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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 17, 2024
ALBERTSONS COMPANIES, INC.,	)	
	)	
Defendants.	)	Portland, Oregon
	)	

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PRELIMINARY INJUNCTION HEARING  
DAY 15 - PLAINTIFFS' CLOSING ARGUMENT  
BEFORE THE HONORABLE ADRIENNE NELSON  
UNITED STATES DISTRICT COURT JUDGE

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## INDEX

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Plaintiffs' Closing Argument by Ms. Musser	3435
Plaintiffs' Closing Argument by Ms. Hall	3468

## TRANSCRIPT OF PROCEEDINGS

(September 17, 2024)

(In open court:)

THE COURT: Good morning. We are in day 15 -- please be seated -- in Case Number 3:24-cv-00347, Federal Trade Commission and Plaintiff States v. the Kroger Company and Albertsons Companies, Incorporated. This is the day for closing arguments.

So if counsel will state any new appearances on the record, your appearances will continue if you have already stated your appearance on the record and any housekeeping matters. Otherwise, we'll begin.

MS. MUSSER: Just briefly, an update on the briefing that we spoke about on Friday.

THE COURT: Yes.

MS. MUSSER: We are still conferring with opposing counsel, but what we would propose, if it's okay with Your Honor, is to file a joint proposal within 14 hours after the close of the hearing today.

That's acceptable. Absolutely.

MR. WOLF: Thank you, Your Honor.

THE COURT: Okay.

MS. MUSSER: Good morning, Your Honor.

THE COURT: Good morning.

MS. MUSSER: May I proceed?



1 THE COURT: Yes, you may.

2

3 PLAINTIFFS' CLOSING ARGUMENT

4 MS. MUSSER: Almost a month ago plaintiffs came  
5 before this Court asking it to pause the multibillion-dollar  
6 merger of Kroger and Albertsons due to the threat this  
7 merger poses to millions of Americans' access to affordable  
8 and convenient groceries in communities across the country.

9 In support of our request, this Court has seen document  
10 after document and heard testimony by witness after witness  
11 showing intense competition between Kroger and Albertsons on  
12 almost every aspect of running a grocery store. From list  
13 prices and coupons, to technology innovations, to assortment  
14 and presentation of food in stores. Far from cherry-picked  
15 or selective, this evidence has spanned from the division  
16 level to the very top of both a Kroger and Albertsons  
17 company and showed competition in communities throughout  
18 America.

19 But plaintiffs did not stop there with the ordinary  
20 course evidence. We also presented economic evidence of  
21 harm when looking at both the change in market structure and  
22 when analyzing changes in incentives, separate and apart  
23 from market definition.

24 Under either approach, Dr. Hill conservatively  
25 estimated harm in between 1,513 and 1,785 local markets.

1           And, Your Honor, I want to take a minute to sit with  
2 those numbers. In a case where billions are being thrown  
3 around with alarming frequency, it's important not to lose  
4 sight of what this merger means and what's at stake here.  
5 Because these numbers represent communities. Communities  
6 where shoppers depend on Kroger and Albertsons for an  
7 affordable and accessible place to get their groceries, in  
8 communities where shoppers are dependent on competition  
9 between these two companies to offset the cost of providing  
10 food for their families.

11           And it's this local competition in these communities  
12 that this merger will eliminate if allowed to go through.

13           The Clayton Act, however, was designed to stop, in its  
14 incipiency, acquisitions just like this, acquisitions that  
15 risk harming communities by depriving them the benefits of  
16 competition. And it's for this reason that plaintiffs come  
17 before you, asking this Court, to preliminarily enjoin this  
18 transaction.

19           Under the 13(b) standard, plaintiffs need only raise a  
20 serious and substantial question going to the merits.  
21 Plaintiffs here do more than merely graze that bar and  
22 present evidence establishing that this merger has a  
23 reasonable probability of substantially lessening  
24 competition as required by the Clayton Act.

25           Now, under the Clayton Act, courts analyze mergers

1 under a burden-shifting framework. First, plaintiffs meet  
2 their burden if they can establish their prima facia case  
3 one way.

4 Your Honor, we have shown four.

5 Turning, first, to our supermarkets case, we establish  
6 that part of our case two ways: We define a market and show  
7 that this merger will result in a presumptively  
8 anticompetitive increase in market concentration in  
9 thousands of local markets; second, we provide direct  
10 evidence that defendants are competing today and that  
11 tomorrow that competition will be eliminated.

12 Turning to our labor case, we show that the market  
13 structure for union grocery workers will also be  
14 presumptively anticompetitive post-merger and that the  
15 union's bargaining leverage will be reduced.

16 Once plaintiffs meet their burden, the burden then  
17 shifts to defendants to produce evidence in rebuttal, which  
18 they have not and cannot do.

19 But turning, first, to the supermarket case, I want to  
20 change things up a little bit from our briefing in my  
21 opening statement and start first with market definition,  
22 given the emphasis that has been placed on it throughout  
23 this hearing.

24 At bottom, the purpose of market definition is to make  
25 sure that the defined market includes sufficient

1 competition, such that market shares are informative of  
2 defendants' ability to raise prices or reduce quality after  
3 the merger.

4 Here, plaintiffs have established that both markets,  
5 the supermarket product market and the large-format market,  
6 are properly defined markets.

7 And before I get into the evidence this Court has heard  
8 supporting a finding of harm in either market, I want to  
9 dispel the idea that these two markets are somehow in  
10 tension with each other, as defendants have contended,  
11 because defendants are wrong on both the facts and the law.

12 But let's start first with the law.

13 The Court in *Brown Shoe* explained that there can be  
14 both a broader product market as well as a more narrow  
15 submarket. The Supreme Court went on to explain in *United*  
16 *States v. Aluminum Co. of America* that simply because  
17 there's competition in a larger industry, in that case  
18 conductors, that did not preclude the finding that the  
19 aluminum and copper conductors were two separate submarkets.

20 Now, collectively, these Supreme Court cases and their  
21 progeny established three key points relevant to this  
22 proceeding and plaintiffs' arguments here.

23 First, that there is no one true market for antitrust  
24 purposes; second, that there can be a broad product market  
25 that is properly defined; and, third, a more narrow

1 submarket within that broader market.

2 Now, to be clear, plaintiffs are not arguing and need  
3 not argue that there's only competition among supermarkets  
4 for groceries. Instead, plaintiffs contend and the evidence  
5 produce at this hearing shows that there is competition in a  
6 broader market, including Costco, Aldi, and Lidl, plaintiffs  
7 large form -- format market, as well as specialized or  
8 particularized competition in a more narrow submarket --  
9 plaintiffs' supermarket product market -- both of which are  
10 shown on the slide in front of you.

11 As the Supreme Court has explained, there's nothing  
12 novel. There's nothing unique about this.

13 And perhaps more to the point, plaintiffs have shown  
14 that product markets are properly defined in this merger  
15 causes harm in either, which makes sense, because the only  
16 type of stores that this Court has heard evidence of  
17 throughout the hearing, that are not included in here, are  
18 stores such as convenience stores or Dollar General stores.

19 And common sense supports that these types of stores  
20 aren't a good replacement for supermarkets like Kroger and  
21 Albertsons.

22 But let's turn next to the facts this Court has seen  
23 establishing both markets.

24 Plaintiffs start with the supermarket product market  
25 for two reasons: First, Kroger and Albertsons, the merging

1 parties, are themselves supermarkets. And case law and  
2 economic theory explain that the analysis of the relevant  
3 market should start there.

4 Second, other courts have found that a supermarket  
5 product market is a properly defined antitrust market. And  
6 while defendants argue that consumer behavior has somehow  
7 fundamentally shifted in an understandable attempt to  
8 distance themselves from the case law, an analysis under  
9 both the *Brown Shoe* practical indicia, as well as the  
10 hypothetical monopolist test, shows that defendants'  
11 contentions are unfounded.

12 Let's turn first to the *Brown Shoe* practical indicia.

13 Courts use the *Brown Shoe* practical indicia to assess  
14 the boundaries of a market to determine whether the alleged  
15 product comprises an antitrust submarket. That's the more  
16 narrow market that we spoke of.

17 So, in other words, the purpose of the *Brown Shoe*  
18 practical indicia is to determine "Is this product unique  
19 enough that other options are an inferior substitute?"

20 Here, that's exactly what the evidence shows.

21 Supermarkets provide a unique one-stop shopping  
22 experience for their shoppers by offering a depth and  
23 breadth of features that are distinct from other grocery  
24 formats. Here, witness after witness explained during the  
25 course of this hearing including, Mr. Knopf, the CEO of

1 Raley's supermarket chain, that customers can purchase  
2 substantially all of their household food and non-food  
3 requirements in a single visit to a supermarket due to the  
4 depth and breadth of offerings that they provide.

5 In contrast, other store formats offering a materially  
6 different shopping experience that makes it more difficult  
7 for shoppers to check all the items off their list.

8 The slide -- this slide summarizes some of the key  
9 differences between supermarkets and other store formats.  
10 For example, supermarkets offer much larger ranges of SKUs,  
11 while other assortments offer significantly less.

12 Supermarkets also offer a full selection of national  
13 brands, such as Cheerios, while other formats have a much  
14 smaller brand selection or, in some cases, hardly any at  
15 all.

16 And, finally, supermarkets have specialty counters  
17 staffed by associates that are available to shift with an --  
18 assist with a shopper's shopping experience, while other  
19 store formats have either no staffed counters or no  
20 specialty counters at all.

21 And taking a step back, what the evidence in this case  
22 has shown is that supermarkets offer a shopping experience  
23 targeted at providing a one-stop shop from there -- for  
24 their customers.

25 And because of these differences, other store formats

1 serve different missions. And as witnesses throughout the  
2 course of this hearing explained, including Walmart's,  
3 Mr. Lieberman -- and excerpts of his testimony is on this  
4 particular slide -- that customers go to different stores  
5 depending on what different missions they need, and  
6 different missions satisfy a particular need state, and a  
7 customer's need state will determine what type of format  
8 works for their particular need.

9       So if a customer needs to get a full set of groceries  
10 for the week, a supermarket's one-stop shopping  
11 experiment -- experience will best meet that need, while  
12 other formats just aren't going to provide the same set of  
13 options.

14       For example, Mr. Van Helden, from Stater Bros.,  
15 explained that supermarkets like Stater Bros. provide a  
16 unique stopping -- shopping experience. That shopping  
17 experience, as Mr. Van Helden explained, is the one-stop  
18 shop.

19       In contrast, other formats, such as dollar stores, as  
20 explained by Mr. Unkelbach, offer a fill-in or treasure hunt  
21 experience. And because of their more limited selection,  
22 dollar stores understand -- dollar store customers  
23 understandably typically don't buy a full set of weekly  
24 groceries at a dollar store.

25       So, too, with club stores.



1           As Ms. George, from Costco, explained, club store --  
2 Costco customers tend to make a larger stock-up trip, aptly  
3 named "a Costco run."

4           And, finally, evidence from Mr. Neal, Sprouts  
5 Farmers -- from Sprouts Farmers Market, the chief  
6 merchandising officer explained that customers use Sprouts  
7 to fill in items that they cannot get at their primary shop,  
8 and their primary shop is where they purchase their staples,  
9 like Diet Coke and Kraft Macaroni & Cheese. And, instead,  
10 what Sprouts tries to offer is what they call a treasure  
11 hunt experience.

12           Turning to the next *Brown Shoe* practical indicia,  
13 unique production facilities, witnesses have explained key  
14 differences in the various formats that drive different  
15 shopping experiences.

16           For example, witnesses have explained that club stores  
17 provide a more warehouse feel, while limited assortment  
18 stores offer a no-frills experience with no specialty  
19 departments.

20           Similarly, Mr. Unkelbach explained that dollar stores  
21 are a smaller size, and they too don't have specialty  
22 departments like a staffed deli counter.

23           And, finally, natural and organic stores provide a  
24 smaller store size and more of that farmers market feel for  
25 its customers.

1           Turning next to the next two *Brown Shoe* practical  
2 indicia factors, are pricing and price sensitivity.

3           Now, these two factors look at two separate aspects of  
4 pricing. The first is, "How do supermarkets price?" And  
5 the second is why they change price.

6           Turning first to that first factor: How supermarkets  
7 price.

8           As the evidence has shown throughout the course of this  
9 hearing, supermarkets price differently than other store  
10 formats. Supermarkets often have a high-low pricing format  
11 with a focus on list prices and a base price.

12           While some offer everyday low pricing, such as Walmart,  
13 even those tend to be differently priced than the other  
14 format types.

15           For example, witnesses have explained that Costco  
16 focuses on larger pack sizes. They also charge a membership  
17 fee. Limited selection stores have a low price point and  
18 charge for basics, such as shopping carts.

19           Third, dollar stores, as indicated by their name, price  
20 their products in the dollar range and very rarely charge  
21 over five dollars for most of their products.

22           Similarly, natural and organic stores often price  
23 higher than supermarkets.

24           Turning to the next *Brown Shoe* factor involving  
25 pricing, supermarket witnesses also explained in addition to

1 pricing differently, they also react differently to  
2 different store formats.

3 For example, witnesses explained that supermarkets  
4 influence other supermarkets' pricing. For example, Kroger  
5 witnesses admitted that they price off of Walmart, who's  
6 included in our market, and Albertsons when making pricing  
7 decisions.

8 Albertsons' witnesses similarly testified that  
9 traditional supermarkets, such as Kroger, when they are in  
10 overlapping markets, are the competitor that they price  
11 against.

12 Turning to the last *Brown Shoe* factor: Industry  
13 recognition. Based on these practical differences between  
14 supermarkets and other store formats, it's no surprise that  
15 witnesses consistently explained throughout the course of  
16 the hearing that supermarkets are a little different.  
17 They're either a different channel. They're a different  
18 type of format. And as shown, a few illustrative examples  
19 on this screen, market participants view supermarkets as  
20 different from other retail formats and other channels,  
21 which makes sense because, for customers looking for that  
22 one-stop shopping experience, using a Dollar Tree or Sprouts  
23 to build their cart, just isn't a good option.

24 Turning from the product market aspect of market  
25 definition to geographic market, there's also been ordinary

1 course evidence supporting the geographic markets here are  
2 local.

3 For example, Rodney McMullen explained that Kroger and  
4 Albertsons both try to be focused on local communities,  
5 which, again, makes sense. Shoppers are only willing and  
6 able to drive so far to grab their weekly groceries. And  
7 taken together, the documents and testimony presented has  
8 established that supermarkets are unique type of store  
9 experience. They're a unique product, and that competition  
10 for that product is local.

11 But in addition to the ordinary course documents and an  
12 analysis of *Brown Shoe*, plaintiffs also support their  
13 geographic and product market through the testimony of their  
14 economic expert, Dr. Nicholas Hill.

15 Now, Dr. Nicholas Hill analyzed two product markets,  
16 and I want to pause briefly here and explain why he did  
17 that.

18 First, Dr. Hill started with the market identified in  
19 the complaint: the supermarket product market. But  
20 defendants criticize plaintiffs' market definition despite  
21 this ordinary course evidence as overly narrow in their  
22 answer.

23 In response, Dr. Hill tested whether expanding that  
24 product market to include additional formats changed his  
25 analysis, and he concluded, under either product market,

1 supermarket product market or a larger format market, that  
2 there was still harm in thousands of communities, as  
3 analyzed under the economic tools that he had at his  
4 disposal.

5 In addition to a product market, Dr. Hill also assessed  
6 the geographic market.

7 Now, Dr. Hill, accounts for this local nature of  
8 competition in two separate ways.

9 First, Dr. Hill looks around a focal store and looks at  
10 where 75 percent of that store's customers come from and  
11 doubles it. But, again, to address concerns raised by  
12 defendants that this wouldn't account for differences in how  
13 far folks were willing to drive between one store and a  
14 different format, Dr. Hill looked at it another way and  
15 focuses on the draw area by store, as represented by the  
16 graphic on the screen and as explained in Dr. Hill's  
17 testimony.

18 And here you can see that in that approach, called the  
19 customer-based approach, any store where both the focal  
20 store and the potential competitor store attract the same  
21 customers are going be included in that part -- geographic  
22 market around that store.

23 So to determine whether his proposed markets catch  
24 sufficient competition, meaning could there be a price  
25 increase outside of the type of store formats included in

1 that market, what Dr. Hill did was he applied a hypothetical  
2 monopolist test over both the supermarket product market in  
3 those local communities as well as the large-format market  
4 over local areas.

5 Dr. Hill's analysis showed that whichever way you  
6 looked at it, the supermarket product market, the  
7 large-format market, the catchment area, or the customary  
8 store area, thousands of markets pass the HMT as shown on  
9 this screen.

10 Now, once he identified a particular market, Dr. Hill  
11 moved to assess shares in that market. And as Dr. Hill  
12 explained during his testimony to this Court, a merger that  
13 increases concentration post merger is presumptively  
14 anticompetitive under the merger guidelines, which again  
15 makes sense, because the higher the market concentration,  
16 the more power defendants have in that local community after  
17 that merger.

18 And to calculate concentrations he applied is the  
19 standard tool that economists use called HHI, and when  
20 assessing these changes in concentration through HHIs, he  
21 found that, in the supermarket market, that there were 1,922  
22 communities across the country where concentration was  
23 presumptively anticompetitive after the merger.

24 And, again, he also looked at the large-format market  
25 and said, "Even if we include Whole Foods, even if we

1 include Costco, there's still harm in 1,788 communities  
2 across the country when assessing that larger market."

3 Now, despite this ordinary course evidence, as well as  
4 the robust testimony of Dr. Hill, defendants, nonetheless,  
5 argue that plaintiffs' market fails for three primary  
6 reasons, and I want to take each in turn.

7 First, defendants argue that, because you can buy a  
8 banana anywhere, that means any place you can get a banana  
9 should be in the market; and, in other words, all grocery  
10 stores are the same.

11 But *Staples* and *Whole Foods* directly address this point  
12 and explain that how you can get the banana also matters.  
13 Put differently, the experience of a store can determine the  
14 contours of a market.

15 In other words, a banana may not really just be a  
16 banana, rather whether a store is a good choice for that  
17 banana depends on what else you are getting, how many  
18 bananas you need, the store experience you can either afford  
19 or are looking for, and whether you want an organic or fair  
20 trade banana, which makes sense, because, as Mr. McMullen  
21 admitted, if a shopper is on mission to pick up her weekly  
22 groceries, it is more inconvenient to have to go to three or  
23 four stores instead of one because one doesn't offer the  
24 pack sizes you want, the other doesn't have your preferred  
25 brands, and one doesn't offer the assortment of fresh

1 produce she was looking for.

2 Now, putting that aside, assuming that shoppers can or  
3 would shop at multiple stores to meet their grocery needs  
4 ignores the commercial realities shoppers face in  
5 communities across the country.

6 For example, it assumes that shoppers do not have to  
7 take a bus to multiple locations, carrying bags from  
8 different stores. It assumes that shoppers can afford  
9 Whole Foods premiums or Costco memberships, and it assumes  
10 that shoppers can afford to spend money on gas, driving  
11 around, or even out of town to the nearest club store or  
12 Dollar General.

13 And from a board -- boardroom in Cincinnati, these may  
14 seem like small things, but to many, these are significant  
15 obstacles to overcome to try to get the same assortment of  
16 products that a shopper could get in one swoop at a  
17 supermarket.

18 Second, defendants argue that customer preferences have  
19 fundamentally shifted. Specifically, that customers no  
20 longer distinguish between shopping channels, what they call  
21 channel blurring; but the evidence shows otherwise.

22 As Dr. Hill explained, shop -- looking at the data,  
23 shoppers still primary rely on supermarkets to purchase the  
24 majority of food. And once that data is expanded to include  
25 the large-format markets, 96 percent of groceries are



1 purchased at either supermarkets or large-format markets.

2 In other words, shoppers are showing, with their  
3 purchases, that they still prefer, first and foremost, to  
4 shop at supermarkets for their grocery needs.

5 As part of this channel-blurring contention, defendants  
6 also argue that there's been a sea change in shoppers'  
7 habits, such that they do not value a one-stop shop anymore  
8 and, instead, have shifted to other formats, including  
9 online; but, again, this is inconsistent with the data.

10 What the data shows and as illustrated on the screen,  
11 that with the exception of a spike during COVID, stores have  
12 been remarkably consistent among the various formats,  
13 contradicting claims that one-stop shop was an anomaly  
14 during COVID or that there's been some sort of shift between  
15 formats.

16 The ordinary course evidence presented throughout this  
17 hearing also supports this. For example, Kroger's own 10-Ks  
18 have consistently argued that customers still desire a  
19 one-stop shop.

20 Defendants' last argument that other store formats --  
21 primarily Amazon, Costco, and Walmart -- negate the  
22 importance of the one-stop shop or, in some way, cast doubt  
23 on market -- plaintiffs' market definition is similarly  
24 unavailing.

25 In the first instance, this is belied by the

1 ordinary-course documents.

2 As Rodney McMullen explained, Costco and Walmart  
3 entered his radar in the '90s. Amazon joined his radar in  
4 2017 when it purchased Whole Foods. And during that entire  
5 time, Kroger was telling their shareholders that customers  
6 desire one-stop shopping at their brick-and-mortar stores  
7 throughout that entire time. Kroger only stopped telling  
8 its shareholders that one month after the FTC filed its  
9 complaint discussing one-stop shopping.

10 In addition, plaintiffs' markets account for the  
11 presence of Walmart, Costco, and Amazon brick-and-mortar  
12 stores in their market definition.

13 Walmart and Amazon Fresh are included in plaintiffs'  
14 supermarket product market, and Costco and Whole Foods are  
15 included in plaintiffs' large-format market.

16 And despite these companies' presence in those markets,  
17 Dr. Hill has shown that the market shares in both of those  
18 markets are presumptively anticompetitive and presumptively  
19 violate the antitrust laws.

20 The only company that is not included in plaintiffs'  
21 market definition is Amazon's true ecommerce store, meaning  
22 those ecommerce sales that are not provided through a  
23 fulfillment center, but those sales are de minimis and,  
24 practically, it makes sense that they're not included,  
25 Your Honor, because, as witnesses have explained, shoppers

1 still prefer to shop in brick-and-mortar stores.

2 For example, it's much more difficult to pick the exact  
3 type of banana you like online than it is to get that in a  
4 store where you can determine whether or not you want an  
5 underripe banana for next week or you want to make banana  
6 bread that day.

7 Simply because Amazon and Walmart have a large volume  
8 of sales, that does not negate the validity of plaintiffs'  
9 market definition. There is no Amazon or Walmart exemption  
10 in the antitrust laws. Because if that were true, markets  
11 would essentially be able to consolidate so that there were  
12 only two or three competitors in every market where Amazon  
13 or Walmart is present, and no such exemption exists.

14 Because plaintiffs' markets account for the current  
15 presence of Amazon, Walmart, and Costco, the burden shifts  
16 to defendants to say that in the future that there's  
17 evidence that the presence of Amazon, Walmart, and Costco  
18 will expand in a manner that is timely, likely, and  
19 sufficient to offset plaintiffs' showing of harm.

20 The reason the case law requires this makes sense.  
21 Because it's only after this has been a finding that this  
22 particular acquisition risks harm to competition that  
23 defendants then bear the burden to show that these markets  
24 are going to change such that that risk is eliminated.

25 And defendants have not done that.

1           While they point to atmospheric allegations that  
2 Amazon, Walmart, and Costco are expanding, the evidence they  
3 put forth does not show that this entry will be timely,  
4 likely, or sufficient to offset the harm alleged.

5           For example, they have failed to show where that entry  
6 will occur and to establish that the entry will occur in the  
7 markets that plaintiffs are alleging harm is going to happen  
8 as a result of this merger.

9           In addition to evidence of these structural changes  
10 that I just walked through, plaintiffs have also put forth  
11 direct evidence showing that this acquisition has a  
12 reasonable probability of substantially lessening  
13 competition.

14           Plaintiffs have put forth two main buckets of evidence.  
15 The first is an economic analysis called CMCR, and the  
16 second is extensive evidence of head-to-head competition  
17 that will be eliminated if this transaction goes through.

18           Turning first to CMCR, Dr. Hill explained that what a  
19 CMCR does is it looks at how much of a cost reduction is  
20 necessary to offset the merged firms' incentive to raise  
21 prices as a result of the merger.

22           Here, Dr. Hill found that 1,513 large-format focal  
23 stores have a CMCR greater than 5 percent. Meaning that in  
24 order to offset the incentive to raise prices in those  
25 communities, there has to be at least a reduction of five

1 percent in cost.

2 Now, what's important about this analysis is that this  
3 analysis accounts for the presence of other companies not  
4 included in plaintiffs' market definition. Meaning, it  
5 accounts for the Dollar Generals, the convenience stores,  
6 and what other format people can get food. This alone is  
7 direct evidence of substantial harm in markets across the  
8 country.

9 Ordinary course evidence also supports Dr. Hill's  
10 opinions and findings of harm.

11 As Mr. McMullen explained, Kroger and Albertsons  
12 compete across every aspect of operating groceries,  
13 including fresh produce, friendly in-store experience,  
14 price, and rewards and loyalty programs.

15 The evidence also shows throughout this hearing that  
16 this competition is not de minimis. As Mr. McMullen  
17 testified, the Albertsons banner is Kroger's number one or  
18 number two competitor in 14 of the 17 major metropolitan  
19 markets where they both compete.

20 So, too, with Mr. Sankaran. Albertsons' CEO also  
21 explained that 8 out of the 12 divisions listed on the  
22 screen Albertsons is a primary food competitor for a Kroger  
23 banner.

24 In addition to -- executives testified about two main  
25 aspects of this competition: nonprice competition and price

1 competition.

2 So let's start first with nonprice competition.

3 As Mr. Aitken testified, he explained that in response  
4 from a direct hit from Albertsons, Kroger looked to get  
5 scrappy and figure out how to improve their own pickup  
6 experience.

7 Likewise, Mr. Aitken explained that Kroger competes  
8 with Albertsons to improve the quality of their private  
9 label products as well as to improve how they -- they show  
10 products in their stores. So they compete to improve the  
11 in-store experience for their customers.

12 In addition to this non-price competition, this Court  
13 has also heard extensive evidence about pricing competition.

14 As Tony Silva, Albertsons' pricing executive,  
15 testified, Albertsons identifies that primary food  
16 competitor, and that primary food competitor, where the two  
17 companies overlap, is Kroger.

18 Now, while defendants like to argue that this price  
19 competition is meaningless because Albertsons tends to be  
20 priced higher than Kroger, as Mr. Sankaran, Albertsons' CEO,  
21 acknowledged, that's not always true. As seen throughout  
22 the course of this hearing, sometimes Albertsons' prices are  
23 lower than Kroger. And as Mr. Sankaran also explained,  
24 Albertsons is continually investing in order to reduce  
25 costs, save money, and lower prices.

1           In other words, Albertsons is continuing to reduce that  
2 spread and continuing to compete fiercely against Kroger.

3           Kroger, similarly, competes with Albertsons on price.

4           Now, to start with, Kroger is not an EDLP, rather  
5 Kroger mostly prices off of a spread against Walmart. And  
6 as Kroger's pricing executive explains, Kroger uses  
7 Albertsons as a price ceiling in nearly all divisions where  
8 Kroger and Albertsons overlapped through its high-priced  
9 retail rule.

10           Now, again, defendants try to argue that this is a  
11 meaningless constraint. But, yet again, throughout the  
12 course of this hearing, this Court saw document after  
13 document analyzing Albertsons as a high-price retailer.

14           Common sense would tell you that no company spends that  
15 much money implementing a rule that is meaningless.

16           And as Mr. Groff explained, the purpose behind this  
17 rule is clear, to ensure that Kroger isn't priced above its  
18 traditional supermarket competitors.

19           Indeed, the documents shown throughout this hearing  
20 show that Kroger assesses Albertsons and adjust to make sure  
21 that when Albertsons is beating him on price, that they  
22 lower in response.

23           This comes through most clearly in the testimony and  
24 documents this Court has seen with the division presidents.

25           As Mr. McMullen explained, division presidents are most

1 aligned with local competitive dynamics. And, without fail,  
2 each testified that Albertsons and Kroger are key  
3 competitors for both price and nonprice competition.

4 For example, Michael Marx, a division president, spoke  
5 to this Court about egg pricing. And this Court saw that  
6 even though egg pricing was going down, Kroger wasn't going  
7 to follow because Albertsons' banner was staying at the same  
8 price.

9 This Court also saw and heard similar testimony and  
10 ordinary-course documents supporting that testimony from  
11 Mr. Schwilke, the division president of Ralphs in Southern  
12 California, which provided another example of Kroger using  
13 Albertsons as a price ceiling.

14 So, too, with Mr. Kammeyer. Mr. Kammeyer explained  
15 that in his region he would change price based on Albertsons  
16 and Safeway and would respond to competition, such as around  
17 the Super Bowl, by competing on promotions.

18 Similarly, Mr. Curry, the Albertsons president in the  
19 Southern California Division, explained that Ralphs was one  
20 of their biggest competitors that they monitored closely to  
21 make sure that Albertsons kept winning.

22 Mr. Huntington also explained that, during the course  
23 of the King Soopers strike, Albertsons analyzed how it would  
24 benefit from their strike, anticipating that, if that strike  
25 occurred, it would be, quote, "massive for Albertsons."



1           And, finally, Todd Broderick summarized the competition  
2 between the two companies succinctly. He said these -- he  
3 wrote, "These guys are spiraling down, and I need to push my  
4 foot on the back of their neck." In other words, he needed  
5 to compete.

6           Now, to rebut this evidence of harm, defendants argue  
7 that they are, quote "monomaniacally focused on Walmart,"  
8 presumably making competition between Kroger and Albertsons  
9 meaningless; and, as a second line of defense, argue that  
10 the grocery market is just generally competitive.

11           But, Your Honor, neither argument prevails.

12           To start, the case law explains quite clearly that a  
13 merger -- a merger doesn't need to eliminate all competition  
14 in a market in order to be anticompetitive, nor does it even  
15 need to eliminate competition between the two largest  
16 competitors. Instead, it needs to substantially lessen  
17 competition. And to do that, a merger need only eliminate a  
18 close competitor, which here the extensive evidence of  
19 head-to-head competition shows.

20           First, turning to defendants' arguments regarding  
21 Walmart.

22           Now, if we can turn to the next slide, please.

23           Defendants showed this slide in opening, and they  
24 showed this slide in an attempt to illustrate that  
25 Albertsons was so far behind Kroger that its presence in the

1 market was meaningless. But the evidence presented at trial  
2 shows that this isn't quite right. First, Walmart is not  
3 the only pricing constraint on Kroger. Rather, as the  
4 record reflects and Kroger's own executives admitted, Kroger  
5 considers both Walmart and Albertsons in making pricing  
6 decisions.

7 And as witnesses admitted throughout the course of this  
8 evidence you're hear -- hearing, Albertsons is sometimes  
9 ahead in this race, pushing Kroger to compete harder, not  
10 just to catch up to Walmart, not just to maintain that price  
11 spread, but to avoid losing to Albertsons.

12 And to the extent that defendants contend they want to  
13 merge to compete with Albertsons, the Ninth Circuit in  
14 *RSR Corp.* has squarely rejected that justification.

15 Moreover, defendants' focus on the pricing gap between  
16 Kroger and Albertsons not only ignores the occasions where  
17 Albertsons is, in fact, priced lower, but also ignores that  
18 it has been continually improving and investing in order to  
19 compete harder.

20 As Mr. Aitken explains, Albertsons was doing all the  
21 right things and was catching up to Kroger. But if  
22 Albertsons is eliminated from the competitive race, that  
23 competitive pressure to reduce the spread will no longer be  
24 there. And, instead, Kroger will be free to set prices  
25 higher than Walmart when it's in its interest to do so.

1           For example, when it's trying to offset inflation  
2 increases or in markets where Walmart just isn't present,  
3 such as right here in Portland.

4           Second, this monomaniacal focus also ignores nonprice  
5 competition between Kroger and Albertsons. As evidence  
6 presented in this hearing shows, Kroger and Albertsons  
7 compete to innovate. They compete to improve quality and to  
8 improve store experience. And putting price aside, this  
9 acquisition will eliminate that nonprice competition, which  
10 right now shoppers benefit as Kroger and Albertsons compete  
11 to provide fresh, clean, friendly, low -- well-stocked  
12 experience to local shoppers in their communities.

13           Turning to the other competitors, for the most part,  
14 Kroger relies on the testimony of executives to argue that  
15 there is extensive competition on the grocery market, but  
16 this is not borne out by the evidence. Rather, documents  
17 show that there's a fundamentally different competitive  
18 dynamic between Kroger and Albertsons and between other  
19 types of stores.

20           And while Kroger and Albertsons may obtain data or  
21 include them in various decks, what defendants have not  
22 presented is the same body of ordinary-course evidence  
23 showing that they are responding and competing with these  
24 realty -- retailers in the same communities and in the same  
25 manner that makes it -- in a manner that makes competition

1 between Kroger and Albertsons meaningless.

2 It is also contradicted by Dr. Hill's CMCR analysis,  
3 which, again, is format agnostic. It looks at anywhere and  
4 takes into account anywhere that shoppers can buy groceries  
5 and still show harm in thousands of communities.

6 Plaintiffs have more than met their burden to produce  
7 evidence in support of their prima facie case.

8 But in addition to supporting their prima facie  
9 supermarket case, plaintiffs have also provided evidence  
10 supporting their labor claims.

11 Today, Kroger and Albertsons are two of the largest  
12 union grocery employers in the country, collectively  
13 employing over 710,000 workers.

14 Throughout the course of this hearing, the Court heard  
15 evidence, evidence explaining that today unions leverage --  
16 that unions leverage competition between union grocery  
17 workers during a strike or other collective action.

18 This leverage specifically comes into play during  
19 whipsaw strikes. Whipsaw strikes are a tool that unions use  
20 at the negotiating table employed when a union reaches an  
21 agreement with one employer and then threatens to strike the  
22 other employer if it hasn't reached an agreement.

23 And, Your Honor, this tactic isn't theoretical.

24 Dan Clay explained that he used this very tactic in a  
25 December 2021 strike right here in Oregon. And right now,

1 when faced with these tactics, Albertsons and Kroger aren't  
2 aligned in approach, as explained by Mr. McPherson. And  
3 because of that, unions are able today to play Kroger and  
4 Albertsons off of each other to the benefit of workers.

5 After this merger, employers will not be able to use  
6 this same tactic. As Mr. McPherson told the Court, the  
7 reason is simple. To use a whipsaw strike, unions would  
8 need to have another major union grocer to leverage. And  
9 after this acquisition, in many markets where there were  
10 two, there will now only be one, which is why, as Ms. Zinder  
11 explained, if this acquisition were to go through, the  
12 credibility of the threat to strike would be minimized and,  
13 in fact, it would be de minimis.

14 It's no surprise that unions throughout this country  
15 oppose this merger.

16 Now, separate and apart from this direct evidence of  
17 harm, ordinary course documents and testimony also show that  
18 the line of commerce impacted by this merger is union  
19 grocery jobs in CBA areas.

20 First, turning to union grocery jobs. Witnesses  
21 throughout this hearing have shown that union grocery jobs  
22 differ from nonunion, non-grocer jobs, which makes sense,  
23 because if they didn't, why be in a union to begin with?

24 But, for example, Ms. Zinder and Mr. Clay, two union  
25 witnesses, explained that union jobs give a unique quality

1 of benefits.

2 Likewise, Ms. Zinder explained that many union grocers  
3 have unique skills that may not be easily transferable to  
4 other union employers.

5 This Court has also heard evidence that these  
6 agreements are negotiated among what's called CBA areas and  
7 that post-acquisition, any decrease in bargaining terms will  
8 reverberate throughout the areas governed by these  
9 agreements.

10 And Dr. Hill explained that, under the assumption that  
11 the markets were properly defined, and this transaction was  
12 also likely to materially increase concentration and  
13 violation of the guideline presumptions in dozens of markets  
14 for union grocery workers in CBA areas.

15 Now, in response, defendants try to distract from these  
16 commercial realities, not through reliance on a single union  
17 witness, but rather primarily relying on paid-for testimony  
18 of their experts, which, in large part, completely misses  
19 the point.

20 For example, Dr. McCrary testified who employers view  
21 as substitutes, not who workers view as substitutes. To the  
22 extent his analysis did focus on difference between union  
23 and nonunion employment, his analysis that there was no wage  
24 differential was rebutted by Professor Ashenfelter.

25 So, too, with Mr. King. Mr. King primarily focuses on

1 whether employees would have the same protection under labor  
2 law post acquisition. We agree with him. They will. But  
3 that misses the point.

4 What unions are concerned with and what plaintiffs have  
5 alleged isn't that the law will cease to exist, but rather  
6 bargaining leverage under that law will change to the  
7 detriment of workers post acquisition.

8 Plaintiffs have more than met their burden to show a  
9 serious and substantial question on both the supermarket  
10 case and its labor case.

11 Under the burden-shifting framework, the burden then  
12 shifts to defendants to rebut plaintiffs' case or to provide  
13 evidence of efficiencies or a sufficient divestiture.

14 Defendants have done neither.

15 Because efficiencies are only considered after a  
16 finding of harm, well-established case law places the burden  
17 on defendants to rebut plaintiffs' showing of harm by  
18 establishing what's called "cognizable efficiencies."

19 It's helpful to take a minute here and explain the  
20 purpose of this burden. Because courts only reached  
21 efficiencies after plaintiffs have shown a risk of harm,  
22 plaintiffs have to offset this to make sure that  
23 shoppers/consumers are not left bearing the risk.

24 To do this, courts require a high standard for  
25 defendants of substance -- to substantiate their

1 efficiencies claims such that it's possible to verify, by  
2 reasonable means, the likelihood and magnitude of each  
3 asserted efficiency, how and when each would be achieved,  
4 and how each would enhance the merged firms' ability and  
5 incentives, and why these alleged efficiencies cannot be  
6 achieved in a -- without the risk of harm to consumers,  
7 meaning they have to be merger-specific.

8 In recognition of this high burden, not a single court  
9 has found that defendants have met this burden once  
10 plaintiffs have established their prima facie case.

11 Here, too, defendants fall far short of their burden.  
12 Defendants' claims can be broken down into three primary  
13 buckets, two of which fail under the laws right out of the  
14 gate.

15 Defendants have presented testimony, primarily through  
16 their own witnesses, alleging that the merger may benefit  
17 separate business lines outside of the line of commerce  
18 impacted by their acquisition. For example, defendants have  
19 argued that this merger will provide national coverage to  
20 increase their retail media business and will benefit that  
21 business and possibly, tangentially, allow it to invest back  
22 into their supermarket business.

23 But Ninth Circuit case law has summarily rejected this  
24 exact argument in *Saint Alphonsus* as well as the Supreme  
25 Court in *United States v. National Bank* and *RSR Corp.*, which



1 makes good sense, because just because it's going to benefit  
2 another benefit -- or it's going to benefit another line of  
3 business isn't going to help people who are concerned about  
4 the supermarket business; and just because a merger might  
5 benefit a community somewhere else isn't going to help  
6 people here in Portland or in the other thousands of local  
7 communities that may be harmed by this merger, which is why  
8 the courts have routinely rejected efficiencies that are in  
9 a different business line or in a different geography.

10 The second bucket of efficiencies that fail right out  
11 of the gate are revenue efficiencies.

12 As the Court in *ProMedica* explained, revenue  
13 enhancement opportunities are not true efficiencies because  
14 they merely shift revenue among the participants in the  
15 market and, in effect, do nothing more than increase  
16 defendants' bottom line.

17 These holdings recognize that simply making more money  
18 means the company is more profitable, but what they choose  
19 to do with that profit may or may not benefit customers but  
20 will almost certainly benefit shareholders.

21 Now, these next two slides are off the public screen.

22 I'll give my colleague a minute.

23 Okay. The third bucket are cost savings. And as  
24 Mr. Yeater explained, the vast majority of these claims are  
25 based on unsupported assumptions that do not reach the high

1 standard laid out by the Aetna court. But, regardless,  
2 however you look at these cost savings, they are de minimis  
3 and represent a small fraction of the total cost of the  
4 combined entities. As Dr. Hill explained, even a more  
5 generous view of the parties' alleged efficiencies show that  
6 they are nowhere near close to the amount needed to offset  
7 the harm in thousands of markets across the country.

8 Defendants have not and cannot meet their burden to  
9 show that the efficiencies are -- offset the clear harm  
10 established throughout the plaintiffs' prima facie case.

11 I'll now turn it over to my colleague, Ms. Hall, to  
12 discuss the deficiency of defendants' proposed remedy.

13 MS. HALL: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MS. HALL: For Kroger's acquisition of Albertsons  
16 to be permissible under the Clayton Act, on account of a  
17 divestiture defense, the divestiture must remedy all of the  
18 competitive harm the merger causes. The proposed  
19 divestiture to C&S does not.

20 And defendants' own expert, Dr. Israel, concedes it  
21 does not. That map we showed you of Santa Fe, New Mexico,  
22 Dr. Israel concedes that the markets around four stores in  
23 this city are -- suffer competitive harm, even under his  
24 deeply flawed analysis.

25 For that reason alone, the Court should enjoin this

1 merger.

2 Yet, defendants are going to tell you that harm to  
3 Santa Fe families, whose own attorney general is a plaintiff  
4 in this case, is insubstantial compared to all the benefits  
5 they will get from combining their businesses. That is not  
6 the test. Benefits must flow to the harmed community to  
7 even be considered to offset that harm.

8 The evidence in this case has shown that Kroger raised  
9 prices in its no-competition zone. So there is no reason to  
10 expect the Santa Fe markets to benefit from this merger.

11 I would like to review for the Court evidence of the  
12 serious risks to competition that many communities in this  
13 state and nationwide face from this merger and divestiture.

14 In evaluating this evidence, we respectfully submit  
15 that the Court should consider who will benefit if the  
16 divestiture to C&S fails: Kroger.

17 Kroger needs C&S to appear capable of success to  
18 prevail in this litigation, but after the litigation is  
19 over, Kroger and C&S would be competitors. And Kroger would  
20 profit if C&S-owned stores lost sales. Precisely, as C&S  
21 predicts they will. But the deal is still worthwhile for  
22 C&S, because among those mismatched assets, are six  
23 distribution centers with the stores acting as a built-in  
24 customer base for wholesale distribution.

25 With a low purchase price, C&S can afford to close or

1 sell off the parts of the package it doesn't need or want.

2 This divestiture was not created through an ordinary  
3 arm's length negotiating process between business leaders.

4 As Mr. Cosset testified, the divestiture package was  
5 created by lawyers and experts, and that was the package.  
6 Mr. Winn confirmed the divestiture package was offered on a  
7 take-it-or-leave-it basis without the ability to add or  
8 remove individual stores.

9 And without access to the negotiations between Kroger  
10 and C&S, we don't know what C&S really wants or needs and  
11 what Kroger is just sticking it with, like the Kroger stores  
12 that Mr. Galante testified make up a disproportionate amount  
13 of the unprofitable stores in the package, not earning  
14 enough to cover their rent.

15 Mr. Cosset also testified that C&S was, quote, the best  
16 available divestiture buyer for this lawyer-made hodgepodge  
17 of stores and assets. But that's not the test either.

18 In fact, perhaps the clearest sign that this  
19 divestiture is incredibly risky is that C&S, which currently  
20 operates only 23 stores, at least half of which are losing  
21 money, is the best buyer Kroger could come up with.

22 The question for the Court is whether the divestiture  
23 remedies the likelihood of substantial harm due to Kroger's  
24 acquisition of Albertsons. That question, we submit, only  
25 plaintiffs have squarely answered, and the answer is "No."

1           Let's return to the legal framework for evaluating the  
2 proposed divestiture that we outlined in opening. Courts  
3 evaluate a divestiture defense under the *Sysco* test,  
4 requiring that defendants produce evidence showing that the  
5 divestiture will restore all the competitive intensity loss  
6 due to the merger.

7           For example, in *United States v. Aetna*, the District  
8 Court enjoined the merger because it concluded, quote, "that  
9 the proposed divestiture would not replace the competition  
10 lost due to the merger."

11           Now, in *Illumina*, considering a conduct-based remedy,  
12 the Fifth Circuit held that it was sufficient for defendants  
13 to show that the proposed remedy, quote, "sufficiently  
14 mitigates the merger's effect such that it was no longer  
15 likely to substantially lessen competition."

16           Here, because defendants are advancing a divestiture  
17 defense, the *Sysco* standard applies. But defendants haven't  
18 met either standard in the course of this proceeding.

19           Today I'd like to discuss how defendants' contradictory  
20 claims about the acquisition and the divestiture undermine  
21 their credibility with respect to both.

22           Defendants' divestiture defense fails because it leaves  
23 hundreds of unremedied markets, both supermarket and  
24 large-format store markets. Even if C&S could sustain the  
25 stores' current levels of competitive intensity, competition

1 is likely to be harmed in many additional markets because  
2 C&S faces such substantial challenges that its own overly  
3 optimistic deal model predicts it will not return to the  
4 stores' present level of profitability for over a decade.

5 Defendants have not even attempted to show that the  
6 divestiture will remedy harms to labor markets.

7 And the equities of a merger between and divestiture of  
8 assets from the employers of over 700,000 people and  
9 providers of food to tens of millions of American families  
10 clearly favor entry of an injunction.

11 In opening, we told you that defendants' claims about  
12 divestiture contradicted their claims about the merger.  
13 During this hearing, those inconsistencies have multiplied.

14 Defendants say Kroger needs to merge to have sufficient  
15 scale to be competitive with Walmart, but C&S can be  
16 competitive with 579 stores spread over 18 states and the  
17 District of Columbia.

18 C&S's wholesale network does not make up for this lack  
19 of retail scale. Its 17 -- its 7,500 independent customers  
20 account for less than a quarter of its wholesale revenues  
21 annually. Including its chain customers, C&S has total  
22 wholesale revenues of \$20 billion.

23 But even adding \$20 billion in retail revenue from the  
24 divestiture stores doesn't even approach the buying power of  
25 Albertsons, which had \$78 billion in retail revenue last

1 year.

2 If the purpose of the merger is to attain scale, then  
3 why has Kroger refused to divest Albertsons' assets that it  
4 doesn't need to attain that scale? And I say "Kroger,"  
5 because we know, from Mr. Winn's testimony, that C&S wanted  
6 these assets.

7 You may recognize this slide from defendants' opening.  
8 Let's compare what C&S is getting in each of these  
9 categories with what Kroger is retaining.

10 First, banners.

11 Kroger already has 20 banners, but of Albertsons'  
12 approximately twenty banners, Kroger is willing to part only  
13 with Carrs, found only in Alaska; Haggen, found only in  
14 Washington; a license to Albertsons in two states where it  
15 is weak; and a license to Safeway in two other states.

16 Three separate C&S advisors told C&S not to acquire QFC  
17 because it is a weak banner. Yet C&S is still acquiring the  
18 QFC and Mariano's banners, about which Ms. Florenz observed,  
19 Kroger gave us their worst chains.

20 The Kroger banners in the divestiture are also  
21 regionally limited; QFC in Washington and Portland and  
22 Mariano's in Chicago. As a result, C&S is acquiring stores  
23 in ten states and the District of Columbia that have to be  
24 rebannered to a banner not currently present in those  
25 states.

1           Next, let's look at private label products C&S is  
2 getting compared to what Kroger is keeping for itself.

3           Mr. Aitken testified that Kroger has the fastest  
4 growing private label brand in the United States, but Kroger  
5 won't be parting with any of its own brands or with  
6 Albertsons' billion-dollar private labels, like O Organics,  
7 Signature, and Lucerne.

8           C&S has just a couple thousand private label products  
9 today, most through the Topco collective, used by small  
10 chains and independents, and will receive ownership of  
11 Albertsons' brands that make up just 15 percent of  
12 Albertsons' private label revenue.

13           C&S's difficulty building brand equity with unknown  
14 banners in many states will be compounded by the lack of  
15 popular exclusive private label brands that offer national  
16 brand equivalents, but C&S's deal model assumes no loss of  
17 sales due to losing access to the private label products  
18 sold in the divestiture stores today.

19           And when C&S's license to Signature and O Organics  
20 products ends, customers can find those same products at the  
21 Kroger-owned stores in the very same markets.

22           Finally, why has Kroger refused to give C&S technology  
23 assets? Mr. Aitken testified that Kroger offers ecommerce  
24 through pickup in stores and first-party and third-party  
25 delivery. Kroger's loyalty program has 60 million members



1 and data on over 90 percent of all Kroger sales  
2 transactions. And Kroger's data analytics allow it to offer  
3 what Mr. Aitken called "the best personalization."

4 Yet, Kroger is not divesting Albertsons or its own  
5 ecommerce, loyalty, or data analytics assets.

6 C&S has no first-party ecommerce capabilities. And its  
7 Grand Union stores' ecommerce sales dropped by 80 to 90  
8 percent after C&S's acquisition.

9 The basic loyalty programs for Piggly Wiggly and  
10 Grand Union, with 300,000 and 50,000 users, respectively,  
11 cannot be used across banners and lack fuel points.

12 Far from giving C&S a clone of the Albertsons tech  
13 stack, Kroger is excluding IT systems relating to marketing,  
14 ecommerce, and loyalty programs, and not transferring  
15 Albertsons' models, algorithms, and optimization inputs.

16 C&S's own pricing tools are extremely limited. So C&S  
17 is dependent on Kroger to provide base price and promotion  
18 plans, sales forecasting, and loyalty program services for  
19 at least a year.

20 Kroger is also claiming it will achieve hundreds of  
21 millions of dollars in purported efficiencies from assets  
22 C&S doesn't have and won't be getting in the divestiture.

23 Post-divestiture, Kroger will have 51 manufacturing  
24 facilities and increased own brand volumes, which  
25 Mr. Gokhale testified will permit Kroger to be more

1 efficient in manufacturing private label products, including  
2 in-sourcing products currently produced by third parties.

3 C&S, by contrast, is receiving a single dairy plant and  
4 five small private label brands. So it will face a higher  
5 cost of private label goods as compared to the merged  
6 company.

7 Kroger's alternative profit business, including its  
8 retail media network, has 20 years of data science  
9 capability and earns over \$1.3 billion per year in profit.

10 By acquiring Albertsons media collective, Kroger  
11 projects hundreds of millions of dollars in additional  
12 revenue from access to Albertsons' customer data and  
13 in-store and online placement opportunities, but Mr. Cosset  
14 testified that having nationwide data coverage will allow  
15 Kroger to better monetize customer data for both its  
16 customer insight and retail media businesses.

17 Meanwhile, C&S's Mr. McGowan testified that  
18 manufacturers expect retailers to have retail media  
19 capabilities, but C&S will have to rely on a vendor to  
20 create retail media network, which will take three years,  
21 and they project de minimus revenues in the first year.

22 C&S can cede the program with just three years of  
23 customer data from the divested stores and does not receive  
24 any analysis Kroger or Albertsons has derived from that  
25 data. So it won't have the level of personalization that

1 makes Kroger's retail media program so valuable.

2 As a result, C&S risks declines in vendor funding,  
3 impacting its ability to offer promotional prices on  
4 national brand products.

5 Because we addressed defendants' divestiture defense in  
6 our case-in-chief, they bear a heightened burden to adduce  
7 evidence.

8 Defendants' contentions about the divestiture are  
9 implausible. In the face of contradictory positions, they  
10 take on scale, brand equity assets, and alternative profit  
11 sources.

12 Their attempt to prove the efficacy of the divestiture  
13 is also undermined by C&S employees' prior sworn statements  
14 and contemporaneous business records, showing their serious  
15 concerns about the composition of the divestiture and their  
16 ability to operate all of the stores.

17 The Court has heard a lot about C&S's current retail  
18 services, but those services make up a tiny fraction of  
19 C&S's revenues, aren't working for the Grand Union stores,  
20 and Mr. McGowan testified that they will not be used to  
21 support the acquired stores. Instead, the infrastructure  
22 for the acquired stores will be cobbled together from new  
23 employees, consultants, vendors, and years of TSA services.

24 Ms. Morris testified to her high hopes for the divested  
25 stores, but during her direct examination, she was not shown

1 a single document, because she cannot engage in the details  
2 of C&S's plans unless and until the merger closes and the  
3 divestiture occurs.

4 In contrast, the C&S witnesses who do know the plans  
5 have expressed significant doubts. Defendants' experts  
6 don't analyze whether the divestiture will remedy lost  
7 competition. Dr. Israel assumes that the stores under C&S's  
8 ownership will function exactly as they do today, relying on  
9 Mr. Galante. But Mr. Galante doesn't do any such analysis,  
10 nor does he have the expertise to do so.

11 His opinion is essentially that C&S has identified a  
12 lot of risks and put them in the deal model. He does not  
13 offer any opinion on whether the proposed divestiture will  
14 restore competition loss due to the merger or on competitive  
15 intensity.

16 Mr. Galante didn't even look at C&S's historical  
17 performance against its prior deal models to see whether  
18 this deal model is likely to accurately predict future  
19 performance.

20 Defendants say, "Trust Kroger. Trust C&S. Trust the  
21 banks." Mr. Galante dispelled any suggestion of being an  
22 independent expert when he testified that, quote, "I would  
23 never second-guess management's decisions and judgment."

24 No court to consider a divestiture has deferred to the  
25 judgment of the selling or acquiring party, let alone that

1 of their finance sources, nor should it. The seller is  
2 motivated by the desire to get its merger approved. The  
3 acquirer thinks that its likely to make a profit in some  
4 way, and the banks think that they will get repaid, but  
5 defendants acknowledge that in Haggen all of those parties  
6 got it seriously wrong.

7 More importantly, none of those analyses addresses or  
8 is even relevant to whether C&S's operation of the divested  
9 stores is likely to remedy a substantial loss of competition  
10 in a particular market.

11 C&S and its investors can make plenty of money without  
12 restoring competition to each of the hundreds of markets in  
13 which Kroger's acquisition of Albertsons is presumptively  
14 unlawful.

15 In opening, we briefly showed this list of reasons that  
16 the divestiture is flawed, based on elements considered by  
17 the *Aetna* court. There the Court considered the divestiture  
18 buyer's experience and capabilities in the markets in which  
19 the divestiture assets competed, as well as whether the  
20 divested assets made up, quote, "an existing business entity  
21 that would be," quote, "more likely to preserve the  
22 competition would have been lost through the merger."

23 I'd like to show you how the evidence in this hearing  
24 has lined up against each of these points.

25 To be entitled to an injunction, we need only to have

1 shown a serious and substantial issue with respect to  
2 post-transaction harm in a single geographic market and a  
3 single product market after accounting for the divestiture.

4 But, Dr. Hill's analysis shows hundreds of unremedied  
5 markets, both in the supermarket and large-format stores  
6 market, even if the divested stores continue to compete  
7 exactly as they do today.

8 Dr. Hill calculated 1,002 supermarket product markets  
9 and 551 large-format store markets in which the acquisition  
10 is presumptively unlawful after accounting for the  
11 divestiture.

12 He also calculated a CMCR above 5 percent in 335 of  
13 those supermarket product markets and 234 large-format store  
14 markets.

15 In addition to the hundreds of markets that even a  
16 perfectly performing divestiture would not remedy, the  
17 evidence has shown that competition is likely to be harmed  
18 in many additional markets.

19 These are Dr. Hill's analyses of the potential number  
20 of harmed supermarket -- supermarket product markets if the  
21 divested stores lose sales or close.

22 No matter how well the divestiture does, it would do  
23 nothing for markets like Santa Fe without a single divested  
24 store.

25 In markets like Corvallis, where Kroger will have over

1 50 percent of the market even after the divestiture, C&S's  
2 acquisition of one store and resulting lack of density will  
3 cause multiple issues. C&S will struggle to build brand  
4 recognition for a new banner, will lack scale to spread  
5 fixed costs relating to advertising, and will have less  
6 efficient supply.

7 Given all these challenges, C&S may well choose to  
8 close or sell isolated stores rather than try to compete  
9 with the dominant merged Kroger.

10 Plaintiffs cannot deny -- strike that -- defendants  
11 cannot deny the plain facts that C&S's retail stores lose  
12 money and make up just 1 percent of C&S's current revenues.  
13 The retail services C&S provides to its customers account  
14 for less than half a percent of its revenue and do not  
15 include running the physical stores, managing employees, or  
16 interacting with customers.

17 Mr. Galante, offered by defendants as an expert in  
18 divestitures, agreed with Professor Fox that, quote, "the  
19 divestiture in this matter is not a standalone business."  
20 C&S is not acquiring the distribution centers and  
21 manufacturing plants that supply the stores today, not  
22 getting a full management team, not getting the store  
23 banners on half the stores, not acquiring a loyalty or  
24 retail media program, and not acquiring a full private label  
25 brands business or either party's most important private

1 label brands.

2 It's not even getting a complete IT system, as the most  
3 valuable aspects of the Albertsons tech stack are not being  
4 transferred.

5 As a result, even Mr. Galante concedes the transaction  
6 is, quote, "complex" and, quote, "incorporates a level of  
7 risk."

8 C&S also may not get all the in-store workers for the  
9 divested stores because unionized associates at divested  
10 stores in Southern California have the right to bump  
11 less-senior out of stores retained by Kroger. And  
12 Ms. Zinder testified that she will advise her members to  
13 exercise that right.

14 Mr. McGowan acknowledges the bumping risk but says C&S  
15 will be keeping the management-level store personnel.  
16 That's not who keeps stores clean and stocked and not who  
17 serves customers. Bumping rights will fill the C&S Southern  
18 California stores with junior employees from other stores  
19 who don't know the stores or the community. The Southern  
20 California C&S stores may suffer in customer experience from  
21 day one.

22 Despite C&S having previously lost sales due to  
23 rebannered the acquired top stores as Grand Union, and  
24 Mr. Galante's testimony that Bain offered, quote, "a level  
25 of external objectivity," C&S is underestimating the risk of



1 sales lost from rebannered. C&S is not using Bain's  
2 worst-case rebannered detriments. It's discounting the  
3 base-case detriments by a third, and it is not accounting  
4 for the loss of private label, loyalty, and ecommerce assets  
5 that support the existing banners, and all the while the  
6 retained Kroger and Albertsons stores will be competing in  
7 the same markets under their original banners, with  
8 continuity of private label, loyalty, and ecommerce, as well  
9 as sophisticated pricing inventory and forecasting systems  
10 that C&S will lack.

11 The *Aetna* court addressed the effect of transition  
12 services on the ability of a divestiture to restore  
13 competition. Citing *Sysco*, it wrote, "Courts are skeptical  
14 of a divestiture that relies on a 'continuing relationship  
15 between the seller and buyer of divested assets' because  
16 that leaves the buyer susceptible to the seller's actions --  
17 which are not aligned with ensuring that the buyer is an  
18 effective competitor."

19 C&S is dependent on Kroger for many services that will  
20 affect customer experience in stores, such as pricing and  
21 promotions, licensed private label products, and  
22 distribution services.

23 And at the corporate level, Kroger determines whom C&S  
24 can hire from existing Kroger and Albertsons leadership.

25 Ms. Morris testified that, quote, "We're working with

1 Kroger as we speak to get strong leaders."

2 Ms. Florenz confirmed that C&S will be using base  
3 pricing provided by Kroger without change. With respect to  
4 promotional pricing, she said that Ms. Morris would be most  
5 knowledgeable, but Ms. Morris testified that she has been  
6 unable to discuss strategy with C&S due to her current  
7 position at Albertsons. No witness has contradicted the  
8 plain language of this June 2024 business plan, which  
9 Mr. Galante testified, quote, "provides context in the  
10 prospective management, in terms of what they did and what  
11 they expect going forward."

12 The business plan shows that C&S intends to offer the  
13 same base and promotional pricing as Kroger for as long as  
14 they operate stores under the same banners, in the same  
15 markets.

16 Thus, the divestiture will not replace the intense  
17 head-to-head price competition that six Kroger and  
18 Albertsons division presidents testified exist today.

19 This is private screens only.

20 Thank you.

21 This C&S presentation to SoftBank states that the price  
22 of the divestiture assets is low compared to their value and  
23 that the increase in own store real estate, as compared to  
24 the prior divestiture, offers attractive returns.

25 The Court in *Aetna* found that a low purchase price

1 offers buyers a chance to profit without becoming a  
2 significant competitor. There, as here, internal  
3 communications showed that the buyer might decide to  
4 withdraw from several of the divestiture markets in short  
5 order and only compete in some.

6 Thus, the low purchase price supported the conclusion  
7 that the buyer had serious doubts about its own ability to  
8 manage all the divestiture assets.

9 Here, too, a low purchase price makes it easier for C&S  
10 and SoftBank to achieve a return on their investment without  
11 becoming an effective competitor to Kroger.

12 Because of the hodgepodge nature of the stores in the  
13 divestiture package, including just two stores in each of  
14 Houston, Louisiana, and Montana, sale of those orphan stores  
15 would be an obvious way to simplify retail operations  
16 stretching across 18 states and the District of Columbia,  
17 none of which is a current C&S retail geography.

18 Defendants point to the existence of C&S distribution  
19 centers in some of those states, but that simply gives C&S  
20 the ability to supply wholesale groceries. It does not  
21 overcome the disproportionate cost of supplying to and  
22 advertising for so few stores or the effect of lack of  
23 density on brand recognition.

24 Curiously, defendants and C&S have chosen to emphasize  
25 the divestiture's benefits to C&S's wholesale business.

1           To the extent they are suggesting that the Court can  
2 consider benefits to competition in grocery wholesale  
3 markets, they invite error.

4           As we said in opening and as my colleague just said  
5 again, harm in one market cannot be offset by benefits in  
6 another. And this is all the more true where the purported  
7 benefits are not even in the product market in which the  
8 acquisition may cause a substantial loss of competition.

9           On the other hand, the benefits to C&S's wholesale  
10 business are relevant to assessing C&S's incentives to make  
11 the enormous investments in the retail business contemplated  
12 by the deal model and the further expense and effort that  
13 Professor Fox believes may be required.

14           C&S can profit from the expansion of its wholesale  
15 business through the acquisition of six additional  
16 distribution centers, and it does not need to own the retail  
17 stores to profit from supplying them.

18           Now, this is Ms. Florenz's testimony about just a few  
19 of the risks not modeled in C&S's conservative deal model.  
20 She testified that that deal model, quote, "outlines what  
21 C&S expects will happen post close on an EBITDA, sales, and  
22 cash flow basis. C&S expects below-market revenue growth  
23 for most regions for four years post divestiture, averaging  
24 just 1 percent per year, and declining four-wall retail  
25 EBITDA in years one through three, not returning to

1 pre-divestiture levels until year 11."

2 Dr. Israel's analysis takes none of this into account.  
3 C&S's expectations are based on overly optimistic  
4 assumptions, not only about rebannered and these excluded  
5 risks, but also about the growth of pharmacy sales, even  
6 though Ms. Morris testified that Albertsons' pharmacies face  
7 staffing challenges and many are loss-making.

8 Mr. Galante says C&S won't run out of cash, so  
9 everything is fine, but he misses the point. If sales are  
10 declining at C&S-owned stores, they are not competing as  
11 effectively as those stores do today.

12 Dr. Hill shows those declining sales and the resulting  
13 increase in sales at Kroger-owned stores increases  
14 concentration and increases the number of markets in which  
15 consumers face a likelihood of substantial harm.

16 In opening, we showed the 30 percent decline in sales  
17 at the stores C&S acquired from Topps in a prior  
18 merger-related divestiture. Not only are the Grand Union  
19 stores not profitable, C&S never expected the Topps stores  
20 to be profitable as a retail operation. Instead, C&S  
21 expected to lose money on retail and to profit from  
22 wholesale supply to those stores.

23 Regarding this divestiture, internal C&S communications  
24 show that its senior vice president for corporate  
25 development, current CEO, and former CEO and current board

1 member have discussed selling or closing the divested  
2 stores.

3 Defendants suggested that C&S's continued ownership of  
4 the Grand Union stores with some kind of proof of its retail  
5 operations commitment, but C&S couldn't sell those stores  
6 without FTC approval. If the Court permits this merger and  
7 divestiture to occur, C&S will be subject to no such  
8 restriction and may sell stores in connection with wholesale  
9 supply contracts, as it just did in 2021, and closed stores,  
10 as it did with the loss-making Piggly Wiggly just last year.

11 Kroger's acquisition of Albertsons will permanently  
12 reduce union bargaining leverage due to the elimination of a  
13 significant union grocery competitor who can be leveraged  
14 against Kroger to obtain concessions.

15 Kroger's history of failing to coordinate effectively  
16 with Albertsons contradicts its self-serving claim that  
17 unions don't actually do better through whipsaw bargaining.  
18 The merger eliminates Kroger's union bargaining competitor  
19 entirely from some markets and, in others, shrinks it from a  
20 major to a minor.

21 The evidence establishes plaintiffs' overwhelming  
22 likelihood of success in establishing a likelihood of  
23 substantial harm, not simply in a single product and  
24 geographic market, but in hundreds. The equities also  
25 heavily favor entry of an injunction.

1           One way to see the imbalance between the private and  
2 public interest in this case is to look at what witnesses  
3 have said about the divestiture.

4           For Mr. Winn, Mr. McGowan, and Ms. Morris, the  
5 divestiture to C&S means excitement about a fun new business  
6 opportunity and the chance to win, but for Kroger and  
7 Albertsons employees, the divestiture to C&S evokes memories  
8 of the fallout of the last major grocery divestiture where  
9 long-tenured workers lost their jobs and accumulated union  
10 benefits because they trusted promises that stores would  
11 stay open and no jobs would be lost.

12           Mr. Cosset testified that over 60,000 people have been  
13 told their new employer is C&S. Their livelihoods, their  
14 ability to support their families will depend on C&S  
15 actually operating those stores that it didn't want to  
16 promise not to close. The "all" was a problem in doing so  
17 successfully.

18           Unlike Richard Cohen, SoftBank, and C&S lenders, those  
19 60,000 employees and the millions of households served by  
20 the divested stores don't have a choice in whether to gamble  
21 on C&S.

22           While the voices of the public who rely on Kroger and  
23 Albertsons to feed their families have been largely absent  
24 from this proceeding, they should be present in the Court's  
25 equitable analysis as the most vulnerable to harm should the

1 merger result in higher prices, lower wages, or closed  
2 stores.

3 Now, Albertsons claims, without any documentary  
4 evidence and in the face of Mr. Sankaran's congressional  
5 testimony, that it is considering layoffs and store closures  
6 absent a merger, but both Kroger and C&S admit that layoffs  
7 and store closures may happen post-merger and divestiture.  
8 Even if the threat is real, the proposed transactions don't  
9 neutralize it.

10 Defendants will tell you that any delay is fatal to the  
11 transactions, but that is their choice, not an  
12 inevitability, and not a basis on which to deny an  
13 injunction.

14 Defendants tried to suggest that the Court should rule  
15 before their October 9th outside date, and Mr. Cosset even  
16 testified that they're prepared to close on that date. They  
17 could only do so by violating the Colorado State Court's  
18 preliminary injunction. That will remain in effect until  
19 five business days after a ruling on a trial that doesn't  
20 even start for two more weeks.

21 Public interest in effective antitrust enforcement  
22 requires pausing the transaction to permit full exploration  
23 of the scope of the harm posed and the crafting of an  
24 appropriate and effective remedy, unhindered by the  
25 premature sharing of competitively sensitive information,



1 and the transition of hundreds of thousands of employees to  
2 new employers.

3 Because defendants have conceded that the divestiture  
4 does not remedy the acquisition's competitive harm to  
5 multiple markets in Santa Fe, New Mexico, because the  
6 overwhelming evidence shows likelihood of substantial harm  
7 to hundreds of other markets. And because the equities  
8 favor protection of the public from a likely illegal merger,  
9 the proper course is clear.

10 Kroger's acquisition of Albertsons should be enjoined.

11 Plaintiffs reserve the remainder of our time for  
12 rebuttal.

13 THE COURT: All right. This is a good time for a  
14 break, and you can make your transition. We are going to be  
15 switching out court reporters.

16 And so let's take a ten-minute break. Court is in  
17 recess for ten minutes.

18 (Recess taken.)

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## C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 15

Plaintiffs' Closing Argument

September 17, 2024

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

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

Official Court Reporter  
Oregon CSR No. 98-0346

Signature Date: 9/17/2024  
CSR Expiration Date: 9/30/2026

<p><b>MR. WOLF: [1]</b> 3434/21  <b>MS. HALL: [2]</b> 3468/13  3468/15  <b>MS. MUSSER: [5]</b>  3434/13 3434/16 3434/23  3434/25 3435/4  <b>THE COURT: [7]</b> 3434/4  3434/15 3434/22 3434/24  3435/1 3468/14 3491/13</p>	<p><b>1162 [2]</b> 3429/7 3429/10  <b>12 [1]</b> 3455/21  <b>121 [2]</b> 3429/4 3432/3  <b>13 [1]</b> 3436/19  <b>14 [2]</b> 3434/18 3455/18  <b>15 [4]</b> 3427/15 3434/4  3474/11 3492/5  <b>17 [5]</b> 3427/6 3434/2  3455/18 3472/19 3492/7  <b>1700 [1]</b> 3432/17  <b>18 [2]</b> 3472/16 3485/16  <b>1900 [1]</b> 3432/12</p>	<p><b>4</b>  <b>400 [3]</b> 3428/5 3428/17  3432/3  <b>45202 [1]</b> 3430/25  <b>455 [1]</b> 3428/21</p>
<p><b>\$</b>  <b>\$1.3 [1]</b> 3476/9  <b>\$20 [2]</b> 3472/22 3472/23  <b>\$78 [1]</b> 3472/25</p>	<p><b>2</b>  <b>20 [2]</b> 3473/11 3476/8  <b>20001 [1]</b> 3430/12  <b>20006 [2]</b> 3432/13  3432/17  <b>2001 [1]</b> 3430/19  <b>20024 [2]</b> 3428/6 3432/10  <b>20036 [1]</b> 3430/20  <b>201 [1]</b> 3430/5  <b>2017 [1]</b> 3452/4  <b>2021 [2]</b> 3462/25 3488/9  <b>2024 [5]</b> 3427/6 3434/2  3484/8 3492/7 3492/17  <b>2026 [1]</b> 3492/18  <b>20580 [1]</b> 3428/14  <b>215 [1]</b> 3428/17  <b>23 [1]</b> 3470/20  <b>234 [1]</b> 3480/13  <b>250 [1]</b> 3430/14</p>	<p><b>5</b>  <b>50 [1]</b> 3481/1  <b>50,000 [1]</b> 3475/10  <b>51 [1]</b> 3475/23  <b>551 [1]</b> 3480/9  <b>55th [1]</b> 3430/14  <b>579 [1]</b> 3472/16</p>
<p><b>'</b>  <b>'90s [1]</b> 3452/3  <b>'continuing [1]</b> 3483/14</p>	<p><b>3</b>  <b>30 [1]</b> 3487/16  <b>300,000 [1]</b> 3475/10  <b>3000 [1]</b> 3430/2  <b>301 [1]</b> 3432/20  <b>335 [1]</b> 3480/12  <b>3468 [1]</b> 3433/3  <b>34th [1]</b> 3430/22  <b>3:24-cv-00347-AN [2]</b>  3427/4 3492/4</p>	<p><b>6</b>  <b>60 [1]</b> 3474/25  <b>60,000 [2]</b> 3489/12  3489/19  <b>600 [2]</b> 3428/13 3430/19  <b>601 [1]</b> 3430/12  <b>60603 [1]</b> 3428/25  <b>680 [1]</b> 3432/10</p>
<p><b>/</b>  <b>/s/Jill [1]</b> 3492/16</p>	<p><b>7</b>  <b>7,500 [1]</b> 3472/19  <b>700 [1]</b> 3429/4  <b>700,000 [1]</b> 3472/8  <b>710,000 [1]</b> 3462/13  <b>75 percent [1]</b> 3447/10  <b>760 [1]</b> 3430/2  <b>767 [1]</b> 3430/7  <b>7th [1]</b> 3428/5</p>	<p><b>8</b>  <b>80 [1]</b> 3475/7  <b>85701 [1]</b> 3428/17</p>
<p><b>0</b>  <b>00347 [1]</b> 3434/5  <b>02110 [1]</b> 3430/22  <b>0346 [1]</b> 3492/18  <b>1</b>  <b>1 percent [1]</b> 3481/12  <b>1,002 [1]</b> 3480/8  <b>1,513 [2]</b> 3435/25  3454/22  <b>1,785 [1]</b> 3435/25  <b>1,788 [1]</b> 3449/1  <b>1,922 [1]</b> 3448/21  <b>10-Ks [1]</b> 3451/17  <b>100 [1]</b> 3430/22  <b>1000 [1]</b> 3432/20  <b>10019 [1]</b> 3430/15  <b>1014 [1]</b> 3430/25  <b>10153 [1]</b> 3430/8  <b>11 [1]</b> 3487/1  <b>11000 [1]</b> 3428/21  <b>115 [1]</b> 3428/24</p>	<p><b>9</b>  <b>9/17/2024 [1]</b> 3492/17  <b>9/30/2026 [1]</b> 3492/18  <b>90 [2]</b> 3475/1 3475/7  <b>94065 [1]</b> 3430/5  <b>94102 [1]</b> 3428/21  <b>96 [1]</b> 3450/25  <b>97204 [3]</b> 3429/4 3432/3</p>	<p><b>9</b>  <b>9/17/2024 [1]</b> 3492/17  <b>9/30/2026 [1]</b> 3492/18  <b>90 [2]</b> 3475/1 3475/7  <b>94065 [1]</b> 3430/5  <b>94102 [1]</b> 3428/21  <b>96 [1]</b> 3450/25  <b>97204 [3]</b> 3429/4 3432/3</p>

**9**

**97204...** [1] 3432/21  
**97205** [1] 3430/3  
**97301** [2] 3429/7 3429/10  
**98-0346** [1] 3492/18  
**9th** [1] 3490/15

**A**

**ability** [9] 3438/2 3466/4  
3470/7 3477/3 3477/16  
3483/12 3485/7 3485/20  
3489/14  
**able** [4] 3446/6 3453/11  
3463/3 3463/5  
**about** [20] 3434/14  
3439/12 3455/2 3455/24  
3456/13 3458/5 3467/3  
3471/20 3472/11 3472/12  
3473/18 3477/8 3477/15  
3477/17 3485/7 3486/18  
3487/4 3487/5 3489/3  
3489/5  
**above** [3] 3457/17  
3480/12 3492/11  
**above-entitled** [1]  
3492/11  
**absent** [2] 3489/23  
3490/6  
**Absolutely** [1] 3434/20  
**acceptable** [1] 3434/20  
**access** [4] 3435/7 3470/9  
3474/17 3476/12  
**accessible** [1] 3436/7  
**account** [8] 3447/12  
3452/10 3453/14 3462/4  
3468/16 3472/20 3481/13  
3487/2  
**accounting** [3] 3480/3  
3480/10 3483/3  
**accounts** [3] 3447/7  
3455/3 3455/5  
**accumulated** [1] 3489/9  
**accurately** [1] 3478/18  
**achieve** [2] 3475/20

3485/10  
**achieved** [2] 3466/3  
3466/6  
**acknowledge** [1] 3479/5  
**acknowledged** [1]  
3456/21  
**acknowledges** [1]  
3482/14  
**acquire** [1] 3473/16  
**acquired** [4] 3477/21  
3477/22 3482/23 3487/17  
**acquirer** [1] 3479/3  
**acquiring** [7] 3473/17  
3473/22 3476/10 3478/25  
3481/20 3481/23 3481/24  
**acquisition** [20] 3453/22  
3454/11 3461/9 3463/9  
3463/11 3464/7 3465/2  
3465/7 3466/18 3468/15  
3470/24 3471/20 3475/8  
3479/13 3480/9 3481/2  
3486/8 3486/15 3488/11  
3491/10  
**acquisition's** [1] 3491/4  
**acquisitions** [2] 3436/14  
3436/14  
**across** [9] 3435/8  
3448/22 3449/2 3450/5  
3455/7 3455/12 3468/7  
3475/11 3485/16  
**Act** [4] 3436/13 3436/24  
3436/25 3468/16  
**acting** [1] 3469/23  
**action** [1] 3462/17  
**actions** [1] 3483/16  
**actually** [2] 3488/17  
3489/15  
**Adam** [1] 3432/6  
**add** [1] 3470/7  
**adding** [1] 3472/23  
**addition** [9] 3444/25  
3446/11 3447/5 3452/10  
3454/9 3455/24 3456/12  
3462/8 3480/15

**additional** [5] 3446/24  
3472/1 3476/11 3480/18  
3486/15  
**address** [2] 3447/11  
3449/11  
**addressed** [2] 3477/5  
3483/11  
**addresses** [1] 3479/7  
**adduce** [1] 3477/6  
**adjust** [1] 3457/20  
**admit** [1] 3490/6  
**admitted** [4] 3445/5  
3449/21 3460/4 3460/7  
**ADRIENNE** [1] 3427/16  
**advancing** [1] 3471/16  
**advertising** [2] 3481/5  
3485/22  
**advise** [1] 3482/12  
**advisors** [1] 3473/16  
**Adwoa** [1] 3432/8  
**Aetna** [5] 3468/1 3471/7  
3479/17 3483/11 3484/25  
**affect** [1] 3483/20  
**afford** [4] 3449/18 3450/8  
3450/10 3469/25  
**affordable** [2] 3435/7  
3436/7  
**after** [20] 3434/19  
3435/10 3435/10 3438/2  
3440/24 3448/16 3448/23  
3452/8 3453/21 3457/12  
3463/5 3463/9 3465/15  
3465/21 3469/18 3475/8  
3480/3 3480/10 3481/1  
3490/19  
**again** [9] 3446/5 3447/11  
3448/14 3448/24 3451/9  
3457/10 3457/11 3462/3  
3486/5  
**against** [6] 3445/11  
3457/2 3457/5 3478/17  
3479/24 3488/14  
**agnostic** [1] 3462/3  
**ago** [1] 3435/4

**A**

**agree [1]** 3465/2  
**agreed [1]** 3481/18  
**agreement [2]** 3462/21  
3462/22  
**agreements [2]** 3464/6  
3464/9  
**ahead [1]** 3460/9  
**Aitken [6]** 3456/3 3456/7  
3460/20 3474/3 3474/23  
3475/3  
**al [2]** 3427/3 3492/3  
**alarming [1]** 3436/3  
**Alaska [1]** 3473/13  
**ALBERTSONS [73]**  
**Albertsons' [14]** 3445/8  
3455/20 3456/14 3456/20  
3456/22 3458/7 3473/3  
3473/11 3474/6 3474/11  
3474/12 3475/15 3476/12  
3487/6  
**Aldi [1]** 3439/6  
**Alexander [1]** 3428/9  
**algorithms [1]** 3475/15  
**aligned [3]** 3458/1  
3463/2 3483/17  
**all [21]** 3441/2 3441/7  
3441/15 3441/20 3449/9  
3457/7 3459/13 3460/20  
3468/17 3469/4 3471/5  
3475/1 3477/16 3479/5  
3481/7 3482/8 3483/5  
3485/8 3486/6 3489/16  
3491/13  
**allegations [1]** 3454/1  
**alleged [5]** 3440/14  
3454/4 3465/5 3466/5  
3468/5  
**alleging [2]** 3454/7  
3466/16  
**allow [3]** 3466/21 3475/2  
3476/14  
**allowed [1]** 3436/12  
**almost [3]** 3435/4

3435/12 3467/20  
**alone [3]** 3455/6 3468/25  
3478/25  
**Alphonsus [1]** 3466/24  
**already [2]** 3434/10  
3473/11  
**also [36]** 3435/20  
3437/13 3441/12 3444/16  
3444/25 3445/1 3445/25  
3446/12 3447/5 3448/24  
3449/12 3451/6 3451/17  
3454/10 3455/9 3455/15  
3455/20 3456/13 3456/23  
3458/9 3458/22 3460/17  
3461/4 3462/2 3462/9  
3463/17 3464/5 3464/12  
3470/15 3473/20 3475/20  
3477/13 3480/12 3482/8  
3487/5 3488/24  
**alternative [2]** 3476/7  
3477/10  
**aluminum [2]** 3438/16  
3438/19  
**always [1]** 3456/21  
**Amazon [10]** 3451/21  
3452/3 3452/11 3452/13  
3453/7 3453/9 3453/12  
3453/15 3453/17 3454/2  
**Amazon's [1]** 3452/21  
**America [2]** 3435/18  
3438/16  
**American [1]** 3472/9  
**Americans' [1]** 3435/7  
**among [5]** 3439/3  
3451/12 3464/6 3467/14  
3469/22  
**amount [2]** 3468/6  
3470/12  
**analyses [2]** 3479/7  
3480/19  
**analysis [17]** 3440/2  
3440/8 3446/12 3446/25  
3448/5 3454/15 3455/2  
3455/3 3462/2 3464/22

3464/23 3468/24 3476/24  
3478/9 3480/4 3487/2  
3489/25  
**analytics [2]** 3475/2  
3475/5  
**analyze [2]** 3436/25  
3478/6  
**analyzed [3]** 3446/15  
3447/3 3458/23  
**analyzing [2]** 3435/22  
3457/13  
**Andrew [2]** 3430/16  
3432/11  
**Angeli [2]** 3432/2 3432/2  
**annually [1]** 3472/21  
**anomaly [1]** 3451/13  
**another [6]** 3447/14  
3458/12 3463/8 3467/2  
3467/2 3486/6  
**answer [2]** 3446/22  
3470/25  
**answered [1]** 3470/25  
**anticipating [1]** 3458/24  
**anticompetitive [6]**  
3437/8 3437/14 3448/14  
3448/23 3452/18 3459/14  
**antitrust [6]** 3438/23  
3440/5 3440/15 3452/19  
3453/10 3490/21  
**Antonio [1]** 3431/1  
**Antonio Matthews [1]**  
3431/1  
**any [13]** 3434/9 3434/11  
3441/14 3447/19 3449/8  
3464/7 3474/5 3476/24  
3478/9 3478/13 3478/21  
3490/3 3490/10  
**anymore [1]** 3451/7  
**anywhere [3]** 3449/8  
3462/3 3462/4  
**apart [2]** 3435/22  
3463/16  
**appear [1]** 3469/17  
**appearance [1]** 3434/11

**A**

**appearances [3]** 3427/18  
3434/9 3434/10  
**applied [2]** 3448/1  
3448/18  
**applies [1]** 3471/17  
**approach [5]** 3435/24  
3447/18 3447/19 3463/2  
3472/24  
**appropriate [1]** 3490/24  
**approval [1]** 3488/6  
**approved [1]** 3479/2  
**approximately [1]**  
3473/12  
**aptly [1]** 3443/2  
**are [86]**  
**area [3]** 3447/15 3448/7  
3448/8  
**areas [5]** 3448/4 3463/19  
3464/6 3464/8 3464/14  
**aren't [4]** 3439/20  
3442/12 3463/1 3477/19  
**Arens [1]** 3428/7  
**argue [11]** 3439/3 3440/6  
3449/5 3449/7 3450/18  
3451/6 3456/18 3457/10  
3459/6 3459/9 3461/14  
**argued [2]** 3451/18  
3466/19  
**arguing [1]** 3439/2  
**argument [8]** 3427/15  
3433/2 3433/3 3435/3  
3451/20 3459/11 3466/24  
3492/6  
**arguments [3]** 3434/8  
3438/22 3459/20  
**ARIZONA [2]** 3428/15  
3428/16  
**arm's [1]** 3470/3  
**Arnold [2]** 3430/11  
3430/14  
**around [6]** 3436/3 3447/9  
3447/22 3450/11 3458/16  
3468/22

**as [105]**

**Ashenfelter [1]** 3464/24  
**aside [2]** 3450/2 3461/8  
**asking [2]** 3435/5  
3436/17  
**aspect [3]** 3435/12  
3445/24 3455/12  
**aspects [3]** 3444/3  
3455/25 3482/3  
**asserted [1]** 3466/3  
**assess [2]** 3440/13  
3448/11  
**assessed [1]** 3447/5  
**assesses [1]** 3457/20  
**assessing [3]** 3448/20  
3449/2 3486/10  
**assets [14]** 3469/22  
3470/17 3472/8 3473/3  
3473/6 3474/23 3475/5  
3475/21 3477/10 3479/19  
3479/20 3483/4 3484/22  
3485/8  
**assets' [1]** 3483/15  
**assist [1]** 3441/18  
**associates [2]** 3441/17  
3482/9  
**assortment [4]** 3435/13  
3443/17 3449/25 3450/15  
**assortments [1]** 3441/11  
**assumes [5]** 3450/6  
3450/8 3450/9 3474/16  
3478/7  
**assuming [1]** 3450/2  
**assumption [1]** 3464/10  
**assumptions [2]** 3467/25  
3487/4  
**atmospheric [1]** 3454/1  
**attain [2]** 3473/2 3473/4  
**attempt [3]** 3440/7  
3459/24 3477/12  
**attempted [1]** 3472/5  
**attorney [4]** 3428/16  
3428/20 3428/23 3469/3  
**attract [1]** 3447/20

**attractive [1]** 3484/24

**available [2]** 3441/17  
3470/16

**Avenue [8]** 3428/13  
3428/21 3430/2 3430/7  
3430/12 3432/10 3432/17  
3432/20

**averaging [1]** 3486/23

**avoid [1]** 3460/11

**AZ [1]** 3428/17

**B**

**back [3]** 3441/21 3459/4  
3466/21

**bags [1]** 3450/7

**Bain [1]** 3482/24

**Bain's [1]** 3483/1

**Balbach [1]** 3428/10

**Bambo [1]** 3430/4

**banana [10]** 3449/8  
3449/8 3449/12 3449/15  
3449/16 3449/17 3449/20  
3453/3 3453/5 3453/5

**bananas [1]** 3449/18

**Bank [1]** 3466/25

**banks [2]** 3478/21 3479/4

**banner [6]** 3455/17  
3455/23 3458/7 3473/17  
3473/24 3481/4

**banners [11]** 3473/10  
3473/11 3473/12 3473/18  
3473/20 3474/14 3475/11  
3481/23 3483/5 3483/7  
3484/14

**bar [1]** 3436/21

**bargaining [6]** 3437/15  
3464/7 3465/6 3488/12  
3488/17 3488/18

**Barrington [1]** 3430/6

**base [6]** 3444/11 3469/24  
3475/17 3483/3 3484/2  
3484/13

**base-case [1]** 3483/3

**based [7]** 3445/13

**B****based... [6]** 3447/193458/15 3467/25 3471/11  
3479/16 3487/3**basic [1]** 3475/9**basics [1]** 3444/18**basis [3]** 3470/7 3486/22  
3490/12**be [64]** 3434/5 3437/113437/13 3437/15 3438/13  
3438/24 3439/2 3444/13

3446/4 3447/21 3447/24

3449/9 3449/15 3453/11

3454/3 3454/17 3454/25

3456/19 3458/25 3459/14

3460/23 3460/24 3463/5

3463/10 3463/12 3463/13

3463/23 3464/3 3466/3

3466/5 3466/7 3466/12

3467/7 3468/16 3469/7

3469/19 3472/1 3472/15

3472/15 3473/23 3474/5

3474/14 3475/11 3475/22

3475/25 3477/20 3477/22

3479/21 3479/25 3480/17

3482/15 3483/6 3484/2

3484/4 3485/15 3486/5

3486/13 3487/20 3488/7

3488/13 3489/11 3489/24

3491/10 3491/14

**bear [2]** 3453/23 3477/6**bearing [1]** 3465/23**beating [1]** 3457/21**because [42]** 3436/5

3438/11 3438/16 3439/15

3441/25 3442/21 3445/21

3448/15 3449/7 3449/20

3449/23 3452/25 3453/7

3453/10 3453/14 3453/21

3456/19 3458/7 3463/3

3463/23 3465/15 3465/20

3467/1 3467/1 3467/4

3467/13 3469/22 3471/8

3471/16 3471/22 3472/1

3473/5 3473/17 3477/5

3478/1 3482/9 3483/15

3485/12 3489/10 3491/3

3491/5 3491/7

**becoming [2]** 3485/1

3485/11

**been [11]** 3437/22

3445/25 3451/6 3451/12

3451/14 3453/21 3460/18

3479/22 3484/5 3489/12

3489/23

**before [5]** 3427/16

3435/5 3436/17 3438/7

3490/15

**begin [2]** 3434/12

3463/23

**behavior [1]** 3440/6**behind [2]** 3457/16

3459/25

**being [3]** 3436/2 3478/21

3482/3

**belied [1]** 3451/25**believes [1]** 3486/13**below [2]** 3486/22 3492/9**below-market [1]**

3486/22

**benefit [13]** 3458/24

3461/10 3463/4 3466/16

3466/20 3467/1 3467/2

3467/2 3467/5 3467/19

3467/20 3469/10 3469/15

**benefits [10]** 3436/15

3464/1 3469/4 3469/6

3485/25 3486/2 3486/5

3486/7 3486/9 3489/10

**best [4]** 3442/11 3470/15

3470/21 3475/3

**Beth [1]** 3432/6**better [2]** 3476/15

3488/17

**between [23]** 3435/11

3435/25 3436/9 3441/9

3445/13 3447/13 3450/20

3451/14 3459/2 3459/8

3459/15 3460/15 3461/5

3461/18 3461/18 3462/1

3462/16 3464/22 3470/3

3470/9 3472/7 3483/15

3489/1

**biggest [1]** 3458/20**billion [5]** 3472/22

3472/23 3472/25 3474/6

3476/9

**billion-dollar [1]** 3474/6**billions [1]** 3436/2**bit [1]** 3437/20**Blackburn [1]** 3428/4**blurring [2]** 3450/21

3451/5

**board [2]** 3450/13

3487/25

**boardroom [1]** 3450/13**body [1]** 3461/22**borne [1]** 3461/16**Boston [1]** 3430/22**both [21]** 3435/16

3435/21 3438/4 3438/11

3438/14 3439/9 3439/23

3440/9 3446/4 3447/19

3448/2 3452/17 3455/19

3458/3 3460/5 3465/9

3471/21 3471/23 3476/15

3480/5 3490/6

**bottom [2]** 3437/24

3467/16

**boundaries [1]** 3440/14**Bowl [1]** 3458/17**Bradley [1]** 3432/5**brand [9]** 3441/14 3474/4

3474/13 3474/16 3475/24

3477/4 3477/10 3481/3

3485/23

**brands [8]** 3441/13

3449/25 3474/5 3474/11

3474/15 3476/4 3481/25

3482/1

**bread [1]** 3453/6**breadth [2]** 3440/23

**B**

**breadth...** [1] 3441/4  
**break** [2] 3491/14  
 3491/16  
**brick** [3] 3452/6 3452/11  
 3453/1  
**briefing** [2] 3434/14  
 3437/20  
**briefly** [3] 3434/13  
 3446/16 3479/15  
**broad** [1] 3438/24  
**broader** [3] 3438/14  
 3439/1 3439/6  
**Broderick** [1] 3459/1  
**broken** [1] 3466/12  
**Bros** [2] 3442/14 3442/15  
**Brown** [10] 3438/13  
 3440/9 3440/12 3440/13  
 3440/17 3443/12 3444/1  
 3444/24 3445/12 3446/12  
**Bryson** [1] 3428/9  
**bucket** [2] 3467/10  
 3467/23  
**buckets** [2] 3454/14  
 3466/13  
**build** [2] 3445/23 3481/3  
**building** [1] 3474/13  
**built** [1] 3469/23  
**built-in** [1] 3469/23  
**bump** [1] 3482/10  
**bumping** [2] 3482/14  
 3482/17  
**burden** [17] 3437/1  
 3437/2 3437/16 3437/16  
 3453/15 3453/23 3462/6  
 3465/8 3465/11 3465/11  
 3465/16 3465/20 3466/8  
 3466/9 3466/11 3468/8  
 3477/6  
**burden-shifting** [2]  
 3437/1 3465/11  
**bus** [1] 3450/7  
**business** [21] 3466/17  
 3466/20 3466/21 3466/22

3467/3 3467/4 3467/9  
 3470/3 3476/7 3477/14  
 3479/20 3481/19 3481/25  
 3484/8 3484/12 3485/25  
 3486/10 3486/11 3486/15  
 3489/5 3490/19  
**businesses** [2] 3469/5  
 3476/16  
**buy** [3] 3442/23 3449/7  
 3462/4  
**buyer** [7] 3470/16  
 3470/21 3483/15 3483/16  
 3483/17 3485/3 3485/7  
**buyer's** [1] 3479/18  
**buyers** [1] 3485/1  
**buying** [1] 3472/24

**C**

**CA** [2] 3428/21 3430/5  
**calculate** [1] 3448/18  
**calculated** [2] 3480/8  
 3480/12  
**CALIFORNIA** [7] 3428/19  
 3428/20 3458/12 3458/19  
 3482/10 3482/18 3482/20  
**call** [2] 3443/10 3450/20  
**called** [6] 3447/18  
 3448/19 3454/15 3464/6  
 3465/18 3475/3  
**came** [1] 3435/4  
**can** [28] 3437/2 3438/13  
 3438/24 3441/1 3447/18  
 3449/7 3449/8 3449/12  
 3449/13 3449/18 3450/2  
 3450/8 3450/10 3453/4  
 3455/6 3459/22 3462/4  
 3466/12 3469/25 3472/15  
 3474/20 3476/22 3479/11  
 3483/24 3486/1 3486/14  
 3488/13 3491/14  
**cannot** [9] 3437/18  
 3443/7 3466/5 3468/8  
 3475/11 3478/1 3481/10  
 3481/11 3486/5

**capabilities** [3] 3475/6  
 3476/19 3479/18  
**capability** [1] 3476/9  
**capable** [1] 3469/17  
**Carrs** [1] 3473/13  
**carrying** [1] 3450/7  
**cart** [1] 3445/23  
**carts** [1] 3444/18  
**case** [29] 3427/4 3434/5  
 3436/2 3437/2 3437/5  
 3437/6 3437/12 3437/19  
 3438/17 3440/1 3440/8  
 3441/21 3453/20 3459/12  
 3462/7 3462/9 3465/10  
 3465/10 3465/12 3465/16  
 3466/10 3466/23 3468/10  
 3469/4 3469/8 3477/6  
 3483/2 3483/3 3489/2  
**cases** [2] 3438/20  
 3441/14  
**Casey** [1] 3430/1  
**cash** [2] 3486/22 3487/8  
**cast** [1] 3451/22  
**catch** [2] 3447/23  
 3460/10  
**catching** [1] 3460/21  
**catchment** [1] 3448/7  
**categories** [1] 3473/9  
**cause** [3] 3481/3 3486/8  
 3492/12  
**causes** [2] 3439/15  
 3468/18  
**CBA** [3] 3463/19 3464/6  
 3464/14  
**cease** [1] 3465/5  
**cede** [1] 3476/22  
**ceiling** [2] 3457/7  
 3458/13  
**center** [1] 3452/23  
**centers** [4] 3469/23  
 3481/20 3485/19 3486/16  
**CEO** [5] 3440/25 3455/20  
 3456/20 3487/25 3487/25  
**certainly** [1] 3467/20



**C**

**certified [1]** 3492/14  
**certify [1]** 3492/9  
**chain [2]** 3441/1 3472/21  
**chains [2]** 3473/19  
3474/10  
**challenges [3]** 3472/2  
3481/7 3487/7  
**chance [2]** 3485/1 3489/6  
**change [8]** 3435/21  
3437/20 3444/5 3451/6  
3453/24 3458/15 3465/6  
3484/3  
**changed [1]** 3446/24  
**changes [3]** 3435/22  
3448/20 3454/9  
**channel [3]** 3445/17  
3450/21 3451/5  
**channel-blurring [1]**  
3451/5  
**channels [2]** 3445/20  
3450/20  
**charge [3]** 3444/16  
3444/18 3444/20  
**Charles [1]** 3428/3  
**check [1]** 3441/7  
**Cheerios [1]** 3441/13  
**Cheese [1]** 3443/9  
**cherry [1]** 3435/14  
**cherry-picked [1]**  
3435/14  
**Cheryl [1]** 3429/8  
**Chicago [2]** 3428/25  
3473/22  
**chief [2]** 3443/5 3477/6  
**choice [3]** 3449/16  
3489/20 3490/11  
**choose [2]** 3467/18  
3481/7  
**chosen [1]** 3485/24  
**Christian [1]** 3430/10  
**Christine [1]** 3430/23  
**Christopher [1]** 3429/3  
**Cincinnati [2]** 3430/25

3450/13  
**Circuit [3]** 3460/13  
3466/23 3471/12  
**Citing [1]** 3483/13  
**city [1]** 3468/23  
**Civil [2]** 3429/6 3429/9  
**claim [1]** 3488/16  
**claiming [1]** 3475/20  
**claims [9]** 3451/13  
3462/10 3466/1 3466/12  
3467/24 3471/20 3472/11  
3472/12 3490/3  
**Clay [2]** 3462/24 3463/24  
**Clayton [4]** 3436/13  
3436/24 3436/25 3468/16  
**clean [2]** 3461/11  
3482/16  
**clear [4]** 3439/2 3457/17  
3468/9 3491/9  
**clearest [1]** 3470/18  
**clearly [3]** 3457/23  
3459/12 3472/10  
**clone [1]** 3475/12  
**close [9]** 3434/19  
3459/18 3468/6 3469/25  
3480/21 3481/8 3486/21  
3489/16 3490/16  
**closed [2]** 3488/9 3490/1  
**closely [1]** 3458/20  
**closes [1]** 3478/2  
**closing [7]** 3427/15  
3433/2 3433/3 3434/8  
3435/3 3488/1 3492/6  
**closures [2]** 3490/5  
3490/7  
**club [4]** 3442/25 3443/1  
3443/16 3450/11  
**CMCR [6]** 3454/15  
3454/18 3454/19 3454/23  
3462/2 3480/12  
**Co [1]** 3438/16  
**cobbled [1]** 3477/22  
**cognizable [1]** 3465/18  
**Cohen [1]** 3489/18

**Coke [1]** 3443/9  
**colleague [3]** 3467/22  
3468/11 3486/4  
**collective [3]** 3462/17  
3474/9 3476/10  
**collectively [2]** 3438/20  
3462/12  
**Colleen [1]** 3430/18  
**Colorado [1]** 3490/17  
**Columbia [3]** 3472/17  
3473/23 3485/16  
**combined [1]** 3468/4  
**combining [1]** 3469/5  
**come [3]** 3436/16  
3447/10 3470/21  
**comes [2]** 3457/23  
3462/18  
**commerce [2]** 3463/18  
3466/17  
**commercial [2]** 3450/4  
3464/16  
**COMMISSION [6]** 3427/3  
3428/2 3428/5 3428/13  
3434/6 3492/3  
**commitment [1]** 3488/5  
**common [2]** 3439/19  
3457/14  
**communications [2]**  
3485/3 3487/23  
**communities [19]** 3435/8  
3435/17 3436/5 3436/5  
3436/8 3436/11 3436/15  
3446/4 3447/2 3448/3  
3448/22 3449/1 3450/5  
3454/25 3461/12 3461/24  
3462/5 3467/7 3469/12  
**community [4]** 3448/16  
3467/5 3469/6 3482/19  
**companies [8]** 3427/7  
3432/1 3432/15 3434/7  
3436/9 3455/3 3456/17  
3459/2  
**companies' [1]** 3452/16  
**company [9]** 3427/6

**C**

**company... [8]** 3430/1  
3430/24 3434/6 3435/17  
3452/20 3457/14 3467/18  
3476/6  
**compare [1]** 3473/8  
**compared [5]** 3469/4  
3474/2 3476/5 3484/22  
3484/23  
**compete [14]** 3455/12  
3455/19 3456/10 3457/2  
3459/5 3460/9 3460/13  
3460/19 3461/7 3461/7  
3461/10 3480/6 3481/8  
3485/5  
**competed [1]** 3479/19  
**competes [2]** 3456/7  
3457/3  
**competing [5]** 3437/10  
3458/17 3461/23 3483/6  
3487/10  
**competition [54]** 3435/11  
3435/17 3436/8 3436/11  
3436/16 3436/24 3437/11  
3438/1 3438/17 3439/3  
3439/5 3439/8 3446/9  
3447/8 3447/24 3453/22  
3454/13 3454/16 3455/16  
3455/25 3455/25 3456/1  
3456/2 3456/12 3456/13  
3456/19 3458/3 3458/16  
3459/1 3459/8 3459/13  
3459/15 3459/17 3459/19  
3461/5 3461/9 3461/15  
3461/25 3462/16 3469/9  
3469/12 3471/9 3471/15  
3471/25 3478/7 3478/14  
3479/9 3479/12 3479/22  
3480/17 3483/13 3484/17  
3486/2 3486/8  
**competitive [13]** 3458/1  
3459/10 3460/22 3460/23  
3461/17 3468/18 3468/23  
3471/5 3471/25 3472/15

3472/16 3478/14 3491/4  
**competitively [1]**  
3490/25  
**competitor [12]** 3445/10  
3447/20 3455/18 3455/22  
3456/16 3456/16 3459/18  
3483/18 3485/2 3485/11  
3488/13 3488/18  
**competitors [7]** 3453/12  
3457/18 3458/3 3458/20  
3459/16 3461/13 3469/19  
**complaint [2]** 3446/19  
3452/9  
**complete [1]** 3482/2  
**completely [1]** 3464/18  
**complex [1]** 3482/6  
**composition [1]** 3477/15  
**compounded [1]**  
3474/14  
**comprises [1]** 3440/15  
**conceded [1]** 3491/3  
**concedes [3]** 3468/20  
3468/22 3482/5  
**concentration [7]** 3437/8  
3448/13 3448/15 3448/20  
3448/22 3464/12 3487/14  
**concentrations [1]**  
3448/18  
**concerned [2]** 3465/4  
3467/3  
**concerns [2]** 3447/11  
3477/15  
**concessions [1]** 3488/14  
**concluded [2]** 3446/25  
3471/8  
**conclusion [1]** 3485/6  
**conduct [1]** 3471/11  
**conduct-based [1]**  
3471/11  
**conductors [2]** 3438/18  
3438/19  
**conferring [1]** 3434/16  
**confirmed [2]** 3470/6  
3484/2

**conformed [1]** 3492/13  
**Congress [1]** 3428/17  
**congressional [1]** 3490/4  
**connection [1]** 3488/8  
**Connolly [1]** 3432/9  
**Connor [1]** 3428/16  
**Connors [1]** 3430/18  
**conservative [1]** 3486/19  
**conservatively [1]**  
3435/24  
**consider [3]** 3469/15  
3478/24 3486/2  
**considered [4]** 3465/15  
3469/7 3479/16 3479/17  
**considering [2]** 3471/11  
3490/5  
**considers [1]** 3460/5  
**consistent [1]** 3451/12  
**consistently [2]** 3445/15  
3451/18  
**consolidate [1]** 3453/11  
**constraint [2]** 3457/11  
3460/3  
**consultants [1]** 3477/23  
**consumer [1]** 3440/6  
**consumers [3]** 3465/23  
3466/6 3487/15  
**contemplated [1]**  
3486/11  
**contemporaneous [1]**  
3477/14  
**contend [2]** 3439/4  
3460/12  
**contended [1]** 3438/10  
**contention [1]** 3451/5  
**contentions [2]** 3440/11  
3477/8  
**context [1]** 3484/9  
**continually [2]** 3456/24  
3460/18  
**continue [2]** 3434/10  
3480/6  
**continued [1]** 3488/3  
**continuing [2]** 3457/1

**C**

**continuing...** [1] 3457/2  
**continuity** [1] 3483/8  
**contours** [1] 3449/14  
**contracts** [1] 3488/9  
**contradicted** [3] 3462/2  
 3472/12 3484/7  
**contradicting** [1]  
 3451/13  
**contradictory** [2]  
 3471/19 3477/9  
**contradicts** [1] 3488/16  
**contrast** [4] 3441/5  
 3442/19 3476/3 3478/4  
**convenience** [2] 3439/18  
 3455/5  
**convenient** [1] 3435/8  
**coordinate** [1] 3488/15  
**copper** [1] 3438/19  
**Corp** [2] 3460/14 3466/25  
**corporate** [2] 3483/23  
 3487/24  
**correct** [1] 3492/10  
**Corvallis** [1] 3480/25  
**Cosset** [5] 3470/4  
 3470/15 3476/13 3489/12  
 3490/15  
**cost** [8] 3436/9 3454/19  
 3455/1 3467/23 3468/2  
 3468/3 3476/5 3485/21  
**Costco** [14] 3439/6  
 3443/1 3443/2 3443/3  
 3444/15 3449/1 3450/9  
 3451/21 3452/2 3452/11  
 3452/14 3453/15 3453/17  
 3454/2  
**costs** [2] 3456/25 3481/5  
**could** [5] 3447/24  
 3450/16 3470/21 3471/24  
 3490/17  
**couldn't** [1] 3488/5  
**counsel** [4] 3430/24  
 3431/1 3434/9 3434/17  
**counter** [1] 3443/22

**counters** [3] 3441/16  
 3441/19 3441/20  
**country** [8] 3435/8  
 3448/22 3449/2 3450/5  
 3455/8 3462/12 3463/14  
 3468/7  
**couple** [1] 3474/8  
**coupons** [1] 3435/13  
**course** [22] 3435/20  
 3440/25 3442/2 3444/8  
 3445/15 3446/1 3446/11  
 3446/21 3449/3 3451/16  
 3452/1 3455/9 3456/22  
 3457/12 3458/10 3458/22  
 3460/7 3461/22 3462/14  
 3463/17 3471/18 3491/9  
**court** [47] 3427/1  
 3427/17 3429/7 3429/10  
 3432/19 3434/3 3435/5  
 3435/9 3436/17 3438/7  
 3438/13 3438/15 3438/20  
 3439/11 3439/16 3439/22  
 3448/12 3456/12 3457/12  
 3457/24 3458/5 3458/5  
 3458/9 3462/14 3463/6  
 3464/5 3466/8 3466/25  
 3467/12 3468/1 3468/25  
 3469/11 3469/15 3470/22  
 3471/8 3477/17 3478/24  
 3479/17 3479/17 3483/11  
 3484/25 3486/1 3488/6  
 3490/14 3491/15 3491/16  
 3492/17  
**Court's** [2] 3489/24  
 3490/17  
**Courthouse** [1] 3432/20  
**courts** [8] 3436/25  
 3440/4 3440/13 3465/20  
 3465/24 3467/8 3471/2  
 3483/13  
**cover** [1] 3470/14  
**coverage** [2] 3466/19  
 3476/14  
**COVID** [2] 3451/11

3451/14  
**Cowie** [1] 3432/7  
**crafting** [1] 3490/23  
**CRC** [2] 3432/19 3492/16  
**create** [1] 3476/20  
**created** [2] 3470/2  
 3470/5  
**credibility** [2] 3463/12  
 3471/21  
**criticize** [1] 3446/20  
**Cromwell** [1] 3432/16  
**CRR** [2] 3432/19 3492/16  
**CSR** [3] 3492/16 3492/18  
 3492/18  
**Curiously** [1] 3485/24  
**current** [8] 3453/14  
 3471/25 3477/17 3481/12  
 3484/6 3485/17 3487/25  
 3487/25  
**currently** [3] 3470/19  
 3473/24 3476/2  
**Curry** [1] 3458/18  
**customary** [1] 3448/7  
**customer** [10] 3442/9  
 3447/19 3450/18 3469/24  
 3476/12 3476/15 3476/16  
 3476/23 3482/20 3483/20  
**customer's** [1] 3442/7  
**customer-based** [1]  
 3447/19  
**customers** [21] 3441/1  
 3441/24 3442/4 3442/22  
 3443/2 3443/6 3443/25  
 3445/21 3447/10 3447/21  
 3450/19 3451/18 3452/5  
 3456/11 3467/19 3472/19  
 3472/21 3474/20 3481/13  
 3481/16 3482/17  
**cv** [3] 3427/4 3434/5  
 3492/4

**D**

**D.C** [1] 3432/17  
**dairy** [1] 3476/3

**D****Dan [2]** 3432/16 3462/24**Dan Clay [1]** 3462/24**Dan Richardson [1]**

3432/16

**Daniel [1]** 3428/3**data [14]** 3450/22

3450/24 3451/9 3451/10

3461/20 3475/1 3475/2

3475/5 3476/8 3476/12

3476/14 3476/15 3476/23

3476/25

**date [4]** 3490/15 3490/16

3492/17 3492/18

**David [1]** 3432/2**Davis [1]** 3430/10**day [6]** 3427/15 3434/4

3434/7 3453/6 3482/21

3492/5

**days [1]** 3490/19**DC [6]** 3428/6 3428/14

3430/12 3430/20 3432/10

3432/13

**de [5]** 3452/23 3455/16

3463/13 3468/2 3476/21

**deal [9]** 3469/21 3472/3

3474/16 3478/12 3478/17

3478/18 3486/12 3486/19

3486/20

**decade [1]** 3472/4**December [1]** 3462/25**Dechert [1]** 3432/12**decide [1]** 3485/3**decisions [3]** 3445/7

3460/6 3478/23

**decks [1]** 3461/21**decline [1]** 3487/16**declines [1]** 3477/2**declining [3]** 3486/24

3487/10 3487/12

**decrease [1]** 3464/7**deeply [1]** 3468/24**DEFENDANT [2]** 3430/1

3432/1

**defendants [49]** 3427/8

3437/10 3437/17 3438/10

3438/11 3440/6 3446/20

3447/12 3448/16 3449/4

3449/7 3450/18 3451/5

3453/16 3453/23 3453/25

3456/18 3457/10 3459/6

3459/23 3460/12 3461/21

3464/15 3465/12 3465/14

3465/17 3465/25 3466/9

3466/11 3466/15 3466/18

3468/8 3469/2 3471/4

3471/12 3471/16 3471/17

3472/5 3472/14 3478/20

3479/5 3481/10 3481/17

3485/18 3485/24 3488/3

3490/10 3490/14 3491/3

**defendants' [16]** 3438/2

3440/10 3451/20 3459/20

3460/15 3466/12 3467/16

3468/12 3468/20 3471/19

3471/22 3472/11 3473/7

3477/5 3477/8 3478/5

**defense [6]** 3459/9

3468/17 3471/3 3471/17

3471/22 3477/5

**deferred [1]** 3478/24**deficiency [1]** 3468/12**define [1]** 3437/6**defined [6]** 3437/25

3438/6 3438/25 3439/14

3440/5 3464/11

**definition [10]** 3435/23

3437/21 3437/24 3445/25

3446/20 3451/23 3452/12

3452/21 3453/9 3455/4

**delay [1]** 3490/10**deli [1]** 3443/22**delivery [1]** 3474/25**density [2]** 3481/2

3485/23

**deny [3]** 3481/10 3481/11

3490/12

**Department [2]** 3429/6

3429/9

**departments [2]** 3443/19

3443/22

**depend [2]** 3436/6

3489/14

**dependent [3]** 3436/8

3475/17 3483/19

**depending [1]** 3442/5**depends [1]** 3449/17**depriving [1]** 3436/15**depth [2]** 3440/22 3441/4**derived [1]** 3476/24**designed [1]** 3436/13**desire [3]** 3451/18 3452/6

3479/2

**despite [4]** 3446/20

3449/3 3452/16 3482/22

**details [1]** 3478/1**determine [6]** 3440/14

3440/18 3442/7 3447/23

3449/13 3453/4

**determines [1]** 3483/23**detriment [1]** 3465/7**detriments [2]** 3483/2

3483/3

**development [1]** 3487/25**Dickinson [1]** 3428/3**did [8]** 3435/19 3438/18

3446/16 3448/1 3464/22

3484/10 3488/9 3488/10

**didn't [3]** 3463/23

3478/16 3489/15

**Diet [1]** 3443/9**differ [1]** 3463/22**difference [1]** 3464/22**differences [5]** 3441/9

3441/25 3443/14 3445/13

3447/12

**different [16]** 3441/6

3442/1 3442/4 3442/5

3442/6 3443/14 3445/2

3445/16 3445/17 3445/17

3445/20 3447/14 3450/8

3461/17 3467/9 3467/9

**D**

**differential** [1] 3464/24  
**differently** [5] 3444/9  
3444/13 3445/1 3445/1  
3449/13  
**difficult** [2] 3441/6  
3453/2  
**difficulty** [1] 3474/13  
**digitally** [1] 3492/13  
**direct** [6] 3437/9 3454/11  
3455/7 3456/4 3463/16  
3477/25  
**directly** [1] 3449/11  
**discounting** [1] 3483/2  
**discuss** [3] 3468/12  
3471/19 3484/6  
**discussed** [1] 3488/1  
**discussing** [1] 3452/9  
**dispel** [1] 3438/9  
**dispelled** [1] 3478/21  
**disposal** [1] 3447/4  
**disproportionate** [2]  
3470/12 3485/21  
**distance** [1] 3440/8  
**distinct** [1] 3440/23  
**distinguish** [1] 3450/20  
**distract** [1] 3464/15  
**distribution** [6] 3469/23  
3469/24 3481/20 3483/22  
3485/18 3486/16  
**DISTRICT** [8] 3427/1  
3427/2 3427/17 3432/20  
3471/7 3472/17 3473/23  
3485/16  
**divest** [1] 3473/3  
**divested** [12] 3476/23  
3477/24 3479/8 3479/20  
3480/6 3480/21 3480/23  
3482/9 3482/9 3483/15  
3488/1 3489/20  
**divesting** [1] 3475/4  
**divestiture** [63] 3465/13  
3468/17 3468/17 3468/19  
3469/13 3469/16 3470/2

3470/4 3470/6 3470/16  
3470/19 3470/22 3471/2  
3471/3 3471/5 3471/9  
3471/16 3471/20 3471/22  
3472/6 3472/7 3472/12  
3472/24 3473/20 3474/18  
3475/22 3475/23 3477/5  
3477/8 3477/12 3477/15  
3478/3 3478/6 3478/13  
3478/24 3479/16 3479/17  
3479/19 3480/3 3480/11  
3480/16 3480/22 3481/1  
3481/19 3483/12 3483/14  
3484/16 3484/22 3484/24  
3485/4 3485/8 3485/13  
3486/23 3487/1 3487/18  
3487/23 3488/7 3489/3  
3489/5 3489/7 3489/8  
3490/7 3491/3  
**divestiture's** [1] 3485/25  
**divestitures** [1] 3481/18  
**division** [8] 3429/9  
3435/15 3457/24 3457/25  
3458/4 3458/11 3458/19  
3484/18  
**divisions** [2] 3455/21  
3457/7  
**Dixon** [1] 3428/11  
**do** [21] 3436/21 3437/18  
3444/4 3450/6 3451/7  
3459/17 3460/25 3465/24  
3467/15 3467/19 3467/25  
3478/4 3478/8 3478/9  
3478/10 3480/7 3480/22  
3481/14 3487/11 3488/17  
3490/17  
**document** [5] 3435/9  
3435/10 3457/12 3457/13  
3478/1  
**documentary** [1] 3490/3  
**documents** [8] 3446/7  
3446/11 3452/1 3457/19  
3457/24 3458/10 3461/16  
3463/17

**does** [14] 3453/8 3454/3  
3454/19 3459/14 3468/19  
3468/21 3472/18 3476/23  
3478/10 3478/12 3480/22  
3485/20 3486/16 3491/4  
**doesn't** [10] 3449/23  
3449/24 3449/25 3459/13  
3470/1 3472/24 3473/4  
3475/22 3478/9 3490/19  
**doing** [2] 3460/20  
3489/16  
**dollar** [13] 3435/5  
3439/18 3442/19 3442/22  
3442/22 3442/24 3443/20  
3444/19 3444/20 3445/22  
3450/12 3455/5 3474/6  
**dollars** [3] 3444/21  
3475/21 3476/11  
**dominant** [1] 3481/9  
**don't** [8] 3442/23  
3443/21 3470/10 3478/6  
3482/19 3488/17 3489/20  
3490/8  
**done** [2] 3453/25  
3465/14  
**doubles** [1] 3447/11  
**doubt** [1] 3451/22  
**doubts** [2] 3478/5 3485/7  
**down** [3] 3458/6 3459/3  
3466/12  
**dozens** [1] 3464/13  
**Dr** [22] 3446/14 3446/15  
3446/18 3446/23 3447/9  
3447/14 3447/16 3448/1  
3448/5 3448/10 3448/11  
3449/4 3450/22 3454/22  
3464/10 3464/20 3468/20  
3468/22 3478/7 3480/4  
3487/2 3487/12  
**Dr.** [10] 3435/24 3447/5  
3447/7 3452/17 3454/18  
3455/9 3462/2 3468/4  
3480/8 3480/19  
**Dr. Hill** [7] 3435/24

**D**

**Dr. Hill...** [6] 3447/5  
3447/7 3452/17 3454/18  
3468/4 3480/8  
**Dr. Hill's** [3] 3455/9  
3462/2 3480/19  
**draw** [1] 3447/15  
**drive** [3] 3443/14 3446/6  
3447/13  
**driving** [1] 3450/10  
**dropped** [1] 3475/7  
**Drummonds** [1] 3428/9  
**due** [10] 3435/6 3441/3  
3470/23 3471/6 3471/10  
3474/17 3478/14 3482/22  
3484/6 3488/12  
**during** [10] 3440/24  
3448/12 3451/11 3451/14  
3452/4 3458/22 3462/17  
3462/18 3472/13 3477/25  
**dynamic** [1] 3461/18  
**dynamics** [1] 3458/1

**E**

**each** [11] 3438/10 3449/6  
3458/2 3463/4 3466/2  
3466/3 3466/4 3473/8  
3479/12 3479/24 3485/13  
**earning** [1] 3470/13  
**earns** [1] 3476/9  
**easier** [1] 3485/9  
**easily** [1] 3464/3  
**EBITDA** [2] 3486/21  
3486/25  
**ecommerce** [9] 3452/21  
3452/22 3474/23 3475/5  
3475/6 3475/7 3475/14  
3483/4 3483/8  
**economic** [5] 3435/20  
3440/2 3446/14 3447/3  
3454/15  
**economists** [1] 3448/19  
**EDLP** [1] 3457/4  
**effect** [5] 3467/15

3471/14 3483/11 3485/22  
3490/18  
**effective** [4] 3483/18  
3485/11 3490/21 3490/24  
**effectively** [2] 3487/11  
3488/15  
**efficacy** [1] 3477/12  
**efficiencies** [13] 3465/13  
3465/15 3465/18 3465/21  
3466/1 3466/5 3467/8  
3467/10 3467/11 3467/13  
3468/5 3468/9 3475/21  
**efficiency** [1] 3466/3  
**efficient** [2] 3476/1  
3481/6  
**effort** [1] 3486/12  
**egg** [2] 3458/5 3458/6  
**Ehrenkrantz** [1] 3430/18  
**either** [11] 3435/24  
3438/8 3439/15 3441/19  
3445/17 3446/25 3449/18  
3451/1 3470/17 3471/18  
3481/25  
**elements** [1] 3479/16  
**eliminate** [5] 3436/12  
3459/13 3459/15 3459/17  
3461/9  
**eliminated** [4] 3437/11  
3453/24 3454/17 3460/22  
**eliminates** [1] 3488/18  
**elimination** [1] 3488/12  
**Elizabeth** [1] 3428/7  
**else** [2] 3449/17 3467/5  
**Emily** [1] 3428/4  
**emphasis** [1] 3437/22  
**emphasize** [1] 3485/24  
**employed** [1] 3462/20  
**employees** [7] 3465/1  
3477/23 3481/15 3482/18  
3489/7 3489/19 3491/1  
**employees'** [1] 3477/13  
**employer** [3] 3462/21  
3462/22 3489/13  
**employers** [6] 3462/12

3463/5 3464/4 3464/20  
3472/8 3491/2  
**employing** [1] 3462/13  
**employment** [1] 3464/23  
**ends** [1] 3474/20  
**enforcement** [3] 3429/6  
3429/9 3490/21  
**engage** [1] 3478/1  
**enhance** [1] 3466/4  
**enhancement** [1]  
3467/13  
**enjoin** [2] 3436/17  
3468/25  
**enjoined** [2] 3471/8  
3491/10  
**enormous** [1] 3486/11  
**enough** [2] 3440/19  
3470/14  
**ensure** [1] 3457/17  
**ensuring** [1] 3483/17  
**entered** [1] 3452/3  
**entire** [2] 3452/4 3452/7  
**entirely** [1] 3488/19  
**entities** [1] 3468/4  
**entitled** [2] 3479/25  
3492/11  
**entity** [1] 3479/20  
**entry** [5] 3454/3 3454/5  
3454/6 3472/10 3488/25  
**Enu** [1] 3432/5  
**equitable** [1] 3489/25  
**equities** [3] 3472/7  
3488/24 3491/7  
**equity** [2] 3474/13  
3477/10  
**equivalents** [1] 3474/16  
**error** [1] 3486/3  
**essentially** [2] 3453/11  
3478/11  
**establish** [3] 3437/2  
3437/5 3454/6  
**established** [6] 3438/4  
3438/21 3446/8 3465/16  
3466/10 3468/10

**E**

**establishes [1]** 3488/21  
**establishing [4]** 3436/22  
3439/23 3465/18 3488/22  
**estate [1]** 3484/23  
**estimated [1]** 3435/25  
**et [2]** 3427/3 3492/3  
**evaluate [1]** 3471/3  
**evaluating [2]** 3469/14  
3471/1  
**even [25]** 3444/13  
3448/25 3448/25 3450/11  
3458/6 3459/14 3468/4  
3468/23 3469/7 3471/24  
3472/5 3472/23 3472/24  
3478/16 3479/8 3480/6  
3480/15 3481/1 3482/2  
3482/5 3486/7 3487/5  
3490/8 3490/15 3490/20  
**every [3]** 3435/12  
3453/12 3455/12  
**everyday [1]** 3444/12  
**everything [1]** 3487/9  
**evidence [52]** 3435/15  
3435/20 3435/20 3436/22  
3437/10 3437/17 3438/7  
3439/4 3439/16 3440/20  
3441/21 3443/4 3444/8  
3446/1 3446/21 3449/3  
3450/21 3451/16 3453/17  
3454/2 3454/9 3454/11  
3454/14 3454/16 3455/7  
3455/9 3455/15 3456/13  
3459/6 3459/18 3460/1  
3460/8 3461/5 3461/16  
3461/22 3462/7 3462/9  
3462/15 3462/15 3463/16  
3464/5 3465/13 3469/8  
3469/11 3469/14 3471/4  
3477/7 3479/23 3480/17  
3488/21 3490/4 3491/6  
**evokes [1]** 3489/7  
**exact [2]** 3453/2 3466/24  
**exactly [3]** 3440/20

3478/8 3480/7  
**examination [1]** 3477/25  
**example [18]** 3441/10  
3442/14 3443/16 3444/15  
3445/3 3445/4 3446/3  
3450/6 3451/17 3453/2  
3454/5 3458/4 3458/12  
3461/1 3463/24 3464/20  
3466/18 3471/7  
**examples [1]** 3445/18  
**exception [1]** 3451/11  
**excerpts [1]** 3442/3  
**excitement [1]** 3489/5  
**excluded [1]** 3487/4  
**excluding [1]** 3475/13  
**exclusive [1]** 3474/15  
**executive [2]** 3456/14  
3457/6  
**executives [3]** 3455/24  
3460/4 3461/14  
**exemption [2]** 3453/9  
3453/13  
**exercise [1]** 3482/13  
**exist [2]** 3465/5 3484/18  
**existence [1]** 3485/18  
**existing [3]** 3479/20  
3483/5 3483/24  
**exists [1]** 3453/13  
**expand [1]** 3453/18  
**expanded [1]** 3450/24  
**expanding [2]** 3446/23  
3454/2  
**expansion [1]** 3486/14  
**expect [3]** 3469/10  
3476/18 3484/11  
**expectations [1]** 3487/3  
**expected [2]** 3487/19  
3487/21  
**expects [2]** 3486/21  
3486/22  
**expense [1]** 3486/12  
**experience [22]** 3440/22  
3441/6 3441/18 3441/22  
3442/11 3442/16 3442/17

3442/21 3443/11 3443/18  
3445/22 3446/9 3449/13  
3449/18 3455/13 3456/6  
3456/11 3461/8 3461/12  
3479/18 3482/20 3483/20  
**experiences [1]** 3443/15  
**experiment [1]** 3442/11  
**expert [4]** 3446/14  
3468/20 3478/22 3481/17  
**expertise [1]** 3478/10  
**experts [3]** 3464/18  
3470/5 3478/5  
**Expiration [1]** 3492/18  
**explain [5]** 3438/15  
3440/2 3446/16 3449/12  
3465/19  
**explained [42]** 3438/13  
3439/11 3440/24 3442/2  
3442/15 3442/17 3442/20  
3443/1 3443/6 3443/13  
3443/16 3443/20 3444/15  
3444/25 3445/3 3445/15  
3446/3 3447/16 3448/12  
3450/22 3452/2 3452/25  
3454/18 3455/11 3455/21  
3456/3 3456/7 3456/23  
3457/16 3457/25 3458/14  
3458/19 3458/22 3462/24  
3463/2 3463/11 3463/25  
3464/2 3464/10 3467/12  
3467/24 3468/4  
**explaining [1]** 3462/15  
**explains [3]** 3457/6  
3459/12 3460/20  
**exploration [1]** 3490/22  
**expressed [1]** 3478/5  
**extensive [4]** 3454/16  
3456/13 3459/18 3461/15  
**extent [3]** 3460/12  
3464/22 3486/1  
**external [1]** 3482/25  
**extremely [1]** 3475/16

**F**

**faced [1]** 3463/1  
**faces [1]** 3472/2  
**facia [1]** 3437/2  
**facie [4]** 3462/7 3462/8  
 3466/10 3468/10  
**facilities [2]** 3443/13  
 3475/24  
**fact [3]** 3460/17 3463/13  
 3470/18  
**factor [3]** 3444/6 3444/24  
 3445/12  
**factors [2]** 3444/2 3444/3  
**facts [3]** 3438/11 3439/22  
 3481/11  
**fail [3]** 3458/1 3466/13  
 3467/10  
**failed [1]** 3454/5  
**failing [1]** 3488/15  
**fails [3]** 3449/5 3469/16  
 3471/22  
**fair [1]** 3449/19  
**fall [1]** 3466/11  
**fallout [1]** 3489/8  
**families [5]** 3436/10  
 3469/3 3472/9 3489/14  
 3489/23  
**far [6]** 3435/14 3446/6  
 3447/13 3459/25 3466/11  
 3475/12  
**farmers [3]** 3443/5  
 3443/5 3443/24  
**fastest [1]** 3474/3  
**fatal [1]** 3490/10  
**favor [3]** 3472/10  
 3488/25 3491/8  
**Fe [5]** 3468/21 3469/3  
 3469/10 3480/23 3491/5  
**features [1]** 3440/23  
**FEDERAL [7]** 3427/3  
 3428/2 3428/5 3428/13  
 3430/22 3434/5 3492/3  
**fee [1]** 3444/17  
**feed [1]** 3489/23

**feel [2]** 3443/17 3443/24  
**few [3]** 3445/18 3485/22  
 3486/18  
**fiercely [1]** 3457/2  
**Fifth [2]** 3430/7 3471/12  
**figure [1]** 3456/5  
**file [1]** 3434/18  
**filed [1]** 3452/8  
**fill [3]** 3442/20 3443/7  
 3482/17  
**fill-in [1]** 3442/20  
**finally [5]** 3441/16 3443/4  
 3443/23 3459/1 3474/22  
**finance [1]** 3479/1  
**find [1]** 3474/20  
**finding [4]** 3438/8  
 3438/18 3453/21 3465/16  
**findings [1]** 3455/10  
**fine [1]** 3487/9  
**firms' [2]** 3454/20 3466/4  
**first [26]** 3437/1 3437/5  
 3437/19 3437/21 3438/12  
 3438/23 3439/25 3440/12  
 3444/4 3444/6 3444/6  
 3446/18 3447/9 3449/7  
 3451/3 3451/25 3454/15  
 3454/18 3456/2 3459/20  
 3460/2 3463/20 3473/10  
 3474/24 3475/6 3476/21  
**first-party [2]** 3474/24  
 3475/6  
**Fishkin [1]** 3432/11  
**five [4]** 3444/21 3454/25  
 3476/4 3490/19  
**fixed [1]** 3481/5  
**FI [1]** 3430/22  
**flawed [2]** 3468/24  
 3479/16  
**Florenz [2]** 3473/18  
 3484/2  
**Florenz's [1]** 3486/18  
**flow [2]** 3469/6 3486/22  
**focal [3]** 3447/9 3447/19  
 3454/22

**focus [4]** 3444/11  
 3460/15 3461/4 3464/22  
**focused [2]** 3446/4  
 3459/7  
**focuses [3]** 3444/16  
 3447/15 3464/25  
**folks [1]** 3447/13  
**follow [1]** 3458/7  
**food [10]** 3435/14  
 3436/10 3441/2 3441/2  
 3450/24 3455/6 3455/22  
 3456/15 3456/16 3472/9  
**Foods [5]** 3448/25  
 3449/11 3450/9 3452/4  
 3452/14  
**foot [1]** 3459/4  
**forecasting [2]** 3475/18  
 3483/9  
**foregoing [1]** 3492/9  
**foremost [1]** 3451/3  
**form [1]** 3439/7  
**format [21]** 3438/5  
 3439/7 3442/7 3444/10  
 3444/14 3445/18 3447/1  
 3447/14 3448/3 3448/7  
 3448/24 3450/25 3451/1  
 3452/15 3454/22 3455/6  
 3462/3 3471/24 3480/5  
 3480/9 3480/13  
**formats [19]** 3440/24  
 3441/5 3441/9 3441/13  
 3441/19 3441/25 3442/12  
 3442/19 3443/14 3444/10  
 3445/2 3445/14 3445/20  
 3446/24 3447/25 3451/8  
 3451/12 3451/15 3451/20  
**former [1]** 3487/25  
**forth [3]** 3454/3 3454/10  
 3454/14  
**forward [1]** 3484/11  
**found [7]** 3440/4 3448/21  
 3454/22 3466/9 3473/13  
 3473/13 3484/25  
**four [5]** 3437/4 3449/23



**F**

**four...** [3] 3468/22  
3486/23 3486/24  
**four-wall** [1] 3486/24  
**Fox** [2] 3481/18 3486/13  
**fraction** [2] 3468/3  
3477/18  
**framework** [3] 3437/1  
3465/11 3471/1  
**Francisco** [1] 3428/21  
**Frangie** [1] 3428/10  
**free** [1] 3460/24  
**frequency** [1] 3436/3  
**fresh** [4] 3449/25  
3452/13 3455/13 3461/11  
**Friday** [1] 3434/14  
**friendly** [2] 3455/13  
3461/11  
**frills** [1] 3443/18  
**front** [1] 3439/10  
**FTC** [2] 3452/8 3488/6  
**fuel** [1] 3475/11  
**fulfillment** [1] 3452/23  
**full** [6] 3441/12 3442/9  
3442/23 3481/22 3481/24  
3490/22  
**fun** [1] 3489/5  
**function** [1] 3478/8  
**fundamentally** [3] 3440/7  
3450/19 3461/17  
**funding** [1] 3477/2  
**further** [1] 3486/12  
**future** [2] 3453/16  
3478/18

**G**

**Galante** [9] 3470/12  
3478/9 3478/9 3478/16  
3478/21 3481/17 3482/5  
3484/9 3487/8  
**Galante's** [1] 3482/24  
**gamble** [1] 3489/20  
**gap** [1] 3460/15  
**gas** [1] 3450/10

**gate** [3] 3428/21 3466/14  
3467/11  
**gave** [1] 3473/19  
**general** [7] 3428/16  
3428/20 3428/24 3430/24  
3439/18 3450/12 3469/3  
**generally** [1] 3459/10  
**Generals** [1] 3455/5  
**generous** [1] 3468/5  
**geographic** [7] 3445/25  
3446/1 3446/13 3447/6  
3447/21 3480/2 3488/24  
**geography** [2] 3467/9  
3485/17  
**George** [1] 3443/1  
**get** [16] 3436/7 3438/7  
3442/9 3443/7 3449/8  
3449/12 3450/15 3450/16  
3453/3 3455/6 3456/4  
3469/5 3479/2 3479/4  
3482/8 3484/1  
**getting** [7] 3449/17  
3473/8 3474/2 3475/22  
3481/22 3481/22 3482/2  
**give** [3] 3463/25 3467/22  
3474/22  
**given** [2] 3437/22 3481/7  
**gives** [1] 3485/19  
**giving** [1] 3475/12  
**go** [4] 3436/12 3442/4  
3449/22 3463/11  
**goes** [1] 3454/17  
**going** [14] 3436/20  
3442/12 3447/21 3453/24  
3454/7 3458/6 3458/6  
3467/1 3467/2 3467/3  
3467/5 3469/2 3484/11  
3491/14  
**Gokhale** [1] 3475/25  
**Golden** [1] 3428/21  
**good** [10] 3434/4  
3434/23 3434/24 3439/20  
3445/23 3449/16 3467/1  
3468/13 3468/14 3491/13

**goods** [1] 3476/5  
**Gordon** [1] 3428/19  
**got** [1] 3479/6  
**Gotshal** [4] 3430/4  
3430/7 3430/19 3430/21  
**governed** [1] 3464/8  
**grab** [1] 3446/6  
**Grand** [6] 3475/7  
3475/10 3477/19 3482/23  
3487/18 3488/4  
**Grand Union** [1] 3475/10  
**Grant** [1] 3428/11  
**graphic** [1] 3447/16  
**graze** [1] 3436/21  
**greater** [1] 3454/23  
**grocer** [2] 3463/8  
3463/22  
**groceries** [11] 3435/8  
3436/7 3439/4 3442/9  
3442/24 3446/6 3449/22  
3450/25 3455/12 3462/4  
3485/20  
**grocers** [2] 3432/16  
3464/2  
**grocery** [17] 3435/12  
3437/13 3440/23 3449/9  
3450/3 3451/4 3459/10  
3461/15 3462/12 3462/16  
3463/19 3463/20 3463/21  
3464/14 3486/2 3488/13  
3489/8  
**Groff** [1] 3457/16  
**Group** [1] 3432/2  
**growing** [1] 3474/4  
**growth** [2] 3486/22  
3487/5  
**guess** [1] 3478/23  
**Guia** [1] 3428/11  
**guideline** [1] 3464/13  
**guidelines** [1] 3448/14  
**guys** [1] 3459/3

**H**

**habits** [1] 3451/7

**H**

**had** [3] 3447/3 3472/25  
3485/7

**Haggen** [2] 3473/13  
3479/5

**Hahn** [1] 3430/17

**half** [3] 3470/20 3481/14  
3481/23

**Hall** [3] 3428/7 3433/3  
3468/11

**Hamburger** [1] 3428/4

**hand** [1] 3486/9

**happen** [3] 3454/7  
3486/21 3490/7

**harder** [2] 3460/9  
3460/19

**hardly** [1] 3441/14

**harm** [34] 3435/21  
3435/25 3438/8 3439/15

3447/2 3449/1 3453/19  
3453/22 3454/4 3454/7

3455/7 3455/10 3459/6  
3462/5 3463/17 3465/16

3465/17 3465/21 3466/6  
3468/7 3468/9 3468/18

3468/23 3469/2 3469/7  
3470/23 3480/2 3486/5

3487/15 3488/23 3489/25  
3490/23 3491/4 3491/6

**harmed** [5] 3467/7  
3469/6 3472/1 3480/17  
3480/20

**harming** [1] 3436/15

**harms** [1] 3472/6

**Harper** [1] 3428/23

**Harris** [1] 3428/8

**has** [41] 3435/9 3435/15  
3436/22 3437/22 3438/7

3439/11 3439/16 3439/22  
3440/6 3441/22 3444/8

3446/7 3452/17 3453/21  
3454/11 3454/25 3456/13

3457/24 3460/14 3460/18  
3464/5 3466/9 3466/23

3469/8 3472/21 3473/3

3473/11 3474/3 3474/8

3474/22 3474/25 3475/6

3476/8 3476/24 3477/17

3478/11 3478/24 3479/24

3480/17 3484/5 3484/7

**hasn't** [1] 3462/22

**have** [74]

**haven't** [1] 3471/17

**having** [2] 3476/14  
3482/22

**he** [19] 3446/16 3446/25

3447/3 3448/1 3448/10

3448/18 3448/20 3448/24

3456/3 3458/15 3459/2

3459/2 3459/4 3462/24

3478/10 3478/12 3478/22

3480/12 3487/9

**head** [7] 3432/14 3454/16

3454/16 3459/19 3459/19

3484/17 3484/17

**hear** [1] 3460/8

**heard** [8] 3435/10 3438/7

3439/16 3456/13 3458/9

3462/14 3464/5 3477/17

**hearing** [21] 3427/14

3434/19 3437/23 3439/5

3439/17 3440/25 3442/2

3444/9 3445/16 3451/17

3455/15 3456/22 3457/12

3457/19 3460/8 3461/6

3462/14 3463/21 3472/13

3479/23 3492/5

**heavily** [1] 3488/25

**heightened** [1] 3477/6

**held** [1] 3471/12

**Helden** [2] 3442/14

3442/17

**help** [2] 3467/3 3467/5

**helpful** [1] 3465/19

**her** [5] 3449/21 3477/24

3477/25 3482/12 3484/6

**here** [20] 3436/4 3436/21

3438/4 3438/22 3439/17

3440/20 3440/24 3446/1

3446/16 3447/18 3454/22

3459/18 3461/3 3462/25

3465/19 3466/11 3467/6

3471/16 3485/2 3485/9

**HHI** [1] 3448/19

**HHIs** [1] 3448/20

**Hiemstra** [1] 3429/8

**high** [7] 3444/10 3457/8

3457/13 3465/24 3466/8  
3467/25 3477/24

**high-low** [1] 3444/10

**high-price** [1] 3457/13

**high-priced** [1] 3457/8

**higher** [6] 3444/23

3448/15 3456/20 3460/25

3476/4 3490/1

**Hill** [21] 3435/24 3446/14

3446/15 3446/18 3446/23

3447/5 3447/7 3447/9

3447/14 3448/1 3448/10

3448/11 3449/4 3450/22

3452/17 3454/18 3454/22

3464/10 3468/4 3480/8

3487/12

**Hill's** [6] 3447/16 3448/5

3455/9 3462/2 3480/4

3480/19

**him** [2] 3457/21 3465/2

**hire** [1] 3483/24

**his** [12] 3442/3 3446/24

3447/3 3447/23 3448/12

3452/3 3452/3 3458/15

3464/22 3464/23 3468/23

3478/11

**historical** [1] 3478/16

**history** [1] 3488/15

**hit** [1] 3456/4

**HMT** [1] 3448/8

**hodgepodge** [2] 3470/16

3485/12

**holdings** [1] 3467/17

**Holler** [1] 3430/13

**Honor** [9] 3434/18

**H**

**Honor...** [8] 3434/21  
3434/23 3436/1 3437/4  
3452/25 3459/11 3462/23  
3468/13

**HONORABLE** [1]  
3427/16

**hopes** [1] 3477/24

**Hough** [1] 3428/8

**hours** [1] 3434/18

**house** [1] 3431/1

**household** [1] 3441/2

**households** [1] 3489/19

**housekeeping** [1]  
3434/11

**Houston** [1] 3485/14

**how** [14] 3444/4 3444/6  
3447/12 3449/12 3449/17  
3454/19 3456/5 3456/9  
3458/23 3466/3 3466/4  
3471/19 3479/23 3480/22

**however** [2] 3436/13  
3468/2

**hundreds** [9] 3471/23  
3475/20 3476/11 3479/12  
3480/4 3480/15 3488/24  
3491/1 3491/7

**hunt** [2] 3442/20 3443/11

**Huntington** [1] 3458/22

**hypothetical** [2] 3440/10  
3448/1

**I**

**I'd** [2] 3471/19 3479/23

**I'll** [2] 3467/22 3468/11

**idea** [1] 3438/9

**identified** [3] 3446/18  
3448/10 3478/11

**identifies** [1] 3456/15

**ignores** [4] 3450/4  
3460/16 3460/17 3461/4

**IL** [1] 3428/25

**illegal** [1] 3491/8

**ILLINOIS** [2] 3428/23

3428/23

**illumina** [1] 3471/11

**illustrate** [1] 3459/24

**illustrated** [1] 3451/10

**illustrative** [1] 3445/18

**imbalance** [1] 3489/1

**impacted** [2] 3463/18  
3466/18

**impacting** [1] 3477/3

**implausible** [1] 3477/9

**implementing** [1]  
3457/15

**importance** [1] 3451/22

**important** [3] 3436/3  
3455/2 3481/25

**importantly** [1] 3479/7

**improve** [6] 3456/5  
3456/8 3456/9 3456/10  
3461/7 3461/8

**improving** [1] 3460/18

**INC** [2] 3427/7 3432/2

**incentive** [2] 3454/20  
3454/24

**incentives** [3] 3435/22  
3466/5 3486/10

**incipiency** [1] 3436/14

**include** [6] 3446/24  
3448/25 3449/1 3450/24  
3461/21 3481/15

**included** [9] 3439/17  
3445/6 3447/21 3447/25  
3452/13 3452/15 3452/20  
3452/24 3455/4

**includes** [1] 3437/25

**including** [9] 3439/6  
3440/25 3442/2 3451/8  
3455/13 3472/21 3476/1  
3476/7 3485/13

**inconsistencies** [1]  
3472/13

**inconsistent** [1] 3451/9

**inconvenient** [1] 3449/22

**Incorporated** [1] 3434/7

**incorporates** [1] 3482/6

**increase** [7] 3437/8

3447/25 3464/12 3466/20  
3467/15 3484/23 3487/13

**increased** [1] 3475/24

**increases** [4] 3448/13  
3461/2 3487/13 3487/14

**incredibly** [1] 3470/19

**Indeed** [1] 3457/19

**independent** [2] 3472/19  
3478/22

**independents** [1]  
3474/10

**INDEX** [1] 3432/24

**indicated** [1] 3444/19

**indicia** [6] 3440/9  
3440/12 3440/13 3440/18  
3443/12 3444/2

**individual** [1] 3470/8

**industry** [2] 3438/17  
3445/12

**inevitability** [1] 3490/12

**inferior** [1] 3440/19

**Infinger** [1] 3432/7

**inflation** [1] 3461/1

**influence** [1] 3445/4

**information** [1] 3490/25

**informative** [1] 3438/1

**infrastructure** [1]  
3477/21

**injunction** [7] 3427/14  
3472/10 3479/25 3488/25  
3490/13 3490/18 3492/5

**innovate** [1] 3461/7

**innovations** [1] 3435/13

**inputs** [1] 3475/15

**insight** [1] 3476/16

**instance** [1] 3451/25

**instead** [8] 3439/4  
3443/9 3449/23 3451/8  
3459/16 3460/24 3477/21  
3487/20

**insubstantial** [1] 3469/4

**intends** [1] 3484/12

**intense** [2] 3435/11

**I**  
**intense...** [1] 3484/16  
**intensity** [3] 3471/5  
3471/25 3478/15  
**interacting** [1] 3481/16  
**interest** [3] 3460/25  
3489/2 3490/21  
**internal** [2] 3485/2  
3487/23  
**inventory** [1] 3483/9  
**invest** [1] 3466/21  
**investing** [2] 3456/24  
3460/18  
**investment** [1] 3485/10  
**investments** [1] 3486/11  
**investors** [1] 3479/11  
**invite** [1] 3486/3  
**involving** [1] 3444/24  
**is** [130]  
**isn't** [8] 3445/23 3457/17  
3460/2 3461/2 3462/23  
3465/5 3467/3 3467/5  
**isolated** [1] 3481/8  
**Israel** [3] 3468/20  
3468/22 3478/7  
**Israel's** [1] 3487/2  
**issue** [1] 3480/1  
**issues** [1] 3481/3  
**it** [60] 3435/5 3437/22  
3441/6 3447/11 3447/14  
3448/6 3449/22 3450/6  
3450/8 3450/9 3452/4  
3452/24 3453/3 3454/19  
3455/4 3458/23 3458/25  
3459/14 3459/16 3460/18  
3461/25 3462/2 3462/3  
3462/22 3463/13 3466/21  
3468/11 3468/20 3470/1  
3470/7 3470/7 3470/11  
3471/8 3471/12 3471/14  
3471/22 3472/3 3473/3  
3473/14 3473/17 3475/2  
3475/13 3475/20 3476/4  
3476/25 3479/1 3479/6

3480/22 3482/2 3483/3  
3483/13 3485/9 3485/20  
3486/16 3488/9 3488/10  
3488/19 3489/15 3490/5  
3490/9  
**it's** [16] 3434/17 3436/3  
3436/11 3436/16 3445/14  
3453/2 3453/21 3460/25  
3461/1 3463/14 3465/19  
3466/1 3467/1 3467/2  
3482/2 3483/2  
**items** [2] 3441/7 3443/7  
**its** [32] 3436/13 3443/25  
3452/8 3452/8 3457/8  
3457/17 3459/25 3460/25  
3465/10 3469/9 3472/2  
3472/19 3472/19 3472/20  
3472/21 3474/5 3475/4  
3475/6 3476/7 3476/15  
3477/3 3478/17 3479/2  
3479/3 3479/11 3481/13  
3481/14 3485/7 3486/14  
3487/24 3488/4 3488/16  
**itself** [1] 3474/2

**J**  
**Jacob** [1] 3428/4  
**Jacob Hamburger** [1]  
3428/4  
**James** [1] 3432/11  
**Jeanine** [1] 3428/10  
**Jeanine Balbach** [1]  
3428/10  
**jessup** [3] 3432/19  
3432/21 3492/16  
**jill** [3] 3432/19 3432/21  
3492/16  
**jobs** [7] 3463/19 3463/20  
3463/21 3463/22 3463/25  
3489/9 3489/11  
**John** [3] 3428/3 3430/1  
3430/13  
**joined** [1] 3452/3  
**joint** [1] 3434/18

**Jon** [1] 3432/14  
**Jon-Peter** [1] 3432/14  
**Jonathan** [1] 3432/5  
**Joseph** [1] 3430/18  
**Joseph Ehrenkrantz** [1]  
3430/18  
**Joshua** [2] 3430/10  
3432/6  
**JUDGE** [1] 3427/17  
**judgment** [2] 3478/23  
3478/25  
**June** [1] 3484/8  
**junior** [1] 3482/18  
**just** [23] 3434/13 3436/14  
3442/12 3445/23 3449/15  
3454/10 3459/10 3460/10  
3460/10 3461/2 3467/1  
3467/4 3470/11 3474/8  
3474/11 3476/22 3481/12  
3485/13 3486/4 3486/18  
3486/24 3488/9 3488/10  
**Justice** [2] 3429/6 3429/9  
**justification** [1] 3460/14

**K**  
**Kammeyer** [2] 3458/14  
3458/14  
**Katherine** [1] 3428/9  
**Kaye** [2] 3430/11 3430/14  
**Kayser** [2] 3429/3 3429/3  
**keeping** [2] 3474/2  
3482/15  
**keeps** [1] 3482/16  
**Kelly** [1] 3432/14  
**kept** [1] 3458/21  
**key** [4] 3438/21 3441/8  
3443/13 3458/2  
**Kientzle** [1] 3430/11  
**kind** [1] 3488/4  
**King** [3] 3458/23 3464/25  
3464/25  
**Knopf** [1] 3440/25  
**know** [4] 3470/10 3473/5  
3478/4 3482/19

**K****knowledgeable [1]**

3484/5

**Kraft [1]** 3443/9**KROGER [105]****Kroger's [15]** 3451/17

3455/17 3457/6 3460/4

3468/15 3470/23 3474/25

3475/2 3476/7 3477/1

3479/13 3488/11 3488/15

3488/18 3491/10

**Kroger-owned [2]**

3474/21 3487/13

**Ks [1]** 3451/17**Kuester [1]** 3430/9**L****label [15]** 3456/9 3474/1

3474/4 3474/8 3474/12

3474/15 3474/17 3476/1

3476/4 3476/5 3481/24

3482/1 3483/4 3483/8

3483/21

**labels [1]** 3474/6**labor [5]** 3437/12

3462/10 3465/1 3465/10

3472/6

**lack [7]** 3472/18 3474/14

3475/11 3481/2 3481/4

3483/10 3485/22

**Laguna [1]** 3430/17**laid [1]** 3468/1**language [1]** 3484/8**large [15]** 3438/5 3439/7

3448/3 3448/7 3448/24

3450/25 3451/1 3452/15

3453/7 3454/22 3464/18

3471/24 3480/5 3480/9

3480/13

**large-format [12]** 3438/5

3448/3 3448/7 3448/24

3450/25 3451/1 3452/15

3454/22 3471/24 3480/5

3480/9 3480/13

**largely [1]** 3489/23**larger [6]** 3438/17

3441/10 3443/2 3444/16

3447/1 3449/2

**largest [2]** 3459/15

3462/11

**Larkins [1]** 3429/3**LaSalle [1]** 3428/24**last [5]** 3445/12 3451/20

3472/25 3488/10 3489/8

**Laura [1]** 3428/7**law [12]** 3432/2 3438/11

3438/12 3440/1 3440/8

3453/20 3459/12 3465/2

3465/5 3465/6 3465/16

3466/23

**laws [3]** 3452/19 3453/10

3466/13

**lawyer [1]** 3470/16**lawyer-made [1]** 3470/16**lawyers [1]** 3470/5**layoffs [2]** 3490/5 3490/6**Le'ora [1]** 3428/12**leaders [2]** 3470/3 3484/1**leadership [1]** 3483/24**least [3]** 3454/25 3470/20

3475/19

**leave [1]** 3470/7**leaves [2]** 3471/22

3483/16

**left [1]** 3465/23**legal [1]** 3471/1**lenders [1]** 3489/18**length [1]** 3470/3**less [5]** 3441/11 3472/20

3481/5 3481/14 3482/11

**less-senior [1]** 3482/11**lessen [2]** 3459/16

3471/15

**lessening [2]** 3436/23

3454/12

**let [1]** 3478/25**let's [8]** 3438/12 3439/22

3440/12 3456/2 3471/1

3473/8 3474/1 3491/16

**level [7]** 3435/16 3472/4

3476/25 3482/6 3482/15

3482/24 3483/23

**levels [2]** 3471/25 3487/1**leverage [7]** 3437/15

3462/15 3462/16 3462/18

3463/8 3465/6 3488/12

**leveraged [1]** 3488/13**license [3]** 3473/14

3473/15 3474/19

**licensed [1]** 3483/21**Lidl [1]** 3439/6**Lieberman [1]** 3442/3**like [15]** 3436/14 3439/20

3442/15 3443/9 3443/22

3450/14 3453/3 3456/18

3469/11 3470/11 3471/19

3474/6 3479/23 3480/23

3480/25

**likelihood [6]** 3466/2

3470/23 3487/15 3488/22

3488/22 3491/6

**likely [11]** 3453/18

3454/4 3464/12 3471/15

3472/1 3478/18 3479/3

3479/9 3479/21 3480/17

3491/8

**Likewise [2]** 3456/7

3464/2

**Lily [1]** 3428/8**limited [5]** 3442/21

3443/17 3444/17 3473/21

3475/16

**line [6]** 3459/9 3463/18

3466/17 3467/2 3467/9

3467/16

**lined [1]** 3479/24**lines [1]** 3466/17**list [4]** 3435/12 3441/7

3444/11 3479/15

**listed [1]** 3455/21**litigation [3]** 3432/15

3469/18 3469/18

**L**

**little [2]** 3437/20 3445/16  
**livelihoods [1]** 3489/13  
**LLC [1]** 3432/2  
**LLP [10]** 3429/3 3430/2  
 3430/4 3430/7 3430/11  
 3430/14 3430/19 3430/21  
 3432/12 3432/16  
**local [13]** 3435/25  
 3436/11 3437/9 3446/2  
 3446/4 3446/10 3447/7  
 3448/3 3448/4 3448/16  
 3458/1 3461/12 3467/6  
**locations [1]** 3450/7  
**long [2]** 3484/13 3489/9  
**long-tenured [1]** 3489/9  
**longer [3]** 3450/20  
 3460/23 3471/14  
**look [5]** 3444/3 3468/2  
 3474/1 3478/16 3489/2  
**looked [4]** 3447/14  
 3448/6 3448/24 3456/4  
**looking [5]** 3435/21  
 3445/21 3449/19 3450/1  
 3450/22  
**looks [4]** 3447/9 3447/9  
 3454/19 3462/3  
**lose [4]** 3436/3 3480/21  
 3481/11 3487/21  
**losing [3]** 3460/11  
 3470/20 3474/17  
**loss [8]** 3471/5 3474/16  
 3478/14 3479/9 3483/4  
 3486/8 3487/7 3488/10  
**loss-making [2]** 3487/7  
 3488/10  
**lost [8]** 3469/20 3471/10  
 3478/6 3479/22 3482/22  
 3483/1 3489/9 3489/11  
**lot [2]** 3477/17 3478/12  
**Louisiana [1]** 3485/14  
**low [9]** 3444/10 3444/12  
 3444/17 3461/11 3469/25  
 3484/22 3484/25 3485/6

3485/9  
**lower [5]** 3456/23  
 3456/25 3457/22 3460/17  
 3490/1  
**loyalty [9]** 3455/14  
 3474/25 3475/5 3475/9  
 3475/14 3475/18 3481/23  
 3483/4 3483/8  
**Lucerne [1]** 3474/7  
**Luke [1]** 3430/16  
**Luna [1]** 3430/6

**M**

**MA [1]** 3430/22  
**Macaroni [1]** 3443/9  
**made [2]** 3470/16  
 3479/20  
**magnitude [1]** 3466/2  
**main [2]** 3454/14 3455/24  
**Maine [1]** 3432/10  
**Mainigi [1]** 3432/5  
**maintain [1]** 3460/10  
**major [4]** 3455/18 3463/8  
 3488/20 3489/8  
**majority [2]** 3450/24  
 3467/24  
**make [15]** 3437/24  
 3443/2 3453/5 3457/20  
 3458/21 3465/22 3470/12  
 3472/18 3474/11 3477/18  
 3479/3 3479/11 3481/12  
 3486/10 3491/14  
**makes [14]** 3439/15  
 3441/6 3445/21 3446/5  
 3448/15 3449/20 3452/24  
 3453/20 3461/25 3461/25  
 3463/22 3467/1 3477/1  
 3485/9  
**making [6]** 3445/6  
 3459/8 3460/5 3467/17  
 3487/7 3488/10  
**manage [1]** 3485/8  
**management [3]** 3481/22  
 3482/15 3484/10

**management's [1]**  
 3478/23  
**management-level [1]**  
 3482/15  
**managing [1]** 3481/15  
**Manges [4]** 3430/4  
 3430/7 3430/19 3430/21  
**manner [3]** 3453/18  
 3461/25 3461/25  
**manufacturers [1]**  
 3476/18  
**manufacturing [3]**  
 3475/23 3476/1 3481/21  
**many [10]** 3449/17  
 3450/14 3463/9 3464/2  
 3469/12 3472/1 3474/14  
 3480/18 3483/19 3487/7  
**map [1]** 3468/21  
**Mariano's [2]** 3473/18  
 3473/22  
**Mark [1]** 3430/16  
**market [81]**  
**marketing [1]** 3475/13  
**markets [55]** 3435/25  
 3437/9 3438/4 3438/6  
 3438/9 3439/14 3439/23  
 3445/10 3446/1 3446/15  
 3447/23 3448/8 3450/25  
 3451/1 3452/10 3452/16  
 3452/18 3453/10 3453/14  
 3453/23 3454/7 3455/7  
 3455/19 3461/2 3463/9  
 3464/11 3464/13 3468/7  
 3468/22 3469/10 3471/23  
 3471/24 3472/1 3472/6  
 3474/21 3479/12 3479/18  
 3480/5 3480/8 3480/9  
 3480/13 3480/14 3480/15  
 3480/18 3480/20 3480/23  
 3480/25 3483/7 3484/15  
 3485/4 3486/3 3487/14  
 3488/19 3491/5 3491/7  
**Marx [1]** 3458/4  
**Massachusetts [1]**

**M****Massachusetts...** [1]

3430/12

**massive** [1] 3458/25**materially** [2] 3441/5

3464/12

**Matheson** [1] 3428/3**matter** [2] 3480/22

3481/19

**matters** [2] 3434/12

3449/12

**Matthew** [1] 3430/9**Matthews** [1] 3431/1**may** [18] 3434/25 3435/1

3449/15 3450/13 3461/20

3464/3 3466/16 3467/7

3467/19 3467/19 3473/7

3481/7 3482/8 3482/20

3486/8 3486/13 3488/8

3490/7

**McCrary** [1] 3464/20**McGowan** [4] 3476/17

3477/20 3482/14 3489/4

**McMullen** [6] 3446/3

3449/20 3452/2 3455/11

3455/16 3457/25

**McPherson** [2] 3463/2

3463/6

**meaning** [5] 3447/24

3452/21 3454/23 3455/4

3466/7

**meaningless** [6] 3456/19

3457/11 3457/15 3459/9

3460/1 3462/1

**means** [6] 3436/4 3449/8

3466/2 3467/18 3489/5

3492/11

**Meanwhile** [1] 3476/17**media** [8] 3466/20 3476/8

3476/10 3476/16 3476/18

3476/20 3477/1 3481/24

**meet** [5] 3437/1 3437/16

3442/11 3450/3 3468/8

**member** [1] 3488/1**members** [2] 3474/25

3482/12

**membership** [1] 3444/16**memberships** [1] 3450/9**memories** [1] 3489/7**merchandising** [1]

3443/6

**merely** [2] 3436/21

3467/14

**merge** [2] 3460/13

3472/14

**merged** [4] 3454/20

3466/4 3476/5 3481/9

**merger** [48] 3435/6

3435/7 3436/4 3436/12

3436/22 3437/7 3437/14

3438/3 3439/14 3448/12

3448/13 3448/14 3448/17

3448/23 3454/8 3454/21

3459/13 3459/13 3459/17

3463/5 3463/15 3463/18

3466/7 3466/16 3466/19

3467/4 3467/7 3468/18

3469/1 3469/10 3469/13

3471/6 3471/8 3471/10

3472/7 3472/12 3473/2

3478/2 3478/14 3479/2

3479/22 3487/18 3488/6

3488/18 3490/1 3490/6

3490/7 3491/8

**merger's** [1] 3471/14**merger-related** [1]

3487/18

**merger-specific** [1]

3466/7

**mergers** [1] 3436/25**merging** [1] 3439/25**merits** [1] 3436/20**met** [4] 3462/6 3465/8

3466/9 3471/18

**metropolitan** [1] 3455/18**Mexico** [2] 3468/21

3491/5

**Michael** [3] 3430/11

3432/7 3458/4

**might** [2] 3467/4 3485/3**million** [1] 3474/25**millions** [5] 3435/7

3472/9 3475/21 3476/11

3489/19

**minimis** [4] 3452/23

3455/16 3463/13 3468/2

**minimized** [1] 3463/12**minimus** [1] 3476/21**minor** [1] 3488/20**minute** [4] 3436/1

3465/19 3467/22 3491/16

**minutes** [1] 3491/17**mismatched** [1] 3469/22**misses** [3] 3464/18

3465/3 3487/9

**mission** [1] 3449/21**missions** [3] 3442/1

3442/5 3442/6

**mitigates** [1] 3471/14**model** [7] 3472/3

3474/16 3478/12 3478/18

3486/12 3486/19 3486/20

**modeled** [1] 3486/19**models** [2] 3475/15

3478/17

**monetize** [1] 3476/15**money** [8] 3450/10

3456/25 3457/15 3467/17

3470/21 3479/11 3481/12

3487/21

**monitored** [1] 3458/20**monomaniacal** [1]

3461/4

**monomaniacally** [1]

3459/7

**monopolist** [2] 3440/10

3448/2

**Montana** [1] 3485/14**month** [2] 3435/4 3452/8**more** [24] 3436/21

3438/14 3438/25 3439/8

3439/13 3440/15 3441/6

**M**

**more... [17]** 3442/21  
 3443/17 3443/24 3448/16  
 3449/22 3453/2 3462/6  
 3465/8 3467/15 3467/17  
 3467/18 3468/4 3475/25  
 3479/7 3479/21 3486/6  
 3490/20  
**Moreover [1]** 3460/15  
**Moriarty [1]** 3432/8  
**morning [5]** 3434/4  
 3434/23 3434/24 3468/13  
 3468/14  
**Morris [6]** 3477/24  
 3483/25 3484/4 3484/5  
 3487/6 3489/4  
**Morrison [2]** 3429/4  
 3432/3  
**mortar [3]** 3452/6  
 3452/11 3453/1  
**most [10]** 3444/21  
 3457/23 3457/25 3461/13  
 3474/9 3481/25 3482/2  
 3484/4 3486/23 3489/25  
**mostly [1]** 3457/5  
**motivated [1]** 3479/2  
**moved [1]** 3448/11  
**Mr [55]** 3428/3 3428/3  
 3428/4 3428/8 3428/9  
 3428/10 3428/12 3428/15  
 3428/16 3428/23 3429/3  
 3429/5 3430/1 3430/4  
 3430/9 3430/10 3430/10  
 3430/11 3430/13 3430/16  
 3430/16 3430/17 3430/17  
 3430/18 3432/2 3432/5  
 3432/6 3432/7 3432/8  
 3432/9 3432/11 3442/14  
 3442/17 3442/20 3443/4  
 3449/20 3455/11 3455/16  
 3456/20 3456/23 3457/16  
 3457/25 3458/14 3458/22  
 3463/2 3463/6 3464/25  
 3464/25 3470/15 3474/23

3476/17 3477/20 3482/5  
 3482/14 3489/4  
**Mr. [32]** 3440/25 3442/3  
 3443/20 3455/20 3456/3  
 3456/7 3458/11 3458/14  
 3458/18 3460/20 3463/24  
 3467/24 3470/4 3470/6  
 3470/12 3473/5 3474/3  
 3475/3 3475/25 3476/13  
 3478/9 3478/9 3478/16  
 3478/21 3481/17 3482/24  
 3484/9 3487/8 3489/4  
 3489/12 3490/4 3490/15  
**Mr. Aitken [5]** 3456/3  
 3456/7 3460/20 3474/3  
 3475/3  
**Mr. Clay [1]** 3463/24  
**Mr. Cosset [4]** 3470/4  
 3476/13 3489/12 3490/15  
**Mr. Curry [1]** 3458/18  
**Mr. Galante [8]** 3470/12  
 3478/9 3478/9 3478/16  
 3478/21 3481/17 3484/9  
 3487/8  
**Mr. Galante's [1]** 3482/24  
**Mr. Gokhale [1]** 3475/25  
**Mr. Kammeyer [1]**  
 3458/14  
**Mr. Knopf [1]** 3440/25  
**Mr. Lieberman [1]**  
 3442/3  
**Mr. Sankaran [1]**  
 3455/20  
**Mr. Sankaran's [1]**  
 3490/4  
**Mr. Schwilke [1]** 3458/11  
**Mr. Unkelbach [1]**  
 3443/20  
**Mr. Winn [2]** 3470/6  
 3489/4  
**Mr. Winn's [1]** 3473/5  
**Mr. Yeater [1]** 3467/24  
**Ms [30]** 3428/2 3428/4  
 3428/7 3428/7 3428/8

3428/9 3428/10 3428/11  
 3428/11 3428/12 3428/19  
 3429/8 3430/6 3430/9  
 3430/18 3430/23 3432/5  
 3432/6 3432/7 3432/8  
 3433/2 3433/3 3443/1  
 3463/10 3464/2 3468/11  
 3484/4 3484/5 3487/6  
 3489/4  
**Ms. [7]** 3463/24 3473/18  
 3477/24 3482/12 3483/25  
 3484/2 3486/18  
**Ms. Florenz [2]** 3473/18  
 3484/2  
**Ms. Florenz's [1]**  
 3486/18  
**Ms. Morris [2]** 3477/24  
 3483/25  
**Ms. Zinder [2]** 3463/24  
 3482/12  
**much [5]** 3441/10  
 3441/13 3453/2 3454/19  
 3457/15  
**multibillion [1]** 3435/5  
**multibillion-dollar [1]**  
 3435/5  
**multiple [4]** 3450/3  
 3450/7 3481/3 3491/5  
**multiplied [1]** 3472/13  
**Musser [2]** 3428/2  
 3433/2  
**must [2]** 3468/17 3469/6  
**my [5]** 3437/20 3459/3  
 3467/22 3468/11 3486/4

**N**

**N.E [1]** 3429/10  
**N.W [2]** 3428/13 3430/12  
**name [1]** 3444/19  
**named [1]** 3443/3  
**narrow [5]** 3438/14  
 3438/25 3439/8 3440/16  
 3446/21  
**national [5]** 3441/12



**N**

**national...** [4] 3466/19  
3466/25 3474/15 3477/4  
**nationwide** [2] 3469/13  
3476/14  
**natural** [2] 3443/23  
3444/22  
**nature** [2] 3447/7  
3485/12  
**NE** [1] 3429/7  
**Neal** [1] 3443/4  
**near** [1] 3468/6  
**nearest** [1] 3450/11  
**nearly** [1] 3457/7  
**necessary** [1] 3454/20  
**neck** [1] 3459/4  
**need** [17] 3436/19 3439/2  
3442/5 3442/6 3442/7  
3442/8 3442/11 3449/18  
3459/3 3459/13 3459/15  
3459/17 3463/8 3470/1  
3473/4 3479/25 3486/16  
**needed** [2] 3459/4  
3468/6  
**needs** [7] 3442/9 3450/3  
3451/4 3459/16 3469/17  
3470/10 3472/14  
**negate** [2] 3451/21  
3453/8  
**negotiated** [1] 3464/6  
**negotiating** [2] 3462/20  
3470/3  
**negotiations** [1] 3470/9  
**neither** [2] 3459/11  
3465/14  
**NELSON** [1] 3427/16  
**network** [3] 3472/18  
3476/8 3476/20  
**neutralize** [1] 3490/9  
**never** [2] 3478/23  
3487/19  
**new** [11] 3430/8 3430/15  
3432/17 3434/9 3468/21  
3477/22 3481/4 3489/5

3489/13 3491/2 3491/5  
**next** [9] 3439/22 3443/12  
3444/1 3444/1 3444/24  
3453/5 3459/22 3467/21  
3474/1  
**Ngan** [1] 3430/6  
**Nicholas** [2] 3446/14  
3446/15  
**Nicole** [1] 3428/19  
**Ninth** [3] 3430/2 3460/13  
3466/23  
**no** [26] 3427/4 3438/23  
3441/19 3441/19 3443/18  
3443/18 3445/14 3450/19  
3453/9 3453/13 3457/14  
3460/23 3463/14 3464/23  
3469/9 3469/9 3470/25  
3471/14 3474/16 3475/6  
3478/24 3480/22 3484/7  
3488/7 3489/11 3492/18  
**no-competition** [1]  
3469/9  
**no-frills** [1] 3443/18  
**Nolan** [1] 3428/16  
**non** [3] 3441/2 3456/12  
3463/22  
**non-food** [1] 3441/2  
**non-grocer** [1] 3463/22  
**non-price** [1] 3456/12  
**none** [3] 3479/7 3485/17  
3487/2  
**nonetheless** [1] 3449/4  
**nonprice** [5] 3455/25  
3456/2 3458/3 3461/4  
3461/9  
**nonunion** [2] 3463/22  
3464/23  
**Nord** [1] 3429/5  
**not** [87]  
**nothing** [4] 3439/11  
3439/12 3467/15 3480/23  
**novel** [1] 3439/12  
**now** [25] 3436/25  
3438/20 3439/2 3444/3

3446/15 3447/7 3448/10  
3449/3 3450/2 3455/2  
3456/18 3457/4 3457/10  
3459/6 3459/22 3461/10  
3462/25 3463/10 3463/16  
3464/15 3467/21 3468/11  
3471/11 3486/18 3490/3  
**nowhere** [1] 3468/6  
**number** [5] 3434/5  
3455/17 3455/18 3480/19  
3487/14  
**Number 3:24-cv-00347**  
[1] 3434/5  
**numbers** [2] 3436/2  
3436/5  
**NW** [3] 3430/19 3432/12  
3432/17  
**NY** [2] 3430/8 3430/15

**O**

**Obaro** [1] 3430/4  
**objectivity** [1] 3482/25  
**observed** [1] 3473/18  
**obstacles** [1] 3450/15  
**obtain** [2] 3461/20  
3488/14  
**obvious** [1] 3485/15  
**occasions** [1] 3460/16  
**occur** [3] 3454/6 3454/6  
3488/7  
**occurred** [1] 3458/25  
**occurs** [1] 3478/3  
**October** [1] 3490/15  
**off** [6] 3441/7 3445/5  
3457/5 3463/4 3467/21  
3470/1  
**offer** [15] 3441/10  
3441/11 3441/12 3441/22  
3442/20 3443/10 3443/18  
3444/12 3449/23 3449/25  
3474/15 3475/2 3477/3  
3478/13 3484/12  
**offered** [3] 3470/6  
3481/17 3482/24

**O**

**offering [2]** 3440/22  
3441/5

**offerings [1]** 3441/4

**offers [3]** 3474/23  
3484/24 3485/1

**Office [3]** 3428/16  
3428/20 3428/23

**officer [1]** 3443/6

**Official [1]** 3492/17

**offset [11]** 3436/9  
3453/19 3454/4 3454/20  
3454/24 3461/1 3465/22  
3468/6 3468/9 3469/7  
3486/5

**often [2]** 3444/10  
3444/22

**OH [1]** 3430/25

**okay [3]** 3434/17 3434/22  
3467/23

**once [4]** 3437/16 3448/10  
3450/24 3466/9

**one [28]** 3437/3 3438/23  
3440/21 3441/23 3442/10  
3442/17 3445/22 3447/13  
3449/23 3449/23 3449/25  
3450/16 3451/7 3451/13  
3451/19 3451/22 3452/6  
3452/8 3452/9 3455/17  
3458/19 3462/21 3463/10  
3481/2 3482/21 3486/5  
3486/25 3489/1

**one-stop [11]** 3440/21  
3441/23 3442/10 3442/17  
3445/22 3451/7 3451/13  
3451/19 3451/22 3452/6  
3452/9

**online [3]** 3451/9 3453/3  
3476/13

**only [25]** 3436/19 3439/3  
3439/15 3446/5 3452/7  
3452/20 3453/12 3453/21  
3459/17 3460/3 3460/16  
3463/10 3465/15 3465/20

3470/20 3470/24 3473/12  
3473/13 3473/13 3479/25  
3484/19 3485/5 3487/4  
3487/18 3490/17

**open [2]** 3434/3 3489/11

**opening [8]** 3437/21  
3459/23 3471/2 3472/11  
3473/7 3479/15 3486/4  
3487/16

**operate [2]** 3477/16  
3484/14

**operates [1]** 3470/20

**operating [2]** 3455/12  
3489/15

**operation [2]** 3479/8  
3487/20

**operations [2]** 3485/15  
3488/5

**opinion [2]** 3478/11  
3478/13

**opinions [1]** 3455/10

**opportunities [2]**  
3467/13 3476/13

**opportunity [1]** 3489/6

**oppose [1]** 3463/15

**opposing [1]** 3434/16

**optimistic [2]** 3472/3  
3487/3

**optimization [1]** 3475/15

**option [1]** 3445/23

**options [2]** 3440/19  
3442/13

**ord.uscourts.gov [1]**  
3432/21

**order [5]** 3454/24  
3456/24 3459/14 3460/18  
3485/5

**ordinary [12]** 3435/19  
3445/25 3446/11 3446/21  
3449/3 3451/16 3452/1  
3455/9 3458/10 3461/22  
3463/17 3470/2

**ordinary-course [3]**  
3452/1 3458/10 3461/22

**OREGON [7]** 3427/2  
3427/8 3429/3 3429/6  
3429/9 3462/25 3492/18

**organic [3]** 3443/23  
3444/22 3449/19

**Organics [2]** 3474/6  
3474/19

**original [2]** 3483/7  
3492/12

**orphan [1]** 3485/14

**other [40]** 3438/10  
3440/4 3440/17 3440/19  
3440/23 3441/5 3441/9  
3441/11 3441/13 3441/18  
3441/25 3442/12 3442/19  
3444/9 3444/13 3445/4

3445/14 3445/20 3445/20  
3449/9 3449/15 3449/24  
3451/2 3451/8 3451/20  
3455/3 3455/6 3457/1

3459/4 3461/13 3461/18  
3462/17 3462/22 3463/4  
3464/4 3467/6 3473/15  
3482/18 3486/9 3491/7

**others [1]** 3488/19

**otherwise [2]** 3434/12  
3450/21

**our [8]** 3435/9 3437/5  
3437/6 3437/12 3437/20  
3445/6 3477/6 3491/11

**out [10]** 3450/11 3455/21  
3456/5 3461/16 3466/13  
3467/10 3468/1 3482/11  
3487/8 3491/15

**outlined [1]** 3471/2

**outlines [1]** 3486/20

**outside [3]** 3447/25  
3466/17 3490/15

**over [13]** 3444/21 3448/2  
3448/4 3462/13 3468/11  
3469/19 3472/4 3472/8  
3472/16 3475/1 3476/9  
3480/25 3489/12

**overcome [2]** 3450/15

**O**

**overcome...** [1] 3485/21  
**overlap** [1] 3456/17  
**overlapped** [1] 3457/8  
**overlapping** [1] 3445/10  
**overly** [3] 3446/21 3472/2  
 3487/3  
**overwhelming** [2]  
 3488/21 3491/6  
**own** [14] 3451/17 3456/5  
 3460/4 3466/16 3468/20  
 3469/3 3472/2 3474/5  
 3475/4 3475/16 3475/24  
 3484/23 3485/7 3486/16  
**owned** [4] 3469/20  
 3474/21 3487/10 3487/13  
**ownership** [3] 3474/10  
 3478/8 3488/3

**P**

**pack** [2] 3444/16 3449/24  
**package** [6] 3470/1  
 3470/4 3470/5 3470/6  
 3470/13 3485/13  
**Pai** [1] 3428/12  
**paid** [1] 3464/17  
**paid-for** [1] 3464/17  
**Parkway** [1] 3430/5  
**part** [6] 3437/6 3447/21  
 3451/5 3461/13 3464/18  
 3473/12  
**participants** [2] 3445/19  
 3467/14  
**particular** [6] 3442/4  
 3442/6 3442/8 3448/10  
 3453/22 3479/10  
**particularized** [1] 3439/8  
**parties** [3] 3440/1 3476/2  
 3479/5  
**parties'** [1] 3468/5  
**parting** [1] 3474/5  
**parts** [1] 3470/1  
**party** [4] 3474/24  
 3474/24 3475/6 3478/25

**party's** [1] 3481/25  
**pass** [1] 3448/8  
**Paul** [2] 3428/10 3428/23  
**pause** [2] 3435/5 3446/16  
**pausing** [1] 3490/22  
**Pennsylvania** [1]  
 3428/13  
**people** [5] 3455/6 3467/3  
 3467/6 3472/8 3489/12  
**per** [2] 3476/9 3486/24  
**percent** [13] 3447/10  
 3450/25 3454/23 3455/1  
 3474/11 3475/1 3475/8  
 3480/12 3481/1 3481/12  
 3481/14 3486/24 3487/16  
**perfectly** [1] 3480/16  
**performance** [2] 3478/17  
 3478/19  
**performing** [1] 3480/16  
**perhaps** [2] 3439/13  
 3470/18  
**permanently** [1] 3488/11  
**permissible** [1] 3468/16  
**permit** [2] 3475/25  
 3490/22  
**permits** [1] 3488/6  
**Perry** [1] 3430/16  
**personalization** [2]  
 3475/3 3476/25  
**personnel** [1] 3482/15  
**Peter** [1] 3432/14  
**Pfaffenroth** [1] 3430/9  
**pharmacies** [1] 3487/6  
**pharmacy** [1] 3487/5  
**physical** [1] 3481/15  
**pick** [2] 3449/21 3453/2  
**picked** [1] 3435/14  
**pickup** [2] 3456/5  
 3474/24  
**Piggly** [2] 3475/9  
 3488/10  
**Pitt** [1] 3432/5  
**place** [2] 3436/7 3449/8  
**placed** [1] 3437/22

**placement** [1] 3476/13  
**places** [1] 3465/16  
**plain** [2] 3481/11 3484/8  
**plaintiff** [7] 3428/2  
 3428/15 3428/19 3428/22  
 3429/2 3434/6 3469/3  
**plaintiffs** [28] 3427/4  
 3435/4 3435/19 3436/16  
 3436/19 3436/21 3437/1  
 3437/16 3438/4 3439/2  
 3439/4 3439/6 3439/13  
 3439/24 3446/12 3454/7  
 3454/10 3454/14 3462/6  
 3462/9 3465/4 3465/8  
 3465/21 3465/22 3466/10  
 3470/25 3481/10 3491/11  
**plaintiffs'** [22] 3427/15  
 3433/2 3433/3 3435/3  
 3438/22 3439/9 3446/20  
 3449/5 3451/23 3452/10  
 3452/13 3452/15 3452/20  
 3453/8 3453/14 3453/19  
 3455/4 3465/12 3465/17  
 3468/10 3488/21 3492/6  
**plan** [2] 3484/8 3484/12  
**plans** [3] 3475/18 3478/2  
 3478/4  
**plant** [1] 3476/3  
**plants** [1] 3481/21  
**play** [2] 3462/18 3463/3  
**please** [2] 3434/5  
 3459/22  
**plenty** [1] 3479/11  
**Podoll** [1] 3432/6  
**point** [8] 3439/13  
 3444/17 3449/11 3454/1  
 3464/19 3465/3 3485/18  
 3487/9  
**points** [3] 3438/21  
 3475/11 3479/24  
**popular** [1] 3474/15  
**Porter** [2] 3430/11  
 3430/14  
**Portland** [8] 3427/8

**P**

**Portland...** [7] 3429/4  
3430/3 3432/3 3432/21  
3461/3 3467/6 3473/21  
**posed** [1] 3490/23  
**poses** [1] 3435/7  
**position** [1] 3484/7  
**positions** [1] 3477/9  
**possible** [1] 3466/1  
**possibly** [1] 3466/21  
**post** [10] 3437/14  
3448/13 3464/7 3465/2  
3465/7 3475/23 3480/2  
3486/21 3486/23 3490/7  
**post-acquisition** [1]  
3464/7  
**Post-divestiture** [1]  
3475/23  
**post-merger** [2] 3437/14  
3490/7  
**post-transaction** [1]  
3480/2  
**potential** [2] 3447/20  
3480/19  
**power** [2] 3448/16  
3472/24  
**practical** [7] 3440/9  
3440/12 3440/13 3440/18  
3443/12 3444/1 3445/13  
**practically** [1] 3452/24  
**pre** [1] 3487/1  
**pre-divestiture** [1]  
3487/1  
**Precisely** [1] 3469/20  
**preclude** [1] 3438/18  
**predict** [1] 3478/18  
**predicts** [2] 3469/21  
3472/3  
**prefer** [2] 3451/3 3453/1  
**preferences** [1] 3450/18  
**preferred** [1] 3449/24  
**preliminarily** [1] 3436/17  
**preliminary** [3] 3427/14  
3490/18 3492/5

**premature** [1] 3490/25  
**premiums** [1] 3450/9  
**prepared** [1] 3490/16  
**presence** [6] 3452/11  
3452/16 3453/15 3453/17  
3455/3 3459/25  
**present** [6] 3436/22  
3453/13 3461/2 3472/4  
3473/24 3489/24  
**presentation** [2] 3435/14  
3484/21  
**presented** [7] 3435/20  
3446/7 3451/16 3460/1  
3461/6 3461/22 3466/15  
**preserve** [1] 3479/21  
**president** [5] 3432/14  
3458/4 3458/11 3458/18  
3487/24  
**presidents** [3] 3457/24  
3457/25 3484/18  
**pressure** [1] 3460/23  
**presumably** [1] 3459/8  
**presumptions** [1]  
3464/13  
**presumptively** [8] 3437/7  
3437/14 3448/13 3448/23  
3452/18 3452/18 3479/13  
3480/10  
**prevail** [1] 3469/18  
**prevails** [1] 3459/11  
**previously** [1] 3482/22  
**price** [33] 3444/2 3444/4  
3444/5 3444/7 3444/9  
3444/11 3444/17 3444/19  
3444/22 3445/5 3445/10  
3447/24 3455/14 3455/25  
3456/12 3456/18 3457/3  
3457/7 3457/13 3457/21  
3458/3 3458/8 3458/13  
3458/15 3460/10 3461/8  
3469/25 3475/17 3484/17  
3484/21 3484/25 3485/6  
3485/9  
**priced** [5] 3444/13

3456/20 3457/8 3457/17  
3460/17  
**prices** [12] 3435/13  
3438/2 3444/11 3454/21  
3454/24 3456/22 3456/25  
3457/5 3460/24 3469/9  
3477/3 3490/1  
**pricing** [22] 3444/2  
3444/4 3444/10 3444/12  
3444/25 3445/1 3445/4  
3445/6 3456/13 3456/14  
3457/6 3458/5 3458/6  
3460/3 3460/5 3460/15  
3475/16 3483/9 3483/20  
3484/3 3484/4 3484/13  
**prima** [5] 3437/2 3462/7  
3462/8 3466/10 3468/10  
**primarily** [4] 3451/21  
3464/17 3464/25 3466/15  
**primary** [8] 3443/7  
3443/8 3449/5 3450/23  
3455/22 3456/15 3456/16  
3466/12  
**prior** [4] 3477/13 3478/17  
3484/24 3487/17  
**private** [18] 3456/8  
3474/1 3474/4 3474/6  
3474/8 3474/12 3474/15  
3474/17 3476/1 3476/4  
3476/5 3481/24 3481/25  
3483/4 3483/8 3483/21  
3484/19 3489/1  
**probability** [2] 3436/23  
3454/12  
**problem** [1] 3489/16  
**proceed** [1] 3434/25  
**proceeding** [3] 3438/22  
3471/18 3489/24  
**proceedings** [2] 3434/1  
3492/11  
**process** [1] 3470/3  
**produce** [6] 3437/17  
3439/5 3450/1 3455/13  
3462/6 3471/4

**P**

**produced [1]** 3476/2  
**product [28]** 3438/5  
 3438/14 3438/24 3439/9  
 3439/14 3439/24 3440/5  
 3440/15 3440/18 3445/24  
 3446/9 3446/10 3446/13  
 3446/15 3446/19 3446/24  
 3446/25 3447/1 3447/5  
 3448/2 3448/6 3452/14  
 3480/3 3480/8 3480/13  
 3480/20 3486/7 3488/23  
**production [1]** 3443/13  
**products [14]** 3444/20  
 3444/21 3450/16 3456/9  
 3456/10 3474/1 3474/8  
 3474/17 3474/20 3474/20  
 3476/1 3476/2 3477/4  
 3483/21  
**Professor [3]** 3464/24  
 3481/18 3486/13  
**profit [10]** 3467/19  
 3469/20 3476/7 3476/9  
 3477/10 3479/3 3485/1  
 3486/14 3486/17 3487/21  
**profitability [1]** 3472/4  
**profitable [3]** 3467/18  
 3487/19 3487/20  
**progeny [1]** 3438/21  
**program [5]** 3474/25  
 3475/18 3476/22 3477/1  
 3481/24  
**programs [3]** 3455/14  
 3475/9 3475/14  
**project [1]** 3476/21  
**projects [1]** 3476/11  
**ProMedica [1]** 3467/12  
**promise [1]** 3489/16  
**promises [1]** 3489/10  
**promotion [1]** 3475/17  
**promotional [3]** 3477/3  
 3484/4 3484/13  
**promotions [2]** 3458/17  
 3483/21

**proof [1]** 3488/4  
**proper [1]** 3491/9  
**properly [5]** 3438/6  
 3438/25 3439/14 3440/5  
 3464/11  
**proposal [1]** 3434/18  
**propose [1]** 3434/17  
**proposed [8]** 3447/23  
 3468/12 3468/18 3471/2  
 3471/9 3471/13 3478/13  
 3490/8  
**prospective [1]** 3484/10  
**protection [2]** 3465/1  
 3491/8  
**prove [1]** 3477/12  
**provide [11]** 3437/9  
 3440/21 3441/4 3442/12  
 3442/15 3443/17 3443/23  
 3461/11 3465/12 3466/19  
 3475/17  
**provided [4]** 3452/22  
 3458/12 3462/9 3484/3  
**providers [1]** 3472/9  
**provides [2]** 3481/13  
 3484/9  
**providing [2]** 3436/9  
 3441/23  
**public [5]** 3467/21  
 3489/2 3489/22 3490/21  
 3491/8  
**purchase [7]** 3441/1  
 3443/8 3450/23 3469/25  
 3484/25 3485/6 3485/9  
**purchased [2]** 3451/1  
 3452/4  
**purchases [1]** 3451/3  
**purported [2]** 3475/21  
 3486/6  
**purpose [5]** 3437/24  
 3440/17 3457/16 3465/20  
 3473/2  
**purposes [1]** 3438/24  
**push [1]** 3459/3  
**pushing [1]** 3460/9

**put [5]** 3449/13 3454/3  
 3454/10 3454/14 3478/12  
**putting [2]** 3450/2 3461/8

**Q**

**QFC [3]** 3473/16 3473/18  
 3473/21  
**quality [4]** 3438/2 3456/8  
 3461/7 3463/25  
**quarter [1]** 3472/20  
**question [4]** 3436/20  
 3465/9 3470/22 3470/24  
**quite [2]** 3459/12 3460/2  
**quote [15]** 3458/25  
 3459/7 3470/15 3471/8  
 3471/13 3478/22 3479/20  
 3479/21 3481/18 3482/6  
 3482/6 3482/24 3483/25  
 3484/9 3486/20

**R**

**race [2]** 3460/9 3460/22  
**radar [2]** 3452/3 3452/3  
**raise [4]** 3436/19 3438/2  
 3454/20 3454/24  
**raised [2]** 3447/11 3469/8  
**Raley's [1]** 3441/1  
**Ralphs [2]** 3458/11  
 3458/19  
**range [1]** 3444/20  
**ranges [1]** 3441/10  
**rarely [1]** 3444/20  
**rather [7]** 3449/16 3457/4  
 3460/3 3461/16 3464/17  
 3465/5 3481/8  
**RDR [2]** 3432/19 3492/16  
**reach [1]** 3467/25  
**reached [2]** 3462/22  
 3465/20  
**reaches [1]** 3462/20  
**react [1]** 3445/1  
**real [2]** 3484/23 3490/8  
**realities [2]** 3450/4  
 3464/16  
**really [2]** 3449/15

**R**

**really...** [1] 3470/10  
**realty** [1] 3461/24  
**reason** [5] 3436/16  
3453/20 3463/7 3468/25  
3469/9  
**reasonable** [3] 3436/23  
3454/12 3466/2  
**reasons** [3] 3439/25  
3449/6 3479/15  
**rebannered** [1] 3473/24  
**rebannering** [4] 3482/23  
3483/1 3483/2 3487/4  
**Rebecca** [1] 3430/21  
**rebut** [3] 3459/6 3465/12  
3465/17  
**rebuttal** [2] 3437/17  
3491/12  
**rebutted** [1] 3464/24  
**receive** [2] 3474/10  
3476/23  
**receiving** [1] 3476/3  
**recess** [2] 3491/17  
3491/18  
**recognition** [4] 3445/13  
3466/8 3481/4 3485/23  
**recognize** [2] 3467/17  
3473/7  
**record** [4] 3434/10  
3434/11 3460/4 3492/10  
**records** [1] 3477/14  
**reduce** [5] 3438/2  
3456/24 3457/1 3460/23  
3488/12  
**reduced** [1] 3437/15  
**reduction** [2] 3454/19  
3454/25  
**Redwood** [2] 3430/5  
3430/5  
**reflects** [1] 3460/4  
**refused** [2] 3473/3  
3474/22  
**regarding** [2] 3459/20  
3487/23

**regardless** [1] 3468/1  
**region** [1] 3458/15  
**regionally** [1] 3473/21  
**regions** [1] 3486/23  
**rejected** [3] 3460/14  
3466/23 3467/8  
**related** [1] 3487/18  
**relating** [2] 3475/13  
3481/5  
**relationship** [1] 3483/14  
**relevant** [4] 3438/21  
3440/2 3479/8 3486/10  
**reliance** [1] 3464/16  
**relies** [2] 3461/14  
3483/14  
**rely** [3] 3450/23 3476/19  
3489/22  
**relying** [2] 3464/17  
3478/8  
**remain** [1] 3490/18  
**remainder** [1] 3491/11  
**remarkably** [1] 3451/12  
**remedies** [1] 3470/23  
**remedy** [10] 3468/12  
3468/17 3471/11 3471/13  
3472/6 3478/6 3479/9  
3480/16 3490/24 3491/4  
**remove** [1] 3470/8  
**rent** [1] 3470/14  
**repaid** [1] 3479/4  
**replace** [2] 3471/9  
3484/16  
**replacement** [1] 3439/20  
**REPORTER** [2] 3432/19  
3492/17  
**reporters** [1] 3491/15  
**represent** [2] 3436/5  
3468/3  
**represented** [1] 3447/15  
**request** [1] 3435/9  
**require** [1] 3465/24  
**required** [2] 3436/24  
3486/13  
**requirements** [1] 3441/3

**requires** [2] 3453/20  
3490/22  
**requiring** [1] 3471/4  
**reserve** [1] 3491/11  
**respect** [3] 3471/21  
3480/1 3484/3  
**respectfully** [1] 3469/14  
**respectively** [1] 3475/10  
**respond** [1] 3458/16  
**responding** [1] 3461/23  
**response** [4] 3446/23  
3456/3 3457/22 3464/15  
**restore** [3] 3471/5  
3478/14 3483/12  
**restoring** [1] 3479/12  
**restriction** [1] 3488/8  
**result** [7] 3437/7 3454/8  
3454/21 3473/22 3477/2  
3482/5 3490/1  
**resulting** [2] 3481/2  
3487/12  
**retail** [23] 3445/20 3457/9  
3466/20 3472/19 3472/23  
3472/25 3476/8 3476/16  
3476/18 3476/20 3477/1  
3477/17 3481/11 3481/13  
3481/24 3485/15 3485/17  
3486/11 3486/16 3486/24  
3487/20 3487/21 3488/4  
**retailer** [1] 3457/13  
**retailers** [2] 3461/24  
3476/18  
**retained** [2] 3482/11  
3483/6  
**retaining** [1] 3473/9  
**return** [3] 3471/1 3472/3  
3485/10  
**returning** [1] 3486/25  
**returns** [1] 3484/24  
**revenue** [9] 3467/11  
3467/12 3467/14 3472/23  
3472/25 3474/12 3476/12  
3481/14 3486/22  
**revenues** [5] 3472/20

**R**

**revenues... [4]** 3472/22  
 3476/21 3477/19 3481/12  
**reverberate [1]** 3464/8  
**review [1]** 3469/11  
**rewards [1]** 3455/14  
**Richard [1]** 3489/18  
**Richardson [1]** 3432/16  
**right [11]** 3460/2 3460/21  
 3461/3 3461/10 3462/25  
 3462/25 3466/13 3467/10  
 3482/10 3482/13 3491/13  
**rights [1]** 3482/17  
**risk [8]** 3436/15 3453/24  
 3465/21 3465/23 3466/6  
 3482/7 3482/14 3482/25  
**risks [6]** 3453/22 3469/12  
 3477/2 3478/12 3486/19  
 3487/5  
**risky [1]** 3470/19  
**Rives [1]** 3430/2  
**RMR [2]** 3432/19 3492/16  
**robust [1]** 3449/4  
**Rodney [2]** 3446/3  
 3452/2  
**Rohan [1]** 3428/12  
**Room [1]** 3432/20  
**Rothman [1]** 3428/8  
**routinely [1]** 3467/8  
**RSR [2]** 3460/14 3466/25  
**RSR Corp [1]** 3460/14  
**rule [4]** 3457/9 3457/15  
 3457/17 3490/14  
**ruling [1]** 3490/19  
**run [2]** 3443/3 3487/8  
**running [2]** 3435/12  
 3481/15  
**Ryan [1]** 3432/9

**S**

**S's [22]** 3472/18 3474/13  
 3474/16 3474/19 3475/8  
 3475/16 3476/17 3477/17  
 3477/19 3478/2 3478/7

3478/16 3479/8 3481/1  
 3481/11 3481/12 3485/25  
 3486/9 3486/10 3486/19  
 3487/3 3488/3  
**S-215 [1]** 3428/17  
**S-owned [2]** 3469/20  
 3487/10  
**S.W [6]** 3428/5 3429/4  
 3430/2 3432/3 3432/10  
 3432/20  
**Safeway [2]** 3458/16  
 3473/15  
**said [6]** 3448/25 3459/2  
 3484/4 3486/4 3486/4  
 3489/3  
**Saint [1]** 3466/24  
**Saivignesh [1]** 3428/15  
**sale [1]** 3485/14  
**Salem [2]** 3429/7 3429/10  
**sales [17]** 3452/22  
 3452/23 3453/8 3469/20  
 3474/17 3475/1 3475/7  
 3475/18 3480/21 3482/22  
 3483/1 3486/21 3487/5  
 3487/9 3487/12 3487/13  
 3487/16  
**same [16]** 3442/12  
 3447/20 3449/10 3450/15  
 3458/7 3461/22 3461/24  
 3461/24 3463/6 3465/1  
 3474/20 3474/21 3483/7  
 3484/13 3484/14 3484/14  
**San [1]** 3428/21  
**Sankaran [3]** 3455/20  
 3456/20 3456/23  
**Sankaran's [1]** 3490/4  
**Santa [5]** 3468/21 3469/3  
 3469/10 3480/23 3491/5  
**satisfy [1]** 3442/6  
**save [1]** 3456/25  
**savings [2]** 3467/23  
 3468/2  
**saw [3]** 3457/12 3458/5  
 3458/9

**say [4]** 3453/16 3472/14  
 3473/4 3478/20  
**says [2]** 3482/14 3487/8  
**scale [6]** 3472/15  
 3472/19 3473/2 3473/4  
 3477/10 3481/4  
**Scholer [2]** 3430/11  
 3430/14  
**Schultz [1]** 3430/10  
**Schwilke [1]** 3458/11  
**science [1]** 3476/8  
**scope [1]** 3490/23  
**scrappy [1]** 3456/5  
**screen [6]** 3445/19  
 3447/16 3448/9 3451/10  
 3455/22 3467/21  
**screens [1]** 3484/19  
**sea [1]** 3451/6  
**seated [1]** 3434/5  
**Sebastian [1]** 3430/17  
**second [10]** 3437/9  
 3438/24 3440/4 3444/5  
 3450/18 3454/16 3459/9  
 3461/4 3467/10 3478/23  
**second-guess [1]**  
 3478/23  
**see [3]** 3447/18 3478/17  
 3489/1  
**seem [1]** 3450/14  
**seen [4]** 3435/9 3439/22  
 3456/21 3457/24  
**selection [4]** 3441/12  
 3441/14 3442/21 3444/17  
**selective [1]** 3435/15  
**self [1]** 3488/16  
**self-serving [1]** 3488/16  
**sell [4]** 3470/1 3481/8  
 3488/5 3488/8  
**seller [2]** 3479/1 3483/15  
**seller's [1]** 3483/16  
**selling [2]** 3478/25  
 3488/1  
**senior [3]** 3432/14  
 3482/11 3487/24

**S**

**sense [11]** 3439/15  
3439/19 3445/21 3446/5  
3448/15 3449/20 3452/24  
3453/20 3457/14 3463/22  
3467/1  
**sensitive [1]** 3490/25  
**sensitivity [1]** 3444/2  
**separate [7]** 3435/22  
3438/19 3444/3 3447/8  
3463/16 3466/17 3473/16  
**September [3]** 3427/6  
3434/2 3492/7  
**serious [6]** 3436/20  
3465/9 3469/12 3477/14  
3480/1 3485/7  
**seriously [1]** 3479/6  
**serve [1]** 3442/1  
**served [1]** 3489/19  
**serves [1]** 3482/17  
**services [8]** 3475/18  
3477/18 3477/18 3477/23  
3481/13 3483/12 3483/19  
3483/22  
**serving [1]** 3488/16  
**set [4]** 3442/9 3442/12  
3442/23 3460/24  
**several [1]** 3485/4  
**Seymour [1]** 3432/8  
**shareholders [3]** 3452/5  
3452/8 3467/20  
**shares [3]** 3438/1  
3448/11 3452/17  
**sharing [1]** 3490/25  
**she [7]** 3450/1 3477/25  
3478/1 3482/12 3484/4  
3484/5 3486/20  
**shift [3]** 3441/17 3451/14  
3467/14  
**shifted [3]** 3440/7  
3450/19 3451/8  
**shifting [2]** 3437/1  
3465/11  
**shifts [3]** 3437/17

3453/15 3465/12  
**Shoe [10]** 3438/13  
3440/9 3440/12 3440/13  
3440/17 3443/12 3444/1  
3444/24 3445/12 3446/12  
**shop [12]** 3441/23  
3442/18 3443/7 3443/8  
3450/3 3450/22 3451/4  
3451/7 3451/13 3451/19  
3451/22 3453/1  
**shopper [2]** 3449/21  
3450/16  
**shopper's [1]** 3441/18  
**shoppers [17]** 3436/6  
3436/8 3440/22 3441/7  
3446/5 3450/2 3450/4  
3450/6 3450/8 3450/10  
3450/23 3451/2 3452/25  
3461/10 3461/12 3462/4  
3465/23  
**shoppers' [1]** 3451/6  
**shoppers/consumers [1]**  
3465/23  
**shopping [13]** 3440/21  
3441/6 3441/18 3441/22  
3442/10 3442/16 3442/16  
3443/15 3444/18 3445/22  
3450/20 3452/6 3452/9  
**Shores [2]** 3430/5 3430/5  
**short [2]** 3466/11 3485/4  
**should [9]** 3440/3 3449/9  
3468/25 3469/15 3479/1  
3489/24 3489/25 3490/14  
3491/10  
**show [17]** 3437/6  
3437/12 3453/23 3454/3  
3454/5 3456/9 3457/20  
3461/17 3462/5 3463/17  
3465/8 3468/5 3468/9  
3471/13 3472/5 3479/23  
3487/24  
**showed [8]** 3435/17  
3448/5 3459/23 3459/24  
3468/21 3479/15 3485/3

3487/16  
**showing [8]** 3435/11  
3451/2 3453/19 3454/11  
3461/23 3465/17 3471/4  
3477/14  
**shown [15]** 3437/4  
3439/10 3439/13 3441/22  
3444/8 3445/18 3448/8  
3452/17 3457/19 3463/21  
3465/21 3469/8 3477/25  
3480/1 3480/17  
**shows [13]** 3439/5  
3440/10 3440/20 3450/21  
3451/10 3455/15 3459/19  
3460/2 3461/6 3480/4  
3484/12 3487/12 3491/6  
**shrinks [1]** 3488/19  
**sight [1]** 3436/4  
**sign [1]** 3470/18  
**signature [6]** 3474/7  
3474/19 3492/12 3492/13  
3492/13 3492/17  
**signed [1]** 3492/13  
**significant [4]** 3450/14  
3478/5 3485/2 3488/13  
**significantly [1]** 3441/11  
**signing [1]** 3492/9  
**Silva [1]** 3456/14  
**similar [1]** 3458/9  
**similarly [6]** 3443/20  
3444/22 3445/8 3451/23  
3457/3 3458/18  
**simple [1]** 3463/7  
**simplify [1]** 3485/15  
**simply [5]** 3438/16  
3453/7 3467/17 3485/19  
3488/23  
**single [9]** 3441/3 3464/16  
3466/8 3476/3 3478/1  
3480/2 3480/3 3480/23  
3488/23  
**sit [1]** 3436/1  
**Sivitz [1]** 3430/21  
**six [3]** 3469/22 3484/17



**S**

**six...** [1] 3486/15  
**size** [2] 3443/21 3443/24  
**sizes** [2] 3444/16  
3449/24  
**skeptical** [1] 3483/13  
**skills** [1] 3464/3  
**SKUs** [1] 3441/10  
**slide** [8] 3439/10 3441/8  
3441/8 3442/4 3459/22  
3459/23 3459/24 3473/7  
**slides** [1] 3467/21  
**small** [4] 3450/14 3468/3  
3474/9 3476/4  
**smaller** [3] 3441/14  
3443/21 3443/24  
**so** [25] 3434/9 3440/17  
3442/9 3442/25 3446/6  
3447/23 3453/11 3455/20  
3456/2 3456/10 3458/14  
3459/25 3460/25 3464/25  
3469/9 3475/16 3476/4  
3476/25 3477/1 3478/10  
3485/22 3487/8 3489/16  
3490/17 3491/16  
**SoftBank** [3] 3484/21  
3485/10 3489/18  
**sold** [1] 3474/18  
**some** [10] 3441/8  
3441/14 3444/12 3451/14  
3451/22 3479/3 3485/5  
3485/19 3488/4 3488/19  
**somehow** [2] 3438/9  
3440/6  
**sometimes** [2] 3456/22  
3460/8  
**somewhere** [1] 3467/5  
**Sonia** [1] 3430/9  
**Soopers** [1] 3458/23  
**sophisticated** [1] 3483/9  
**sort** [1] 3451/14  
**sources** [2] 3477/11  
3479/1  
**sourcing** [1] 3476/2

**Southern** [5] 3458/11  
3458/19 3482/10 3482/17  
3482/19  
**spanned** [1] 3435/15  
**speak** [1] 3484/1  
**specialized** [1] 3439/7  
**specialty** [4] 3441/16  
3441/20 3443/18 3443/21  
**specific** [1] 3466/7  
**specifically** [2] 3450/19  
3462/18  
**spend** [1] 3450/10  
**spends** [1] 3457/14  
**spike** [1] 3451/11  
**spiraling** [1] 3459/3  
**spoke** [3] 3434/14  
3440/16 3458/4  
**spread** [6] 3457/2 3457/5  
3460/11 3460/23 3472/16  
3481/4  
**Sprouts** [5] 3443/4  
3443/5 3443/6 3443/10  
3445/22  
**squarely** [2] 3460/14  
3470/25  
**stack** [2] 3475/13 3482/3  
**staffed** [3] 3441/17  
3441/19 3443/22  
**staffing** [1] 3487/7  
**stake** [1] 3436/4  
**standalone** [1] 3481/19  
**standard** [6] 3436/19  
3448/19 3465/24 3468/1  
3471/17 3471/18  
**staples** [2] 3443/8  
3449/11  
**start** [8] 3437/21 3438/12  
3439/24 3440/3 3456/2  
3457/4 3459/12 3490/20  
**started** [1] 3446/18  
**state** [9] 3428/15 3428/19  
3428/22 3429/2 3434/9  
3442/6 3442/7 3469/13  
3490/17

**stated** [1] 3434/11  
**statement** [1] 3437/21  
**statements** [1] 3477/13  
**Stater** [2] 3442/14  
3442/15  
**Stater Bros** [1] 3442/15  
**states** [17] 3427/1  
3427/17 3432/20 3434/6  
3438/16 3466/25 3471/7  
3472/16 3473/14 3473/15  
3473/23 3473/25 3474/4  
3474/14 3484/21 3485/16  
3485/19  
**stay** [1] 3489/11  
**staying** [1] 3458/7  
**stenographic** [1]  
3492/11  
**step** [1] 3441/21  
**Stewart** [1] 3432/6  
**sticking** [1] 3470/11  
**still** [10] 3434/16 3447/2  
3449/1 3450/23 3451/3  
3451/18 3453/1 3462/5  
3469/21 3473/17  
**stock** [1] 3443/2  
**stock-up** [1] 3443/2  
**stocked** [2] 3461/11  
3482/16  
**Stoel** [1] 3430/2  
**stop** [13] 3435/19  
3436/13 3440/21 3441/23  
3442/10 3442/17 3445/22  
3451/7 3451/13 3451/19  
3451/22 3452/6 3452/9  
**stopped** [1] 3452/7  
**stopping** [1] 3442/16  
**store** [44] 3435/12  
3441/5 3441/9 3441/19  
3441/25 3442/22 3442/24  
3443/1 3443/24 3444/9  
3445/2 3445/14 3446/8  
3447/9 3447/13 3447/15  
3447/19 3447/20 3447/20  
3447/22 3447/25 3448/8

**S**

**store... [22]** 3449/13  
3449/16 3449/18 3450/11  
3451/20 3452/21 3453/4  
3455/13 3456/11 3461/8  
3471/24 3476/13 3480/9  
3480/13 3480/24 3481/2  
3481/22 3482/8 3482/15  
3484/23 3490/5 3490/7  
**store's [1]** 3447/10  
**stores [92]**  
**stores' [3]** 3471/25  
3472/4 3475/7  
**strategy [1]** 3484/6  
**Street [12]** 3428/5  
3428/17 3428/24 3429/4  
3429/7 3429/10 3430/14  
3430/19 3430/22 3430/25  
3432/3 3432/12  
**stretching [1]** 3485/16  
**strike [9]** 3458/23  
3458/24 3458/24 3462/17  
3462/21 3462/25 3463/7  
3463/12 3481/10  
**strikes [2]** 3462/19  
3462/19  
**strong [1]** 3484/1  
**structural [1]** 3454/9  
**structure [2]** 3435/21  
3437/13  
**struggle [1]** 3481/3  
**subject [1]** 3488/7  
**submarket [4]** 3438/15  
3439/1 3439/8 3440/15  
**submarkets [1]** 3438/19  
**submit [2]** 3469/14  
3470/24  
**substance [1]** 3465/25  
**substantial [11]** 3436/20  
3455/7 3465/9 3470/23  
3472/2 3479/9 3480/1  
3486/8 3487/15 3488/23  
3491/6  
**substantially [5]** 3436/23

3441/2 3454/12 3459/16  
3471/15  
**substantiate [1]** 3465/25  
**substitute [1]** 3440/19  
**substitutes [2]** 3464/21  
3464/21  
**success [2]** 3469/17  
3488/22  
**successfully [1]** 3489/17  
**succinctly [1]** 3459/2  
**such [18]** 3438/1 3439/18  
3441/13 3442/19 3444/12  
3444/18 3445/9 3451/7  
3453/13 3453/24 3458/16  
3461/3 3466/1 3471/14  
3472/2 3478/9 3483/20  
3488/7  
**suffer [2]** 3468/23  
3482/20  
**sufficient [7]** 3437/25  
3447/24 3453/19 3454/4  
3465/13 3471/12 3472/14  
**sufficiently [1]** 3471/13  
**suggest [1]** 3490/14  
**suggested [1]** 3488/3  
**suggesting [1]** 3486/1  
**suggestion [1]** 3478/21  
**Suite [6]** 3428/17  
3428/21 3429/4 3430/2  
3430/19 3432/3  
**Sullivan [2]** 3430/16  
3432/16  
**summarily [1]** 3466/23  
**summarized [1]** 3459/1  
**summarizes [1]** 3441/8  
**Super [1]** 3458/17  
**supermarket [26]**  
3437/19 3438/5 3439/9  
3439/24 3440/4 3441/1  
3441/3 3444/25 3446/19  
3447/1 3448/2 3448/6  
3448/21 3450/17 3452/14  
3457/18 3462/9 3465/9  
3466/22 3467/4 3471/23

3480/5 3480/8 3480/13  
3480/20 3480/20  
**supermarket's [1]**  
3442/10  
**supermarkets [25]**  
3437/5 3439/3 3439/20  
3440/1 3440/21 3441/9  
3441/10 3441/12 3441/16  
3441/22 3442/15 3444/4  
3444/6 3444/9 3444/10  
3444/23 3445/3 3445/9  
3445/14 3445/16 3445/19  
3446/8 3450/23 3451/1  
3451/4  
**supermarkets' [1]** 3445/4  
**supply [5]** 3481/6  
3481/21 3485/20 3487/22  
3488/9  
**supplying [2]** 3485/21  
3486/17  
**support [6]** 3435/9  
3446/12 3462/7 3477/21  
3483/5 3489/14  
**supported [1]** 3485/6  
**supporting [5]** 3438/8  
3446/1 3458/10 3462/8  
3462/10  
**supports [3]** 3439/19  
3451/17 3455/9  
**Supreme [4]** 3438/15  
3438/20 3439/11 3466/24  
**sure [4]** 3437/25 3457/20  
3458/21 3465/22  
**surprise [2]** 3445/14  
3463/14  
**Susan [1]** 3428/2  
**susceptible [1]** 3483/16  
**sustain [1]** 3471/24  
**switching [1]** 3491/15  
**swoop [1]** 3450/16  
**sworn [1]** 3477/13  
**Sysco [3]** 3471/3 3471/17  
3483/13  
**system [1]** 3482/2

**S****systems [2]** 3475/13  
3483/9**T****table [1]** 3462/20  
**tactic [3]** 3462/23  
3462/24 3463/6  
**tactics [1]** 3463/1  
**take [8]** 3436/1 3449/6  
3450/7 3465/19 3470/7  
3476/20 3477/10 3491/16  
**take-it-or-leave-it [1]**  
3470/7  
**taken [3]** 3446/7 3491/18  
3492/10  
**takes [2]** 3462/4 3487/2  
**taking [1]** 3441/21  
**tangentially [1]** 3466/21  
**targeted [1]** 3441/23  
**team [1]** 3481/22  
**tech [2]** 3475/12 3482/3  
**technology [2]** 3435/13  
3474/22  
**tell [3]** 3457/14 3469/2  
3490/10  
**telling [2]** 3452/5 3452/7  
**ten [3]** 3473/23 3491/16  
3491/17  
**ten-minute [1]** 3491/16  
**tend [2]** 3443/2 3444/13  
**tends [1]** 3456/19  
**tens [1]** 3472/9  
**tension [1]** 3438/10  
**tenured [1]** 3489/9  
**terms [2]** 3464/7 3484/10  
**test [5]** 3440/10 3448/2  
3469/6 3470/17 3471/3  
**tested [1]** 3446/23  
**testified [27]** 3445/8  
3455/17 3455/24 3456/3  
3456/15 3458/2 3464/20  
3470/4 3470/12 3470/15  
3474/3 3474/23 3475/253476/14 3476/17 3477/20  
3477/24 3478/22 3482/12  
3483/25 3484/5 3484/9  
3484/18 3486/20 3487/6  
3489/12 3490/16  
**testimony [18]** 3435/10  
3442/3 3446/7 3446/13  
3447/17 3448/12 3449/4  
3457/23 3458/9 3458/10  
3461/14 3463/17 3464/17  
3466/15 3473/5 3482/24  
3486/18 3490/5  
**than [15]** 3436/21 3444/9  
3444/13 3444/23 3453/3  
3454/23 3456/20 3456/23  
3460/25 3462/6 3465/8  
3467/15 3472/20 3481/8  
3481/14  
**Thank [2]** 3434/21  
3484/20  
**that [319]**  
**that's [6]** 3434/20  
3440/15 3440/20 3456/21  
3470/17 3482/16  
**their [71]**  
**them [4]** 3436/15 3461/21  
3478/12 3486/17  
**themselves [2]** 3440/1  
3440/8  
**then [5]** 3437/16 3453/23  
3462/21 3465/11 3473/2  
**theoretical [1]** 3462/23  
**theory [1]** 3440/2  
**there [21]** 3435/19  
3438/13 3438/23 3438/24  
3439/5 3440/3 3441/23  
3447/2 3447/24 3448/21  
3453/9 3453/11 3454/25  
3460/24 3461/15 3463/9  
3463/10 3464/23 3469/9  
3479/17 3485/2  
**there's [10]** 3438/17  
3439/3 3439/11 3439/12  
3445/25 3449/1 3451/63451/14 3453/16 3461/17  
**these [33]** 3436/5 3436/9  
3436/11 3438/9 3438/20  
3439/19 3441/25 3444/3  
3445/13 3448/20 3450/13  
3450/14 3452/16 3453/23  
3454/9 3459/2 3459/3  
3461/23 3463/1 3464/5  
3464/8 3464/15 3466/5  
3467/17 3467/21 3467/24  
3468/2 3473/6 3473/8  
3479/24 3480/19 3481/7  
3487/4  
**they [56]** 3437/2 3437/18  
3441/4 3442/5 3443/7  
3443/8 3443/10 3443/21  
3444/5 3444/16 3445/1  
3445/5 3445/9 3445/10  
3450/20 3451/3 3451/7  
3454/1 3454/2 3454/5  
3455/19 3456/9 3456/9  
3456/10 3457/21 3458/20  
3459/7 3459/23 3460/12  
3461/7 3461/23 3463/23  
3465/2 3466/7 3467/14  
3467/18 3468/2 3468/6  
3469/5 3469/21 3476/21  
3477/6 3477/9 3477/20  
3478/8 3479/4 3480/7  
3484/10 3484/11 3484/14  
3486/1 3486/3 3487/10  
3489/10 3489/24 3490/16  
**they're [5]** 3445/17  
3445/17 3446/9 3452/24  
3490/16  
**things [3]** 3437/20  
3450/14 3460/21  
**think [1]** 3479/4  
**thinks [1]** 3479/3  
**third [7]** 3432/20 3438/25  
3444/19 3467/23 3474/24  
3476/2 3483/3  
**third-party [1]** 3474/24  
**this [133]**

**T**

**Thomas [2]** 3432/8  
3432/9  
**those [24]** 3436/2  
3444/13 3448/3 3452/16  
3452/17 3452/22 3452/23  
3454/24 3469/22 3472/13  
3473/24 3474/20 3477/18  
3479/5 3479/7 3480/13  
3485/14 3485/19 3487/11  
3487/12 3487/22 3488/5  
3489/15 3489/18  
**though [2]** 3458/6 3487/6  
**thousand [1]** 3474/8  
**thousands [7]** 3437/9  
3447/2 3448/8 3462/5  
3467/6 3468/7 3491/1  
**threat [3]** 3435/6 3463/12  
3490/8  
**threatens [1]** 3462/21  
**three [9]** 3438/21 3449/5  
3449/22 3453/12 3466/12  
3473/16 3476/20 3476/22  
3486/25  
**through [18]** 3436/12  
3446/13 3448/20 3452/22  
3454/10 3454/17 3457/8  
3457/23 3463/11 3464/16  
3466/15 3470/2 3474/9  
3474/24 3479/22 3486/15  
3486/25 3488/17  
**throughout [18]** 3435/17  
3437/22 3439/17 3442/1  
3444/8 3445/15 3451/16  
3452/7 3455/15 3456/21  
3457/11 3457/19 3460/7  
3462/14 3463/14 3463/21  
3464/8 3468/10  
**thrown [1]** 3436/2  
**Thus [2]** 3484/16 3485/6  
**Tim [1]** 3429/5  
**time [4]** 3452/5 3452/7  
3491/11 3491/13  
**timely [2]** 3453/18 3454/3

**tiny [1]** 3477/18  
**today [13]** 3434/19  
3437/10 3462/11 3462/15  
3463/3 3471/19 3474/9  
3474/18 3478/8 3480/7  
3481/21 3484/18 3487/11  
**Todd [1]** 3459/1  
**together [2]** 3446/7  
3477/22  
**told [4]** 3463/6 3472/11  
3473/16 3489/13  
**tomorrow [1]** 3437/11  
**Tony [1]** 3456/14  
**too [7]** 3442/25 3443/21  
3455/20 3458/14 3464/25  
3466/11 3485/9  
**tool [2]** 3448/19 3462/19  
**tools [2]** 3447/3 3475/16  
**top [2]** 3435/16 3482/23  
**Topco [1]** 3474/9  
**Topps [2]** 3487/17  
3487/19  
**total [2]** 3468/3 3472/21  
**town [1]** 3450/11  
**trade [7]** 3427/3 3428/2  
3428/5 3428/13 3434/6  
3449/20 3492/3  
**traditional [2]** 3445/9  
3457/18  
**transaction [6]** 3436/18  
3454/17 3464/11 3480/2  
3482/5 3490/22  
**transactions [3]** 3475/2  
3490/8 3490/11  
**transcript [3]** 3433/4  
3492/10 3492/12  
**transferable [1]** 3464/3  
**transferred [1]** 3482/4  
**transferring [1]** 3475/14  
**transition [3]** 3483/11  
3491/1 3491/14  
**treasure [2]** 3442/20  
3443/10  
**Tree [1]** 3445/22

**trial [2]** 3460/1 3490/19  
**tried [1]** 3490/14  
**tries [1]** 3443/10  
**trip [1]** 3443/2  
**Trisha [1]** 3428/11  
**true [7]** 3438/23 3452/21  
3453/10 3456/21 3467/13  
3486/6 3492/10  
**Trust [3]** 3478/20  
3478/20 3478/20  
**trusted [1]** 3489/10  
**try [5]** 3446/4 3450/15  
3457/10 3464/15 3481/8  
**trying [1]** 3461/1  
**TSA [1]** 3477/23  
**Tucson [1]** 3428/17  
**turn [5]** 3439/22 3440/12  
3449/6 3459/22 3468/11  
**turning [13]** 3437/5  
3437/12 3437/19 3443/12  
3444/1 3444/6 3444/24  
3445/12 3445/24 3454/18  
3459/20 3461/13 3463/20  
**twenty [1]** 3473/12  
**two [26]** 3436/9 3437/6  
3438/9 3438/19 3439/25  
3444/1 3444/3 3444/3  
3446/15 3447/8 3453/12  
3454/14 3455/18 3455/24  
3456/16 3459/2 3459/15  
3462/11 3463/10 3463/24  
3466/13 3467/21 3473/14  
3473/15 3485/13 3490/20  
**Tyler [1]** 3432/7  
**type [6]** 3439/16 3442/7  
3445/18 3446/8 3447/25  
3453/3  
**types [3]** 3439/19  
3444/14 3461/19  
**typically [1]** 3442/23  
**Tyree [1]** 3428/12

**U**

**unable [1]** 3484/6

**U**

**unavailing [1]** 3451/24  
**under [19]** 3435/24  
 3436/19 3436/25 3437/1  
 3440/8 3446/25 3447/3  
 3448/14 3464/10 3465/1  
 3465/6 3465/11 3466/13  
 3468/16 3468/23 3471/3  
 3478/7 3483/7 3484/14  
**underestimating [1]**  
 3482/25  
**undermine [1]** 3471/20  
**undermined [1]** 3477/13  
**underripe [1]** 3453/5  
**understand [1]** 3442/22  
**understandable [1]**  
 3440/7  
**understandably [1]**  
 3442/23  
**unfounded [1]** 3440/11  
**unhindered [1]** 3490/24  
**union [26]** 3437/13  
 3462/12 3462/16 3462/20  
 3463/8 3463/18 3463/20  
 3463/21 3463/23 3463/24  
 3463/25 3464/2 3464/4  
 3464/14 3464/16 3464/22  
 3475/7 3475/10 3477/19  
 3482/23 3487/18 3488/4  
 3488/12 3488/13 3488/18  
 3489/9  
**union's [1]** 3437/15  
**unionized [1]** 3482/9  
**unions [8]** 3462/15  
 3462/16 3462/19 3463/3  
 3463/7 3463/14 3465/4  
 3488/17  
**unique [9]** 3439/12  
 3440/18 3440/21 3442/16  
 3443/13 3446/8 3446/9  
 3463/25 3464/3  
**UNITED [7]** 3427/1  
 3427/17 3432/20 3438/15  
 3466/25 3471/7 3474/4

**Unkelbach [2]** 3442/20  
 3443/20  
**unknown [1]** 3474/13  
**unlawful [2]** 3479/14  
 3480/10  
**unless [1]** 3478/2  
**Unlike [1]** 3489/18  
**unprofitable [1]** 3470/13  
**unremedied [2]** 3471/23  
 3480/4  
**unsupported [1]** 3467/25  
**until [3]** 3478/2 3487/1  
 3490/18  
**up [13]** 3437/20 3443/2  
 3449/21 3460/10 3460/21  
 3470/12 3470/21 3472/18  
 3474/11 3477/18 3479/20  
 3479/24 3481/12  
**update [1]** 3434/13  
**us [1]** 3473/19  
**use [6]** 3440/13 3443/6  
 3448/19 3462/19 3463/5  
 3463/7  
**used [4]** 3462/24 3474/9  
 3475/11 3477/20  
**users [1]** 3475/10  
**uses [1]** 3457/6  
**using [4]** 3445/22  
 3458/12 3483/1 3484/2

**V**

**Vacura [1]** 3429/3  
**validity [1]** 3453/8  
**valuable [2]** 3477/1  
 3482/3  
**value [2]** 3451/7 3484/22  
**Van [2]** 3442/14 3442/17  
**various [3]** 3443/14  
 3451/12 3461/21  
**vast [1]** 3467/24  
**vendor [2]** 3476/19  
 3477/2  
**vendors [1]** 3477/23  
**Venkat [1]** 3428/15

**verify [1]** 3466/1  
**very [4]** 3435/16 3444/20  
 3462/24 3474/21  
**vice [2]** 3432/14 3487/24  
**view [4]** 3445/19 3464/20  
 3464/21 3468/5  
**Vine [1]** 3430/25  
**violate [1]** 3452/19  
**violating [1]** 3490/17  
**violation [1]** 3464/13  
**visit [1]** 3441/3  
**voices [1]** 3489/22  
**volume [1]** 3453/7  
**volumes [1]** 3475/24  
**vulnerable [1]** 3489/25

**W**

**wage [1]** 3464/23  
**wages [1]** 3490/1  
**walked [1]** 3454/10  
**wall [1]** 3486/24  
**Walmart [21]** 3444/12  
 3445/5 3451/21 3452/2  
 3452/11 3452/13 3453/7  
 3453/9 3453/13 3453/15  
 3453/17 3454/2 3457/5  
 3459/7 3459/21 3460/2  
 3460/5 3460/10 3460/25  
 3461/2 3472/15  
**Walmart's [1]** 3442/2  
**want [12]** 3436/1 3437/19  
 3438/8 3446/16 3449/6  
 3449/19 3449/24 3453/4  
 3453/5 3460/12 3470/1  
 3489/15  
**wanted [1]** 3473/5  
**wants [1]** 3470/10  
**warehouse [1]** 3443/17  
**was [26]** 3436/13 3447/2  
 3448/1 3448/22 3450/1  
 3451/13 3452/5 3458/6  
 3458/7 3458/19 3459/25  
 3460/1 3460/20 3460/21  
 3464/11 3464/23 3464/24

**W**

**was... [9]** 3470/2 3470/4  
3470/5 3470/6 3470/15  
3471/12 3471/14 3477/25  
3489/16

**Washington [9]** 3428/6  
3428/14 3430/12 3430/20  
3432/10 3432/13 3432/17  
3473/14 3473/21

**wasn't [1]** 3458/6

**way [7]** 3437/3 3447/14  
3448/5 3451/22 3479/4  
3485/15 3489/1

**ways [2]** 3437/6 3447/8

**we [29]** 3434/4 3434/14  
3434/16 3434/17 3435/20  
3437/4 3437/5 3437/6  
3437/9 3437/12 3440/16  
3448/25 3448/25 3459/22  
3465/2 3468/21 3469/14  
3470/10 3470/24 3471/2  
3472/11 3473/5 3477/5  
3479/15 3479/25 3484/1  
3486/4 3487/16 3491/14

**we'll [1]** 3434/12

**We're [1]** 3483/25

**weak [2]** 3473/15  
3473/17

**week [2]** 3442/10 3453/5

**weekly [3]** 3442/23  
3446/6 3449/21

**weeks [1]** 3490/20

**Weil [4]** 3430/4 3430/7  
3430/19 3430/21

**well [13]** 3438/14 3439/7  
3440/9 3448/3 3449/3  
3456/9 3461/11 3465/16  
3466/24 3479/19 3480/22  
3481/7 3483/8

**well-established [1]**  
3465/16

**well-stocked [1]** 3461/11

**went [1]** 3438/15

**were [9]** 3438/19 3447/13

3448/21 3453/10 3453/11  
3461/2 3463/9 3463/11  
3464/11

**West [1]** 3430/14

**what [28]** 3434/17 3436/4  
3440/20 3441/21 3442/5  
3442/7 3443/10 3443/10  
3448/1 3449/17 3450/20  
3451/10 3454/18 3455/6  
3461/21 3465/4 3465/4  
3467/18 3470/10 3470/11  
3473/8 3473/9 3474/2  
3475/3 3484/10 3484/10  
3486/20 3489/2

**what's [4]** 3436/4 3455/2  
3464/6 3465/18

**Wheatley [1]** 3430/23

**when [15]** 3435/21  
3435/22 3445/6 3445/9  
3448/19 3449/2 3452/4  
3457/21 3460/25 3461/1  
3462/20 3463/1 3466/3  
3474/19 3478/22

**where [19]** 3436/2 3436/6  
3436/8 3443/8 3447/10  
3447/19 3448/22 3453/4  
3453/12 3454/5 3455/19  
3456/16 3457/7 3460/16  
3463/9 3473/14 3480/25  
3486/6 3489/8

**whether [14]** 3440/14  
3446/23 3447/23 3449/16  
3449/19 3453/4 3465/1  
3470/22 3478/6 3478/13  
3478/17 3479/8 3479/19  
3489/20

**which [32]** 3437/17  
3439/9 3439/15 3445/21  
3446/5 3448/14 3449/20  
3458/12 3459/18 3461/9  
3462/3 3463/10 3463/22  
3464/18 3466/13 3466/25  
3467/7 3470/19 3470/20  
3472/25 3473/18 3475/24

3476/20 3479/13 3479/18  
3480/9 3483/17 3484/8  
3485/17 3486/7 3487/14  
3490/12

**whichever [1]** 3448/5

**while [12]** 3440/6  
3441/11 3441/13 3441/18  
3442/11 3443/17 3444/12  
3454/1 3456/18 3461/20  
3483/5 3489/22

**whipsaw [4]** 3462/19  
3462/19 3463/7 3488/17

**who [10]** 3464/20  
3464/21 3467/3 3469/15  
3478/4 3482/16 3482/16  
3482/19 3488/13 3489/22

**who's [1]** 3445/5

**Whole [5]** 3448/25  
3449/11 3450/9 3452/4  
3452/14

**Whole Foods [1]** 3450/9

**wholesale [12]** 3432/16  
3469/24 3472/18 3472/20  
3472/22 3485/20 3485/25  
3486/2 3486/9 3486/14  
3487/22 3488/8

**whom [1]** 3483/23

**whose [1]** 3469/3  
**why [8]** 3444/5 3446/16  
3463/10 3463/23 3466/5  
3467/7 3473/3 3474/22

**Wiggly [2]** 3475/9  
3488/10

**will [66]** 3434/9 3434/10  
3436/12 3437/7 3437/11  
3437/13 3437/15 3442/7  
3442/11 3453/18 3454/3  
3454/6 3454/6 3454/17  
3460/23 3460/24 3461/9  
3463/5 3463/10 3464/7  
3465/2 3465/5 3465/6  
3466/19 3466/20 3467/20  
3469/5 3469/15 3469/21  
3471/5 3472/3 3472/6

## W

**will... [34]** 3474/10  
3474/14 3475/20 3475/23  
3475/25 3476/4 3476/14  
3476/19 3476/20 3477/20  
3477/22 3478/6 3478/8  
3478/13 3479/4 3480/25  
3481/2 3481/3 3481/4  
3481/5 3482/12 3482/15  
3482/17 3483/6 3483/10  
3483/19 3484/2 3484/16  
3486/21 3488/7 3488/11  
3489/14 3490/10 3490/18  
**Williams [1]** 3432/9  
**willing [3]** 3446/5  
3447/13 3473/12  
**win [2]** 3430/17 3489/6  
**Winn [2]** 3470/6 3489/4  
**Winn's [1]** 3473/5  
**winning [1]** 3458/21  
**withdraw [1]** 3485/4  
**within [2]** 3434/18  
3439/1  
**without [12]** 3458/1  
3466/6 3470/7 3470/9  
3479/11 3480/23 3484/3  
3485/1 3485/10 3488/6  
3490/3 3492/12  
**witness [6]** 3435/10  
3435/10 3440/24 3440/24  
3464/17 3484/7  
**witnesses [16]** 3442/1  
3443/13 3443/16 3444/15  
3444/25 3445/3 3445/5  
3445/8 3445/15 3452/25  
3460/7 3463/20 3463/25  
3466/16 3478/4 3489/2  
**Wolf [1]** 3430/9  
**won't [4]** 3474/5 3475/22  
3476/25 3487/8  
**words [6]** 3440/17  
3449/9 3449/15 3451/2  
3457/1 3459/4  
**workers [9]** 3437/13

3462/13 3462/17 3463/4  
3464/14 3464/21 3465/7  
3482/8 3489/9  
**working [2]** 3477/19  
3483/25  
**works [1]** 3442/8  
**worst [2]** 3473/19 3483/2  
**worst-case [1]** 3483/2  
**worthwhile [1]** 3469/21  
**would [27]** 3434/17  
3450/3 3453/11 3457/14  
3458/15 3458/16 3458/23  
3458/25 3463/7 3463/12  
3463/13 3465/1 3466/3  
3466/4 3469/11 3469/19  
3469/19 3471/9 3478/22  
3479/21 3479/22 3480/16  
3480/22 3484/4 3485/15  
3489/10 3489/11  
**wouldn't [1]** 3447/12  
**wrong [2]** 3438/11  
3479/6  
**wrote [2]** 3459/3 3483/13

## Y

**year [7]** 3473/1 3475/19  
3476/9 3476/21 3486/24  
3487/1 3488/10  
**years [6]** 3476/8 3476/20  
3476/22 3477/23 3486/23  
3486/25  
**Yeater [1]** 3467/24  
**Yes [2]** 3434/15 3435/1  
**yet [4]** 3457/11 3469/2  
3473/17 3475/4  
**York [3]** 3430/8 3430/15  
3432/17  
**you [29]** 3434/10 3434/21  
3435/1 3436/17 3439/10  
3447/18 3448/5 3449/7  
3449/8 3449/12 3449/17  
3449/18 3449/18 3449/19  
3449/24 3453/3 3453/4  
3453/4 3453/5 3457/14

3468/2 3468/21 3469/2  
3472/11 3473/7 3479/23  
3484/20 3490/10 3491/14  
**you're [1]** 3460/8  
**your [13]** 3434/10  
3434/11 3434/18 3434/21  
3434/23 3436/1 3437/4  
3449/24 3452/25 3459/11  
3462/23 3468/13 3491/14  
**Your Honor [7]** 3434/18  
3434/21 3434/23 3436/1  
3437/4 3452/25 3468/13

## Z

**Zinder [4]** 3463/10  
3463/24 3464/2 3482/12  
**zone [1]** 3469/9