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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 12, 2024
ALBERTSONS COMPANIES, INC.,)	
)	
Defendants.)	Portland, Oregon
_____)	

PRELIMINARY INJUNCTION HEARING
DAY 13 - AFTERNOON SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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J. McCrary - D

1 (September 12, 2024)

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

3 (Afternoon session; open court:)

4 THE COURT: All right. Please be seated.

5 MS. BARRINGTON: Good afternoon.

6 Luna Barrington for the defendants. We've passed out
7 the binders. I would like to introduce one new team member,
8 Katie Rider, who is with us today.

9 THE COURT: Hello.

10 MS. BARRINGTON: At this time we would like to call
11 Justin McCrary to the stand.

12 THE COURT: All right.

13 (The witness was duly sworn.)

14 THE CLERK: Thank you. Please be seated. Would you
15 please state your name for the record, spelling your last.

16 THE WITNESS: Justin McCrary. J-U-S-T-I-N,
17 M-C-C-R-A-R-Y.

18 DIRECT EXAMINATION

19 BY MS. BARRINGTON:

20 Q Good afternoon, Professor McCrary. What are you here to
21 testify about here today?

22 A The labor market aspects of the plaintiffs' claims.

23 Q Did you prepare demonstratives to assist with your
24 testimony?

25 A I did.

J. McCrary - D

1 Q I would like to pull up DDX27, please. They should also
2 be in the sleeves of your binder.

3 Are these the demonstratives that you prepared?

4 A Yes, they are.

5 Q If we can turn to the next slide, please.

6 Professor McCrary, could you please briefly describe your
7 educational background for the Court?

8 A Sure. I obtained my undergraduate degree in public policy
9 from Princeton University in 1996. I then got my Ph.D. in
10 economics from UC Berkeley in 2003.

11 Q Can you please describe your professional experience for
12 the Court.

13 A Yes. After my training at Berkeley, I then went on to
14 teach at the University of Michigan. I then returned to UC
15 Berkeley, and currently I teach at Columbia University where I
16 am the Paul J. Evanson professor of law.

17 Q What courses do you teach at Columbia University?

18 A At Columbia, I teach antitrust. I teach corporations law.
19 I teach law and economics and a class on how lawyers use
20 economics and statistics.

21 Q What did you teach at Berkeley?

22 A At Berkeley, I taught courses on econometrics. I taught
23 graduate labor economics. I taught corporations law, law and
24 economics, things like that.

25 Q Have you worked in a grocery retail store before?

J. McCrary - D

1 A Yes. When in high school, I was a salad bar clerk at a
2 Safeway and a cashier at a different one after I graduated.

3 Q Do you also publish papers in the area of labor economics?

4 A I do.

5 Q Where have you published papers?

6 A Peer-review journals in economics, such as American
7 Economic Review, the Journal of Labor Economics, the Review of
8 Economics and Statistics, journals like that.

9 Q Approximately how many papers have you published in the
10 area of labor economics?

11 A In labor economics specifically, I would say about a
12 dozen.

13 Q Have you served as an expert witness before?

14 A Yes. In litigation, yes.

15 Q Have you been retained as an expert economist to evaluate
16 competition in labor markets?

17 A Yes.

18 Q Approximately how many times?

19 A I think it's five or six times.

20 Q Have you been retained as an expert for the Government in
21 an antitrust merger case?

22 A Yes. I was retained by the Department of Justice as a
23 consulting expert in the AT&T-T-Mobile merger.

24 Q Have you been retained as an expert by labor unions?

25 A Yes. I think the first time I was retained as an expert

J. McCrary - D

1 was in connection with collective bargaining, where I was
2 retained by a union.

3 Q In cases where you have testified or served as an expert
4 witness, have courts credited your opinions?

5 A Yes.

6 MS. BARRINGTON: Your Honor, at this time defendants
7 proffer Professor McCrary as an expert in antitrust labor
8 economics.

9 MR. DICKINSON: No objection.

10 THE COURT: He will be designated as an expert.

11 MS. BARRINGTON: Thank you.

12 BY MS. BARRINGTON:

13 Q If we could turn to the next slide, please. Now, you
14 testified that you are here to offer economic analysis of
15 plaintiffs' labor theory. Can you briefly describe to the
16 Court what your understanding of that theory is.

17 A Yes. There are two pieces of that. The first is that
18 union grocery labor in CBA areas is a relevant antitrust
19 market. Then the second aspect of their claims is that the
20 merger would substantially lessen competition or lead to worse
21 outcomes for workers.

22 Q Can you describe your assignment when you were retained
23 for this case.

24 A Yes. It was to review the labor market aspects of the
25 plaintiffs' complaint and to respond to the expert testimony

J. McCrary - D

1 put forward by Dr. Hill in connection with the labor market
2 aspect of his work.

3 Q I would like to talk about Dr. Hill's opinion as they
4 relate to plaintiffs' labor theory. Did you have an
5 opportunity to review Dr. Hill's testimony in this trial?

6 A I did.

7 Q Does Dr. Hill offer any opinions to support plaintiffs
8 theory that there is a union grocery labor market in CBA areas?

9 A No.

10 Q Does Dr. Hill offer any support for plaintiffs' theory
11 that this merger would substantially lessen competition in a
12 valid labor market?

13 A No.

14 Q Does Dr. Hill offer any support for plaintiffs' theory
15 that this merger would harm workers?

16 A No.

17 Q Does Dr. Hill offer any support for plaintiffs' theory
18 that this merger would reduce the union's bargaining leverage?

19 A No.

20 Q To your understanding, what opinions does Dr. Hill offer
21 about plaintiffs' labor theory?

22 A I believe the opinion he offered is limited to a question
23 of market concentration, which is to say he accepts the
24 plaintiffs' proposed labor market and calculates employment
25 shares in those markets.

J. McCrary - D

1 Q Now, Professor McCrary, did you analyze whether plaintiffs
2 have properly defined a valid antitrust market?

3 A I did.

4 Q And did you analyze whether this merger may substantially
5 impact competition in a valid labor market?

6 A I did.

7 Q Did you prepare an expert report in this case summarizing
8 your opinions and the materials upon which you relied on in
9 forming your opinions?

10 A Yes.

11 Q Turning to the tab in your binder labeled DX2739, is this
12 the expert report you filed in this case?

13 A Yes.

14 Q If you can turn to page 130 of your report, can you tell
15 me the date you filed the report.

16 A Give me a moment. July 1st, 2024.

17 Q And is that your signature on the page?

18 A Yes, it is.

19 MS. BARRINGTON: Your Honor, I would like to offer
20 DX2739 into evidence.

21 MR. DICKINSON: No objection, Your Honor.

22 THE COURT: It will be received.

23 MS. BARRINGTON: Thank you.

24 BY MS. BARRINGTON:

25 Q Please turn to the next slide. Does this slide provide an

J. McCrary - D

1 overview of your opinions?

2 A Yes.

3 Q Can you walk us through the opinions that you are offering
4 here today?

5 A Yes. There are three, corresponding to market definition,
6 market concentration, and merger effects.

7 The first opinion, market definition, has two parts
8 to it. The first is the labor market is broader than union
9 grocery. The second part of that market definition and opinion
10 is that CBA areas are not a relevant geographic market. If you
11 put the two of those together, my opinion is that union grocery
12 labor and CBA areas is not a valid antitrust market.

13 Q What is your second opinion as it relates to market
14 concentration?

15 A The second opinion that I'm offering today is that in any
16 properly defined labor market, market concentration is very
17 low, not the levels that Dr. Hill points to.

18 Q What about your third opinion as it relates to merger
19 effects?

20 A The likely effects of the merger are that they won't lead
21 to harm for workers.

22 Q Now I, would like to talk briefly about how you reached
23 your opinions. Did you analyze data to arrive at your
24 conclusions?

25 A Yes, I did.

J. McCrary - D

1 Q Why do economists rely on data?

2 A I guess there are really two parts to that. The first is
3 that data allows us to take a broad perspective. It is
4 different from looking at, for example, an isolated
5 circumstance or something along those lines. The second piece
6 is that when we analyze data, we tend to be measuring things
7 that are hard facts, things like price or something like that,
8 not, for example, a belief that somebody has or a concern that
9 they might express.

10 Q If we can turn to the next slide, please. Does this slide
11 reflect the various sources of data that you relied on?

12 A It does. There is a lot of data sets listed here. I have
13 grouped them into three categories. The first is party data,
14 so data produced either by Kroger or by Albertsons as part of
15 this litigation.

16 The second two categories are categories that don't
17 pertain to information specific to this litigation. The middle
18 category, for example, is government data, data produced by the
19 United States Government pertaining to labor markets. Then the
20 final category is data that are collected by third-party firms
21 that also pertain to labor markets.

22 Q Under "government data," there is a reference to DOL O-NET
23 data in the second line. Can you explain what O-NET data is?

24 A Yes. O-NET data is a collection maintained by the
25 Department of Labor. It is called the Occupational Information

J. McCrary - D

1 Network. What it does is it looks at each occupation and
2 describes the types of tasks that a person would engage with if
3 they had that occupation and the kinds of skills that they have
4 and categorizes occupations also in terms of what other
5 occupations you might have the skills to move into if you were
6 in a given occupation.

7 Q Does O-NET help job seekers find relevant jobs based on
8 their skills?

9 A Well, that's how the documentation actually explicitly
10 describe the O-NET data, as a way of providing career advice.

11 Q Now, why did you look at multiple sources of data?

12 A Well, one of the things we like to try to do is
13 triangulate in economics, which is to say if you have, for
14 example, two different data sets, and they both point towards
15 the same conclusion, that strengthens your confidence that
16 conclusion is the correct one.

17 Q In addition to data, do you also rely on academic research
18 and articles in reaching your opinions?

19 A I did.

20 Q Approximately how many?

21 A Roughly 60.

22 Q If we can turn to the next slide, I would like to start
23 with your first opinion as it relates to market definition.
24 Can you please tell the Court what your opinion is on market
25 definition.

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1 A Yes. My opinion on market definition is that union
2 grocery labor in CBA areas is not a valid antitrust market. I
3 said that as a product market aspect looking at union grocery
4 and a geographic aspect.

5 Q If we could turn to the next slide, please.

6 Now, we heard about market definition in a product
7 market. Can you explain how economists define an antitrust
8 labor market?

9 A Yes. It is the same idea, but it works slightly
10 differently because it is different context. In the product
11 market context, we would talk about a consumer and their
12 preferences, so if the given product wasn't available, what
13 other product would they substitute to. That's a question of
14 which things do they like.

15 If you are looking at a labor market, the right idea
16 there is, instead, about the workers' skills. So if the
17 instant job were not available, what other job would you expect
18 for the person to substitute to, so alternatives in the labor
19 market, if you will, as opposed to alternatives in the product
20 market.

21 Q Do you consider whether jobs are reasonably
22 interchangeable?

23 A Yes. That's exactly the idea, which is try to understand,
24 if the one job was not available for whatever reason, what
25 other job would be the kind of thing you would think the worker

J. McCrary - D

1 would substitute to. We would describe that as reasonable
2 interchangeability as well.

3 Q Why are the set of jobs that are reasonably
4 interchangeable important to defining a labor market?

5 A Well, it helps you to figure out the set of alternative
6 employers, and that's really the main idea in trying to
7 understand what you have as an option. If you were a worker,
8 if you think of options, that's the thing that actually gives
9 the competitive constraint, really, to the firm to offer up a
10 competitive wage, which is when you have lots of options, you
11 would exercise those unless they paid you that competitive
12 wage.

13 Q How do you determine which jobs are reasonably
14 interchangeable for a particular worker?

15 A Well, the starting point for which jobs are reasonably
16 interchangeable is to identify the skills that the worker has.
17 That's a natural way to think of it, because those are the
18 things that an alternative employer would be demanding, what
19 kind of skills does the person bring to the table.

20 Q When you're defining a labor market, do you have to
21 include every job that a worker might be able to do?

22 A No. I don't think you would necessarily take an extreme
23 position like every job. But if there were major job flows,
24 those are the kinds of things you definitely would want to
25 include in the labor market.

J. McCrary - D

1 Q Do you also consider where the jobs are located?

2 A Yes. There are some types of jobs, such as those as
3 Kroger and Albertsons, where the expectation would be that a
4 person wouldn't commute particularly a long distance, so you
5 would want to think in terms of what your applicant pool would
6 look like in terms of where they lived, so some near distance
7 with respect to the store, for example.

8 Q Do you also consider wages that are offered by potential
9 employers?

10 A Yes. That's the competitive constraint that I was
11 mentioning a moment ago. If you think of options in the labor
12 market, it's clearly right. But if you're trying to understand
13 those competitive constraints -- were a firm to lower wages,
14 for example, you would expect workers to take advantage of
15 better options that they might have and that pertains
16 specifically to the prices you see in the labor market.

17 Q So as a matter of economics, what happens if an employer
18 cannot attract or retain its employees?

19 A Well, if you can't hold on to the people you have got, and
20 if you can't attract new people to join you, it is very hard to
21 run your business successfully. And it is bad for business to
22 have problems with either one of those.

23 Q Now, I would like to discuss the specific approach you
24 took to evaluate plaintiffs' union grocery labor market in a
25 CBA area. Turn to the next slide. Does this slide reflect

J. McCrary - D

1 your approach and your conclusions?

2 A It does.

3 Q Did you evaluate the two components separately?

4 A I did.

5 Q Can you explain your approach as it relates to union
6 grocery?

7 A Yes. So my analysis started there with an evaluation of
8 the jobs that Kroger and Albertsons employees can and do
9 substitute between.

10 Q What did you find?

11 A What I find is that Kroger and Albertsons are embedded in
12 a much broader labor market. Employees can and frequently do
13 switch to alternative employers, and the alternative employers
14 that they switch to are frequently outside of union grocery.
15 They are not necessarily unionized employers, and they are not
16 necessarily grocery.

17 Q What approach did you take to determine whether CBA areas
18 is a valid geographic?

19 A I started really with the question of geographic market,
20 and it's what I described to you a moment ago. It's the area
21 where you would expect for somebody to be considering
22 alternative employment options. And what I did is I compared
23 the actual CBA areas that the plaintiffs have proposed to see
24 if they fit the bill.

25 Q And what did you find?

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1 A I find that CBA areas don't really describe where workers
2 are looking for employment. It just isn't -- it is not really
3 measuring that concept at all. If you look at CBA areas,
4 sometimes they are large -- too large, really, to be the kind
5 of distance that a worker would be expected to commute.
6 Sometimes they are too small. And sometimes they just have
7 internal contradictions.

8 Q Okay. Let's start with your first conclusion, that the
9 market is broader than union grocery labor. Turn to the next
10 slide, please.

11 You testified that your approach was to evaluate the
12 jobs that Kroger and Albertsons workers could substitute to.
13 How did you do this analysis?

14 A Well, I framed my work here around three different
15 questions I was trying to answer. The first is: Who is the
16 typical worker at a Kroger and Albertsons and what kind of
17 skills do they have? The second question was: What kind of
18 aspects of their decision-making would really motivate them in
19 particular? What aspect of compensation would motivate their
20 employment decisions? Then the third is whether or not workers
21 at Kroger and Albertsons have credible alternatives,
22 alternatives where the company has to pay them a competitive
23 wage to hold on to them.

24 Q If we can turn to the next slide, please. Let's take each
25 of those questions in turn. We will start with the skills of a

J. McCrary - D

1 typical worker. Why is it important to identify the skills
2 that these workers have?

3 A Well, skills is what an alternative employer would be
4 demanding in the labor market. So we start by trying to
5 identify a worker's skills, because that tells us about the set
6 of alternatives that they probably have available to them in a
7 broader labor market.

8 Q What did you find with respect to the skills of a Kroger
9 and Albertsons worker?

10 A My main conclusion here is that workers at Kroger and
11 Albertsons have general skills. So they have skills that would
12 be in demand at a wide variety of alternative employers and a
13 broader labor market.

14 Q And economics? Is there a distinction between general
15 skills and specialized skills?

16 A Yes. There is an idea of specialized skills, such as
17 those that you might acquire through education or perhaps
18 on-the-job training, something like that. General skills is
19 more of the idea of a type of skill that a person might have
20 with no particular educational requirement or no particular
21 training being required.

22 Q Can you give us a few examples of what you mean by
23 "general skills"?

24 A Sure. An example would be punctuality, the ability to
25 show up on time for your shift. Reliability, that you show up

J. McCrary - D

1 each day you're supposed to. Customer service. Perhaps, also,
2 the ability to work well with other people and to communicate
3 effectively, skills like that.

4 Q I would like to now turn to what your data shows. If we
5 can turn to the next slide, please.

6 What are the characteristics of a typical worker at
7 Kroger and Albertsons?

8 A Well, the typical person at a Kroger or an Albertsons,
9 it's their first job. So if you look in the data, about
10 70 percent of workers at the firms, this is the first position
11 they've had.

12 Q And what does that tell you as an economist?

13 A Well, it tells you that this is an entry-level position.
14 It tells you that immediately there's lots of different
15 industries where the person could have started off their
16 career. They chose to start it at a grocery store, but they
17 could have gone to any number of different potential employers.

18 Q If we can turn to the next slide, please. What does the
19 data tell you about the level of education required to work at
20 a Kroger or an Albertsons store?

21 A Well, if you look in job postings data for Kroger and for
22 Albertsons, for the majority and maybe even the vast majority
23 of positions, there is no educational requirement specified.
24 For example, if you look in Kroger's job posting data, for
25 86 percent of those postings, there is no educational

J. McCrary - D

1 requirement specified; and for Albertsons, the corresponding
2 figure is 97 percent. So for 97 percent of job postings,
3 there's no educational requirement specified.

4 Q So for the small percentages that do have an education
5 requirement, what is that requirement?

6 A When an educational requirement is mentioned, it is high
7 school degree or a GED.

8 Q What does this data tell you as an economist?

9 A It confirms what you would expect on the basis of the bulk
10 of workers starting off their career in the position, which is
11 to say it's a general skills type position, not a specialized
12 skill.

13 Q If we can turn to the next slide, please.

14 Let's talk about the actual positions that are
15 available at a Kroger or an Albertsons store. What data did
16 you look at to determine the most common positions that workers
17 have at those stores?

18 A Data on job titles. So if you look at the underlying data
19 for Kroger and for Albertsons, you see a list of job titles for
20 different employees. And if you look at those job titles, it
21 is very clear that the bulk of people in the grocery store are
22 what you might expect. Just from being alive in the world,
23 when you walk into a grocery store, who do you expect to
24 encounter? It is a cashier or a clerk. That's 70 percent of
25 job titles for Kroger and 70 percent of job titles for

J. McCrary - D

1 Albertsons.

2 Q And what does this tell you as an economist?

3 A This confirms again the perspective that workers at Kroger
4 and Albertsons have general skills.

5 Q Do the majority of Albertsons and Kroger workers have
6 specialized skills?

7 A No. So we -- for example, we have heard some testimony
8 pertaining to meat cutters. That might fit the bill as to a
9 position that has some degree of specialization to it. If you
10 look at the available data, that's perhaps 1 or 2 percent of
11 Kroger and Albertsons, respectively.

12 Q Now turn to the next slide, please.

13 Are most Kroger and Albertsons workers hourly
14 workers?

15 A Yes. The vast majority. In the underlying data, about
16 96 percent of employees at Kroger and Albertsons are hourly
17 workers.

18 Q So would these workers be paid an hourly wage versus, for
19 example, a salary?

20 A That's correct. An hourly worker would receive an hourly
21 wage.

22 Q Next slide, please.

23 Professor McCrary, can you summarize what the data
24 tells you about the typical worker at Kroger and Albertsons and
25 the types of skills that they have.

J. McCrary - D

1 A Yes. So the typical worker at a Kroger or an Albertsons
2 is a person who has general skills, and those are skills which
3 could be used across a wide variety of alternative employers
4 and different industries.

5 Q Okay. Let's talk about. Turn to the next slide, please.
6 Let's talk about your second inquiry. Did you also analyze
7 what motivates the typical Kroger and Albertsons workers in
8 employment decisions?

9 MR. DICKINSON: Your Honor, I object to this line of
10 questioning here. This is undisclosed expert opinion. Nowhere
11 in Professor McCrary's report did he talk about the motivation
12 of workers' decisions -- employment decisions. He did not
13 conduct any surveys or expert analyses. He interviewed no
14 workers. In fact, in the deposition, he said his analysis was
15 agnostic to motivations, and so this is not something disclosed
16 to plaintiffs.

17 MS. BARRINGTON: Your Honor, Professor McCrary
18 discusses the motivations of the workers in his expert report
19 at DX2496 paragraphs 120 to 123. This is properly within the
20 scope of his expert report. I'm happy to read the relevant
21 pages.

22 MR. DICKINSON: I don't think that's correct,
23 Your Honor. I searched this morning. The word "motivate"
24 doesn't appear in his report. He is talking about where people
25 come from and where they go, but not the workers' motivations

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1 for why they are coming or why they are going. So this
2 analysis about motivations is not something that's contained in
3 his report.

4 MS. BARRINGTON: Your Honor, Professor McCrary is
5 going to talk about how wages are what motivates these
6 employment decisions, and that's expressly set forth in his
7 report.

8 THE COURT: Well, then this slide is misleading,
9 because it seems to say "decisions." If it is about wages --

10 MS. BARRINGTON: I apologize, Your Honor.

11 THE COURT: So if it is about wages, then it is fine.
12 But if it is about motivation, as the objection has been
13 raised, it is sustained.

14 MS. BARRINGTON: I will reframe the questions,
15 Your Honor.

16 THE COURT: All right.

17 BY MS. BARRINGTON:

18 Q Can you move to the next slide, please.

19 Professor McCrary, did you analyze the tenure of
20 employees that work at Kroger and Albertsons?

21 A Yes.

22 Q And why did you do that?

23 A Well, if you're trying to understand the employment
24 decision of a person in the labor market, there are many
25 different aspects of compensation. There are wages. There is

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1 also benefits and things along those lines. But the record is
2 consistent with most of the benefits that we've heard of as
3 being something tethered to seniority. So tenure is actually
4 quite important in terms of understanding what fraction of
5 workers would be eligible to receive some of those benefits,
6 whereas wages themselves are something that almost all workers
7 at a Kroger or an Albertsons would receive.

8 Q So if we take a look at this slide here, can you describe
9 for the Court what the data shows.

10 A Yes. So this is a cohort that was hired at a Kroger or an
11 Albertsons beginning in January 2019. And if you move from
12 left to right, it's tracking what fraction of the workforce is
13 still with the firm at the different time horizons -- three
14 months, six months, one year.

15 Q So what happens three months after they've joined Kroger
16 or Albertsons?

17 A For Kroger, 41 percent of workers who start in
18 January 2019 have already left the firm. If you look for
19 Albertsons, 38 percent have left after three months.

20 Q What about six months later?

21 A For both Kroger and for Albertsons, it's a majority. So
22 if you look at Kroger, 58 percent of workers will have left
23 within six months. If you look at Albertsons, 56 percent will
24 have left within six months.

25 Q And what about after one year?

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1 A After one year, the bulk of the people who are hired will
2 have left. So if you look at Kroger, 72 percent of workers
3 will have left at that time horizon. And if you look at
4 Albertsons, 71 percent will have left within a year.

5 Q So why is the fact that the majority of employees leave
6 Kroger and Albertsons within the first six months relevant to
7 your conclusions?

8 A Well, I described before that many of the benefits that
9 you've heard discussion of are benefits that attach at
10 different seniority points, and many workers at Kroger and
11 Albertsons -- in fact, the majority -- will leave before any of
12 those benefits will actually attach to them.

13 Q So from an economics perspective, if the vast majority of
14 workers don't receive union benefits, then what -- why are they
15 leaving?

16 MR. DICKINSON: Objection, Your Honor. Again, this
17 is getting to the motivation of why workers are leaving. There
18 has -- nothing in this report talks about why they leave. It
19 is just talking about -- in the paragraph counsel cited, it is
20 talking about where they are coming and where they are going,
21 but not the reasons why.

22 THE COURT: Sustained.

23 MS. BARRINGTON: I'll rephrase, Your Honor.

24 Thank you.

25

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1 BY MS. BARRINGTON:

2 Q Professor McCrary, from an economics perspective, are
3 wages important to your analysis?

4 A Yes.

5 Q Does that mean that other union benefits are irrelevant?

6 A No. I'm sure it's right that there may be senior members
7 of a workforce who place value on aspects of benefits that they
8 receive, for example, a pension benefit. At the same time, if
9 you are asking the question that I'm trying to answer here, it
10 is market definition. For market definition, what I'm trying
11 to understand is whether it would be true that the employer
12 would be in a position, for example, to do something like
13 reduce wages, and the answer is that they wouldn't be able to
14 because of the competitive constraints that they face and the
15 need that the tenure analysis shows for them to hire, just to
16 make sure the store is staffed.

17 Q Now, did you also look at job postings data to determine
18 whether or not jobs that are actually advertised for Kroger or
19 Albertsons mention the word "union"?

20 A Yes.

21 Q And what did you find? If we can turn to the next slide,
22 please.

23 A Yes. So the overwhelming majority of job postings don't
24 say anything about union. So for Kroger and Albertsons, my
25 estimate is that 96 percent of job postings don't have any

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1 mention to whether the position is unionized.

2 Q What do you conclude from that, Professor McCrary?

3 A Well, you conclude that if the advertising for the
4 position doesn't mention whether the position is unionized,
5 that that's not an important aspect of how to attract
6 applicants.

7 Q So we have talked about your tenure analysis and we talked
8 about the job postings that don't advertise the positions as
9 being union. What do you conclude from this data?

10 A Well, what you conclude from that is that if you are
11 looking at how to approach the question of how a firm holds on
12 to workers, it would really be focused on an investigation of
13 wages. So in particular that's what the tenure analysis shows
14 you.

15 With respect to the union description that we are
16 looking at right now, this is about a slightly different
17 question, which is whether "union" is an important modifier for
18 the plaintiffs' claimed product market aspect of the labor
19 market, "union grocery." It seems as though that's not what
20 attracts people to apply for a position at Kroger or
21 Albertsons.

22 Q Did you consider whether Kroger and Albertsons' wages are
23 comparable to its competitors'?

24 A I did.

25 Q We can turn to the next slide, please. What did you find?

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1 A The evidence that I have seen is consistent with Kroger
2 and Albertsons facing competition in the labor market for
3 workers from a wide variety of firms that are outside of union
4 grocery. Some firms would be not unionized terms and other
5 firms would not be in grocery.

6 Q Did you analyze whether there was a difference in wages
7 for Kroger and Albertsons workers at union and non-union
8 stores?

9 A Yes.

10 Q Turn to the next slide, please.

11 What does your data show?

12 A If you look at a Kroger unionized store and a Kroger
13 non-unionized store, there is no difference in terms of the
14 wages they pay. If you do the same kind of investigation for
15 Albertsons, it's the same conclusion, which is to say that the
16 wages are the same between unionized and non-unionized stores.

17 Q So do jobs at union grocery stores have distinct pricing?

18 A No.

19 Q Can you summarize the evidence that you looked up to
20 determine -- let me rephrase that. What does the evidence tell
21 you about the considerations -- what does your evidence show?

22 A The evidence that I have summarized so far shows if you
23 look at the kinds of skills that workers possess, they possess
24 general skills. Those skills are in demand from a wide variety
25 of different potential employers, and the wages that you see

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1 are consistent with that proposition. If you look as well,
2 there is nothing special to "union" in terms of how to attract
3 people to apply for positions, and all of that paints a broader
4 picture of there being a broader labor market that both Kroger
5 and Albertsons were embedded in?

6 Q Move over two slides. About your third question, did you
7 analyze whether Kroger and Albertsons workers have credible
8 alternatives?

9 A Yes.

10 Q What did you do to analyze this question?

11 A Well, I started again with the question of what kinds of
12 skills do workers at Kroger and Albertsons have, and then what
13 would be the ability to deploy that kind of skill to an
14 alternative employer. That would constitute the side of
15 credible alternatives that workers at Kroger and Albertsons
16 have.

17 Q Now, if we can turn to the next slide.

18 What did you find?

19 A Well, if you look at general skills that a worker at
20 Kroger and Albertsons possesses, those are relevant because
21 those are transferable. So in particular, if you think of a
22 person who is working in a given occupation that is about a
23 general skill, they can switch and work in a different
24 occupation; or if they wanted to continue on in the same
25 occupation, they could switch to a different industry. For

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1 example, if you look at a cashier, which I described before as
2 a common occupation at Kroger and Albertsons, the cashier could
3 move on to a different occupation, such as a sales
4 representative; or if you look at the cashier who wanted to
5 remain a cashier, they could move on to work on outside of
6 grocery. For example, they could become a cashier in a
7 clothing store.

8 Q Next slide, please. Is this an example of what the data
9 shows that a cashier's skill could be applied in other
10 industries?

11 A Yes.

12 Q And what does the data tell you about the industries that
13 cashiers can work in?

14 A Well, these are data drawn from the Bureau of Labor
15 Statistics. So the U.S. Government counts workers by
16 occupation by industry, and you can look at cashiers and
17 determine in what industries do they work. So in addition to
18 food and beverage -- that's the industry that U.S. Government
19 places Kroger and Albertsons in -- you can be a cashier in a
20 liquor store or a gas station or a clothing retailer, anywhere
21 where there is a cash register really.

22 Q So in the BLS data you referenced, what percentage of
23 cashiers are employed in the food and beverage retail industry?

24 A That's about 25 percent.

25 Q So what percentage of cashiers are employed outside the

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1 food and beverage retail industry?

2 A That would be the balance of that, so 75 percent of
3 cashiers would work outside of food and beverage.

4 Q Did you also analyze what percentage of cashiers are
5 likely employed at Kroger or at Albertsons?

6 A Yes.

7 Q What percentage of cashiers are employed by Kroger or
8 Albertsons?

9 A It's about 5 percent. So of all the cashiers in the
10 country, about 5 percent might work for either of those two
11 firms.

12 Q Does that mean that 95 percent of cashiers work as
13 cashiers for other employers?

14 A That's correct.

15 Q Is that true for other common positions that you would
16 find at a Kroger or Albertsons store?

17 A Yes. The detail on that is contained in my expert report,
18 so I didn't put together demonstratives for that. But I did
19 that same analysis in my work for this case, and the conclusion
20 holds broadly.

21 Q What does this tell you about the employment options for
22 workers at Kroger and Albertsons?

23 A It tells you that they have many of them. That is to say,
24 in particular, there are lots of alternative employers that
25 demand the same set of skills that Kroger and Albertsons

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1 workers have. So what that tells you is that the proper labor
2 market is clearly broader than union grocery.

3 Q So we have talked about how cashiers can work as cashiers
4 in other industries. But cashiers also switch occupations?

5 A Yes.

6 Q Turn to the next slide, please.

7 What are some of the common occupations that cashiers
8 come from and move to?

9 A Yes. So if you look to the data on prior occupations, the
10 five most common ones are displayed on the demonstrative on the
11 left. The data also allows you to examine the most common
12 subsequent occupations from a cashier. And it is all
13 consistent with a broader picture of people who are cashiers
14 having general skills. For example, people who are currently
15 cashiers might have previously been an administrative assistant
16 or perhaps a server in a restaurant. And if you look at
17 subsequent occupations, you would see things like customer
18 service representative, a retail salesperson or perhaps an
19 office clerk.

20 Q Is this also true for other common positions at Kroger and
21 Albertsons?

22 A Yes. This is the same, really, as my response to the
23 prior question, which is I didn't prepare the demonstratives
24 indicating this, but details on exactly that question are
25 addressed in my expert report.

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1 Q Now, we talked earlier about the typical worker, and you
2 shared that many workers at Kroger and Albertsons are
3 first-time workers. If we can turn to the next slide.

4 Can you remind us what that data shows?

5 A Yes. So previously I described that 70 percent of workers
6 at a Kroger or an Albertsons, it's their first job, and this
7 pie chart is showing you the 70 percent figure and reminding
8 you the balance of that is 30 percent, and it's showing you an
9 array of different prior employers that workers at a Kroger and
10 Albertsons have for those who actually do have prior work.

11 Q Does this suggest that many Kroger and Albertsons workers
12 are just starting their careers?

13 A Yes.

14 Q What does the academic literature tell you about the
15 tendency of these types of employees to switch jobs?

16 A The typical estimate in economics is that in the first
17 decade of the person's career, they would switch jobs seven
18 times.

19 Q What does this tell you about the skills that these
20 workers bring to Kroger and Albertsons?

21 A It's again that's are general skills positions.

22 Q I would like to take a closer look at the 30 percent of
23 employees that do have prior work experience before they join
24 Kroger or Albertsons. Turn to the next slide.

25 What does the data tell you about where they come

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1 from?

2 A So what I did, I looked at the top 20 most common previous
3 employers, and I rate that here on the demonstrative. What you
4 see is that the prior employers for workers at a Kroger or an
5 Albertsons for those that do have prior employment experience
6 are outside of union grocery in many instances. So if you look
7 on the list, you see, for example, Home Depot, Macy's, Lowe's,
8 places like that that you might think of perhaps as retail, but
9 you wouldn't necessarily think of them as grocery, because they
10 are not.

11 If you think of the list of employers, it is also
12 true that many of them are not unionized. So that is to say
13 the previous employers are indicative of workers having
14 alternative employers that they could have that are outside of
15 union grocery.

16 Q Now, if we can turn to the next slide. Did you also
17 analyze where workers go when they leave Kroger and Albertsons?

18 A Yes. This is the subsequent employers' list. To a
19 certain extent, you see overlap. For example, Home Depot shows
20 up again; so does Lowe's. UPS shows up. In other words, the
21 subsequent employer list is similar to the previous employer
22 list, and many of the alternative employers are outside of
23 union grocery.

24 Q So is this data consistent with "union grocery" being a
25 valid antitrust labor market?

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1 A No.

2 Q You explained that workers can switch between industries
3 and occupations. Is that reflected in the substitution data
4 for Kroger and Albertsons workers?

5 A Yes. So in particular substitution to alternative
6 employers that are outside of grocery is consistent with
7 substitution to a different industry.

8 Q Did you also conduct an analysis to determine whether
9 workers changed jobs from Kroger to Albertsons and vice versa?

10 A Yes.

11 Q And why did you conduct this analysis?

12 A Well, plaintiffs claimed "labor market is specific to
13 "union grocery," and if that were true, then you would expect a
14 lot of job switching to be between Kroger and Albertsons, and
15 so I was curious to see if that is what the data showed.

16 Q What did the data show?

17 A The data shows, if anything, the opposition of that
18 prediction. It shows in general there is very little switching
19 between Kroger and Albertsons.

20 Q Turn to the next slide, please. Can you walk us through
21 what this data shows.

22 A Yes. So there are three different data sets that are
23 being drawn upon here. The first is Albertsons' prior
24 employment data. If you look at that, about 1.9 percent of
25 employees at Albertsons have listed Kroger as a prior employer.

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1 The second data set is Kroger's prior employer data. That's
2 saying that 2.5 percent of people in the data list Albertsons
3 as a prior employer. Then the third data set says,
4 "Lightcast," which is a third-party data provider. For the
5 Lightcast data, Kroger and Albertsons have a prior employer of
6 Albertsons or Kroger less than 1 percent of the time.

7 Q Next slide, please.

8 Professor McCrary, did you also look at data about
9 top subsequent employers of workers at Kroger and Albertsons?

10 A I did.

11 Q And what does that data show?

12 A That data shows what you might have expected based on
13 looking at the prior employers, which is subsequent employers
14 for people who are currently working at Kroger or Albertsons is
15 only very rarely Albertsons or Kroger, respectively. The
16 estimate is 1.3 percent of the time.

17 Q Is this data consistent with "union grocery" being a
18 distinct market?

19 A No. It is roughly opposite what you would expect if that
20 were true.

21 Q Turn to the next slide.

22 Professor McCrary, do Kroger and Albertsons workers
23 have credible alternatives in the market?

24 A Yes. The analysis that I presented so far is very
25 consistent with the idea that workers at Kroger and Albertsons

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1 have many credible alternatives in the market and that they can
2 and do substitute to alternative employers that are broader
3 than just union grocery.

4 Q Based on your analysis, what do you conclude regarding
5 plaintiffs' proposed grocery union labor market?

6 A It is too narrow.

7 Q Did plaintiffs perform any economic tests for union
8 grocery labor?

9 A No, they did not.

10 Q Did they perform a hypothetical monopolist test?

11 A No, they did not.

12 Q Did they a SSNIP-T test?

13 A No, they did not.

14 Q Did you apply an economic test?

15 A I did.

16 Q Turn to the next slide, please.

17 What is your conclusion based on your test?

18 A My conclusion is that the labor market is broader than
19 "union grocery," and in particular that the claimed union
20 grocery market fails the hypothetical monopolist test.

21 Q I would like to turn to the geographic market definition,
22 which is the second component of the market definition
23 analysis. What geographic market do the plaintiffs allege
24 here?

25 A CBA areas is that what they claim is the geographic

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1 market.

2 Q And what do you understand CBA areas to cover?

3 A Well, it differs from CBA to CBA, but all of them are
4 administrative areas, areas for the collective bargaining
5 agreement.

6 Q Next slide, please. Why is the geographic market an
7 important inquiry when defining a relevant antitrust market?

8 A Well, it's the -- it's the area over which you would
9 expect for a person to consider alternatives to their instant
10 job. In particular, it would be the kind of thing where, if
11 you are looking to understand the set of alternative employers,
12 you don't want to have the area that you're looking at be too
13 narrow, because you might inappropriately exclude somebody who
14 was a viable alternative for the worker, and you also don't
15 want for it to be too broad, because it could then include
16 areas where the person just wouldn't be likely to substitute
17 their work.

18 Q Can you describe how economists determine whether the
19 geographic market is properly defined in a labor case?

20 A Well, we would look to see whether it corresponded to
21 basic concept of the kind of commuting distance you would
22 expect for a worker to be willing to consider.

23 Q Do CBA areas capture how far workers would reasonably
24 travel to find alternative employment?

25 A No. They don't seem to have anything to do with that

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1 concept.

2 Q Why is that?

3 A As I said before, they're really administrative areas more
4 than anything else. The admins. I've reviewed is consistent
5 with CBA areas being sometimes implausibly large, sometimes
6 being implausibly small, and sometimes being internally
7 inconsistent, as I mentioned.

8 Q I would like to take a look at a few examples, if we
9 could. Next slide, please.

10 Can you describe what this slide shows?

11 A This is showing one of the CBA areas that have been
12 proposed as a geographic market. This is Southern California.
13 In particular, this is showing you the three cities that are
14 included in here. There are many others, but three of them are
15 San Diego, LA, and Bakersfield.

16 Q Do plaintiffs assume in this CBA area that a worker would
17 consider jobs between Bakersfield and San Diego as a reasonable
18 alternative?

19 A That would be what the plaintiffs appear to be proposing,
20 yes.

21 Q Does the CBA area reflect the alternative areas that
22 workers would consider for employment from an economics
23 perspective?

24 A No. This is not a reasonable approach from an economic
25 perspective. If you've ever driven through Southern

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1 California, you realize immediately that getting from LA County
2 to Orange County can be a slog. It is just too broad of an
3 area.

4 Q Next slide, please.

5 What does this map show?

6 A This is a map looking at two suburbs in between Denver and
7 Boulder in Colorado, Longmont and Loveland, and this is an
8 example of CBA areas that are too small. If you look at the
9 distances in question, it's about a 20-minute drive, and it
10 could be even less if you look at a particular instance.

11 But if you look at the set of alternative employers
12 that a worker would consider, you could be a worker in an area
13 that's covered by the Longmont CBA, and you could have an
14 alternative employer that you would be willing to consider in
15 Loveland. So this is an example of CBAs that are simply too
16 small.

17 Q Does this CBA area reflect the alternative areas that
18 workers would consider for employment?

19 A No, I don't believe so.

20 Q If we can turn to the next slide, please.

21 Can you describe what this map shows.

22 A Yes. This is a map that is looking at Boulder, Colorado,
23 specifically, and it's highlighting three stores that are in
24 Boulder, stores 1, 2, and 3 as I have labeled them here. This
25 is probably a designation that might fall under the heading of

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1 historical accident. Stores 1 and 3 are included in the
2 Boulder CBA. But for reasons I don't fully understand, store 2
3 is actually in the Denver CBA, not the Boulder CBA.

4 Q Do these CBA areas reflect the CBA areas that workers
5 would consider for employment?

6 A No, I don't believe so.

7 Q Now, is it your opinion, Professor McCrary, that CBA areas
8 are not a valid geographic market?

9 A That's correct. That is my opinion.

10 Q Next slide, please.

11 Professor McCrary, what is your overall conclusion as
12 it relates to market definition?

13 A It's the union grocery labor and CBA areas is not a valid
14 antitrust market.

15 Q Now, let's talk about your second opinion. Turn to the
16 next slide, please.

17 Can you remind the Court what your second opinion is.

18 A Yes. It's in any properly defined labor market, market
19 concentration is very low and not the high levels that Dr. Hill
20 points to.

21 Q All right. So you testified earlier that Dr. Hill had
22 calculated Kroger and Albertsons employee shares in a union
23 grocery market in CBA areas, and you found that market is
24 concentrated; is that right?

25 A That is what Dr. Hill concluded, yes.

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1 Q Does Dr. Hill's calculation assume that union grocery
2 labor in CBA areas is a valid antitrust market?

3 A He is making that assumption, yes.

4 Q We just looked at a number of different employers that
5 workers at Kroger and Albertsons switched to that are either
6 non-union or non-grocery. Does Dr. Hill exclude these
7 employers from his market concentration analysis?

8 A Yes. He excludes all or virtually all of the alternative
9 employers that I was just describing.

10 Q Now, did you calculate Dr. Hill's market shares if you
11 were to include just some of the employers that we discussed?

12 A I did.

13 Q And if we can turn to the next slide. Which employers did
14 you add to your calculation?

15 A Well, what I did, I started with adding in the obvious
16 ones. So I included, for example, employers that were not
17 unionized but were in grocery, and then I also included a set
18 of 13 additional employers. So I wasn't trying to include all
19 possible alternative employers as much as I was just trying to
20 see does Dr. Hill's conclusion hold up to the inclusion of a
21 few alternative employers.

22 Q What does your calculation show here?

23 A It shows that Dr. Hill's market shares fall dramatically,
24 and so they are not above the 30 percent figure that he points
25 to in any of these areas, either for Kroger CBA areas or for

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1 Albertsons CBA areas.

2 Q So you mentioned CBA areas. Does your concentration
3 analysis use CBA areas as the relevant geographic area?

4 A Well, what I'm doing is I'm using the analysis that
5 Dr. Hill put forth as a starting point to see whether it is
6 something that holds up to changes to his assumptions, but I'm
7 not really putting these forward as geographic markets of
8 anything. That's the opposition of my view.

9 Q Now, are these concentration -- does your calculation hold
10 whether you use the concentration thresholds under either the
11 2010 or 2023 merger guidelines?

12 A Yes. That's correct.

13 Q Now, does Dr. Hill exclude other occupations that grocery
14 workers could substitute to?

15 A Yes.

16 Q Turn to the next slide.

17 Did you also calculate Dr. Hill's market shares if
18 you were to include just some of the other occupations that
19 grocery workers could substitute to?

20 A Yes. This is an alternative exercise where I'm including,
21 not a set of alternative employers, but a set of alternative
22 occupations, but it points to the same conclusion, which is
23 that if you look at the areas -- the geographic areas that the
24 plaintiffs propose, you don't see anything like market
25 concentration in those areas.

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1 Q If we could turn to the next slide.

2 Professor McCrary, what is your opinion as it relates
3 to market concentration?

4 A My opinion is that in any properly defined labor market,
5 market concentration would be very low.

6 Q I would like to turn to your final, about the alleged
7 effects of the merger. Did you analyze the competitive effects
8 of the merger?

9 A I did.

10 Q Is that an important question in a merger case?

11 A I would probably go further than that. I would probably
12 say it is probably the question to be resolved.

13 Q What is your opinion on the likely effects of the proposed
14 merger?

15 A My view is that the merger is not likely to lead to harm
16 for workers.

17 Q Were you able to analyze data to come to this conclusion?

18 A Yes, I was.

19 Q Can you describe your analysis.

20 A Yes. So in many ways what I was thinking would be helpful
21 is to take note of the fact that there are areas of the
22 United States where we already have the post-merger world in
23 the sense that we have only a Kroger in that area or only an
24 Albertsons unionized store in that area, and we can compare
25 what you see in terms of wages at those kinds of locations

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1 versus locations where you have a Kroger unionized store and an
2 Albertsons unionized store. So that comparison tells us what
3 the effects of the proposed merger would be.

4 Q So areas where there is both a union Kroger store and a
5 union Albertsons store, is that what you call an "overlap area"
6 in your report?

7 A Yes, it is.

8 Q And in areas where there is just only one union Kroger
9 store or only one union Albertsons store, is that what you
10 refer to as a "non-overlap area"?

11 A That's correct.

12 Q If we can turn to the next slide.

13 Can you give me an example of an overlap area?

14 A Sure. If you look on the right-hand of the display, you
15 are looking at Chicago, Illinois. Chicago is an example of an
16 area where you have both unionized Albertsons stores as well as
17 unionized Kroger stores. In the display I have depicted
18 Albertsons as orange and Kroger as blue. You can see on the
19 right hand there is both orange and blue dots, so there are
20 both types of stores.

21 Q Can you give us an example of a non-overlap area?

22 A Sure. On the left-hand of the display is San Jose,
23 California. In San Jose there is only unionized Albertsons
24 stores. There is no unionized Kroger stores there.

25 Q The complaint in this case identifies four states that are

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1 at issue here with respect to the labor theory. That's
2 California, Washington, Colorado, and Oregon. How many overlap
3 areas are there in those four states?

4 A For those four states, there is 45 overlap areas.

5 Q And how many non-overlap areas are there?

6 A 39, if I'm not mistaken.

7 Q How about at a national level? How about overlap areas
8 and non-overlap areas are there nationwide?

9 A Nationwide those figures are about 75 and 300,
10 respectively.

11 Q How did you evaluate whether the overlap areas produces a
12 different result?

13 A Well, what I did is I used a tool that's common in
14 economics that's called regression, and that allows you to
15 isolate the particular effect that you're trying to determine.
16 In this case, that's the effect of overlap as compared to a
17 non-overlap condition.

18 Q If we can turn to the next slide, please.

19 What does your regression show?

20 A What it shows is that wages are the same in between areas
21 where there is overlap versus areas where there is not. So if
22 you look in the display, on the left hand, you have the results
23 for the nation as a whole. If you look on the right, you have
24 the four states that you were just describing. The top part
25 pertains to Albertsons; the bottom pertains to Kroger. But all

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1 four of those designations are inconsistent with the
2 proposition that the proposed merger would lead to a change in
3 wages. If anything, it is inconsistent with that and tells you
4 that wages would be expected to be the same in the post-merger
5 world.

6 Q So what does that tell you about the likely effects of the
7 proposed merger?

8 A It tells me that the proposed merger is unlikely to harm
9 workers.

10 Q Now, did you test other aspects of compensation?

11 A I did.

12 Q If we can turn to the next slide. What are the results of
13 that analysis?

14 A They are the same. So if you look at non-wages --

15 MR. DICKINSON: Your Honor, I object to this. This
16 is, again, undisclosed expert opinion. This slide is talking
17 about things that he read --

18 THE COURT: Put it down.

19 MR. DICKINSON: Thank you.

20 MS. BARRINGTON: May I address the Court?

21 THE COURT: I just didn't want the slide being
22 displayed while he is making his argument.

23 MR. DICKINSON: This is related to opinions expressed
24 in our expert rebuttal report. Professor McCrary did not
25 respond to that, and unlike Dr. Israel, he didn't put in any

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1 corrected reports or surrebuttal reports. He had an
2 opportunity to do so or ask the plaintiffs if that would
3 acceptable. And he did not. So in responding to responding
4 Professor Ashenfelter, he is talking about things that are
5 completely outside of his report.

6 MS. BARRINGTON: Your Honor, if I may. The FTC
7 expressly solicited Professor McCrary's opinions about this
8 exact issue at his deposition on July 18, 2024.

9 Mr. Dickinson asked him expressly if he could "please
10 continue and describe the opinions that you have formed about
11 Dr. Ashenfelter's report," and that's exactly what
12 Professor McCrary is testifying about today. The courts in the
13 Ninth Circuit that have held that an expert witness can testify
14 to opinions not disclosed in his expert report if those
15 opinions were solicited in deposition by the opposing party. I
16 have cites for that, Your Honor.

17 MR. DICKINSON: Your Honor, in his deposition he said
18 he has not had an opportunity to respond to Professor
19 Ashenfelter, and it was concerning whether he would. To this
20 date he has not. We have not seen any additional reports, any
21 additional analyses, corrected, surrebuttal, like Dr. Israel
22 did, or anything of the sort.

23 THE COURT: So citations will not help me right now.
24 Answer the question: Is that an accurate statement of what
25 happened; he has not submitted anything else in writing?

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1 MS. BARRINGTON: He has not submitted anything in
2 writing. Mr. Dickinson solicited his opinions at his
3 deposition.

4 THE COURT: I understand that.

5 MS. BARRINGTON: And Professor McCrary provided the
6 exact same opinions that he is going to offer to the Court
7 today. So there is no prejudice or surprise. They have known
8 about this since July 18, 2024.

9 MR. DICKINSON: I disagree, Your Honor. We do not
10 have any writing from Professor McCrary on these issues. It is
11 not -- it is prejudicial for us to try to take discovery of
12 something that we do not have an expert report on. So when I
13 asked if he had thoughts about Professor Ashenfelter, he said
14 he had not had an opportunity to respond to it. To this day,
15 he still hasn't in writing. That's the extent of our
16 objection, Your Honor. We don't have an expert report or
17 anything in writing that we had an opportunity to take
18 discovery of.

19 MS. BARRINGTON: Your Honor, they have his sworn
20 testimony from his deposition that was solicited by
21 Mr. Dickinson. I'm happy to read you the passage.

22 THE COURT: Read the passage.

23 MS. BARRINGTON: This is at page 170, line 14:

24 "QUESTION: What conclusions have you drawn in the
25 work that you have done since writing the report?"

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1 There is a long answer.

2 THE COURT: Read the answer.

3 MS. BARRINGTON: It's long.

4 "Well, I haven't had an opportunity to submit, for
5 example, a follow-up report, so I probably won't be able to
6 give you the same coherence that I would if I were able to
7 produce a written product summarizing that. But I would say
8 the following:

9 "No. 1, I formed opinions regarding the experts
10 reports submitted by Dr. Hill and Professor Ashenfelter
11 subsequent to the filing of my report. Probably the easiest
12 way to go about that is for you to introduce those as exhibit,
13 and then we can talk about those reactions. It is notable to
14 me in reaching the opinions that I hold today, upon review
15 Dr. Hill's reply report, he has a mere two paragraphs in his
16 report in which he purports to discuss aspects of my analysis,
17 and he does not actually in that work try to support,
18 substantially sustain anything like the conclusions that he put
19 forward in his first report, which themselves were uncritical
20 in their acceptance of plaintiffs' proposed labor market
21 definition. The work that Professor Ashenfelter has done offer
22 a different set of opinions regarding that. There is at least
23 more written than two paragraphs. But maybe I should pause
24 there before describing you those opinions."

25 Mr. Dickinson then asked: "Please continue. And you

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1 were saying that you're going to pause, but I would like you to
2 please continue and describe the opinions that you have formed
3 about Dr. Ashenfelter's report."

4 There is another very long answer, Your Honor. But
5 the crux of his testimony is on page 173 at lines 13: "If you
6 look at the alternative metrics for pay that he wants to talk
7 about, those alternative metrics are ones, which if you subject
8 them to any kind of analysis of competitive effects, they don't
9 support what he says is true, which is if he used his same
10 metrics but subject them to a competitive effects analysis,
11 they don't show any effect of the proposed merger on those
12 metrics; for example, hours, total pay, or average labor costs
13 that he puts forward."

14 Again, Your Honor, Mr. Dickinson expressly asked him
15 about his opinions in response Dr. Ashenfelter's rebuttal
16 report, and he is giving the exact same opinion that he gave in
17 his deposition in court today

18 THE COURT: As long as it is consistent, it is
19 overruled. It will be allowed.

20 MS. BARRINGTON: Thank you, Your Honor.

21 BY MS. BARRINGTON:

22 Q Are your overlap regression results -- let start back,
23 Professor McCrary, if I may.

24 My question to you was, did you also test other
25 aspects of compensation?

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1 A Yes.

2 Q And if we can turn to the slide here. What are the
3 results of that analysis?

4 A It's the same. That is to say, if you look at the
5 competitive effects analysis that I put forward before with
6 respect to wages, it shows the same result with respect to each
7 of the variables that Professor Ashenfelter describes. In
8 particular, if you look at each of the variables he looks at,
9 the conclusion is the proposed merger would not lead to a
10 worsening of those terms with respect to unionized employees.

11 Q Now, are your overlap regression results consistent with
12 your analysis of the alternatives that are available to Kroger
13 and Albertsons workers?

14 A You know, it all points in the same direction, really,
15 which is the reason why you would have an expectation, even
16 before you did something like the overlap regression that I did
17 as part of my work in this matter, is precisely because there
18 is many alternative employers in the labor market.

19 So if you look at the set of employers who would
20 demand the general skills that Kroger and Albertsons workers
21 have, you would expect that the proposed merger would be
22 something that wouldn't be likely to impact the options that
23 they have, because they have lots of possible alternative
24 employers. And the overlap regression really just underscores
25 that and says both situations in which you have a Kroger and

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1 Albertsons alone and a situation where you have a Kroger and an
2 Albertsons in the same area, they are both competing with all
3 of those alternative employers, and so they have to pay a
4 competitive wage.

5 Q Have you seen any evidence that Kroger and Albertsons are
6 competing with each other when they are negotiating collective
7 bargaining agreements?

8 A No.

9 Q Can you explain to the Court what you mean when you say
10 that Kroger and Albertsons do not compete when they're
11 negotiating for collective bargaining agreements?

12 A Well, there is a notion of, for example, bidding for
13 contracts where you might be in competition with one another,
14 but Kroger can't take a CBA contract away from Albertsons, and
15 Albertsons can't take a CBA contract away from Kroger. That's
16 just not how that works.

17 Q We have also heard about a union tactic where unions like
18 to leverage a strike or strike threat and send customers to
19 another union store. Does your regression test whether the
20 availability of that tactic impacts outcomes in CBA
21 negotiations?

22 A It does. The way that works is, if you look at overlap
23 areas, the tactic you just described of striking or threatening
24 to strike and to send workers to another unionized grocery,
25 that's an available tactic in an overlap area. But the overlap

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1 regression results that I just described to you, they tell you
2 that tactic's availability doesn't predict an outcome with
3 respect to the things that I talked about, like wages or
4 non-wage aspects of compensation.

5 Q We also heard testimony about unions that play Kroger and
6 Albertsons off of each other in negotiations, or "whipsaw
7 bargaining" as plaintiffs call it. Do you recall that
8 testimony?

9 A I do.

10 Q Along the same lines, do you recall a text exchange
11 between Kroger executives where they are expressing frustration
12 about CBA terms that they thought Albertsons had agreed to?

13 A I do.

14 Q What does your regression tell you about whether the
15 availability of the whipsaw tactic affects outcomes?

16 A It is the same thing, really, which is in areas with
17 overlap, something like a whipsaw tactic is available. If you
18 look at what the overlap regression tells you, it says the
19 availability of that tactic doesn't affect bottom-line outcome
20 of wages or non-wage terms.

21 Q Does your regression measure the effect of any other
22 tactic that relies on having both an independent Kroger and an
23 independent Albertsons?

24 A Yes. If you look at what the regression is doing, it's
25 comparing overlap areas to non-overlap areas. So anything that

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1 would be consistent with an independent Kroger and Albertsons
2 is exactly what that comparison is isolating.

3 Q So taken together, Professor McCrary, what are you able to
4 conclude from the data about whether the merger would likely
5 harm workers if the unions could no longer use these particular
6 tactics?

7 A My view is the data fully support the idea that those
8 tactics might go to something like the process, but that they
9 don't affect the bottom-line results with respect to wages or
10 non-wage outcomes.

11 Q If we can turn to the next slide.

12 Professor McCrary, what does this tell you about the
13 likely effects of the merger on union grocery labor?

14 A This tells me that the proposed merger is not likely to
15 harm workers.

16 MS. BARRINGTON: I pass the witness.

17 Thank you, Your Honor.

18 MR. DICKINSON: Good afternoon.

19 Your Honor, Charles Dickinson for the FTC. May I
20 proceed?

21 THE COURT: Yes.

22

23

24

25

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1

2

CROSS-EXAMINATION

3 BY MR. DICKINSON:

4 Q Good afternoon. How are you?

5 A I'm well. Thank you, Mr. Dickinson.

6 Q Good to see you again.

7 I want to ask you a few questions about your
8 background and experience, to start, okay?

9 A Sure.

10 Q So you have been an expert witness in something like 50
11 cases. Does that sound right?

12 A I'm not sure of the exact number, but I'm happy to take
13 you at your representation.

14 Q Okay. Ballpark? That sounds about right?

15 A Sure. I don't have any reason to think it is false.

16 Q And you have never worked on a merger addressing issues of
17 labor markets, correct?

18 A I think that's correct, yes.

19 Q In fact, this is the first time you have submitted expert
20 testimony in any antitrust merger case; is that right?

21 A Expert testimony, yes.

22 Q And even outside the merger context, you have never served
23 as an expert witness in a case involving supermarkets; is that
24 fair?

25 A Sitting right now, I don't remember one, no.

J. McCrary - X

1 Q Or divestitures?

2 A Sitting here right now, I don't recall.

3 Q And you have never reached an opinion as an expert witness
4 on what is a relevant labor market, correct?

5 A You know, I would have to go back and look. I think the
6 answer to your question is no. That is to say, that I have
7 reached opinions regarding that, but I would probably have to
8 go back to look at the antitrust labor cases that I've worked
9 on to see whether that's correct.

10 Q You don't recall any cases where you have ever reached an
11 opinion on what is a relevant market?

12 A Well, what I was trying to remember is whether my scope
13 was specifically market definition or whether my scope instead
14 in antitrust labor cases has been about what the claimed market
15 was. I just would have to go back to refresh my recollection.

16 Q Okay. And you're not offering this Court in this case
17 either any opinion on what is a relevant antitrust market,
18 correct?

19 A I think you're asking me a question that I could agree
20 with, which is -- I think you are asking me have I put forward
21 an affirmative opinion about exactly what is the outer boundary
22 of the labor market here. And if that's your question, the
23 answer is, no, I haven't done that. What I have done instead
24 is I have analyzed whether Dr. Hill's conclusion is correct,
25 and to reach that conclusion, I didn't need to actually do some

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1 like what you're asking me about.

2 Q That first part was my question; the last part was not. I
3 think I understood your answer that you have not, so thank you
4 for that.

5 Turning to your publications, you've written a lot of
6 academic papers. Is that fair to say?

7 A I guess it depends on who you ask. I would say I have
8 written a number that my mother is proud of, but maybe someone
9 thinks I should have written more.

10 Q You have never written publications involving supermarkets
11 at all; is that right?

12 A I don't think so.

13 Q Or retail stores in general; is that fair?

14 A I think that's also correct.

15 Q And you previously testified that the only publication
16 you've ever authored that had anything to do with unions was a
17 2007 paper about pattern and practice lawsuits against police
18 departments; is that right?

19 A I guess that's not exactly right either. I also have a
20 paper that was in the Review of Economics and Statistics in
21 2014 that had an explicit consideration of information on
22 unions from the current population survey. I don't know
23 whether that surveyed into the final published version, but it
24 is certainly there in the National Bureau of Economic Research
25 version.

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1 Q Okay. And I think you said -- you testified you teach
2 antitrust at Columbia Law School; is that fair?

3 A That's correct.

4 Q And you believe that antitrust has always been about
5 protecting not just consumers but also protecting workers,
6 correct?

7 A When I teach antitrust, I describe that antitrust is about
8 protecting the competitive process, and that's just as true for
9 buyers as it is for sellers. Workers is a good example of
10 that.

11 Q Professor McCrary, you submitted a comment to the federal
12 government on the 2023 merger guidelines about labor markets
13 and the subject of your testimony here; is that correct?

14 A That's correct. Yes.

15 Q And do you recall one way or the other whether in that
16 comment you expressed the view that a lessening of competition
17 between employers in a labor market may involve diminution of
18 bargaining leverage that workers can use to negotiate
19 compensation?

20 A I couldn't tell you offhand whether you are quoting it
21 correctly. I think I may have written something along those
22 lines.

23 Q Is it a true statement, Professor McCrary, that a
24 lessening of competition between employers in a labor market
25 may involve the diminution of bargaining leverage that workers

J. McCrary - X

1 could use to negotiate compensation?

2 A It could, although it's interesting, because the term
3 "bargaining leverage" has been used by so many different people
4 in so many different ways. I can tell you what I was thinking
5 in that context, which is about what are the person's outside
6 options are, which is different in the ways I have heard
7 "leverage" use be used here.

8 Q Okay. Let's move on to the specific opinions you offered
9 on market definition. Now, in your demonstrative today and
10 your overview of opinions, I think you started with the topic
11 of market definition; is that right?

12 A I think that's right. I'm happy to look to whatever slide
13 you want to point me too.

14 Q Well, you agreed you offered testimony on the topic of
15 market definition?

16 A Correct.

17 Q So I would like to start with some antitrust market
18 definition basics. You would agree that there can be more than
19 one relevant antitrust geographic market impacted by a merger,
20 right?

21 A Yes.

22 Q And similarly, you would agree that there can be more than
23 one relevant antitrust product market impacted by a merger too?

24 A That could be true as well, yes.

25 Q Nowhere in your report or your demonstrative or your

J. McCrary - X

1 direct examination today did you say to the Court that the
2 relevant market is X. Fair?

3 A That's correct. So what I did is exactly what I described
4 to you before, which is to see whether plaintiffs' claims are
5 consistent with the data that I reviewed.

6 Q Okay. And so let's turn to your analysis of plaintiffs'
7 market definition.

8 Now, you did not mention in the analysis that you did
9 the hypothetical monopolist test, but you are familiar with the
10 hypothetical monopolist test, right?

11 A Now you confused me, because I thought I did talk about
12 the hypothetical monopolist test.

13 Q Well, in terms of the analysis that you did on market
14 definition -- let me back up. Are you familiar with the
15 hypothetical monopolist test?

16 A Yes.

17 Q And that's sometimes referred to as the SSNIP test, but
18 those are essentially one and the same. Fair?

19 A Yeah. There are some subtle distinctions perhaps running
20 around there. But I would say the hypothetical monopolist test
21 is the framework that economists are using. Sometimes people
22 talk about a SSNIP as being a way to implement that.

23 Q In fact, in your view, the hypothetical monopolist test is
24 the leading way in which you would think of economists
25 approaching questions of market definition, right?

J. McCrary - X

1 A I don't think there is any controversy about the
2 hypothetical monopolist test being the framework that people
3 are using.

4 Q I just want to make sure I got that correct. My question
5 was whether you believe that the hypothetical monopolist test
6 is the leading way in which you would think of economists
7 approaching questions on market definition. Is that a fair
8 statement?

9 A That sounds about right, sure.

10 Q Okay. Again, at least as far as economists think of it,
11 the core of the question there around market definition is
12 really about substitution in response to price changes,
13 correct?

14 A That's correct. That's how the hypothetical monopolist
15 test framework works.

16 Q In the labor context -- price is a little weird. We
17 wouldn't think about price so much, but we would think about
18 some form of compensation. Fair?

19 A No. That's exactly why I described to you that the right
20 way to think about how to implement a hypothetical monopolist
21 test in this context is to focus on wages, because if you look
22 at the idea of what will be profitable for a hypothetical
23 monopolist, it certainly would have to be to maintain staff at
24 the store. You can't be profitable if you don't have enough
25 cashiers to take the customers' money. So from that

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1 perspective, it is exactly what I did, which is looking whether
2 it would be profitable for a combined firm to reduce wages, and
3 my answer to that question is a clear "no."

4 Q I was just trying to get the language down. Usually when
5 you talk about a hypothetical monopolist, you are talking about
6 price. I was saying that can be confusing in the labor
7 context. We will use "wages." Are you okay if we talk about
8 wages instead of price in the context of a hypothetical
9 monopolist test?

10 A Sure. That's what I was just trying to agree to.

11 Q Good. So the idea, again, of the hypothetical monopolist
12 or SSNIP test is contemplating a price change and asking the
13 question what kinds of substitution would you expect in the
14 wake of that price change; is that fair?

15 A Yes, that's the idea.

16 Q In this case you have put forward no evidence that is
17 predicated on a reduction in compensation, correct?

18 A I would disagree with that. I think that's exactly what I
19 just described to you. So, my clear prediction from an
20 economic perspective is it would be unprofitable for Kroger, as
21 a combined firm, to reduce wages, because if you look at the
22 evidence on tenure, within the year, they're going to have to
23 hire 70 percent of the headcount at the store just to stay in
24 place with respect to employees. So that's exactly what I have
25 done.

J. McCrary - X

1 Q Professor McCrary, I'm not asking you about your
2 prediction. I'm asking you about the evidence you used to put
3 forward your analysis. Specifically going back to my question,
4 you have put forward no evidence that is predicated on a
5 reduction in compensation, correct?

6 A Well, again, I'm not sure that I really understand the
7 daylight that you're trying to introduce in between those
8 ideas. So I haven't put forward anything other than what
9 you've seen in my testimony today or in my deposition or in the
10 expert report, but I think it actually directly answers the
11 question that you've just put to me now.

12 Q So is it your testimony that in your report you do analyze
13 the question of whether people would substitute, in response to
14 a reduction in compensation?

15 A What I have described to you is I don't really see any
16 daylight between that and the work I have done here, which is
17 to say, if you're asking me -- this is what I remember you
18 asking me in deposition. It was something like: When you are
19 analyzing substitution, is that because the workers in question
20 had experienced a change in compensation? I told you then the
21 same thing I would tell you now. It is just looking at
22 substitution in the market. But that does put me in a position
23 to make a prediction as an economist as to what would happen,
24 and that's, I think, exactly the same work that I did in my
25 report, I did in deposition, and I have done here today.

J. McCrary - X

1 Q Again, I'm asking you whether the substitution that you're
2 talking about in your report is predicated on a reduction in
3 compensation.

4 A Well, then I think we are on the same page, which is the
5 substitution analysis that I have done is looking at where a
6 person has come from and gone to over the course of a career,
7 just tracking which employers they substitute between.

8 Q Okay. Switching gears, let me ask you some questions
9 about workers. You testified on direct about things that
10 workers are interested in, like wages and other aspects of
11 compensation. Does that sound right?

12 A Well, what I was describing was something along those
13 lines, but it was from the perspective of how to implement a
14 hypothetical monopolist test.

15 Q And you would agree with me that in general the employment
16 relationship is one that involves not just hourly pay but other
17 aspects of compensation too?

18 A Yes.

19 Q Such as health care?

20 A That's an example, yes.

21 Q And retirement benefits?

22 A Sure.

23 Q And paid vacation?

24 A Sure.

25 Q Overtime?

J. McCrary - X

1 A Yes.

2 Q There could be lots of different reasons why a worker may
3 choose to switch from an employer, right?

4 A Oh, I'm so sorry. Were you always asking me questions
5 about why a worker might switch employers? I thought you were
6 just giving me categories of non-wage compensation.

7 Q I was. This question is a different question. There
8 could be lots of different reasons why a worker would choose to
9 switch employers, correct?

10 A In an abstract context, yes, that could be the case.

11 Q For example, a worker may switch in order to relocate to
12 be with his family?

13 A Yeah, that could occur.

14 Q Or for school?

15 A Sure.

16 Q Or for lifestyle changes?

17 A Yes. I suppose that's true too.

18 Q Those are all reasons for job switching that are not
19 predicated on a reduction in wages. Fair?

20 A Those were all examples of things that I would probably
21 describe as not the typical things, and so you wouldn't expect
22 that to be the dominant thing that leads to switching, but they
23 could occur, of course, in specific instances.

24 Q I wasn't asking about the frequency of them. I was asking
25 whether those are reasons for job switching that are not

J. McCrary - X

1 predicated on a reduction in wages. You would agree with that,
2 right?

3 A Well, the examples you gave, I think, weren't about wages.
4 I think that's correct, yes.

5 Q And you have not done any analysis to assess the role that
6 a differential wage opportunity played for any worker who
7 switched jobs, correct?

8 A I'm not sure I'm tracking the question.

9 Q Well, you have done no analysis on whether job switching
10 that you observed in the data was due to the opportunity to
11 obtain a higher wage?

12 A Well, then I'm not sure I understand this question as
13 opposed to the one from a little bit ago. So what I described
14 to you before, I think, is right, which is the substitution
15 analysis that I did in my work in this case is just tracking
16 the alternative employers that people have been at and switched
17 to. But I don't think it's right that -- your question is
18 about that. I think it is about something else.

19 Q Okay. I think I understand your answer. That's fair.

20 All right. You testified on direct, I think towards
21 the end of your testimony, about your analysis comparing wages
22 where Kroger and Albertsons have union workers and where they
23 do not, the overlap areas.

24 Do you recall that?

25 A Yes.

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1 Q Okay. We have heard a lot of testimony in this case about
2 how the unions play Kroger and Albertsons off one another.
3 With this opinion that you are offering here, essentially
4 you're challenging the idea that unions are better off when
5 they can play Kroger and Albertsons off one another; is that
6 fair?

7 A Well, what I'm describing is something that's looking at
8 the bottom line, the result. It's not necessarily something
9 that's talking about the process. So it could be right that a
10 different set of tactics being available to one either might
11 simplify the process. It might complexify the process. So I'm
12 not here to talk about that. I am here to talk about the
13 implications of that for wages or for non-wage aspects for
14 compensation, and that's really what the overlap regressions
15 are getting at.

16 Q So you're challenging -- you're showing results and your
17 view that challenges the idea that unions are better off when
18 they can play Albertsons and Kroger off of each other compared
19 to when they cannot. Fair?

20 A That's right. The availability of the tactic in an
21 overlap area is not something that has a bottom line in terms
22 of something that would benefit or harm a union member. That
23 is to say, wages are the same and all of the non-wage aspects
24 of compensation are the same between overlap and non-overlap
25 areas.

J. McCrary - X

1 Q You were in court were you not to hear the testimony of
2 Ms. Zinder and Mr. Clay, the only union representatives to
3 testify in this case?

4 A Yes, I was.

5 Q So to test this idea that unions are better off or not
6 when they can play Kroger and Albertsons off of each other,
7 this is the regression you walked through, correct?

8 A I'm sorry? Say the question again.

9 Q The regression you walked through at the end, this is to
10 test the question we were just talking about. Fair?

11 A Yes. It is a comparison between overlap and non-overlap
12 areas. In overlap areas, the tactic of playing the one firm
13 against the other would be available, and that wouldn't be true
14 in a non-overlap area.

15 Q Specifically the regression you set up is trying to
16 estimate the effect on hourly wages if both Kroger and
17 Albertsons have union workers in the same area; is that fair?

18 A As well as non-wage aspects of compensation. All of the
19 variables that Professor Ashenfelter pointed to, I tested as
20 well.

21 Q And none of those variables are in your report, though,
22 right?

23 A Well, obviously as a matter of sequencing, they couldn't
24 have been.

25 MR. DICKINSON: Your Honor, I move to strike the last

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1 answer about the regression he set up outside of his report.

2 MS. BARRINGTON: Your Honor, this was exactly the
3 subject of our back-an-forth a little bit during direct. He
4 opened the door at deposition. Professor McCrary has already
5 testified to this. So I'm not sure what he is moving to
6 strike.

7 MR. DICKINSON: So he had not set up a regression at
8 the time of his deposition to test these different variables
9 that he is talking about here.

10 THE COURT: He is talking about the last sentence
11 when he said he did some.

12 MS. BARRINGTON: Yes, Your Honor. He didn't have it
13 in his report, but he did testify to it at his deposition and
14 again today in court.

15 THE COURT: Yes. So I'm going to overrule it.

16 MR. DICKINSON: Thank you, Your Honor.

17 BY MR. DICKINSON:

18 Q Professor McCrary, obviously on direct you testified,
19 again, contrary to the testimony of the unions in this case,
20 that you don't think it makes a difference to union workers if
21 both Kroger and Albertsons are operating union stores in the
22 same MSAs; is that right?

23 A Well, the phrasing there might be not as precise as an
24 economist would say it. I would say in terms of wages and
25 non-wage aspects of compensation, there isn't a difference

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1 between an overlap and non-overlap areas. That's how I would
2 have answered that question. Yours was about what makes a
3 difference to a person.

4 As I've said, I can't speak to something to the
5 process that might be involved with respect to negotiations or
6 something like that. But in terms of the bottom line, from an
7 economic perspective, I would say there is no difference there.

8 Q Okay. You recall in your results in this regression,
9 essentially you find that the percent difference in wages in
10 overlap versus non-overlap areas -- I think it was a little
11 positive for Albertsons and a little negative for Kroger, but
12 essentially they are not statistically different. Is that a
13 fair summary?

14 A I believe you are asking me a question about column 1 of
15 Exhibit 22; is that correct?

16 Q Yes. Or column 2.

17 A Well, pick one.

18 Q 1. Let's go with 1?

19 A So for column 1, I think what's true is that the result is
20 statistically insignificant for Albertsons, and that was
21 consistent with your prior question. And if anything, the
22 results might be inconsistent with your prediction with respect
23 to Kroger, but I'm not sure your statement about statistically
24 significant is necessarily correct in that example.

25 Q Okay. In running your regressions, you control for a

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1 number of different variables, right?

2 A That's correct.

3 Q In choosing what variables to control for, you
4 considered -- basically you consider what variables might
5 actually impact the results of the test; is that fair?

6 A No. What I did, instead, I tried to make sure that you
7 should do careful works in economics, so you definitely don't
8 want to make an apples-to-oranges comparison. For example, I
9 think we all understand that Southern California is an
10 expensive place to live. You don't necessarily want to make a
11 comparison that is conflating the thing that you're trying to
12 measure with something like the difference in cost of living
13 between two places. So the set of controls that I looked at
14 were designed to allow me get an apples-to-apples comparison so
15 that I could isolate the effects of overlap as opposed to
16 non-overlap. So that's how I went about that.

17 Q Okay. So let me just ask about one of the variables that
18 you do not factor in your analysis. You heard testimony that
19 Kroger and Albertsons engage in multi-employer bargaining in
20 some areas of the country, right?

21 A Yes. I believe I heard testimony along those lines.

22 Q And in some areas of the country they do not engage in
23 multi-employer bargaining, true?

24 A I think I heard something along those lines as well.

25 Q And you heard Mr. Dosenbach testify this week, where

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1 Kroger and Albertsons engage in multi-employer bargaining, they
2 present a single proposal to the union, right?

3 A I guess I must have not been paying careful enough
4 attention to your question. I may have said something ever so
5 slightly imprecise. I think you were asking me about areas of
6 the country where there was multi-employer bargaining, and the
7 testimony I heard was a little bit more consistent with just
8 varying, but not necessarily across space as much across time
9 and space. I think it is just different from CBA to CBA
10 exactly how they decide to approach it. So I think that's
11 probably the better way to answer your prior question.
12 Apologies.

13 Q That's fair. So some CBAs engaged in multi-employer
14 bargaining and some did not. Fair?

15 A That's correct. I believe that's a more accurate
16 statement.

17 Q As Mr. Dosenbach testified, when they engage in
18 multi-employer bargaining, they are presenting a single
19 proposal to the union, right?

20 A Yes. That's what I heard him say.

21 Q And where two employers present a single proposal to the
22 union, you would not be surprised to find that wages would be
23 the same in the two contracts, right?

24 A That stands to reason, yes.

25 Q In your report you state that multi-employer bargaining is

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1 a good benchmark for post-merger bargaining; is that fair?

2 A Yes.

3 Q But your regression does not account for whether Kroger
4 and Albertsons have engaged in multi-employer bargaining in any
5 of the contracts, correct?

6 A I think that's also correct.

7 Q Now, you testified on direct about some market
8 concentration numbers.

9 Do you recall that testimony?

10 A I do.

11 Q And you were in court to hear Dr. Israel testify the other
12 day -- this week?

13 A No.

14 Q Did you read his testimony?

15 A No. I have not reviewed Dr. Israel's testimony.

16 Q Do you agree that a first step in defining "market share"
17 or concentrations and analyzing them is to have a valid market?

18 A Yes. The first step -- well, I would have said that
19 probably a little bit differently. I probably would have said
20 that you should be considering, when you are engaging in
21 something like market concentration analysis, you should be
22 paying attention to the market definition exercise as well.

23 Q Okay. So the numbers in concentrations that you're
24 offering in your report and testimony today to the Court are
25 figures that represent shares -- they are not in any relevant

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1 antitrust market, correct?

2 A Well, what I'm doing -- maybe this didn't come across.
3 What I'm doing is I'm trying to see whether Dr. Hill's
4 conclusions hold up to a weakening of the assumption that he is
5 making that your proposed labor market is correct.

6 Q But I just want to make sure I understand. You have not
7 presented any market shares in any market that you think is a
8 valid antitrust market, correct?

9 A That's correct. So I'm saying something like the
10 following, which is, I'm trying to understand whether his
11 conclusion is correct. And so what I did, I bracketed the
12 criticism that I have of the geographic aspect of the claimed
13 labor market, and I just included a few of the obvious
14 employers that you ought to include in the relevant market.
15 That immediately undoes the conclusion that he reaches
16 regarding concentration, and I didn't need to do any work after
17 to conclude I disagree with the conclusion.

18 Q Okay. Where you state in your direct examination that
19 market concentration is very low in any properly defined labor
20 market, just so the record is clear, you have not identified
21 any properly defined labor market in which to calculate shares;
22 is that fair?

23 A What I have done is the following: I have said that I'm
24 confident that a non-union grocery belongs in the relevant
25 labor market, but it is also true that many other alternative

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1 employers belong in that market. What I did is I included the
2 ones I was able to, the ones that are quite clear from the
3 record, and I'm not however saying that's the outer boundary of
4 the relevant labor market. It could be broader than that.

5 Q So I don't think that was my question. My question was:
6 You have not presented any market shares in any market that you
7 believe to be a valid antitrust market; is that correct?

8 A Well, then I guess you're just asking me the question: Am
9 I saying that's the outer boundary of the labor market, which
10 is why I was just describing to you, no, that's not what I'm
11 trying to say.

12 Q So it's correct that you have not presented market shares
13 in any valid antitrust market?

14 A So I'm not sure that I quite get it. So what I was doing
15 in the market concentration part of my work here and in my
16 report is I was trying to see whether I agreed with Dr. Hill's
17 conclusion, but I'm not trying to say that I put forward the
18 outer boundary of the labor market with respect to the profit
19 market side.

20 Q Okay. I think that answers the question. I would like to
21 turn to your demonstratives. I have a couple more questions.
22 Let's look at slide 35, if you would, please.

23 Mr. Dunkin, if you are able to pull that up, that
24 would be great. There we go.

25 So, Professor McCrary, the CBA in

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1 Southern California, you're aware that's made up of multiple
2 local unions, correct?

3 A Yes.

4 Q Let's go to a different slide. Turn to slide 26, please.
5 The source here for this slide you cite to -- the last one is
6 Kroger and Albertsons' previous employer data.

7 Do you see that?

8 A I do.

9 Q And that refers to data that is kept by the companies,
10 where they ask their retail hires who they previously worked
11 for, correct?

12 A That's correct.

13 Q And are you aware that the previous employer data field
14 was left blank in approximately 77 percent of the applications
15 that Albertsons has in the data set you're relying on here?

16 A That might be right, yes.

17 Q Would you be surprised if Kroger similarly did not track
18 previous employers for a substantial number of their workers
19 either?

20 A Well, there is some discrepancy between the previous
21 employers stated for Kroger and for Albertsons. They are
22 structured differently. So I don't have any reason to disagree
23 with you sitting here right now, but I would have an
24 expectation that it would be a little bit different due to how
25 the data sets are constructed.

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1 Q A little bit different. But it might be similar to the
2 77 percent of Albertsons' data that is blank?

3 A That might be the right number. I'm just not sure,
4 sitting here, off the top of my head.

5 Q If you go to slide 28, this is a -- where you identify
6 some subsequent employers; is that right?

7 A Yes. This is correct.

8 Q The source for this is, again, Albertsons' previous
9 employer data?

10 A Well, on the prior slide as well -- that wasn't the only
11 source that was cited. In particular, it was pointing to the
12 Lightcast data as well. You're right. This is a slide about
13 subsequent employers, and the Lightcast data would be the basis
14 for that.

15 Q And the Lightcast data is where they collect job resumes
16 for workers, right?

17 A That's right.

18 Q So job resumes -- this is a third party that collects job
19 resumes, including grocery store workers?

20 A That's correct.

21 Q You can take that slide down, Mr. Dunkin.

22 Just a couple more questions. You described Kroger
23 and Albertsons workers in your report as "low skill," correct?

24 A I don't remember off the top of my head that's the word I
25 used, but I might have.

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1 Q But you would agree in your report you analyze low skill
2 workers, like those at Kroger and Albertsons?

3 A Well, I wouldn't necessarily have any reason to disagree
4 with that, no. That might be right.

5 Q And you were present when Mr. Clay and Ms. Zinder
6 testified a few weeks ago, right?

7 A Correct.

8 Q You recall when they identified the types of workers in
9 grocery stores that have higher skilled positions, at least in
10 their view. Do you recall that?

11 A I don't recall exactly which testimony you might be
12 referencing, no.

13 Q Ms. Zinder, for example, referred to meat cutters and
14 department heads and pharmacy jobs and receivers, front-end
15 receivers --

16 A Oh, that part, I do recall, yes.

17 Q And she described them as more higher-skilled positions;
18 is that right?

19 A I don't recall her phrasing, but you might be right.

20 Q And you didn't testify today about any of those positions;
21 is that fair?

22 A Well, as I'm sure you know, that's not quite right either.
23 I described, for example, the prevalence of meat cutters.

24 Q But none of the other high-skilled positions that they
25 testified about?

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1 A No. That's correct.

2 MR. DICKINSON: I pass the witness, Your Honor.

3 THE COURT: Any redirect?

4 MS. BARRINGTON: No, Your Honor.

5 THE COURT: You can step down.

6 You may call your next witness.

7 MR. PERRY: Your Honor, for our next and last
8 witness, defendants will call Mr. Dan Galante.

9 THE COURT: All right.

10 (The witness was duly sworn.)

11 THE CLERK: Thank you. Please be seated. Would you
12 please state your name for the record, spelling your last.

13 THE WITNESS: Daniel Galante. D-A-N-I-E-L,
14 G-A-L-A-N-T-E.

15 DIRECT EXAMINATION

16 BY MR. PERRY:

17 Q Good afternoon, Mr. Galante.

18 A Good afternoon.

19 Q Did you prepare some slides in advance of your testimony
20 today?

21 A Yes, I did.

22 Q Mr. Rennick, could we put those up, please.

23 MR. PERRY: Your Honor, most of these will be public,
24 but there are a few that have confidential information, largely
25 from C&S, a third party.

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1 THE COURT: All right.

2 BY MR. PERRY:

3 Q Could you please describe for the Court your educational
4 background?

5 A Sure. I attended DePaul University in Chicago for my
6 bachelor's and master's degree. I graduated in 1989. And then
7 ten years later, I completed an executive management business
8 program at Harvard Business School, which appointed me alumnus
9 of the school.

10 Q Do you have any professional certifications, Mr. Galante?

11 A Yes. I'm a certified public accountant.

12 Q Could you briefly give us an overview of your employment
13 history?

14 A I started my career in public accounting with Ernst &
15 Young, one of the big four global accounting firms. I was
16 promoted to partner in the transaction advisory practice, and
17 then I went off to build practices in a few management
18 consulting firms: FTI Consulting. I became co-national
19 practice leader at Alvarez & Marsal's practice. And then
20 national managing partner at Grant Thornton, which is a global
21 accounting firm, before about seven years ago joining Berkeley
22 Research Group to build a transaction advisory practice, which
23 today we have about 100 professionals.

24 Q What is Berkeley Research Group?

25 A Berkeley Research Group is a global professional services

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1 firm that focuses on economics, dispute and litigation support,
2 corporate finance, and performance improvement, and other
3 advisory services.

4 Q What are your responsibilities as the practice leader of
5 the transition advisory practice at BRG?

6 A So as I mentioned before, I was the first hire to be able
7 to build a practice, assemble a team, and my practice
8 responsibilities include recruiting practice management, client
9 attraction, as well as client management. But overall I'm a
10 senior partner in the group. I work with teams. I handle
11 client cases. I put teams into projects, and I'm actively
12 involved in the execution and delivery of projects.

13 Q How many transactions have you been involved with
14 personally over the course of your career, Mr. Galante?

15 A So I have actually been involved in over 800 transactions
16 representing either buyers or sellers of companies in a variety
17 of industries.

18 Q What kinds of companies have you worked with in those
19 800-plus transactions?

20 A So this is just a sample of a few. Most of these have
21 been during my period at Berkeley Research Group. For example,
22 in the convenience store space, we have sold businesses to
23 7-Eleven and CircleK. Recently we just completed a transaction
24 of over 250 stores.

25 I worked with companies like Clif Bar. When they

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1 purchased a divested business from their co-packer, it was two
2 manufacturing facilities from a 10-manufacturing unit. That
3 actually had TSA and other requirements.

4 And another one that's very relevant to this case is
5 I worked with a private equity purchaser of a specialty
6 retailer, 100 units Janie and Jack from the Gap a few years
7 back.

8 Q Have any of the transactions you've worked on been in the
9 grocery retail space, Mr. Galante?

10 A Yes, a few early in my career. I advised a private equity
11 sponsor on the purchase of Roundy's and then worked with the
12 management team at Roundy's on a few add-on in-store
13 attractions.

14 Q You have used the words "transaction advisor" a few times.
15 Can you explain to the Court what a transaction advisor does.

16 A Sure. From a transaction standpoint, I work with buyers
17 and sellers in preparing them to go through the transaction
18 process, and that could be evaluating the information they
19 have, their financial performance, how their financial
20 performance is laid out, and also performing due diligence for
21 those companies so they could evaluate the current state of
22 what the transaction represents.

23 Q Mr. Galante, have you worked on any transactions involving
24 divestitures?

25 A I have. I have worked on numerous divestitures in my

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1 career.

2 Q When you advise a company on either on the buy side or
3 sell side about a transaction, what are the materials that you
4 generally review?

5 A Sure. In the sense that I'm a certified public
6 accountant, I start with the financial statements, typically
7 audited financial statements that allow me to understand the
8 historical performance over the last three or more years to
9 then evaluate where the risks may be and where the
10 opportunities may be.

11 The financial statements lead into other materials
12 available for management, which can include a deal model as
13 well as their investment thesis or what may be outlined in a
14 business plan.

15 Q What is the role of a deal model? We will talk more about
16 that in a minute, Mr. Galante, but what is the role of a
17 deal model in your role as a transaction advisor?

18 A So in any transaction, a deal model is critical to be able
19 to quantify the costs and the programs and the changes that may
20 be initiated and outlining the future financial performance of
21 a potential company or transaction.

22 Q You also mentioned business plans. What's the role of a
23 business plan in your role as a transaction advisor?

24 A Yes. So what a business plan does, it actually explains
25 out more from an English standpoint about how such items will

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1 be accomplished, what the activities are, what the timeline is.
2 It ties back to the costs that are included in the deal model.

3 Q Have you served, Mr. Galante, as an expert witness before
4 this litigation?

5 A Yes, I have.

6 Q What was the most recent case in which you served as an
7 expert?

8 A So last year I served as an expert witness in ASSA ABLOY's
9 contemplated acquisition of Spectrum Brands, which included a
10 divestiture of Fortune Brands of its smart-lock business.

11 Q Was that another transaction that was challenged by the
12 United States Government?

13 A It was. It was challenged by the Department of Justice.

14 Q How did the work in that case compare to the work you did
15 here?

16 A Actually it was very similar. All the work was around the
17 divestiture and the diligence that was applied around the
18 divestiture in the financial model in that going forward.

19 Q Is that the only case in which you have served as an
20 expert?

21 A No. I have actually served as an expert over the last
22 five years in four other cases. All of those cases had to do
23 with transaction advisory, due diligence process, the M&A sales
24 process, and the adequacy of due diligence.

25 Q Mr. Galante, did the courts in which you testified accept

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1 you as an expert?

2 A Yes.

3 Q Has any court ever excluded you as an expert?

4 A No.

5 Q Has any court ever criticized your expert opinion?

6 A No.

7 MR. PERRY: Your Honor, defendants proffer
8 Mr. Galante as an expert in corporate mergers, acquisitions,
9 and divestitures, including the role of deal models and
10 business plans in such transactions.

11 MS. HALL: No objection.

12 THE COURT: He will be received. He is designated as
13 an expert in those areas.

14 MR. PERRY: Thank you, Your Honor.

15 BY MR. PERRY:

16 Q Let's turn to your assignment here, Mr. Galante. What did
17 we ask you to do?

18 A So essentially I was asked to be able to evaluate the work
19 that C&S has done, understanding the divested business as well
20 as the risks and challenges associated with the divested
21 business and how such amounts were incorporated ultimately into
22 the deal model, the underwriting process, and the business
23 plan.

24 Q You've probably just mentioned a couple of them, but what
25 materials did you rely on in forming your opinions in that

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1 respect?

2 A So it was actually quite a bit. Clearly the financial
3 statements was a starting point, both for C&S as well as the
4 deal model for the divestiture. But we had access to numerous
5 documents from a financial standpoint, depositions, other books
6 and records, and all of the materials that I used to form my
7 opinions are included in Exhibit B to my report.

8 Q Thank you, Mr. Galante. Let's take a look at slide 4,
9 DDX21, slide 4. Is this a summary of the opinions that you
10 reached in this case?

11 A Yes. This is a summary of my four opinions.

12 Q In the usual way, we will go through them in a little bit
13 of detail, but just quick hit at the start. No. 1,
14 Mr. Galante, C&S is a strong buyer and well capitalized. What
15 does that mean?

16 A C&S brings a wealth of knowledge in the grocery industry.
17 They have a long history of profitable performance. Their
18 shareholders are committing \$900 million in equity to fund this
19 divestiture, and they have open credit lines after that if the
20 transaction needs more resources.

21 Q No. 2, Mr. Galante, is comprehensive due diligence, which
22 supports the financial model and business plan.

23 A Based on my review, the C&S management team performed
24 extensive operational and financial due diligence and
25 incorporated best-in-class consultants to help them from a

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1 search standpoint and specialty standpoint.

2 Q No. 3, identification and addressing the risks in those
3 documents, correct?

4 A Yes. C&S evaluated the risks that were identified and
5 also quantified the impact, and that impact was then
6 incorporated into the deal model and business plan.

7 Q We would will talk about that in some detail, I think.
8 Thank you.

9 Finally, your fourth opinion, Mr. Galante, C&S is
10 acquiring the functional equivalent of a standalone business.

11 What does that mean?

12 A C&S -- the divestiture in this matter is not a standalone
13 business. Divestitures, by definition, are not standalone
14 business. In this situation the assets, the stores, the
15 resources, talents, and time are afforded with the capabilities
16 that C&S bring to this divestiture to make a transition or
17 allow a transition to a standalone business. So essentially
18 this divestiture, in my opinion and my words, is the functional
19 equivalent of a standalone business.

20 Q Mr. Galante, did you prepare an expert report in this case
21 summarizing your opinions and the reasons for them?

22 A Yes, I did.

23 Q If you turn to the tab in your binder, Mr. Galante, to the
24 one labeled DX2738, is that the amended expert report that you
25 filed -- or you prepared in this matter?

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1 A Yes, it is.

2 Q That's dated July 1st, 2024. The date is page 108.

3 A Yes, it is.

4 MR. PERRY: Your Honor, at this time we introduce
5 into evidence DX2738, the amended expert report of Mr. Galante.

6 MS. HALL: No objection.

7 THE COURT: It will be received.

8 MR. PERRY: Thank you, Your Honor.

9 BY MR. PERRY:

10 Q Mr. Galante, you mentioned a moment ago that all the
11 materials you relied on are listed in Schedule B of your
12 report; is that right?

13 A That's correct.

14 Q Did you rely on any other materials in preparing your
15 report?

16 A In preparing my report, no. Everything is in Schedule B.

17 Q Since submitting your report in July, have you relied on
18 anything else in preparing to give your testimony today?

19 A It will just be the testimony that I heard here in court
20 over the last three weeks.

21 Q Mr. Galante, did you rely on any privileged materials in
22 preparing your report?

23 A No, I didn't.

24 Q Did you have access to any privileged materials?

25 A No, I didn't.

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1 Q Did you ask for and were denied access to any materials on
2 the ground that they were privileged?

3 A No, I didn't.

4 Q Were all the materials that you relied on to your
5 knowledge provided to the United States Government?

6 A They were, as they were included in Schedule B, and my
7 understanding is they have access to all of that.

8 Q And you were deposed two times in connection with your
9 report, right?

10 A That's correct.

11 Q Once by the FTC?

12 A Yes.

13 Q To your memory, was a single privilege objection ever
14 raised to any question in your deposition?

15 MS. HALL: Objection, Your Honor. We weren't party
16 to whatever this other deposition was. I believe it is in a
17 different proceeding. So whether anyone raised any objection
18 in that is irrelevant here.

19 MR. PERRY: I'll take that concession from Ms. Hall.
20 Thank you. Let me ask a different question.

21 THE COURT: All right.

22 BY MR. PERRY:

23 Q Speaking only to your FTC deposition as the only one
24 relevant to this proceeding, Mr. Galante, did the FTC
25 deposition involve any objections to any questions on the basis

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1 of privilege?

2 A Not that I'm aware of.

3 Q Thank you. As you just mentioned, you were in court for
4 much of the witness testimony, right?

5 A That's true.

6 Q Were you here when Mr. Fox, the Government's so-called
7 divestiture expert, testified?

8 A I was.

9 Q Did you hear him testify that he did not analyze C&S's due
10 diligence?

11 A Yes. He said that.

12 Q Did you analyze C&S's due diligence?

13 A Yes. That was part of the scope of my assignment.

14 Q Did you hear Mr. Fox testify that he did not analyze C&S's
15 financial ability?

16 A Yes.

17 Q Is that something you analyzed?

18 A I definitely included that in my analysis.

19 Q Now, did you hear Mr. Fox testify that C&S will face
20 certain challenges once this transaction closes and the
21 divestiture is underway?

22 A Yes, he did. A transaction is about risk. There is risk
23 and challenges associated with any M&A transaction.

24 Q Did you also hear Mr. Fox testify that he has no opinion
25 on whether or not C&S can overcome those challenges?

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1 A Yes. He stated that.

2 Q Let's turn now to your opinions, Mr. Galante.

3 No. 1, why did you start with the financial position
4 of C&S as a buyer in its capital structure?

5 A Because I think it's important in terms of understanding
6 the operating cash flow that a core company has in a strategic
7 transaction and what it brings to an acquisition candidate that
8 it is looking to acquire and pull in, as well as how that
9 company is capitalized from a standpoint of additional debt
10 capacity to manage the transaction and have capacity in the
11 future if additional resources may be required.

12 Q You just described this as a "strategic transaction."
13 What did you mean by that in the context of the strength of the
14 buyer?

15 A Well, a strategic transaction is where you have a company
16 operating in an industry and marketplace, and they look for an
17 acquisition to be able to increase or expand their existing
18 business or focus on adjacencies in their business.

19 Q What did you learn, Mr. Galante, regarding the
20 capitalization of this transaction?

21 A So, this transaction, a \$2.9 billion purchase price is
22 capitalized with 900 million of equity and the other \$2 billion
23 in debt.

24 Q So let's start with the equity. Where is that coming
25 from?

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1 A So the equity is coming from an existing -- it is coming
2 400 million from SoftBank, which is an institutional investor,
3 as well as 500 million from the existing shareholders of C&S,
4 Mr. Cohen.

5 Q So let's start with SoftBank. What is SoftBank, for the
6 Court's information?

7 A So SoftBank is an institutional asset manager that has
8 over \$100 billion of assets under management and make
9 investments through a variety of funds into acquisitions of
10 companies?

11 Q Does SoftBank have an investment thesis or recommendation
12 for this particular transaction, to your knowledge?

13 A Yeah. To my knowledge, from reading the depositions and
14 the testimony, which is also consistent with working with
15 institution investors, SoftBank is backing an experienced
16 management team. They are looking for a return and believe in
17 the business model and plan as put forth by C&S.

18 Q That's \$400 million that SoftBank has committed in equity
19 funding, right?

20 A That is correct.

21 Q And 500 million in equity is coming from Mr. Cohen and his
22 family. We have heard a little bit about them, but who are the
23 Cohens?

24 A The Cohen family is one of the most wealthy families in
25 the United States, and Mr. Cohen sits on the board. The family

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1 has owned C&S since the inception in the early 1900s.

2 Q What is the importance in your opinion, Mr. Galante, to
3 the amount or percentage of equity funding for this
4 transaction, which, as your slide reflects, is 32 percent?

5 A I think what's important from a capitalization standpoint
6 is equity is permanent capital. Permanent capital means, in
7 order for those investors to get a return, the business has to
8 be successful. It has to generate future profits to be able to
9 make a return. It is much different than other levels of
10 capital that have priority or preference over the equity
11 capital.

12 Q All right. Thank you. That's a \$2.9 billion transaction.
13 Where is the other \$2 billion coming from, Mr. Galante?

14 A So the other \$2 billion is coming from C&S's existing
15 money center bank, Wells Fargo. They are investing over
16 \$900 million, and just over a billion dollars is coming from
17 Blue Owl Capital, which is another alternative investor,
18 issuing private capital, and Blue Owl is well known in the
19 industry with almost \$200 billion assets under management.

20 Q Now, does an institutional lender, such as Wells Fargo,
21 have an interest in how a business in which it lends almost a
22 billion dollars perform in your experience as a transaction
23 advisor?

24 A Absolutely. I mean, they are interested in, not only the
25 performance of C&S, which they watched for a while, but also

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1 the deal model here and the future performance, because it is
2 the only way they are going to be able to have their debt be
3 paid.

4 Q As part of your analysis, Mr. Galante, did you compare the
5 capitalization structure of this transaction to the
6 capitalization of the Haggen transaction, about which the Court
7 has heard periodic reference over the last three weeks?

8 A Yes, I have.

9 Q Did you prepare a slide on that?

10 A I did.

11 Q Can you explain to the Court what's being shown here,
12 please.

13 A I think if we look at capitalization between the two, we
14 talked about the divested business. In Haggen, the private
15 equity sponsor added \$50 million of equity capital, or just
16 over 10 percent of equity, which in my opinion would deem it to
17 be a thinly capitalized acquisition.

18 Q And what is the difference, if any, that you see between
19 this deal and that deal from a capitalization structure?

20 A When it is thinly capitalized, it doesn't give you a lot
21 of room to make mistakes, and so that's the difference.

22 32 percent is a very healthy level of equity funding for a
23 strategic transaction, and 10 percent, based on my experience
24 in the transactions I've worked on, is very low.

25 Q Thank you, Mr. Galante. We talked about the

D. Galante - D

1 capitalization structure, right? That's the new money coming
2 in?

3 A That's correct.

4 Q Did you also analyze whether C&S itself, the existing
5 company that will become the owner of the divestiture business
6 once this transaction has been consummated, is a strong buyer?

7 A I did, yes.

8 Q And what did you learn in that respect?

9 A So C&S has a long history of strong financial performance.
10 They are going through a change strategically, which they are
11 looking for a transformational acquisition to be able to
12 continue to grow the company.

13 Q I should have asked you: How did you assess the financial
14 position of C&S? It is a privately traded company; is that
15 correct?

16 A It is a privately held company.

17 Q So it doesn't have SEC filings and the things that we
18 might have with a public company?

19 A Not available to the public, but they do have audited
20 financial statements.

21 Q And did you have access to those audited financial
22 statements?

23 A I did review the audited financial statements, and I
24 looked back five years, audited financial statements, to look
25 at their history of performance as well balance sheet and

D. Galante - D

1 capitalization.

2 Q Have other transactions in which you have served as a
3 transaction advisor involved privately held companies?

4 A A lot of the transactions I work on are with privately
5 held companies.

6 Q And are you familiar with the financial statements and
7 other materials available to both the companies themselves and
8 investors in those companies in this respect?

9 A Absolutely.

10 Q Was there anything unusual about the C&S documents based
11 on your review?

12 A No. They are all very normal and what I would expect for
13 a company of this size.

14 Q You mentioned they had some business challenges, but they
15 had a strong balance sheet in other performances; is that
16 right?

17 A That's correct.

18 Q How would you describe the metrics, if you will -- how
19 would you measure that performance? Is there a single or other
20 line item or something that you look to?

21 A Yeah. I think if we look at sales, if you look at the
22 actual size of the company, and C&S sales are significant for
23 the company. Then even when sales decline, as Mr. Winn
24 mentioned in his testimony, they have still been able to manage
25 operating cash flow or EBITDA and generate profitable results.

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1 Q We have heard that term EBITDA or EBITDA (enunciating) a
2 number of times during this trial, but I'm not sure anybody
3 defined it, Mr. Galante. What does it mean to you as an
4 accountant and transaction advisor?

5 A So EBITDA is earnings before interest, taxes,
6 depreciation, and amortization.

7 Essentially it reflects the operating cash flow from
8 running the business or performance. It's used because it
9 pulls out the capital structure of a company that they operate
10 in to make those results comparable to other companies.

11 Q Thank you, Mr. Galante.

12 Mr. Rennick, the next slide is confidential. If we
13 can show it, please, only on the private screen.

14 Can we look, Mr. Galante, at slide 7. What are you
15 showing here, please?

16 A So I think h this is what I indicated before. If we look
17 at C&S's historical financial statements for the past five
18 years, and this is the income statements that goes to net
19 income and then to EBITDA.

20 Q Without saying the numbers out loud, which of these
21 lines -- you mentioned net sales, right? You would look at
22 that line?

23 A I would look at net sales. This chart here is in millions
24 of dollars. So the way to think about it is those first two
25 digits are billions of dollars in sales.

D. Galante - D

1 Q Okay. The other one you mentioned is EBITDA or EBITDA
2 (enunciating). What is that telling you as an accountant and
3 transaction advisor regarding C&S's operation? Again, without
4 saying the numbers out loud.

5 A Sure. I think what is important here, when you look at
6 the top line sales declines that the company has had, which was
7 poor performance in terms of losing mass merchant customers as
8 well as what Mr. Winn testified in replacing, I think he said
9 \$5 billion of sales over the years, despite the negative sales
10 they have been able to maintain, a healthy, consistent dollar
11 profit over the entire period.

12 Q Mr. Galante, recognizing there are some people who read
13 English rather than financial statements, have you unpacked
14 these numbers into pro-sentences in your report?

15 A I did. I summarized the conclusion in the report.

16 Q Mr. Rennick, this is for the private screens only. Go to
17 DX2738, which is Mr. Galante's report, paragraph 50. If you
18 could highlight the first sentence, Mr. Rennick.

19 Mr. Galante, is this the plain English version of the
20 numbers we were just looking at in the table showing the
21 five-year historical financial performance of C&S?

22 A Yeah. It's the summary. The first two lines of that
23 sentence is a summary of its performance over those five years.

24 Q Is there more detail about various aspects of those
25 figures also set forth in this part of your report?

D. Galante - D

1 A It is. Just a little bit later in my report I summarize
2 it.

3 Q Thank you, Mr. Galante.

4 What is your overall opinion of C&S as a buyer of the
5 divestiture assets, Mr. Galante, focusing on the historical
6 performance of C&S and the capital structure of the investment.

7 A My view is C&S is an extremely strong buyer of this
8 divested business.

9 Q Why is that?

10 A For the reasons mentioned. I mean, first off, C&S itself
11 has an extremely strong supply chain and is able to support --

12 MS. HALL: Objection, Your Honor. This witness has
13 no expertise of assessing the strength of a supply chain.

14 THE COURT: Sustained.

15 BY MR. PERRY:

16 Q Mr. Galante, have you looked at the financial reports and
17 the financial statements and the capital structure of this
18 investment?

19 A Yes, I have.

20 Q Based on that information, do you have a view of C&S as a
21 buyer for the divested business?

22 A C&S is a very strong buyer. They have a strong financial
23 position, and they are investing significant equity capital,
24 \$900 million into the divestiture.

25 Q All right. That was your first opinion.

D. Galante - D

1 Let's move on to your second. The first part of it
2 is that C&S completed comprehensive due diligence; is that
3 right?

4 A The due diligence performed was extensive, yes.

5 Q Again, the word has been said, but I'm not sure it has
6 been explained. What is due diligence in the context of a
7 complex M&A transaction such as this one?

8 A So due diligence takes several different forms, depending
9 on the buyer and their investment thesis in a transaction. Due
10 diligence is what I perform most of the time in serving
11 clients. It essentially evaluates the current state of the
12 business operations and trend of historical performance, both
13 financially and operationally. It gives you an understanding
14 of what's required to be able to operate the business
15 prospectively with changes that may need to be made.

16 Q Why do companies perform due diligence in connection with
17 M&A transactions?

18 A So the best likelihood of having a successful transaction
19 is by conducting due diligence to understand what you're buying
20 and how to operationalize that in a business plan
21 prospectively. Due diligence is also required by various
22 members of capital structure and/or supporting the M&A
23 transaction to underwrite the transaction.

24 Q What does "underwriting" mean, as you just used it?

25 A Underwriting is essentially the ability to obtain approval

D. Galante - D

1 to be able to move forward with the transaction.

2 Q Now, was the due diligence in this case conducted by C&S
3 on its own, or did it have help?

4 A There was an extensive list of people that conducted due
5 diligence. It started with C&S management and their extended
6 functional teams, and they brought in consultants to be able to
7 help them support what they needed in the process.

8 Q Mr. Rennick, the next slide is for the private screens
9 only, please. Can we display on those screens only slide 9.

10 Mr. Galante, in your experience with over 800
11 transactions, can you explain the role of consultants in
12 general with respect to complex M&A transactions and
13 divestitures, including the due diligence process you're in the
14 middle of describing.

15 A Sure. I've worked with these consulting firms and various
16 consulting firms in a lot of the M&A transactions that I've
17 advised on. But consultants are brought in for a couple of
18 reasons: One, they are able to provide search capabilities.
19 Typically management teams don't have the ability to house
20 their internal due diligence department for transactions that
21 come up, especially large transactions that require significant
22 due diligence.

23 Second, the consultants like these work on
24 transactions all the time, so they're seeing the best-in-case
25 or the best-in-class examples of what's working and what's not

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1 working in not only a company's industry but potentially across
2 a variety of industries, and they are able to bring that
3 experience together to provide more timely and relevant advice.

4 And third, the level of functional expertise that may
5 be required to evaluate situations, especially in a larger
6 complex transaction like this.

7 Q In your experience does the fact that consultants may be
8 external to the company influence the advice they give to the
9 company in any way?

10 A I think actually one of the reasons to use consultants
11 from the advice they're going to provide is there is a level of
12 external objectivity. They are not sold on a transaction
13 happening. They're there to be able to give objective advice,
14 and they don't have any positives or negatives based on the
15 outcome of the transaction.

16 Q Now, there is a large number of consultants in this case.
17 Is that unusual in a complex transaction?

18 A In a complex divestiture transaction like that, that is
19 not unusual.

20 Q Now, in your experience as a transaction advisor, are all
21 consultants created equal, or are there a hierarchy, if you
22 will, of consultants out there in the business world?

23 A There is definitely differences in consultants. I think
24 in larger transactions, more complicated transactions, they
25 migrate towards larger firms. The reason they migrate towards

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1 larger firms is because those firms have a broader breadth of
2 capabilities as well as talents to be able to support the
3 needs.

4 Q An important point, I think, Mr. Galante, that may have
5 been obscured in this case, who makes decisions at the end of
6 the day? The company or its consultants?

7 A Consults consult and managers manage. The decision
8 process is always of that of the management team, and they have
9 to use their experience and business judgment based on
10 conclusions and advice they get from their consultants.

11 Q What does that term "business judgment" mean in the
12 context of a complex M&A transaction?

13 A Every decision requires business judgment. Business
14 judgment needs to be made by those who have the responsibility
15 and accountability to complete the -- to live up to the results
16 that may be achieved. That experience is led by the management
17 team that's responsible for executing the transaction.

18 Q Now, on your slide 9, Mr. Galante, you're showing some of
19 the consultants who advised C&S with respect to the divestiture
20 business; is that right?

21 A That's right. I reviewed work from all of these
22 consultants during the evaluation and in forming my opinions.

23 Q Just quickly, could you give us a sense of, for example,
24 of Tata Consultancy Services. What role did they play in
25 assisting C&S with the divestiture transaction?

D. Galante - D

1 A Sure. Tata was extensively involved in a detail IT
2 understanding in what's going to be required in setting up the
3 clone and then managing the clone. And Tata will also continue
4 to work for C&S post-transaction in the integration process.

5 Q How about Bain & Company, the next one there on the chart?

6 A So Bain is one of the -- is a global management consulting
7 firm, one of the larger consulting firms in the world. They
8 focused on commercial as well as customer preferences, work on
9 re-bannering. And private label.

10 Q Deloitte.

11 A Deloitte is one of the four largest accounting firms in
12 the country, and they have a significant consulting practice.
13 They were advising on the information technology strategy as
14 well as a lot of business aspects around talent, capital, and
15 integration going forward.

16 Q KPMG?

17 A KPMG is another one of the big four global accounting
18 firms. KPMG was involved in a number of the aspects of the
19 detailed diligence, financial diligence, also Q of E, or
20 quality of earnings, as well as capital IT, and leading up to
21 TSA and day-one preparation.

22 Q And the last one on this slide is Centerview Partners?

23 A Centerview was the investment banking partner that helped
24 evaluate the transaction and quantify -- and raise the capital
25 from C&S's financing sources.

D. Galante - D

1 Q Now, in the hierarchy of consultants in the business
2 world, Mr. Galante, in your experience, how would you rank the
3 advisors listed here that C&S retained in connection with this
4 transaction?

5 A These are the largest consulting firms in the world and
6 best-in-class advisors for a transaction like this.

7 Q I think you mentioned there are others besides these as
8 well?

9 A There is probably six or eight other firms that have done
10 some level of work.

11 Q Mr. Galante, without saying the number out loud, would you
12 explain to the Court, please, what the number is that is
13 printed on the bottom of your slide, DDX21-9?

14 A That is the budget that was approved by C&S for consulting
15 services through due diligence and day-one closing as well as
16 integration of the business.

17 Q In your experience with 800 transactions as a transaction
18 advisor, is that big number?

19 A That's a huge number.

20 Q As of the date of your report, do you know how much of
21 that had actually been spent?

22 A As of the date of my report, about 40 percent of that was
23 already spent.

24 Q Now, I don't mean to put you on the spot, Mr. Galante, but
25 have you and Berkeley Research Group equaled that amount?

D. Galante - D

1 A No, not even close.

2 Q Have you attempted to replicate the work that Tata
3 Consultancy Services, Bain & Company, Deloitte, KPMG,
4 Centerview Partners, and five to eight other consulting firms
5 with that budget that appears on the screen did for C&S in this
6 case?

7 A My role wasn't to replicate. It was to evaluate. In my
8 experience of going through the course of doing that, I was
9 able to appropriately evaluate and form my opinions.

10 Q Do you know if Mr. Fox made any effort to duplicate or
11 replicate the work that all of those companies did with the
12 budget listed on that slide?

13 A He did not.

14 Q No, he did not.

15 All right. You mentioned with respect to KPMG a
16 quality of earnings analysis. Did I catch that correctly?

17 A That's correct. Yes.

18 Q Is that sometimes called a Q of E?

19 A It is.

20 Q Because we need more acronyms in the world?

21 A Right.

22 Q What is a quality of earning analysis in the context of a
23 complex M&A transaction or divestiture?

24 A So a quality of earnings analysis is an accounting-based
25 analysis that looks at historical performance and provides

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1 adjustments for non-routine, out-of-period, one-time changes in
2 accounting policies or business activities to come up with a
3 number that's typically called adjusted EBITDA that could be
4 used for various sources in the transaction.

5 Q And what did the quality of earnings or Q of E analysis
6 performed here show?

7 A So in order for KPMG to do their quality of earnings, they
8 focused on store-level performance, and they looked at the
9 performance of the 579 stores and essentially the conclusions
10 were two or three small adjustments that really had an
11 immaterial effect on the reported 4-Wall EBITDA.

12 Q And did that quality of earnings analysis then become an
13 input into some other analysis that C&S performed with this
14 transaction?

15 A Yeah. As I said before, the diligence is coordinated with
16 the deal model. Essentially the quality of earnings analysis
17 that is embedded by KPMG goes in to be the baseline performance
18 in the deal model that projections are then built off of later.

19 Q Can we turn to the deal model now?

20 A Yeah, I would be happy to.

21 Q Mr. Rennick, the next one can be on the public screen.

22 What is a deal model? You mentioned it briefly
23 earlier. Let's think about it. We have a company that is
24 assessing this package of stores and other assets and whether
25 or not to invest \$2.9 billion into it. What role does the deal

D. Galante - D

1 model play? What is it and what role does it play in that
2 analysis?

3 A So the deal model is essential, because as we mentioned,
4 we know what historical performance is, and we could see that
5 over the past couple of years. What future performance is is
6 going to be based on the investment thesis and how
7 management -- how new management is going to operate this
8 business going forward. So what the deal model does, it starts
9 with the base historical performance and provides a series of
10 mathematical calculations based on assumptions that were
11 prepared from the diligence findings and management's judgment
12 to be able to project out performance over the next -- and in
13 this case -- eleven years.

14 Q Is it a crystal ball, Mr. Galante?

15 A It is never a crystal ball.

16 Q What is it if it is not a crystal ball?

17 A It shows direction and alignment with the investment
18 strategy, the investment thesis, and how they're going to
19 accomplish that, which is outlined in detail explanations
20 within the business plan.

21 Q You have been involved in over 800 transactions. Is it
22 usual or unusual for a deal model to be prepared?

23 A There is a deal model in every transaction, full stop.

24 Q Who, in this case, to your knowledge, received a copy of
25 the deal model for the C&S transaction?

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1 A Well, certainly the management team that had the
2 responsibility in preparing it and are going to be held
3 accountable to it. It was also used to underwrite the equity
4 for both Mr. Cohen as well as SoftBank. It was used to
5 underwrite the debt.

6 MS. HALL: Objection, Your Honor. Ms. Florenz
7 testified that a different deal model went to the financing
8 sources in this case. Mr. Galante testified about that at his
9 deposition; that he is aware there is a different financing
10 model that went to the banks.

11 MR. PERRY: I'm not sure what the objection is,
12 Your Honor. I'm happy to address that. I'll ask him a
13 question. How is that?

14 THE COURT: I understand that's what you are
15 saying --

16 MS. HALL: My objection is there is a lack of
17 specificity. There is three deal models here. The one on the
18 screen says conservative deal model. There is a different
19 financing model. Mr. Galante testified that he looked at that,
20 and that's the one that went to the banks. I want to be clear
21 which one we are talking about that.

22 MR. PERRY: I appreciate that from Ms. Hall,
23 Your Honor, and I'm happy to address that with questions for
24 the witness to make the point clear, if that's acceptable.

25 THE COURT: Fair enough.

D. Galante - D

1 BY MR. PERRY:

2 Q Are you familiar with the term "conservative deal model"?

3 A I am. In this context here, yes.

4 Q In general -- in general, you said there a deal model in
5 every case, full stop, right?

6 A Yes.

7 Q Is there often multiple iterations or variations of the
8 deal model in general cases?

9 A Yeah. Typically when a management team puts together a
10 deal model, there is three versions. There is a high version.
11 There is a base version. And there is low version.

12 Q A high version, a base version, and a low version?

13 A When I say "high, base, low," it refers to profitability
14 and performance.

15 Q Okay. In this case, the C&S transaction, do you know
16 whether there were multiple versions of the deal model as you
17 described the general practice?

18 A Yeah. There were three deal models prepared. One was
19 called the strategic model. One was called the financing
20 model. Then there was the C&S conservative deal model.

21 Q Which was the high version?

22 A The strategic model.

23 Q Which was the base version?

24 A The financing model.

25 Q And which was the low version?

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1 A The C&S conservative model.

2 Q Are they similar in certain respects?

3 A They are completely the same in terms of the architecture,
4 the calculations, the formulations. The difference between the
5 three are assumptions that were used.

6 Q Do you know which one was provided to the investors?

7 A So I don't know specifically which deal model was provided
8 to the investors, but they included one of the -- they included
9 either the financing or the conservative case, because the
10 strategic case is usually held to management from an operating
11 performance standpoint.

12 Q And which version of the deal model did you analyze?

13 A We analyzed in detail the C&S conservative deal model,
14 because that was the deal model that was in evidence in this
15 case.

16 Q And that would be the low model in your hierarchy?

17 A It was the low model. We did review the summary
18 performance of the other two models, noting that the C&S
19 conservative model was the lowest in profitability, but did not
20 do any analysis.

21 Q And just so we are clear and don't have any confusion,
22 when I'm asking you questions for the next few minutes about
23 the deal model, are you talking about the conservative model?

24 A All of our conversation today will be on the C&S
25 conservative deal model.

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1 Q Which is the lowest profitability, the worst case that C&S
2 projected?

3 A That's right, yes.

4 Q And if it turns out that either the financing model or
5 strategic model is correct when the crystal ball becomes
6 clearer, then the numbers would all just be better for C&S; is
7 that right?

8 A That's correct. In my experience in working with both
9 banks and equity sponsors and the underwriting process, they
10 typically will get all of these models to look at in using
11 their underwriting.

12 Q Now, does a deal model in general, and this deal model in
13 particular, contain assumptions?

14 A It contains assumptions, yes. A lot of assumptions in
15 terms of future performance.

16 Q Is there any way to do a deal model without assumptions?

17 A There is no way to predict the future without using
18 assumptions and going off of base performance.

19 Q Now, on the slide here, DDX21-10, you have some
20 information about the C&S conservative deal model. What is the
21 import of this information?

22 A So I think this is just trying to highlight the sheer size
23 and massive amounts of data and calculations. I mean, it is 62
24 worksheets or tabs. Each one of those worksheets is extensive
25 and can include either data or calculations for particular

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1 aspects. There is 1,400 columns, almost 7,000 rows, over
2 80,000 mathematical calculations that's driving performance
3 going forward, and over 215,000 cells of calculations or data
4 in this model. This is extensive, and it demonstrates the
5 level of diligence as well as granularity that they felt was
6 important in projecting the future.

7 MR. PERRY: Your Honor, the C&S conservative deal
8 model was admitted into evidence during Ms. Florenz's testimony
9 as PX3602. The Court has it in the files as a native document.
10 It is an Excel document. We printed it out with a certain
11 amount of success in the binder before you. It is about a
12 two-inch stack of very hard to read numbers.

13 With the Court's permission, could my colleague
14 approach with a laptop for Mr. Galante -- let me ask a
15 question.

16 BY MR. PERRY:

17 Q Would you actually use a printout of the deal model in any
18 relation in connection with your work, Mr. Galante?

19 A No. All these pages are double-sided. It is very
20 difficult to look at other than the summary pages. We would
21 actually work with the native file.

22 MR. PERRY: May we run a brief demonstration on the
23 native file?

24 MS. HALL: No objection.

25 THE COURT: It's not a problem. And I understand

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1 there is no objection.

2 MR. PERRY: Your Honor, while they plug in the cord,
3 I'm just checking on where --

4 THE COURT: If you want to take a break now, you can.
5 It is up to you. You have got it up there. They are going to
6 probably going to have to make it larger. It is hard to read.

7 MR. PERRY: I think maybe we should work on it. If
8 we could take a brief break.

9 THE COURT: Yes. We can take our 15-minute break for
10 the afternoon. Yes.

11 (Recess.)

12 (Proceedings resumed:)

13 THE COURT: Please be seated. All right. Hopefully
14 everything is taken care of.

15 MR. PERRY: Hopefully, Your Honor. If it is not, we
16 will move on from there.

17 THE COURT: All right.

18 BY MR. PERRY:

19 Q Mr. Galante, you should have a laptop in front of you in
20 which is loaded PX3602, the native version of the C&S
21 conservative deal model. Is that working for you?

22 A Yes, it is.

23 Q Mr. Rennick, can we show that on the private screens only.

24 Could you take us on a quick tour, Mr. Galante, of
25 how you have worked with this deal model and how others with

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1 access to it could work with it?

2 A Sure. I'll explain it from a general perspective. It is
3 extremely complex, and as I mentioned, each one of these little
4 tabs on the bottom is either a full analysis or data source.
5 But if we look at this summary model tab, it includes what's
6 called here in column P12-23, which is essentially the last 12
7 months or 2023's operating performance from a store level.
8 This comes from KPMG's quality of earnings diligence.

9 Then management has projected years 1 through 11
10 going out to reflect future performance. So essentially this
11 tab here is the summary of all of the input sheets that lead
12 into the model.

13 Q When you say "input sheets," is that something that's
14 within the deal model itself?

15 A So let me move over to the input tab, which is next to it.
16 This is a listing of all the assumptions. What C&S has done,
17 in addition to laying out the assumptions, at a fairly granular
18 level, they have also, as I scroll over to the side, they have
19 included source information, including, for example, an
20 analysis from Maine, where they're projecting retail sales to
21 grow 3 percent through 2030. So their assumptions and the
22 support for their assumptions are also embedded throughout this
23 model.

24 Q So anyone who works with this model can see the
25 assumptions and the support for the assumptions; is that right?

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1 A That's right. I'll just scroll down to see a little bit
2 the level of assumptions that they have. It's going from sales
3 to fuel, wholesale, and then right down.

4 Q Okay. So that's the inputs tab; is that right?

5 A That's right.

6 Q What's next on our magical mystery tour?

7 A So let me go back to the model. As I said before, this
8 model was built up from a database from the 579 stores that was
9 acquired from both Kroger and Albertsons for the stores that
10 included in this divestiture. If I click here on the grocery
11 sales, which that number, the first two digits represents
12 billions of dollars in sales, let me walk you through where it
13 comes from in the model.

14 Q Did you say "millions" or "billions"?

15 A Billions. The first two digits represents billions,
16 because this model is in millions of dollars. So it represents
17 scale.

18 I will take that number and flip over, which goes
19 about 30 tabs to the right, to show all of the banners that are
20 being acquired in the divestiture and the number of stores by
21 banner. So this here reflects the total, 579. If we come up
22 to the first tab, there are 97 Albertsons stores included
23 there. So we will click on "Albertsons," and then we will move
24 to show where that comes on on a regional basis.

25 So those Albertsons stores, if we look just at the

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1 Pacific Northwest, which is highlighted here in cell A1, you
2 will see 27 stores are Albertsons and this is their related
3 sales.

4 Q Okay. So we have data at the store level of increasing
5 levels of specificity as you go through the sheets. Is that
6 one way to think about it?

7 A That's right. I think it's important, because the way the
8 model works is at a regional level. So both sales declines and
9 growth, re-bannering calculations, and other calculations are
10 all done at a regional level. So this summarizes all of the
11 579 stores to a regional level to be able to project the
12 performance going forward.

13 Q Did I understand the previous slide to show that at the
14 regional level it starts with the individual store-level data
15 for all the stores within that region?

16 A Let me take you to the next tab here. I clicked on the
17 sales for Albertsons, and I'm going to move back. And this is
18 the database that it starts from. This database not only
19 having financial performance also shows extensive attributes
20 around the store. And you can see hourly wages at a store
21 level, the sales at a store level between grocery, pharmacy,
22 fuel. Keep going over, we have gross profit for each one of
23 those categories. As we continue to slide over, it ends at
24 4-Wall EBITDA, which is the bottom number that KPMG did their
25 analysis on.

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1 Q We have a large database with lots of granular detail
2 leading to 4-Wall EBITDA for each of the 579 stores that then
3 gets rolled up to the regional level and overall financials; is
4 that correct?

5 A That's right. In this model the source data goes back
6 three years, even though we just showed in the summary model
7 tab -- C&S just showed in the summary model tab base year for
8 2023.

9 Q So you have the actuals for the base year, and then we
10 looked at one tab, is that right, for some of the assumptions
11 for future years?

12 A That's right. The first tab was the inputs.

13 Q Are all of the assumptions set forth in there or
14 elsewhere -- either in that tab or elsewhere in the model on
15 which it was built?

16 A All of the assumptions are in the inputs tab. Where the
17 assumptions come from and the rationale for those may be
18 contained in tabs throughout this document. That was the
19 analysis that was performed.

20 Q How long did you spend personally and your team,
21 Mr. Galante, with this deal model?

22 A I spent significant time in this deal model understanding
23 the performance, how it was laid out, and my team members spent
24 hundreds of hours testing the calculations, verifying the
25 calculations, understanding support that comes in from outside

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1 sources into this deal model that's not included to make sure
2 that we didn't find any errors or calculations, and we
3 understood how the assumptions were being used.

4 Q Did you find any broken formulas?

5 A None.

6 Q Did you find any errors?

7 A We did not.

8 Q Did Mr. Fox testify about any errors or omissions in the
9 deal model?

10 A He did not.

11 Q Did the complexity of this deal model surprise you based
12 on your experience with 800 financial transactions?

13 A Not for a deal of this magnitude.

14 Q But it is complex?

15 A It's comprehensive.

16 Q Comprehensive?

17 A The transaction -- the divestiture itself is complex,
18 which is why it requires comprehensive due diligence and
19 comprehensive analysis and financial modeling that's also
20 outlined in the business plan.

21 Q Thank you, Mr. Galante. You can close that laptop, and I
22 think that will turn off the deal model.

23 Mr. Rennick, if we can turn on the public screens to
24 DDX slide 11. In addition to the deal model, did C&S prepare a
25 business plan for the divestiture business?

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1 A They did. And this is the summary and some supporting
2 pages from the business plan.

3 MR. PERRY: Your Honor, the business plan is already
4 in evidence in this case as DX1058.

5 BY MR. PERRY:

6 Q I think you mentioned in discussing your experience as
7 transaction advisor that the operative business plan is a
8 document that you typically review in connection with the
9 business plan; is that right?

10 A What the business plan does, it actually articulates and
11 summarizes the future performance and the accountability and
12 timelines and responsibility for the inputs that are put in the
13 deal model. I worked -- we do a lot of the diligence side
14 coming up to provide guidance in terms of the assumptions that
15 will be used in the deal model and also provide perspective of
16 what goes into the business plan.

17 Q You may have answered this, but I'm slow. What is the
18 connection between the deal model we were just looking at and
19 the business plan prepared by C&S?

20 A So the deal model quantifies either the revenue movements,
21 the gross profit percentages, or the costs associated with
22 running the business into the future based on the challenges
23 and the risks and the opportunities that were identified in
24 diligence, and those challenges, risks, and opportunities are
25 documented in English in the business plan that support the

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1 quantified numbers in the deal model.

2 Q If we could turn to the plan itself, Mr. Rennick. This is
3 public. This particular slide is public. DDX1058, slide 2.

4 Does a business plan typically explain in plain
5 English how the business expects to be operated?

6 A It does. It provides context in the prospective
7 management in terms of what they did and what they expect going
8 forward.

9 Q For example, this slide we are looking at from the
10 business plan, which is in evidence, says, "We are being
11 realistic about what it is going to take to succeed with these
12 assets and have both the financial and contractual ability to
13 weather the transition period and come out the other side. In
14 other words, this is not going to be another Haggren."

15 Do you know what a transition period is in the
16 context of a divestiture, Mr. Galante?

17 A As I mentioned before, divestitures are not standalone
18 business. So you need the time to be able to transition the
19 assets, the resources, the talent into a new platform and
20 augment that platform and enhance it to be able to operate as a
21 standalone business.

22 Q Were you here with when Mr. Cosset testified about the
23 transition services agreement or TSA?

24 A I was, yes.

25 Q Are TSAs, in your experience, with over 800 transactions

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1 as a transaction advisor, unusual in divestiture transactions?

2 A TSAs are very usual in all the divestiture transactions.

3 All the transactions I have been involved in, there is some
4 form of a TSA involved.

5 Q Why is that? Why do almost all divestitures involve some
6 sort of a TSA agreement -- TSA contract?

7 A As I mentioned earlier, a divestiture by its definition is
8 not a standalone business, and you're buying assets, product
9 lines, customer accounts that need to be stood up into a
10 prospective environment, whether it's part of a strategic
11 acquire or a new platform.

12 Q Thank you, Mr. Galante.

13 So your second opinion, I think we have gone through,
14 comprehensive due diligence, the financial model, which is the
15 deal model, right, and the business plan. I should be clear.
16 "Financial model" is sometimes a different word for the deal
17 model?

18 A Yes, sir.

19 Q Your third opinion is that C&S identified and addressed
20 the risks in this divestiture business.

21 Mr. Galante, to be clear, you looked at the
22 transaction documents, the deal model, and the business plan,
23 right? You're not looking into a crystal ball. You're looking
24 at what C&S actually modeled? Do I understand that correctly?

25 A That's right. I looked at the history, which is actual,

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1 but then prospectively the assumptions that they used, why they
2 came up with those assumptions, and then what they modeled out
3 in the future.

4 Q If we can turn to the next slide, Mr. Rennick.

5 Do you recall when Mr. Cosset testified that the TSA
6 and APA are broadly organized into five categories -- stores
7 and banners, distribution, private labels, systems and data,
8 and talent?

9 A Yes, I did.

10 Q And he showed a version of this chart?

11 A That's right.

12 Q And do you recall Mr. Fox also testified that most, if not
13 all of these areas, is how he organized the "challenges" that
14 he identified in connection with the transaction?

15 A Yes.

16 Q Let me ask you a question, by the way. You used the term
17 "risks," and Mr. Fox used the term "challenges." Is there a
18 difference in this divestiture business between risks and
19 challenges in your opinion?

20 A No. I think "challenges" incorporates a level of risk,
21 and you need to be able to plan for it. In this transaction,
22 they are used the same.

23 Q What do you mean by "a level of risk that you need to plan
24 for"?

25 A Well, there is going to be change. In any type of change

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1 in management, you need to be able to plan for the change,
2 understand the current state and where you want to go, and then
3 what that gap is or what you need to be able to get there,
4 which could include a variety of different things. But what it
5 does include is costs, to be able to achieve that, and time.
6 So that's what you need to do to be able to transition a
7 business.

8 Q And did you make a determination, Mr. Galante, based on
9 your experience as transaction advisor, whether C&S planned for
10 the risks or the challenges identified by Mr. Fox, identified
11 by Mr. Cosset, identified by everyone in this courtroom
12 associated with the transaction and listed on this slide in the
13 transaction documents, deal model, and business plan?

14 A In my experience, in working in a number of transactions
15 and a lot of divestitures, C&S has done extensive due diligence
16 and have a complete understanding and plan for the transition
17 of all these items in an appropriate and reasonable manner.

18 Q Let me ask this question, because I was a little confused
19 on this point. Did Mr. Fox identify a single thing -- a single
20 "challenge" that is not addressed by C&S itself in the deal
21 model and business plan?

22 A All of Mr. Fox's challenges are included in the business
23 plan. And I tested the deal model and the deal plan. They
24 incorporate the appropriate and reasonable amounts.

25 Q Thank you, Mr. Galante. Let's tick through these quickly,

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1 if we could. More detail on all of these things is in your
2 report, right?

3 A Yes.

4 Q Let's first go, Mr. Rennick, on the private screen only,
5 please, to slide 15.

6 We have heard a lot in this case about re-bannering.
7 Does C&S understand it has to re-banner some of these stores?

8 A C&S understands re-bannering. They've had experience in
9 re-bannering, and I think they have learned in their experience
10 in re-bannering to appropriately assess what the requirements
11 are for this divestiture.

12 Q And without saying the numbers, how does the deal model
13 account for re-bannering in connection with the divestiture?

14 A So on the investment side, that first expense, which was
15 recommended by Bain in their analysis of re-bannering
16 requirements for these stores, is included as a one-time cost,
17 and that cost is in the deal model.

18 Q So on the left-hand side, it's under "investments," those
19 are all one-time costs?

20 A Those are all one-time expenses incorporated into the deal
21 model.

22 Q So that's to put on the new signs?

23 A The amount per store for the signs, the re-bannering, the
24 concepts. It does not include any extensive level of
25 remodeling, but it is for re-bannering.

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1 Q We will get back to remodeling. That's the one-time
2 expenses.

3 Mr. Fox also expressed something having to do with
4 brand equity and the possibility that consumers -- the store
5 would lose sales when it changed banners.

6 Do you remember that?

7 A Yes, he did.

8 Q Did C&S account for that possibility in the deal model?

9 A They did account for it. Bain did a lot of the work
10 quantifying and calculating the sales detriment, and we see
11 that on the right-hand side where this amount is on average per
12 year. The decline in sales and gross profit that they've
13 incorporated in the C&S conservative model.

14 Q Now, it is kind of funny word, "sales detriment" or "sales
15 decrement" -- people use different things. What does that mean
16 in the context of a deal model and re-bannering in particular?

17 A So in projecting sales, typically you're projecting sales
18 growth. So you would assume a percentage growth from the prior
19 year. In this case they took the growth percentages and
20 reduced it by the sales detriment based on the stores they had
21 to re-banner, their planned time for re-bannering it, and they
22 did that at the regional level, very granular.

23 Q Now, I think you said some of these figures or maybe all
24 of them come from the Bain analysis, right?

25 A Yes. They all come from the Bain analysis.

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1 Q Do you remember when Mr. Fox testified that C&S used the
2 Bain base case rather than the Bain worst case for
3 re-bannering?

4 A Yes, I recall that.

5 Q Do you have a reaction to that testimony?

6 A Well, in my experience in financial modeling and getting
7 assumptions from clients, there is always going to be a base
8 case, which is the most widely used case and applicable in most
9 situations, and then there is a worst case from the standpoint
10 of what could happen if other things that weren't expected
11 developed. And in my experience, the worst case is very rarely
12 used. But the base case or some modification of the base case,
13 based on management's judgment and experience, is used in
14 financial modeling.

15 Q And you heard Ms. Florenz testify that it was management's
16 business judgment here to use the Bain base case rather than
17 the worst case, right?

18 A She did say that, yes.

19 Q Now, if the Court or anyone were to have the appetite to
20 override management's business judgment and apply the worst
21 case, did Mr. Fox analyze what effect that would have on C&S's
22 financial projections?

23 A Mr. Fox did not. He just stated that they didn't use the
24 worst case.

25 Q Did you test the financial impact of using the worst case?

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1 A Initially I didn't I think it was important to evaluate
2 the worst case, because I typically don't do that in the
3 transactions that I advise on. But based on Mr. Fox's concern
4 I analyzed and tested, if the worst case were to occur, what
5 would the impact be.

6 Q And what was your conclusion without stating the actual
7 number?

8 A So the analysis essentially changed the sales decrement by
9 a cash flow perspective of 1 percent. It is immaterial and
10 doesn't change my conclusions at all.

11 Q Is the analysis that you did of testing -- a sensitivity
12 analysis essentially a Bain's worst case -- set forth in
13 paragraph 175 of your report, which is in evidence as DX2783 --
14 2738. I apologize.

15 A Yes, it is.

16 Q Thank you, Mr. Galante. The next category of risks or
17 challenges -- Mr. Rennick, you can go to slide 17 on the public
18 screen -- is distribution. Mr. Fox didn't have a lot to say
19 about distribution, did he?

20 A He thought there were challenges with distribution.

21 Q He noted, for example, they would have to -- C&S will have
22 to -- is planning to build two new distribution centers?

23 A Yes. C&S is planning to build two new distribution as
24 well as a depot. And the cost associated with outfitting and
25 building those are incorporated in the financial model.

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1 Q They're in there already?

2 A They're in there.

3 Q Okay. Let's go on to private label. We have heard a lot
4 about private label in this case. Is this another risk that
5 C&S planned for and quantified in its financial model and
6 addressed in its business plan?

7 MS. HALL: Objection, Your Honor. Could Mr. Perry
8 please not lead the witness.

9 THE COURT: I know you're trying to get through. So
10 just ask him the questions. You don't have to lead. I know we
11 are all trying to deal with time constraints, so I understand.

12 MR. PERRY: Thank you, Your Honor.

13 BY MR. PERRY:

14 Q How, if at all, Mr. Galante, did C&S address private label
15 in the deal model and business plan?

16 A Well, first off, the transaction documents include a
17 transition service agreement that allows a majority of the
18 sales and products to continue for four years, and the
19 analysis -- we did the analysis as far as the amount of sales
20 that actually need to be replaced, and that sales need to be
21 replaced in those first four years is only 2 percent of sales.
22 So they had the time frame to do it. And they've also started
23 to engage third-party consultants and advisors to help them
24 plan for and transition private label products.

25 Q Now, Mr. Fox again testified that C&S's approach to

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1 private label may have somehow have been inconsistent with the
2 Bain survey, although he did not actually show any of us the
3 Bain survey he was talking about.

4 Do you recall that?

5 A Yeah. I think he actually said there would be a
6 significant impact. And in my review the Bain materials, he's
7 just wrong.

8 Q Did you actually look at the Bain survey?

9 A Yeah. I spent a lot of time in the Bain survey around
10 private labels.

11 Q Did you cite it in your report, in fact?

12 A I did cite it in my report.

13 Q Let's go to the next slide, Mr. Rennick.

14 If you look at the top, what was Bain's conclusion as
15 to the risk of changing private labels, Mr. Galante?

16 A Yes. The conclusion of their analysis is highlighted in
17 the first two sentences of the slide. It says, "The risk of
18 changing private labels: If Walnut brands changed, customers
19 indicated that it would have limited effect on their shopping
20 frequency at that store."

21 Q Thank you, Mr. Galante. Does the C&S conservative deal
22 model include costs for transitioning private label?

23 A It does. It includes increases to costs as it starts --
24 as the transition services start to expire. Then it continues
25 those higher costs throughout the deal model, understanding

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1 they may have a different procurement opportunity than Kroger
2 or Albertsons has today.

3 Q Does the conservative deal model account for -- does the
4 conservative deal model account for private labels in any other
5 way?

6 A The conservative deal model incorporates private label
7 sales, which are decreased by the re-bannering impacts and have
8 higher costs, which provides a lower gross margin.

9 Q So there is a margin impact assumed in the deal model?

10 A It maintains the same cost -- it maintains the same sales
11 price but increased costs, so the margin is eroded.

12 Q Did you hear any testimony at the trial that suggests that
13 might be a conservative assumption?

14 A Yes. Mr. Winn indicated that, from a procurement
15 standpoint, that they feel that they are potentially going to
16 do better than some of the costs that were achieved by
17 Albertsons.

18 Q And is there any testimony in this trial or document, for
19 that matter, that suggests they are going to do worse than the
20 deal model assumes?

21 A Not that I'm aware of.

22 Q Next, risk or challenge, systems and IT. Is this
23 something that is also addressed in the conservative deal
24 model?

25 A Yes, it is.

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1 Q What are you showing on DDX21-20, which is a confidential
2 slide?

3 A I think what's really important in this situation is that
4 they are moving to an IT clone, and that clone currently serves
5 82 percent of the stores that are part of the divestiture,
6 which provides familiarity with the operations of the
7 associates at the store level as well as the managers, and
8 that's going to transition over to the new company, where
9 they're going to operate on one system as opposed to the
10 multiple systems that the entities are operating under today.

11 Q Have you seen a structure like that in any of the
12 divestitures you have been involved with as a transaction
13 advisor, Mr. Galante?

14 A I actually have. In my experience, I mentioned before the
15 100 store Janie and Jack divestiture from the Gap, they all ran
16 on the Gap's system. They needed to separate the division and
17 carry it over to a new IT platform to be able to operate the
18 business, and they had a transition services agreement and
19 completed that in less than a year.

20 Q On the right-hand side of the slide, without saying the
21 money out loud, what is represented by that very large figure?

22 A That is the transition costs included in the deal model to
23 be able to pay for and support IT transition and stand-up to
24 the new platform.

25 Q Did Mr. Fox testify that this would not be enough to

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1 complete the transition to the systems needed for the IT
2 systems at the divestiture business?

3 A He did express concern -- and I'm not quite sure -- it
4 wasn't supported though.

5 Q Are you aware of any testimony or documents in the case
6 that would suggest that this very large number is not
7 sufficient?

8 A I am not.

9 Q All right. Finally, Mr. Galante, is talent. Did C&S plan
10 for this challenge in the conservative deal model?

11 A C&S did plan for talent in the model. They planned in the
12 transaction documents the transition of talents. And in the
13 model they incorporated costs from a corporate perspective in
14 the future operating -- standalone operating costs.

15 Q So the cost of the 70-plus-thousand people that are going
16 over are in the model; is that correct?

17 A From a 4-Wall EBITDA standpoint, all the store level and
18 distribution costs of the 67,000 employees are in 4-Wall
19 EBITDA. In addition to that, the company is going to
20 transition 800 -- about -- corporate employees on day one and
21 grow that to 1,800 corporate employees as they work off the
22 transition services agreement, and all those costs are
23 incorporated in the model.

24 Q Now, let's step back for a second on addressing the risks.
25 You have talked about how each of the five things that have

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1 been at issue in this trial are addressed in the deal model and
2 accounted for, right?

3 A Yes.

4 Q But things happen in the real world. Would you agree with
5 that?

6 A Planning -- the best plan will always change. Things do
7 happen in a just course.

8 Q Do deal models have a mechanism for management to account
9 for -- quantify and account for the possibility of unforeseen
10 events or changes in running a business down the road?

11 A They do. I mean, as an example, the company -- the
12 business plan here is generating positive operating cash flow.
13 So to the extent that costs were higher, they would be able to
14 use that positive cash flow from the operations to support
15 those costs. But in addition, as I mentioned earlier, C&S
16 overall has additional lines of credit and debt capacity to be
17 able to support any challenges or incremental costs that they
18 may incur.

19 Q What if the divested business were to come up on some
20 capital expenditures? You mentioned remodeling, for example.
21 It turns out that 2 of the 579 stores need a gut renovation.
22 Where is that in the conservative deal model?

23 A Well, there is a significant line for capital expenditures
24 in the deal model which covers store replacements as well as
25 remodeling.

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1 Q Mr. Rennick, this one is for the private screen only,
2 please. If we can go to slide 22.

3 Mr. Galante, is this the number you just referred to?

4 A Yeah. That is called base package CapEx. And base
5 package CapEx is all store level and store-related capital
6 expenditures in the first five years of the model. An amount
7 that's greater than that is in the next six years of the model,
8 but we broke it down to the first five years.

9 Q So if in the first five years a store needed to be
10 remodeled, would this be enough to cover that?

11 A Based on what I've reviewed and in my experience, yes.

12 Q If in the first five years a store needed a new POS system
13 or a complete computer system rebuild, would that be enough to
14 cover that?

15 A That's all in the IT budget, yes, there is enough money
16 here.

17 Q But if they went through the IT budget, and they still
18 needed more computers, is there still enough to cover it here?

19 A Yes.

20 Q And is this money available in the business plan for those
21 kinds of unforeseen capital events that happen to every
22 business?

23 A It is in the deal model and the business plan, yes.

24 Q Do you recall whether Mr. Fox took any consideration of
25 the CapEx quantification in critiquing the challenges that C&S

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1 will face?

2 A He did not.

3 Q All right. We are almost done, Mr. Galante. You were
4 here in the opening, right?

5 A I was, yes.

6 Q And you were here when Ms. Florenz was examined by the
7 Government?

8 A Yes, I was.

9 Q Mr. Rennick, for the private screen only, can we please
10 show slide 23. This is a demonstrative used by the Government.
11 It was marked in this case as PX7. They used it opening
12 without the numbers, and I believe with Mr. Florenz with the
13 numbers.

14 Do you recall that?

15 A Yes.

16 Q Can you explain what's happening on this slide?

17 A What this slide depicts is year one, the number up on top,
18 on the upper left-hand side, is the base year 4-Wall EBITDA, so
19 the store level profitability. This projects a reduction in
20 profitability through years one through three and then small
21 increases in profitability to come back to the level of
22 profitability at a store level that they had in year eleven.

23 Q So why is there that dip in 4-Wall EBITDA in the few years
24 after the acquisition closes and C&S begins running these
25 divestiture stores?

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1 A So the reason there is a dip is because of assumptions
2 that management included in the deal model -- conservative
3 assumptions, like significant declines in sales in the first
4 few years as opposed to increases as well as re-bannering sales
5 detriment that we talked about and private label additional
6 costs and margin erosion that we talked about.

7 Q So they didn't have their rose-colored glasses on when
8 they prepared this analysis?

9 A The investors saw this. They decided to invest \$2.9
10 billion, and they know exactly what they're getting in this
11 transaction.

12 Q Let me very clear what this slide shows. That dotted
13 line, is that breakeven at the top of the slide?

14 A No, that's not breakeven. That shows profitability levels
15 at year zero or where they are today.

16 Q Where would breakeven be? Is it even shown on this slide?

17 A It's not shown on this slide, and it is significantly
18 below where the year three low point is.

19 Q In the worst year, the lowest year, year three -- please
20 don't say the number out loud -- are the stores generating
21 significant free cash flow?

22 A Yes.

23 Q And is that number in thousands? Millions? Or billions?

24 A Billions.

25 Q Billions?

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1 A Billions.

2 Q Thank you, Mr. Galante.

3 Last bit: Did you make this slide?

4 A I did, yes.

5 Q Why? What are you trying to tell us?

6 A I think what this does is summarizes how, in my opinion,
7 based on my experience and the analysis and work that I
8 performed in forming my opinions, it shows quadrants of what
9 this divestiture is. The first two quadrants are items that
10 the sellers are providing. The bottom two quadrants are items
11 that the transaction documents and structure or C&S are
12 providing. And I'm happy to walk you through it.

13 Q Let's do it. Again, we are going to focus on the
14 transaction documents, the deal model, and the business model,
15 not crystal ball, right?

16 A Exactly.

17 Q Thank you, Mr. Galante.

18 A So what the sellers are providing here are resources.
19 They're selling stores, stores from two different companies
20 today. They are providing an IT clone and platform to operate
21 those stores. They are providing banners that are known in
22 markets to run those stores. They are transitioning private
23 label product lines in selling those stores. Most importantly,
24 they're transitioning people that have experience operating
25 those stores and working, from a corporate standpoint, with the

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1 stores and with other people to create a transition.

2 All of those resources come together with the money
3 that C&S brings to the table, \$2.9 billion as well as
4 additional resources, if needed, and the time that comes from
5 the transaction documents. The transaction documents
6 specifically are the transition services agreement. And the
7 reason you have a transition services agreement is to provide
8 adequate time to stand up a business into a standalone
9 operation. And here, they have a variety of time spans, but it
10 is four years to stand this business up.

11 Q So that brings us to your final opinion, Mr. Galante.
12 No. 4 on the chart. Let's have it.

13 A As I mentioned, C&S, in the divested business, is
14 acquiring the functional equivalent of a standalone business.

15 Q Mr. Galante, in your professional opinion, after reviewing
16 800 -- being involved in 800 -- as a transaction advisor -- has
17 C&S identified, quantified, and planned for the risks or
18 challenges associated with this divestiture business?

19 A They have performed extensive diligence. They have. And
20 they've included the impact of those in the deal model and the
21 business plan.

22 MR. PERRY: Thank you, sir. I pass the witness.

23 MS. HALL: Your Honor, I believe the binders have
24 already been passed out for the Court, and we will hand out one
25 to the defendants as well.

D. Galante - X

1 THE COURT: All right.

2 CROSS-EXAMINATION

3 BY MS. HALL:

4 Q Mr. Galante, to pick up on your last remark, you don't
5 have any expertise yourself to be able to identify risks or
6 challenges associated with the divestiture business, correct?

7 A I have identified risk and challenges in advising clients
8 in other divestitures. I evaluated the work that was done by
9 their advisors on this deal.

10 Q Right. You had to evaluate C&S advisors' work. But you
11 yourself are not an expert in the challenges of setting up a
12 new grocery business, correct?

13 A Yes.

14 Q Let's start with what opinions you're not offering in the
15 case. You do not offer an opinion about competitive intensity,
16 correct?

17 A Yes. That's correct.

18 Q And you do not offer an opinion about whether the merger
19 will result in a loss of competition?

20 A Yes. That's correct.

21 Q You do not offer an opinion about whether the proposed
22 divestiture will restore competition loss due to the merger?

23 A Yes.

24 Q You do not offer an opinion about harm to consumers?

25 A Yes.

D. Galante - X

1 Q You do not offer an opinion about consumer welfare?

2 A Yes.

3 Q You haven't been engaged to look into the future to
4 determine whether C&S will effectively operate the business
5 after closing?

6 A Yes. I don't think anybody can look into the future.

7 Q Mr. Galante, you've never been retained ton assess the
8 causes of underperformance in a supermarket chain, correct?

9 A Not in a supermarket chain, but other companies.

10 Q In the demonstrative you used with counsel, you describe
11 this as a transformational transaction for C&S?

12 A I do, yes.

13 Q That's because acquiring the divestiture stores and
14 operating them requires C&S to transform as a business,
15 correct?

16 A The transaction will transform C&S, and it will be known
17 for something different than it is known today.

18 Q And we looked briefly on slide 20 at a substantial IT
19 transition expense. That's not an expense that the stores
20 today bear, correct?

21 A I'm sorry. Slide 20?

22 Q I'm sorry. Of DDX21.

23 A Is it in your binder.

24 Q No. It was with your counsel. It was tucked in the front
25 of your binder.

D. Galante - X

1 Just on the private screens, please, Mr. Dunkin.

2 A Okay.

3 Q You've found it at least on paper?

4 A I have it on paper.

5 Q That IT transition expense is not borne by the stores
6 today, correct?

7 A There will be annual licenses fee, but this is all
8 transition stand-up costs.

9 Q And there are a number of costs in the deal model that
10 aren't borne by the stores today, correct?

11 A Yes. Also supporting the transition.

12 Q So continuing to talk about the deal model, you haven't
13 compared C&S's prior acquisitions to the deal model C&S made
14 for those acquisitions, right?

15 A That's correct. That wasn't part of the scope.

16 Q So you don't know if C&S has a track record of creating
17 deal models that accurately predict their future performance?

18 A I think this transaction is much different, because C&S is
19 not going to run this business. A new management team is going
20 to run the business.

21 Q If we could pull up -- and I believe this is
22 confidential -- Figure 1 of your report. That's DX2738 at
23 page 8.

24 A Yes.

25 Q And you're not aware of other risks that C&S faced in

D. Galante - X

1 operating the divestiture stores that aren't included in this
2 chart, correct?

3 A Well, it depends on the magnitude. I think this chart
4 reflects the large risks that we have identified and were
5 evaluated.

6 Q And you haven't gotten into the specifics of what assets
7 are not part of the store divestiture package, correct?

8 A I have not.

9 Q And Professor Fox testified that C&S will face a challenge
10 from the commercial TSA services ending before C&S re-banners
11 most of its stores, correct?

12 A He did, yes.

13 Q At that time there will be stores owned by Kroger and C&S
14 with the same banner but different loyalty programs and
15 e-commerce capabilities?

16 A Yeah. That's correct.

17 Q That risk is not included in Figure 1 or the C&S deal
18 model, correct?

19 A No. But I'm not sure why it would be.

20 Q In your report you state that Kroger has the right to use
21 historical customer data from customers that shopped at both
22 divested and retained locations, correct?

23 A My report states that yes.

24 Q And Kroger could use that data to target advertising to
25 customers of the divested stores?

D. Galante - X

1 A I don't know.

2 Q That risk is not included in figure 1 or the C&S deal
3 model, correct?

4 MR. PERRY: Objection. Assumes facts not in
5 evidence.

6 MS. HALL: Okay.

7 THE COURT: I'm going to sustain it. Go ahead.

8 BY MS. HALL:

9 Q There is a risk that Kroger could send advertising to the
10 market around the divested stores, correct?

11 A In a competitive environment, companies could advertise
12 and work to compete, yes, as they desire.

13 Q And the risk of Kroger specifically targeting divested
14 stores is not included in figure 1 or the C&S deal model,
15 correct?

16 A No. I didn't think there's a need to be quantified or
17 included. I'm not sure there is a way to quantify that.

18 Q I believe you said you were present when Mr. Winn
19 testified?

20 A I was, yes.

21 Q And he testified that having more stores in a region helps
22 all the stores in that region?

23 A Yes. Absolutely.

24 Q And that means more efficient marketing and promotional
25 programs in that region?

D. Galante - X

1 A Amongst other items, yes.

2 Q And fixed costs can be allocated over more stores?

3 A He did say that, yes.

4 Q And Mr. Wins testified that if C&S has fewer stores in a
5 region, it will have lower volumes of fresh products, and it
6 will be harder to keep costs for those fresh products?

7 A I don't know if he testified to that. I don't know if he
8 said that. I don't recall.

9 Q Okay. Would you turn to your binder. I believe there is
10 a tab that should be label hearing transcript, 1190. It is a
11 9-30 hearing transcript -- or 8-30. I was informed I'm a month
12 ahead of myself already.

13 THE COURT: Which one.

14 BY MS. HALL:

15 Q It says 8-30 hearing transcript, 1190. There is a cover
16 sheet and then the testimony is on the back. Look at lines 11
17 to 14 on page 1190.

18 A Yeah. He said, "Yes." He said, "Generally, yes."

19 Q And in some states post-divestiture C&S will only have a
20 couple of stores?

21 A That's correct.

22 Q The risks Mr. Winn testified about regarding having fewer
23 stores in a region aren't included in figure 1 or the C&S deal
24 model, correct?

25 A Those haven't been quantified. I don't think there is a

D. Galante - X

1 way to, so, no, they are not included.

2 Q You view retail media network services as a profit center,
3 correct?

4 A That's what I learned in testimony over this week and my
5 understanding generally.

6 Q So you didn't analyze the risk of C&S's cost of goods
7 being higher because it is not able to offer retail media
8 network services?

9 MR. PERRY: Objection. Assumes facts not in
10 evidence.

11 MS. HALL: Your Honor, I can connect that.

12 BY MS. HALL:

13 Q You were present when Mr. McGowan testified?

14 A I was, yes.

15 Q And he testified that manufacturers expect their retailing
16 partners to have functioning retail media networks?

17 A You know, I don't recall. But I'm sure he did, if you're
18 saying it. I'm happy to go to it and look at it.

19 Q Sure. It is 8-29, hearing transcript, at 1123 is the
20 page. If you look at lines 2 through 4.

21 A What page was it?

22 Q It was 1123 -- 1023, lines 2 through 4.

23 A He said, "Yes."

24 MR. PERRY: Your Honor, I renew my objection. The
25 original question was, "The risk of C&S costs of goods being

D. Galante - X

1 higher," which is not Mr. McGowan's testimony that was just
2 shown to the witness, and there is no evidence to support the
3 question that the Government asked.

4 THE COURT: I don't know if he switched to another
5 topic --

6 MS. HALL: Your Honor, if I may.

7 THE COURT: -- because that says a different topic.

8 BY MS. HALL:

9 Q Mr. Aitken testified that the money --

10 THE COURT: So what are you doing?

11 MS. HALL: I'm asking a new question.

12 THE COURT: All right. Fair enough.

13 BY MS. HALL:

14 Q Mr. Galante, Mr. Aitken testified that the money that
15 Kroger earns from its retail media network can be applied to
16 the cost of its products, correct?

17 A My understanding, looking at Kroger's financial statements
18 as well as the testimony from Mr. Cosset, is that Kroger
19 classifies that as alternative profit, which is outside of
20 store operations.

21 Q Your report indicates that you relied on the deposition of
22 Mr. van der Veen, who is a Bain consultant?

23 A I read his deposition, yes.

24 Q And he testified at his deposition that Bain had
25 identified a risk that C&S may be unable to maintain vendor

D. Galante - X

1 funding at the divestiture stores, correct?

2 A You know, why don't we go to it to make sure.

3 Q Sure. It is PX4093, page 97.

4 A Okay.

5 Q That's line 17 to 21 on page 97.

6 A Well, it says the specific risks that Bain is identifying.

7 So it's really the work they're doing is around maintaining
8 trade funding, so yes.

9 Q But that risk isn't accounted for in C&S's deal model,
10 correct?

11 A So I think Mr. Winn testified that they procured
12 continuation of costs from a number of significant consumer
13 product companies, and he also believed they would be able to
14 do better. Their negotiations are in process.

15 Q Mr. Winn didn't testify that any contracts had been
16 finalized with any suppliers, correct?

17 A That's correct.

18 Q C&S currently has 15 percent of its retail revenues
19 derived from private label sales?

20 A C&S does, yes.

21 Q And Kroger and Albertsons derive about 25 percent of their
22 retail revenues from private label sales?

23 A That's correct.

24 Q And C&S assumes in its deal model that C&S will receive
25 25 percent of its revenues from private label sales?

D. Galante - X

1 A It's a continuation of what Kroger and Albertsons are
2 doing, yes.

3 Q Even though four years after the divestiture C&S will have
4 lost access to 100 percent of Kroger private label products and
5 the Albertsons private label products responsible for
6 85 percent of Albertsons' private label sales?

7 A Yeah. That's correct. I mean, they have the four years
8 to build their own private label products and transition.

9 Q During that period, if they are using the licensed private
10 label products from Albertsons, in year three, there is an
11 additional charge to acquire those products, correct?

12 A That is correct. And that cost is included in the model.

13 Q And there is a substantially higher cost to acquire those
14 products in year four of the model?

15 A That's correct. And it is included in the model.

16 Q I believe you said you were present when Ms. Florenz
17 testified?

18 A I was.

19 Q She testified that C&S was advised by Bain that a change
20 in private label brands would have a similar effect on sales as
21 a change on the name on the store, correct?

22 A Why don't we go to that.

23 Q Sure. It is 8-30, page 1146.

24 A There has been a lot of testimony in the last three weeks.

25 Q Yes. Once you are on 1146, it is lines 2 through 14.

D. Galante - X

1 MR. PERRY: Your Honor, I would ask that the witness
2 read through line 21 under the rule of optional completeness,
3 please.

4 MS. HALL: No objection.

5 THE COURT: Yes. Let's let him find it.

6 THE WITNESS: I'm sorry. What lines?

7 BY MS. HALL:

8 Q With your counsel's inclusion, it is lines 2 through 21.

9 A Okay.

10 Q And that risk of changing private label brands was not
11 incorporated into the C&S deal model, correct?

12 A Well, I think she felt it was incorporated with the large
13 cost expense that they put in their P&L.

14 Q But the risk of a decline in sales is not included in the
15 deal model, correct?

16 A No. The only decline in sales for private label is the
17 sales detriments that are incorporated in the deal model as
18 well as the "lower than the declines" in years one and two.

19 Q Now, are you speaking there of the decline in year one
20 overall and the decline in specific regions for re-bannering?

21 A The lower than projected assumptions for growth in year
22 two as well as re-bannering in years three and throughout, yes.

23 Q The total sales numbers that were used in some of the
24 parts of the deal model, those include pharmacy revenues,
25 correct?

D. Galante - X

1 A Yes, they do.

2 Q And those are assumed to grow at the same rate as grocery
3 revenues?

4 A That's correct.

5 Q And do you think that's a reasonable assumption?

6 A I do, yes.

7 Q You did not spend a lot of time on pharmacy because you
8 didn't think the risk there was as great as in other areas?

9 A That's correct.

10 Q Were you present for Ms. Morris' testimony?

11 A Yes, I was.

12 Q And she testified that Albertsons continues to have
13 challenges in some markets with recruitment and attrition in
14 its pharmacy operations?

15 A Yes. I recall that.

16 Q And she testified that many of Albertsons' pharmacies are
17 loss making?

18 A Yes. I recall that.

19 Q Does that change your opinion about the reasonableness of
20 assuming that pharmacy revenues grow at the same rate as
21 grocery revenues?

22 A No, it doesn't.

23 Q Pharmacy revenues make up 11 percent of the total revenues
24 in the C&S deal model?

25 A I would have to do the math. It is something like that.

D. Galante - X

1 It was much smaller than grocery and a little larger than fuel.

2 Q Now, earlier we had a brief discussion about the fact that
3 there are multiple deal models.

4 Do you recall that?

5 A Yes.

6 Q And as of the beginning of April 2024, there was only one
7 deal model, right?

8 A I don't know if they continued to change the deal model.
9 All our analysis was on the C&S conservative model.

10 Q Do you recall Ms. Florenz testifying that before late
11 April 2024 that was called the base case?

12 A I don't specifically remember. I don't specifically
13 remember.

14 Q Regarding the finance model that we briefly spoke about,
15 the difference between the conservative model and the finance
16 model is that the finance model uses a 4 percent growth rate
17 overall instead of a 3 percent base growth rate, correct?

18 A All I did when I looked at the strategic and the financing
19 case is I looked to see that that EBITDA or profitability was
20 greater than the conservative case, or the conservative case
21 was the lowest level of profitability. I did not go into the
22 assumptions to understand why, because it really wasn't
23 relevant to the opinions I was providing.

24 Q Ms. Florenz also testified regarding the strategic
25 initiative model that there is no back-up or plan about how to

D. Galante - X

1 achieve the double-digit millions additional fully loaded
2 EBITDA shown in that model?

3 A She did say that, yes.

4 Q And Ms. Florenz testified that the conservative deal model
5 is what C&S thinks will happen post-close?

6 A I think she was cautious on that, because nobody knows
7 what will happen. But that's management's best estimate and
8 judgment as of the time they prepared it.

9 Q Let's talk briefly about re-bannering. You said during
10 your direct testimony that sellers are providing banners known
11 in the market, but the acquired banners are other than a couple
12 of licensed states' regional chains, correct?

13 A A lot of them are, yes.

14 Q And to re-banner the stores in the package that needs to
15 be re-bannered, C&S is going to have to extend those regional
16 banners into new markets?

17 A Yes. They would have to do some of that.

18 Q In your report you said to mitigate risks associated with
19 introducing change to customers too quickly, for example, C&S
20 plans to engage an endorsement strategy of using banner
21 variations in the third year of TSA?

22 A I think I mentioned that was an option for them to use in
23 the transition documents.

24 Q And Ms. Florenz testified that they decreased Bain's base
25 rate re-bannering detriments by a third because of the

D. Galante - X

1 possibility of using that endorsement strategy?

2 A That is correct.

3 Q And I believe you said that Bain is one of the
4 best-in-class consultants that C&S hired?

5 A Well, they are one of the best-in-class global consulting
6 firms in the world, yes.

7 Q And they have a level of external objectivity?

8 A That's correct.

9 Q And C&S has limited retail experience?

10 A I don't know if C&S has limited retail experience. Did I
11 say that?

12 Q I'm asking you if you would agree that C&S has limited
13 retail experience.

14 A I think C&S has retail experience in different ways than
15 historically that it's going to be used going forward.

16 Q And C&S saw significant declines at the top stores it
17 re-bannered as Grand Union?

18 MR. PERRY: Objection, Your Honor. Scope. We didn't
19 talk about any prior divestitures.

20 MS. HALL: I thought it was relevant, Your Honor, to
21 respond to his view of their retail experience.

22 THE COURT: Sustained.

23 BY MS. HALL:

24 Q C&S has not incorporated all of Bain's recommendation and
25 advice regarding re-bannering, correct?

D. Galante - X

1 A C&S took all of Bain's recommendation and advice and
2 applied management judgment. Management judgment then came up
3 with numbers that were included in the deal model and the
4 business plan.

5 Q Going back to the deposition of Mr. van der Veen of Bain,
6 he testified that Bain advised against using interim
7 re-bannering strategies like endorsement, correct?

8 A You will have to take me there. I don't recall.

9 Q Sure. Let's go to PX4093. That will be at page 109.
10 Once you are on 109, it starts at line 9 through 25.

11 A Through 25 or 29?

12 Q Page 109, lines 9 through 25.

13 A Okay. I read it.

14 Q So does that refresh your recollection that Bain advised
15 against using interim re-bannering strategies like endorsement?

16 A I think Mr. van der Veen indicated that's what is written
17 on the slide, yes.

18 Q And they advised against using interim re-bannering
19 strategies because of increased costs, correct?

20 A Can you point me to where that is.

21 Q Sure. Page 110, lines 1 through 6.

22 A Yes. They indicate that brand changeovers may require
23 additional costs, which you'd have to take the one sign down,
24 so you need a cost to remove that sign, if you have two signs
25 up in a traditional banner. I don't think it's significant,

D. Galante - X

1 and clearly there is capital in the budget -- in the CapEx
2 budget to handle that.

3 Q Mr. van der Veen also testified that Bain neither designed
4 nor verified the C&S deal model?

5 A Yeah. My understanding is Bain was not involved in the
6 preparation of the deal model.

7 Q Okay. Let's switch topics slightly to talk about what
8 successful operation looks like to you of the divestiture
9 stores. I believe the slide we saw towards the beginning of
10 your testimony, you included the gross margin of C&S over the
11 past five years -- the little snapshot from their audited
12 financials?

13 A The C&S financial statements from the audit included the
14 income statement categories for the past five years.

15 Q And your analysis uses gross margin, among other measures,
16 because that's what you're able to contribute to your operating
17 costs of the store to generate profitability?

18 A Yeah. I mean, gross margins are your first level of
19 profitability, and then you have store operating costs in a
20 profit and loss statement, yes.

21 Q And you would say that C&S has maintained the competitive
22 position of the stores if their gross revenues grow with the
23 market?

24 A I'm not an expert on competitive positioning, so I'm not
25 sure I can answer that.

D. Galante - X

1 Q Okay. You would say the divestiture is a success if C&S
2 performs in accordance with its deal model?

3 A I did say that, and I agree.

4 Q And if C&S performs in accordance with the deal model, C&S
5 projects that stores in most regions will grow slower in the
6 market for years after the divestiture, correct?

7 A That is correct, based on the assumptions that they've
8 incorporated in the model.

9 Q And including a risk in the financial model doesn't
10 eliminate the risk to the business, right?

11 A No. What it does is it ensures that the business has
12 adequate resources and time to be able to work through that
13 risk or challenge.

14 Q Turning now to the business plan that you testified about,
15 which is DX1058 -- and I think it is in both binders at this
16 point -- specifically slide 12.

17 Mr. Dunkin, you can put this up on the private
18 screen, if possible. But if we have tech issues, we can use
19 paper.

20 Thank you so much.

21 Are you there?

22 A I'm there, yes.

23 Q The second bullet refers to C&S's 7,500 independent store
24 customers?

25 A It indicates they service 7,500 independent stores.

D. Galante - X

1 Q In the last sentence of that bullet, there is an amount
2 indicated of how much revenue that C&S earns from those 7,500
3 stores?

4 A That is correct, yes.

5 Q And that's less than 25 percent of C&S's annual revenues?

6 A For the independents, yes.

7 Q So serving 7,500 stores doesn't give C&S scale and cost of
8 goods equivalent to Albertsons, correct?

9 A I think if you look at the first slide, where it says,
10 "C&S revenues of" -- blank -- "represents" -- blank -- "at
11 retail" --

12 Q Uh-huh.

13 A And then if you took that and added the revenue for the
14 divested business, you actually get very close to what
15 Albertsons' revenues is today at a retail level.

16 Q And that would be a fraction of what the combined
17 Kroger-Albertsons revenues will be, correct?

18 A Yeah. It would.

19 Q But specifically we have heard a lot during this
20 proceedings about 7,500 stores that C&S serves, correct?

21 A Yes.

22 Q And the revenue from serving those 7,500 stores is less
23 than a quarter of C&S's revenues, correct?

24 A Yes. That's correct.

25 Q So serving 7,500 stores does not give C&S scale equivalent

D. Galante - X

1 to Albertsons, correct?

2 A I'm not sure I would look at it from a comparison that
3 way. I think you have to look at the company as a whole, not
4 just a piece of it.

5 Q Okay. You testified earlier --

6 Thank you, Mr. Dunkin. You can take that down.

7 You talked about SoftBank's investment thesis,
8 correct, based on a deposition of a SoftBank employee?

9 A That's correct.

10 Q And that same employee also testified that SoftBank can
11 achieve a double-digit return on its investment even if C&S
12 substantially underperforms its deal model?

13 A If you could take me to the deposition, I could refresh
14 myself.

15 Q That, I may not have with me -- and Mr. Dunkin -- so,
16 unfortunately, I'll move on.

17 You referred also to the diligence done by C&S's
18 lenders?

19 A Yes.

20 Q You haven't seen their analysis, correct?

21 A No. I didn't request, and it wasn't required in forming
22 my opinions, but I've worked with lenders on transactions, and
23 I know the level of diligence that's required to be able to
24 underwrite that for equity facilities.

25 Q C&S's lenders have the ability to include contract terms

D. Galante - X

1 to protect themselves in the event C&S experiences financial
2 difficulties?

3 A As I mentioned before, debt typically has security or
4 priority over other types of capitalization like equity, so
5 yeah, they would have preference.

6 Q But retail customers of the divested stores can't use
7 contracts to protect themselves from the risks C&S experiences
8 financial difficulties?

9 A I'm not sure how to answer that question.

10 Q Would you agree that retail customers of C&S stores face a
11 risk if C&S experiences financial difficulties?

12 A I think in my testimony earlier, to the extent that C&S
13 has issues or risks that aren't foreseen in the model, there is
14 capital to be able to work through those, both in the
15 performance of the stores, the performance of C&S's wholesale
16 business, as well as their debt capacity.

17 Q Let's talk about the performance of the stores. Turning
18 back to your report, which is DX2738, page 46.

19 Let's just keep this on the private screen for
20 safety's sake.

21 Looking at Figure 11 here -- let's let it come up on
22 the screen.

23 A Yes.

24 Q That chart identifies 40 stores in the divestiture package
25 with negative EBITDA, correct?

D. Galante - X

1 A Negative 4-Wall EBITDA, yes.

2 Q And the Kroger dots are black dots, and Kroger being only
3 94 stores in the entire 579 package, you would agree they're
4 overrepresented in the negative EBITDA category, correct?

5 A Well, they are overrepresented, but they also are more
6 owned stores or more leased stores, so if you looked at EBITDA,
7 the representation becomes more balanced.

8 Q And when you calculate EBITDA, you take out the obligation
9 to pay rent, correct?

10 A You take out the rent expense, yes.

11 Q But the stores still do have to pay rent?

12 A Yes.

13 Q So stores that are negative EBITDA may be in a negative
14 EBITDA because they can't afford their rent?

15 A Yeah. That's a way to look at it.

16 Q You started from a model, I believe you testified, that
17 starts from store-level data, correct?

18 A That is correct. The model -- the C&S conservative model
19 starts from store-level data.

20 Q But then it builds it up only into regional projections,
21 correct?

22 A Regional and by banner overall.

23 Q So there is no ability to look ahead and see store-level
24 projections of what stores may become EBITDA negative as a
25 result of the decline in sales or the decline in margins

D. Galante - ReD

1 predicted in the deal model?

2 A Yes. But I wouldn't expect that in a model like this.

3 Q But the decision to close a store would be made on
4 store-level performance?

5 A Yes. I mean, you look at a variety of things.

6 Performance over time as opposed to one data point like we have
7 here as well as the opportunity in terms of the reason that
8 it's not performing and what may allow it to help it perform.

9 Q And both Mr. McGowan and Mr. Winn testified that just last
10 year they closed a C&S-owned Piggly Wiggly store because it was
11 poor performing and losing money?

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

13 THE COURT: Sustained.

14 MS. HALL: No further questions, Your Honor.

15 MR. PERRY: Mr. Dunkin, could you leave that one up
16 for a moment, please.

17 Very brief areas, if I may, Your Honor.

18 THE COURT: Go right ahead.

19 REDIRECT EXAMINATION

20 BY MR. PERRY:

21 Q Mr. Galante, we are going in reverse order and start with
22 the scatter plot on the screen. This is in your report, page
23 46, Figure 11. First, can you tell the Court what this is so
24 we know what we are looking at.

25 A Sure. This is a chart where all the stores are

D. Galante - ReD

1 represented by a dot. The Albertsons stores in the 579 package
2 are a light blue dot, and the Kroger stores are a dark blue
3 dot. And what it does, it shows the 4-Wall EBITDA in millions
4 of dollars going across the right and percentage margin going
5 up and down.

6 Q So the stores above the line are making more money? Is
7 that one way to think about it?

8 A Yes. They are profitable at a 4-Wall EBITDA level.

9 Q Did you explain the scatter plot in plain English in your
10 report, Mr. Galante?

11 A It is, yes.

12 Q Paragraph 80 of your report says that this very graph that
13 we were just looking at reveals that "very few of the stores
14 being conveyed had negative 4-wall EBITDA. Of the 579 stores
15 conveying in the divestiture, 539 stores or 93 percent have
16 positive 4-wall EBITDA. Based on my experience, this
17 represents a reasonable concentration of negative 4-Wall EBITDA
18 stores in a portfolio of this magnitude."

19 Is that your opinion, Mr. Galante?

20 A That is my opinion, yes.

21 Q And why is that? Why would a portfolio have a small
22 number, 7 percent of stores, that may be negative at a certain
23 point in time on a 4-Wall EBITDA basis?

24 A Things happen in business. Things happen in stores. And
25 performance dips and performance improves. When you're looking

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1 at a portfolio of stores like this and an experienced
2 multi-unit retailer, they have programs in place to be able to
3 leverage the experiences of what's working in other stores and
4 help those underperforming stores. Some of the stores that are
5 underperforming may be one year, and the next year they're
6 performing again. This is a one-year snapshot.

7 Q Did you, in fact, look at the reason for the
8 underperformance of these stores on this scatter plot?

9 A I did not get into the details at a store level.

10 Q But did you look in general? I'll point you to paragraph
11 88 of your report, Mr. Galante.

12 A In general, sales performance. The sales performance was
13 significantly below that of the average. And based on my
14 analysis, an additional 2 million in sales per store would put
15 all of those stores into a positive territory.

16 Q Without saying the total 4-Wall EBITDA for the stores, but
17 is 2 million in additional sales a large or a small fraction of
18 4-Wall EBITDA for these stores?

19 A It's small.

20 Q And on an overall basis in the scatter plot, is the
21 portfolio profitable?

22 A The portfolio is significantly profitable, and all the
23 negative losses of those 40 stores is insignificant to the
24 overall profitability.

25 Q Thank you, Mr. Galante. We can take that down,

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1 Mr. Rennick.

2 The second subject of three: At the beginning of
3 your examination Ms. Hall asked you about various risks.

4 Do you recall that?

5 A I do, yes.

6 Q The list I kept was the risk that the post-merger Kroger
7 will continue to compete with all other grocers by running
8 advertisements that might be seen by C&S consumers, right?

9 MS. HALL: Objection. It mischaracterizes the
10 question I asked. I specifically asked about the risk that
11 Kroger would target the divested stores.

12 MR. PERRY: By advertising to the customers of those
13 stores, Your Honor.

14 THE COURT: Overruled.

15 MR. PERRY: Thank you, Your Honor.

16 BY MR. PERRY:

17 Q The risk of spoilage in stores and fresh products in those
18 regions in which there might be fewer stores, right.

19 A Yes.

20 Q The risk that C&S might not have a retail media operation?

21 A That's correct.

22 Q Some risks unclear associated with vendor funding?

23 A Yes.

24 Q And some risks, again, unclear related to private label
25 over and above what's in the deal model.

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1 Do you recall that?

2 A Yes.

3 Q You said twice that you didn't think those risks needed to
4 be included in the deal model. Can you explain why you have
5 that view?

6 A Which one do you want me to address?

7 Q Well, can you package them up perhaps.

8 A From an overall standpoint, the deal model has a lot of
9 conservative assumptions. When I say "conservative
10 assumptions," that means conservative relative to another
11 assumption that could have been incorporated. I think the
12 sales detriments, the private label margin erosion, the overall
13 sales declines incorporate conservative assumptions, and
14 overall the deal model reflects prudent and reasonable
15 performance of this store set over the future period.

16 Q Now, did Ms. Hall quantify the risk of targeting
17 customers?

18 A She did not. And I actually indicated I didn't know how
19 you'd quantify some of the points.

20 Q Did Mr. Hall quantify it?

21 MS. HALL: I don't think we have a Mr. Hall in the
22 case.

23 MR. PERRY: I'm sorry, Your Honor. Brain freeze.

24 THE COURT: I know.

25

D. Galante - ReD

1 BY MR. PERRY:

2 Q Mr. Fox. Let me put it this way: Has anybody in this
3 case quantified the risk of targeting customers that Ms. Hall
4 asked you about?

5 A No.

6 Q Has anyone in this case quantified the risk of spoilage
7 that Ms. Hall asked you about?

8 A No.

9 Q Same for retail media?

10 A Yes. It's not quantified.

11 Q It's not quantified?

12 A Yes.

13 Q And is the same true for vendor funding?

14 A It is the same. It is not quantified.

15 Q Is the same true for private label, whatever is not in the
16 model?

17 A Yes.

18 Q So the FTC, which bears the burden of proof in this
19 action, has not brought forth any evidence, now that we are
20 about to close our case, to be clear, on the quantification of
21 the risks that Ms. Hall raised with you in your
22 cross-examination as not being included in the deal model.

23 Do you agree with that, Mr. Galante?

24 MS. HALL: Objection. Argumentative.

25 THE COURT: Overruled.

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1 THE WITNESS: I have not seen any quantification of
2 any risks. And in my opinion, there doesn't need to be any
3 quantification for those items, as I mentioned when I was
4 replying to those points.

5 BY MR. PERRY:

6 Q Thank you, Mr. Galante. Final questions --

7 MR. PERRY: I have to put the "s" on there,
8 Your Honor, because I'm not quite sure it is one.

9 BY MR. PERRY:

10 Q Ms. Hall asked you some questions about whether C&S
11 followed all of Bain's recommendations.

12 Do you recall that?

13 A Yes.

14 Q And you answered, and I wrote this down: "C&S took Bain's
15 recommendation and applied management judgment."

16 Do you remember that?

17 A That is correct, yes.

18 Q Could you explain to us what you meant by that.

19 A So as I mentioned earlier, consultants are a great
20 opportunity to be able to get experienced professionals, search
21 capabilities, a deeper breadth that you may have on your
22 management team, and they come up with observations, insights,
23 conclusions in terms of what they're engaged to consult on.

24 Management has the responsibility and the obligation
25 to evaluate that in the context of their decision, and based on

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1 their experience and how they are going to run the business,
2 determine what assumption that they use to put in the model.
3 And based on my review of the evidence, consultants provided
4 conclusions, and management evaluated those conclusions and
5 consciously made business judgment to be able to incorporate
6 what they felt was required in the deal model.

7 Q Are you, Mr. Galante, in your capacity as a transaction
8 advisor and expert witness in this case, second-guessing the
9 business judgment made by the management of the C&S company in
10 deciding to invest \$2.9 billion into this divestiture business?

11 A I would never second-guess management's decisions and
12 judgment. It is that of theirs.

13 Q Do you think anyone on my side of the courtroom over here
14 is qualified to second-guess the business judgment made by the
15 C&S company in deciding to invest \$2.9 billion into the
16 divestiture business?

17 A No. Nobody is, other than the investors and the
18 management team.

19 MR. PERRY: Thank you, Mr. Galante.

20 No further questions, Your Honor.

21 THE COURT: You can step down.

22 THE WITNESS: Thank you.

23 MR. PERRY: I have a housekeeping matter, Your Honor,
24 if we have one minute.

25 THE COURT: You have time.

1 MR. PERRY: During Mr. Cosset's testimony, we asked
2 that one of his demonstratives be moved into substantive
3 evidence of certain employment numbers. The Government
4 objected to one-half of it and not the other half.

5 THE COURT: Right.

6 MR. PERRY: We have prepared a substitute document
7 that has the un-objected half as DX3019. We will provide that
8 in the ordinary course to be admitted into evidence for that
9 purpose in accordance to the Court's ruling. And I believe is
10 there is no objection.

11 MS. MUSSER: There is no objection.

12 THE COURT: All right.

13 MR. PERRY: With that, Your Honor, the defendants
14 rest and thank the Court for its consideration.

15 MS. MUSSER: If I may, just to touch base on timing
16 and to make sure we are all on the same page. I think we will
17 have plenty of time to present the three witnesses we have
18 planned with a nine o'clock start time, if that's okay with
19 Your Honor.

20 THE COURT: That's fine.

21 MS. MUSSER: That's all we wanted to check in. I
22 don't believe we will have any problems finishing tomorrow as
23 planned.

24 THE COURT: Great. Then can we talk about closing
25 arguments on next Tuesday? I know each side wants two hours.

1 I was just trying to think about that, and I wondered if maybe
2 we should start at 8:30 versus 9:00, because I expect you will
3 want a break that morning. We could break in between the two
4 closing arguments. So I'm thinking about your travel time. If
5 that's not a concern, we can start at 9:00.

6 MS. MAINIGI: 8:30 sounds great to us, Your Honor.

7 MS. MUSSER: That's fine with us as well.

8 THE COURT: All right.

9 Court will be adjourned until 9:00 a.m. tomorrow
10 morning.

11 MR. PERRY: Thank you, Your Honor.

12 (Court adjourned.)

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

/s/ Dennis W. Apodaca
DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

September 12, 2024
DATE

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