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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 - MORNING SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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DR. MARK ISRAEL

Direct Examination by Ms. Pfaffenroth

2584

TRANSCRIPT OF PROCEEDINGS

(September 11, 2024)

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Good morning. Please be seated. We are in day 12 of the preliminary injunction hearing for the Federal Trade Commission, et al. v. the Kroger Company and Albertsons Companies, Incorporated.

If counsel will address any issues we need to address prior to taking testimony this morning, we can do so, as well as state any appearances of new attorneys.

The previously identified attorney appearances remain.

MS. MUSSER: From plaintiffs, we have no issues and no new people.

THE COURT: All right.

MS. PFAFFENROTH: For Kroger, we have no new attorneys and no preliminaries.

THE COURT: All right.

MS. MAINIGI: Same for us, Your Honor.

THE COURT: Fair enough. Okay. You may call your first witness.

MS. PFAFFENROTH: Thank you, Your Honor.

Your Honor, we call Dr. Mark Israel.

///

Israel - D

1 DR. MARK ISRAEL,
2 called as a witness in behalf of the Defendants, being first
3 duly sworn, is examined and testified as follows:

4

5 THE WITNESS: I do.

6 DEPUTY COURTROOM CLERK: Please state and spell
7 your first and last name for the record.

8 THE WITNESS: Sure. My name is Mark A. Israel.
9 M-a-r-k. I-s-r-a-e-l.

10 THE COURT: Okay.

11 MS. PFAFFENROTH: Thank you.

12

13 DIRECT EXAMINATION

14 BY MS. PFAFFENROTH:

15 Q. Dr. Israel, good morning.

16 A. Good morning.

17 Q. Could you briefly describe your professional experience
18 for the record?

19 A. Sure. So I'm an economist by training. I have a Ph.D.
20 in economics from Stanford University that I received in
21 2000.

22 After I left Stanford, I went and taught at
23 Northwestern University at the Kellogg School of Management.
24 I was there a full time for eight years, teaching business
25 strategy and economics.

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1 As part of that, I had the opportunity to work on some
2 competition matters, some antitrust matters, and really fell
3 in love with diving into the competition matters, so I
4 switched over to doing that full time.

5 As of 2008, I joined a firm called Compass Lexecon,
6 where I have been ever since, doing all sorts of competition
7 economics work.

8 Q. And have you published articles in peer-reviewed
9 journals?

10 A. Yes. I have 25 or 30 articles primarily on competition
11 economics topics.

12 Q. You mentioned that you taught for a number of years.
13 Could you just describe briefly the types of courses that
14 you taught?

15 A. So my teaching was focused on business school, on MBA
16 students. Most of what I taught was courses in business
17 strategy, which is really the application of competition
18 economics ideas, to, you know, actual businesses in the real
19 world, how they form their strategies, how we marry the
20 discipline of economics with the actual way businesses form
21 strategies and compete.

22 Q. And have you received any awards in the past few years?

23 A. Yes. So in 2023 the Global Competition Review, which
24 is an organization focused on competition policy and
25 antitrust, named me the Competition Economist of the Year,

Israel - D

1 globally, for that year.

2 I think Who's Who Legal, another organization who does
3 things like that, has named me -- I think it's called a
4 Global Elite Thought Leader for the last several years.

5 Q. And about how many -- for how many antitrust matters
6 have you worked on over your career as a lead economist?

7 A. I don't have an exact count, but it's well more than a
8 hundred.

9 Q. And have you worked for both plaintiffs and defendants?

10 A. Yes. I've worked for private plaintiffs, defendants,
11 and the Government.

12 Q. And the Government.

13 Have you worked for the Federal Trade Commission?

14 A. I have. I've been retained three times as the lead
15 expert on a case, a merger case by the FTC. Two of those
16 cases settled or ended before they went to trial. All of
17 them resulted in expert reports, but only one of them
18 resulted in testimony in court.

19 Q. And have you -- about how many times have you testified
20 in antitrust merger cases before?

21 A. It's over 10; probably, roughly, 15.

22 Q. And in the cases where you testified, were there courts
23 that credited your opinions?

24 A. Yes. Courts have credited my opinions and cited to
25 them favorably in many instances.

Israel - D

1 Q. And have courts ever disagreed with your opinions?

2 A. Yes. When you offer your opinion, people disagree

3 sometimes. It's an unpleasant part of the process.

4 Sometimes they agree; sometimes they disagree. Sometimes

5 strongly in each direction. That's an unfortunate part of

6 the process, but it happens.

7 Q. Has any court found you qualified to be an expert

8 before?

9 A. Yes. In every case where I've testified, the court has

10 found me qualified.

11 Q. And has any court ever found you unqualified to testify

12 as an expert?

13 A. No.

14 MS. PFAFFENROTH: Your Honor, I move to offer

15 Dr. Mark Israel as an expert in his field of industrial

16 organization economics as applied to mergers.

17 MR. PAI: No objections from plaintiffs,

18 Your Honor.

19 THE COURT: He will be identified as an expert.

20 MS. PFAFFENROTH: Thank you, Your Honor.

21 BY MS. PFAFFENROTH: (Continuing):

22 Q. Dr. Israel, did you prepare expert reports for this

23 case?

24 A. I did.

25 I believe I filed a reply report on -- a reply report

Israel - D

1 to Dr. Hill's report on July 20th of this year and then a
2 brief surrebuttal report on July 30th.

3 MS. PFAFFENROTH: Your Honor, I would move to
4 admit DX2623, which is Dr. Israel's corrected reply report;
5 DX2624, which is the surrebuttal report; and DX2940 through
6 DX2946, which are the appendices to the reply report into
7 evidence.

8 MR. PAI: No objection, Your Honor.

9 THE COURT: They all will be received.

10 MS. PFAFFENROTH: Thank you.

11 BY MS. PFAFFENROTH: (Continuing):

12 Q. So, Dr. Israel, what was your assignment for this case?

13 A. I was asked to generally assess and evaluate the
14 potential competitive effects of the proposed transaction;
15 and, in particular, in doing that, to evaluate and react to
16 the claims made by the plaintiffs; and, in particular, the
17 reports and claims made by Dr. Hill.

18 Q. And when you say "the transaction," could you just
19 clarify for the Court the transaction to which you're
20 referring?

21 A. Yes. Well, all of my analysis, as I would do in every
22 case, is the transaction before us now, which I would define
23 as the -- the transaction we're considering that would
24 happen if this goes forward.

25 So it's the sale of Albertsons stores to both Kroger

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1 and C&S. So, roughly, just under 1,800 Albertsons stores to
2 Kroger; just under 500 Albertsons stores to C&S; and then
3 the sale of just under 100 Kroger stores to C&S.

4 So I'm looking at that transaction as a whole and
5 attempting to apply the tools of competition economics in a
6 consistent way to assess all parts of that transaction.

7 Q. And could you describe at a high level what you did to
8 prepare for your testimony today?

9 A. Sure. So I, with supportive staff, have attempted to
10 go through as much of the documentary record in the case as
11 possible. Obviously, it's huge, but I tried to go through
12 as much of that as possible. Reviewed the documents, have
13 reviewed a lot of testimony, deposition testimony. I've
14 been in court almost every day or read the transcripts when
15 I couldn't make it. So I've tried to focus on the documents
16 and the testimony.

17 And then a key part of what economists bring to bear is
18 data analysis. So I've gone through data on prices and
19 sales and competition, and so on, and performed analyses on
20 those data sets.

21 Q. And could you describe, at a high level, your
22 understanding of plaintiffs' theory in this case?

23 A. Sure. So, put simply, I would say that it's -- that by
24 acquiring Albertsons, and thus removing Albertsons as an
25 independent competitor, that Kroger will -- that the

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1 transaction will substantially lessen competition; and,
2 really, in particular, that it will give Kroger the ability
3 to raise prices.

4 Q. And what is your response to that theory?

5 A. I guess I would start by saying that I think that
6 theory and the support that's been put forward for it, by
7 Dr. Hill in particular, makes a number of what I would call
8 "errors" or economic claims that I disagree with, and I
9 think those errors drive a lot of the conclusion and lead
10 plaintiffs to a faulty conclusion that the transaction will
11 harm competition.

12 Q. And did you prepare slides for your testimony today?

13 A. I did.

14 MS. PFAFFENROTH: Mr. Rennick, could we put up
15 Dr. Israel's slides?

16 And I'll just note that there are a handful of slides
17 that contain sensitive pricing information, so we'll be
18 taking those slides off the public screens.

19 BY MS. PFAFFENROTH: (Continuing):

20 Q. So, Dr. Israel, you referenced errors that you feel
21 that Dr. Hill committed in his analysis.

22 Could you walk the Court through, starting with the
23 first error that you identified?

24 A. Sure. So the slide has what I consider the five most
25 consequential errors that I think Dr. Hill made.

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1 The first one is just insufficient focus on the extreme
2 importance of Walmart in this industry; and Walmart to
3 Kroger's pricing strategy, in particular.

4 From the testimony we've heard and my analysis and the
5 data on the case, Kroger is laser-focused on Walmart. It
6 sees Walmart as really the fulcrum of its efforts to
7 compete, and so that tells me that today Walmart will be
8 there and be the firm that is the firm that Kroger is
9 chasing, and post-transaction, Walmart will be there and be
10 the firm that Kroger is chasing.

11 So there's, you know, no basis to think Kroger would
12 have any ability to raise prices.

13 And Albertsons today is farther behind Walmart. Can't
14 target -- can't sort of target them with pricing as well,
15 and so by Kroger taking over Walmart and shifting to
16 Kroger's demonstrated strategy of getting close to Walmart,
17 that would lead to lower Albertsons prices.

18 So by not focusing on just, in this industry, the
19 extreme importance of Walmart, I think Dr. Hill commits a
20 fundamental error.

21 Q. And moving on, what about the second error?

22 A. The second error is -- so if Walmart is the key
23 constraint from everything I've seen, Albertsons is not an
24 important constraint on Kroger's pricing.

25 And I would say Dr. Hill's error here is not take --

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1 making use of the real-world pricing data, where we have a
2 sort of very good and unique ability, in this case, to study
3 the exact question at hand, which is, "How does Kroger price
4 when it does or does not face competition from Albertsons?"
5 That exists in different areas today. We can learn from
6 that. It's a very useful economic study, and Dr. Hill does
7 not make use of it at all.

8 Q. And what about the third error?

9 A. So then, moving on to what Dr. Hill does or has done
10 and presented in his testimony -- so a lot of the discussion
11 was about market shares. I think Dr. Hill consistently
12 inflates defendants' market shares. He does it in both of
13 his market definitions -- supermarket and large format -- by
14 leaving out important competitors from the markets, thus
15 making the defendants' market shares look bigger.

16 And then he also presented in his rebuttal and in
17 testimony a new method relative to his first report that he
18 called the customer-based method, and as I can explain in
19 more detail, as we go through things that, that method, by
20 its very nature, by the way it's constructed, automatically
21 overstates defendants' shares.

22 Q. And could you explain error number four for the Court,
23 please.

24 A. Sure. So error number four, again, on the -- on the
25 things that Dr. Hill does, when he defines markets and when

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1 he computes his measures of pricing pressure, he
2 consistently uses the wrong margins.

3 In particular, the margins that we need to use need
4 to -- it needs to be the costs that you're deducting to get
5 those margins, deduct all of the variable costs that go up
6 as you increase output.

7 So Dr. Hill and I agree it should be the marginal cost,
8 the costs that go up as you increase output, but it should
9 be all of those costs that vary with output, and he only
10 subtracts a small subset of them.

11 Q. And, finally, the fifth.

12 A. So, yeah, the fifth one kind of refers back to some
13 things that I've already said. One being that you need to
14 consider the entire transaction, including the divestiture,
15 meaning including the sale of stores to C&S; and you need to
16 consider the appropriate margins.

17 And the error I see from Dr. Hill is he has done work
18 where he acknowledges each of those. He looks at his
19 analysis with accounting for this divestiture for the sale
20 to C&S, and he looks at his work account using the
21 appropriate variable margins, but he never takes what, to
22 me, is the obvious next step of putting those two things
23 together and seeing what the bottom line is if you do both.

24 Q. Okay. Thank you.

25 So then taking a step back, can you summarize for the

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1 Court your overall conclusions in this case?

2 And I'll note we have -- we have a slide and we also
3 have the board that's up over to the sides. We're going to
4 keep coming back to these as we march through the different
5 points so that we can keep track.

6 A. Okay. I'll focus on the slide as much as I can, since
7 that's all the way behind me.

8 But the -- so my conclusions -- these more
9 affirmatively follow from what I've been describing. So I
10 break them up into direct evidence and indirect evidence.
11 "Direct evidence," meaning evidence of pricing and
12 competition that doesn't work through -- where you don't
13 have to develop a full economic model. You can study the
14 pricing data that's out there.

15 So from those data I conclude that Walmart constrains
16 Kroger's pricing. It's really the driving force. It's what
17 Kroger is chasing, and that will remain true post-merger,
18 thus preventing price increases.

19 And, number two, the flip side of that, that real-world
20 data shows that Albertsons does not affect Kroger pricing.
21 Kroger pricing does not look different when Albertsons is
22 present or absent.

23 And then I turn to the indirect evidence, because,
24 really, focus more on the models that Dr. Hill has
25 presented, market definition, and competitive effects,

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1 economic models.

2 And there I conclude -- the third conclusion is that
3 plaintiffs' markets are not properly defined. They're not
4 defined in the appropriate way. That results in markets
5 that leave out important competition and that, therefore,
6 fail proper versions of the hypothetical monopolist test.

7 And then, finally, turning to competitive effects, so
8 this is economic models of pricing, I find that properly
9 implemented competitive effects models, whether it's the
10 GUPPI, which we've heard talked about, or the CMCR -- and as
11 I'll explain, those are really very much the same thing, but
12 either of them shows no harm for competition.

13 Q. Okay. And why did you start with direct evidence? Why
14 are you taking that first?

15 A. I mean, for me, as an economist, the question that I'm
16 trying to ask myself and answer in every merger case is
17 "Will the merger harm competition?" or the -- a major focus
18 of that is, "Will the merger lead to higher prices?"

19 And direct -- direct evidence, when it's available to
20 use, gives me what I consider the best way to answer that,
21 rather than work through the assumptions and complexities of
22 an economic model.

23 If you can look directly at firm strategies, see who's
24 constraining them today, see how they're pricing today, and
25 see if there's any basis to say that constraint and that

Israel - D

1 pricing would change from the merger, and then you have a
2 much more direct way to answer the fundamental question.

3 I'd also note that both -- we've talked some about the
4 2010 and the 2023 merger guidelines. They have differences
5 between them for sure, but both of them prominently feature
6 the value of direct evidence if you have it.

7 Q. And could you just explain why you're focusing on
8 Kroger's pricing strategy rather than the pricing strategy
9 of Albertsons?

10 A. Well, put simply, Kroger will run the combined firm.
11 And so Kroger's pricing strategy will -- will dictate. It's
12 an important thing from my time teaching business
13 strategies. Firms have different strategies. Those are
14 real things in the real world, from go-to-market, as they
15 say, in different ways. And the way that the acquiring firm
16 will go to market is particularly important.

17 Q. And have you reached a conclusion with respect to
18 Kroger's pricing strategy?

19 A. Yes. As I've said, Kroger's pricing strategy is
20 overwhelmingly focused on Walmart. It's focused on the
21 broader market too, but with Walmart, as -- as I say, the
22 fulcrum, that's the thing that brings that together.

23 And so Kroger is really in a race of trying to chase
24 Walmart, and that will continue to be true post-transaction.

25 Q. And what formed the basis of that opinion, that

Israel - D

1 conclusion?

2 A. So, again, it's the same basic thing as I described,
3 that I study and try to do my job here. So it's based on
4 documents. It's based on testimony. It's based on
5 price-check data that we've heard discussion about. It's
6 based on my own analysis of the data. I think those are the
7 main things.

8 Q. Okay. And with respect to -- let's break them down a
9 little bit. With respect to testimony -- so what testimony
10 from this trial did you find informative about what Kroger's
11 pricing strategy will be post-merger?

12 A. Yeah, I mean, it's testimony I've heard here, I would
13 say, that reflects testimony I had read in deposition. I
14 would highlight two. Mr. Aitken, chief marketing -- or
15 chief commercial officer, or some title like that, at
16 Kroger, but who is at a high level, in charge of these
17 things, I think he referred to Kroger as monomaniacally
18 focused on Walmart, but basically saying Kroger -- you know,
19 he really described in detail a broad strategy that Kroger
20 has gone to market with for a long time, which is to get as
21 close to Walmart as possible.

22 And then Mr. Groff, Andy Groff, who does that at a --
23 pricing at a more detailed level, also talked about --
24 talked about focusing on Walmart. He talked about it in
25 more detail with the various pricing programs that the

Israel - D

1 Kroger has that are focused on Walmart.

2 And he's the one who's made it clear consistently that
3 Kroger does that both because it sees it as the best way to
4 keep its loyal customers and attract price-sensitive
5 customers, but also because, in his view, Walmart is itself
6 competing and pricing against others, like Aldi and Amazon
7 and Costco; and so by targeting Walmart, Kroger can compete
8 with those players as well.

9 Q. Okay. So moving on to a second category, you mentioned
10 price-check data. What did Kroger's price-check data tell
11 you?

12 A. So I think, if we advance one slide, I have a slide on
13 this.

14 So Kroger price-checks Walmart effectively everywhere.
15 In particular, Kroger price-checks Walmart in 100 percent in
16 every role-based pricing zone. So in every one of its main
17 pricing zones, which is at issue here, in every overlap
18 pricing zone.

19 So this data confirms that not only is Kroger saying
20 that its strategy is priced to Walmart, but it's collecting
21 price-check data to implement that strategy in every overlap
22 pricing zone.

23 Q. So as an economist, what does that price-check data
24 tell you?

25 A. It tells me that Kroger, you know, is doing -- is

Israel - D

1 taking a step that it needs to take to have it be true that
2 it's pricing against Walmart.

3 I mean, the price-check -- every piece of evidence here
4 is one part of the story. So the price-check data alone --
5 all that tells you is Kroger is collecting the data.

6 So it's the price-check data combined with the
7 testimony and the observed prices that Kroger sets that
8 tells me that Kroger is using that Walmart price-check data
9 as the primary driver of its prices.

10 MS. PFAFFENROTH: Okay. Before we move on to the
11 next point, I'm going to ask Mr. Rennick to take the slides
12 off the public screen, because the next slide is
13 confidential.

14 BY MS. PFAFFENROTH: (Continuing):

15 Q. You also mentioned ordinary course business documents
16 that helped lead to your conclusions. What did your review
17 of those documents show you?

18 A. So the next slide, if we advance one, is an example of
19 a Kroger price-benching document. So price-benching
20 versus -- price-benchmarking -- excuse me -- versus Walmart.

21 So here you see an ordinary course document of, again,
22 not just checking Walmart's prices, but pricing against
23 them. And this document is Kroger tracking over time how
24 well it does versus Walmart.

25 And, generally, you see that the top line here, the

Israel - D

1 regular prices, which are non-promotional -- sometimes
2 called white tag prices -- are pretty far above Walmart, but
3 then when -- as it adds promotional prices, sort of its
4 basic promotions, get it down to the lines in the middle,
5 and then it's more complicated promotions that they've
6 talked -- that Mr. Aitken and Mr. Groff talked about, you
7 know, "buy two get two free," more complicated promotions
8 like that, get it down quite close to Walmart.

9 I think Mr. Aitken really focused on that bottom line
10 as Kroger's goal and what he was proud of; but, again, you
11 see that Kroger is taking the price-check data and using it
12 in pricing and focusing its strategy on being as close to
13 Walmart as it can.

14 Q. And did you take a look at the Kroger pricing strategy
15 at a more granular level?

16 A. I did.

17 So, again, if we advance this slide here, or maybe it's
18 a few slides in a row that will come up, I went through
19 Kroger's -- Kroger has a large number of different "pricing
20 programs," it calls them. These are the way it prices
21 different products. So it prices grocery products and
22 natural foods products.

23 If we keep scrolling through this, you'll see just
24 different types of products that Kroger is -- Kroger is
25 saying, "How should we price these programs?"

Israel - D

1 What you see is in basically every place, this is like
2 the tactics to implement the strategy.

3 Basically, in every one of these cases, the tactic is
4 price to Walmart. Some cases get all the way to Walmart.
5 In some cases, a little bit above Walmart.

6 The one exception here are not -- still includes
7 Walmart, but the Simple Truth organic brand also mentions
8 another competitor of -- on organic products.

9 And so these -- aside from that one, every one of these
10 pricing programs is a tactic designed to get as close to
11 Walmart as possible.

12 Q. So that was with respect to program items. I know
13 you've also heard a lot of testimony during the course of
14 the trial about everyday essentials.

15 Can you talk about the everyday essentials pricing?

16 A. Yeah. Sure. So there's been a lot of talk about
17 everyday essentials. There's a lot of talk about five
18 products: milk, eggs, sugar, lettuce, and bananas. It's
19 like a test in here that you can name those.

20 But those products are -- you know, they are a small
21 percentage, something like 1 percent, of Kroger sales, but I
22 think products that Kroger thinks consumers pay attention
23 to.

24 And so for those, they're -- Mr. Groff explained what
25 the documents also say. They're priced quite locally. More

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1 locally than these other programs or that the goal is to get
2 priced to the level of the low-priced competitor in each --
3 in each market.

4 And Mr. Groff indicated that's not going to be --
5 Albertsons, basically anywhere, it's generally Walmart or
6 maybe somebody like Aldi.

7 Q. And what about for products that are neither in the
8 pricing program nor everyday essentials?

9 A. Something like half of Kroger's products would fall
10 into this sort of "other" bucket; but, again, the tactic
11 there, even if they're not called out in pricing programs,
12 is to get within a range of Walmart as well. Maybe slightly
13 more above Walmart than the pricing programs, but still a
14 percentage above Walmart.

15 Q. And did you hear testimony during the trial about
16 certain Kroger divisions that do not follow the corporate
17 level pricing strategies?

18 A. Yes. I recall testimony, I think, about QFC and
19 Mariano's -- QFC out here in the Northwest, and Mariano's in
20 Chicago -- as particular Kroger banners that don't follow
21 this Walmart laser-focused -- they may have looked at
22 Walmart, but also have more mention of Albertsons banners.

23 Q. And are you concerned about competition in areas
24 post-merger where QFC and Mariano's compete today, after
25 the -- after the merger is closed?

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1 A. No.

2 Q. And why not?

3 A. Because those banners and almost all those stores are
4 being divested.

5 So the vast majority of the QFC banners and the QFC
6 banner itself, so the vast majority of the stores and the
7 banner itself, will be divested to C&S. Same for Mariano's.

8 And so those banners, to the extent they focus more on
9 Albertsons banners today, will still be out there competing
10 with Albertsons banners. It will be C&S competing with
11 Kroger, but they'll still be able to compete with those
12 Albertsons banners in the same way.

13 Q. And --

14 MR. PAI: Your Honor, objection. I move to
15 strike.

16 THE COURT: Your microphone isn't on.

17 MR. PAI: My eyesight is not telling me if it's on
18 or not. Is that better?

19 THE COURT: Yes, we can hear you.

20 MR. PAI: I want to move to strike the witness's
21 last statement, which I believe he said, "It will be C&S
22 competing with Kroger, but they will be able to compete with
23 those Albertsons banners in the same way."

24 Throughout his deposition and in his report, Dr. Israel
25 makes clear that he is not offering testimony on C&S's

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1 ability to be an effective competitor post-divestiture.
2 That was something we covered exhaustively in his
3 deposition, that that was not an opinion he was offering,
4 and I move to strike the last statement.

5 MS. PFAFFENROTH: Your Honor, the witness is
6 simply responding to testimony that he's heard over the
7 course of the trial.

8 THE COURT: That's not his role. It will be
9 stricken.

10 MR. PAI: Thank you, Your Honor.

11 BY MS. PFAFFENROTH: (Continuing):

12 Q. So outside of QFC and Mariano's, did you take a look at
13 the role that Albertsons plays otherwise in Kroger's pricing
14 strategy?

15 A. Yes. So I certainly looked at the role that Albertsons
16 plays and have discussed and heard -- and the testimony
17 indicates that Kroger does price-check Albertsons. We've
18 seen data against that, that in its broader price-check
19 program, Kroger collects pricing data on Albertsons.

20 Kroger has made clear that it's -- that Albertsons is
21 priced-check as what it calls a high-price retailer, or an
22 HPR; and, you know, Kroger has made clear that basically
23 what it does is in every area it price-checks one generally
24 high-priced retailer, just kind of as a guardrail, to make
25 sure its prices aren't higher than that. And so Albertsons

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1 plays that role in some areas.

2 We know that in areas where Albertsons is not present
3 somebody else plays that role.

4 So from that, I draw an inference that
5 post-transaction, if Albertsons wasn't present, Kroger would
6 substitute someone else into that role.

7 Q. And how does Albertsons' pricing today compare to that
8 of Kroger?

9 A. So I have a slide, if we -- if we -- maybe we already
10 have. Advance one slide.

11 So this is from my own data analysis of the price-check
12 data. So when, as I said, Kroger does collect Albertsons'
13 data, as part of this high-price retailer program, this
14 chart confirms that, in fact that terminology is consistent
15 with the data across the board, looking at all of the
16 different Albertsons banners. Their prices are
17 substantially above Kroger's prices.

18 There's a range across banners; but, broadly speaking,
19 this is in that sort of just over 10 -- 10 to 12 percent
20 range that Kroger has spoken about.

21 Q. And why is it relevant to your analysis that
22 Albertsons' pricing today, on average, is higher than that
23 of Kroger?

24 A. I guess for two reasons. I've already spoken about
25 some. One is that, you know, if Albertsons -- if Kroger's

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1 goal, which it states repeatedly and you see in the data, is
2 to chase Walmart, then Kroger is trying to get down toward
3 Walmart.

4 And a player like Albertsons, who's far above Kroger,
5 is not going to be the source of pricing pressure as Kroger
6 tries to get down toward Walmart. And you see Kroger well
7 below Albertsons, which indicates it's not like matching
8 Albertsons is what Kroger is doing.

9 And the second reason I mentioned is, if Albertsons'
10 prices are this much higher than Kroger's, then that's --
11 Albertsons' go-to-market strategy based on its position,
12 Kroger consistently has a go-to-market strategy, which is to
13 get close to Walmart, so that would indicate to me that the
14 likely effect of the transaction will be to lower
15 Albertsons' prices.

16 Q. And so what is -- what is your understanding the extent
17 to which Albertsons affects Kroger's pricing today?

18 A. From what I have seen in the record, in deposition
19 testimony and testimony here, Kroger sees that as very, very
20 minimal.

21 Consistent with the pricing data, Albertsons is not one
22 of the HPRs that is close to Kroger and therefore constrains
23 it very much. So Mr. Groff has said, in his deposition and
24 in testimony here, that it has very little effect. Some
25 other HPRs might have more. You see that in the data. But

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1 Albertsons has very, very little effect.

2 Q. And so moving on to the fourth category that you had
3 identified, you mentioned data analysis. Your own data
4 analysis informed your conclusions.

5 Could you describe that for the Court.

6 A. Sure. So what I always try to do, for my process, will
7 be to look at what the documents say, you know, hear what
8 the witnesses say, but then bring my own data analysis to
9 bear.

10 So what I did was, you know, look at the actual
11 price-check data and see if it's true that -- or just
12 confirm what -- what's been stated many times, that Kroger's
13 prices are targeted to and closely tracking Walmart's
14 prices.

15 Q. And can you describe what the regression analysis is --
16 what that means -- that you performed?

17 A. Yeah. So I did perform a regression analysis to do
18 that. Basically, that says where there's price-check data
19 and you have a data -- a data point, a price, for Kroger and
20 for Walmart, let's see how well they tracked each other.
21 It's basically -- a regression is basically a sophistic --
22 in this case, it's a more sophisticated way to see if
23 there's a correlation. That's what it's doing in this case.

24 And all the regression is adding is saying let's
25 account for or control for the other things that affect

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1 prices.

2 So I control for, you know, what specific product it
3 is; how prices are moving in the area over time, in general;
4 the demographics of the area; the number of competitors in
5 the area, in order to really isolate the Kroger-Walmart
6 relationship, in particular.

7 Q. And what conclusions did you reach in that analysis?

8 A. It confirmed, as you would expect, everything we see in
9 strategy and the -- and the documents and the testimony,
10 which is that Kroger's data, Kroger's prices follow
11 Walmart's quite closely. That relationship, that sort of
12 regression-based correlation between them is multiple times
13 higher than it is for the other stores.

14 Q. And did you also run an analysis that accounted for the
15 presence of an Albertsons?

16 A. Yes.

17 Q. And so what did you do there?

18 A. So given my fundamental conclusion from all the data
19 and documents here that Kroger pricing is really being set
20 as -- relative to Walmart, I tried to think about, "Well,
21 how could there be an effect from the transaction in that
22 world, given that Walmart will still be there?"

23 And the answer I could think of was, well, if it were
24 true that Kroger feels the need to track Walmart when
25 Albertsons is present but, where Albertsons is absent,

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1 Kroger feels more -- you know, less pressure -- it doesn't
2 need to track Walmart as well -- then maybe there could be
3 some effect due to Albertsons' competition.

4 So I looked at this relationship, this regression
5 between Kroger pricing and Walmart pricing, in areas where
6 Albertsons is present and in areas where Albertsons is
7 absent, to see if the relationship holds in both cases.

8 Q. And so what was -- what was the result of that
9 analysis?

10 A. The relationship between Kroger pricing and Walmart
11 pricing is almost identical. Then, like a decimal point or
12 I think 1 -- 1/100th or 1/10th of 1 percent of the same
13 relationship between the two whether or not Albertsons is
14 present.

15 So this -- the statements that we hear from Kroger and
16 what's in the documents, that this is the policy everywhere,
17 is confirmed by the data.

18 Q. And did Dr. Hill respond to your analysis?

19 A. He did.

20 Q. And what -- what was his response?

21 A. The main thing that he did -- sort of analysis he did
22 in response was to do a regression analysis, like I did; but
23 instead of looking at Kroger prices as they relate to
24 Walmart prices, he looked at Kroger prices as they relate to
25 Albertsons prices.

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1 If we go on a slide, I have a summary of what he
2 showed.

3 Q. And so what did he find?

4 Could you explain that?

5 A. This is also something I had found myself and was in my
6 report too. You see that Albertsons' prices are much less
7 correlated, a much lower level of correlation with Kroger
8 than Walmart.

9 So Albertsons has this, sort of, base level of
10 correlation that you see across products in the market in
11 general, but Albertsons isn't a store that stands out.
12 Walmart is the store that stands out as really driving
13 things. Right?

14 Albertsons has a low level of correlation that you see
15 across lots of products in the market, but it's the Walmart
16 prices that are clearly dominating here.

17 Q. And just to clarify, when you talk about products in
18 the market, what are you referring to when you say
19 "products"?

20 A. So the analysis here is price-check data, so it's at
21 the level here of a specific -- sort of specific category, a
22 specific product, so basically a specific SKU.

23 And so we're tracking how those prices move together
24 between Kroger and Walmart or between Albertsons and
25 Walmart, and the Albertsons prices are capturing the fact

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1 that's true across many stores that their prices move
2 together some, because they're the same underlying products,
3 but Walmart is the store that stands out as actually having
4 this strong relationship.

5 Q. And so your slide says in the title that this analysis
6 includes divestiture stores. Could you just explain why
7 that's relevant here?

8 A. So this correlation that is shown between Kroger's
9 pricing and Albertsons' pricing includes prices that are set
10 at QFC and Mariano's, for example.

11 And as the documents say, and I acknowledged earlier,
12 those -- those are banners that do indicate that they track
13 Albertsons' prices more closely, and so those are going to
14 push up the correlation, be it one of the sources of
15 correlation, so if you took those out because they're being
16 divested and, you know, they won't be Kroger banners
17 post-transaction, then you -- then that correlation would
18 fall.

19 Q. So taking a step back to your overall conclusions and
20 moving on to point number two on the board here and on the
21 conclusion slide, could you discuss any additional analysis
22 you did to study whether competition from Albertsons is
23 affecting Kroger's pricing?

24 A. Sure. It might be helpful to advance one slide.

25 So this is -- I mean, I described this earlier. So

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1 this is what I consider to be a very good opportunity to do
2 a relevant study in this case, because we have areas of the
3 country, we know, where Kroger competes with Albertsons and
4 areas where it does not.

5 And so this map illustrates hypothetical areas named
6 "Gotham City" and "Metropolis." And here, to make it -- to
7 make it simple and explain the idea, you have two areas that
8 are identical, except in Gotham City, Kroger faces
9 competition from an Albertsons and in Metropolis, it does
10 not.

11 And so what I did in my analysis is say, "Let's study
12 whether Kroger pricing is higher in the -- in the -- in the
13 Metropolis type areas. Let's see if the pricing is higher
14 absent competition from Albertsons."

15 To do that is to -- to finish the story, I used a
16 regression analysis here. Again, the idea of the regression
17 is to control for other things besides Albertsons that would
18 affect pricing.

19 Dr. Hill, I know, testified that you need to control
20 for things when you do a study like this, and so he used a
21 regression. In particular, the variable I use to study
22 prices is margins. So intentionally looking at prices
23 relative to costs, in order to control for costs. And then
24 I also, in the regression, account for things like the
25 number of other competitors, the total grocery sales in the

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1 area as a measure of demand, the demographic characteristics
2 of the area, and so on. And with all of that in place, I
3 can then isolate the question, "Does Albertsons affect
4 Kroger pricing?"

5 Q. And has this type of compare -- comparing prices in
6 places where the merging parties compete and places where
7 the merging parties do not compete, has that kind of
8 comparison been done before in merger cases?

9 A. Yes. Just a couple of times. I know of it in the FTC
10 challenge of the Staples-Office Depot merger, and also the
11 FTC challenge of the -- in this industry, of the
12 Whole Foods-Wild Oats Merger. In both cases, it was done on
13 the side of the FTC.

14 And so the slide that's up here now is from the FTC's
15 brief, I think, in the FTC --

16 MR. PAI: Objection, Your Honor.

17 The material on this slide, including the source,
18 you'll see it says, "FTC, TRO, and PI brief" at 3-4 and is
19 quoted, is not a material relied upon in Dr. Israel's expert
20 report. He did not disclose that he was considering or
21 looking at any of the methodologies as reflected in these
22 briefs.

23 There is one reference in the body of his brief to the
24 generic statement that some similar analysis might have been
25 done in Staples, but no such detail was provided, nor was

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1 there any reference to relying on this particular figure or
2 the analysis in the brief.

3 MS. PFAFFENROTH: Your Honor, Dr. Israel is going
4 to -- he will be explaining his own analysis in the context
5 of the fact that this is the same type of analysis that the
6 FTC has done in previous cases.

7 This is on the litigation record that --

8 THE COURT: So he needs to do that instead of --
9 because he's not a lawyer.

10 MS. PFAFFENROTH: Understood, Your Honor.

11 We'll move on, and then he can refer it back in terms
12 of the economic analysis.

13 BY MS. PFAFFENROTH: (Continuing):

14 Q. So, Dr. Israel, did you have sufficient data in this
15 case to undertake this type of --

16 THE COURT: It needs to be taken down.

17 MS. PFAFFENROTH: Oh, I'm sorry. Could we just --
18 how about we move back -- okay.

19 THE COURT: However you want to do it, but that
20 didn't need to be displayed on the screen because he can't
21 rely on it.

22 MS. PFAFFENROTH: That's fine.

23 MR. PAI: I have no objection to you proceeding to
24 the next slide.

25 MS. PFAFFENROTH: Thank you.

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1 THE COURT: Whatever you want to do.

2 THE WITNESS: This slide, I think, is going to
3 work.

4 BY MS. PFAFFENROTH: (Continuing):

5 Q. In this case, Dr. Israel, did you have sufficient data
6 in order to undertake this type of comparison, looking at
7 places where the merging parties compete and looking at
8 places where the merging parties do not compete?

9 A. Yes. And if we advance two slides, there's a map, I
10 think, that will show that or --

11 Q. There we go.

12 A. Yeah. So this is -- I mean, this is the analysis, this
13 was the idea of the economics that I had mentioned had been
14 used previously, and then I used, which is just -- if you
15 have a situation where you have a post-transaction and the
16 claim is that the transaction, by combining -- you know a
17 lessened competition, if you have areas of the country or
18 areas where the merging parties do and don't compete or they
19 do and don't overlap, you have this ability to say, "Well,
20 today does the presence of one another affect the way they
21 set prices?"

22 So, in this case -- honestly, this is a type of study
23 that I look to do any time there's a merger. It's an early
24 question I always ask: "Can we find places where they don't
25 compete now, so I can see whether it matters?"

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1 And in this case, we have that.

2 Q. And so what were the results of your analysis?

3 A. We find that there is no statistically significant --
4 really no measurable effect of Albertsons' presence on
5 Kroger pricing.

6 So controlling for everything else: demand, cost,
7 demographics. You ask yourself, if there's an Albertsons
8 there or if there's an Albertsons not there, do Kroger's
9 margins, which means their prices controlling for costs, do
10 those look different? And the answer is no.

11 Q. And do your results depend on the specific inputs used,
12 in terms of margins, for this analysis, in particular?

13 A. No. I know there's going to be a lot of discussion
14 about the margins you need to use in a GUPPI-type analysis
15 or even a market definition analysis later.

16 Here, what I'm trying to do is just say, "I want to
17 look at prices and I want to control for costs." So what I
18 like to do is use a variety of measures of cost to make sure
19 it doesn't drive the results.

20 So I looked at this both for gross margins, like
21 Dr. Hill has used, and GUPPI, which I disagree with there,
22 but I checked here to make sure that doesn't matter. Also,
23 variable margins, none of those matter to the results.

24 However you control for costs, there's -- Albertsons'
25 competition is not affecting Kroger pricing.

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1 Q. And do your results depend on whether divestiture
2 stores in this analysis are or are not included?

3 A. No. Not for Kroger pricing. I've done -- I've done
4 that -- again, as a check, I've done the regressions,
5 including in the data set, the stores that will be divested,
6 or excluding them, and it makes no difference.

7 Q. And you mentioned earlier the merger guidelines. Does
8 this analysis depend on whether which -- which merger
9 guidelines you consider? 2010 or 2023?

10 A. No. This is direct evidence, sort of the clearest
11 version I can see of direct evidence, just in the data.
12 Does Albertsons affect Kroger pricing? Both guidelines say
13 it makes sense to do that.

14 Q. And did you also test the extent to which Kroger has an
15 effect on Albertsons' pricing?

16 A. I did. So that's the same analysis in reverse.
17 What I found there was, overall, Kroger -- the presence
18 of or -- or absence of a Kroger has a small but detectable
19 effect on Albertsons' pricing. It's less than one percent,
20 but it's there in the overall data.

21 I actually -- one thing I actually take some comfort in
22 that as a, sort of, check that the regression is working
23 well, because, based on what I've seen in the record, what
24 we've heard, Kroger doesn't really look at Albertsons very
25 much for pricing, but Albertsons looks some at Kroger; and

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1 so it seems consistent to me that there's some effect of
2 Kroger on Albertsons.

3 Of course, again, as I said earlier, Kroger will be the
4 price-setter post-transaction, so I think the Kroger
5 question is the one that really matters, but what we do see,
6 that Albertsons effect.

7 Q. And what happens with this analysis if you take into
8 account the divestitures? Is there an effect?

9 A. So if you take out the Albertsons stores that are being
10 divested and rerun the regression and ask "Does Kroger's
11 presence or absence have an effect on the Albertsons stores
12 that are not being divested?" then that effect totally goes
13 away.

14 Q. And why? Why does that effect go away?

15 A. I mean, in some sense, the data tells me the answer.
16 It goes away because it's not there in the -- in the data,
17 but it makes sense to me, as an economist, because the
18 divestiture stores are chosen as places where there's closer
19 competition. And so if you take them out, then the Krogers
20 that are left are going to be more distant.

21 In all my analysis, I'm looking at whether they're
22 within three miles of each other. I should have said that.
23 So they're within three miles. But the non-divested stores
24 are the ones where you'd less likely see an effect.

25 Q. So just taking a step back, can you explain what we

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1 should take away, at a high level, from these regression
2 analyses?

3 A. Yeah. I mean, it's really confirming the flip side of
4 the coin of the Walmart information and the Walmart
5 regressions. Walmart, in particular, the prices that
6 Walmart sets, drive Kroger pricing, and that's not affected
7 by whether there's an Albertsons there or not, both in that
8 the Walmart relationship remains true, with or without an
9 Albertsons, and that Kroger prices, Kroger margins, are not
10 different at all in areas with or without an Albertsons.

11 Q. And how did -- well, I should say, "Did Dr. Hill
12 respond to your analysis here?"

13 A. Yes. He made -- he's made a couple points that he
14 emphasized in his report and in testimony.

15 So one point he said that -- you know, he sort of said
16 these regressions don't work or even economists don't use
17 them because -- because it's -- it's hard to disentangle the
18 effects of competition from -- from Albertsons from other
19 things, like cost or demand.

20 And then, second, he said that maybe my regressions
21 were not valid because I was not detecting a relationship
22 between pricing and the number of nearby competitors, when
23 you -- you would think there would be such a relationship.

24 Q. Okay. Can we get a little more detail, but break that
25 down?

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1 So with respect to the first criticism, with respect to
2 variations in supply, variations in demand, how -- how would
3 you respond to that criticism?

4 A. I mean, I did control for supply and demand cost. I
5 mean, I agree you need to control for those things. You
6 need to have what economists would call a "well-specified
7 regression" that controls for these other factors, but my
8 regression includes costs, because I use margins. So
9 it's -- everything is relative to costs. I control for
10 demand by having a measure of grocery sales. I control for
11 demographics. I control for the overall trend in prices
12 within each state to capture, sort of, local inflation.

13 So I did -- and I tried different controls, as I
14 mentioned, in testing these things, and my result holds with
15 very good controls in whatever I put in.

16 And I would note that Dr. Hill made this criticism,
17 but, you know, didn't -- he didn't put in other controls or
18 show that something I was missing would change my results.

19 Q. And so what about the second criticism, with respect to
20 variance with the number of competitors?

21 A. I mean, I do find that there is an effect of the
22 overall number of competitors, and I find there's an effect
23 of Walmart, in particular, which is what I would expect.

24 It's not a large effect, because, again, in a -- in a
25 market this competitive, that generally has this many

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1 competitors, adding or subtracting one generally doesn't
2 lead to giant price effects; but you definitely see a
3 relationship.

4 And, in fact, as I've said, you see -- this test that
5 he's proposing is kind of see if the regression gives
6 results that make sense; and it does.

7 As I said earlier, it finds more of an effect of Kroger
8 on Albertsons than the other way around. It finds that, for
9 example, the number of Walmarts has a -- has a bigger effect
10 on Albertsons than on Kroger, which is consistent with the
11 fact that Kroger really prices to -- as long as there's a
12 Walmart in the price zone, Kroger says it prices -- it
13 matches it or prices within a gap of it, but whereas
14 Albertsons seems to be reacting more to the number of
15 Albertsons.

16 But on all of those dimensions, I think a strength of
17 this regression is that it's finding the effects that are
18 consistent with what we've heard and with the industry.
19 It's just not finding any effect of competition between
20 Kroger and Albertsons on Kroger prices.

21 Q. And a few -- a few answers ago, in the lead-up to this,
22 you mentioned that Dr. Hill testified that these types of
23 regressions aren't used by economists.

24 What's your response to that?

25 A. I just disagree with that. I mean, this is direct

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1 evidence that we use all the time. In situations in which
2 you have what I call a laboratory -- and what you have on
3 the screen right now, where I can look at the data and say,
4 "I can see where there's competition between Kroger and
5 Albertsons and where there's not, and we're going to study
6 that," and I always would and ask the question "Are prices
7 higher where there's not competition?"

8 I agree with Dr. Hill entirely that you need to run
9 your regressions carefully. You need to try different
10 forms. You need to control for things. But I've done that,
11 and the results are consistent of finding no effect.

12 Q. So switching gears, let's go back to your overall
13 conclusions again. And moving on from direct evidence to
14 indirect evidence, and, specifically, number three.

15 You talk about plaintiffs' markets not being properly
16 defined. What is the question that market definition is
17 trying to answer?

18 A. So we're trying to define -- when we try to define a
19 market -- again, this is switching gears now to the, sort
20 of, economic models and tools we use. When economists try
21 to define a market, they are -- I think it's easiest to
22 talk, in this case, about a given store. I agree with
23 Dr. Hill that's where we focus, at least to start.

24 You're asking for a given store, say a given Kroger
25 store. What are the set of close competitors to it?

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1 And the way we define "close competitors" is who are
2 the close substitutes?

3 Q. And do you have a slide that might help illustrate
4 this? We move on?

5 A. Yes. So, really, what this slide illustrates is -- I
6 said "close substitutes." So what do I mean by "close
7 substitutes"?

8 So the question of substitution is if Kroger attempted
9 to increase price or reduce quality after the merger, where
10 would shoppers turn to buy some or all of their groceries?

11 So, basically, I mean, the simple way -- if Kroger
12 tries to raise prices, some revenue is going to flow out.
13 People are going to go elsewhere.

14 Where are they going to go? And market definition is
15 trying to find the set of close substitutes as a way to
16 define, you know, all of the key competitors for that store.

17 Q. And so you said some or all of the customers' grocery
18 needs. What do you mean by "some or all"?

19 A. I mean, just simply, it's any form of substitution that
20 matters. It's where the dollars go. So it's pretty common
21 in places; and, you know, we've seen it in this industry
22 that -- you know, people shop at multiple places, and so
23 substitution can -- take the "share of wallet" term we
24 found. They may shift more of their wallet from one store
25 to another.

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1 So it's not the case that only -- only if somebody
2 stopped shopping at Kroger and started shopping somewhere
3 else. Probably likely behavior, based on what we see in
4 share of wallet, and so on, is that people will still shop
5 at Kroger. They'll just buy more at Costco or more at
6 another store, or whatever. And so all of that substitution
7 needs to be measured.

8 Q. And did you consider data that reflected where
9 consumers -- where shoppers are shopping today?

10 A. Yes. In lots of places I did. So the data set, I
11 think, has been discussed in here is Circana. Circana is a
12 panel data set, meaning, it tracks shoppers over time.

13 So one question I asked is, is it true, am I right,
14 that people tend to shop at multiple stores, such that they
15 can substitute by shift -- just spending more at another
16 store they already go to?

17 And the Circana data tells me that, I think, well over
18 90 percent of people, accounting for over 95 percent of
19 dollars of spending, are people who shop at more than one
20 store per month.

21 Q. And why is that relevant, that it's more than
22 90 percent that are already shopping somewhere else?

23 A. Yeah, I mean it's a big thing that I draw from data
24 like the share of wallet data. Right? Is I'm not going to
25 stop at the share of wallet data and say that proves

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1 substitution. I'm going to go on to talk about how I
2 measure substitution.

3 But what it tells you in this industry is people are
4 already going to multiple stores.

5 So if I'm just thinking about myself going into
6 multiple stores or thinking about it as an economist, and I
7 see prices go up at one store, and I think about "What's a
8 likely close substitute for that store?" a likely close
9 substitute is another store you already go to, because it's
10 quite easy to just buy more stuff there, especially in --
11 you can get more into this, but people are buying the same
12 categories of products at these different stores.

13 So if prices go up at Kroger and I can buy more of my
14 products at the Aldi or the Costco that I go to, that's
15 going to be a close substitute, because I'm already going
16 there.

17 Q. So taking all that into account, what's your view about
18 how one should go about defining relevant markets in this
19 case?

20 A. Yeah. So this is -- is changing topics a little, just
21 to the nuts and bolts of market definition. So the way I
22 would define a market is the way that I have always said you
23 should define a market, if you can, which is you start with
24 the product in question. Here, that you start with the
25 store in question. And you build out, in terms of closeness

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1 of substitution.

2 So the way you should define a market is not to
3 redefine what stores are in or out or what circle the area
4 is. You should look at the store, the Kroger, and you
5 should say, "What's the next closest substitute to that
6 Kroger? And then what's the next substitute closest?" And
7 you build your way out. Whatever the data tells you, based
8 on where it is, what format it is, whatever, until you get a
9 set, you've built your way out to the set of substitutes
10 that are enough that you have captured the most -- the
11 important substitutes.

12 Q. And is that always something that you can do, is -- is
13 what -- what -- what happens if you don't have the right
14 data?

15 A. I mean, if you don't have the right data, then, you
16 know, you -- I'm not saying you just give up. I mean,
17 people have used other methods. But the goal is to do as
18 well as you can.

19 I guess the key for me here is that we can do this in
20 this case; so there are cases where you have to sort of
21 approximate, and then there's a debate about whether the
22 approximation is good enough. But in this case, you don't
23 have to approximate, because we have a tool that would let
24 us do exactly that.

25 Q. And so how would you go about it in analyzing

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1 substitution store by store?

2 Here, we're not talking about one store. We're talking
3 about thousands of stores.

4 A. So, yeah, if we advance one slide, there has been
5 discussion of this grocery industry study that existed
6 before this case, called EGK, for the names of the three
7 authors. EGK was -- is a model, a computer model, an
8 economic model on a computer that does exactly this. Right?

9 And so what's up here is a picture of the paper and a
10 quote, but you can see the authors are saying that they're
11 building a tool to capture rich substitution patterns that,
12 you know, illustrate the importance of location, format, and
13 spatial distribution. They note they're doing that so you
14 don't have to ex-ante define markets.

15 So you don't have to predetermine the market. You let
16 the data tell you the substitution pattern.

17 So what I -- this industry is unique, in some ways, or
18 at least rare, in that we have the tool that does this for
19 us. Right?

20 We don't have to literally go by hand, market by
21 market. EGK run, with updated data, as I've done, will tell
22 you the close substitutes for every store in the country.

23 Q. And so this is a model. Can you just help the Court
24 understand the inputs to this model? What goes into it?

25 A. Sure. So if we advance one slide -- I mean, the key --

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1 the first key input really is not even listed on the slide,
2 but we have every store, and we have data from TDLinx, a
3 data company, on the revenue.

4 We have all these different areas of the country where
5 there's different combinations of stores.

6 So, basically, what EGK is doing, in a nutshell, is
7 saying, "If I look at different areas with different
8 combinations of stores in different locations, in each of
9 those areas I can see how the revenue shakes out between
10 those different stores. One of them maybe has an Aldi; one
11 doesn't. I see the one that doesn't have the Aldi. Where
12 does that revenue go?"

13 So it uses that laboratory of different areas just to
14 study how consumers are substituting across stores.

15 And it bases that substitution on the nature of the
16 stores. What banner is it? What format is it? What are
17 its characteristics? It also bases it on how far away are
18 people from the store. It also bases it on what are the
19 demographic characteristics in the area? It puts all that
20 into a computer model, using, you know, state-of-the-art
21 economic -- econometric techniques, and it determines, based
22 on all that, how are consumers substituting between stores
23 of different types, stores that are different distances,
24 stores of different sizes, and so on.

25 Q. And so when you -- when you run the model, what is --

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1 what's the output?

2 A. So the output is substitution measures. Basically, the
3 output is diversion ratios.

4 So once you've run the model, you now have the ability
5 for any store in the country to ask the key substitution
6 question, which is, "If that store were to raise its price
7 by 5 or 10 percent, where would people go?" And you can
8 rank the stores by that diversion ratio.

9 So you have the inputs that you would need to define
10 the market correctly everywhere. Because you can rank the
11 substitutes everywhere using the output of this model.

12 Q. And do you and Dr. Hill agree with respect to what
13 diversions show?

14 A. I think we agree as far as what a diversion ratio is
15 and using a diversion ratio as a measure of substitution.

16 Q. And so Dr. Hill testified about product market,
17 geographic market. How does EGK address those dimensions of
18 the grocery store competition?

19 A. I mean, it combines them, which is what you really
20 should do. I mean, again, the merger guidelines -- I
21 think Dr. Hill and I agree that those are ultimately two
22 parts of the same question. How do you define the market?

23 So EGK -- remember, it's ranking substitutes. And so
24 it's doing that both based on what type of store it is --
25 that's product market -- and how close it is. That's

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1 geographic market.

2 But it's doing that -- you don't have to draw a circle
3 to start with. You don't have to say this banner is in or
4 out. For every store, you can figure out, based both on
5 product and geography, what are the closest substitutes?

6 Q. Okay. And for geographic market, you mentioned
7 distance. What does EGK tell you about how far customers
8 will travel to purchase groceries?

9 A. So it tells you, in the original paper and in my
10 updating of that paper with -- with the new and with some
11 refinements that I've described in my report, it tells
12 you -- it gives you a measure of how far people are willing
13 to drive, and it distinguishes that by banner.

14 So if we advance one slide, basically, EGK -- in my
15 paper, it's the same pattern as was in the original paper,
16 and my update had confirmed that. People are willing to
17 drive farther to go to a club store or a supercenter than
18 they are to go to a supermarket and a little less far to go
19 to, like, a Lidl or a Whole Foods.

20 So this tells me competition from Lidl and Whole Foods
21 is more local. It's still matters if they're near the store
22 in question.

23 Costco, Sam's Club, and Walmart can compete from much
24 farther away, and it really draw from a bigger area than
25 supermarkets.

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1 Q. And did you also take a look at actual customer data
2 with respect to the same question about -- about relative
3 distance that consumers will travel?

4 A. I did.

5 So if we advance one slide -- so this is the actual
6 customer data, the catchment data. So this is looking at,
7 not from the model, but from the actual data, and asking the
8 question, "How far out do you have to go around the store to
9 capture 50 percent of store's customers?"

10 So this is draw-area-type idea that we've heard about.
11 But what it's telling you here is -- was what -- confirming
12 what EGK showed and showing the -- you know, the strength of
13 that model.

14 The people drive -- you know, Kroger and Albertsons and
15 the Walmart Neighborhood Market, which is the grocery store
16 version, and Lidl, are drawing people from a closer-in area,
17 whereas Sam's, Walmart, and Costco are drawing people from
18 farther away.

19 And so this is important for the market definition
20 discussion because it's saying you shouldn't just draw a
21 circle, because the circle would have to be bigger,
22 potentially much bigger for Costco and Walmart, and so one
23 circle is not going to capture the market. Instead, you'd
24 have to look at where people actually go.

25 Q. And did Dr. Hill -- or does Dr. Hill disagree that

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1 customers may drive farther to get to a Costco or a Walmart?

2 A. No. He acknowledges that in his report.

3 Q. And did Dr. Hill criticize your EGK model, the model
4 itself?

5 A. No. I mean, he doesn't criticize anything about the
6 model, in what I've heard.

7 Now, what he doesn't do is use it to define the
8 markets -- right? -- which, to me, is sort of the most
9 fundamental issue about markets. This is, in my view and
10 what I've said and what the guidelines say, the right way to
11 define the market is build out with a model or a measure of
12 substitution.

13 Do not do that when you can, to me, says the markets
14 that plaintiffs have defined are wrong; but Dr. Hill doesn't
15 criticize the model but doesn't use it to define markets.

16 Q. And so in his testimony Dr. Hill used Corvallis as an
17 example of his market definition.

18 Could you move on to -- to Dr. Hill's slide, but could
19 you use this also as an example of how Dr. Hill defined the
20 market in this specific area?

21 A. Sure. So Dr. Hill's Corvallis market, you can say,
22 simply, it's -- it's -- there's a six-point -- so this is a
23 market around a Fred Meyer store in Corvallis, and the
24 market is a 6 -- every store in a 6.4-mile radius around
25 that Fred Meyer's.

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1 In his supermarket market, it would only be the
2 supermarkets and supercenters inside the circle. In its
3 large-format market, it would be all the large-format stores
4 inside the circle; but, in most cases, it's only stores
5 inside the circle with -- giving no credit to anything
6 outside the circle.

7 Q. Okay. And do you think Dr. Hill's approach is
8 appropriate for -- is appropriate as a way to define a
9 market for this industry?

10 A. No. As I said, it's not based on substitution. You're
11 drawing the circle. The circle is based on Kroger and
12 Albertsons draw areas here -- Kroger's, and it's not looking
13 at substitutions. So it's just defining a set of stores,
14 defining a circle, and saying, "That's it," without looking
15 at where people actually go, which may well be outside the
16 circle.

17 Q. Okay. You mentioned, at the outset of your testimony,
18 you testified in other -- in other merger litigations. Have
19 you ever used a circle to define a market?

20 A. I have.

21 As I said earlier, if you don't have a measure of
22 substitution, I'm not saying that you just give up and can
23 never challenge a merger.

24 So I have used it really under three conditions: One
25 is you don't have better substitution data; two is that you

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1 don't have a reason to think that different stores have
2 different circle sizes or different draw areas so that you
3 can use one circle; and three is that you have some reason
4 to think the players, the firms, are fairly similar, fairly
5 homogeneous, so that just drawing a circle and looking at
6 who's in it can capture the market.

7 So it's an approximation that you can use if you don't
8 have better data, and then the argument would be about "Is
9 it a good enough approximation?" But that's the situation
10 in which I would consider it.

11 Q. And so did you measure substitution in Corvallis using
12 your EGK model?

13 A. I did.

14 If we'd advance one slide.

15 So I -- actually, this is using EGK to tell me what do
16 the diversions look like.

17 So let's -- instead of drawing a circle and saying,
18 "That's the market," let's actually look at where people are
19 going.

20 So one thing you find is that, you know, even though
21 all the stores in the next town over, Albany, are excluded
22 from the market, 22 and a half percent, so just under a
23 quarter of the diversion is actually flowing to those
24 stores.

25 And it's notable, in particular, here because there is

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1 no Walmart. There's a Walmart Neighborhood Market in
2 Corvallis, but that's a smaller grocery store, not a Walmart
3 Supercenter. There's no Walmart Supercenter in Corvallis.
4 There's no Costco in Corvallis. So those are outside
5 Dr. Hill's market.

6 They are present over in Albany, and we see people
7 substituting to those stores.

8 Q. And can you just take a closer look at Albany and
9 explain that?

10 A. Sure. So Albany is blowing up here on this next slide.
11 It gives you the specific diversion ratios by store. You
12 know, it's about 12 miles away, but to that Costco, for
13 example, that's about 12 miles away, EGK is telling you
14 about 6.5 percent of the diversion from the Fred Meyer in
15 Corvallis would go to that Costco.

16 I would note that 6.5 percent is bigger than for some
17 of the Safeways inside Dr. Hill's market, and that's where
18 you run into problems. You're not considering substitute --
19 competitors in the order of substitution, and you're leaving
20 out important substitutes, like Costco, like Walmart, and so
21 on.

22 Q. So staying with Dr. Hill's market, so we've heard
23 testimony that Dr. Hill defined a -- what he calls a
24 supermarkets market or a supermarkets and supercenters
25 market and a large-format market.

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1 So let's start with the supermarkets market.

2 Did you reach conclusions with respect to the FTC's
3 supermarkets market?

4 A. Yeah. So if we'd advance one slide.

5 I mean, put simply -- so the supermarkets is taking a
6 narrow product market. It's only supermarkets and
7 supercenters, and my conclusion is it's just not valid
8 certainly in any sort of blanket way, the way that market
9 would do to say those other formats can just be left out.

10 There's too much substitution across formats.

11 As we see from EGK, as we see from share of wallet
12 data, as we see from documents, as we see from Dr. Hill's
13 own analysis, there's lots of cross-format substitution.

14 It's certainly not valid to just say, from the top, all
15 those formats are out in all cases.

16 Q. So let's start with the first bullet. EGK.

17 You mentioned the EGK paper. Does that paper reach
18 conclusions? Does EGK reach conclusions about cross-format
19 competition in grocery?

20 A. Yes. So even without my update to it, a major focus of
21 the paper is saying, based on their findings, that there's
22 lots of competition between supermarkets and club stores, in
23 particular.

24 And the authors even say that that's really important
25 to account for in merger analysis. For example, they say,

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1 "If you go to analyze the previous Ahold-Delhaize merger but
2 you had ignored club store competition, you would have
3 gotten the wrong answer."

4 Q. And what about -- what about your model? What does
5 your EGK model tell you about this?

6 A. So my model is an update with newer data and with some
7 refinements to the way some inputs are brought into the
8 model, and I get the same result. Lots of -- very
9 consistent with them. Lots of substitution between club
10 stores and across formats, including natural and organic,
11 for example, and supermarkets.

12 Q. And could you just walk us through the results from
13 your EGK model with respect to this cross-format
14 substitution with club stores, with natural and organic
15 stores?

16 A. Sure. So if you'd advance one slide. So this is
17 coming straight out of EGK. This is aggregated as a way to
18 illustrate it, but if you look at Kroger stores and you look
19 at -- in the overlap areas only. So where there's
20 competition here between Kroger and Albertsons. If you look
21 at the extent of diversion to club stores, it's
22 13.2 percent; only 12.7 in its Supercenters. So club stores
23 are a bigger source of diversion overall, yet they would be
24 omitted from the supermarket market.

25 If you go down to the next slide, the same thing for

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1 Albertsons. Here, club stores are slightly smaller than
2 supercenters, but still very close.

3 So bottom line, the model is telling you there's lots
4 of substitution to club stores. You certainly can't just
5 define a market that says "club stores are out everywhere,"
6 but that's what the supermarket market does.

7 Q. So what about natural and organic? Did you take a look
8 at that as well?

9 A. Yeah. So if you'd advance one more slide, same thing.

10 So here's the -- the model is telling me for the Kroger
11 stores in the overlap areas, 5.3 percent of the diversion is
12 going to Trader Joe's, Whole Foods, and Sprouts. Those are
13 out of the market. That's as big as the diversion that's
14 going to Target and Super Target that are inside the market.
15 That's for Kroger.

16 If you'd advance more slide, same basic pattern for
17 Albertsons.

18 So the natural and organic are a slightly smaller
19 diversion than club stores, but still a lot, and still as
20 big as some of what's included in the market.

21 So, again, my conclusion would be, you know, you really
22 need to look local area by local area and decide what
23 competes. You certainly can't define a product market that
24 leaves out these other formats everywhere.

25 Q. And I think this second bullet on your supermarkets

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1 market slide related to share of wallet data. And you
2 briefly explained that earlier. Could you just refresh on
3 what that Circana share of wallet data actually is?

4 A. Yeah. So I know it's been discussed, so I can be
5 quick. It's a panel data that looks at where people shop
6 over time. Kroger uses it in the ordinary course.

7 And for Kroger, it looks at Kroger customers and where
8 they bought -- where else they buy the same products they
9 buy at Kroger.

10 Q. And what does that tell you about Kroger's customers?

11 A. So if we'd advance one slide, so this is sort of on the
12 dollar, where does -- for the stuff that Kroger's customers
13 are buying at Kroger, where are they spending the money on
14 that same stuff?

15 \$0.27 on the dollar is going to Kroger. You see the
16 other numbers here.

17 Not surprisingly, given everything we've heard, Walmart
18 is number two; but then number three is Costco. Right? So
19 you quickly see that the third-most-common place these
20 customers are going is a club store.

21 You also see, in combination, a lot going to the last
22 bucket here, which are other stores that would be excluded
23 from the supermarket market.

24 And, again, that tells me, you know, EGK can't really
25 measure substitution for me, but this helps me understand

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1 why there's so much substitution. Because people are
2 shopping at all these stores for the same stuff, making it
3 easy for them to shift between stores.

4 Q. And I think the third category that you highlighted was
5 ordinary course business documents.

6 So what do Albertsons documents tell you about
7 competition with Costco?

8 A. So if you'd advance one slide.

9 So this is an Albertsons ordinary course share of
10 wallet document. Albertsons uses a different source for
11 share of wallet called Numerator, but it's the same idea.

12 And so this document Albertsons is noting that it's --
13 it's our shoppers have significant share of wallet with
14 Albertsons' key categories at Costco. So things like oil
15 and shortening and eggs and frozen seafood are called out as
16 being purchased even more at Costco than they are at
17 Albertsons for the same customers and the same product
18 types.

19 Q. Okay. And are there -- are there other Albertsons
20 documents that sort of help illustrate this?

21 A. Yeah. So one more slide.

22 This one I noted -- it's really the same, so I won't
23 spend much time on it. It's saying lots of share of wallet
24 goes to Costco. We just note that if -- it's talking about
25 "leakage." It's a term that's in the documents and we've

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1 heard in testimony. And the top two categories on here
2 where there's leakage are fruits and vegetables. So to me
3 that was interesting. As I looked at this, it's not just
4 for other different types of products at Costco. It's the
5 sort of core, you know, fruit and vegetable produce-type
6 products are at the very top of what people are buying at
7 Costco.

8 Q. And so what conclusions can you draw from these types
9 of documents?

10 A. Again, as I said, these documents -- I guess two
11 things: One, the companies are certainly focusing on club
12 stores. In particular, here in Costco, as a source of
13 diversion. So they're thinking about competition there.

14 And the share of wallet, again, tells me the same
15 customers are buying the same stuff at these stores, making
16 it natural that there would be a lot of substitution between
17 them.

18 Q. And did you hear testimony from Costco itself during
19 the trial that was informative in this regard?

20 A. Yeah, I did. I would say the Costco testimony was
21 consistent with this competition.

22 As Ms. George testified -- and I haven't seen that, you
23 know, here in her deposition -- testified that -- I think
24 the last thing she said was Kroger is a significant
25 competitor of Costco. And she described it as a significant

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1 sales competitor, which I think she basically described as
2 their sale -- there's diversion between them. They're
3 losing sales between them.

4 I did also hear her say they weren't as important of a
5 price competitor. That's consistent with what I'm saying
6 earlier, that a higher-priced store isn't really what drives
7 your prices. Same thing as I talked about for Kroger and
8 Albertsons, but there's -- certainly the sales competition
9 is consistent with the idea that they're important and their
10 prices are lower than Kroger, so they're really a driver for
11 Kroger.

12 Q. And so moving on to natural and organic again, what did
13 you learn from the parties' documents about competition with
14 respect to natural and organic stores?

15 A. So Kroger has documents that are competitive playbooks.
16 So it's overtly thinking about how to compete with those
17 stores, and Albertsons has done studies where it looks at
18 what happens when, say, a Whole Foods opens near it, and
19 it's found that Whole Foods' entry can actually have a
20 bigger effect even than Walmart in some cases.

21 So it's finding important competition from natural and
22 organic.

23 Q. And then what about the parties' ordinary course
24 documents with respect to competition and, like, a limited
25 assortment or a value store, like Aldi, like Lidl?

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1 A. So, again, Kroger has these competitive playbooks
2 indicating a focus on those stores. If we advance one
3 slide, we see an Albertsons document, another sort of share
4 of wallet cross-shopping document, and here it notes that 22
5 percent of Albertsons shoppers are shopping at Aldi, a big
6 number, and bigger, for example, than WinCo.

7 Again, even though Aldi would be excluded from the
8 supermarket market and WinCo would be in the market, again,
9 showing that sort of cutoff doesn't make sense, given the
10 importance of these stores.

11 Q. And then moving on to that final category on the slide
12 relating to supermarket markets, but you referenced
13 Dr. Hill's entry analysis. What would that tell you?

14 A. So if we advance the slide -- I mean, Dr. Hill did his
15 own version of an entry analysis, regression analysis that
16 he did, controlling for some other things. And for Kroger,
17 in particular, he found that the entry of a Costco has as
18 big an effect on Kroger sales as the entry of an Albertsons.

19 So here you're seeing something that's excluded
20 entirely from the supermarket market being as impactful as
21 one of the merging parties. I think just making it clear
22 that you just can't exclude these other formats.

23 Q. And so Dr. Hill's testimony -- in Dr. Hill's testimony,
24 he discussed, in detail, differences between, you know
25 "traditional" -- I'm putting it in quotes, air quotes --

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1 "traditional" supermarkets and other grocery store formats.

2 So what do these differences tell you about competition
3 in the grocery industry?

4 A. Yeah. So, I mean, I think the implication that is --
5 you know, he's trying to draw is that, because they're
6 different, they're weaker competitors or they should be
7 excluded.

8 I mean, as I say in my report and I would say here, I
9 think that's backwards. I think that, you know, what we
10 have here is a variety of formats that are each very good at
11 something -- right? -- or several things.

12 So Costco has, you know, the Costco shopping experience
13 and low prices and a variety of products. Whole Foods maybe
14 has high quality. Aldi has very low prices. And as we see
15 in the Kroger strategy, Kroger is trying to figure out how
16 to compete with all of those. Right?

17 And so, really, it's -- to me, it's -- the fact that
18 somebody is great at almost each one of -- every one of
19 those things, makes the competition intense. To me, it's a
20 key reason why there won't be a problem post-transaction
21 because each of those stores, who's good at what it does,
22 will continue to put that pressure on Kroger.

23 So bottom line, it says to me you can't leave them out
24 of a supermarket market because then you're missing that
25 competitive pressure.

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1 Q. So then that was Dr. Hill's supermarkets market.

2 Dr. Hill also testified about a large-format market.

3 Do you have observations or conclusions about

4 Dr. Hill's large-format market?

5 A. I do. And to summarize them, if we advance one slide.

6 So the large-format market takes a step in the right
7 direction, in that it at least doesn't just leave out, on a
8 blanket "everywhere" basis, these other formats, but it
9 otherwise still has the same problems.

10 One is that it's not defined by -- the stores in the
11 market are not defined by ranking substitution, so we know
12 it's wrong. Instead, they're defined by drawing circles.
13 Again, are based on the parties' 75 percent draw areas times
14 two. So it has this rule that that's always the market. It
15 drops that down. That's not based on where people
16 substitute, and so it creates various problems when you
17 don't do things by substitution. Right? And I list some
18 here.

19 It often omits important competitors. Walmarts and
20 club stores that are outside the circle -- right? -- are
21 likely competitors, because people will drive farther to go
22 to Walmart or a club store and, in particular, are important
23 competitors for Kroger, because we know Kroger looks for
24 Walmarts elsewhere in the price zone, even if they're far
25 away, and prices against them.

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1 So this sort of just "drop a circle" blanket rule omits
2 competitors in a lot of cases, and doesn't consider club
3 stores and supercenters, and so on, correctly.

4 In other cases, the circle you drop down, just by the
5 way it's constructed, ends up very, very large, and you end
6 up including hundreds of stores in the market in some cases.
7 And now you're combining stores that really -- are far apart
8 and don't really compete with each other.

9 When you do that, you end up with market shares that
10 don't mean anything because you're adding up market shares
11 for firms that don't even compete.

12 Q. So you're talking about both examples where the
13 large-format market is underinclusive and is excluding
14 stores and also where it's overinclusive.

15 Could you just walk us through an example of the first
16 category, an underexclusive circle?

17 A. Underinclusive. I think you said "underexclusive."

18 If you go down one slide, so this is Portland. This is
19 Dr. Hill's market around the Fred Meyer in Portland. So
20 this is a market that is 5 miles wide. There is no Walmart
21 in that circle. There's no Costco in that circle, because
22 you just drop this 5-mile circle and restrict it to that.

23 There's a -- there's a Costco .6 miles outside the
24 circle. Again, given Costco draw areas and how far people
25 go to Costco, it's very likely and -- that that's a strong

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1 competitor, yet it's excluded.

2 Walmart is a little farther away and across the river,
3 but what we know from Kroger is, you know, they seek out
4 Walmarts that are in the price zone and they price against
5 them.

6 And so rather than identify Costco and Walmart as
7 important competitors and include them based on substitution
8 and pricing, Dr. Hill's method would say they're irrelevant,
9 and, in my view, that can't be correct.

10 Q. Okay. And can you also walk the Court through an
11 example of an overly large circle?

12 A. So this is Dallas. In urban areas, you have a lot of
13 stores. Pretty localized competition between them, often.
14 Like, close stores compete. But people drive from various
15 places to go to work and so on, so sometimes you get big
16 draw areas, and then you multiply them by two under
17 Dr. Hill's method.

18 So in Dallas, he ends up with a circle that's
19 25.6 miles in radius. So the market he would be defining
20 would have over 550 large-format stores, 69 Krogers and 80
21 Albertsons.

22 Then, again, there's just no way these are all
23 competing with each other, given that many stores between
24 various stores, how far apart some of them are.

25 And the problem with that is, you know, when you do

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1 merger analysis, then you take two shares from the parties
2 and you add them up, but those shares are of stores that
3 aren't competing with each other, so adding them up doesn't
4 tell you anything about competition.

5 Q. And does this type of example happen frequently in
6 Dr. Hill's data?

7 A. Yeah. Certainly. And these are two examples, but both
8 examples you see frequently where there's stuff just outside
9 or stuff just inside.

10 I mean, that's one way to see it for this Dallas-type
11 example. There are -- if you look at all of the stores in
12 the data, there are -- there are 250 cases where the next
13 closest party store that's in the market is more than five
14 miles away. It's farther than we generally see people
15 driving for supermarkets. There are 60 cases where it's
16 more than ten miles away.

17 So, again, there's a large number of cases where this
18 method will combine the shares of stores that are quite
19 distant to each other.

20 Q. Okay. So in his rebuttal report, did Dr. Hill respond
21 to your criticisms about these sort of circle-based
22 geographic markets with an alternative methodology?

23 A. He did.

24 MR. PAI: Objection, Your Honor.

25 Dr. Israel is about to testify about the customer-based

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1 approach that Dr. Hill presented in his reply report.

2 In his deposition, I asked Dr. Israel if he had
3 conducted any additional analysis or conducted -- or derived
4 any new opinions after review of Dr. Hill's reply report.
5 He did not mention anything about the customer-based
6 approach.

7 I'll also note that Dr. Israel submitted his corrected
8 report on July 20th, which was eight days after Dr. Hill's
9 reply report. He also submitted his surrebuttal report on
10 July 30th, which was 18 days after Dr. Hill's reply report,
11 which mentioned the customer-based shares. Not in his
12 deposition, nor in these two reports, did he ever mention
13 anything about the customer-based approach or offer any
14 opinions. Therefore, he should be able to testify about
15 these issues today.

16 MS. PFAFFENROTH: Your Honor, Dr. Israel here is
17 responding directly to Dr. Hill's testimony in this case
18 where he testified on direct with respect to his
19 customer-based shares methodology.

20 THE COURT: I'm going to sustain the objection and
21 ask you a question.

22 MS. PFAFFENROTH: Yes.

23 THE COURT: I know how long his testimony is to be
24 this morning. Is this a good break time, or do you have
25 another area that you would like to explore before a break?

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1 MS. PFAFFENROTH: I think this would be a good
2 time for a break.

3 THE COURT: Okay. All right. I was just asking.
4 We'll be in recess for 15 minutes.

5 (Recess taken.)

6 DEPUTY COURTROOM CLERK: All rise.

7 THE COURT: You may continue.

8 MS. PFAFFENROTH: Thank you, Your Honor.

9 BY MS. PFAFFENROTH: (Continuing):

10 Q. Dr. Israel, returning to the overall conclusions slide
11 and the board, the foam board, over there, let's move from
12 direct evidence, the direct evidence analysis you did, to
13 indirect evidence.

14 With respect to number 3, can you explain the test that
15 you ran to test Dr. Hill's proposed relevant product in
16 geographic markets?

17 A. Sure. So I ran versions of the hypothetical monopolist
18 tests. Really two. Starting -- starting with one looking
19 at actual pricing data, so -- just to take a step back
20 quickly, the hypothetical monopolist test is asking if this
21 market is well-defined, then, when we see a monopolist in
22 this market, only one competitor, prices should be 5 percent
23 or more, a SSNIP higher than when there's not a monopolist.

24 So it's called the hypothetical monopolist test because
25 most of the markets don't have a monopolist today, so it's

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1 hypothetical. But the question is are -- will -- are
2 prices -- can you say that prices will be 5 percent higher
3 if there's a monopolist than not?

4 So my main version of the test is to look at actual
5 data where we -- because we actually have observations here
6 where we see a monopolist in -- in some of Dr. Hill's
7 markets and ask: "We have the information. Are prices
8 5 percent higher when there's a monopolist based on actual
9 pricing?"

10 Q. And you mentioned the term "SSNIP."

11 Can you just explain what a SSNIP is?

12 A. Yeah, so SSNIP is S-S-N-I-P. I think it stands for a
13 "small but significant and non-transitory increase in
14 price." Generally taken to be a 5 percent.

15 So, again, the question is, if this market works and
16 you show me a monopolist area, I'll show you prices that are
17 5 percent higher than they are otherwise.

18 Q. And can you just briefly explain your methodology for
19 running the test you just described?

20 A. Yes. So, really, it's a version of -- it's similar to
21 the regressions that I described earlier for my study of
22 whether Albertsons affects Kroger pricing. There, the way
23 it worked was look for areas where Albertsons and Kroger do
24 or do not overlap.

25 Here, it looks for areas where, according to Dr. Hill's

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1 market, there's a monopolist, and look for areas where
2 there's not, and then see if prices are 5 percent higher or
3 where there is a monopolist.

4 Otherwise, it's the same. I can -- I use margins to
5 control for costs. I also control for grocery spending in
6 the area, local demographic characteristics, to isolate that
7 question of "Does the market work?" in the sense that prices
8 are 5 percent higher in monopoly markets versus
9 non-monopolies?

10 Q. And does your analysis depend here on which merger
11 guidelines you are considering?

12 A. No. The hypothetical monopolist is in both. This is
13 really a direct evidence version of the hypothetical
14 monopolist. Look at actual prices. And both versions of
15 the guidelines indicate that light competitive effects,
16 direct evidence, can be useful for the hypothetical
17 monopolist test.

18 Q. And is the methodology that you use here a typical way
19 for an economist to run this test?

20 A. Absolutely, in my experience. It's been used in the
21 same cases we mentioned earlier.

22 Again, in my experience, I've used it in many other
23 cases and other economists have. In my experience, just
24 like the guidelines say, direct evidence is useful.

25 So if we're saying a market is useful and we have

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1 actual instances of monopolies, then economists will look to
2 see if prices are actually 5 percent higher in those cases.

3 Q. And is the methodology that you use here, is it
4 different from the hypothetical monopolist test?

5 A. No. It's an actual data version. So all these
6 questions are hypothetical monopolist tests, in the sense
7 that they're asking "If you took a market as defined, that
8 doesn't have a monopoly, and made it a monopoly, would
9 prices be 5 percent higher?"

10 This is just asking the question by looking at markets
11 where it actually is a monopoly and seeing if that's true.

12 Q. And are there any academic articles that endorse this
13 methodology?

14 A. Yes. If you'd advance one slide.

15 So this is a paper by Nathan Miller, et al., that's
16 been cited extensively by Dr. Hill, for example; but it's
17 describing the methodology in general terms, which is --
18 what I'm doing is looking for comparing regions that are
19 monopolists, meaning they have only one competitor, to
20 regions that have more competitors. And so the method --
21 the paper indicates that it's informative to know whether
22 price differences can be attributed to differences in the
23 number of competitors.

24 And carefully conducted regression analyses that
25 identify the causes for the difference can be appropriate.

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1 So this is exactly what I'm doing. Regression analysis
2 that looks at "Are prices different based on the number of
3 competitors"; in particular, one versus more than one.

4 Q. And you just used the term "a carefully conducted
5 regression analysis."

6 Have you done that here?

7 A. Yes. So "carefully conducted" -- I mean, there's a
8 couple points that is -- that are made in the paper. One is
9 you should control for the other things that affect prices,
10 like control for costs and demand and demographic
11 characteristics to isolate the effect of the number of
12 competitors, and you should identify the causes for the
13 differences in the number of competitors. That's a huge
14 advantage of this industry. We know we have regional
15 players who are located in some areas but not others.

16 So you have certain geographies where you just have
17 fewer competitors. And so just like I did in the Albertsons
18 versus Kroger case, I'm using that to study the effect on
19 pricing with these controls in place.

20 Q. And so how much data did you have to use for this
21 analysis?

22 A. There are many cases in which the markets that Dr. Hill
23 defines leads to a monopoly. And, in particular, you know,
24 I have data from 2009 to 2023 or 2020- -- maybe into 2024,
25 and so the -- you know, if I look for all the -- the data

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1 are monthly, so if I look for every case where I see a month
2 in which one of Dr. Hill's markets would be a monopoly, I
3 have over 700 of those. So I can study those 700 monthly
4 observations, relative to all the other monthly observations
5 where there's not a monopoly and compare the differences.

6 And when I use this method, again, you know, lots of
7 the various variables in the model give statistically
8 significant results. It's very similar to what I used for
9 Kroger and Albertsons, where I talked about how it yields
10 reasonable results. So I've been as careful as I can to
11 control for things, try it different ways, and so on.

12 Q. So starting with the supermarkets market, Dr. Hill's
13 supermarkets market, what did your implementation of the
14 hypothetical monopolist test, using actual data, show with
15 respect to Dr. Hill's supermarkets market?

16 A. So if we can advance a slide.

17 So this is a picture of the test. So on the market --
18 according to the supermarkets market, the market on the left
19 is a monopoly, because Albertsons is the only one of those
20 stores that would be in the supermarket market, and the
21 market right would not be a monopoly because there's more
22 than one traditional grocer.

23 So the idea is to test all the observations of this
24 form.

25 So if you'd advance a bit more?

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1 What we find is prices in the market on the right are
2 not -- regression does not yield that they're 5 percent
3 higher than prices in markets like the one on the left, and
4 so the test fails.

5 It does not meet the standard, which is, according to
6 this market, you show me a monopoly, and I show you prices
7 that are 5 percent higher. That is not true.

8 Q. And so when you say, "It fails the test," what are you
9 really saying?

10 A. I'm saying that it doesn't meet -- it doesn't pass the
11 fundamental -- or this fundamental thing that a valid market
12 needs to do, which is, the reason we look at markets in
13 cases like this and maybe form presumptions, and so on, is,
14 if you have a valid market, then that market works in the
15 sense that, as it goes to monopoly, prices go up by at least
16 a SSNIP.

17 If that's not what happens in general, then that market
18 is not informative for our pricing analysis. So it's not
19 useful.

20 Q. And so if a -- if a proposed market fails the test, how
21 do we -- how do we think about shares or concentration in
22 that proposed market?

23 A. Again, they're not valid. Markets -- a first step in
24 defining market shares or concentrations and analyzing them
25 is having a valid market.

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1 And, again, it's for this reason that if -- if the
2 market needs to be able to predict that a monopolist would
3 consistently have a higher price, if it can't do that, then
4 it's not useful for the competitive analysis.

5 Q. And would the presumptions that Dr. Hill testified
6 about from the merger guidelines, either 2010 or 2023, would
7 they apply if the market itself fails the hypothetical
8 monopolist test?

9 A. Again, no. They're based on the shares and
10 concentrations that are only as good as the market
11 definition.

12 Q. Okay. So let's turn now to Dr. Hill's large-format
13 market. So what did your application of the hypothetical
14 monopolist test, using the actual data, show for Dr. Hill's
15 large-format market?

16 A. So if we just advance through these slides, it's the
17 same answer.

18 Here, the monopolist, in the large-format market,
19 requires that there's only one large-format store inside the
20 circle. So that's what we see on the left.

21 But, again, if you take all the observations that are
22 like that and ask, "Does that tell me prices are 5 percent
23 higher, controlling for all these other factors?" The
24 answer is no.

25 Q. And so when you found that the prices actually charged

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1 were not 5 percent higher, was that on an individual store
2 basis or is that an average across stores?

3 A. I mean, it's a regression, and so it's effectively
4 asking if that's true on average.

5 So there are -- I mean, there can be individual markets
6 that are exceptions. Right? But what the -- the test is
7 asking, to me, what is the fundamental question of market
8 definition, what I keep saying, "If you show me a monopoly,
9 can I tell you prices will be 5 percent higher?"

10 The question I'm asking is, "Can you say that in
11 general? Is it predictive?"

12 So this says, "No, it's not predictive."

13 It doesn't mean there wouldn't be some cases where the
14 prices are 5 percent higher. But if that's not true, even
15 on average, you know, then the market is not letting me
16 predict that. Right?

17 I would need to know that at least on average it's true
18 to be able to make that prediction; otherwise, the market is
19 not useful.

20 Q. And in fact, were there individual stores that did
21 exceed the 5 percent threshold?

22 A. There are individual stores that -- where you see the
23 prices -- you know, they would yield a result that was
24 larger than 5 percent.

25 Q. And how does that interface with the divestitures that

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1 have been proposed in this case?

2 A. Almost every one -- all but three of those cases were
3 stores that would be divested. So in that sense, they are
4 divested. They are not at issue, as far as a Kroger or
5 Albertsons combination.

6 So there's only three cases where we have a store that
7 is going to be -- that isn't going to be divested, where you
8 have this exception case where the increase would be larger
9 than 5 percent.

10 I would note for those three, if you go on and -- and
11 do the work and see if that -- those three would pass the
12 structural presumption, the answer is "No" in all three
13 cases.

14 Q. And why do you think that Dr. Hill's supermarket market
15 and large-format market fail your hypothetical monopolist
16 test?

17 A. I mean, it's really everything that I have been saying
18 for a while now. They're not -- these markets are not
19 defined according to substitution. They leave out important
20 competitors. They don't pay enough attention to where
21 Walmart is.

22 And so, bottom line, you show me a monopoly in one of
23 them, I can't tell you if prices will be 5 percent higher,
24 because I haven't done a good job nailing down what actually
25 matters for pricing.

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1 Q. And so did you also -- moving back to Dr. Hill's
2 approach, to the hypothetical monopolist test, did you also
3 analyze Dr. Hill's approach?

4 A. I did.

5 Q. And what did you do in that analysis?

6 A. So in Dr. Hill's approach, is it -- it's going after
7 the same thing. It's "Do I think, based on these markets,
8 prices will be 5 percent higher?" But it's a theoretical
9 economic framework that, instead of looking at actual data,
10 it uses an economic model, called an aggregate diversion
11 model, to try to predict from that model, if its assumptions
12 are right, what would -- "How much would prices go up?"

13 So instead of using the regression and real data, it
14 uses this theoretical model.

15 What I did was implement that model myself but making
16 several corrections to Dr. Hill's model.

17 Q. And then could you -- could you just explain how
18 Dr. Hill's implementation of the hypothetical monopolist
19 test compares to your actual?

20 A. Yes. Again, both of them are asking, "You show me a
21 market, can I tell you the prices will be 5 percent higher?"
22 Mine looks at actual data on whether that's true, and his
23 uses this theoretical tool to -- called the aggregate
24 diversion ratio, to try to predict it.

25 My strong view, myself, is you should use the actual

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1 data where you have it, rather than have to rely on economic
2 models, which can be useful but have lots of assumptions and
3 so on; but it's two different ways of trying to answer this
4 price question.

5 Q. And so what did do you to correct Dr. Hill's
6 hypothetical monopolist test?

7 A. I did three things. Like a lot of what we do in
8 antitrust, it come up -- these models -- these economic
9 models come down to diversion, ratios, and margins. So I
10 used the superior actual substitution measures of diversion
11 from the EGK model. I used margins -- we'll talk about more
12 later, but margins that account for all variable costs,
13 rather than leaving out a bunch of variable costs, as we
14 need to do.

15 And I also only focused on the stores that are not
16 going to C&S, that are not being divested. So I'm focused
17 on the cases where the merger creates a Kroger-Albertsons
18 overlap.

19 Q. And so here, what did you -- what did you find after
20 correcting for Dr. Hill's hypothetical monopolist test?

21 A. So if we'd advance one slide, I do this for both the
22 supermarket markets and for the large-format markets for all
23 the different stores we're looking at, and I find that, when
24 you make the changes that account for the divestiture, you
25 use the correct diversions and margins, that the vast

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1 majority -- like, you know, more than, I think,
2 95 percent -- or roughly 95 percent of Dr. Hill's
3 supermarket markets fail the test, and something like 75
4 percent of his large-format markets fail the test.

5 So similar to my actual data test, we're seeing that,
6 you know, overwhelmingly, in general, this method that
7 Dr. Hill is applying yields markets that fail the test.

8 Q. And so what does that -- what does that tell you?

9 A. I mean, it tells me that -- you know, he's got a --
10 sort of a top-down method where he says, "These are the
11 products. This is the circle. That's the market."

12 It's not a localized analysis where you build it up in
13 each -- each area. It's more of a machine, as I think of
14 it, that cranks out markets everywhere. And both of these
15 tests tell me the machine doesn't work because it's --
16 it's -- the majority -- the vast majority of cases it's the
17 only markets that fail.

18 So if I have a methodology that is yielding markets
19 that much more often don't pass than do pass -- right? --
20 the conclusion I would draw from that is the method doesn't
21 work. The machine is broken.

22 Q. So then, moving, again, back to your overall
23 conclusions, staying with indirect evidence but moving down
24 to point number four, can you explain the two models that
25 you and Dr. Hill used to measure competitive effects?

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1 A. Yes. So there's already been a fair bit of discussion
2 about GUPPIs and CMCRs. Those are two very similar models
3 to basically, again, combine diversions really as the key
4 measure of substitution with profit margins to form a
5 measure of whether the proposed merger leads to concern,
6 whether it leads to significant upward pricing pressure to
7 have a concern.

8 I should emphasize that the GUPPI that I'm using to
9 make it even a larger mouthful, is a multi-product GUPPI.
10 So it includes -- it looks at all of the products combined.

11 Dr. Hill's CMCr is also a multi-product model. In
12 fact, I know Dr. Hill has talked about -- said there's a
13 difference between those, but the multi-product GUPPI and
14 the CMCr are literally derived from the exact same
15 equations, and you'll do the same thing. It's just the
16 GUPPI, the multi-product GUPPI gives an answer in terms of
17 price pressure, and the CMCr converts that into a
18 marginal -- a cost number.

19 Q. And so is there a difference between your model and
20 Dr. Hill's model in terms of the thresholds that you're
21 applying?

22 A. So we both apply a 5 percent model -- a threshold to
23 look at these metrics and ask, "Are they above 5 percent,"
24 as an indicator whether the models can say there's a cause
25 for concern.

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1 Q. And you said you started with the GUPPI analysis.

2 Why did you choose to use the GUPPI analysis versus the
3 CMCR analysis?

4 A. Basically, it's in order to be able to do this
5 5 percent comparison in the most valid way, so this 5
6 percent safe harbor number is used for GUPPIs. It's been
7 around a long time. I use it -- I mean, in most every case
8 I do, if you compute a GUPPI, you compare it to 5 percent.
9 But that number is specific to the GUPPI.

10 So there are other measures of price pressure, broader
11 measures of upward pricing pressure. There's CMCRs. Those
12 are generally compared to the 5 percent number, so I use the
13 GUPPI so that I can use the standard 5 percent safe harbor.

14 Q. And can you just explain what you mean when you say "a
15 5 percent safe harbor" in this context?

16 A. Sure. So we can advance the slide, because I'll get
17 here.

18 The GUPPI methodology was developed years ago in a
19 paper by two economists named Carl Shapiro and Joe Farrell.
20 They advanced it as a -- as a tool for competitive effects.
21 But what was recognized from the beginning is, by
22 construction in any merger, every GUPPI will be positive.
23 It'll always give you a positive number.

24 And so, you know, in the original paper, and then as
25 Carl Shapiro took this method with him, when he became the

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1 chief economist at DOJ and put it in the 2010 merger
2 guidelines, a 5 percent safe harbor has come with it.

3 5 percent is -- like I say, in every merger I do,
4 people compute GUPPIs. Or everyone that has GUPPIs, people
5 can compute them and look at them relative to 5 percent.

6 And the clearest statement of that was Carl Shapiro,
7 while he was at the DOJ, gave a speech, which I think
8 summarizes it well, which is to say the safe harbor is used,
9 not because we think a price increase would be okay, but
10 because a smaller amount of upward pricing pressure is
11 unlikely, at the end of the day, to correspond to an actual
12 merger -- post-merger price increase.

13 I think Carl, when he was at DOJ and putting this in
14 the merger guidelines, did a good job of saying, "We use 5
15 percent to say it's big enough to give us a conclusion, at
16 the end of the day, that a post-merger price increase is
17 likely."

18 Q. And is the 5 percent --

19 MR. PAI: Your Honor, objection.

20 Sorry to interrupt.

21 Your Honor, I move to strike part of the witness's last
22 response about the work other people have done. He said
23 something to the effect of -- and I'm just going off the
24 quick-time, Your Honor, that the safe harbor has come with
25 it -- people compute -- 5 percent is -- people can compute

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1 them and look at them relative to 5 percent, and that was a
2 clear statement of -- that was Carl Shapiro. While he was
3 at the DOJ, he gave a speech. That part is fine, Your
4 Honor. He can testify about the speech.

5 But he also said that everybody uses a 5 percent.

6 We have no problem with Dr. Israel testifying about
7 what he uses, but without doing any sort of analysis or
8 representing analysis in his report about the use of 5
9 percent by other economists in other cases, that's just an
10 improper opinion that has no support in his report or
11 elsewhere.

12 THE COURT: Overruled. It'll stay.

13 BY MS. PFAFFENROTH: (Continuing):

14 Q. So, Dr. Israel --

15 MS. PFAFFENROTH: Thank you, Your Honor.

16 BY MS. PFAFFENROTH: (Continuing):

17 Q. Dr. Israel, is the 5 percent GUPPI that you described,
18 that threshold, commonly used in merger analysis?

19 A. Certainly, in my experience of the cases I know by
20 myself and by the economists that I work with and against, I
21 see it all the time.

22 Q. And Dr. Hill, in his direct testimony, cited to
23 academic paper of yours from 2021 in which you recommend the
24 use of CMCs over GUPPIs.

25 Could you just provide a little bit more context to

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1 your points in that paper?

2 A. Sure. This is a quote. It's a paper by me and my
3 colleague, Dennis Carlton. This is the quotes that I think
4 Dr. Hill put up. I think it's worth going down one slide
5 that gives the broad -- the longer version of that quote
6 from the paper. You can see the point we were explicitly
7 making, that I have made many times, which is, UPP, which,
8 in its simplest form, simplifies matters by focusing only on
9 one product at a time.

10 And that's -- we said that's an issue, and we recommend
11 CMCR there because it accounts for the effects of all -- on
12 all the products.

13 As I said here, the multi-product GUPPI is the sister
14 to the CMCR. It does the same thing, in terms of pricing;
15 so the point I'm making is look at all the products
16 together.

17 It's certainly -- the CMCR is one way to do that. We
18 recommended it there. The multi-product GUPPI is another
19 way to do the same thing but has this advantage of being a
20 GUPPI that can be compared to 5 percent.

21 Q. And are you using a single-product GUPPI or a
22 multi-product GUPPI in your analysis in this case?

23 A. Everything here is a multi-product GUPPI. So it's
24 really the same math as the CMCR, just expressed in terms of
25 prices.

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1 Q. Okay. And if we step back and think about the inputs
2 into these models, how important are the inputs into either
3 a GUPPI model or a CMCR model?

4 A. The inputs are everything. I mean, for all the
5 complicated letters and acronyms and everything, these are
6 basically tools that take a diversion ratio and a margin and
7 combine them into a measure of pricing pressure.

8 If you'd go down one slide.

9 I mean, it's not quite just multiplying the diversion
10 ratio times the margin. Although that's what a
11 single-product GUPPI would be. It's very close to that.
12 But that's effectively they're multiplying diversion ratios
13 times margins to get these measures, and so your output is
14 obviously only as good as the diversion ratio and the
15 margin. So garbage in garbage out, basically.

16 Q. And so, with reference to this slide, what are the key
17 inputs into both of these models?

18 A. So in both cases, it's diversion ratios and margins.
19 And, frankly, the bigger difference between Dr. Hill and
20 myself is not CMCR versus GUPPI, which really, as I've said
21 before, is kind of a "Fahrenheit versus Celsius" thing.
22 It's really the inputs.

23 So Dr. Hill uses diversion ratios based on market
24 shares, census block group market shares; but assuming
25 diversion ratios are just proportional to shares without

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1 actually measuring substitution, and then he uses gross
2 margins, which leave out a lot of variable costs.

3 I use diversion ratios based on EGK, which actually
4 measures substitutions. So it actually measures the
5 diversion ratio. It doesn't assume it's share. And I use
6 the ordinary course variable margins that take out all of
7 the relevant variable margins associated with increasing
8 output.

9 Q. Okay. And so just going a step deeper there, first, on
10 diversion, can you explain how your approach to diversion
11 really is different from Dr. Hill's here?

12 A. Let me just -- to be quick, his method base looks in
13 each block group and figures out shares and just says
14 "people substitute based on shares," but that doesn't
15 account for how close the stores are together or what format
16 they are or how popular the store is in that area.

17 EGK, as we've said, brings all that together and
18 actually measures substitution.

19 So I use a measure of substitution, not an assumption
20 that it's share. Again, I think it's an unreasonable
21 assumption here, given all the differences across stores and
22 different locations and so on.

23 Q. And so, then, with respect to the second input, with
24 respect to margins, you just testified that Dr. Hill uses
25 gross margins. In your opinion, are gross margins the

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1 appropriate margin to use in this model, in this case,
2 for -- to measure competitive effects?

3 A. Not the gross margins, as they're defined in this
4 industry, given what else we have available.

5 The goal is always to capture the costs that go up as
6 output goes up. Right?

7 And so, generically, people sometimes -- economists
8 sometimes use the word "gross margin" to mean that number,
9 but what we're always driving for is the true increase, the
10 true variable costs. How much do costs go up as output goes
11 up? Right?

12 And the reason that's what we're driving for is because
13 that's what the GUPPI and the CMCR need. Right?

14 The fundamental question that they're asking is, "If
15 one firm raises price and loses some sales to its merger
16 partner, how much money does the merger partner make?"

17 To answer that, we have to know, not only how many
18 sales does the merger partner capture, but how much does it
19 cost the merger partner?

20 So we have to have all of the costs that go up when
21 those sales go up.

22 And so, in this industry, as defined by these firms,
23 gross margins do not do that.

24 Q. And so what was the source of the variable margins that
25 you used in your model for this case?

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1 A. It was the numbers that come from the Kroger capital
2 finance group, so I used them -- Mr. Maharooof testified
3 about them in trial. These are explicitly numbers that the
4 capital finance group uses to answer this question. If they
5 make an investment or if a store nearby closes such that
6 sales go up, how much of that flows to the bottom line? How
7 much of that is margin?

8 So they are explicitly measuring how much -- this exact
9 question: "How much do profits go up, accounting for all
10 variable costs?"

11 Q. And so let's compare what's included in the margins
12 that you use in the model and the margins that Dr. Hill uses
13 in his model, just starting from the perspective of
14 Albertsons.

15 Can you walk us through that?

16 A. Sure. So for Albertsons -- Dr. Hill's gross margins
17 for Albertsons are literally just price, minus cost of goods
18 sold. So I think it's worth thinking about selling some
19 more cans of tuna fish.

20 So if a -- if a store sells more cans of tuna fish,
21 Dr. Hill's gross margins would say the cost associated with
22 those sales is just the cost -- the product cost of the tuna
23 fish. Basically, what Albertsons has to pay its supplier
24 for a can of tuna fish.

25 It does not include lots of other stuff that goes up as

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1 you sell more stuff. It does not include the transportation
2 of the tuna fish to the grocery store. It does not include
3 the warehouse costs associated with more tuna fish. It does
4 not include hourly employees. So as the store gets busier,
5 the store needs to have more people that sell things, so
6 it's selling more tuna fish and more other things. It does
7 not capture the labor. It does not capture bags. It does
8 not capture credit card fees that are deducted from every
9 sale. It's literally just the cost of the product. Not the
10 cost of getting the product to the store, and not anything
11 about the cost of the grocery operation itself.

12 Q. And so what about, then, with respect to the Kroger
13 margins?

14 A. If we'd advance one slide.

15 Show Kroger margins that Dr. Hill uses address a couple
16 of these things. And this is common in gross margins,
17 honestly, that what gross margins will include in industries
18 like this are the cost of the goods but also the cost of
19 transporting the goods and the warehouse costs.

20 So they tend to capture sort of that wholesale side of
21 the cost of the product, not -- the product itself and the
22 transportation and the warehousing, but they still leave out
23 everything about the actual cost of a grocery store. Right?
24 So there's nothing here about how much more money Kroger has
25 to pay to run its stores.

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1 So as it gets busier and it needs more workers to do
2 restocking and to work at the checkout counters and to bag
3 groceries, those are not included, nor are the bags
4 themselves or the supplies, nor are the credit card fees,
5 and so on.

6 So it's really the wholesale side of the operation but
7 it leaves out everything about the retail side of the
8 operation.

9 Q. And so did you hear any testimony or see any evidence,
10 during the course of this trial, that suggest that Kroger's
11 gross margins or Albertsons' gross margins are the
12 appropriate measure for competitive -- for this competitive
13 effects analysis?

14 A. Yes.

15 What Mr. Maharroof testified about, the very numbers
16 that -- that I relied on -- if you'd advance the slide.

17 As I said, he testified --

18 MR. PAI: Objection, Your Honor. This document
19 was not relied upon in Dr. Israel's report, and in his
20 deposition he testified extensively that he did not rely on
21 any ordinary course documents that evaluated -- in
22 evaluating margins. Instead, he relied almost exclusively
23 on the conversations his team had with Kroger's finance --
24 financial -- capital finance group.

25 MS. PFAFFENROTH: So, Your Honor, Mr. Maharroof is

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1 a member of the Kroger's capital finance group.

2 Dr. Israel testified during his deposition that he
3 relied on materials provided by the capital finance group.
4 Again, of which Mr. Maharroof is a part. This is not a new
5 opinion. It's not new reliance. It is simply Dr. Israel
6 referring to testimony that is consistent with that as in
7 his report.

8 MR. PAI: Your Honor, specifically -- well, my
9 objection is to the fact that he testified that he did not
10 look at the underlying documents. He did not consider the
11 underlying documents. That was his direct testimony in his
12 deposition.

13 THE COURT: Well, you get to cross-examine him on
14 it.

15 Overruled.

16 MR. PAI: Yes, Your Honor.

17 MS. PFAFFENROTH: Thank you, Your Honor.

18 THE WITNESS: So this is a document from the
19 capital finance group that illustrates what the capital
20 finance group does here, which is the basis for the margins
21 that, as I said, my staff and I discussed at length and that
22 I relied on in the report.

23 So this illustrates -- this is sort of an example that
24 illustrates how on point these are for the exercise that we
25 need to do here. So the exercise that Mr. Maharroof spoke of

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1 is a nearby store closes, so the store in question gets
2 \$100,000 more in sales, that's exactly the question you need
3 for a GUPPI or a CMCR. And what this -- what the
4 calculation does here is go through and for each cost
5 category, figure out how much is variable, deduct that from
6 the sales, and come up with a bottom-line margin.

7 So when it does that, it comes up with a bottom-line
8 margin after deducting all those variables costs of 17.15
9 percent.

10 BY MS. PFAFFENROTH: (Continuing):

11 Q. And how does that compare with the variable margins
12 that you used in your report that came from the capital
13 finance group?

14 A. Well, it's very similar, and the margins vary from
15 store to store, but similar to what Mr. Maharooof said in
16 testimony. I get margins that are between 15 and 20, and
17 that's what we're seeing here.

18 Q. And what evidence does Dr. Hill rely on to support his
19 use of gross margins in this case?

20 A. Well, one thing he said was that they are -- you know,
21 that they are used -- they are referred to by the parties in
22 the ordinary course in discussing profitability.

23 To me, that's -- you know, that -- lots of margins are
24 discussed at all sorts of levels in discussing
25 profitability. It doesn't tell you what's the right margin

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1 to use in a -- in a GUPPI analysis.

2 Sometimes we look to what the parties say to help us
3 guide if it's the right margin for us to use or the best
4 margin we have available; but here, nothing about the fact
5 that they sometimes report it makes it the best margin
6 available when we have, really, an ideal variable margin
7 from Mr. Maharroof.

8 Q. And did Dr. Hill undertake any analyses to support
9 his -- the value of gross margins that he used in the model
10 in this case?

11 A. He did. So this is in his report.

12 If we'd advance one slide? Or -- yeah.

13 So on the left is what Dr. Hill has put in his report.
14 So he studied a ten-day strike in Denver. So some
15 King Soopers stores in Denver went on sale -- went on strike
16 for ten days.

17 As a result of that, some sales shifted to nearby
18 stores. So he kind of did a one-place Denver, mini, in the
19 sense that it was a short version of what Mr. Maharroof's
20 document said, and he -- Dr. Hill asked, for this one event
21 that lasted ten days, "How much did costs go up when sales
22 went up? Therefore, what does that tell me about variable
23 costs?"

24 And when he did that, he compared those changes to
25 other stores to see how much effect there was from this

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1 event. When you put all that together, he said he got a --
2 he got a margin of 28 percent, which he said was similar to
3 his gross margin.

4 Q. And did you find this analysis to be informative in
5 this case?

6 A. No. Really, for three reasons.

7 First is this is a ten-day one-off event in Denver,
8 when we have the actual Kroger capital finance number, which
9 is a much -- you know, the ordinary course version of this
10 experiment. So I think we have the actual variable margin
11 that the company uses for exactly the right event. So I
12 think that's more informative.

13 Two, this event was ten days long. Right? In ten days
14 you're not going to -- all the stuff that's being left out
15 of Dr. Hill's method or the increased costs of the grocery
16 operation -- it's very unlikely in ten days those have time
17 to fully adjust. Hire more labor, and so on, is unlikely.

18 And then, three, even to the extent cost did adjust,
19 Dr. Hill would only pick them up if they show up on a
20 store-specific profit and loss statement for January.

21 So to the extent any of the labor came from other
22 stores and was on their profit and loss statement or the
23 restocking happened in February after the sales happened in
24 January, none of that would show up.

25 So I just don't think a ten-day event in one city is

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1 informative when you have Kroger's own analysis used in the
2 ordinary course to make investments of the correct number.

3 Q. And so did you conduct any analyses in response to
4 Dr. Hill's margin analysis based on the King Soopers strike?

5 A. I did. Again, I think the best thing to do is use the
6 Kroger numbers that are, you know, perfectly on point in
7 this case.

8 But because he had done an event study and my -- you
9 know, one of my criticisms was it was too short.

10 I looked at an event in Washington where a couple of
11 QFC stores closed. They closed in response to a Seattle
12 ordinance saying that they had to pay hazard pay. So some
13 of those stores closed. It gives you a similar event.
14 Sales shifted to nearby Albertsons stores. You can see how
15 much sales went up and how much costs went up. But here I
16 have a six-month -- it was a permanent closure. So I can
17 study six months before and after. So I deal with these
18 concerns about ten -- a ten-day event. When I do that, I
19 get a 17.5 percent margin. Right back to where we were.

20 Q. And so Dr. Hill served a surrebuttal report just a few
21 days ago responding to your QFC analysis.

22 What was his response?

23 A. He made two points about my analysis.

24 One, he said that it appears that maybe some of the
25 effects of this event started a couple of months before

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1 April. So in technical terms, he said I failed a parallel
2 trends test; but, really, that just means it looks like
3 maybe the effects started before April.

4 And then, secondly, he said -- well, kind of a
5 technical point, but he said if you're trying to measure
6 cost increases -- and there was an ordinance that raised
7 wages in Seattle, then you -- in order to figure out the
8 cost increases, you really ought to study the affected
9 stores relative to other stores in Seattle. So they all
10 have the hazard pay effect.

11 And so his argument was, I think, that if you -- I had
12 used a broader set of controls. So he said -- he's seemed
13 to imply that if you look just at the stores in Seattle, all
14 of their costs went up so that the measured cost increase
15 that I got would have been smaller, if I only looked at
16 stores in Seattle, such that my margin would have been
17 bigger.

18 Q. And so taking the first criticism regarding sort of the
19 time frame, could you give your response to that?

20 A. Sure. At most, that would mean that you should start
21 the study a month or two earlier. And, in fact, I find that
22 if you start the event a month or two earlier, or even just
23 drop these months a month or two earlier from the analysis,
24 because there were kind of in-between months, either way you
25 get rid of this parallel trends problem he raised, and you

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1 get right back to the same margins.

2 So it's not an issue. You can just move it back and
3 you confirm my result.

4 Q. And what about the critique relating to differences in
5 costs relating to the hazard pay increase?

6 A. So that's -- Dr. Hill is advancing a hypothesis that if
7 I limited my cost -- my study of cost changes to just
8 Seattle and I compare -- I use Seattle as the basis to see
9 what happened to costs, that I should find a smaller cost
10 increase and thus a bigger margin, but if I do that -- if I
11 run my cost analysis just on Seattle, I actually find that
12 the cost increase goes up, not down. So it's the opposite
13 of his hypothesis.

14 MR. PAI: Objection, Your Honor. Move to strike
15 the last two responses.

16 These were not analyses that were submitted in the
17 surrebuttal report that Dr. Israel submitted after the close
18 of expert discovery. We've not -- taken no discovery of
19 this. There's been no disclosure of these opinions
20 whatsoever, Your Honor.

21 MS. PFAFFENROTH: Your Honor, we received the
22 surrebuttal report two days ago, and Dr. Israel is
23 responding -- describing and responding to the criticisms
24 that were raised by Dr. Hill and what his actual analysis --
25 how it relates to that and what -- and putting context

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1 around those criticisms as to why they are not persuasive.
2 That is from his study.

3 MR. PAI: May I respond, Your Honor?

4 Your Honor, Dr. Israel already filed an untimely
5 surrebuttal report. The Court allowed us to file a reply
6 report, which Dr. Hill did, pursuant to the Court's order
7 two days -- I believe it might have been more than two days
8 in advance of Dr. Israel's testimony, but the plaintiffs get
9 the last word, Your Honor, and the opportunity for
10 Dr. Israel to continue to offer new testimony after reports
11 are in is prejudicial to the Government -- the plaintiffs'
12 ability to put forward our case.

13 THE COURT: Sustained.

14 BY MS. PFAFFENROTH: (Continuing):

15 Q. Dr. Israel, what is your overall opinion about the
16 utility of these studies in the -- either study -- King
17 Soopers or QFC -- in the context of this case?

18 A. I don't think they add much. Given that we have, I
19 mean, really as good a measure of actual variable cost as
20 I've seen in my work. We have the number from Kroger that
21 they used to make actual investment decisions.

22 So you can do these studies in their specific cities,
23 and they're kind of one-offs, and you get different numbers
24 if you do them different ways, but we have the number that
25 actually is used to make real decisions by the firm, which

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1 is really the perfect analysis for what we need for a GUPPI.

2 Q. And so let's talk about, now, switching gears back to
3 that third consideration. We had the diversion ratios, we
4 had margins, and now the divestiture.

5 Did your competitive effects analyses account for the
6 divestiture in this case?

7 A. Yes. In every case, I consider the divestiture.

8 Again, what a -- what a GUPPI or a CMCR do is take
9 margins and diversions as they exist to look at what the
10 competitive situation is today, and then they change who
11 owns the firms and say what the happens to prices when some
12 of the firms are jointly owned.

13 And so I accounted for actually which stores will and
14 will not be jointly owned.

15 Q. And why does that make sense? Why does it make sense
16 to consider the divestiture in this case?

17 A. Because it's the actual transaction that's on the
18 table. Right?

19 And the way you use these tools is, again, study
20 margins and diversions, or shares in other cases, all these
21 tools, you study the data that is in the world now, and then
22 you say, "How is the ownership structure changing? Does
23 that increase or decrease competition?" and you study what's
24 actually going to happen with the real transaction, not with
25 the transaction that's not occurring.

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1 Q. And Dr. Hill, in his testimony, criticized you for
2 assuming there will be what he's referring to as a "perfect
3 divestiture."

4 What is your response to that?

5 A. I'm not assuming a perfect divestiture. I'm just
6 applying the tools of competition and economics in a
7 consistent way.

8 Again, the way these tools work is you take shares,
9 diversions, margins as they exist, that creates the current
10 competitive condition, and you then say, "If we change who
11 owns the stores, how much does it relax the current
12 competitive condition?"

13 So I think what Dr. Hill is saying -- or what he said
14 in testimony is that I should have reduced some of the
15 shares for some of the stores at C&S.

16 That's not how the methods work. The methods are
17 designed to avoid that speculation by saying, "Here's the
18 current competitive condition. Here's the change in
19 ownership structure. Does that harm competition?"

20 That's what I did.

21 Q. And if you were going to try to predict the success of
22 a divestiture buyer, what would you do?

23 A. I mean, as I've said, I would do, not these tools of
24 competition economics that I've used in this case. That's a
25 different analysis where someone would have to come in and

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1 look at all of Kroger, Albertsons, and C&S, and see who's
2 going up, who's going down, and look at all sides of it.
3 You wouldn't just take C&S down. You would do a strategic
4 analysis of all of that in a consistent way.

5 Again, what I'm doing is advancing the tools of
6 competition economics, which let us use current data, but
7 that would be a different analysis that would have to look
8 at all those stores. Who's stronger? Who's weaker?
9 Certainly, I wouldn't just take C&S down and see what
10 happens.

11 Q. Thank you.

12 So let's start with your GUPPI analysis. When you
13 consider the diversion ratios, the margins, and the
14 divestiture, what did your GUPPI analysis find?

15 A. So when I put those things together -- it's on the
16 slide now -- you find that the overwhelming majority of the
17 stores, all but two of the stores, have a GUPPI below the
18 5 percent safe harbor.

19 In fact, the vast, vast majority of them are below
20 3 percent. So GUPPI is far below the level that would pass
21 the safe harbor or create concern.

22 Q. And you testified earlier this morning with respect to
23 price zones. What happens if you consider this in terms of
24 price zones as opposed to individual stores?

25 A. So the next slide has that -- so just to be clear, you

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1 know, what we know is that Kroger is not setting prices
2 store by store. They are setting them zone by zone. So if
3 you take into account that reality and roll these GUPPIs up
4 to the price zone level, then even the two above 5 percent
5 go away. They're all below 5 percent.

6 Q. So let's take a look at Dr. Hill's GUPPI analysis from
7 his rebuttal report.

8 Can you just explain what this chart is showing?

9 A. So this is -- GUPPIs, like what I've done, to get --
10 Dr. Hill also does these GUPPIs. Instead of reporting the
11 number of stores with a GUPPI above 5 percent, he's
12 converting it into dollars, which basically is just looking
13 at the sales revenue of each store and then applying a
14 factor, what he uses as half the GUPPI for technical
15 reasons. But it's basically just converting the count of
16 stores into a dollar number.

17 So what you see is he has his baseline number, he has
18 what he calls my GUPPI model which is really applying the
19 EGK diversions, and then he has two bars on the right which
20 say he'll use my margins, what I consider the correct
21 variable margins, or he'll consider the divestiture. Right?
22 And what you see is either of those changes drastically
23 reduce this measure of harm that he's claiming, but he never
24 looks at those in combination.

25 Q. And so what happens if you do look at it in

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1 combination?

2 A. If go down one more slide, again, this is just a dollar
3 version of my GUPPI counts. And so you get the same basic
4 story. If you look at them in combination at the store
5 level, that measure of harm goes all the way down from what
6 had been, you know, \$1.5 billion down to 3 million, because
7 there's only two stores above 5 percent; and if you look at
8 the zone level, it goes to zero.

9 Q. And is there any dispute between you and Dr. Hill about
10 the calculations here, the math, with respect to the
11 competitive harm in the chart?

12 A. No. Not that I know of.

13 Q. And we've been talking about Dr. Hill's GUPPI analysis.
14 Let's shift now and take a look at Dr. Hill's CMCR
15 analysis.

16 A. Okay.

17 Q. And what is this? What is this showing?

18 A. So these are using CMCR. These are, again, going back
19 to counts that are above -- of stores above 5 percent. He
20 doesn't use the dollar number here. I think, again, because
21 the CMCRs are a cost measure, not a price measure, so he
22 doesn't have a price effect here.

23 But the first three bars are just his initial report
24 and then he excludes four stores that he acknowledges had
25 been closed. And then what he refers to as my CMCR model is

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1 the alternative diversions. So those each give you, you
2 know, over 1,500 stores he says have CMCRs above 5 percent.

3 But in column -- columns 4 and 6, you see what happens.
4 In this case, if you change to my margins or change to -- or
5 account for the divestiture.

6 So, again, using those variable margins or accounting
7 for the divestiture, both dramatically reduce the number of
8 stores above 5 percent, but he never considers that in
9 combination.

10 Q. You talked about the fourth column and the sixth
11 column. Why did you skip the fifth column?

12 A. In the fifth column, he's restricting things to stores
13 that pass the 2010 merger guidelines presumption, but the
14 presumption is a market share market definition thing. You
15 don't need to apply it here. It just doesn't really bear on
16 the CMCR calculation, so you don't need to consider it.

17 Q. Does Dr. Hill calculate the number of markets where he
18 would assert competitive harm if you combine the variable,
19 your variable margins, and the divestiture -- if you take
20 those together?

21 A. He does not. But if you advance one slide, you can see
22 what happens.

23 So if you -- if you take them both into account at the
24 store level, you drop down to four stores above 5 percent,
25 it was two in GUPPIs, it's four in CMCRs -- and as I

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1 explained, CMCRs, by construction, give us a slightly higher
2 number, so more are above 5 percent. That's why I use the
3 GUPPI. Because it's appropriately compared to 5 percent.
4 But then if you do it at the price zone level, even the CMCR
5 goes to zero.

6 Q. And where are those stores?

7 A. The four stores that are above 5 percent are all in
8 Santa Fe, New Mexico.

9 Q. And if you were to ignore the fact that Kroger sets
10 price at the price zone level in the actual world, how many
11 of these stores would you have to take out such that all of
12 the CMCRs are below 5 percent?

13 A. One. So it's really one. If one more -- say if one
14 more of those stores was in -- was divested, all of the
15 CMCRs would be zero.

16 Q. And with reference back to the GUPPI analysis now and
17 the two stores that you referenced there, would that same
18 store resolve that -- the two stores that were above the
19 threshold of 5 percent?

20 A. Yes.

21 Q. Okay. So just taking a step back, how does this
22 evidence that we've just been talking about, in terms of the
23 indirect evidence, the models, how does that relate to the
24 evidence at the top of your overall conclusions, the direct
25 evidence about Kroger's pricing?

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1 A. Yes. It's -- what I said at the beginning, if you look
2 at 1, 2, and 4 on here, they are different ways to assess
3 the same question, "Will this transaction lead to higher
4 prices?"

5 Number 1 and number 2 use direct evidence from
6 strategies and pricing today. Number 4 uses a more
7 complicated economic model that I don't think is necessary,
8 because we have direct evidence.

9 But where we end up is the same place.

10 If you do number 4, the GUPPIs and CMCs correctly, you
11 get no concern for harm, which is consistent, not
12 surprisingly, with what the direct evidence tells us.

13 Q. And so based on everything we've discussed this morning
14 what is your -- what is your bottom-line conclusion with
15 respect to this proposed merger?

16 A. It's that I've looked at direct evidence on pricing and
17 strategies and competition today, I've looked at indirect
18 evidence based on economic tools that ask the same question;
19 both those methods lead me to the same place, which is
20 there's no basis for concern that this merger will harm
21 competition.

22 Thank you, Dr. Israel. I pass the witness.

23 THE COURT: We're going to be on our lunch break
24 until 1:00. Court is in recess.

25 (Morning session concluded at 12:04 PM.)

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C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 12

September 11, 2024

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

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

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 9/11/2024
CSR Expiration Date: 9/30/2026

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