the
25 divestiture package?

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1 A. Yes. The four bidders that were involved in that final
2 phase, each had a consideration of value associated with the
3 scope of their -- of their bid; and, ultimately, as I
4 mentioned earlier, it was narrowed down to the final two
5 bidders, who were a better match for the total scope of the
6 divestiture consideration; and, obviously, C&S as the
7 selected buyer.

8 Q. Could you explain for the Court the mechanics or the
9 formula of the price or valuation of the divestiture
10 package?

11 A. The process is relatively standard for this type of
12 transaction, which is looking at the -- the --

13 Q. I'm sorry. I'm going to interrupt. But what is "this
14 type of transaction," grocery retail transactions?

15 A. I would say a divestiture or a transaction where you're
16 selling an asset and an existing business. You tend to
17 evaluate first the performance of the asset.

18 Yes, it is, of course, the case in retail, and there
19 are elements that are particular to the methodology in
20 retail, but I would say, at most, M&A, merger and
21 acquisition, transaction are focused on the quality of the
22 business acquired, which drives the consideration for that.

23 Q. And I really do apologize for interrupting, Mr. Cosset,
24 Thanks for that clarification.

25 So you said it's relatively standard in M&A divestiture

Cosset - D

1 transactions to value assets in a particular way, and then I
2 think you were going to give "that way," if you would.

3 A. Yes. And, you know, in retail, the best proxy for the
4 performance of a business would be what we refer to as the
5 operating cash flow or the four-wall EBITDA of that
6 business, which is you look at all the stores that are
7 contemplated for the divestiture. You do the sum, the
8 aggregate of the operating cash flow, and any supporting
9 asset. And then you apply a multiple to that business, and
10 that multiple is, you know, set by the buyer and seller,
11 which is the nature of the transaction; but, ultimately, the
12 bidders each have their perspective on how they value the
13 business. That would be the methodology the bankers would
14 have used.

15 Q. So it's -- if I understood it correctly, essentially
16 four-wall EBITDA of the divested assets, times the multiple?

17 A. That's correct, yes.

18 Q. And the four-wall EBITDA comes from the historical
19 performance of the stores and other assets; is that correct?

20 A. That's correct, yes.

21 Q. So that comes from Kroger and Albertsons?

22 A. That's --

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

24 THE COURT: Overruled. I'm going to give him some
25 leeway.

Cosset - D

1 BY MR. PERRY: (Continuing):

2 Q. Mr. Cosset, did all of the final bidders have access to
3 the historical information regarding the four-wall EBITDA of
4 the divestiture package store set?

5 A. Absolutely. At the store level.

6 Q. And then the other major component is the multiple; is
7 that correct?

8 A. That's correct, which is set at the discretion of the
9 bidder.

10 Q. So the four-wall EBITDA comes from historical
11 performance, and the multiple is proposed by the bidders?

12 A. That's correct.

13 Q. How close, do you recall -- you had for final bidders.
14 How close were the multiples that they proposed for this
15 divestiture package?

16 A. They were in a very narrow range, which is not unusual
17 in this type of transaction.

18 Q. So Kroger, by August of '23, had a set of four final
19 bidders who had proposed a price or valuation that was in a
20 narrow -- or very narrow or close range of price or
21 valuation. How did Kroger and Albertsons select, among
22 those final bidders, to choose C&S?

23 Did you have criteria?

24 A. We did. Part of it, obviously, is the application, the
25 approach to the bidding process, which led to that August

Cosset - D

1 cycle, and then three dimensions. The strategic commitment
2 and alignment to operating the stores; the expanse of the
3 actual bidders; and, lastly, their financial wherewithal.

4 Q. And did you apply these criteria -- did Kroger apply
5 these criteria to all of the final bidders in making its
6 selection of C&S as the divestiture buyer?

7 A. Yes. Absolutely.

8 Q. Let's start with number one.

9 What does it mean: "Strategic commitment to operating
10 the business"?

11 A. It is -- it was critical, as we had identified, even
12 before starting the process, that we find a divestiture
13 buyer who would be committed and align with the long-term
14 operation and ongoing operation of the divested business.

15 So that means operating the stores, continuing the
16 operation of the stores, but also things like maintaining
17 frontline employment of our associates in stores and
18 facilities and assuming responsibility for the CBAs that
19 affect those associates. These were all part of the
20 strategic alignment and commitment that we needed to
21 confirm.

22 Q. Did Kroger make a determination as to whether C&S met
23 the criterion of a strategic commitment to operating the
24 stores?

25 A. Absolutely.

Cosset - D

1 Q. And what was that determination?

2 A. They were -- we positively confirmed they were
3 strategically committed, as has been reported publicly, in
4 the past, by -- by the divestiture buyer.

5 Q. Going on to the second criterion, Mr. Cosset, what does
6 it mean: "Direct and indirect experience in the retail
7 industry"?

8 A. It was important not just to validate that the
9 divestiture buyer would be committed, strategically
10 committed to acquiring the stores, but also capable. So we
11 identified the experience. We measured or assessed the
12 experience of the divestiture bidders to confirm their
13 capacity and capability of operating these stores and that
14 business.

15 Q. The Court has heard evidence in this case that C&S,
16 historically, has been primarily a wholesale operation with
17 a relatively smaller retail operation. Did Kroger take that
18 fact into account in assessing whether C&S had the requisite
19 direct and indirect experience in operating a retail grocery
20 operation?

21 A. We did. All the aspects of their existing business and
22 track record were taken into consideration, and I would say,
23 if you think about the -- kind of the simple components that
24 make up the operation of retail, it starts with knowing what
25 you want to sell, understanding your customers, which,

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1 obviously, you do through experience and data; but once you
2 do know, you need to first source the products that you want
3 to sell, and C&S has both direct and indirect -- in fact,
4 indirect experience at a scale that exceed the complexity of
5 many retailers, including us, considering the support over
6 7,000 independent retailers.

7 So sourcing these items that are going to be relevant
8 to your operation, distributing, or transporting these
9 items. Again, C&S demonstrated both direct and indirect
10 experience in that field, supplying thousands of retailers,
11 as it is the case today.

12 And then there's an element around the store operation
13 once you get the goods to the stores, and we felt very
14 confident that they had been providing services; supporting
15 these independent retailers; and made a commitment, beside
16 their direct and indirect experience, to continue to invest
17 in this capabilities; and, of course, the package that is
18 considered in the divestiture contemplate a lot of the
19 components that they would require to operate the stores.

20 Q. And we'll get to some of those components in a bit,
21 Mr. Cosset, but did Kroger make a determination as to
22 whether and why C&S had the requisite direct and indirect
23 experience in retail grocery operations as set forth in the
24 second criteria?

25 A. We did, yes, and confirmed that was the case.

Cosset - D

1 Q. Thank you, Mr. Cosset.

2 The third is: "Financial wherewithal." What does that
3 mean in the context of this divestiture transaction?

4 A. There probably is two elements that I'm -- in this
5 category. One is a simple mathematical element, which was
6 our bankers needed to validate the capacity. The
7 divestiture bidder had to acquire the divestiture package.

8 Second, which is equally important, if not more
9 important, for the long term, is the ability and the
10 commitment to invest in that business for the long-run, to
11 continue to operate stores, operate the business, and make
12 investment to continue to improve the experience, which the
13 experience in our stores and in retail, in general, is not
14 static.

15 And our bankers and through the due diligence validated
16 both of these aspects, which was also amplified by personal
17 commitment, that some of the investors made -- investors
18 made in the business, both -- two significant investors made
19 equity investment as opposed to leveraging the overall
20 business to fund the transaction, which is a further
21 testament to their commitment.

22 Q. Why was it important to Kroger, in evaluating C&S as a
23 divestiture buyer, that two of the investors agreed to make
24 equity investments into this transaction?

25 A. I wouldn't say it's important as much as it was a very

Cosset - D

1 welcome testament to their long-term commitment and ability
2 to back their commitment with personal investment.

3 These are not a small-dollars amount and from very
4 savvy business executives.

5 Q. I think you've already answered this, but just so we're
6 clear, did Kroger make a determination; and, if so, what was
7 it, as to whether C&S met the third criterion, financial
8 wherewithal, in respect of this divestiture transaction?

9 A. We assessed and validated they were absolutely
10 qualified and met the criteria.

11 Q. Did any of the other final bidders meet all of the
12 criteria set forth by Kroger and Albertsons in connection
13 with the divestiture transaction?

14 A. I would say we assessed all the bidders in the final
15 phase, and each would have had components that could have
16 met some other criteria of the dimension we just discussed,
17 but no one was better qualified than C&S, ultimately, which
18 is why we led -- we ultimately made the decision to sell it
19 to C&S, to buy the divestiture business.

20 Q. Mr. Cosset, if someone were to come into this court and
21 make the suggestion that Kroger had the incentive to find a,
22 quote/unquote, "weak" or, quote/unquote, "inexperienced"
23 buyer for the divestiture assets, would you have a reaction
24 to such a suggestion?

25 A. I would say it's not correct. There is no -- there's

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1 no party that is more motivated or incentivized to find a
2 compelling and ultimately successful divestiture buyer.
3 Without that, Kroger doesn't get to complete the merger,
4 which is the very reason why we're even considering a
5 divestiture package.

6 Q. Mr. Cosset, was Kroger committed to finding the best
7 available divestiture buyer in the marketplace?

8 A. Committed? Absolutely necessary required. Which was
9 an absolute requirement in the process, not something that
10 was a "nice to have" on the -- on the list.

11 Q. Mr. Cosset, from your perspective and your involvement
12 in this divestiture transaction and leading up to the
13 selection of C&S in the fall of 2023, do you know of anyone,
14 any company in the United States of America, that's better
15 suited than C&S to run the divestiture business at issue in
16 this courtroom today?

17 A. We would have picked a different bidder if there was
18 somebody better qualified than C&S.

19 So, no, I don't know of any better bidder to acquire
20 the divestiture package.

21 Q. Thank you, Mr. Cosset.

22 Shifting gears, again, sir --

23 MR. PERRY: And, Your Honor, I'm mindful of the
24 time, but I'll take my cue from you.

25 THE COURT: Continue on. I know that we're going

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1 to try and go longer. We'll have a shortened lunch just to
2 get through everyone.

3 MR. PERRY: Thank you.

4 BY MR. PERRY: (Continuing):

5 Q. Shifting gears again, if we can go back to the
6 contracts, Mr. Cosset.

7 We talked about the merger agreement. Let's now talk
8 about the asset purchase agreement and the transition
9 services agreement.

10 A. Okay.

11 Q. And if I call those the APA and the TSA, I think you
12 will know what I mean?

13 A. Yes, I do.

14 Q. I hope everybody else does too.

15 Can you say -- explain to the Court, Mr. Cosset, at a
16 very high level, what is -- what is in the APA? What is the
17 purpose of the asset purchase agreement between Albertsons,
18 Kroger, and C&S?

19 A. It is intended to reflect all the assets that are being
20 conveyed and all the terms that govern the assets being
21 conveyed. That's where you would find a list of assets,
22 information about the assets were applicable, and the
23 process by which the assets would be transferred to the
24 divestiture buyer. C&S in this case.

25 Whereas the TSA, the services agreement, transition

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1 services agreement, is intended to list all the services
2 that will be made available and provided to C&S during the
3 transition period. Again, listing the services and the
4 description or definition of its services.

5 Q. So as one example, is the price for the divestiture
6 package set forth in the APA and TSA executed on April 22,
7 2024?

8 A. Financial consideration, terms associated with the
9 asset purchase agreement, therefore the overall divestiture
10 package, which combine both of these agreements, would be,
11 yes, listed in the APA.

12 Q. Do you know, not to the penny, but in round numbers,
13 Mr. Cosset, what is the price that C&S has agreed to pay and
14 Kroger and Albertsons have agreed to accept for the
15 divestiture package set forth in these complex set of
16 contracts?

17 A. \$2.9 billion, with the inclusion of inventory
18 adjustments, which can be a valuable number.

19 Q. \$2.9 billion?

20 A. That's correct.

21 Q. Thank you, Mr. Cosset.

22 You mentioned the TSA involves the services, and it's
23 in the title too, for the transition; is that right?

24 A. Yes.

25 Q. Why does this transaction include a TSA, a transition

Cosset - D

1 services agreement at all? In other words, why not just
2 hand the keys over to C&S and let them drive from day one?

3 A. There are -- there are things that are not as easy as
4 handing the keys, that require some transition handover
5 period, and they're usually some of the things that are
6 probably the shortest in the transition services agreement;
7 but, more importantly, the -- through the collaboration with
8 C&S, in preparation of these agreements, we really aimed and
9 intended to capture any of the services we could provide C&S
10 to mitigate any concern or risk they may see in the actual
11 transition of some of these assets.

12 Q. Do you know, Mr. Cosset, whether transition services
13 agreements are common or rare in M&A transactions?

14 A. Yeah. They're typical. Most assets in an M&A
15 transaction would require some level of support for a period
16 of time.

17 Q. I'd like to show you another document, and this one is
18 already in evidence, Your Honor. It's DX1727, which is a
19 May 6, 2024, board of director presentation, and that's
20 after the APA and TSA were signed; correct, Mr. Cosset?

21 A. That's correct, yes.

22 MR. PERRY: And if we could turn to page 13,
23 slide 5, Mr. Rennick.

24 BY MR. PERRY: (Continuing):

25 Q. You testified yesterday, Mr. Cosset, that you had,

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1 among other things, the transformation management office at
2 Kroger; is that correct?

3 A. That's correct, yes.

4 Q. And do you sometimes call that the TMO?

5 A. Yep. TMO. There are a lot of acronyms, unfortunately.

6 Q. There are a lot of acronyms. And within the TMO are
7 there -- is there an SMO and an IMO?

8 A. You're pushing. Yes. Separation management and
9 integration management offices.

10 Q. All right. Acronyms out of the way, could we tell the
11 Court -- could you please tell the Court what's going on in
12 this slide from the May 6, 2024, board meeting?

13 A. This timeline, this chart, reflects an update which was
14 back in May of 2024. An update on the progress and status
15 of what we would consider the critical activities of our
16 separation effort, and separation would refer to the
17 divestiture package.

18 Q. So May was after this lawsuit was filed, Mr. Cosset.
19 Did Kroger stop working on the transaction when the
20 lawsuit was filed?

21 A. No. Activities both related to the integration and the
22 separation continued, and in many instances, actually
23 accelerated and increased as we get closer and closer to the
24 beginning of what was set as a proxy for the beginning of
25 both the integration and the separation.

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1 Q. Is Kroger working on closing the transaction at this
2 moment?

3 A. Yes, we are. We are actually behind the proxy date
4 that we have used for the past two years, in anticipation of
5 the integration and separation.

6 Q. How many people at Kroger do you estimate are working
7 on the transaction this week?

8 A. Between integration and separation, we probably have --
9 I'll call it this week, around 2,000 associates that are
10 dedicating energy across the organizations that are involved
11 in the separation and the integration. We've got over
12 10,000 plans that are being executed, as we speak, to get
13 ready for what we've called "day one," which is now "day
14 one-plus" for the teams.

15 Q. Will Kroger be prepared to close this transaction, with
16 2,000 people working on it and 10,000 processes in place, by
17 the outside date under the contract of October 9, 2024?

18 A. Yes, we are.

19 Q. How much of your personal time, Mr. Cosset, as one of
20 the six most-senior officers of the Kroger Company, do you
21 spend on transaction-related efforts?

22 A. Just for the separation itself, it's over -- well over
23 30 percent of my time is dedicated to the planning and
24 preparation for the separation and, ultimately, the
25 execution of the divestiture transition.

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1 Q. And are you involved in a variety of meetings and
2 presentations, and so forth, on that subject?

3 A. You know, weekly. The last few weeks, a little less,
4 because I have been out of town, but definitely weekly, and
5 we have meetings and sessions internally or with Albertsons
6 or C&S or both several times a week, and our weekly
7 governance meetings is every Monday at 5:30 Eastern Time,
8 but it's just like -- there's a lot of activities to
9 coordinate and align across the companies, as you would
10 imagine, getting ready for the execution.

11 Q. Let me pause on that word you used. "Governance."
12 What's a weekly governance meeting, Mr. Cosset?

13 A. It's the meeting we have -- one of the meetings, one of
14 the governance meetings we have across the three companies
15 at 5:30 p.m., that I just mentioned, as an example is
16 between C&S and Kroger exclusively where Kroger represents
17 both Kroger and Albertsons in the context of the separation,
18 and that's where we review progress on all the plans and
19 potential issues that may come up during the daily
20 activities that our companies and associates are working on.

21 Q. Is that governance structure set up within the
22 agreements themselves?

23 A. There are several committees and governance elements
24 that are called out both in the TSA and the APA. That's
25 correct.

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1 Q. If someone were to come into this Court, Mr. Cosset,
2 and suggest that the only way that C&S could force Kroger or
3 Albertsons to comply with its obligations under the APA or
4 TSA is to bring a lawsuit in court, would you have a
5 reaction to such a suggestion?

6 A. I would say it's not correct.

7 Obviously, we -- the best way to demonstrate that point
8 is that we have surprises or things that we discover or
9 escalate on a weekly basis, and we resolve them, not by
10 going to court, but by collaborating and having these
11 discussions as committed parties to doing what it's going to
12 take to set ourself up for the divestiture or the
13 integration, for that matter.

14 Q. Based on your regular meetings with all the parties,
15 Mr. Cosset, do you have an understanding as to whether all
16 of the parties to the APA and TSA, including not just
17 Kroger, but also Albertsons and C&S, will be ready to close
18 this transaction come October 9, 2024?

19 A. Yes.

20 Q. And what is it? Will they be?

21 A. Yes. Yes, we are. Sorry. Yes, we are.

22 You know, coincidentally or ironically, we refer to the
23 close date as "day one," and this document in May, it was
24 not perfect, but the green dots show that we were, at the
25 time, ready for September 1st.

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1 Again, there are elements that are flexible that need
2 to be finalized, when you get within days of the execution,
3 but at the time, most of the elements were already ready for
4 an execution.

5 Q. Thank you, Mr. Cosset.

6 Let's shift gears once again, if we could.

7 At a high level, based on your work daily or weekly
8 with these agreements, can you explain to the Court what
9 assets and services C&S will be receiving as part of the
10 divestiture package pursuant to the April 2, 2024, APA and
11 TSA?

12 A. Maybe I'll use the description from earlier, but
13 backward. It starts with the stores. So all the stores and
14 related banners, which is how customers ultimately would
15 start their engagement; then we identified and specify all
16 the terms around the distribution network that support the
17 stores; then we look at any of the private label or product
18 that would support the operation of the business, very
19 important component is all the technology and the systems
20 that support either business processes that are taking place
21 in the stores or outside the stores; and then last, but not
22 least, all the talent consideration. Again, with the
23 associates being transitioned to C&S and the support of
24 those associates.

25 Q. And, Mr. Cosset, did you ask us and help us prepare a

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1 demonstrative showing those five categories of assets and
2 services that C&S will be receiving under the divestiture
3 package?

4 A. I did, yes.

5 MR. PERRY: Mr. Rennick, could we show that,
6 please? DDX20-5.

7 BY MR. PERRY: (Continuing):

8 Q. So you mentioned, Mr. Cosset, stores and banners,
9 distribution, private labels, systems and data, and
10 talent -- or IT systems and talent. Is that right?

11 A. That's correct.

12 Q. Okay. Let's start at the top, shall we?

13 A. Okay.

14 Q. Does the APA identify the stores and banners that are
15 being divested from Kroger and Albertsons to C&S?

16 A. Yes, it does.

17 The terms governing the stores is in the Section 1.1 I
18 was referring to earlier. The schedule that supports the
19 store list and detailed information for those stores is in
20 Schedule 2.1, which is attached to the APA.

21 Q. How many stores is C&S getting?

22 A. 579 stores.

23 Q. Before they sign this agreement, what were they able
24 to -- what was C&S able to learn about those 579 stores?

25 A. All the data related to the performance of the stores,

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1 history of the stores, and then other what I would consider
2 more administrative details. They are important, but is it
3 a leased building, is it an owned building, and things of
4 that nature. So any information that would be relevant for
5 the operation of that store, both historic performance and
6 ongoing operation of that store.

7 Q. Was there any mystery, as between the three parties to
8 this agreement, as to the store set or the characteristics
9 of those stores before this agreement was executed?

10 A. None.

11 Q. Now that it has been executed, is there any mystery for
12 anyone who has access to this contract as to what the stores
13 are, where they are, how they perform, and so forth?

14 A. Everything that is relevant to the actual stores, where
15 they are and so forth, is available to anybody who can have
16 access to the contract. The financial performance and
17 history of that data is managed more confidentially.

18 I wouldn't, for example, see performance of an
19 Albertsons store -- detailed performance of Albertsons
20 stores.

21 Q. It's a good point. Thank you for bringing that up.

22 Where is the competitive information, the historical
23 performance of these stores, and so forth? Who maintains
24 that and how?

25 A. The parties that support Kroger, Albertsons, and C&S,

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1 behind a wall, if you will, have access to that data, but
2 the employees of the companies typically do not have access
3 to that information.

4 I don't have access to competing -- competitive
5 information.

6 Q. So you and Kroger can't look at Albertsons' store
7 performance?

8 A. I can't. There is a very limited number of exceptions.
9 There's a couple of individuals at the Kroger company who
10 have been excluded from the operation of the Kroger Co. who
11 are supporting that process, and those individuals would be
12 under very strict walls to manage that process for the
13 Kroger Company.

14 Q. And why do the parties maintain such strict walls and
15 separation regarding information such as that?

16 A. We compete until we don't, and having information that
17 would inform our posture in the marketplace would not be
18 appropriate.

19 Q. Thank you, Mr. Cosset.

20 Are banners detailed in the TSA and APA?

21 A. Yes, they are reflected in the APA itself. And then
22 the process around the banner conveyance or transition is
23 both in the APA and the TSA.

24 Q. Banners have been discussed somewhat in this trial.
25 I'm not sure anybody's ever laid out exactly what C&S is

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1 getting.

2 Could you do that for us, Mr. Cosset?

3 A. Yes. We are transferring, conveying four banners:
4 Carrs, Mariano's, QFC, and Haggen, and we are licensing two
5 banners in given geographies; specifically Colorado,
6 Wyoming, Arizona, and California.

7 Q. And are those transfers and licenses set forth on your
8 demonstrative DDX20-5?

9 A. Yes. They are, yes.

10 Q. And if we wanted to confirm that, we could go to the
11 cited schedules of the APA and TSA? It would show that?

12 A. Yes. Actually, Section 1.1 would list some of this
13 information.

14 Q. How much time will C&S have to rebanner the stores?

15 A. They'll have a total of 36 months.

16 Q. And is that set forth in the APA or TSA?

17 A. In both.

18 Both documents have terms that are relevant to the
19 rebanner process, yes.

20 Q. Was there any mystery to C&S before it signed this
21 agreement on April 22, 2024, what banners it was getting or
22 how long it would have to transition to those banners?

23 A. No surprises. Everything was, not just discussed, but
24 properly articulate and reflected in the agreements.

25 Q. Is there any surprise or mystery to anybody who has

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1 access to these agreements after they were signed, including
2 the United States Government, as to what banners C&S is
3 getting or how long they have to transition?

4 A. It is very clearly and properly documented in both
5 documents.

6 Q. Do you understand -- do you have an understanding,
7 based on your work with these documents, Mr. Cosset, what
8 the purpose is of a banner transition period as set forth in
9 the TSA?

10 A. Yes. It's the process that happens in this type of
11 transition that allows the acquirer, the business who is
12 acquiring the divestiture business, to transition, inform
13 the customers and perform a number of activities that
14 signaled the shift from one brand to another. Banner.
15 Brand. Banner. I apologize. "Brand" would probably be
16 what the customer would refer to, as opposed to "banner."
17 It's kind of an industry word.

18 Q. And do you have an understanding, based on working with
19 these agreements, why there is a period of a total of 36
20 months for rebannered?

21 A. We were very keen on creating as much flexibility for
22 C&S to not just perform the typical technical -- whatever is
23 considered technical activities of that process, but also
24 have the time to make certain decisions and choices in terms
25 of how they want to go to market and, therefore, engage

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1 their customers along the way to have a smoother transition.

2 The biggest issue in rebannering, typically, come from
3 the abrupt nature of the change in brand, which typically is
4 caused by a short -- a short window that is granted to the
5 buyer.

6 Q. As head of the transformation management office at
7 Kroger, do you have a view, Mr. Cosset, of whether C&S will
8 have adequate time to rebanner under the TSA?

9 A. I'm very confident this is enough time, and Kroger is
10 going to have to rebanner a number of stores, hundreds of
11 stores, in various geographies, and we have the same terms
12 governing that rebannering process, and I can attest that
13 our teams have looked at the details of that process and are
14 confident they have also enough time and flexibility to
15 manage that process, which is another testament.

16 Q. I may have missed it, Mr. Cosset, but I think that's
17 the first mention in this trial that Kroger will be
18 rebannering stores.

19 How many stores will Kroger be rebannering?

20 A. I don't know the specific number, other than it's --
21 it's going to be north of 200 stores, roughly.

22 Q. Maybe about the same as C&S is doing?

23 A. Roughly. It's the same range.

24 Q. And do you have a team who looks at rebannering and
25 figures out how long it's going to take for Kroger to do it?

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1 A. That's underway. That's a process that's active today
2 because there are elements that we cannot necessarily
3 perform around the choice in the scheduling and the
4 sequencing until the team's -- our retail operation and
5 merchandising and marketing operation, until they have more
6 access to data that they would otherwise not see while we're
7 in this competing situation, if that makes sense.

8 Q. It does.

9 Recognizing that uncertainty, does Kroger expect that
10 36 months would be sufficient to rebanner 200-plus stores as
11 part of this same transaction?

12 A. Yes. The teams that are accountable and responsible
13 for doing this work are comfortable with the process and the
14 time that's been allocated in the agreement for the
15 rebannering.

16 Q. Thank you, Mr. Cosset.

17 The next category of assets and services being conveyed
18 to or provided to C&S under the April 22, 2024, divestiture
19 package is distribution.

20 Do the divestiture agreements -- does the divestiture
21 package say anything about that subject?

22 A. Yes. We reflect the distribution, the list of assets
23 or facilities that is being divested in -- across the
24 network, as well as in quite a bit of details, all the
25 services that will be provided to support the transition of

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1 the conveyed assets and also support C&S post-execution
2 through distribution across the network.

3 Q. Is C&S receiving any physical distribution facilities?

4 A. They are, yes. They are receiving six facilities in
5 Arizona, Utah, Washington, and Colorado. And not six in
6 each. Total six facilities across the states.

7 Q. And that's in addition to C&S's existing distribution
8 facilities; correct?

9 A. That's correct.

10 Q. The C&S receiving any distribution services from Kroger
11 following day one?

12 A. Yes. We -- that was an area that we collaborated on
13 quite extensively. Obviously, C&S has a lot of experience
14 and already capacity, in a way, in their distribution
15 network, so we looked at -- once we had more clarity on the
16 store and they were being divested, C&S did analysis, we did
17 analysis, external parties did analysis of the necessary
18 capacity to support those stores and what assets would be
19 required to compliment what existed. And either these
20 assets were conveyed or, when more appropriate, supplemented
21 with distribution services that are captured in the TSA.

22 MR. MATHESON: I'm going to object, Your Honor.
23 The witness was instructed at his deposition not to respond
24 to any questions regarding the reasons that assets -- any
25 assets were included at the divestiture package, and it

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1 sounds as if he's just testified that, while the assets were
2 being selected, that one of the bases in which they were
3 selected was that it was sufficient to support something.

4 MR. PERRY: Let me ask another question,
5 Your Honor.

6 THE COURT: Yes.

7 MR. PERRY: I didn't ask that question. I
8 appreciate the objection, and we absolutely are not seeking
9 to introduce that evidence.

10 THE COURT: All right. So I'll sustain that
11 objection. Question: So when you finish -- or a question:
12 How much longer? And maybe when you finish this section we
13 take a break, and I'm going to give you an hour, because I
14 do realize how many witnesses we have left. So I think
15 you're in really good step.

16 MR. PERRY: I have two questions on this topic,
17 Your Honor, and probably 20 minutes left, but I'll --

18 THE COURT: That's good. I think that's a good
19 time for us to break.

20 MR. PERRY: Thank you, Your Honor.

21 BY MR. PERRY: (Continuing):

22 Q. Mr. Cosset, to be clear, I'm not asking, as my
23 colleague pointed out, and he's -- and he's correct. I'm
24 not asking about the pre- -- the discussions with C&S before
25 the divestiture package was signed.

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1 My question really is to you as head of the
2 transformation management office at Kroger, who works with
3 these agreements every day. Do you have an understanding,
4 based on the terms of the agreements, as executed on
5 April 22, 2024, whether C&S has adequate distribution
6 capacity for the divested stores? Question mark.

7 A. Yes, I have --

8 MR. MATHESON: Objection, Your Honor. Foundation.
9 It's unclear what his foundation would be to testify
10 regarding the adequacy of any distribution facilities,
11 packages, or anything else.

12 THE COURT: It was a really long question for him,
13 so I'm going to sustain the objection and let you break it
14 down.

15 I don't want you to feel like you said two questions
16 that you have to limit that. You can -- you can finish this
17 line.

18 MR. PERRY: Thank you.

19 THE COURT: And lay the foundation.

20 BY MR. PERRY: (Continuing):

21 Q. Mr. Cosset, you testified that, since the agreement has
22 been -- was signed on April 22, 2024, you work daily or
23 weekly on implementing the -- the transformation; is that
24 correct?

25 A. That's correct.

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1 Q. And after that date, have you met with and worked with
2 C&S and others regarding the distribution assets and
3 services provided under the APA and TSA?

4 A. Yes, we have.

5 Q. Have you had meetings and discussions with C&S
6 regarding their distribution needs and the divested stores'
7 distribution needs?

8 A. Yes, we have.

9 Q. Do you have an understanding as to C&S's existing
10 distribution capacity and the additional distribution
11 capacity being provided in the divestiture package after
12 April 22, 2024?

13 A. Yes, we have.

14 Q. And with all of that as prelude, do you have an
15 understanding, as head of the Kroger transformation
16 management office, whether C&S is getting sufficient
17 distribution, assets, and services to provide product to the
18 divested store -- the store set in the divestiture package
19 following day one?

20 MR. MATHESON: I'm going to have to object again,
21 Your Honor. This cannot be information acquired in the
22 ordinary course of his business. He's been asked what he
23 learned from C&S, what he's been told by C&S. This is not
24 the ordinary course of his business duties. This is a
25 specific project that is litigation-focused, and I don't

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1 think it's appropriate for him to testify to his
2 understanding received from others. That's hearsay.

3 MR. PERRY: Your Honor, he spends 30 to 40 percent
4 of his time on the transformation. He oversees 2,000 people
5 doing this. This is his job. This is the --

6 THE COURT: I understand this is his job, but C&S
7 is the better position -- place to answer that question.
8 I'm sustaining that objection.

9 MR. PERRY: Thank you, Your Honor.

10 BY MR. PERRY: (Continuing):

11 Q. Mr. Cosset --

12 MR. PERRY: Well, that would be at the end of that
13 section. We'll move on to another module, so I think that
14 would be a good break, Your Honor.

15 THE COURT: All right. So let's come back at
16 1:30. I'll give you as much of an hour lunch as possible.
17 That will require you to come back. I know you've been on
18 and off. My apologies. We stand adjourned.

19 (Moring session concluded at 12:34 PM.)

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C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 11

September 10, 2024

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

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

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 9/10/2024
CSR Expiration Date: 9/30/2026

BY MR. MATHESON:

(Continuing): [10]

2317/12 2319/2 2322/13
2323/2 2325/14 2326/1
2329/12 2330/21 2331/4
2331/13

BY MR. PERRY:

(Continuing): [13]

2381/13 2383/10 2387/11
2389/10 2389/23 2391/13
2395/1 2402/4 2404/24
2410/7 2418/21 2419/20
2421/10

BY MS. HOUGH:

(Continuing): [2]

2365/12 2365/17

BY MS. PFAFFENROTH:

(Continuing): [27]

2294/11 2294/24 2298/7
2299/16 2300/12 2302/19
2303/3 2303/19 2306/22
2307/18 2308/5 2309/3
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