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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 11, 2024
ALBERTSONS COMPANIES, INC.,	)	
	)	
Defendants.	)	Portland, Oregon
_____	)	

PRELIMINARY INJUNCTION HEARING  
DAY 12 - AFTERNOON SESSION  
BEFORE THE HONORABLE ADRIENNE NELSON  
UNITED STATES DISTRICT COURT JUDGE

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(September 11, 2024)

P R O C E E D I N G S

(Afternoon session; open court:)

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

MR. PAI: Thank you. Rohan Pai on behalf of plaintiff, Federal Trade Commission.

Your Honor, we have already distributed the witness binders.

CROSS-EXAMINATION

BY MR. PAI:

Q Good afternoon, Dr. Israel.

A Good afternoon.

Q I'm going to do my best to speak slowly. If you and I get in a race, let's slow down.

Now, Dr. Israel, during the direct examination of your testimony today, you were asked a number of questions related to market definition, correct?

A Yes.

Q Now, you do not define any relevant product in your report, correct?

A Yeah. I would say I don't go through and define it for each locality. I explain how to do it, but I don't take the last step and actually do the work.

Q You don't offer an affirmative definition of what would be

M. Israel - D

1 the relevant product market in this case, correct?

2 A Yeah. I think that's the same answer. I try to indicate  
3 what would need to be done and how to do it, but I don't go out  
4 and list out the markets.

5 Q And you also don't affirmatively define any relevant  
6 geographic market, correct?

7 A It's the same. So I would use the EGK tool as I  
8 described, but I don't go through and list out the markets.

9 Q In fact, it is your opinion that market definition is not  
10 probative of competition in this industry, correct?

11 A It's most of the first step. I think that the other  
12 analyses and the direct evidence I presented and so on is more  
13 informative.

14 Q Dr. Israel -- and I'm not trying to quibble with you -- in  
15 your report you wrote, "All the above evidence clearly  
16 demonstrates that market definition and associate structural  
17 presumptions are simply not probative about competitive effects  
18 in this industry."

19 Is that fair?

20 A With the addition of structural presumptions. I certainly  
21 think there are any, they are is rebutted by the other evidence  
22 in the case.

23 Q Dr. Israel, you believe as an economist that it is  
24 possible to assess the competitive effects of a transaction  
25 without ever defining a relevant antitrust market, correct?



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1 A If there is good direct evidence, that can be the case.  
2 I've also said market definition is useful in many cases, but  
3 certainly like here, where there is good direct evidence, I  
4 think there are other ways to go.

5 Q Okay. I want to discuss a few of the basic principles of  
6 market definition.

7 Dr. Israel, you agree that the HMT, or the  
8 hypothetical monopolist test, is a standard tool used by  
9 competition economists to define relevant antitrust markets,  
10 right?

11 A I agree that it is a tool that's used. The only thing I  
12 would clarify is I don't think it defines the markets alone.  
13 There are other parts of the analysis, but I agree it's a  
14 standardly used part of the analysis.

15 Q Dr. Israel, you agree that the hypothetical monopolist  
16 test asks whether a profit maximizing hypothetical monopolist  
17 owning all firms in a candidate market would profitably impose  
18 a small but substantial non-transitory increase in price on the  
19 products of at least one firm within that candidate market,  
20 right?

21 A I agree until you get to "at least one firm." I think  
22 there is some disagreement about that, and if you look at only  
23 one firm, you need to do it correctly. So certainly I agree  
24 with the first part, and I agree there is a version of the test  
25 that looks at just one firm, but you need to be careful when

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1 you use that version.

2 Q Dr. Israel, you applied the version that looks at  
3 increasing prices of only one firm when applying the HMT,  
4 correct?

5 A That's fair. I mean, I took the steps to be careful to  
6 make sure that all the assumptions held and so on, but I think  
7 in the context where that worked, I have applied it.

8 Q Dr. Israel, you said the first part of the definition I  
9 read. You'd agree that the hypothetical monopolist is profit  
10 maximizer, right?

11 A Yeah. That sounds right.

12 Q And you would agree that there is a standard assumption in  
13 economics that firms are profit maximizing?

14 A I usually say it that firms are seeking to maximize  
15 profits. They clearly have different approaches and don't  
16 always succeed, but a standard assumption is that's what they  
17 are trying to do.

18 Q All right. Fair enough, Dr. Israel.

19 Dr. Israel, you agree that while a broadly defined  
20 market may satisfy the HMT, there might be narrower markets  
21 that can also satisfy the HMT, correct?

22 A For the HMT itself, that sounds right.

23 Q Dr. Israel, you agree that market definition focuses  
24 solely on demand-side substitution factors, correct?

25 A The act of defining the market itself, I agree. When you

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1 go on to say who participates, what are shares, and so on, you  
2 bring in other things. But for the act of defining the market,  
3 I agree.

4 Q Now, Dr. Israel, would you agree that the group -- the  
5 groups of products -- sorry. Let me rephrase.

6 Dr. Israel, would you agree that a group of products  
7 may satisfy the HMT without including the full range of  
8 substitutes from which customers choose?

9 A Yes. You don't need to include every option that people  
10 turn to. I think of it as including the significant options.

11 Q Now, Dr. Israel, I want to apply sort of how you analyze  
12 market definition in a different merger case in which you  
13 testified in court. I believe you mentioned this on direct  
14 exam, but you testified as economic expert in the FTC's  
15 challenge to the Sysco-US Foods merger, correct?

16 A That's right.

17 Q And you testified as an expert for the Government in  
18 Sysco, correct?

19 A For the FTC, that's correct.

20 Q Sysco and US Foods are broadline food distributors, right?

21 A Among other things, yes.

22 Q And a broadline food distributor like Sysco distributes a  
23 broad line of food service goods, kind of like a supermarket  
24 for distribution, right?

25 A I think as a general statement, that's fine, yeah. And

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1 obviously there is differences from supermarkets, but a broad  
2 line of food carrying a broadline of products, which  
3 supermarkets also do, I agree.

4 Q In Sysco-US Foods, it was your economic opinion that  
5 broadline food service distribution was a relevant product  
6 market, right?

7 A It has been nine years, so I'm just making sure I get it  
8 all. Yeah. I mean, there were other details, because it was  
9 focused on particular customers, so the national versus local  
10 part mattered. But generally, that's correct.

11 Q And in Sysco you opined just because a customer could get  
12 food through different channels of distribution, it didn't mean  
13 that every channel was a sufficient competitive constraint that  
14 should be included in the relevant product market, right?

15 A Yes. I agree. Just the fact that someone had food is not  
16 enough.

17 Q For example, a type of food service distribution that you  
18 also analyzed as part of your work in the Sysco case was  
19 systems distribution, right?

20 A Yes.

21 Q And at a high level, systems distributors distributed high  
22 volumes of more narrow products tailored to serving restaurant  
23 chains like McDonald's, Burger King, or Subway, right?

24 A That's right.

25 Q There was evidence that some customers used both

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1 distribution and broadline distribution, right?

2 A Few. But Subway was one that stuck out because they --  
3 they're sort of an interesting restaurant, that they can buy  
4 produce like other restaurants, but can also use a systems  
5 distributor.

6 Q And you concluded that systems food distribution was not  
7 in the relevant market of broadline food service distribution,  
8 right?

9 A That's correct. But it's why a minute ago that I  
10 mentioned that customers matter. In that case the market was  
11 defined towards particular customers. So that might not be  
12 true for Subway, but it was certainly true for many restaurants  
13 for whom the systems model wouldn't work.

14 Q But even though it was true for some customers in your  
15 national market, you still didn't find that was sufficient to  
16 include it in your product market, right?

17 A Again, that's because in that case the market was defined  
18 for a targeted set of customers. So unlike here, there was  
19 different prices for different customers and only some  
20 customers were in the market. So what Subway would do wouldn't  
21 matter from what other customers would do in that case.

22 Q Another type of food distribution that you examined in  
23 Sysco was specialty distribution, right?

24 A Yes.

25 Q An example of specialty distribution would, for example,

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1 be a distributor who specializes in delivering meat products,  
2 for example?

3 A Yes.

4 Q And there was evidence that some customers purchased from  
5 both broadline and specialty distributors, right?

6 A Yes.

7 Q And it was your opinion in the Sysco case that specialty  
8 food distribution was not in the relevant product market,  
9 right?

10 A That's correct. Certainly the national market. I think  
11 that's correct across the board.

12 Q Now, Dr. Israel, I want to look at how you explained the  
13 analysis to the Court in Sysco because you provided a pretty  
14 clear explanation of your market definition and methodology and  
15 principles. I would like to turn to PX6678. I'm going to ask  
16 you to look the a pages 21 through 23 of the transcript, but  
17 all of them appear on PX6678-006. If you would like me to  
18 repeat that, I'm happy to.

19 A 006?

20 Q Yes, sir.

21 A It is very small on the screen.

22 Q Mr. Dunkin, I think, is going to magnify that for us in a  
23 second.

24 A I'm also having binder issues.

25 THE COURT: Yeah, I know.

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1 MR. PAI: My apologies, Your Honor.

2 MS. PFAFFENROTH: Your Honor, objection. Is counsel  
3 seeking to impeach Dr. Israel, or is he asking Dr. Israel  
4 questions about his methodology in a past merger?

5 MR. PAI: I'm not looking to impeach Dr. Israel. I  
6 am using this similarly as to how I would use an academic paper  
7 or something where I'm going to talk him through his testimony  
8 in a prior case and make sure I understand how he applied  
9 methodology, Your Honor.

10 THE COURT: All right. It's hard to read.

11 MR. PAI: Yes, Your Honor.

12 Mr. Dunkin will be able it to magnify this for us.

13 BY MR. PAI:

14 Q First, starting at transcripts page 21, 4 through 6 -- is  
15 that helpful, Dr. Israel? Thank you.

16 MR. PAI: My apologies for the printing, Your Honor.

17 BY MR. PAI:

18 Q So do you see where you are asked: "Does the existence of  
19 the customer purchasing from both broadline and specialty  
20 distributors impact your conclusions about product market  
21 definition?"

22 Do you see that?

23 A I do.

24 Q So you explain, starting at lines 7 through 12 up there:  
25 "I mean, again, this goes back to the answer I gave before. On

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1 its own the people purchase from many, many different product  
2 markets, so the fact that there's customers who purchase from  
3 two different product markets are not really part of the  
4 methodology for deciding whether there is a relevant product  
5 market."

6 Do you see that, sir?

7 A I do.

8 Q And that applies here too, just because customers may  
9 purchase two different products, that's not part of the  
10 methodology for determining the relevant market, right?

11 A Yeah. I mean, that's what I talked about in the share of  
12 wallet data, so it doesn't answer the question by itself. If I  
13 say it now, I might say it could be part of the methodology and  
14 that it is a piece of evidence, but it certainly doesn't  
15 determine the answer by itself.

16 Q Right. Just to be clear, Dr. Israel, your testimony when  
17 you applied the methodology in Sysco, right, was the fact that  
18 there are customers who purchase two different products are not  
19 really part of the methodology for deciding whether there is a  
20 relevant product market, right?

21 A That is what I said. I think there I was explaining that  
22 you should focus on substitution, and this wouldn't answer that  
23 question on its own.

24 Q Okay. So if we could skip down to line 23, you  
25 continued -- 23 to line 14. "I mean, to me, as I -- when I



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1 think about this stuff or teach this stuff, it is always useful  
2 to sort of bring it back to the examples that I know better, so  
3 I can if I can give an analogy, that might help.

4 "So I think about -- I think a good analogy for my --  
5 from, you know, more of a consumer's life is a grocery store.  
6 So there is a place where we get a lot of food, like a  
7 broadliner. So the grocery store offers me a broad range of  
8 products -- a broad basket of products that I can buy. And  
9 many people buy a lot of products from grocery stores.

10 "Of course, there are also things like peach stands  
11 or farmers' markets or bakeries that offer a certain type of  
12 food of a certain quality -- and I think most consumers  
13 probably purchase from a grocery store a lot and also purchase  
14 some things from peach stands and bakeries and ice cream shops,  
15 so they are purchasing from both."

16 Do you see that?

17 A Yes.

18 Q Here you are analogizing consumers buying -- to broadline  
19 customers buying food from both the grocery store and peach  
20 stands, right?

21 A Yes.

22 Q You will recall that the judge in Sysco cited fairly to  
23 this analogy, right?

24 A That sounds familiar.

25 Q And the point of your analogy is just because consumers

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1 may buy food from both grocery stores and peach stands, and  
2 maybe even buy the same food from grocery stores and peach  
3 stands, they are not necessarily in the same market, right?

4 A I think that's part of it. I mean, I intentionally picked  
5 peach stands because they are a long way from a grocery store.  
6 I think it would apply here. I wouldn't say peach stands are  
7 in the market. So they buy the same things, and a peach stand  
8 is like -- I mean, a specialty distributor, it is clearly quite  
9 distinct in that they generally sell a small subset of the  
10 products.

11 Q We absolutely agree that peach stands are not the relevant  
12 product market here, Dr. Israel.

13 You concluded your testimony here in lines 15 through  
14 25, and I will quote again: "But the question is there -- and  
15 the one we are analyzing here -- is what would happen if there  
16 was a SSNIP, right, so in that case suppose I wake up one  
17 morning and the grocery store has raised its prices on its  
18 products. A basket of products is 5 percent more expensive at  
19 a grocery store. What do I expect would be my reaction? I  
20 think the general -- I think the reaction is those are  
21 different products, and what I do is I look at other groceries,  
22 right. If my grocery store is more expensive -- if Safeway is  
23 more expensive, I'd look at Giant, right. I mean, that's what  
24 serves the same need."

25 Do you see that?

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1 A I do.

2 Q We talked about SSNIPs before. That's referring to the  
3 small but significant non-transitory increase in price, right?

4 A Yes.

5 Q And that is part of the HMT, right?

6 A Yes. And I think this is consistent with what I described  
7 you should measure where people would substitute.

8 Q Right. And your testimony was that customers' willingness  
9 to substitute or switch between products is driven by whether  
10 the product serves the same need, right?

11 A Yeah. I mean, it's what serves the same need.

12 Q Now, you have been present in court for most of the live  
13 testimony, correct, Dr. Israel?

14 A Yes.

15 Q And you've heard live testimony from market participants  
16 that customers have different need states or trip missions that  
17 serve different types -- that are served through different  
18 types of grocery retail formats, correct?

19 MS. PFAFFENROTH: Objection, Your Honor. This is  
20 outside the scope. I did not ask Dr. Israel any questions  
21 about need states or previous testimony in this case about  
22 customer needs states.

23 THE COURT: Sustained.

24 BY MR. PAI:

25 Q Mr. Dunkin, you can take that down. Thank you very much.

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1           Dr. Israel, you testified during your examination  
2 about criticisms that you had about how Dr. Hill implemented  
3 his HMT, correct?

4     A     That sounds right.

5     Q     And you referenced a series of regressions that you ran to  
6 show that there was no relationship between concentrations in  
7 price, right?

8     A     I did. I would say that's distinct from your last  
9 question. It was a separate test that I ran and advocated, not  
10 part of how I criticized his test, but I did do what you're  
11 describing.

12    Q     Okay. And the regressions that you ran helped -- let me  
13 rephrase.

14           From those regressions, you concluded that Dr. Hill's  
15 candidate markets failed the HMT, correct?

16    A     That's correct.

17    Q     So I want to talk about what the analysis does or does not  
18 do. You did not conduct any retrospective study of the effect  
19 of an actual change in concentration within any geographic  
20 market on actual prices within that market, correct?

21    A     Sorry. Can you give me that once more. There were lots  
22 of pieces.

23    Q     Sure. My apologies. You did not conduct a retrospective  
24 study and said, "I'm looking at a particular geographic area  
25 and seeing what happened when there is a change of

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1 concentration in that specific area on prices in that specific  
2 area," correct?

3 A That would be subsumed in what I did. My regression  
4 wasn't limited to one area, but it had many years, and to the  
5 extent there were changes in the number of competitors, the  
6 regression would have used that if -- any corresponding change  
7 in margins as part of the evidence.

8 Q Let me ask it differently, Dr. Israel. A regression  
9 analysis tries to measure the relationship between a dependent  
10 variable and an independent variable, correct?

11 A Yes.

12 Q And the dependent variable -- I'm going to give you my  
13 understanding of a dependent variable. Please correct me if  
14 I'm wrong. A dependent variable is simply the variable for the  
15 outcome you're trying to observe, right?

16 A I mean, I would say it's the thing you are trying to  
17 explain with the regression.

18 Q Okay. Fair enough. And an independent variable is a  
19 variable you are evaluating to see if it can explain that  
20 outcome, right?

21 A That's fair. You can try to explain the dependent  
22 variable, say, margins, with a bunch of independent variables,  
23 like number of competitors and demographics and so on.

24 Q Dr. Israel, in this case you used the level of gross  
25 margin as your dependent variable, correct?

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1 A That's true.

2 Q And gross margins in this analysis was prices minus cost  
3 of goods, right?

4 A Correct. I mean, I also looked at variable margins, but  
5 correct, one of my dependent variables was gross margins, and  
6 that was the level of the gross margin.

7 Q And just to be clear, you did not use a change in gross  
8 margins as your dependent variable, correct?

9 A That's true. But even if you were trying to measure the  
10 effects of changes, you would still measure the dependent  
11 variable in levels. You would just look at it over time.

12 Q And you used a level of HHI as the independent variable,  
13 correct?

14 A One of them. I mean, the regressions I focused on here --  
15 and I really focused on more is the number of competitors, but  
16 I also looked at the HHI.

17 Q And you didn't use the change in HHI as an independent  
18 variable, correct?

19 A It's the same answer. If you want to study how things  
20 change, you use the levels over time, and it tells you the  
21 relationship between how they are changing. But I agree I  
22 didn't use the changes in the regression.

23 Q Dr. Israel, you did not evaluate the effect of prior  
24 mergers of supermarkets on prices in any geographic market in  
25 your reports, correct?

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1 A I did not explicitly. It goes with the previous answer.  
2 To the extent that changed the number of competitors, it would  
3 be part of the body of data that I'm studying, but I didn't do  
4 a study that was restricted to the effects of prior mergers.

5 Q Dr. Israel, I would like to talk about the results of your  
6 regression as they relate to market definition. Let's start  
7 with table 11 of your report, which appears at page 133 of  
8 DX2623, which it should be in your binder. But we will also  
9 put it up on the screen.

10 Mr. Dunkin.

11 Okay. Are you able to see the table?

12 A Yes.

13 Q Now, Dr. Israel, table 11 reports the results from your  
14 implementation of the HMT using different econometric  
15 specifications; is that right?

16 A Generally that's fair, yes.

17 Q And table 11 summarizes your estimated price change  
18 resulting from having a hypothetical monopolist from within  
19 Dr. Hill's markets, right?

20 A Correct.

21 Q Dr. Israel, in the first row of table 11, you report the  
22 results of your regressions with the specification you focus on  
23 is the number of competitors, correct?

24 A Yes.

25 Q In the column under "Product: Supermarkets, plus

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1 supercenters," the row that labeled Kroger" reads negative  
2 0.1 percent, right?

3 A Yes.

4 Q That negative number reflects a price decrease, right?

5 A The negative would be a decrease. This is not  
6 statistically significant, so I wouldn't say it is not zero or  
7 I can't tell it is not zero, but the negative itself would be a  
8 decrease.

9 Q Just to be clear, Dr. Israel, taking one step back, the  
10 numbers reported in the chart are an average effect across  
11 Dr. Hill's candidate markets; is that fair?

12 A Correct. I think I discussed that on direct. These are  
13 averages.

14 Q Right. I just wanted to be clear that what table 11 is  
15 reporting are the averages you described in the direct exam,  
16 right?

17 A Yes.

18 Q So, again, what table 11 is reporting is that if Kroger  
19 monopolized the candidate markets of supermarkets plus  
20 supercenters that Dr. Hill analyzed, the average effect would  
21 be a 0.1 price decrease, correct? That was the average effect  
22 of your regression analysis, correct?

23 A That's the result from the regression. I wouldn't say it  
24 the way you said it, because what I take from this is that  
25 these markets are not predictive of prices. So I wouldn't use



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1 these markets to try to predict what would happen in any  
2 particular case where Kroger -- where there was some change in  
3 the market. I think what this tells you is that looking at the  
4 share or the monopoly in the market, as defined, is just not  
5 predictive.

6 Q Your regressions don't include cost savings, correct?

7 A This is not a study of this merger, so there is nothing  
8 like an efficiency. This is just showing that there is no  
9 relationship between a monopolist in the market, as Dr. Hill  
10 defined it, and what happened to prices.

11 Q Right. I just want to be clear about what it is you were  
12 measuring. From your report you described what was happening  
13 in this table as you're measuring the estimated price change  
14 resulting from having a hypothetical monopolist in Dr. Hill's  
15 proposed markets, correct?

16 A That's fair. It is whether that monopolist in that  
17 market, as defined, can predict what happens to prices.

18 Q So what your regression shows is that the change resulting  
19 from having a hypothetical monopolist within Dr. Hill's  
20 supermarket plus supercenters market was a negative price  
21 change without accounting for any cost savings, right?

22 A It is not significantly different from zero, so I would  
23 never say that. I would say it cannot detect any change.

24 Q I'm not asking what it is detecting, Dr. Israel. I'm  
25 asking what you reported in your table. The result of your

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1 regression was that the average effect of a hypothetical  
2 monopolist in the product supermarkets plus supercenters  
3 product market was negative 0.1 percent on average, correct?

4 A That's the overall average.

5 Q Thank you. Sticking with table 11, for the column  
6 "Product: Large-format," the first row labeled "Kroger" reads  
7 0.2 negative, correct?

8 A Yes.

9 Q So similarly your regression implies that if Dr. Hill's  
10 large-format store market, which includes not only supercenters  
11 and supermarkets but included Costco and Whole Foods and Aldi  
12 and Sam's Club, the results here indicate that the regression  
13 finds that the average price effect would be a 0.2 percent  
14 decrease, correct?

15 A I'm sorry. There was a lot in that question.

16 Q Dr. Israel, that's absolutely fair. Let me break it down.  
17 My apologies.

18 Dr. Hill's large-format store market includes not  
19 only supercenters and supermarkets, but it includes Costco,  
20 Whole Foods, Aldi, Trader Joe's, WinCo, and other large-format  
21 stores, right?

22 A Right. It includes those stores within the circle he  
23 defines.

24 Q Fair enough. And the results in table 11 indicate that if  
25 Kroger was a hypothetical monopolist of Dr. Hill's proposed

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1 markets for large-format stores, the regression finds that the  
2 average price effect in all the candidate markets would be a  
3 .2 percent decrease, correct?

4 A I'm not willing to say the regression implies a .2 percent  
5 decrease on a statistically insignificant result. That's the  
6 point estimate. But statistically, I can't tell that apart  
7 from zero. But I'm willing to say that it says that his  
8 market, as defined, doesn't give you enough information to tell  
9 what would happen to prices if there was a hypothetical  
10 monopolist. So telling me there is a hypothetical monopolist  
11 in his market tells me roughly zero percent change, because it  
12 is just not informative.

13 Q Again, Dr. Israel, in describing your analysis and what  
14 was being shown on table 11, you said that the table measures  
15 the estimated price change resulting from having a hypothetical  
16 monopolist from within Dr. Hill's proposed markets, correct?

17 A I'm willing to say it measures the estimated change. You  
18 went further to say it implies an effect. In reality, what I  
19 would say is it is zero statistically, and what it tells me,  
20 based on that market, I can't predict a price change based on a  
21 monopolist.

22 Q Okay. But just to be clear, the predicted price effect --  
23 those are your words -- a predicted price effect from a  
24 hypothetical monopolist if Kroger hypothetically monopolized  
25 the large-format candidate markets that Dr. Israel identified,

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1 the average effect was a 0.2 percent price decrease, right,  
2 based on your regressions.

3 A I think you said Dr. Israel.

4 Q Dr. Hill's candidate markets.

5 A And I'm really not trying to be picky. But the word in  
6 the report is "estimated." It's a word of art in economics.  
7 That's what the regression produced. If you are asking me what  
8 does it predict, then I would say it is not statistically  
9 different from zero, so I can't tell you it predicts a  
10 decrease. I would say, yeah, the bottom line, though, is  
11 telling me that there's a monopolist in the market, as he  
12 defined it, doesn't tell me what's going to happen to price,  
13 because I don't have enough information about who the  
14 competitors really are.

15 Q Dr. Israel, let's turn to paragraph 199 of your report on  
16 page 128. Again, I'm going to focus -- thank you, Mr. Dunkin.

17 Dr. Israel, you wrote -- focusing on the second  
18 sentence, this paragraph: "Specifically, I find that even a  
19 merger to monopoly within each of Dr. Hill's relevant markets  
20 has a very small impact on Albertsons' prices, less than 5  
21 percent, and nearly no impact on Kroger's prices," correct?

22 A Yes.

23 Q And this paragraph is referencing the results in table 11  
24 that we just discussed, correct?

25 A Sorry. I just haven't looked at the report recently

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1 enough to know if it is just table 11. If it's a summary of  
2 the results, then table 11 would certainly be among those  
3 results.

4 Q You further wrote, continuing on in that paragraph: "Said  
5 differently, my results imply that even if Kroger were a  
6 hypothetical monopolist with a 100 percent share within  
7 Dr. Hill's supermarket or large-format markets, it would not be  
8 expected to increase prices by even 1 percent," correct?

9 A Correct. So based on the results, you would not be able  
10 to expect or predict that it would have such a price increase.  
11 It just doesn't give you enough information based on how the  
12 market is defined.

13 Q Just to be clear, the implication of your regression  
14 results is that if Kroger were a hypothetical monopolist of  
15 Dr. Hill's supermarket markets, which includes Kroger and  
16 Albertsons and Walmart and Target, your regression would not  
17 predict an increase in price by even 1 percent, correct?

18 A You certainly wouldn't be able to predict that on average,  
19 because the market doesn't give you enough information.

20 Q And the implication of your regressions results is that if  
21 Kroger were a hypothetical monopolist of Dr. Hill's  
22 large-format markets, which includes Walmart and Albertsons and  
23 Target and Whole Foods and Sam's Club and Aldi, your regression  
24 would not predict a price increase of even 1 percent, correct?

25 A With the caveat that it includes them inside a circle. As

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1 I said, what I see the problem as is that circle isn't a good  
2 method to figure out who the competitors are, so it is not  
3 predictive.

4 Q Dr. Israel, you testified that you calculated diversion  
5 ratios using the EGK model, correct?

6 A Yes.

7 Q Diversion ratios measure the percentage of a grocery store  
8 sales that would be diverted to another grocery store in the  
9 event of a price increase at the first grocery store, correct?

10 A Correct.

11 Q And you used diversion ratios to assess the degree of  
12 substitution between the defendants and other banners, correct?

13 A I would say between specific stores. That's the only  
14 place I pause, because -- I hope I was clear. It is a  
15 store-specific calculation. So I wouldn't say I would use it  
16 to compute -- I generally wouldn't compute diversion between  
17 the defendants and other banners in total. Maybe you could  
18 summarize things that way, but a diversion is really, as you  
19 said in the first question, how much goes from one store to  
20 another.

21 Q Mr. Dunkin, could you please pull up paragraph 104 of  
22 Dr. Israel's report, DX2623, and we're on page 54.

23 Dr. Israel, just reading the last sentence of  
24 paragraph 104 of your report, you wrote: "This allows me to  
25 assess the degree of substitution between the parties and each

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1 of these banners," correct?

2 A Correct. All I was saying before is the sentence before  
3 matters. So in the sentence before, I say, "If the parties  
4 were to implement an equal price increase on all their  
5 banners." So as long as you tell me what we are doing is  
6 raising the price at every store and then measuring the total  
7 effect, then I'm with you.

8 Q Okay. You interpret higher diversion ratios between two  
9 stores as reflecting greater competition between those two  
10 stores, correct?

11 A Between two stores, yes, I agree.

12 Q Now, during your direct testimony, you testified that  
13 the -- you testified about the diversions from your EGK model  
14 showing that the merging parties compete with other retail  
15 banners and other retail formats.

16 Do you remember that?

17 A I went through the EGK results and some of them on  
18 substitution.

19 Q Okay. And we looked at a number of our charts, right,  
20 that showed diversion to, let's say, club stores and Sprouts  
21 and Whole Foods, right?

22 A That sounds right.

23 Q But the source of those charts was table 4 of your report.  
24 I would like to take a look at table 4, as it seems to  
25 summarize your revenue diversions from Albertsons and Kroger to

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1 different store formats and banners in the overlapping areas  
2 that Dr. Hill identified, okay?

3 A Sure. We can look at it. Yeah.

4 Q So, Mr. Dunkin, please pull up first paragraph 108 of  
5 Dr. Israel's report, DX2623, on page 57.

6 Dr. Israel, this is the first sentence before  
7 table 4. Now you wrote: "Table 4 also indicates that there is  
8 a substantial diversion between the parties and Aldi,  
9 Trader Joe's, and Whole Foods Market," correct?

10 A Yes.

11 Q And you infer from that that there is substantial  
12 competition between the parties and Aldi, Trader Joe's, and  
13 Whole Foods Market, right?

14 A Overall. As we said before, to do this in practice you  
15 would go store by store, but it shows at a summary level there  
16 is substantial diversion.

17 Q Okay. So just to be clear, your opinion, as you reflect  
18 in the report, is that the diversion ratio between the parties  
19 and Aldi reflects substantial competition between the parties  
20 and Aldi overall. Fair enough?

21 A Sorry. Is there a sentence you are referring me to?

22 Q I'm trying to make sure I understand the interpretation  
23 here. You wrote that there is substantial diversion between  
24 the parties and Aldi, Trader Joe's, and Whole Foods Market.  
25 Let me be clear, you meant there was substantial diversion



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1 between the parties and Aldi, the parties and Trader Joe's, and  
2 the parties and Whole Foods Market, right?

3 A Yeah, I agree with that.

4 Q Thank you. Let's take a look at the actual results and  
5 talk about what they mean.

6 Mr. Dunkin, please get us to table 4, which is right  
7 below that.

8 Dr. Israel, the right half of this table reports the  
9 diversion between the parties and various third-party banners,  
10 correct?

11 A Yes.

12 Q And the diversion ratio between Kroger and Aldi is  
13 0.7 percent, correct?

14 A Correct. In the overlap areas as a whole, that's correct.

15 Q And diversion ratio between Albertsons and Aldi is  
16 1 percent, right?

17 A Correct. Just to be clear, again, this aggregate summary,  
18 but that's the overall number, yes.

19 Q As we just discussed, you stated that this was a  
20 substantial diversion, correct?

21 A Yes.

22 Q The diversion ratio between Kroger and Trader Joe's is  
23 1.8 percent, correct?

24 A Correct. In the table this aggregate number is  
25 1.8 percent.

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1 Q And you stated that this was substantial diversion, right?

2 A Yes.

3 Q And that substantial diversion reflected, in your view,  
4 substantial competition between Kroger and Trader Joe's  
5 overall, correct?

6 A I don't think that's what I said. Again, I would assess  
7 competition store by store. That's why I paused on the earlier  
8 answer. I think what I would say is it tells me, in summary,  
9 there is substantial diversion, which means I shouldn't rule  
10 out Trader Joe's on a blanket basis, but to decide whether  
11 Trader Joe's is competing strongly with any store, I would have  
12 to look at the circumstances for that store.

13 Q Fair enough. When you were discussing your diversion  
14 results on your direct exam, though, you were talking about  
15 aggregate diversions, right, numbers across all areas?

16 A Across overlap areas. I mean, I won't -- my conclusion  
17 from that was there is enough diversion that you shouldn't just  
18 rule it out on a blanket basis, not that that aggregate  
19 diversion tells me about competition anywhere in particular.

20 Q The diversion ratio between Kroger and Whole Foods is  
21 1.9 percent, correct?

22 A Correct. In this table.

23 Q In this table. In this table the diversion between  
24 Albertsons and Whole Foods Market was 2 percent?

25 A Correct.

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1 Q Dr. Israel, the left half of table 4 reports the diversion  
2 ratios between the defendants, right?

3 A Correct.

4 Q And the diversion ratio from Kroger to all Albertsons  
5 banners is 17.5 percent, correct?

6 A This aggregate number in this table is 17.5.

7 Q You'd agree that the diversion from Kroger to Albertsons  
8 banners was 20 times greater than the diversions from Kroger to  
9 Aldi, correct?

10 A There is more of the stores. That's why I wouldn't make  
11 comparisons like that from this table. I would agree with my  
12 statement I made on the right-hand side that there is enough  
13 diversion between Kroger and Albertsons that I wouldn't just  
14 rule Albertsons out of the market. Beyond that, to assess  
15 competition, I would go store by store.

16 Q Dr. Israel, you agree that the diversion from Kroger to  
17 Aldi, which was 0.7 percent, was substantial, right? That was  
18 the statement in the paragraph right above that?

19 A I'd agree with that.

20 Q You'd agree the diversion from Kroger to Albertsons is  
21 also extremely substantial?

22 A I mean, I would agree it is substantial in aggregate like  
23 this. As I said, the conclusion I draw from all of that is  
24 don't rule all of those stores out of the market. I agree with  
25 that for Albertsons as much as I agree with it for Aldi.

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1 Q Dr. Israel, you used the EGK model and the diversions  
2 derived from it to estimate GUPPIs, correct?

3 A Yes.

4 Q And in implementing your EGK model to evaluate GUPPIs, you  
5 accounted for the fact that the divestiture was part of the  
6 transaction. Is that your testimony?

7 A Yes.

8 Q And just to be very clear about what analysis you did do  
9 and didn't do, your implementation of EGK and your calculation  
10 of GUPPI does not account for operational changes at divested  
11 stores, correct?

12 A I don't know how you would put them in a GUPPI, because  
13 GUPPIs are based on current diversions and therefore whatever  
14 competition might be lost. So I'm not sure how they would go  
15 in a GUPPI, but I agree I didn't do that.

16 Q And it's fair to say that the EGK model does not  
17 incorporate operational-type questions about changes in  
18 ownership -- about operational-type questions about changes in  
19 ownership, right? It just accounts for change in ownership?

20 A It accounts for banner. So if the banner changes, it  
21 accounts for that. But the EGK model is a model of, in the  
22 world today or the last year, how do consumers choose grocery  
23 stores. It is not a model of grocery operations.

24 Q Your GUPPI analysis, using your implementation of EGK,  
25 does not account for any specific store, divested or otherwise,

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1 would close post-merger, right?

2 A Sorry. Give me that once more.

3 Q Sure. Your GUPPI analysis, using your implementation of  
4 the EGK model, does not account for whether any specific store  
5 might close, right?

6 A I think it's the same answer as before. GUPPIs are based  
7 on current diversions, current competitive pressures, and how  
8 that changes when you changes overlaps. So I don't know how  
9 you would put that in a GUPPI in particular, but I agree it is  
10 not in there.

11 Q In implementing your EGK model, you don't incorporate  
12 anything about changes in a store's cost structure, right?

13 A Again, the EGK model is a model demand. So it is how  
14 consumers choose between the grocery stores that are out there  
15 now.

16 Q My question is: In the model, there is no incorporation  
17 about anything about a change in a store's cost structure,  
18 right?

19 A That sounds right. It's not a model of the grocery-side  
20 operations.

21 Q And in blending your EGK model, you don't incorporate  
22 anything about changes in supply chain operations, correct?

23 A Yeah. Again, it is a model of how consumers choose  
24 between grocery stores, so there is no supply chain operations  
25 in it.

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1 Q You mentioned a couple of times that it is a model of how  
2 consumers choose stores, right? You've said that a few times  
3 now?

4 A Yes.

5 Q You would agree there has been plenty of testimony over  
6 the last few weeks about the importance of private label and  
7 about assortment that might drive consumer choices?

8 A That sounds right.

9 Q The EGK model doesn't account for changes in product  
10 assortment or product availability, correct?

11 A I'm trying to think through the variables that are in  
12 there. In all cases it's a model of how they substitute today,  
13 because that's what you need for the GUPPIs. So I think it's  
14 right that it doesn't account for post-transaction changes in  
15 either direction.

16 Again, the EGK model, as it feeds into the GUPPIs, is  
17 what's the substitution today, and then what would the  
18 implications of that be for what competition might be affected  
19 by combining certain stores under common ownership.

20 Q Similarly, the EGK model would not account for the success  
21 or failure of in-store pharmacy operations, correct?

22 A The EGK model accounts for the presence -- whether the  
23 store has a pharmacy. So beyond that, I might need you to  
24 clarify.

25 Q Sure. But EGK model wouldn't account for it if that

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1 pharmacy is operating -- is providing good service or bad  
2 service, correct? There is no variable for pharmacy  
3 performance?

4 A No. The variable that's in there is, does it have a  
5 pharmacy? There are other variables about the store's sales,  
6 of course, but there is not a separate variable for pharmacy  
7 performance.

8 Q Dr. Israel, I would like to turn now to your criticisms of  
9 Dr. Hill's margins. During your direct testimony you testified  
10 that you calculated variable margins in your initial report,  
11 correct?

12 A At least used variable margins in my initial report.

13 Q And to calculate those variable margins, you would have to  
14 identify variable costs, right?

15 A Correct. And I testified that I relied on what came from  
16 Kroger's capital finance group, as was given to the FTC. Just  
17 to clarify, just to make sure it's clear, in a couple of cases  
18 I, to be conservative, switched things from variable to fixed  
19 to make sure I didn't overcount anything, but generally I  
20 needed to identify what was variable, and I relied on what came  
21 from Kroger.

22 Q So the variable costs you identified, I think you just  
23 testified, came from Kroger's capital finance group, right?

24 A Correct. Just to make sure I'm clear, they were submitted  
25 to the FTC during the investigation, as we had some discussion

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1 of -- my staff had interactions with Kroger and the capital  
2 finance group that produced them.

3 Q And to be clear, Dr. Israel, your team also had  
4 conversations with the capital finance team to understand the  
5 underlying raw data, correct?

6 A That sounds right.

7 Q You did not personally speak with the capital finance  
8 team, right?

9 A At the time, no. I spoke to my team about what we would  
10 need. Then as often happens, I rely on my team to implement my  
11 instructions.

12 Q And you agree that the Kroger capital finance team defined  
13 some of the costs as variable and some of the costs as fixed,  
14 right?

15 A Yes.

16 Q And in crafting your initial report, you didn't review  
17 Kroger's internal documents to see if the capital finance  
18 group's methods in estimating variable or fixed costs were used  
19 on a regular basis within the company, right?

20 A I didn't personally. As I said, I explained to my staff,  
21 who would already know what we are looking for, and they had  
22 the conversations.

23 Q In the process of determining what costs should be counted  
24 as variable costs for your initial report, you didn't review  
25 any ordinary course reports to determine whether they were used



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1 by Kroger in business decision-making, correct?

2 A It's the same answer. I didn't personally review the  
3 reports. I gave the instruction, let's see if they have a  
4 number that they use to compute variable costs, with a lot of  
5 discussion of what that would look like, as I gave in my  
6 direct. But from that point on, it was my staff who had the  
7 discussions.

8 Q You don't cite any specific ordinary course reports from  
9 Kroger supporting your calculation of variable margins in your  
10 initial report, correct?

11 A I think that's right. I mean, the reliance, I think,  
12 was -- you know, it was discussion with staff and then the  
13 conversations that staff had to implement those instructions.

14 Q And the margins that the capital finance group gave you  
15 aren't reported to any public financial disclosure requirement  
16 or SEC filings, right?

17 A I don't know the answer to that.

18 Q Now, Dr. Israel, I want to go back to your experience in  
19 the Sysco-US Foods case and how you thought about margins and  
20 applied your methodology in Sysco, okay?

21 A Sure.

22 Q In the Sysco case, you conducted empirical analysis of  
23 competitive effects of the transaction between Sysco and US  
24 Foods, right?

25 A Yes.

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1 Q And defendants in the Sysco case criticized you for not  
2 using the correct margins, right?

3 A Very late in the case, like sort of at the time of trial  
4 that came out, but then there was some discussion of margins  
5 very late. I remember that, because in Sysco, on the side of  
6 the FTC, as happened here, asking for whatever margins they  
7 could provide, and they gave us what they gave us, and then  
8 they criticized what we were using basically at trial.

9 Q And you offered rebuttal testimony defending your use of  
10 your margins, right?

11 A That's fair. I defended the margins I was using, but then  
12 also looked at what happened if you used the ones -- the other  
13 ones they had finally given us at trial.

14 Q I want to make sure I understood the methodology that you  
15 used to defend the margins -- that you identify in the Sysco  
16 case, okay?

17 A Okay.

18 Q Mr. Dunkin, can you please pull up PX6578 at pages 092 to  
19 093. I'm optimistic that this is easier to read than the last  
20 testimony.

21 A It couldn't be any harder.

22 Q So, Dr. Israel, you did provide rebuttal testimony in the  
23 Sysco case, right?

24 A Yes.

25 Q And you were under oath during that testimony?

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1 A Yes.

2 Q You were asked: "In your opinion, what is the correct  
3 methodology to identify the correct margin to use in this  
4 test?"

5 Do you see that?

6 A Yes.

7 Q And the test referenced here was your test for market  
8 definition and implementing the SSNIP test, right?

9 A I'm not sure actually. It has been a long time.

10 Q If we could -- you used margins that had a wide variety of  
11 both market definition and GUPPI-style analyses in Sysco,  
12 right?

13 A Although they weren't GUPPIs in that matter. I used them  
14 both in market definition analyses, as I recall, but also in a  
15 different form of empirical pricing analysis that I did in that  
16 case.

17 Q So, Dr. Israel, you were asked about the test -- and this  
18 might clarify it. You responded -- if we could go to your  
19 response. "So what I would do is what the merger guidelines  
20 indicate you should do, which is to look at the parties -- look  
21 to their documents for the margins that they referred to. I  
22 particularly think it makes sense to look at their financial  
23 documents, like what they report to the SEC, because they need  
24 to report how they analyze their business and to look at  
25 documents when they talk about pricing pressures and pricing

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1 decisions."

2 Do you see that?

3 A I do.

4 Q So in Sysco you said it made sense to look merging  
5 parties' financial documents, like what they report to the SEC  
6 when trying to identify the right margins, correct?

7 A Look at their financial documents. As I recall, this goes  
8 on to specific things that we could find that they had reported  
9 that were relevant to the specifics of the calculation in that  
10 case, but, yeah, if there is financial documents we can find  
11 that are helpful, then use them.

12 Q Great. I want to keep going with your testimony. You  
13 then later testify: "So there are many documents, many  
14 submissions by Sysco, for example, to the SEC where they  
15 consistently refer to the gross margin, which is the price of  
16 the -- selling one more unit minus the cost of that unit.  
17 That's a number we talked about last time was in the high  
18 teens. They talk about that number. They talk about it. If  
19 that number goes down, they have to change their pricing  
20 policies."

21 Did I read that correctly?

22 A You did.

23 Q In the Sysco case, just to be clear, you testified that  
24 Sysco had many submissions to the SEC where they were  
25 consistently referring to the gross margin, right?

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1 A I think these were like investor letters or something, as  
2 I remember. What really mattered here was two things: One,  
3 they never gave us a number like we have here where they said  
4 this is truly the bottom-line variable cost. We had to do our  
5 best. And second, they had to talk about specific pricing  
6 decisions they made and how they made them that were very  
7 specific to that case that gave me confidence in those margins  
8 in that case.

9 Q Fair enough. Let's go back to your testimony. You  
10 continued: "Just to give a little more background as to why I  
11 think that's so important. If you did -- the margin -- we all  
12 agree as economists the margin we are talking about is price  
13 minus marginal cost. And as Dr. Hausman described it well in  
14 his report, that's the price minus the marginal cost is the  
15 cost of selling one more unit. That's the margin we are  
16 talking about. That's easy to say. That can be hard for  
17 economists to implement, what exactly is that cost" right?

18 A Yeah, I agree with that. That's described for one more  
19 unit. When we are talking about substantial price changes, you  
20 have to measure that for a series of one more unit, because  
21 there are lots of units. But I agree we're trying to measure  
22 what happens as you sell more, and I certainly agree the  
23 challenge we face in every one of these cases is try to get a  
24 good measure of that, and it can be hard for economists to do.

25 Q And just to clarify what you just said, Dr. Israel, your

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1 opinion in Sysco and it seems to continue today, the margin we  
2 care about is the price minus the cost of selling one more  
3 unit, correct?

4 A Selling additional units. I mean, the price that matters  
5 for one more unit is one unit. But if you're going to cut your  
6 price by 1 percent or 5 percent, like we talked about, you're  
7 going to sell a lot more units, so you have got to keep adding  
8 those up. I agree it is the price of incremental units that  
9 you can add up one at a time, and we have to measure that.

10 Q Let's talk about what costs you thought should be  
11 subtracted in your testimony in Sysco. You continued in your  
12 testimony: "As one example, Dr. Hausman and some of the costs  
13 that he subtracts off to get a lower margin, he includes things  
14 like warehousing costs, selling costs, cost of labor. I mean,  
15 those are things that, over a broad scope of business, someone  
16 might say are variable to the overall broadline business, but  
17 if you sell one more unit of food or ten more units of food, do  
18 your warehousing costs actually go up? My own experience from  
19 talking to the guys in the warehouses is the answer is no.  
20 They just move a box around to meet that, so it wouldn't be a  
21 margin cost."

22 Do you see that?

23 A Right. Again, this is sort of what I was referring to  
24 before, very specific to Sysco, and conversations I could get  
25 there about what they actually could do in their warehouses.

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1 Q Dr. Hausman was defendants' expert, right?

2 A Yes.

3 Q And your opinion in that case was he was wrong to subtract  
4 warehousing costs, right?

5 A In that case, because of the information we had about what  
6 they were saying was variable.

7 Q And your opinion was he was wrong to subtract selling  
8 costs, right?

9 A In that case, because of the information we had about what  
10 was variable. It is different from the information we have  
11 here. But in that case, given what was told by the warehouse  
12 guys, that was my opinion.

13 Q And your opinion was he was wrong to subtract costs of  
14 labor, right?

15 A Again, in that case, given what we were told. Because  
16 context matters with these questions, it goes back to these  
17 filings -- the specific filings in that case that were made to  
18 the SEC, when they were talking about specific pricing  
19 decisions, like pricing quotes they had given and what they  
20 considered and what they didn't consider. So, yeah, you have  
21 to do it right for each case. And in that case this was my  
22 opinion.

23 Q And your opinion in Sysco is you would not expect any of  
24 those costs that Dr. Hausman was trying to include in a margin  
25 calculation to go up if you sold one more unit of food or ten

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1 more units of food, right?

2 A What we were told in Sysco in particular was there was a  
3 lot of excess capacity in the way they ran their business, and  
4 so these things -- we were told throughout the investigation --  
5 weren't really variable, right. And as I said, at trial  
6 Dr. Hausman came in with a different number, which we had to  
7 adapt to in the trial.

8 Q And you concluded your answer by noting, "But my general  
9 point is, you know, economists shouldn't be speculating on  
10 which piece is or is not a marginal cost or what affects  
11 pricing decisions. We ought to go to the margins the companies  
12 report, say, to the SEC when they are talking about their  
13 pricing decisions and use the numbers that they report. And in  
14 the case of Sysco, the numbers consistently throughout its  
15 filings is gross margins, which gives you a number in the high  
16 teens," correct?

17 A I absolutely agree. In each case we should try to  
18 understand what's driving -- what's variable and what's driving  
19 pricing decisions.

20 Q And you think it's appropriate for economists to use  
21 numbers that companies publicly report to the SEC as part of  
22 their decision-making, correct?

23 A When they are talking about the SEC about their pricing  
24 decisions, right. In Sysco -- this was all very fresh, because  
25 it was traumatic when they changed their numbers in the trial.



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1 But they had numbers they reported in these SEC investment  
2 letters about how do we assess what prices we can charge, and I  
3 think you should look at how do we asses what prices we could  
4 charge. In this case we have heard that labor costs do go into  
5 pricing decisions, so you would reach a different conclusion.

6 Q Dr. Israel, let's talk about the margins in this case.

7 Kroger routinely reports gross margins to the SEC, right?

8 A Kroger reports lots of margins to the SEC. Now, I think  
9 you're talking about financial reporting as opposed to letters  
10 to the SEC explaining how they set prices.

11 Q You have seen Kroger documents that talk about both gross  
12 margins and pricing decisions together, right?

13 A I mean, that may be. They may be used together. I have  
14 seen documents that talk about gross margins, EBITDA margins.  
15 It is quite natural to me -- what I've seen most here is kind  
16 of a discussion of gross margin, like it is the price. Kroger  
17 gets the product at some cost from wholesalers, and then Kroger  
18 adds a little bit to it, and that's the gross margin. I have  
19 certainly seen that. But I don't think I have seen -- and it  
20 would be inconsistent with what I have seen -- statements that  
21 those are the only costs that they look at in determining what  
22 price to set.

23 Q Dr. Israel, you have heard testimony over the last couple  
24 of weeks from Kroger's and Albertsons' witnesses that they  
25 sometimes do use gross margins in connection with ordinary

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1 course pricing decisions, right?

2 A "In connection with" is very general. I mean, as I said  
3 before, in this industry gross margin is almost like a measure  
4 of price, because Kroger says, "We pay 80 cents for the can of  
5 tuna. We mark it up to 90 cents. The piece of the price we  
6 add is 10 cents." So I have certainly heard them discussing it  
7 that way. I haven't heard anything saying they think that  
8 covers all variable costs. I'm sure I heard Mr. Groff say they  
9 consider more costs than that when they actually determine the  
10 price.

11 Q You were here for Mr. Aitken's testimony, correct?

12 A Yes.

13 Q And you were there when Mr. Aitken testified that when  
14 making pricing assessments, they look at gross margins,  
15 correct?

16 A I mean, I could look at testimony. What I recall him  
17 saying is exactly what I just said, that they look at selling  
18 gross margins as a way to isolate what the price is. I  
19 certainly don't recall him saying, "We ignore other costs when  
20 we determine how to set price," and Mr. Groff said the  
21 opposite.

22 Q And just to conclude on this piece, Dr. Israel, in  
23 drafting your initial report, you do not rely on any ordinary  
24 course documents that actually show that Kroger relied on your  
25 measure of variable margins in making investment or pricing

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1 decisions, correct?

2 A As I said, it was discussions with the capital finance  
3 team that were testified to here, but I don't think I cited a  
4 separate document.

5 Q Dr. Israel, I would like to turn back to your testimony  
6 during your direct exam regarding Costco.

7 Mr. Dunkin, could you please pull up DDX23 and go to  
8 slide 36.

9 Dr. Israel, you drafted these slides, correct?

10 A Yes.

11 Q Now, the image on the slide, the bar chart, that came from  
12 Dr. Hill's rebuttal report, correct?

13 A Yes, it should have.

14 Q But the title is yours, right? "Dr. Hill's analysis shows  
15 that Costco is a significant competitor"?

16 A The box inside there is the piece from him, and then the  
17 title is my slide title.

18 Q So it was your view that Costco's entry resulting in a 5  
19 percent reduction in Kroger sales show that Costco is a  
20 significant competitor to Kroger, correct?

21 A This was all part of the discussion of the supermarkets  
22 market, so a significant enough competitor that it should not  
23 be excluded from the market.

24 Q Okay. But your slide -- and I think your testimony -- was  
25 that Costco is a significant competitor, given the 5 percent

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1 reduction, correct?

2 A As I recall my testimony, just to be clear, it was part of  
3 the discussion of the supermarket market. I think this was the  
4 last piece. I think what I said is Costco has as much effect  
5 as Albertsons, so it's a significant enough competitor that it  
6 shouldn't be excluded from the market. Albertsons is also a  
7 significant enough competitor that it shouldn't be excluded  
8 from the market.

9 Q Just to be clear, Dr. Israel, your slide is that Costco is  
10 a significant competitor to Kroger based on a 5 percent  
11 reduction in Kroger sales, right?

12 A That's what the title is. I hope I am clear, because of  
13 how this fit into the testimony, and that this is -- it's as  
14 significant as Albertsons and therefore you shouldn't exclude  
15 either one from the product market.

16 Q Would you agree that Albertsons had the same entry effect  
17 as Costco?

18 A That was my affirmative point, and I would agree therefore  
19 they should both be in the market.

20 Q Would you agree the fact that Albertsons has the same  
21 entry effect as Costco means Albertsons is a significant  
22 competitor to Kroger?

23 A In that same sense. Significant enough that I never say  
24 that Albertsons should be excluded from the market.

25 Q Dr. Israel, is it fair to say you have been an expert

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1 in -- strike that.

2 Dr. Israel, you have been an expert in merger cases  
3 before, correct?

4 A Yes.

5 Q And you have been an expert for companies trying to merge  
6 for defendants, correct?

7 A Many times.

8 Q And you, in fact, have been an expert for the Government  
9 trying to stop a merger, correct?

10 A Yes.

11 Q I want to talk about those prior cases. If we could go to  
12 PDX15, page 4 of the demonstrative.

13 First, the Sysco case we have talked about a couple  
14 of times today, you were the FTC's expert in that case in 2015,  
15 correct?

16 A Yes.

17 Q The District Court in Sysco granted the FTC's motion for a  
18 preliminary injunction, right?

19 A Yes.

20 Q And it is fair to say that the Court agreed with your  
21 opinion that the merger was anticompetitive, correct?

22 A Yes.

23 Q Now, the second row you testified as an expert in the  
24 Anthem-Cigna merger case brought by the Department of Justice,  
25 correct?

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1 A Yes.

2 Q That was 2017?

3 A I remember 2016, but maybe the ruling was in 2017.

4 Q My apologies. You might have testified in 2016, correct?

5 A That sounds right to me.

6 Q In that case you switched sides, and you went to the  
7 defense side, correct, Dr. Israel?

8 A I wouldn't describe it that way. It was a different case.  
9 I was testifying for the defense.

10 Q Fair enough. I understand the point.

11 Now, you submitted a report for the companies in that  
12 merger, right?

13 A I did.

14 Q And the companies were both health insurers, correct?

15 A Yes.

16 Q And the District Court ultimately granted the Department  
17 of Justice's motion for an injunction in that case, correct?

18 A That's true.

19 Q In that case you argued that the Government's market  
20 definition was too narrow, correct?

21 A I don't remember. Honestly, there was another expert who  
22 talked a lot more about that. But the opinion that I remember  
23 that was the heart of it was an efficiencies opinion in that  
24 case. It is a very memorable case, because in the middle of it  
25 the parties sort of decided they didn't want to merge and

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1 actively undermined the synergies I was talking about. That's  
2 the part I remember.

3 MS. PFAFFENROTH: Your Honor, I would just object.  
4 We are walking through a number of different cases and  
5 resolutions here, none of which are this case and the facts of  
6 this case. Both experts here have won and lost cases. I  
7 object to the relevancy of any of this.

8 THE COURT: Overruled. He can inquire.

9 BY MR. PAI:

10 Q Dr. Israel, you next testified as an expert in the FTC's  
11 challenge to the Wilhelmsen-Drew merger in 2018, correct?

12 A I'm not sure that's next. Also, because this is not a  
13 complete list. There are a bunch of mergers that went the  
14 other way that aren't here. So I'm not sure that is next in my  
15 life, and it is also not next in the chart.

16 Q I'm focusing on your prior federal court testimony  
17 involving mergers, Dr. Israel.

18 A I won't be able to remember what was federal court versus  
19 state versus private. I'm just not going to remember. If you  
20 tell me these are the federal court cases, that may be true. I  
21 have about 10 mergers that I've done. As I recall, I think  
22 five of them went on the side I was on and five didn't. I  
23 don't remember which ones were federal court or other settings.

24 Q Okay. Well, you testified in federal court on behalf of  
25 defendants in the FTC v. Wilhelmsen Holding ASA, correct?

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1 A I did.

2 Q And the merging parties were providers of marine water  
3 treatment chemicals and related services, correct?

4 A Yes.

5 Q In that case you argued that the Government's proposed  
6 market definition was both overinclusive and underinclusive,  
7 right, Dr. Israel?

8 A I don't remember whether I said that or not that much  
9 detail. I think I did object to their market definition.  
10 Beyond that, I would have to look. Just honestly, Sysco was  
11 the first one I did, so I remember almost everything about it.  
12 The other ones are a little fuzzier. I think you are right. I  
13 think I testified against their market definition.

14 Q And the Government prevailed in that case, correct?

15 A Yes.

16 Q And the Court rejected your objections to the market  
17 definition being both overinclusive and underinclusive, right?

18 A I just don't remember the specifics of the opinion. The  
19 Government ultimately did prevail.

20 Q You testified for the defendants in the FTC's challenge to  
21 the Peabody-Arch merger in 2020, correct?

22 A Yes.

23 Q The District Court in the Peabody-Arch case granted the  
24 FTC's motion for preliminary injunction, correct?

25 A Yes.



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1 Q In Peabody, you argued that -- I will take a step back.  
2 The defendants in Peabody were essentially coal companies,  
3 right, Dr. Israel?

4 A Yes.

5 Q And the FTC alleged that the merger between these coal  
6 companies would substantially lessen competition essentially  
7 for the production and sale of coal in part of the country,  
8 right?

9 A Yeah. That sounds right.

10 Q And you were arguing that things other than coal  
11 production should be included in the market, like natural gas,  
12 correct?

13 A In particular, arguing for the importance of competition  
14 from natural gas.

15 Q And the Court specifically rejected your opinion that  
16 other energy sources rendered the FTC's market definition too  
17 narrow, correct?

18 A Again, I could look -- as I recall what the Court said was  
19 there certainly was competition from natural gas and  
20 potentially a broader market, but also defined that there was a  
21 market for just coal.

22 Q You testified in the American Airlines-JetBlue antitrust  
23 case just last year in 2023, correct? Like two years ago?

24 A The testimony was in 2022. It is not a merger case. It  
25 was a joint venture case. It was a Section 1 basically joint

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1 venture case, but I did testify in that.

2 Q And you provided lengthy testimony on behalf of defendants  
3 in that case, correct?

4 A I testified on behalf of defendants. I don't remember how  
5 long it was.

6 Q Fair enough. In this decision the Court specifically  
7 addressed your analysis, right?

8 A Yes. That case is the leading example or -- probably the  
9 one big example of what I said in my direct, where sometimes  
10 courts disagree, and that court certainly disagreed with myself  
11 and all of the defense experts.

12 Q And in that decision the Court noted, "When it comes to  
13 Dr. Israel's analysis predicting the NEA's benefits, his  
14 projections are contaminated by his reliance on scenarios  
15 designed and selected by the defendants."

16 Isn't that correct?

17 A That isn't the way I would characterize what happened, but  
18 that might be what the Court says.

19 Q And the Court also found that you had the demeanor and the  
20 tone of an advocate invested in the outcome of the case,  
21 correct?

22 A I think so.

23 Q The Court also found that you rendered opinions based on  
24 false assumptions, correct?

25 A I don't remember. It may have said that.

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1 Q The Court also found that "in his lengthy testimony,  
2 Dr. Israel also demonstrated a misunderstanding and  
3 misapplication of antitrust concepts," correct?

4 A I think that one goes on to be very specific to airlines,  
5 where obviously I still stand by my opinions, but, yes, the  
6 Court rejected my opinions strongly on airline markets.

7 Q The Court ultimately ruled that "Dr. Israel's opinions  
8 rendered in this case are entitled to no weight," correct?

9 A I recall that. That was true of myself and all of the  
10 defense experts, but I certainly recall that, yes.

11 Q Okay. Then you testified on behalf of defendants in the  
12 FTC's challenge to IQVIA's challenge to IQVIA's proposed  
13 acquisition of Deepintent, correct?

14 A Yes.

15 Q And I believe that testimony was at the end of -- was the  
16 end of last year, correct?

17 A Yes.

18 Q And in that case you contested the Government's market  
19 definition, correct?

20 A Yes.

21 Q And you argued that the proposed market -- the market  
22 proposed by the Government would not satisfy the HMT, correct?

23 A I think my testimony was they had not established it.  
24 They basically relied on shares, and so didn't actually  
25 establish the HMT. My testimony more broadly -- it was an

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1 advertising case, and it was that many forms of advertising  
2 compete. The Government's case was a very specific form of  
3 advertising, and the Court did ultimately find for the  
4 Government.

5 Q And the Court rejected your arguments on market  
6 definition, correct?

7 A I would have to review the opinion. I mean, this wasn't  
8 one that was particularly negative. It was some acceptance of  
9 the experts on each side. I think the review of the experts  
10 was much more balanced, but the Court did ultimately grant the  
11 Government's case.

12 MR. PAI: Your Honor, I'm ready to pass the witness  
13 back. Before I do, I realize I neglected to admit two  
14 documents into evidence, PX6578, page 006 and PX6678, pages 092  
15 to 093. Those are the transcripts we discussed.

16 MS. PFAFFENROTH: I would object, Your Honor. This  
17 is testimony in a different case. Obviously we don't object to  
18 Dr. Israel's testimony regarding his testimony here, but I  
19 don't think it is an appropriate exhibit to be admitted into  
20 evidence in this case.

21 MR. PAI: Your Honor, both the Government and  
22 defendants have moved to include exhibits on their exhibit  
23 list, including academic articles and prior reports. This, in  
24 my view, is no different than any of those insofar as it  
25 reflects his methodologies and his approach to doing the

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1 analysis.

2 THE COURT: I will sustain the objection. His  
3 testimony will stand. It is in the record.

4 MR. PAI: Thank you, Your Honor. I pass the witness.

5 MS. PFAFFENROTH: Just a few additional questions,  
6 Your Honor.

7 REDIRECT EXAMINATION

8 BY MS. PFAFFENROTH:

9 Q So, Dr. Israel, my colleague here just showed you a chart  
10 about previous testimony. Was that an exhaustive list of cases  
11 in which you have testified?

12 A No, not close.

13 Q And are there additional cases that could have been added  
14 in which the Court credited your opinions?

15 A Lots of them, including merger cases. Like I said, I  
16 don't keep straight whether they were federal court or not, but  
17 I do try to keep track of the mergers I have done, and I think  
18 there were five where my side was ruled for by the Court and  
19 five that went the other way.

20 Q Thank you. So earlier in your testimony my colleague  
21 pointed you to a section in your report that says, "Even if  
22 Kroger were a hypothetical monopolist, it would not be expected  
23 to result in a price increase with respect specifically to  
24 Dr. Hill's proposed markets in this case."

25 Do you recall that?

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1 A Yes.

2 Q Can you just put that in context, in light of your overall  
3 conclusions regarding the propriety of Dr. Hill's relevant  
4 markets in this case?

5 A I mean, the context I would put it in is that those  
6 markets -- I mean, what this is showing is those markets are  
7 not capturing in the key competitors. In too many cases they  
8 are leaving out a Walmart or a Costco or somebody else who  
9 drives prices, which means that if you ask the regression --  
10 it's a monopolist in that market -- what's going to happen to  
11 prices, the data set basically says the data says, "I don't  
12 know. It could go either way, because I don't have enough  
13 information about competition."

14 Q And my colleague also directed you to table 4 in your  
15 report that listed a number of diversions with respect to  
16 different competitors.

17 Do you recall that?

18 A I do.

19 Q And in that table could you explain why it is that the  
20 diversions at an aggregate level across all areas of the  
21 country where both Kroger and Albertsons currently compete  
22 would not necessarily lead you to specific conclusions about  
23 the relative level of diversion on a store-level basis?

24 A I mean, effectively these are adding up across thousands  
25 of stores or hundreds of stores, at least. So these could look

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1 very, very different for each individual store, and that's what  
2 you would need to study, and the fact that the numbers are  
3 bigger in some cases than others can also reflect just how many  
4 of the banner there are, so you're adding up across more  
5 places. I think I presented it as a useful summary of overall  
6 diversion between different types of stores. But to actually  
7 measure competition, you would want to do it store by store  
8 where the numbers could look quite different.

9 Q My colleague pointed you specifically to the diversion  
10 ratios in table 4, competitors like Aldi, like Whole Foods,  
11 like Trader Joe's. Would you exclude, for example, a  
12 Jewel-Osco that's an Albertsons banner that competes with  
13 Mariano's, a Kroger banner, because that banner shows a 1.6  
14 percent aggregate diversion ratio?

15 A I certainly wouldn't exclude it. The point that I would  
16 take from an aggregate table like this, which is what I  
17 presented in my direct, there is this much diversion in the  
18 aggregate, then I wouldn't leave that store out in the  
19 aggregate. I would consider it. But I said, you would  
20 consider it store by store to decide whether it's an important  
21 competitor for that store.

22 Q And my colleague also asked you a series of questions  
23 regarding whether you took into account potential  
24 post-acquisition -- post-transaction/post-divestiture changes.  
25 Can you provide some additional context with respect to why you

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1 testified that would not be appropriate for this type of model?

2 A I mean, it is not what a competition model like a GUPPI  
3 does. A GUPPI model, or these competition economic models,  
4 take current conditions, and they say what's constraining  
5 prices now. There are various ways to get at that. They ask  
6 if the merger takes away that constraint, does that create  
7 price pressure. That's why we call it that. There is other  
8 testimony from other folks about strategy changes and so on  
9 that people can assess. But what we offer, as competition  
10 economists, are tools that look at current shares, current  
11 diversions, current margins, to assess current competitive  
12 pressure, to assess whether the merger relaxes that pressure  
13 sufficiently to lead to a price increase.

14 Q And with respect to the types of potential changes that my  
15 colleague was talking about, did Dr. Hill model those into his  
16 CMCR analysis?

17 A No. They are not in the CMCRs. I mean, the only thing I  
18 saw Dr. Hill do was some calculations where he just asked what  
19 would happen if you just reduced the share of the divested  
20 stores. But again, that's just reducing them without analyzing  
21 it. Again, it is not the way these models work. The whole  
22 purpose is it look at current conditions and current  
23 competition to assess what happens to avoid having to engage in  
24 this speculation game of what if one store goes up or down.

25 Q And if you were to do so, would it be appropriate to



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1 consider changes with respect to only a single competitor in  
2 the market?

3 A Not in an analysis that did that. Again, I would never  
4 feed it into a GUPPI. But if I was going to do an analysis of  
5 changes, I would look at: Is Albertsons going to go up or  
6 down? Is Kroger going to go up or down? Is C&S going to go up  
7 or down? That's an entirely different analysis that would have  
8 to be complete and would be distinct.

9 Q A different topic: My colleague asked you, again, about  
10 what you relied upon to determine the appropriate variable  
11 margins in this case, and you testified with respect to  
12 information received from the capital finance group. Did you  
13 see documents here, testimony during the course of this case,  
14 that was consistent with the information provided with respect  
15 to variable margins by the capital finance group?

16 A Everything I heard was entirely consistent with what I had  
17 understood to be true during the investigation.

18 Q And did you hear any testimony or see any evidence that  
19 was inconsistent with your conclusions with respect to the  
20 appropriate margins to use for the competitive effects analysis  
21 in this case?

22 A Not that I recall.

23 Q And just overall, my colleague asked you a number of  
24 questions about the details of analysis, of your opinions,  
25 Dr. Hill's opinions. Did anything he asked you -- any

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1 question, any response -- leave you to change any of the  
2 opinions that you are offering in this case in the testimony  
3 today or in your reports?

4 A No, not at all. I mean, you would have to go through the  
5 specifics of everything that we did, and it reinforced the  
6 decisions I made with the evidence in this case.

7 MS. PFAFFENROTH: Your Honor, no further questions.

8 THE COURT: Thank you. You can step down.

9 I believe the next witness is remote.

10 MR. PODOLL: That's right, Your Honor.

11 THE COURT: Is counsel here?

12 MR. PODOLL: I believe counsel is about to be led in.

13 Your Honor, while that's happening, may my colleague  
14 pass out binders to those in the courtroom?

15 THE COURT: Yes.

16 MR. PODOLL: Thank you, Your Honor.

17 May I proceed, Your Honor?

18 THE COURT: Yes. So let's have counsel identify.

19 MS. MECHE: Rachel Meche, counsel for Target  
20 Corporation and Mr. Conlin.

21 THE COURT: All right. So let's swear in Mr. Conlin.

22 MR. PODOLL: Thank you, Your Honor.

23 THE COURT: We need to swear him in.

24 MR. PODOLL: I'm sorry, Your Honor.

25 (The witness was duly sworn and testified remotely.)

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1 THE CLERK: Thank you. Would you please state your  
2 name for the record, spelling your last.

3 THE WITNESS: John Conlin. J-O-H-N, C-O-N-L-I-N.

4 DIRECT EXAMINATION

5 BY MR. PODOLL:

6 Q Good afternoon, Mr. Conlin.

7 A Good afternoon.

8 Q You have just introduced yourself to the Court. Where do  
9 you work, sir?

10 A I work for Target Corporation.

11 Q And what's your role?

12 A I'm the senior vice president of merchandising for food  
13 and beverage.

14 Q How long have you worked at Target, Mr. Conlin?

15 A I started with Target in June of 2000.

16 Q And, sir, what are your responsibilities as the senior  
17 vice president of food and beverage merchandising?

18 A Yes. I set the business strategy and merchandising  
19 strategy for food and beverage, inclusive of assortment and  
20 product priorities with an influence on price promotions and  
21 the presentation of our products.

22 Q Now, Mr. Conlin, broadly speaking, does Target have stores  
23 in all 50 states?

24 A Yes.

25 Q And does Target plan to continue building new stores in

J. Conlin - D

1 the coming years?

2 A Yes.

3 Q About how many, if you know?

4 A We have publicly announced our aspiration of building 300  
5 stores over the next ten years.

6 Q Now, Mr. Conlin, I want to talk to you a little bit about  
7 Target's grocery business. Could you open on your computer,  
8 although we will put it on the screen, DX2888, which we have  
9 sent to you via email and will displayed here in court.

10 What is this document, Mr. Conlin?

11 A It says it's our 10-K.

12 Q And that's for the fiscal year ending February 1, 2020?

13 A Correct.

14 Q Sir, is this a document Target files with the SEC  
15 annually?

16 A Yes, I believe so.

17 Q And to the best of your knowledge, are its contents true  
18 and accurate?

19 A Yes.

20 MR. PODOLL: Your Honor, we move the admission of  
21 DX2888.

22 MS. HOUGH: No objection.

23 THE COURT: It will be received.

24 BY MR. PODOLL:

25 Q If you could turn to page 40. Mr. Simmons will put it on

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1 your screen. This is a chart.

2 Do you know what this chart reflects, sir?

3 A Let me --

4 Q Maybe I can maybe it easier.

5 Mr. Simmons, can you highlight the top left of this  
6 chart.

7 Mr. Conlin, can you tell us what this chart reflects.

8 A It looks like our business revenues as broken out by some  
9 of our different categories of business.

10 Q Mr. Simmons, could you highlight the row that says "food  
11 and beverage."

12 Mr. Conlin, what does this row of the chart reflect?

13 A It appears to reflect our food and beverage revenue for  
14 the years 2017, 2018, and 2019.

15 Q What was Target's food and beverage revenue in the year  
16 2017?

17 A 14.256 billion.

18 Q And, sir, does that even include beauty and household  
19 products, things like paper towels and toothpaste?

20 A It does not.

21 Q Now, I would like to point you to a second document which  
22 we sent you, which is DX2895.

23 Mr. Simmons, if you could put that up on the screen,  
24 please.

25 Now, Mr. Conlin, what is DX2895?

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1 A It looks like our Form 10-K.

2 Q And that's for the year ending February 3, 2024?

3 A Correct.

4 Q Now, sir, could you please turn to page 46 of this  
5 document. Mr. Simmons will also take us there.

6 You see the same chart here, sir. What were Target's  
7 food and beverage revenues in the year 2023?

8 A 23 billion 899 million is what it is showing.

9 Q Mr. Simmons has now put these charts side by side.

10 Mr. Conlin, how much did Target's food and beverage  
11 grow in the six-year period from 2017 to 2023?

12 A I can't do the math in my head that quickly, but from  
13 14.2 billion to 23.9 billion.

14 Q That's almost \$10 billion?

15 A Correct.

16 Q In six years?

17 A Correct.

18 Q Now, Mr. Conlin, during that time, 2017 to 2023, did  
19 Target win any awards for its grocery business?

20 A I believe it did.

21 Q What award or awards did it win, sir?

22 A I'm not sure off the top of my head all the awards that  
23 were won. I started in this business last year.

24 Q Sure. Why don't I try to refresh your recollection, so I  
25 don't want it this on your screen.

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1           Sir, do you have a copy of your deposition? It will  
2 be -- it is DX2951 in the documents that we sent you.

3 A     Yes.

4 Q     Could you look, without reading it out loud, just read to  
5 yourself lines 22, 13 through 15 and 24, 7 through 10.

6           MS. HOUGH: Your Honor, I object to this question  
7 here. It was asked to Mr. Conlin at his deposition, and he  
8 didn't know the answer then. I don't believe it is appropriate  
9 to have him look back at his deposition testimony where he was  
10 relying on a document not produced by Target that was presented  
11 to him.

12           THE COURT: If he is refreshing his memory, he can do  
13 so. Overruled.

14           But I don't think you gave him the correct page  
15 number. You just told him the line, so he doesn't know where  
16 to look.

17           MR. PODOLL: I'm sorry, Your Honor. I was looking at  
18 deposition 22, 13 through 15 and then 24, 7 through 10.

19           Thank you, Your Honor.

20           THE WITNESS: Okay. I have page 22 up, so I'm  
21 looking at lines 13 through 22, I believe.

22 BY MR. PODOLL:

23 Q     22, 13 through 15, and then if you could look at 24,  
24 7 through 10. Let me know when you have done that, sir.

25 A     Okay.

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1 Q Could you now please put that away and let me know when  
2 you have done that.

3 A Okay.

4 Q Does that refresh your recollection as it to any grocery  
5 awards that Target won between 2017 and 2023?

6 A Yes.

7 Q And what awards did Target -- grocery awards did Target  
8 win between 2017 and 2023?

9 A It appears we won retailer of the year in 2021.

10 Q Now, Mr. Conlin, does Target have a long-term commitment  
11 to growing its grocery business even further beyond that  
12 \$10 billion that we saw?

13 A Yes.

14 Q And is that a long-term commitment, sir?

15 A How do you mean "long-term"?

16 Q Let me just ask it this way: Is Target committed to  
17 growing the grocery business over the long-term?

18 A We are committed to growing our grocery business going  
19 forward, yes.

20 Q Why, sir? Why is Target focused on growing its grocery  
21 business?

22 A We believe that groceries -- we know that groceries are an  
23 important part of our consumers' purchases, and we believe  
24 having a strong grocery presence within our stores and online  
25 creates more customer loyalty and will grow our business over



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1 time.

2 Q Does Target plan to move into new trade areas?

3 MS. HOUGH: Your Honor, I object to the lack of  
4 foundation here. I don't believe a foundation has been  
5 established for Mr. Conlin to testify about Target's expansion  
6 plans, and that would also contradict his testimony at  
7 deposition.

8 THE COURT: Sustained.

9 BY MR. PODOLL:

10 Q Sir, are you -- what was your role before you were the SVP  
11 of food and beverage?

12 A I was the senior vice president of Target properties.

13 Q And in that role, as senior vice president of Target  
14 properties, did you have responsibilities for considering where  
15 new Target stores would be located?

16 A Yes.

17 Q And based on that experience, sir, are you aware whether  
18 Target is intending to move into new trade areas going forward?

19 MS. HOUGH: Again, I object to his lack of foundation  
20 to discuss Target's current expansion plans.

21 THE COURT: Overruled.

22 THE WITNESS: Would you repeat the question, please.

23 BY MR. PODOLL:

24 Q Sure. Based on your experience working with Target  
25 properties, do you know whether Target is intending to move

J. Conlin - D

1 into new trade areas going forward?

2 A In my time in properties, yes, we did plan to build new  
3 Target locations in new trade areas and existing trade areas.

4 Q And incidentally, when did you shift over to the grocery  
5 business?

6 A I started in this role July of 2023.

7 Q Now, back to your current role. Does Target plan to add  
8 distribution centers?

9 A What I know is that we have opened in the last 12 to 18  
10 months three food distribution centers.

11 Q And does Target plan to add more freezers to support its  
12 e-commerce business, which I think you mentioned a minute ago?

13 A Freezers in which capacity?

14 Q To support the delivery of fresh e-commerce goods.

15 A Within those distribution centers?

16 Q Or within your stores, sir.

17 A I'm not sure what our freezer expansion plan is at the  
18 store level.

19 Q Okay. Let's stay on e-commerce for a minute. Are  
20 customers able to purchase groceries from Target without  
21 walking into a Target store?

22 A Yes.

23 Q What are the different ways that a customer can place a  
24 remote grocery order with Target?

25 A A customer could place an order and pick it up in the

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1 store. They could place a digital order and have it delivered  
2 via drive-up in the parking lot. We also have a same-day  
3 delivery service through Target 360, which allows customers to  
4 have groceries delivered to their home same day. And then some  
5 of our grocery items are able to be shipped via brown box to  
6 guests' homes.

7 Q Is Target's go-to-market strategy for the most part  
8 consistent between in-store and online?

9 A Maybe explain "go-to-market strategy."

10 Q Let me ask it this way: Is Target -- does Target have a  
11 consistent go-to-market strategy between store and online in  
12 terms of brands?

13 A Yes.

14 Q Does it offer the same brands?

15 A Yes.

16 Q Does Target have a consistent go-to-market strategy  
17 between in-store and online in terms of pricing?

18 A Yes.

19 Q Does Target have a consistent go-to-market strategy  
20 between in store and online in terms of promotions?

21 A Yes.

22 Q Now, Mr. Conlin, can a customer who is purely ordering  
23 online -- not walking into your store and ordering online --  
24 physically inspect products before they buy them?

25 A No.

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1 Q Is there some ability to do some customization when one  
2 orders online; for example, the size of deli meat you would  
3 want sliced?

4 A Yes. Depending on the way in which they're having it  
5 delivered through same-day delivery, there is customization  
6 available.

7 Q Mr. Conlin, has there been a trend in Target's e-commerce  
8 grocery sales in recent years?

9 A Trend? Maybe explain what you mean.

10 Q Have Target's e-commerce sales grown in recent years?

11 A Yes.

12 Q Have they grown -- has that been a consistent trend?

13 A Yes.

14 Q And that's even after COVID, sir?

15 A Yes.

16 Q Do you, as the head of Target's food and beverage  
17 business, believe that the online grocery business will  
18 continue to be important for Target?

19 A Yes.

20 Q And do you anticipate that Target's e-commerce business  
21 will continue to grow?

22 A Yes.

23 Q Now, sir, I want to take a minute and talk to you about  
24 some of the grocery items that Target sells.

25 Does Target stock national brands of foods and

J. Conlin - D

1 beverages?

2 A Yes.

3 Q Does it stock premium brands, like Boar's Head deli meat?

4 A In some stores, yes.

5 Q Does Target stock private label brands?

6 A Yes.

7 Q We will come back to that later, but I want to keep on  
8 this for a minute.

9 Sir, does Target have delis in its stores where you  
10 can get sliced meat?

11 A Yes.

12 Q Does Target sell bread?

13 A Yes.

14 Q How about dairy products, like cheese and milk?

15 A Yes.

16 Q Does Target sell baked goods?

17 A Yes.

18 Q In fact, do some Targets have bakeries?

19 A Yes.

20 Q Mr. Conlin, does Target sell fresh produce, fruits, and  
21 vegetables?

22 A Yes, we do.

23 Q Does Target sell frozen food and frozen beverages?

24 A Yes.

25 Q Does Target sell meat and poultry, sir?

J. Conlin - D

1 A Yes.

2 Q How about seafood? Does Target sell seafood?

3 A Yes.

4 Q Of course, Target, sir, sells dry goods, food like pasta,  
5 rice, soda, those things?

6 A Yes.

7 Q Where it's legal, does Target sell wine and beer?

8 A Yes.

9 Q And Target sells prepared food in some locations?

10 A In some locations, yes.

11 Q Does Target sell fresh flowers?

12 A In some locations, yes.

13 Q Now, setting aside some variation in things like prepared  
14 foods or wine and beer, are all the things we just talked about  
15 available to Target customers via e-commerce?

16 A Yes.

17 Q And many of those things, sir, can they be delivered on  
18 the same day if someone wants?

19 A Yes. Depending on what market they live in, yes, they are  
20 available same day.

21 Q Now, Mr. Conlin, I want to pivot and talk about how Target  
22 sets its prices.

23 MR. PODOLL: Your Honor, I'm going to be sensitive to  
24 confidentiality here, so I would like to follow the procedure  
25 that we have followed with some of the other witnesses.

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1 BY MR. PODOLL:

2 Q Mr. Conlin, what I'm going to ask you to do is ask you to  
3 open up that deposition again.

4 Mr. Simmons, I'm going to ask him to display some  
5 things on the private screens. Then I'm going to ask  
6 Mr. Conlin to confirm if that's how Target does its pricing.

7 Mr. Simmons, would you display on the private  
8 screens, and Mr. Conlin could you open your deposition to  
9 page 48, lines 11 through 16.

10 Now, Mr. Conlin, could you review this question and  
11 answer, please.

12 I'm sorry, Mr. Conlin. It's lines 9 through 16, I'm  
13 told. Let me know when you have finished doing that.

14 A Okay.

15 Q Sir, does this portion of your deposition accurately  
16 reflect Target's pricing policy?

17 A Yes.

18 MR. PODOLL: Your Honor, I move to admit page 48,  
19 lines 9 through 16 of DX2951.

20 MS. HOUGH: No objection.

21 THE COURT: It will be received.

22 BY MR. PODOLL:

23 Q I have one more of these to do, Mr. Conlin. I would like  
24 to point you to page 59, line 14 to page 60, line 18.

25 And same thing, Mr. Simmons. Let's put this on the

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1 private screens.

2 Mr. Conlin, if you could read this and let me know  
3 when you're done.

4 A Could you repeat that? I'm on page 59. Which lines?

5 Q 59, line 15. We could start at 14, if you would like.  
6 Then through to page 60, line 18.

7 A Okay.

8 Q Sir, same question: Does this section of your deposition  
9 accurately reflect Target's pricing policies?

10 A Yes.

11 MR. PODOLL: Your Honor, I would move to admit 59, 14  
12 through 60, 18 of DX2951.

13 MS. HOUGH: No objection.

14 THE COURT: It will be received.

15 BY MR. PODOLL:

16 Q Now, Mr. Conlin, does Target in pricing and other things  
17 review certain data sets about competitors -- competitor data  
18 sets?

19 A Yes.

20 Q What data sets does Target review in assessing  
21 competitors?

22 A In assessing, I guess -- what aspect of competitors?

23 Q Well, generally competition. Let me ask you this. "Does  
24 Target look at Nielsen data?"

25 A Yes.



J. Conlin - D

1 Q How about Circana data?

2 A Yes.

3 Q And when Target is looking at this data, does it look at a  
4 data feed called MULO+?

5 A Yes.

6 Q I want to stick generally in the same area but shift gears  
7 a little bit. I would like to show you a document titled  
8 DX2967.

9 Mr. Simmons, could you pull this up. Yes, this can  
10 go on the public screen. Thank you, Mr. Simmons.

11 Do you recognize this document, Mr. Conlin?

12 A Yes.

13 Q And what is it?

14 A It's a press release that talks about price cuts on 5,000  
15 frequently shopped items across groceries and essentials.

16 Q Those frequently shopped items included milk, bread, fresh  
17 fruit, diapers, and other things of that nature?

18 A Yes.

19 Q Sir, is this press release accurate to the best of your  
20 knowledge?

21 A Yes.

22 Q And does it reflect Target's intent as of May 20, 2024?

23 A Yes.

24 Q Did this price reduction, in fact, happen, sir, or is it  
25 in the process of happening?

J. Conlin - D

1 A It is in the process of happening.

2 MR. PODOLL: Your Honor, I move the admission of  
3 DX2967.

4 MS. HOUGH: No objection.

5 THE COURT: It will be received.

6 BY MR. PODOLL:

7 Q All right. Mr. Conlin, I want to shift gears now and talk  
8 about who Target competes with in the grocery business. So I  
9 would like to walk through some of your competitors.

10 Does Target compete with Walmart in grocery?

11 A Yes.

12 Q Does Target compete with Sam's Club?

13 A Yes.

14 Q In grocery?

15 A Yes.

16 Q And all my questions, sir, for clarity, I'm going to be  
17 asking you about in your area, all right?

18 A Okay.

19 Q Does Target compete with Costco?

20 A Yes.

21 Q With Kroger?

22 A Yes.

23 Q With BJ's Wholesale Club?

24 A Yes.

25 Q With Giant?

J. Conlin - D

1 A Yes.

2 Q With Publix?

3 A Yes.

4 Q With Dollar General?

5 A Yes.

6 Q With Albertsons?

7 A Yes.

8 Q With Whole Foods?

9 A Yes.

10 Q With Trader Joe's?

11 A Yes.

12 Q With Amazon?

13 A Yes.

14 Q Where they are in your areas, does Target compete with  
15 ethnic grocery stores?

16 A I think it maybe depends on the ethnic grocery store, but,  
17 yes, to some degree.

18 Q How about Aldi? Does Target compete with Aldi?

19 A Yes.

20 Q And I want to pause on Aldi for a minute. Would you  
21 consider Aldi a grocer, Mr. Conlin?

22 A Yes.

23 Q In fact, at the time of your deposition had you ever heard  
24 the term "limited assortment store"?

25 A No, I don't believe so.

J. Conlin - D

1 Q Now, we discussed e-commerce grocery sales a moment ago.  
2 In the e-commerce area, who does Target compete with?

3 A Some examples would be Walmart, Amazon, Whole Foods.  
4 Those are some examples.

5 Q How about DoorDash? Does Target compete with DoorDash in  
6 the e-commerce area?

7 A I don't know if I would characterize it as competing with  
8 DoorDash.

9 Q Okay. So don't put anything on the screen -- well, you  
10 recall being deposed in this case some time ago?

11 A Yes.

12 Q And at that time you swore to tell the truth?

13 A Yes.

14 Q And you did in fact tell the truth?

15 A Yes.

16 Q Now, Mr. Simmons, don't put this up on the screen.

17 MR. PODOLL: Your Honor, I would point you and  
18 Mr. Conlin to page 71, lines 4 through 6 and then 13 to 14 of  
19 his deposition and would ask whether I may proceed.

20 THE COURT: You may.

21 MR. PODOLL: Now may Mr. Simmons display, or would  
22 you prefer I do it without?

23 THE COURT: Do it without.

24 BY MR. PODOLL:

25 Q Mr. Conlin, you were asked in your deposition: "Target

J. Conlin - D

1 competes with others that also offer online grocery delivery?"

2 And you answered: "Yes."

3 Do you see that?

4 A I'm sorry?

5 Q This is page 71, lines 4 through 6.

6 A Page 71, lines 4 through 6.

7 THE COURT: Are you trying to refresh his memory?

8 MR. PODOLL: No, Your Honor. I'm impeaching. I can  
9 refresh too.

10 THE COURT: You just have to tell me what you're  
11 doing.

12 MR. PODOLL: I was intending to impeach.

13 BY MR. PODOLL:

14 Q Why don't we try to refresh, Mr. Conlin. If you look at  
15 the section I justified identified and take a look.

16 A Yes.

17 Q Now have you put it away? Have you put away your  
18 deposition, sir?

19 MS. HOUGH: Your Honor, I object to this as an  
20 improper refreshment. He didn't testify that he didn't recall  
21 whether or not Target competed with DoorDash.

22 MR. PODOLL: That's fair. I'll move on. I don't  
23 think we need to dwell.

24 THE COURT: Okay.

25

J. Conlin - D

1 BY MR. PODOLL:

2 Q Could we turn back to DX2895, which is your 2023 10-K.

3 Let me know when you have it, sir.

4 Mr. Simmons, can you turn to page 21, please.

5 Now, Mr. Conlin this chart reflects Target monitoring  
6 something called a peer group.

7 Do you see that?

8 A Yes.

9 Q Mr. Simmons, could you pull up the paragraph just below  
10 the chart, and I would like you to highlight from Romanette  
11 (ii) to the end of the paragraph.

12 Mr. Conlin, this paragraph explains who the peer  
13 group is; is that right?

14 A Yes.

15 Q Now, Mr. Conlin, do all of the retailers Target identifies  
16 as members of its peer group sell groceries?

17 A No.

18 Q But does Target identify some of the grocery competitors  
19 we've just been talking about as peers?

20 A Yes.

21 Q For example, does Target identify Dollar General as a peer  
22 in its 10-K?

23 A Yes.

24 Q What other grocery competitors does Target identify in its  
25 peer group in this 10-K?

J. Conlin - D

1 A Are you asking what other?

2 Q Sure. I can do this another way.

3 A What other retailers sell groceries?

4 Q I can walk through it. Does Target identify Albertsons as  
5 a peer group in its 10-K?

6 A Yes.

7 Q Amazon?

8 A Yes.

9 Q Costco?

10 A Yes.

11 Q Kroger?

12 A Yes.

13 Q Walmart?

14 A Yes.

15 Q And then if you would look down, Target, as of 2023,  
16 identifies BJ's Wholesale Club?

17 A Yes.

18 Q And Publix is excluded because it's not quoted on a public  
19 stock exchange; is that right?

20 A Correct.

21 Q Now, Mr. Conlin, I have just one more area I would like to  
22 talk with you about, and that is Own Brands. Does Target have  
23 private label brands for grocery products, sir?

24 A Yes.

25 Q What are the names of some of those private label brands?

J. Conlin - D

1 A Good & Gather, Favorite Day, Market Pantry.

2 Q Which of those brands is the largest, sir?

3 A Good & Gather.

4 Q I would like you to turn back to DX2888, which is the 2020  
5 10-K.

6 Mr. Simmons, could you put up page 16, the language  
7 under "curation at scale," starting with "we have delivered."

8 Mr. Conlin, Target in Target's 10-K Target writes,  
9 "We have introduced over 25 new owned and exclusive brands,  
10 including the 2019 launch of our new food and beverage own  
11 brand, Good & Gather, which we expect will become our largest  
12 owned brand."

13 Mr. Conlin, when was Good & Gather introduced?

14 A About 2019.

15 Q How many years ago is that, sir, roughly?

16 A Five.

17 Q What are Good & Gather's revenues today, Mr. Conlin?

18 MS. HOUGH: Objection, Your Honor. Lack of  
19 foundation. He didn't testify that he had any responsibility  
20 for private label brand. He is the vice president, I believe,  
21 responsible for store layout and design.

22 THE COURT: No, that's not his title.

23 MS. HOUGH: I don't believe a foundation has been  
24 laid for him to have any responsibility over the development of  
25 Target's private label brand.



J. Conlin - X

1 THE COURT: I'm going to overrule it and allow him to  
2 answer, if he knows.

3 BY MR. PODOLL:

4 Q Mr. Conlin, what are Good & Gather's revenues today?

5 A This year we are on track to have sales of --

6 Q I am sorry, sir. You broke up. Did you say  
7 three-and-a-half to \$4 billion this year?

8 A Yes.

9 Q And has that grown in recent years?

10 A Yes.

11 Q Mr. Conlin, does Target manufacturer any of its own  
12 private label products in grocery?

13 A Within the Good & Gather brand?

14 Q Let me just ask it a different way. In grocery, does  
15 Target manufacture any of its own private label products?

16 A Our private label products are manufactured from our  
17 vendor base and suppliers, not directly by Target.

18 MR. PODOLL: Thank you, sir. No further questions.

19 CROSS-EXAMINATION

20 BY MS. HOUGH:

21 Q Good afternoon, Mr. Conlin. My name is Lily Hough. We  
22 met this summer earlier at your deposition. Thanks for joining  
23 us again today.

24 You testified previously about how Target sets  
25 prices, so I wanted to revisit that briefly. Now, as the

J. Conlin - X

1 leader of the food and beverages buying teams at Target, you  
2 have some knowledge about Target's pricing strategy, correct?

3 A Correct.

4 Q Now, to price its food and beverage items, Target looks at  
5 certain market-level pricing information; is that right?

6 A That's right.

7 Q And Target uses that information to set a range for the  
8 market that Target then tries to price within; is that right?

9 A Right.

10 Q In fact, the market-level pricing information aggregates  
11 the prices of other retailers who sell similar items as Target  
12 in the grocery department; is that right?

13 A Yes. I believe so.

14 Q Does that market-level pricing information include Kroger?

15 A I believe so, yes. I guess it would depend on the market,  
16 but Kroger being a competitor would be in our consideration set  
17 for pricing.

18 Q And how about Albertsons, which owns Safeway?

19 A Yes.

20 Q How about Ahold-Delhaize which owns Giant?

21 A Yes, I believe so.

22 Q You mentioned Costco as a competitor. That's a different  
23 retail format, the club channel, right?

24 A Different than?

25 Q Kroger, Albertsons, and Giant?

J. Conlin - X

1 A Yes. We consider it, yes.

2 Q And that's because club stores have a unique grocery  
3 offering compared to Target, and that makes it difficult to do  
4 a direct comparison between items, right?

5 A Correct.

6 Q For example, club stores have larger-sized items or pack  
7 counts relative to Target, so there's little to compare  
8 directly there, right?

9 MR. PODOLL: Objection, Your Honor. I didn't go into  
10 anything about comparisons between stores, so it's a scope  
11 objection.

12 MS. HOUGH: I'm happy to -- I'm happy to move on,  
13 Your Honor.

14 THE COURT: All right.

15 BY MS. HOUGH:

16 Q So, Mr. Conlin, Costco prices would not be in the  
17 market-level pricing information we discussed previously  
18 because of the difficulty of directly comparing items; is that  
19 right?

20 A I don't know for sure, but I don't believe so.

21 Q There is also dollar stores you mentioned previously, and  
22 you agree they sell some grocery items as well?

23 A Yes.

24 Q But you have never seen Target do a comparison of its food  
25 and beverage prices to a dollar store, right?

J. Conlin - X

1 A I do believe at the market level, when a dollar store is  
2 the closest competitor, we would monitor pricing at a dollar  
3 store as well.

4 Q Mr. Conlin, have you ever seen Target do a full comparison  
5 of its food and beverage prices to a dollar store?

6 A I have not personally.

7 Q Now, let me ask this: For market share measuring  
8 purposes, do you agree that Target and Kroger have a similar  
9 food and beverage assortment and dollar stores offer something  
10 different than Target?

11 MR. PODOLL: Objection. Scope. I didn't go into  
12 competitors at all and their assortments.

13 MS. HOUGH: Your Honor, if I may be heard on that.

14 THE COURT: I'm thinking about it.

15 You may be heard.

16 MS. HOUGH: I'd submit that, because Mr. Conlin  
17 testified who Target's competitors were, it is within the scope  
18 of that to understand precisely how Target competes and the  
19 format and whether or not those competitors are included in  
20 Target's market-level pricing information is all relevant for  
21 antitrust purposes for determining the relevance of their  
22 competition.

23 THE COURT: Sustained.

24 BY MS. HOUGH:

25 Q Target also engages in competitive promotional activity,

J. Conlin - X

1 correct?

2 A Correct.

3 Q Target puts out weekly ads to make consumers aware of its  
4 promotions; is that right?

5 A Correct.

6 Q So I want to ask about who Target monitors to ensure that  
7 its promotions are competitive?

8 MR. PODOLL: Your Honor, scope. I didn't talk about  
9 promotions.

10 THE COURT: Sustained.

11 BY MS. HOUGH:

12 Q I would like to revisit the 10-K that Mr. Podoll showed  
13 you. It was marked DX2895. I believe he was on page 21.

14 Mr. Dunkin, could I please ask you to pull up again  
15 DX2895, page 21.

16 Are you there, Mr. Conlin?

17 A Yes.

18 Q Mr. Podoll asked you if the peer group on this page  
19 reflects Target's competitors.

20 Do you recall that?

21 A Yes.

22 Q And the peer group there consists of -- and I'm quoting  
23 from the document. "19 online general merchandise department  
24 stores, food and special retailers."

25 Do you see that?

J. Conlin - X

1 A Yes.

2 Q Now, just to be clear, "peer group" is not a word that you  
3 personally use in your merchandising role, right?

4 A I guess I don't use the term "peer group" regularly in the  
5 course of business.

6 Q And if you go back to page 20, the preceding page, do you  
7 see up at the top the section of the 10-K is titled in part  
8 "market for the registrant's common equity"?

9 A Yes.

10 Q So -- and I'm sorry to jump around here. But going back  
11 to the chart that describes Target's peer group, beneath the  
12 figure, I'm just going to paraphrase the first line. It says,  
13 "The above compares the return on Target's common stock and the  
14 S&P Index and hen aforementioned peer group."

15 Do you see that?

16 A Yes.

17 Q So the peer group referenced on this page, do you  
18 understand that to be for benchmarking Target's stock value and  
19 not a peer group for retail grocery price benchmarking?

20 MR. PODOLL: Objection. Foundation.

21 THE COURT: Overruled. He can answer.

22 THE WITNESS: I don't see it specifically calling out  
23 this competitive group in terms of grocery pricing assortment  
24 as a peer group.

25

J. Conlin - X

1 BY MS. HOUGH:

2 Q I also wanted to revisit some questions Mr. Podoll asked  
3 you about Target's expansion efforts. I want to clarify:  
4 Currently your role at Target does not relate to making any  
5 decisions about when or to what extent to expand new stores; is  
6 that right?

7 A Correct.

8 Q I also want to revisit the question that Mr. Podoll asked  
9 you about the awards that Target has won. You testified about  
10 one particular award. Do you recall that testimony today?

11 A Yes.

12 Q You learned about that award in your deposition, right?

13 A I believe so.

14 Q That was when Mr. Podoll showed you an earnings call  
15 transcript that reported on that award. That's when you  
16 learned about that award, correct?

17 A Yes, I believe so.

18 Q Mr. Podoll also asked you about whether Target competes  
19 with ethnic stores, and I believe your testimony was "to some  
20 degree"; is that right?

21 A Yes.

22 Q But when you were asked about ethnic stores at your  
23 deposition, you couldn't think of the names of any. Do you  
24 recall that?

25 A I do not recall that.

J. Conlin - X

1 Q Earlier you testified about how customers can shop online  
2 for groceries at Target, so I had a few follow-up questions on  
3 that. I just want to make sure we are using the same  
4 terminology first. So when I say "online," do you understand  
5 that to mean the customer shopped and purchased the items  
6 online and then fulfilled their order either by delivery or  
7 picking them up at the store. Is that how you use the term  
8 "online"?

9 A Yes.

10 Q And although you said that online grocery is changing, you  
11 agree that there are still customers who prefer to shop for  
12 groceries in Target stores, right?

13 A Yes.

14 Q And Target still does a very large portion of its grocery  
15 sales through its stores, right?

16 A Yes.

17 Q And while you testified that your pricing and promotional  
18 strategies are consistent between in-store and online, you  
19 would agree that Target's online business operates differently  
20 than the in-store business, correct?

21 A Maybe explain what you mean by "operates differently."

22 Q For example, with the online business, it may not always  
23 be the case that the items that the customer ordered are  
24 available to be picked up or delivered on the same day, and  
25 that's different than for a guest who walks into a store,



J. Conlin - X

1 right?

2 A Based on availability or in stock of an item, it may not  
3 be available the same day. If that's what you are referencing,  
4 yes, I would agree.

5 Q So you would agree with that particular challenge in mind,  
6 there are nuances to operating the online business that don't  
7 apply to the in-store business. Is that fair to say?

8 A That's fair to say.

9 Q And also nuances from the customers' perspective when it  
10 comes to shopping online versus shopping in-store. Is that  
11 fair to say?

12 MR. PODOLL: Objection. Objection to what customers  
13 are thinking.

14 THE COURT: Sustained.

15 BY MS. HOUGH:

16 Q Would you agree that shopping online is a very different  
17 experience than for a customer who walks into the store to shop  
18 for groceries?

19 A I would agree that shopping in stores is a different  
20 experience than shopping online for groceries.

21 Q Target tracks its market shares separately for online  
22 versus brick-and-mortar grocery sales, right?

23 A We look at both.

24 Q You look at both markets separately, online and  
25 brick-and-mortar?

J. Conlin - ReD

1 A We look at them together, and we also track them  
2 separately to understand our competitive position in stores and  
3 online, but then we also aggregate them.

4 MS. HOUGH: Thank you. I pass the witness.

5 MR. PODOLL: Your Honor, I have about two questions.

6 THE COURT: Okay.

7 REDIRECT EXAMINATION

8 BY MR. PODOLL:

9 Q Mr. Conlin, just a few questions. You were asked a few  
10 minutes ago about out-of-stocks online. Do you remember those  
11 questions?

12 A I believe so.

13 Q Of course, there can be products that are out of stock in  
14 a store too, right?

15 A Correct.

16 Q The last thing, you were asked a little bit about  
17 Dollar General.

18 Do you remember that?

19 A Yes.

20 Q Now -- and you were asked whether they are included in  
21 your pricing set, right?

22 A Yes.

23 Q Now, do Target employees ever walk stores for competitive  
24 purposes?

25 A Yes.

J. Conlin - ReD

1 Q Do Target employees walk the stores of dollar stores, like  
2 Dollar General?

3 A Yes, I believe so.

4 MR. PODOLL: No further questions, Your Honor.

5 THE COURT: We are finished with your testimony. I  
6 would tell you to step down, but you are not in person. You  
7 can turn your screen off.

8 Thank you.

9 THE WITNESS: Thank you.

10 THE COURT: We are going to take our afternoon break.  
11 I am going to shorten it to ten minutes, because I'm mindful of  
12 the time and the witnesses that you are trying to get on today.  
13 We will come back at 3:20.

14 (Recess.)

15 (Proceedings resumed:)

16 THE COURT: Please be seated. You may call your next  
17 witness.

18 MR. OBARO: Thank you, Your Honor. We call  
19 Sam Heyworth from Amazon.com.

20 THE COURT: All right.

21 MR. OBARO: We also have counsel for Amazon.com.

22 THE COURT: We will have him state his appearance.

23 MR. ENSON: Eric Enson on behalf of Amazon.com, Inc.,  
24 as well as Mr. Heyworth.

25 THE COURT: All right.

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1 (The witness was duly sworn.)

2 THE CLERK: Thank you. Would you please state your  
3 name for the record, spelling your last.

4 THE WITNESS: First name is Samuel, S-A-M-U-E-L; last  
5 name Heyworth, H-E-Y-W-O-R-T-H.

6 DIRECT EXAMINATION

7 BY MR. OBARO:

8 Q Good afternoon, Mr. Heyworth.

9 A Good afternoon.

10 Q Thank you for being with us today. Mr. Heyworth, where  
11 are you currently employed?

12 A I'm employed at Amazon.com.

13 Q How long have you been with Amazon.com?

14 A I have been with Amazon for 20 years.

15 Q What's your current role at Amazon.com?

16 A Vice president of consumables in the U.S.

17 Q Can you describe your responsibilities as vice president  
18 of consumables in the U.S.?

19 A Yes. I oversee the consumables business, which  
20 effectively represents everyday essentials products, which are  
21 made up of, I would say, six primary categories. Those include  
22 health and personal care, grocery, beauty, premium beauty,  
23 baby, and pets.

24 Q And in your role as vice president of U.S. consumables, do  
25 you have a understanding of the consumable capabilities and

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1 future growth plans?

2 A I do.

3 Q For my questions today, I will focus on the grocery  
4 category within the consumables business.

5 Do you understand that?

6 A I do understand. However, I would just say that we see  
7 the consumables business more broadly as representing grocery  
8 in our customers' minds. The products we sell and all the  
9 categories we listed are also products sold by other grocers,  
10 so I just wanted to make that point of clarification. Within  
11 our consumables business, the grocery category is incorporated  
12 of the food and beverage product primarily. However, household  
13 goods, health and personal care items, we think of those as  
14 grocery items as well.

15 Q Understood. Thank you, Mr. Heyworth. How would you  
16 describe Amazon.com's current business objective?

17 A For Amazon.com, we strive to be Earth's most  
18 customer-centric company. We strive to offer Earth's broadest  
19 selection and help our customers find and discover any and all  
20 the products they need.

21 Q And how would you describe the consumable business -- the  
22 objective of the consumable business in particular?

23 A Very similar to Amazon's objective. We strive to offer  
24 Earth's broadest consumable selection at affordable prices with  
25 an incredibly convenient and valuable shopping experience.

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1 Q Would that include grocery items as well?

2 A It would.

3 Q I would like to talk about the various options for  
4 customers to order and get products from Amazon.com. Are there  
5 storefronts on Amazon.com for which customers can purchase  
6 grocery items?

7 A There are.

8 Q What are those storefronts?

9 A Well, the primary storefront is Amazon.com. A customer  
10 can browse or search items through Amazon.com and see a broad  
11 selection of those items available. They can then choose to  
12 purchase them directly from Amazon.com, but we also offer  
13 additional storefronts through which a customer can purchase  
14 and peruse additional products specific to that storefront,  
15 including Amazon Fresh and including Whole Foods and also  
16 third-party grocery offerings that we offer as well through the  
17 dot-com website.

18 Q I would like to take each of those one at a time, starting  
19 with the Amazon Fresh and Whole Foods storefronts?

20 A Yes.

21 Q What types of grocery products can a consumer purchase  
22 through Amazon.com from the Amazon Fresh and Whole Foods  
23 storefronts?

24 A Through Amazon Fresh, you would expect to see a broad  
25 array of national grocery brands, everyday essentials. It is

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1 not as broad an offering as what constitutes our consumables  
2 business on Amazon.com, but it is available for typically a  
3 two-to-four-hour delivery window.

4 Q When you say "everyday essentials," what do you mean by  
5 that?

6 A Typically the products that customers consume, use, and  
7 repurchase most regularly.

8 Q And would that include perishable products to be able to  
9 be purchased from the Amazon Fresh and Whole Foods storefronts?

10 A It would.

11 Q You also mentioned third parties. Are there multiple ways  
12 to fulfill orders for third parties' products purchased through  
13 Amazon.com?

14 A There are.

15 Q Can you describe each of the ways that you can get those  
16 products delivered.

17 A Yes. To be clear we are speaking about Amazon.com broadly  
18 now?

19 Q Yes. Like to purchase third-party products on Amazon.com?

20 A Yes. I'll just make a quick point of distinction in that  
21 we also offer third-party grocery offerings through dot-com.  
22 So we have partnered with Cardenas in one region. Customers  
23 can actually go to Amazon.com, search for products specific to  
24 Cardenas, see their selection, and avail themselves of that  
25 offering. Additional third-party grocers, in particular

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1 regions, are available to our customers. So getting back to  
2 Amazon.com, we offer what I would say is a first-party retail  
3 model as well as a third-party seller model. And we offer  
4 selection that in our retail model we procure from vendors, we  
5 house in our fulfillment centers, and then ship that inventory  
6 out to our customers. We manage the prices of that product.

7 For our third-party business, we offer, I would say  
8 two primary models of offering third-party products on  
9 Amazon.com. The first is where the third-party seller sells  
10 that product themselves and ships it themselves. This is  
11 characterized as our merchant fulfilled network. Those  
12 products are typically available anywhere from two to six days,  
13 if the customer purchases from that seller.

14 We also offer a model called Fulfillment by Amazon,  
15 or FBA, where the seller can choose to ship their inventory to  
16 Amazon for us to ship out to the customer on their behalf. We  
17 house it in our warehouses. We are able to use our existing  
18 fulfillment network. And it gets shipped to customer typically  
19 through a one-to-two-day offering and sometimes same day.

20 Q Okay. I think you mentioned this before, but with respect  
21 to the third-party partnerships, can you give us some examples  
22 of some of the third parties that Amazon partners with to sell  
23 grocery items on Amazon.com?

24 A Well, specifically I mentioned Cardenas before as one of  
25 those retailers. Metropolitan Market is another third-party



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1 seller offering grocery services in Washington state. I hope  
2 I'm addressing the question.

3 Q Yes, it does. Thank you.

4 And without naming the number out loud, because I  
5 know this is information that's sensitive to Amazon, do you  
6 have a percentage of groceries that are sold on Amazon.com for  
7 third-party sellers?

8 A We do.

9 Q And to protect confidentiality, I'm going to show you a  
10 part of your deposition, which should be in your binder. It is  
11 DX2502. It is also going to be shown on the screen in front of  
12 you, if that's easier.

13 Specifically I would ask that you look at page 61,  
14 lines 3 to 7.

15 Mr. Heyworth, is that the percentage of groceries  
16 sold on Amazon.com through third parties?

17 A It is.

18 MR. OBARO: Your Honor, I move to admit DX2502,  
19 page 61, lines 3 to 7 into evidence.

20 MR. MATHESON: No objection, Your Honor.

21 THE COURT: It will be received.

22 MR. OBARO: Thank you.

23 BY MR. OBARO:

24 Q Mr. Heyworth, is the third-party channel that we have been  
25 discussing something that Amazon sees as essential to its

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1 objective of offering the broadest possible selection to  
2 customers?

3 A The way I would characterize it is that offering products  
4 through third-party sellers significantly enhances the  
5 selection we can make available to our customers.

6 Q And you mentioned this a little bit earlier in response to  
7 one of my questions. But can you explain to us what Amazon  
8 fulfillment centers are?

9 A Amazon fulfillment centers are those buildings that we  
10 receive product into. We house that product within the  
11 warehouse, and then we ship it out to customers at the time  
12 that they order it.

13 Q And how many fulfillment centers does Amazon currently  
14 have across the country?

15 A I can tell you that we have over 250 North American  
16 fulfillment centers. I don't believe we've publicly shared the  
17 specific number of fulfillment centers, and I don't know the  
18 answer to that specific question. But I do know it is north of  
19 250 North American FCs.

20 Q Thank you. And without revealing the number publicly, are  
21 you familiar with how many SKUs Amazon.com offers in the  
22 consumables business?

23 A Yes.

24 Q And to protect confidentiality, I'm also going to ask you  
25 to look at your deposition transcript, which again is DX2502,

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1 page 62, lines 22 to page 61, line 1. It will also be on the  
2 screen -- I'm sorry. 67, 22 to 68, 1.

3 A I see that.

4 Q Is that the correct number of SKUs that Amazon.com offers  
5 through its consumable business?

6 A It is.

7 MR. OBARO: Your Honor, I move to admit DX2502 67, 22  
8 to 68, 1 into evidence.

9 MR. MATHESON: No objection.

10 THE COURT: It will be received.

11 MR. OBARO: Thank you.

12 BY MR. OBARO:

13 Q Now, is that number we just looked at just for Amazon.com  
14 consumable business itself?

15 A That's correct.

16 Q Would that number be higher if we included SKUs available  
17 from Amazon Fresh and Whole Foods storefronts on Amazon.com?

18 A It would.

19 Q Mr. Heyworth, is Amazon.com's consumable selection broader  
20 than what you would find in a traditional supermarket?

21 A It is.

22 Q And are private label grocery products also available on  
23 Amazon.com?

24 A Yes, they are.

25 Q Does Amazon.com also sell Amazon Fresh and Whole Food

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1 private label products on Amazon.com?

2 A Yes, we do.

3 Q Does Amazon.com generally offer a variety of package  
4 sizes?

5 A Yes, we do.

6 Q And does Amazon.com strive to offer most pack sizes  
7 available for a given product?

8 A We do.

9 Q We touched on this a little bit earlier, but I would like  
10 to talk about the methods of delivery for purchases that are  
11 made on Amazon.com. Are there options available for same-day  
12 delivery for grocery items that are purchased on Amazon.com?

13 A There are.

14 Q And is same-day delivery available for perishable products  
15 as well?

16 A It is.

17 Q And do the perishable products available for same-day  
18 delivery include things like produce, dairy, eggs, meat?

19 A Yes.

20 Q Are you familiar with the number of SKUs that a same-day  
21 facility has?

22 A I am.

23 Q And we will look at your deposition again to protect  
24 confidentiality, and I would ask you to look at DX2502,  
25 page 40, lines 3 to 7.

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1           Mr. Heyworth, does this represent the number of SKUs  
2 a same-day facility has?

3       A     To be clear, this refers to the number of consumables  
4 items that are typically housed within a sub same-day facility.  
5 We have publicly shared that the total number of items in  
6 sub same-day facilities are around 100,000.

7       Q     You mentioned sub same-day facility. Can you explain what  
8 that is?

9       A     A sub same-day facility is different than our typical  
10 fulfillment center in that houses our fastest moving items.  
11 They're typically smaller in size, but they are located closer  
12 to denser metropolitan areas. As a result, we are able to ship  
13 product more quickly and more efficiently to customers,  
14 typically within a four-to-six hour window; thus, the same day  
15 offering.

16       Q     Thank you.

17               MR. OBARO: Your Honor, I move to admit DX2502,  
18 page 40, lines 3 to 7 into evidence.

19               MR. MATHESON: No objection.

20               THE COURT: It will be received.

21               MR. OBARO: Thank you.

22 BY MR. OBARO:

23       Q     Now, can Amazon.com order grocery items for same-day  
24 in-store pickup, Mr. Heyworth?

25       A     Yes, they can.

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1 Q Does that include perishable items as well?

2 A It does.

3 Q Where can customers pick up Amazon.com orders?

4 A They can pick them up in a variety of locations.

5 Obviously the largest percentage of customers choose to receive  
6 those items direct to their doorstep. However, customers can  
7 order items and have them shipped to a Whole Foods store. They  
8 can have them shipped to an Amazon Fresh store. And we do have  
9 partnerships with other retailers where we might ship products  
10 of any merchandise to that particular retailer, and the  
11 customer will go into that retailer to pick up the package.

12 Q Mr. Heyworth, are you familiar with Amazon's Subscribe &  
13 Save offering?

14 A I am.

15 Q Can you explain what that is, please.

16 A Subscribe & Save is a program that he would operate that  
17 allows a customer to specify an automated delivery cadence of a  
18 item they typically reorder. So I can go on Amazon.com and  
19 choose to receive an item every month, for example, rather than  
20 have to go on myself and order that item every month. I'll  
21 have Amazon automatically deliver it and replenish for me on  
22 that cadence.

23 Q Can customers utilize the Subscribe & Save offering for  
24 consumables?

25 A It can.

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1 Q Including grocery products?

2 A Yes.

3 Q What are the benefits of the Amazon Subscribe & Save  
4 offering to consumers?

5 A First and foremost, convenience. For many customers,  
6 having to maintain that mind share of when to replenish an item  
7 is something they would rather offload to a retailer or to  
8 somebody else. So for those items that are purchased and used  
9 most consistently, it's a real time saver. In addition, we  
10 offer discounts; thus, the "save" of Subscribe & Save off the  
11 purchase price; typically 5 percent off.

12 Q You testified earlier that you worked at Amazon for about  
13 20 years?

14 A Correct.

15 Q Has the grocery business changed and grown during the time  
16 at the company -- during your time at the company?

17 A It has.

18 Q And when did Amazon launch its grocery business?

19 A I believe in 2007.

20 Q Can you describe the growth of the consumables business  
21 since it launched?

22 A It has been quite robust. We have experimented  
23 significantly. We have continued to expand selection. We have  
24 continued to find and work on shopping experience features that  
25 resonate with our customers, and we have been very grateful to

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1 see customers respond in the growth of the business.

2 Q When you say you've seen customers respond to the growth  
3 of the business, what do you mean by that?

4 A Increase in customers; increase in sales year over year.

5 Q Next, I would like to talk about the competitive landscape  
6 in the grocery industry. Can you turn in your binder to what  
7 has been marked as DX2403. It will also be on the screen.

8 A I see that.

9 Q Are you familiar with this document, Mr. Heyworth?

10 A I am.

11 Q And do you recognize it -- do you recognize it as  
12 Amazon.com's 2023 annual report for fiscal year ending  
13 December 31st, 2023?

14 A I do.

15 Q Is this document created in the ordinary course?

16 A Come again?

17 Q Is this document generally created in the ordinary course  
18 of business?

19 A It is.

20 MR. OBARO: I move to enter into evidence DX2403.

21 MR. MATHESON: No objection, Your Honor.

22 THE COURT: It will be received.

23 MR. OBARO: Thank you.

24 BY MR. OBARO:

25 Q Mr. Heyworth, if you could turn to page 4 of the exhibit.



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1 It will also be on the screen. Do you see the section titled  
2 "Competition"?

3 A I do.

4 Q Okay. Do you see the second sentence that says, "The  
5 worldwide marketplace in which we compete is evolving rapidly  
6 and intensely competitive, and we face a broad array of  
7 competitors from many different industry sectors across the  
8 world."

9 Do you see that?

10 A I do.

11 Q And do you agree with that sentence, Mr. Heyworth?

12 A I do agree with that.

13 Q The next sentence says, "Our current and potential  
14 competitors include" -- and No. 8 says, "Companies that sell  
15 grocery products online and in physical stores."

16 Do you see that?

17 A I do.

18 Q Mr. Heyworth, do you agree that Amazon.com competes with  
19 companies that sell grocery products online and in physical  
20 stores?

21 A I do.

22 Q And how does Amazon.com compete with companies that sell  
23 grocery products in physical stores?

24 A Well, first and foremost, do we carry the same product?  
25 The same product types? Specifically the same products? The

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1 same product configurations? Do we offer strong pricing such  
2 that the customer doesn't have to shop around; that they have  
3 trust that Amazon offers a strong deal and comparable pricing  
4 to other retailers? And do we offer a convenient shopping  
5 experience that mirrors or exceeds that of physical stores?

6 Q In response to each of those questions, do you believe  
7 that Amazon.com, in fact, does each of those things that you  
8 mentioned?

9 A I do.

10 Q And does Amazon.com compete with supercenters like  
11 Walmart?

12 A We do.

13 Q And does Amazon.com compete with club stores?

14 A We do.

15 Q Does Amazon.com compete with hard discounters?

16 A We do.

17 Q Does Amazon.com compete with traditional grocery stores?

18 A We don't use the "traditional grocery store" nomenclature  
19 in our business, but I believe I know who you are referring to,  
20 and we do compete with those retailers.

21 Q I appreciate that. Why don't we do it this way. And to  
22 protect confidentiality, I'm going to ask you to look at  
23 exhibits from -- an exhibit from your deposition -- an excerpt  
24 from your deposition and ask you questions about specific  
25 competitors. This is DX2502, page 49, lines 4 to 6.

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1 Do you see that, Mr. Heyworth?

2 A I do.

3 MR. MATHESON: I object, Your Honor. There is  
4 nothing here designated confidential. I'm not sure why we're  
5 showing the witness his deposition testimony.

6 THE COURT: I can't hear you. You don't have the  
7 mic. on.

8 MR. MATHESON: There is nothing on the lines  
9 designated confidential. I'm not sure why we are showing the  
10 witness testimony and prompting him to regurgitate it.

11 THE COURT: Overruled. That's not an objection. He  
12 can answer.

13 MR. MATHESON: Thank you, Your Honor.

14 BY MR. OBARO:

15 Q Mr. Heyworth, if you look at lines 4 to 6, is that a  
16 competitor that you consider -- that Amazon considers to be a  
17 competitor?

18 A It is.

19 MR. OBARO: I move to enter DX2502, page 49, lines 4  
20 to 6 in evidence.

21 MR. MATHESON: We do have an objection, Your Honor.  
22 The witness has not testified inconsistently with what's in his  
23 deposition. This is not confidential. There is no reason why  
24 we are reading this into the record.

25 THE COURT: Sustained.

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1 MR. OBARO: Your Honor, I do believe it is  
2 confidential. If it is not, I am happy --

3 THE COURT: He has to confirm. He can come up to the  
4 mic. so I can hear him.

5 MR. ENSON: Your Honor, we do believe that  
6 information is confidential. That may have been an oversight  
7 that that was not actually marked "confidential." But that  
8 same information certainly was highlighted and marked  
9 "confidential" in other aspects of the deposition transcript.

10 MR. MATHESON: If they want to assert  
11 confidentiality, Your Honor, that is fine with us. We don't  
12 want to stand in the way.

13 THE COURT: All right. So read the page number and  
14 lines, and I'll then overrule the objection, and it will be  
15 entered into the record. Let's make it clear, because I  
16 understand what has just happened.

17 MR. ENSON: Thank you, Your Honor.

18 MR. OBARO: Thank you. It is DX2502, page 49,  
19 lines 4 to 6.

20 THE COURT: It will be received.

21 MR. OBARO: Thank you, Your Honor.

22 BY MR. OBARO:

23 Q Mr. Heyworth, I'm going to show you another part of your  
24 deposition testimony. I believe this information has also been  
25 designated by Amazon.com as confidential. This is page 49,

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1 lines 7 to 8. I'll ask you the same question, which is whether  
2 Amazon.com considers this particular be retailer to be a  
3 competitor?

4 A We do.

5 MR. OBARO: Your Honor, I move to enter DX2502,  
6 page 49, lines 7 to 8 into evidence.

7 MR. MATHESON: The same situation applies,  
8 Your Honor. No objection, if we are going to assume it is  
9 going to be designated confidential, which it has not been.

10 MR. ENSON: Your Honor, yes.

11 THE COURT: It will be received.

12 MR. OBARO: Thank you, Your Honor.

13 BY MR. OBARO:

14 Q Mr. Heyworth, can you turn in your binder to what has been  
15 previously marked as DX3014, and this should appear on the  
16 private screen.

17 A Yes.

18 Q Mr. Heyworth, have you seen this document before?

19 A I have.

20 Q Are you familiar with this document?

21 A I'm somewhat familiar with it.

22 Q And are OP1 global competition updates like this created  
23 in the ordinary course of business?

24 A I believe they are.

25 Q Can you look at the first paragraph and read the first two

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1 sentences to yourself.

2 A Yes.

3 Q Do you agree with those statements?

4 A I do.

5 Q If you'd look at page 3 under "additional business," it  
6 says "grocery."

7 Do you see that?

8 A I do.

9 Q Does Amazon.com view grocery businesses in particular as  
10 intently competitive?

11 MR. MATHESON: Your Honor, I object. Unless this  
12 document is admitted into evidence, I'm not sure why we are  
13 displaying it.

14 THE COURT: It is not being displayed to the public.  
15 It is privately.

16 MR. MATHESON: Even that, Your Honor, shouldn't it be  
17 admitted before it is displayed to the finder of fact. There  
18 has been no foundation laid. If it is in evidence, I obviously  
19 withdraw my objection.

20 THE COURT: It is not in evidence yet. I don't know  
21 what he's --

22 MR. OBARO: Your Honor, it wasn't in evidence yet. I  
23 can move to admit it into evidence. I did lay the foundation.

24 THE COURT: You should.

25 MR. OBARO: Okay.

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1 BY MR. OBARO:

2 Q So, Mr. Heyworth, you are familiar with this document?

3 A I am.

4 MR. MATHESON: Objection, Your Honor. Leading. He  
5 testified he was somewhat familiar with the document. It is  
6 not what the witness said, and it is leading.

7 THE WITNESS: I'm somewhat familiar with it.

8 THE COURT: Yes. That's what he said. You can ask  
9 another question that is not leading.

10 BY MR. OBARO:

11 Q Mr. Heyworth, are you familiar with this document?

12 A I am somewhat familiar with it.

13 Q Are OP1 global competition updates like this created in  
14 the normal course of business?

15 A They are.

16 MR. OBARO: I would move to admit DX3014 into  
17 evidence.

18 MR. MATHESON: Your Honor, there are additional  
19 requirements to the business records exception, and I don't  
20 believe any of those have been satisfied.

21 THE COURT: Yes. That's true.

22 BY MR. OBARO:

23 Q Mr. Heyworth, why don't we do it this way -- we can take  
24 down the document.

25 Does Amazon.com view the grocery business in

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1 particular as intensely competitive?

2 MR. MATHESON: Objection, Your Honor. Leading. The  
3 way he is characterizing it --

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

5 MR. MATHESON: Thank you, Your Honor.

6 BY MR. OBARO:

7 Q Does Amazon.com view the grocery business in particular as  
8 intensely competitive?

9 A We do.

10 Q Why?

11 A It is a business in which many, many retailers compete  
12 quite fiercely for customers. It is a business in which  
13 margins are small, and it is hard to operate a business in many  
14 areas. We see this as a business that is representing the  
15 majority of purchases that many customers make; and thus, an  
16 important relationship with those customers is significant.

17 Q Does Amazon.com pay attention to what brick-and-mortar  
18 grocery stores are doing as it competes with those grocery  
19 stores?

20 A We do.

21 Q Can you give some examples of -- recent examples of  
22 Amazon.com paying attention to what brick-and-mortar stores are  
23 doing?

24 A Well, we continue to evaluate how a number of  
25 brick-and-mortar stores are themselves evolving as omni-channel



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1 retailers. Many brick-and-mortar stores continue to expand  
2 their web offerings, their delivery offerings, their curbside  
3 pickup offerings. They continue to expand the selection method  
4 they offer. They continue to lower prices. They continue to  
5 invest in private brands. We pay attention to all of these  
6 enhancements in the business.

7 Q Mr. Heyworth, does Amazon.com price-match against  
8 traditional supermarkets?

9 A We do.

10 Q And to protect confidentiality I'm going to show you again  
11 an excerpt of your deposition, DX2502. Specifically I want us  
12 to turn to page 32, lines 22 to 33, line 5.

13 Can you take a look at the traditional supermarkets  
14 that are identified in this section, and do you agree with your  
15 testimony here that these are some of the traditional  
16 supermarkets that Amazon.com price checks against?

17 A Yes, they are.

18 MR. OBARO: Your Honor, I move to admit DX2502,  
19 page 32, lines 33 (sic.) to page 33, line 5 into evidence,  
20 please.

21 MR. MATHESON: Your Honor, I'm going to object to the  
22 foundational question. He has testified that he doesn't use  
23 the term "traditional supermarkets." Then he was asked can you  
24 take a look at the traditional supermarkets in this section.  
25 It is impossible to know if he is referring to, for example,

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1 the final retailer that appears in line 33, page 2, the first  
2 complete sentence. There is an online retailer that does not  
3 appear to be a traditional grocery store to me. So it is  
4 totally unclear what he is referring to when he is asked if the  
5 traditional grocery stores that appear --

6 THE COURT: He didn't say that. He said that "within  
7 that."

8 MR. MATHESON: Right, Your Honor. But it is totally  
9 unclear what counsel meant when he asked about the traditional  
10 grocery stores that appear within that section.

11 THE COURT: Overruled. It is clear what he is  
12 asking. It is clear what he is asking.

13 MR. OBARO: Thank you, Your Honor.

14 BY MR. OBARO:

15 Q Mr. Heyworth, when you're looking at grocery retailers and  
16 you're price-checking grocery retailers, what products are you  
17 looking at?

18 A We are looking at all the products they carry, but we are  
19 specifically looking at the products that both we and the  
20 retailer in question carry.

21 Q And does Amazon.com also web scrape against these  
22 competitors' websites to understand their pricing?

23 A We do.

24 Q Does Amazon.com monitor the pricing for these retailers by  
25 going into stores?

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1 A We do.

2 MR. OBARO: Your Honor, I'm going to preserve  
3 confidentiality. I'm going to show you DX2502, page 35, line 4  
4 to 12 -- lines 4 to 12.

5 BY MR. OBARO:

6 Q Mr. Heyworth, does this reflect your understanding of the  
7 frequency Amazon evaluates its competitors' pricing?

8 A It does.

9 MR. OBARO: Your Honor, I move to enter DX2502,  
10 page 35, line 4 to 12 into evidence.

11 MR. MATHESON: No objection, Your Honor.

12 THE COURT: It will be received.

13 BY MR. OBARO:

14 Q Mr. Heyworth, does Amazon have a large and growing grocery  
15 business?

16 A We do.

17 Q And has Amazon been working to build a brick-and-mortar  
18 presence to further expand its grocery business?

19 A We have.

20 Q Does Amazon have plans to open more same-day fulfillment  
21 facilities?

22 MR. MATHESON: I'm going to object, Your Honor, just  
23 because I don't understand what is meant by "Amazon." I  
24 thought we were focused on the Amazon online business. I'd ask  
25 counsel to clarify what he is asking when he says, "Does Amazon

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1 have plans to build a brick-and-mortar business?"

2 MR. OBARO: I can clarify.

3 THE COURT: Yes.

4 BY MR. OBARO:

5 Q Has Amazon.com been working to build its brick-and-mortar  
6 presence to further expand its grocery offerings?

7 A It has been.

8 Q Does Amazon.com have plans to open more same-day  
9 fulfillment facilities?

10 A Yes. And to clarify the prior statement, Amazon, through  
11 its Whole Foods subsidiary, obviously continues to expand the  
12 number of stores offered. We also continue to expand the  
13 number of Amazon Fresh stores that are offered as well.

14 Could you repeat your last question?

15 Q Yes. My last question was whether Amazon.com has plans to  
16 open more same-day fulfillment facilities?

17 A We do.

18 Q And does Amazon.com have plans to build out its warehouse  
19 network to include additional temperature-controlled warehouses  
20 to store perishable products?

21 A We currently -- outside of our Amazon Fresh and  
22 Whole Foods operations, we currently operate a same-day  
23 facility in one particular region, in Phoenix, Arizona, that  
24 utilizes temperature controls and ships perishable to customers  
25 through our Amazon.com same-day offering. This has been a test

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1 that has gone extremely well. We are encouraged by the signals  
2 that we see from customers, and we have plans to expand this.  
3 I would say within the next year we plan to expand to about 20  
4 to 30 times the amount of customers we are serving today.

5 MR. OBARO: Thank you, Mr. Heyworth. I have no  
6 further questions. I pass the witness.

7 MR. MATHESON: May we approach and distribute the  
8 materials, Your Honor?

9 THE COURT: Yes.

10 MR. MATHESON: Thank you, Your Honor.

11 Your Honor, Daniel Matheson for the Federal Trade  
12 Commission.

13 May I proceed?

14 THE COURT: Yes.

15 CROSS-EXAMINATION

16 BY MR. MATHESON:

17 Q Nice to meet you, sir. My name is Daniel Matheson with  
18 the Federal Trade Commission.

19 I have a few questions regarding the final topic you  
20 discussed, which was the same-day service -- for the sub  
21 same-day service test in Phoenix that you referenced.

22 All of that has been designated confidential in your  
23 deposition testimony. Am I to understand it is okay to ask  
24 questions regarding that since you've testified to it in open  
25 court?

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1           MR. ENSON: Your Honor, that's correct. That  
2 testimony was designated confidential in the deposition  
3 transcript. Again, we try to be conscientious in designating  
4 only portions of the transcripts as opposed to the entire  
5 thing, so there may be some inconsistencies between what we  
6 marked in one chapter AND another?

7           THE COURT: I would suggest you sit a little closer  
8 to him.

9           MR. ENSON: I will, Your Honor.

10 BY MR. MATHESON:

11 Q       Sir, I would like to address that particular test  
12 facility. That test began in December of 2023, correct?

13 A       Correct.

14 Q       And as of your deposition in June 2024, you had not opened  
15 any other sub same-day test facilities delivering perishable  
16 products, correct?

17 A       Not at that time, correct.

18 Q       That is only of the 58 Amazon sub same-day fulfillment  
19 centers that offers delivery of perishable products, right?

20 A       At this point in time. However, what we have seen leads  
21 us to choose to expand going forward.

22 Q       And you testified during your deposition that you intended  
23 to expand to one additional metro market, right?

24 A       I believe that was in the context of this year. However,  
25 we choose to expand more broadly into 2025.

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1 Q And so -- strike that.

2 You were asked several questions about your  
3 understanding of Whole Foods Market and Amazon Fresh. Just to  
4 be clear, the organization that you oversee is the Amazon  
5 consumables business, right?

6 A That's right.

7 Q The Whole Foods Market and Amazon Fresh, they are not part  
8 of your organization in the Amazon.com consumables business,  
9 right?

10 A They are not part of my organization, however we work very  
11 closely with those teams.

12 Q Well, you described the business mission or value  
13 proposition of Amazon.com approximately as "Earth's broadest  
14 consumables selection available at great prices delivered  
15 conveniently."

16 Is that a fair characterization?

17 A It is.

18 Q And there is a very different value proposition for  
19 Whole Foods Market, which could be described as "high-quality  
20 perishables and grocery products," right?

21 A That is their value proposition.

22 Q And it's fair to say that Amazon Fresh attempts to offer  
23 the similar types of high-quality perishables and grocery  
24 products that Whole Foods offers, right?

25 A Yes and no. I would say that Amazon Fresh's focus is more

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1 on well-known brands, everyday brands, whereas Whole Foods  
2 tends to focus on organic and natural high-quality food.

3 Q Okay. But it's fair to say that Amazon Fresh focuses on  
4 high-quality perishables?

5 A For sure, yes.

6 Q The first-party offerings of Amazon.com's consumables  
7 business -- do you understand that term?

8 A Yes, our retail business.

9 Q So the retail business of Amazon.com focuses on  
10 shelf-stable groceries rather than perishables, right?

11 A Well, I would say that we do offer perishable products  
12 within our retail business. We also, again, cover a broad  
13 selection outside of perishables in the broader grocery segment  
14 within that business as well.

15 Q It would be accurate to state that Amazon.com's U.S.  
16 consumables business tends not to offer a broad selection of  
17 perishable products due to the fact that Amazon.com's  
18 warehouses are not generally temperature controlled, right?

19 A They are not temperature controlled outside of that one  
20 region in which we are testing today.

21 Q And so focusing on the first part of the question, it  
22 would be accurate to state for that reason, the lack of  
23 temperature control, Amazon.com's U.S. consumables business  
24 tends not to offer a broad selection of perishable products,  
25 right?



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1 A Today, we tend not to offer a broad array of perishable  
2 products through our retail business.

3 Q When we talk about perishable products, is it fair to say  
4 we have a common understanding that the sorts of products that  
5 are not broadly covered by the dot-com business would include  
6 produce, dairy, eggs, and meat?

7 A Well, again, you're referring to the broad dot-com  
8 business. The fact is we have tens of thousands of perishable  
9 products offered through the dot-com consumables business in  
10 perishable categories. However, within the retail business, to  
11 your earlier question, it is not a focal point currently.

12 Q Okay. I made -- that question may have gotten us a little  
13 cross-wise, sir.

14 Do you agree with the statement that Amazon.com's  
15 consumable business does not offer broadly -- strike that --  
16 does not offer broad coverage of produce, dairy, eggs, and  
17 meat?

18 Do you agree with that statement, sir?

19 A Again, "broad" is a relative term here. I would say that  
20 we do offer tens of thousands of items through the dot-com  
21 business. To your earlier line of questioning, it has not been  
22 a focal point of our retail business to date.

23 Q Sir, I would like to -- without explain to the Court,  
24 could I direct your attention to your deposition testimony.  
25 Please review it at lines 73, 24 through lines 74, 2. Please

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1 let me know when you have had an opportunity to review that,  
2 sir.

3 A Pages 73 to 74. And which lines?

4 Q 73, line 24 to 74, line 2.

5 A Yes.

6 MR. MATHESON: Your Honor, may I address the  
7 witness's prior statements, which I believe are inconsistent  
8 with his testimony. This is neither for impeachment nor to  
9 refresh recollection, but instead is admissible for the truth  
10 of the matter asserted under Federal Rules of Evidence  
11 801(d) (1)?

12 THE COURT: Yes.

13 BY MR. MATHESON:

14 Q Sir, at your deposition, you testified: "The perishable  
15 categories are categories that I would say are not broadly  
16 covered by the dot-com business -- produce, dairy, eggs, and  
17 meat."

18 That was your testimony at your deposition, right,  
19 sir?

20 A It was.

21 Q And you were under oath at your deposition, right?

22 A I was.

23 Q Now, you would also include frozen foods in the categories  
24 that are not broadly covered by the dot-com business, right?

25 A Correct.

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1 Q Now, you would agree that each of Amazon Fresh and  
2 Whole Foods offer a broad selection of perishable products,  
3 including produce, dairy, eggs, and meat, right?

4 A I would.

5 Q Okay. I would like to address your testimony, sir,  
6 regarding the everyday essentials program, which you discussed  
7 with my colleague during your direct examination. Now, the  
8 everyday essentials program also does not broadly include the  
9 perishable categories we just discussed -- produce, dairy,  
10 eggs -- produce, dairy, eggs, and meat, right?

11 A I'm unclear as to the everyday essentials program that's  
12 being referenced here.

13 Q Okay. Well, when you used the words "everyday essentials"  
14 in your direct testimony, what did you mean when you used that  
15 in your direct testimony, sir?

16 A It was a storefront presenting what are listed as everyday  
17 essentials. I simply want to clarify that I don't believe it's  
18 a program as much as it is a storefront featuring everyday  
19 essential products.

20 Q Okay. You would agree that Amazon.com's everyday  
21 essential storefront does not broadly include perishables such  
22 as dairy, eggs, produce, and meat, right?

23 A The everyday essentials storefront in question does not  
24 today, no.

25 Q You testified, sir, that SKUs would go up if you were to

S. Heyworth - X

1 compare the Amazon consumables grocery business with Amazon  
2 consumables grocery plus Amazon Fresh and Whole Foods; is that  
3 right?

4 A If we added Whole Foods and Fresh SKU count to the  
5 existing consumables SKU count, it would go up, yes.

6 Q And that's true, even though, as you testified, that  
7 Amazon.com consumables contains a lot more SKUs than are  
8 contained in a traditional grocery store, right?

9 A That is correct.

10 Q And the reason the SKU would go up, if you were to include  
11 Amazon Fresh and Whole Foods storefronts, those storefronts  
12 offer a wide variety of perishable products that are not  
13 offered by the Amazon.com consumables business, right?

14 A They do offer perishable products not carried by the  
15 consumables business, yes.

16 Q We discussed a two-to-four-hour delivery. If a customer  
17 receives from the Whole Foods storefront or the Amazon Fresh  
18 storefront a same-day delivery of perishables, that's going to  
19 come from either a Whole Foods brick-and-mortar store, an  
20 Amazon Fresh brick-and-mortar store, or a distribution facility  
21 serving Amazon Fresh brick-and-mortar stores or Whole Foods  
22 brick-and-mortar stores, right?

23 A In addition to the sub same-day facility that we mentioned  
24 earlier.

25 Q So there is one single place in America, which is Phoenix,

S. Heyworth - X

1 where a consumer might receive from Amazon.com's consumables  
2 business a delivery of perishable?

3 A Today, yes.

4 Q Everywhere else, if people are ordering from the Amazon  
5 Fresh storefront or the Whole Foods storefront and receiving  
6 perishables, they are receiving those from an Amazon Fresh  
7 facility, a Whole Foods facility, and not from an Amazon  
8 consumables dot-com facility, right?

9 A That is correct. The perishable products that I referred  
10 to earlier that are being carried by consumables would be  
11 shipped directly from the third-party sellers to customers.

12 Q Sir, you have testified that you do not use the term  
13 "traditional grocery store" in your general business parlance.  
14 You use the term "conventional grocery store"?

15 A I wouldn't typically use that term -- "traditional,  
16 conventional." From our perspective, the larger supercenter  
17 stores are as traditional as "traditional grocery stores."  
18 Internally we might refer to these retailers as national  
19 grocery brands.

20 Q Can I direct your attention, sir, to line 33 of your  
21 deposition transcript. Let's focus on lines 1 and 2.

22 THE COURT: What page number?

23 MR. MATHESON: Page 33, Your Honor. I apologize.

24 Page 33, lines 1 to 2. This was previously moved into evidence  
25 by my colleague.

S. Heyworth - X

1 BY MR. MATHESON:

2 Q What I want to know, there are five companies listed on  
3 lines 1 and 2. You were asked whether you competed with the  
4 traditional grocery stores that are listed on those lines,  
5 right?

6 A I was.

7 Q How many of those five companies do you think of as  
8 traditional grocery stores when somebody presents you with that  
9 term?

10 A Well, in this context I interpreted the first two.

11 Q And not the subsequent three, because those are different  
12 formats, right?

13 A These would fall outside of the term that is being used as  
14 traditional grocery stores. However, we see these as grocery  
15 competitors.

16 Q And they compete for groceries because they sell some of  
17 the same nonperishable consumables that are sold by  
18 Amazon.com's consumables business; is that right?

19 A That's right. Again, when we think about consumables, we  
20 think of the broader business as a large grocery offering.

21 Q Sir, I would like to address with you the -- you discussed  
22 the delivery. Does the Amazon.com consumables business  
23 deliver -- are a high percentage of its customers members of  
24 Amazon Prime?

25 A They are.

S. Heyworth - X

1 Q That particular number is in camera, but I would direct  
2 you, sir, to your deposition transcript at -- could I ask you  
3 to turn to your deposition transcript at page 65. Review lines  
4 20 through 25.

5 A I see that.

6 Q Having had an opportunity to review that testimony --

7 MR. MATHESON: In order to address the  
8 confidentiality claim, Your Honor, I would ask that -- strike  
9 that --

10 BY MR. MATHESON:

11 Q Does this accurately state the percentage of Amazon.com's  
12 consumable customers that are also Prime members?

13 A It does.

14 MR. MATHESON: Your Honor, I would like to move into  
15 evidence the witness's deposition transcript, page 65, lines 20  
16 through 25.

17 MR. OBARO: No objection, Your Honor.

18 THE COURT: It will be received.

19 BY MR. MATHESON:

20 Q And Amazon Prime has a monthly or annual fee associated  
21 with it, correct?

22 A It does.

23 Q Sir, could I ask you to turn in your binder that you have  
24 been handed to PX3634. This document has been designated  
25 confidential, but let me know when you have had an opportunity

S. Heyworth - X

1 to familiarize yourself with it.

2 A Will it be shown on the screen?

3 Q Mr. Dunkin, can we show the screenshots from 3634,  
4 particularly the first call-out we discussed.

5 I know I need my glasses. I don't know about anybody  
6 else.

7 Do you recognize this document, sir?

8 A I do.

9 Q Is this a document that was prepared by Amazon in the  
10 ordinary course of its business?

11 A It was.

12 Q And was this document prepared for the purpose of  
13 estimating market segment share?

14 A That is my understanding.

15 Q And this document presents information regarding the years  
16 '20, '21, and '22; is that right?

17 A That is my understanding, yes.

18 Q Could I direct your attention, sir --

19 MR. MATHESON: Your Honor, we move to admit PX3634.

20 MR. OBARO: Your Honor -- well, no objection, but  
21 this is beyond the scope of my testimony. I never asked about  
22 market shares.

23 MR. MATHESON: Your Honor, while --

24 THE COURT: I'm confused. Are you objecting or not  
25 objecting?



S. Heyworth - X

1 MR. OBARO: I object to the document, because it is  
2 beyond the scope of the testimony. I never asked about market  
3 shares.

4 MR. MATHESON: Your Honor, if I could address that.  
5 He did ask about the competition within the grocery industry,  
6 and we think it is important to establish Amazon's position  
7 within the grocery segment, which is the only purpose for which  
8 we will be offering testimony regarding this document.

9 THE COURT: I'm sustaining the objection.

10 MR. MATHESON: Thank you, Your Honor.

11 BY MR. MATHESON:

12 Q You have testified that the grocery industry is highly  
13 competitive, right?

14 A Yes.

15 Q In Amazon's view, does it have an enormously large share  
16 of the United States sale of fresh groceries?

17 A No.

18 Q Now, when I say "does Amazon," if you were to include all  
19 of Amazon.com, Whole Foods, and Amazon Fresh, would you say  
20 that combined those three platforms have a large share of the  
21 United States' fresh grocery industry?

22 MR. OBARO: Objection. The objection were sustained.  
23 This goes again to the market share.

24 MR. MATHESON: Your Honor, this is not --

25 THE COURT: I'm going to overrule. He can answer

S. Heyworth - X

1 that question.

2 MR. MATHESON: Thank you, Your Honor.

3 BY MR. MATHESON:

4 Q Would it be helpful to have the question again, sir?

5 A Yes.

6 Q If you were to include the fresh grocery market position  
7 of Amazon.com consumables, Whole Foods Market, and Amazon  
8 Fresh, would you say those three sales platforms combined have  
9 a large share of the United States' fresh grocery market?

10 A I would assume so. I don't know the actual market segment  
11 share of those combined together.

12 Q Okay. At your deposition did you have the opportunity to  
13 review the market segment share of those three combined  
14 entities?

15 A I reviewed the grocery category line item within this  
16 document, which is only specific to food and beverage and does  
17 not represent the full consumables business.

18 MR. OBARO: Same objection, Your Honor. Now he is  
19 asking him about the same document that we ruled was beyond the  
20 scope of my examination.

21 MR. MATHESON: What I'm attempting to understand,  
22 Your Honor, is the success they have had in competing.

23 THE COURT: Then ask those questions.

24 BY MR. MATHESON:

25 Q How much success has Amazon.com consumables had in

S. Heyworth - X

1 penetrating the sale of fresh perishables?

2 A Again, within fresh perishables, that has not grown as  
3 fast as other elements of our broader consumables business.

4 Q Fresh perishables are offered by traditional grocery  
5 stores, such as the grocery stores that you've identified  
6 during your direct examination as competitors, right?

7 A And offered by many other types of competitors, yes.

8 Q Amazon.com's consumables business offers a much larger SKU  
9 selection than the traditional or conventional grocery stores  
10 you have identified as competitors, right?

11 A That is correct.

12 Q It does not offer a much larger SKU selection within fresh  
13 perishables than the traditional or conventional grocery store  
14 competitors we've been discussing, right?

15 A I would say that's the case. However, we continue to  
16 compete with those traditional grocery stores in question for a  
17 broad variety of product.

18 MR. MATHESON: That's all I have. I will pass the  
19 witness. Thanks very much for your time, sir.

20 MR. OBARO: Nothing further from me, Your Honor.

21 THE COURT: You can step down.

22 Thank you.

23 MR. PERRY: May we proceed, Your Honor?

24 THE COURT: Yes, you may.

25 MR. PERRY: The defendants next call Mr. Roger King.

R. King - D

1 (The witness was duly sworn.)

2 THE CLERK: Thank you. Please be seated. Would you  
3 please state your name for the record, spelling your last.

4 MR. PERRY: May we approach with binders, Your Honor?

5 THE COURT: Yes.

6 THE WITNESS: Roger, R-O-G-E-R; last name King,  
7 K-I-N-G.

8 MS. TYREE: Good afternoon, Your Honor. Le'Ora Tyree  
9 on behalf of the Federal Trade Commission.

10 THE COURT: All right. Thank you for stating your  
11 appearance.

12 DIRECT EXAMINATION

13 BY MR. PERRY:

14 Q Good afternoon, Mr. King.

15 A Good afternoon, Mr. Perry.

16 Q Could you please describe your educational history for the  
17 Court.

18 MR. PERRY: Your Honor, to be clear, we are moving  
19 back to the labor case for orientation purposes.

20 THE COURT: Thank you.

21 THE WITNESS: I'm a graduate of the Miami University  
22 Farmer school of business and a graduate of the Cornell Law  
23 School.

24 BY MR. PERRY:

25 Q Mr. Rennick, if we could show the demonstrative.

R. King - D

1           Did you prepare a set of demonstratives to accompany  
2 your testimony today, Mr. King?

3     A     Yes.

4     Q     If we could show DDX24-2. Does this summarize some of  
5 your professional experience, Mr. King?

6     A     Yes, it does.

7     Q     Can you give the Court the high-level overview, please.

8     A     I have been practicing labor law for over 50 years. I  
9 have been in private practice 40 of those 50-some-odd years,  
10 and I have also been involved in the labor policy area of the  
11 United States Congress and also for my present position.

12    Q     What is your present position, Mr. King?

13    A     I'm senior labor and employment counsel for the HR Policy  
14 Association.

15    Q     What's your general job duties at the HR Policy  
16 Association?

17    A     Well, I monitor legislative investments in the labor and  
18 employment area in Congress. I monitor developments from the  
19 National Labor Relations Board, the United States Department of  
20 Labor, particularly the Bureau of Labor Standards. I monitor  
21 developments for the Equal Employment Opportunity Commission.  
22 I monitor developments for the Federal Trade Commission and any  
23 other part of the executive branch that would touch upon  
24 labor-employment matters.

25    Q     Who are the members of the HR Policy Association,

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1 Mr. King?

2 A The association has over 350 members. They are employers.  
3 They employ approximately 9 percent of the private sector  
4 employees in this country.

5 Q Is Kroger a member of that association?

6 A Yes, it is.

7 Q Does Kroger's membership in the HR Policy Association have  
8 any impact on your testimony in this case?

9 A None whatsoever. I have never represented Kroger. In  
10 fact, I have had no conversations with any official or  
11 representative of Kroger regarding this case.

12 Q Thank you, Mr. King.

13 Are you a member of any professional associations?

14 A I am. I am a member of the American Bar Association. I  
15 have been quite active in the ABA. I sit on the association's  
16 labor and employment committees, including a committee on  
17 developing the law under the National Labor Relations Act, the  
18 practice and procedure committee, and I have been active in  
19 various ABA initiatives related to the employment space. I am  
20 also active in the Ohio Bar Association, and I have received  
21 many awards from the association. And I also served as  
22 president of its labor and employment section.

23 Q Have you written and talked on subjects related to labor  
24 policy?

25 A Yes, I have. I have authored many Law Review articles in

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1 the labor employment area that are noted in my expert report.  
2 I also have served as a continuing editor for the publication  
3 known as the Developing Labor Law. Many would consider that  
4 the treatise or the bible for those who practice in the  
5 traditional labor area in the country.

6 Q Mr. King, while you have been a lawyer for many years, are  
7 you here to offer any legal advice or any legal opinions?

8 A No. I'm here as an expert witness. I'm not appearing as  
9 counsel for any party. I'm not here as an advocate for any  
10 party.

11 Q In your capacities over the years, have you had occasion  
12 to become involved with collective bargaining, Mr. King?

13 A It has been an extensive part of my practice, Mr. Perry,  
14 for over 50 years, as I describe. I have been involved in  
15 virtually every aspect of collective bargaining, both at the  
16 table, away from the table, and I have been quite active in the  
17 issues of mergers, acquisitions, and transactions that involve  
18 labor organizations and related issues.

19 Q How many collective bargaining negotiations would you  
20 estimate you have participated in your career?

21 A Hundreds, Mr. Perry. I couldn't begin to count them. Let  
22 me put some context to that, if I may. I have served as the  
23 chief spokesperson for employers at the bargaining table. I've  
24 served as a member of the bargaining team at the bargaining  
25 table. I served in so-called backroom capacity, advising the

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1 bargaining team. I have also advised clients regarding  
2 drafting proposals, reviewing counterproposals, and all  
3 strategies associated with collective bargaining. I have been  
4 involved in every facet of collective bargaining.

5 Q Have any of those experiences specifically involved the  
6 grocery business, Mr. King?

7 A Yes, they have.

8 Q In what capacity have you had that experience?

9 A I served as labor counsel for the Ohio Grocers Association  
10 for over ten years. I had the opportunity to work with  
11 literally dozens, if not more, retail food employers throughout  
12 Ohio and adjacent states.

13 Q Mr. King, at the bottom of the slide is a reference to the  
14 Big Sky Labor and Employment Conference. What is that and what  
15 is your connection to it?

16 A I'm the executive director of the Big Sky Labor and  
17 Employment Institute. It is a 501(c)(3) entity. Its primary  
18 purpose is to hold a conference each year to bring together  
19 representatives of labor, management, and the judiciary with  
20 the objective of reviewing and hopefully finding some solutions  
21 for the labor and employment issues facing this country.

22 Q Thank you, Mr. King.

23 MR. PERRY: Your Honor, at this time the defendants  
24 proffer Mr. King as an expert in labor relations, including  
25 collective bargaining collections between unions and employers?



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1 MS. TYREE: No objection.

2 THE COURT: He will be so designated.

3 MR. PERRY: Thank you, Your Honor.

4 BY MR. PERRY:

5 Q Mr. King, I understand you have reached some opinions in  
6 this case. Does this demonstrative summarize your central  
7 opinions?

8 A Yes, it does.

9 Q We will go through each in a little bit more detail.  
10 Let's tick them off. No. 1?

11 A Yes. I am certainly happy to do that, Mr. Perry.

12 My core opinion No. 1 is the National Labor Relations  
13 Act, the NLRA, and the National Relations Labor Board, NRLB,  
14 protect union and non-union private sector employees, including  
15 protections in the collective bargaining area. That's core No.  
16 1.

17 Q No. 2.

18 A No. 2. The term "CBA area" is not a recognized term in  
19 labor relations. It's not a term I'm familiar with in my 50  
20 years of practice.

21 Q Thank you, Mr. King. No. 3.

22 A No. 3. Unions have many tools and techniques -- tactics,  
23 if you will -- that they can utilize and do utilize in  
24 collective bargaining, and that's a focal point of my report  
25 and my testimony.

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1 Q And No. 4.

2 A This transaction, in my opinion, provides significant  
3 protections for employees and unions.

4 Q Thank you, Mr. King.

5 Are these opinions and others and the bases for those  
6 opinions set forth in a report you prepared in this matter?

7 A Yes, they are.

8 Q If you'd look in your binder to DX2740. It should be the  
9 second tab, sir.

10 A I see that.

11 Q Is that the report you prepared in this case?

12 A Yes, it is.

13 Q It is dated July 1st, 2024, Mr. King?

14 A That is correct.

15 MR. PERRY: Your Honor, at this time defendants move  
16 to admit Mr. King's report, 2724, into evidence.

17 MS. TYREE: No objection.

18 THE COURT: It will be received.

19 MR. PERRY: Thank you, Your Honor.

20 BY MR. PERRY:

21 Q Mr. King, let's turn to your first opinion briefly. In  
22 your experience at the bargaining table -- and I'm going to ask  
23 you now, and I'm going to remind you: We are going to take  
24 your lawyer hat off and put your bargaining hat on. Okay, Mr.  
25 King?

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1 A I agree.

2 Q In your experience at the bargaining table, do you have an  
3 understanding as to whether the negotiators work within a  
4 particular framework?

5 A Absolutely.

6 Q Where does that framework come from?

7 A Well, it comes from the National Labor Relations Act and  
8 interpretations of the Act by the National Labor Relations  
9 Board. And it comes from a great deal of experience that labor  
10 representatives have working with one another. It is a  
11 framework of all those common labor laws, I would suggest.  
12 That's how people conduct themselves when they negotiate  
13 contracts.

14 Q As a matter of labor policy, how would you view the  
15 importance of the NLRA framework for the negotiating table?

16 A The National Relations Labor Act has almost 90 years of  
17 experience. It started with the Wagner Act in 1935, the  
18 Taft-Hartley amendments in 1947, and it is the bedrock of how  
19 we conduct private sector labor law in this country.

20 Q You mentioned the National Labor Relations Board. What  
21 role does it play with respect to that framework?

22 A The board is the overseer of how the National Labor  
23 Relations Act is administered and applied. It provides  
24 mechanisms for employees to decide whether they desire  
25 representation, the representation part of the board, if you

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1 will. The board also regulates collective bargaining and  
2 requires parties to bargain in good faith and monitors issues  
3 that come up from time to time in that space. And the board  
4 also receives some processes on unfair labor practice charges  
5 and adjudicates them when and where appropriate.

6 Q Mr. King, your slide refers to employee rights, and  
7 without going into great detail, we have a quick overview of  
8 the employee rights protected under the NLRA.

9 A Section 7 of the National Labor Relations Act is really at  
10 the core of your question, Mr. Perry. But the act overall  
11 provides for protected considered activity. We call it PCA.  
12 Employees have a right to come together to bargain for terms  
13 and conditions of employment. They have a right to come  
14 together to articulate their issues and concerns to the  
15 employer. So the NRLA really provides significant protections  
16 for employees in many facets of their relationship with their  
17 employer.

18 Q Have you formed an opinion, Mr. King, as to whether the  
19 proposed transaction, when it closes, will change any of the  
20 protections and rights guaranteed to bargaining unit members  
21 under the NLRA?

22 A None whatsoever. None of the rights that I have been just  
23 discussing as provided by the NLRA are curtailed in any manner  
24 by this transaction.

25 Q All right. Let's move on, Mr. King, to opinion No. 2.

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1 Before this litigation, before you were engaged by our firm in  
2 this litigation, had you ever heard the term "CBA area"?

3 A I had not. I was surprised. It is not a recognized term  
4 in labor law. The first time I heard of it is when I started  
5 reading some of the materials here. And, Mr. Perry, I noted  
6 also that labor union witnesses in this case had not heard of  
7 this term either.

8 Q In your seat at the bargaining table, Mr. King, how would  
9 you describe -- as a labor negotiator, how would you describe  
10 what is covered by a collective bargaining agreement, or CBA?

11 A Well, it is the bargaining unit. That's the core of what  
12 is covered.

13 Q And what is a bargaining unit? Is that a term of art in  
14 the field of collective bargaining?

15 A I think so. I think that's fair. A bargaining unit  
16 describes the employees that are covered by the CBA, the  
17 collective bargaining agreement, and represented by the union.

18 Q What relation, if any, is there between geography and a  
19 bargaining unit?

20 A Virtually none.

21 Q Where does one find the bargaining unit in a typical CBA?

22 A That would be at the beginning, in most cases, of the  
23 collective bargaining agreement, and that's where the unit is  
24 described, if you will.

25 Q Is there a particular clause or provision that typically

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1 contains the bargaining unit description?

2 A Yes. It is called a recognition clause.

3 Q A recognition clause. Did you review many of the CBAs  
4 that Kroger and Albertsons have with the UFCW and Teamster  
5 unions-locals in this case?

6 A Yes. Certainly hundreds of them. Certainly 70 percent or  
7 more.

8 Q Mr. King, what are you showing on this next demonstrative,  
9 DDX24-8?

10 A Let's start, Mr. Perry, at the upper left-hand part of  
11 this exhibit.

12 Q Before we go there, what are all three of them? Where did  
13 these come from?

14 A These are excerpts from collective bargaining agreements  
15 that I reviewed in the course of preparing for my testimony.

16 Q Thank you, Mr. King. The one on the upper left, that's  
17 one with the Teamsters; is that right?

18 A Yes. "IBT" stands for International Brotherhood of  
19 Teamsters. This particular collective bargaining agreement is  
20 with Roundy's, and this is for a single store unit.

21 Q So the bargaining unit covered by this agreement is a  
22 single store?

23 A That's correct.

24 Q Is that unusual in your experience, 50 years of labor  
25 negotiations?

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1 A Not at all.

2 So we had other examples, Mr. Perry. Do you want me  
3 to go through those?

4 Q I would love that, Mr. King. Go to the upper right.

5 A Thank you.

6 Moving to the upper right, Article 1, recognition  
7 clause, again, this is the United Food and Commercial Workers  
8 Local 1473 with the Roundy's Company, a banner of Kroger.  
9 Here, we have two specific stores that are covered.

10 Q Okay.

11 A Finally, at the bottom of this exhibit, we have Article 2,  
12 coverage, and this is with United Food and Commercial Workers  
13 1996 with the Kroger Company. Here, this particular collective  
14 bargaining agreement covers stores at -- in multiple counties  
15 and across three states. It is quite broad.

16 Q So one store, two stores, multiple counties in three  
17 states. If we kept going through the hundreds of collective  
18 bargaining agreements you reviewed, what we would find in all  
19 the others?

20 A We would find virtually anything and everything. We would  
21 find what we saw on the screen. We would find two stores,  
22 three stores, four stores. There is no particular method or  
23 methodology, if you will, on the coverage of a bargaining unit.

24 Q Does the graphic representation on the next slide that you  
25 asked us to prepare illustrate the point you just made?

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1 A It does. A bargaining unit could be a single department  
2 in a retail food store. It could consist of multiple  
3 departments. It could consist of all departments. As we just  
4 evidenced, it could be a single store. It could be multiple  
5 stores. It could be a metropolitan area. It could cut across  
6 state lines. It could include various counties. Any  
7 combination thereof.

8 Q Mr. King, do you recall when Andrea Zinder, the president  
9 of one of the Southern California locals, testified in this  
10 trial?

11 A Yes. I was present for her testimony.

12 Q Did you read the CBA covering that Local 324 in  
13 Southern California?

14 A Yes. I have reviewed it.

15 Q What is the bargaining unit in that area? Do you recall?

16 A Yes, I do. That was from the suburbs of Los Angeles all  
17 the way down to San Diego to the Mexican border and east to  
18 Arizona. It is quite broad. Many counties; many cities are  
19 included.

20 Q One last question on the coverage of the bargaining unit:  
21 How is the bargaining unit determined for a particular CBA?

22 A Well, often the parties agree. If no agreement is  
23 reached, then the National Labor Relations Board will  
24 adjudicate their differences and come up with a decision as to  
25 the scope of the unit.



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1 Q And in making that determination, does the board apply any  
2 standards or presumptions?

3 A Yes. What is known as the community of interests test.  
4 That's what has been applied for decades by the board.

5 Q In the context of the grocery retail industry, is there  
6 any presumption as to what size of a bargaining unit satisfies  
7 the community of interest?

8 A Yes. Again, decades of court adjudication have come up  
9 with what is known as the single site -- pardon me just for a  
10 minute -- the single-site presumption test. What I mean by  
11 that is if the labor organization petitions to represent  
12 workers at a single store, that's presumed to be appropriate.

13 Q Thank you, Mr. King. Let's move on to your third core  
14 opinion, which relates to the tools and tactics that unions may  
15 use to negotiate with employers; is that correct?

16 A Yes.

17 Q And did you prepare this demonstrative to help discuss  
18 this issue with the Court, Mr. King?

19 A I did.

20 Q DDX24-11. If we could start with the column on the left,  
21 can you explain that column, sir.

22 A Yes. I would be happy to. So the column on the left  
23 lists protections on the National Relations Act for unions and  
24 for employees. First and foremost is strikes. A strike issue  
25 has many permutations.

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1           Next are strike threats. It's just the discussion of  
2 the potential of a strike. Certainly very prevalent.

3           Boycotts are permitted.

4           Picketing is permitted.

5           Slowdowns are permitted.

6           A very wide array of protected considered activity is  
7 protected by the NLRA.

8 Q       And that's what you referred to earlier as the PCA; is  
9 that right?

10 A       Protected Considered Activity, yes, sir.

11 Q       Mr. King, have you formed an opinion, in your years of  
12 experience as a collective bargaining negotiator, whether the  
13 proposed transaction, when it closes, will affect any of the  
14 protected considered activities under the NLRA?

15 A       The transaction does not diminish, remove, or have any  
16 impact on these protected rights whatsoever.

17 Q       So on the left we have the rights protected by law.  
18 What's the columns on the right?

19 A       These are additional initiatives that a union and its  
20 members can and do pursue. For example, a reference to local,  
21 state, and national employment laws. What's most prevalent  
22 there are minimum wage laws. We have seen many states, many  
23 jurisdictions enact increases in minimum wage for all workers  
24 covered by the statute, and that can and is used in collective  
25 bargaining as an informational point.

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1           The financial strength of the employer, its profit  
2 and loss statement, is often a focal point.

3           The size and unity of the union membership is quite  
4 important. The larger the bargaining unit, the more members  
5 the union represents, the greater leverage it has in the  
6 collective bargaining process.

7           Community support is very important. Community  
8 leaders that appear with the public in general. That can be a  
9 very effective tool or tactic.

10           Earned media. Purchase media are very important.  
11 The labor movement is excellent in the media relations area.

12           When we're talking about blog posts, social media,  
13 online, we have seen a significant increase in labor union  
14 activity in those areas and utilization of those tactics.

15           Publications, traditional publications by the union,  
16 lobbying, political pressure. I can tell you from personal  
17 experience the unions do an excellent job in approaching  
18 leaders at the local, state, and federal level representatives  
19 and presenting their case. We did an excellent job.

20 Q    Let me pause you there, Mr. King. We will come back to  
21 the last one on the bottom right, if we will. You have listed  
22 out a number of tools and tactics here. Is this an exclusive  
23 list, by the way?

24 A    Not at all, Mr. Perry. Time limits in our conversation  
25 today. This is just a representative sample. There are many

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1 more options available.

2 Q Mr. King -- and again, we will leave out the whipsawing  
3 issue, which we will discuss next. Other than whipsawing, do  
4 you have an opinion whether the proposed transaction, when it  
5 closes, will affect any of the tools and tactics listed on your  
6 chart, DDX24-11, or other related tactics that are not  
7 protected by the NLRA?

8 A No impact. No impact whatsoever. All available  
9 post-merger.

10 Q Now, we have heard some testimony in this case about  
11 whipsawing, and we also have heard some arguments about  
12 whipsawing.

13 Do you recall that?

14 A Yes, I do.

15 Q Could you give us the benefit of your 50 years of  
16 experience on the subject of whipsawing, Mr. King.

17 A I'll try to make it brief.

18 Q We would all appreciate that.

19 A When we talk about whipsawing, there are really two types  
20 of whipsawing we should discuss. There is whipsaw bargaining,  
21 which is noted on the screen, and then there is whipsaw  
22 strikes. Whipsaw bargaining is an informational tactic used  
23 frequently in the bargaining process. Correspondingly, a  
24 whipsaw strike is just what it says. It is a strike against an  
25 employer using information from other sources, and if the

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1 employer does not agree to the presentation of a settlement or  
2 an agreement that has been reached from a third party or by a  
3 third party, it tells the target employer, "If you don't agree,  
4 we are going to go out on a strike." That's a whipsaw strike,  
5 far different than whipsaw bargaining.

6 Q Let's start with whipsaw bargaining. Did you hear  
7 Mr. Dosenbach testify yesterday?

8 A I did.

9 Q Did you hear him say that whipsaw bargaining is just  
10 bargaining?

11 A I did.

12 Q Do you have a reaction to his testimony?

13 A His testimony was excellent in all respects, and I  
14 certainly agree with a hundred percent with what he said.

15 Q Why is that? Can you explain why one would say whipsaw  
16 bargaining is just bargaining?

17 A It's a tactic that I've seen used for 50 years in  
18 bargaining. The union will take an information piece from  
19 whatever source -- it could be a non-union increase in wages --  
20 and bring that to the attention of the employer in bargaining  
21 and try to persuade the employer it's bargaining with to match  
22 in some fashion or to accommodate that wage increase from  
23 another source and the contract that's being negotiated. That  
24 happens all the time.

25 Q Did you see an example -- you have been here for most of

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1 the labor testimony, right?

2 A All of it.

3 Q Did you see an example of what you just described,  
4 Mr. King, that type of whipsawing in evidence in this case?

5 A Yes, I have.

6 Q On your demonstrative here --

7 MR. PERRY: Your Honor, this is DDX0114, which was  
8 admitted into evidence during the testimony of  
9 Mr. Jon McPherson.

10 BY MR. PERRY:

11 Q Mr. King, what relevance does this document have to the  
12 opinion you just expressed regarding whipsawing bargaining?

13 A It is an excellent example of whipsaw bargaining.

14 Ms. Cordova here is bringing to the attention of the Kroger  
15 Company --

16 Q Ms. Cordova is a UFCW local president; is that right?

17 A Yes, she is.

18 Q Sorry to interrupt, sir.

19 A Thank you for the clarification. So Ms. Cordova is  
20 bringing to the attention of the Kroger Company wage increases  
21 that have been implemented by non-union employers; in this case  
22 Walmart, Costco, Target, Whole Foods, and making that an  
23 informational source or tactic, if you will, in bargaining with  
24 Kroger. Again, is this a whipsaw strike? No. This is whipsaw  
25 bargaining, an informational tactic.

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1 Q Thank you, Mr. King. It also refers in the next sentence  
2 that fast-food restaurants. How is that relevant to what you  
3 just said?

4 A Again, Ms. Cordova is utilizing the wage increases that  
5 have occurred throughout the fast-food industry, this so-called  
6 "Fight For 15 Movement" that the union movement has very  
7 effectively implemented in this country. She is bringing that  
8 to the attention of the Kroger Company and then utilizing that  
9 as an informational tactic or source in her bargaining with the  
10 company.

11 Q Thank you, Mr. King. You mentioned strikes are different,  
12 right?

13 A They are.

14 Q And strikes are one of the rights that are protected, I  
15 understand, under the NLRA?

16 A The ultimate option for the union, yes.

17 Q The ultimate option. Is there only one kind of strike,  
18 Mr. King?

19 A No. And that's an interesting question. There is a lot  
20 of misunderstanding about that. When people say "strikes" or  
21 talk about strikes, there is often the understanding or  
22 impression that all of the union's members for that bargaining  
23 unit are going to go out on strike. That's not the case. In  
24 fact, the union movement has become very savvy in this area.  
25 There are partial strikes, rolling strikes, episodic strikes,

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1 hopscotch strikes, as they call them. I would define that, so  
2 we're all clear. That's a strike that would hit a retail  
3 employer at location X and then by surprise hit that same  
4 employer at another location without any notice, hopping and  
5 scotching, if you will, around the employer's entities.

6           So there are so many ways the strike option can be  
7 utilized. I just want to emphasize for the record one good  
8 example of that is the recent UAW strike. The UAW utilized the  
9 strike option very effectively. They used a rolling strike.  
10 They didn't take all of their members out on strike against the  
11 Detroit three automakers or any one of them. They only  
12 selected plants, and they decided where and when they were  
13 going to strike, a very effective tactic.

14 Q   Mr. King, did you look as part of your assignment in this  
15 case at the frequency of strikes involving Kroger and  
16 Albertsons?

17 A   That's something I looked for when I started my journey  
18 through the materials. I found only four strikes with Kroger  
19 over decades, and that's remarkable to me, given the hundreds  
20 and hundreds of agreements that are negotiated by the Kroger  
21 Company and its various unions. That's a great record.

22           I also heard the testimony of Mr. Dosenbach  
23 yesterday. Only one strike that he can recall in the history  
24 of Albertsons, at least in his tenure with the company. And  
25 that is an incredibly positive record of labor relations.



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1 Q Rare as they are, Mr. King, do you have an opinion as to  
2 whether strikes in all of their variations as you have just  
3 summarized them would be available to union members and the  
4 union locals following the Kroger-Albertsons merger?

5 A All of those strike options I mentioned, and I am sure  
6 many more are available.

7 Q Do you have any view on whether they would be more or less  
8 effective following the merger -- the strike option, that is?

9 A Well, they are going to be more effective, because they  
10 are going to be utilized with a larger bargaining unit. There  
11 is going to be a lot more of an economic clout, an ability of  
12 the union to economically cripple the target employer, without  
13 question.

14 Q Thank you, Mr. King.

15 Fourth and last opinion.

16 A Well, the transaction protects union employees. To be  
17 more precise, Mr. Perry, it protects the impacted employees in  
18 this transaction.

19 Q And you said earlier you had considerable experience  
20 advising employers in connection with mergers and acquisitions;  
21 is that right?

22 A Yes. Over my private practice experience, literally  
23 hundreds of those types of issues would come to me in one form  
24 or another.

25 Q Have you developed a framework for evaluating the effect

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1 of a corporate transaction, whether a stock purchase or an  
2 asset purchase on unions and their members?

3 A I have. I have a checklist I always start with.

4 Q Is that on this demonstrative, DDX24-15?

5 A Yes, it is.

6 MS. TYREE: Objection, Your Honor. Undisclosed  
7 expert opinion.

8 THE COURT: I can't hear you. I don't think you have  
9 the mic. on.

10 MS. TYREE: It is an undisclosed opinion. We were  
11 never made aware of this checklist. It wasn't part of his  
12 opinion.

13 MR. PERRY: Your Honor, his report deals with  
14 successorship issues extensively, including in paragraphs 70  
15 and 72. The checklist itself is not in there. Mr. King has  
16 testified about this in deposition -- about the subjects in  
17 deposition. The Government was free to ask. This is something  
18 that he regularly uses to evaluate these issues.

19 MS. TYREE: He was asked about his methodology, and  
20 he never mentioned a checklist.

21 THE COURT: I'm going to sustain the checklist.

22 MR. PERRY: Thank you, Your Honor.

23 BY MR. PERRY:

24 Q Mr. King, what does it mean for an employer to assume a  
25 CBA?

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1 A What that means, Mr. Perry, is that the acquiring employer  
2 agrees to abide by all of the terms and conditions of  
3 employment contained in the collective bargaining agreement --  
4 every part of it.

5 Q In an asset purchase transaction such as the divestiture  
6 to C&S, is the employer required to assume a CBA?

7 A Well, not necessarily. It depends on what the collective  
8 bargaining agreement says.

9 Q And you have reviewed many of the collective bargaining  
10 agreements, correct?

11 A I have.

12 Q Do they require assumption in an asset purchase  
13 transaction?

14 A It is a mixed bag. Some of the CBAs had what is called a  
15 successorship clause; others did not.

16 Q Did you hear testimony in this case that C&S has agreed to  
17 assume the CBAs?

18 A Yes, it has.

19 Q And what significance does that agreement to assume the  
20 CBAs have?

21 A I think that's one of the most important parts of this  
22 transaction. C&S has agreed to assume all applicable  
23 collective bargaining agreements in their entirety.

24 Q Does a union have to agree or consent to a buyer's  
25 assumption of a CBA?

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1 A No.

2 Q Did you hear Ms. Zinder's testimony that might have  
3 suggested otherwise, Mr. King?

4 A Yes. I was here for her testimony.

5 Q Did you review the Local 324 CBA and its successorship  
6 provisions?

7 A I did.

8 Q Does that contract require the consent of the union to be  
9 assumed by C&S?

10 A No.

11 Q What happens to union employees, Mr. King, when those CBAs  
12 expire? In other words -- let me set up the scenario for you.  
13 The transaction has closed. The stores have been divested.  
14 C&S is in operation, and one, two, three years down the road,  
15 it has assumed these CBAs, but then they expire. There might  
16 have been some suggestion in this litigation that at that time  
17 the union members would be out of luck.

18 Do you have a view on that suggestion, if it has been  
19 made?

20 MS. TYREE: Objection, Your Honor. Legal opinion.

21 MR. PERRY: I'm not asking for a legal opinion,  
22 Your Honor. I'm asking him for his expertise as a union  
23 negotiator for many years who has done hundreds of corporate  
24 transactions, what happens to a successor entity when the  
25 contract expires.

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1 THE COURT: Overruled. You can answer that.

2 THE WITNESS: Thank you, Your Honor.

3 All the terms and conditions of employment continue  
4 even though the labor agreement has expired. Let me expand, if  
5 I may, for just a moment. This is such a critical point that  
6 has not been brought out to my knowledge in this proceeding to  
7 date.

8 Under traditional contract law, as we know, all terms  
9 and conditions of a contract cease to exist at the end of that  
10 agreement -- contract over. In the federal area of  
11 jurisprudence and labor law and common law, every term and  
12 condition of that expired agreement, but for a very few minor  
13 exceptions, continues. The workers, the impacted employees  
14 enjoy all of the rights, all of the benefits contained in that  
15 expired agreement. That is peculiar in the collective  
16 bargaining labor area. Many people don't understand that, and  
17 that has been seriously, I think, misunderstood or misstated to  
18 the Court.

19 BY MR. PERRY:

20 Q Mr. King, is there a name for the framework you just  
21 described governing expired union contracts?

22 A It is a result of the United States Supreme Court decision  
23 in the Katz case.

24 Q Without offering a legal opinion -- and we can all read  
25 Katz. Sitting at the bargaining table, what does the Katz

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1 doctrine mean to the negotiators of a deal like this one?

2 A It means that everything continues, Mr. Perry, as is, and  
3 the essential terms and conditions of employment.

4 Q And on your demonstrative, have you listed some of the  
5 things that the employer -- the successor employer, right? We  
6 are talking here about C&S; is that right?

7 A Yes. That's correct.

8 Q C&S cannot unilaterally change the wages or benefits even  
9 after a contract expiration; is that correct?

10 A Absolutely not.

11 Q C&S could not refuse to comply with the terms of the CBA?

12 A They would have to continue to comply with all terms of  
13 the CBA.

14 Q They would have to continue to recognize and negotiate  
15 with the union?

16 A Absolutely.

17 Q By the way, we have been talking about C&S. Kroger is  
18 also going to assume the Albertsons contracts; is that right?

19 A That's correct.

20 Q And that happens automatically by operation of law because  
21 of the stock purchase transaction; is that correct?

22 A That is correct.

23 Q But when those contracts apply, do all these same  
24 protections apply to union workers?

25 A When those Kroger contracts expire, and they are from

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1 three to five years, everything we have just covered continues.  
2 The impact of employees will not suffer any diminution  
3 whatsoever of their rights and their protections that were  
4 articulated and covered in the previous CBA.

5 Q Mr. King, let's wrap it up. The transaction that has been  
6 proposed and is under consideration by the Court, by which  
7 the Albertsons Company will merge into Kroger with a  
8 divestiture to C&S, will union employees see any reductions in  
9 their wages?

10 A No.

11 Q Will union workers see any reductions in their benefits?

12 A Absolutely not.

13 Q And will union workers see any reduction in their  
14 seniority?

15 A No.

16 Q Will union workers see any reductions in their pension  
17 funds or pension benefits?

18 A Absolutely not.

19 Q Will the employees' non-transferable of benefits indeed be  
20 affected in any way?

21 A No negative impact at all.

22 Q Final question, Mr. King: Based on your 50 years of  
23 experience in labor relations and collective bargaining, do you  
24 think this transaction is a good deal for unions and union  
25 workers?

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1 A For both. It is one of the most advantageous transactions  
2 I have seen in my 50 years of labor practice: Protections for  
3 the union, and most importantly, protections for employees and  
4 the benefits that have been bargained for them, particularly in  
5 the health and welfare area and the pension area; critical for  
6 their well-being in the future.

7 MR. PERRY: Thank you, Mr. King.

8 No further questions, Your Honor.

9 THE COURT: We are going to put a pause in witness  
10 testimony because we need to end.

11 We have five minutes to 5:00.

12 I want to use this time to ask counsel some questions  
13 about tomorrow and Friday as to what is to be expected, just  
14 generally.

15 MS. MUSSER: Certainly. I'll let Mr. Perry talk  
16 about tomorrow, since it is his case.

17 MR. PERRY: Absolutely, Your Honor. So we will have  
18 the conclusion of Mr. King, I assume, unless the Government  
19 chooses not to cross-examine him.

20 THE COURT: I'm not sure that will happen.

21 MR. PERRY: I wanted to put the offer out there.

22 THE COURT: I understand.

23 MR. PERRY: We will have Ms. Kinney from the  
24 Albertsons Company to talk about a variety of very interesting  
25 things, including share of wallet.



1 THE COURT: Okay.

2 MR. PERRY: We will have Professor McCrary, who is  
3 our labor economist, back to the labor side of the case to  
4 address those issues, including the competitive dynamics,  
5 market definition, and other issues raised by that side.

6 I need to grab my list, Your Honor.

7 THE COURT: Fair enough.

8 MS. MUSSER: Mr. Galante.

9 MR. PERRY: Thank you. Ms. Musser is helping me out.  
10 I appreciate it. We have Mr. Galante, who is our divestiture,  
11 diligence, and modeling expert, who will round out the  
12 defendants' case. We are on track to finish -- I think  
13 tomorrow afternoon is aggressive, but feasible.  
14 Friday morning is absolutely there. Then the Government, I  
15 believe, has -- well, the Government has -- and I'll dot, dot,  
16 dot.

17 MS. MUSSER: I'll take the ball from Mr. Perry here.  
18 We plan on presenting three witnesses in our rebuttal:  
19 Dr. Yeater; Professor Ashfelter, who is sitting with us here  
20 today; and again, Dr. Hill, who this Court is familiar with.

21 We anticipate that as long as we are not talking  
22 about 11:59 on Friday morning and an early Friday morning start  
23 time for our case or mid-morning, we will be able to finish on  
24 Friday.

25 THE COURT: Fair enough.

1 MS. MUSSER: The one request, just to flag, if things  
2 are running slow tomorrow, we might request the Court's  
3 indulgence and convenience -- earlier or late -- so we can get  
4 all done.

5 THE COURT: That's why I'm asking.

6 I want to get you at least done with the presentation  
7 of evidence by five o'clock.

8 MR. PERRY: We all have that interest, Your Honor.  
9 We are available to start earlier or go --

10 THE COURT: Just let me know. The Court is available  
11 too. If you want to start a little early tomorrow, we can do  
12 that. If you want to have the time, that's fine. If you just  
13 want to do it on Friday, that's why I'm asking.

14 MR. PERRY: Your Honor, I have not discussed this  
15 with Ms. Musser. In deference to the Government's rebuttal  
16 case, if we start at 8:30 tomorrow, with the Court's  
17 indulgence, we could try to get in as much as they can. They  
18 are going to get jammed at the end of Friday. I know what that  
19 feeling is like, so it might help to do it earlier on Thursday  
20 rather than Friday and see where we are.

21 THE COURT: Okay. We will start tomorrow at 8:30.

22 All right. See you in the morning.

23 Is there anything else we need to address?

24 MS. MUSSER: Not that I'm aware of.

25 THE COURT: All right.

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MR. PERRY: Thank you, Your Honor.

THE COURT: Thank you.

All right. Court is adjourned.

(Court adjourned.)

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

/s/ Dennis W. Apodaca  
DENNIS W. APODACA, RDR, RMR, FCRR, CRR  
Official Court Reporter

September 11, 2024  
DATE

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