

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
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MEETING

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IN THE MATTER OF: :
 :
Smucker Farms of Lancaster :
County, LLC t/a Smucker Farms : Fact-
of Lancaster County : Finding
2118 14th Street, N.W. : Hearing
Retailer B :
License No. 90945 :
 :
(New Application) :
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May 29, 2013

The Alcoholic Beverage Control Board met in the Alcoholic Beverage Control Hearing Room, Reeves Building, 2000 14th Street, N.W., Suite 400S, Washington, D.C. 20009, Chairperson Ruthanne Miller, presiding.

- PRESENT:
RUTHANNE MILLER, Chairperson
NICK ALBERTI, Member
DONALD BROOKS, Member
HERMAN JONES, Member

MIKE SILVERSTEIN, Member

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

(3:15 p.m.)

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2
3 CHAIRPERSON MILLER: Okay. We are
4 having a continuation of a Fact-Finding
5 Hearing for Smucker Farms of Lancaster County
6 located at 2118 14th Street, N.W., License No.
7 90945.

8 This is related to the new
9 regulation dealing with the definition of what
10 is a full-service grocery store and that
11 regulation set forth specific tests to be met.
12 And Mr. Smucker has submitted drawings and
13 measurements and documentation to show that it
14 meets the test.

15 However, there has been some
16 discrepancy between the way the Board has read
17 the drawings and come to some different
18 conclusions. And so, therefore, at this
19 point, it was determined that it would be most
20 efficient if Board Members and Mr. Smucker
21 could have a dialogue together with the plans
22 in front of us and see if this can be resolved

1 in one way or another, either Mr. Smucker
2 might show that he actually does meet the test
3 or the Board might show why he doesn't.

4 And if that is the case, there
5 would still be an opportunity for Mr. Smucker
6 to make certain changes to meet the test. So
7 this is a new test, so this is a new
8 experience.

9 So okay. I'm going to let -- Mr.
10 Smucker, why don't you identify yourself for
11 the record?

12 MR. SMUCKER: Yes. Eric Smucker,
13 owner of Smucker Farms of Lancaster County.

14 CHAIRPERSON MILLER: Okay.

15 MR. SMUCKER: Applicant and
16 license number I'm not sure of.

17 CHAIRPERSON MILLER: That's fine.
18 That's fine. And then I'm going to,
19 basically, let Mr. Jones have an exchange with
20 you. He is the one that has primarily, but
21 not the only one, been evaluating the numbers.
22 And so I'm going to let you two talk about how

1 you meet or don't meet it and other Board
2 Members actually who have, you know, also done
3 analyses can also raise questions or comments
4 afterwards.

5 So I'm going to let Mr. Jones then
6 go.

7 MEMBER JONES: Thank you, Madam
8 Chair. Did you want to --

9 CHAIRPERSON MILLER: Did you want
10 to say something?

11 MEMBER ALBERTI: No.

12 CHAIRPERSON MILLER: Okay.

13 MEMBER JONES: Thank you, Madam
14 Chair.

15 First, I want to say thank you. I
16 appreciate you being here today. Also I
17 appreciate your willingness to continue to
18 work with us through this dialogue, through
19 this process.

20 The last version we wanted to get
21 clarification on the measurements as they were
22 presented in the last set of drawings. We did

1 receive that document and that's the last
2 document that we have that we are using as a
3 basis for the discussion today.

4 I just want to make sure that we
5 are all on the same page, at least as terms of
6 the baseline reference document.

7 Unfortunately, the document
8 doesn't have like a revision number or a date
9 on it, but the last document we have has all
10 of the measurements for the wall segments as
11 was requested, I believe, through the director
12 and was provided. Is that a copy of the same
13 document that you have in front of you?

14 MR. SMUCKER: That is and all --

15 MEMBER JONES: Okay.

16 MR. SMUCKER: -- of the displays
17 you wanted, all of those measured as well.

18 MEMBER JONES: Perfect. Okay.

19 MR. SMUCKER: And these are
20 interior wall sets.

21 MEMBER JONES: Thank you. All
22 right. So I just wanted to confirm that we

1 had the same document.

2 So, based on that, we reviewed the
3 information, used those measurements, used
4 those measurements for the walls that were
5 given in that document.

6 At a first blush, we agree that
7 the overall store area is 1606. We came to
8 that same number, but where the discrepancy
9 starts is with the total non-selling area.

10 MR. SMUCKER: Yes.

11 MEMBER JONES: And based on our
12 calculations, we determined that the total
13 non-selling area is 506 square feet, which is
14 a far cry from the number that was stated on
15 the actual document itself. And we wanted to
16 give you an opportunity to help us understand
17 how we can potentially reconcile that
18 discrepancy in that sense.

19 So I will tell you how we made the
20 determination of 506 and you can tell us where
21 we deviate in our logic, in our process.

22 So if you look at your diagram,

1 start to the far right or what I would call
2 the back of the store.

3 MR. SMUCKER: Yes.

4 MEMBER JONES: There is an area
5 that is defined as non-selling area storage.
6 There is an area directly adjacent to that
7 that is defined as non-selling area storage.
8 There is an area that is defined as bathroom.

9 MR. SMUCKER: Yes.

10 MEMBER JONES: There is an area
11 that is assigned as work room or defined as
12 work room. And there is an area that is
13 defined as utility.

14 MR. SMUCKER: Correct.

15 MEMBER JONES: Those were the five
16 major segments that we used to determine what
17 your total non-selling area was and/or is or
18 planned to be.

19 MR. SMUCKER: That --

20 MEMBER JONES: Did you include
21 anything else besides those areas?

22 MR. SMUCKER: Yes, we did.

1 MEMBER JONES: Okay.

2 MR. SMUCKER: We included the area
3 directly in front of the bathroom, because all
4 of those areas are more than 3 feet away from
5 any shelf or display/storage area. And
6 according to the regulations, as we
7 interpreted them and as we were told to
8 measure them, anything beyond 3 feet away from
9 any display area cannot be counted as a
10 selling area. So we counted that as part of
11 our non-selling area.

12 The space -- if you go to the
13 left, you will notice that those areas aren't
14 hatched.

15 MEMBER JONES: Yes.

16 MR. SMUCKER: Okay. So all of the
17 places that aren't hatched are non-selling
18 areas and that would include this little
19 cutout right here from the second non-storage
20 selling area. You are adding on about, you
21 know, another 4 square feet there. And then
22 if you keep coming to the left, you will see

1 that before you get to the two big display
2 cases, because we were more than 3 feet, we
3 have a bit of an open area there.

4 We couldn't count that as a
5 selling area. It is not a non-food selling
6 area nor is it a food selling area, so it's a
7 non-selling area. And that would include --
8 you know, and then if you keep going to the
9 left on the bottom behind the produce and the
10 meat case, there is a 1 by 14 plus 17 --

11 MEMBER JONES: A venting area?

12 MR. SMUCKER: Yes, that would be--

13 MEMBER JONES: My A, B and E?

14 MR. SMUCKER: Right.

15 MEMBER JONES: Okay.

16 MR. SMUCKER: And so that is about
17 14, 17, 19 square feet there as well. And
18 then if you look at the entrance, none of that
19 area that is actually hatched there is what we
20 are calling a non-selling area, because it is
21 further than 3 feet away from either the
22 counter, the front display. I mean, you know,

1 that's where, you know, we have people queuing
2 up or they walk in, they walk out.

3 According to our interpretation of
4 the regulations, that's not a selling area.
5 Where if it is 3 feet more from any display
6 case, so we did not count that as a selling
7 area, thus it is included in our 669 square
8 feet.

9 MEMBER JONES: Got it. Okay.

10 MR. SMUCKER: The 669 square feet
11 was taken from CAD. You simply select those
12 different areas and CAD tells you -- the
13 Computer Aided Design Program tells you that
14 is -- I think it was, 669.2 feet. So 669
15 feet.

16 MEMBER JONES: Okay. So for the
17 explanation, I think it points to an area of
18 incongruence in terms of the matter of the
19 interpretation of the word or the words or the
20 wording in the reg.

21 So there is two tests. There is
22 Test 1, which is 50 percent or 6,000. So you

1 clearly pass based on the calculation of
2 selling area for food versus not.

3 MR. SMUCKER: Right.

4 MEMBER JONES: Right. The area
5 where the miscommunication or discrepancy,
6 I'll call it, in terms of interpretation is
7 the more than 3 feet away. That was a measure
8 to be used in Test 2 in order to calculate
9 your 5 percent measure of your selling area
10 for that particular food category item.

11 MR. SMUCKER: Okay. Then there is
12 two different numbers you have to divide by to
13 get to the percentages. So you either have --
14 which is fine, but the way that we did it is
15 we calculated the selling area as -- you know,
16 everything that we calculated here, everything
17 that is drawn out is no more than 3 feet away
18 from that to it being included in Test 2.

19 Is that understood?

20 MEMBER JONES: Say that one more
21 time.

22 MR. SMUCKER: So this diagram --

1 MEMBER JONES: Yes.

2 MR. SMUCKER: -- doesn't show
3 anything that would be counted -- that
4 wouldn't be counted under Test 2.

5 MEMBER JONES: The diagram doesn't
6 show anything that would not be counted under
7 Test 2?

8 MR. SMUCKER: Correct. So when we
9 have these spaces cut out like in the front
10 area --

11 MEMBER JONES: Oh, I got it. So
12 it's just a matter of how you and -- so this
13 is the interpretation, right? So you are
14 saying your selling area --

15 MR. SMUCKER: Right.

16 MEMBER JONES: -- as you defined
17 it --

18 MR. SMUCKER: Correct.

19 MEMBER JONES: -- will not include
20 those areas that are more than 3 feet away
21 from any display case?

22 MR. SMUCKER: Right, in Test 1 or

1 Test 2. I didn't use --

2 MEMBER JONES: And that's where we
3 would challenge your interpretation of the reg
4 from that standpoint or the language in the
5 reg from that standpoint.

6 MR. SMUCKER: So under Test 2 am I
7 supposed to include the areas that are more
8 than 3 feet away from the display case?

9 MEMBER JONES: Under Test 2, you
10 include the areas that are half of the aisle
11 up to 3 feet for those areas that are
12 dedicated to that particular food item or food
13 category.

14 MR. SMUCKER: Absolutely and
15 that's what we did.

16 MEMBER JONES: Right. For -- yes?
17 Yes, you --

18 MEMBER SILVERSTEIN: And we were
19 assuming, Mr. Smucker, that you could use the
20 venting area behind as part of the display
21 itself, because the display can't exist
22 without the venting area. And you can count

1 that as selling area.

2 MR. SMUCKER: Oh, so you mean the
3 19 or whatever it is times 1 feet? Okay. I
4 mean, if you count that in, then it just adds
5 to our overall percentages of what --

6 MEMBER SILVERSTEIN: That will
7 make you closer to what you need to be on the
8 other.

9 MR. SMUCKER: Well, I mean,
10 according to the rules of it being no more
11 than 3 feet, we thought that was, you know,
12 what is open to the public. And it's only
13 that one -- that area behind there isn't open
14 to the public, because a lot of people kept
15 asking me is that open to the public.

16 MEMBER JONES: Correct.

17 MR. SMUCKER: And what is not, I
18 was told by the Director that I don't count
19 that.

20 MEMBER JONES: Correct. So the
21 food selling area as it is defined --

22 MR. SMUCKER: Correct.

1 MEMBER JONES: -- is the area --
2 excuse me. The selling area --

3 MR. SMUCKER: Okay.

4 MEMBER JONES: -- as it is defined
5 is the area in which you are selling product
6 that is accessible to the public that does not
7 include prep areas, storage areas or
8 bathrooms.

9 MR. SMUCKER: Okay.

10 MEMBER JONES: Is that a fair
11 interpretation based on how you read the
12 language that was written in the reg?

13 MR. SMUCKER: I suppose so for
14 Test 1.

15 MEMBER JONES: Correct. Okay.

16 MR. SMUCKER: And --

17 MEMBER JONES: So --

18 MR. SMUCKER: -- but I mean, when
19 we are then looking on the same plan for
20 meeting Test 2, a lot of those selling areas
21 are excluded. So what is our divider? What
22 is our --

1 MEMBER JONES: So the denominator
2 is what you defined as your food selling area
3 from your Test 1?

4 MR. SMUCKER: Okay. So doesn't
5 that -- so then you are going to have certain
6 areas be excluded under Test 2, but you are
7 going to be using the same overall square
8 footage number that you used in Test 1.

9 MEMBER ALBERTI: They are not
10 excluded.

11 MR. SMUCKER: Right.

12 MEMBER ALBERTI: They are not
13 excluded. In Test 2 you have a numerator and
14 you have a denominator, right?

15 MR. SMUCKER: Yes.

16 MEMBER ALBERTI: The numerator is
17 the amount of area that is dedicated to a
18 particular product, right?

19 MR. SMUCKER: Under Test 2,
20 correct.

21 MEMBER ALBERTI: Under Test 2.
22 The way to look at it is that you can only

1 include certain areas in that numerator. You
2 are not -- the denominator doesn't exclude
3 anything. The denominator is always your
4 total selling area.

5 An the numerator is just you are
6 picking up pieces to include. So it's not
7 really this excluding concept on Test 2. The
8 numerator is just what can I include in that
9 numerator? And you can include up to 3 feet
10 from -- well, half an aisle or up to 3 feet
11 from a display case.

12 MEMBER JONES: So it's what are
13 you dedicating for that particular food
14 category --

15 MR. SMUCKER: Right.

16 MEMBER JONES: -- is what is being
17 included in the numerator. So that space that
18 is beyond the 3 feet, you can use that for
19 other non-items if you so choose. We are not
20 mandating that you can or can't use that
21 space. There is not an issue with that.

22 We are saying you can't include

1 anything beyond 3 feet as being dedicated
2 towards that food category. But beyond that
3 3 feet, at 4 feet, you can have the display
4 case selling car batteries, if you so choose,
5 but that wouldn't count towards your food
6 category number, but it's in your selling
7 area.

8 In your drawing, you have a space
9 called H.

10 MR. SMUCKER: Yes.

11 MEMBER JONES: H. I don't know
12 what that is, but I'm assuming it's not one
13 and I don't care. It's not one of the food
14 categories --

15 MR. SMUCKER: Correct.

16 MEMBER JONES: -- that counts
17 towards the definition, right? But H is
18 included in your selling area.

19 MR. SMUCKER: It's included in my
20 non-food selling area.

21 MEMBER JONES: Correct. But --

22 MR. SMUCKER: Right.

1 MEMBER JONES: -- but's included
2 in your non-food selling area. It's included
3 in your food selling area -- I mean, your food
4 -- your selling area, correct? Your overall
5 defined selling area?

6 MR. SMUCKER: So then I was
7 misled, because I was told that the product
8 categories need to be a percentage of the food
9 selling area.

10 MEMBER JONES: And that's still
11 correct.

12 MEMBER ALBERTI: Right.

13 MR. SMUCKER: But the -- but so as
14 this 657 square feet that we have asked -- we
15 have asked CAD. We have said CAD, give us
16 everything that is within 3 feet of this and
17 then if it meets -- if it abuts another one,
18 we divide the difference.

19 We said CAD what is the square
20 feet of that for all these different
21 evaluations? It shoots out 657 square feet.

22 MEMBER JONES: And it shoots out

1 based on the fact that you have defined those
2 blocks that you have interpreted to be non-
3 food selling areas. Those squares. So, for
4 example, in front of your front door --

5 MR. SMUCKER: Those are actually
6 non-selling areas. It's not even that they
7 are non-food selling areas. They are not --

8 MEMBER JONES: So you --

9 MR. SMUCKER: -- selling areas.

10 MEMBER JONES: -- have taken --
11 you are not selling anything in those areas
12 that are accessible to the public where you
13 are selling products, but all around it?

14 MR. SMUCKER: Yes, because
15 according to our interpretation and the
16 numerous times that I have asked, it was
17 further than 3 feet from any display.

18 MEMBER JONES: For -- and I think
19 where the discrepancy comes in is there is a
20 Test 2 and there is a Test 1.

21 In Test 2 what you can count
22 towards that particular product category, that

1 communication is correct.

2 If you took that and extrapolated
3 that to mean this is my different definition
4 of what a selling area for food is, selling
5 area for my overall space is, that's where it
6 wasn't effectively communicated that it wasn't
7 to be used for the Test 2 test or the Test 1
8 test, excuse me.

9 So it is -- so look at it from
10 this perspective. Well, let me back up. So
11 from our perspective, we made the
12 determination that your food selling area was
13 791 square feet, based on the areas where you
14 are selling food products that is accessible
15 to the public, which would include those
16 alcohol in those squares that you have
17 identified, those blocks in the middle of your
18 selling area that are surrounded by, I
19 understand are being sold to the public, that
20 are accessible to the public within an area
21 that is accessible to the public that is not
22 one of the discretely defined non-inclusive

1 areas of bathroom, storage or utility, none of
2 those areas nor prep area.

3 MEMBER ALBERTI: Yes, it's
4 essentially everything to the left. Well,
5 from the bathroom to the front of the store or
6 from the rear of the bathroom to the front of
7 the store, it is essentially that entire area
8 with the exception of some small H that you
9 have in there, but ignoring that small H, that
10 whole area from the back wall of the bathroom
11 to the front of the store is what we consider
12 the selling area, because it is area where
13 product is placed and where customers will
14 pass through to get to the products.

15 MR. SMUCKER: Okay. That's fine.
16 And then so the total area that you are
17 dividing by is what number?

18 MEMBER JONES: 791.

19 MR. SMUCKER: 791. So you added
20 in this, these three areas?

21 MEMBER JONES: Those areas --

22 MEMBER ALBERTI: So I think you

1 probably excluded the check-out counter, I'm
2 guessing also.

3 MR. SMUCKER: No.

4 MEMBER JONES: No.

5 MEMBER ALBERTI: No?

6 MR. SMUCKER: No, we did not.

7 MEMBER JONES: So essentially, to
8 walk backwards or walk through it so that I
9 can try being succinct and clear as I can,
10 looking at your diagram, as Board Member
11 Alberti pointed out, from the back wall of
12 your bathroom as back wall is defined as the
13 back of your store, so the right side of the
14 bathroom --

15 MR. SMUCKER: Yes.

16 MEMBER JONES: -- draw a vertical
17 line all the way up to the top, which would be
18 the left of your store if you are facing the
19 store --

20 MR. SMUCKER: Yes.

21 MEMBER JONES: -- and draw -- and
22 then go from there all the way to the front of

1 your store, that area minus the utility, work
2 room, bathroom square footage and the area
3 associated with the display case for H as well
4 as the access surrounding floor space area for
5 H.

6 MR. SMUCKER: Well, but H is
7 included in the selling area.

8 CHAIRPERSON MILLER: Yes.

9 MEMBER JONES: It is, but it's not
10 included in your food selling area.

11 MEMBER ALBERTI: Right.

12 MR. SMUCKER: Right. But I mean,
13 but you are saying the divider is --

14 MEMBER ALBERTI: Okay. On the
15 right, Mr. Jones, why don't you give him --

16 MEMBER JONES: Sure.

17 MEMBER ALBERTI: -- the -- what we
18 came up with for the total selling area and
19 what we came up with the total food selling
20 area.

21 MEMBER JONES: No problem.

22 MEMBER ALBERTI: And then the

1 total non-food selling area, just those three
2 numbers. Why don't you give him those
3 numbers?

4 MEMBER JONES: Total selling area
5 is 1,100 square feet. That's 1606 minus the
6 total non-food -- or non-selling area of 506.

7 MR. SMUCKER: That's right.

8 MEMBER JONES: Subtract 506 from
9 1606, it's 1,100. The food selling area was
10 calculated to be 791, leaving your non-food
11 selling area as 309.

12 MR. SMUCKER: But then when you
13 are going through and you are dividing, you
14 can't include anything that is more than 3
15 feet away.

16 MEMBER ALBERTI: That's correct.

17 MR. SMUCKER: I mean, these tests
18 and the way that they are interpreted, you are
19 using a smaller portion of a certain category
20 in a larger area.

21 MEMBER ALBERTI: Yes. I mean, we
22 recognize that if you --

1 MR. SMUCKER: And that's --

2 MEMBER ALBERTI: -- add up all of
3 the -- if you add up the square footage for
4 all of your food categories, all right, we
5 recognize that that may not equal the total
6 food selling area. We recognize that and
7 that's, I think, your point. The point you
8 just made.

9 MR. SMUCKER: Right. And that's--
10 I mean, you can see how we would be incredibly
11 confused by it.

12 MEMBER ALBERTI: I understand why
13 you are confused, but I think now that you
14 know that we recognize that, you can see that
15 that is -- I mean, well --

16 MR. SMUCKER: Yes.

17 MEMBER ALBERTI: -- you -- right.
18 But we haven't been changing the numbers. We
19 recognize that from the outset. I don't --
20 it's hard -- I think it is hard to understand.
21 I understand your confusion.

22 MR. SMUCKER: But nobody has told

1 me --

2 MEMBER ALBERTI: And we ask --

3 MR. SMUCKER: -- this. They keep
4 asking me for new dimensions. Nobody has told
5 me we are counting it as this.

6 MEMBER ALBERTI: I understand.

7 MR. SMUCKER: We're counting it as
8 that.

9 CHAIRPERSON MILLER: Yes.

10 MEMBER ALBERTI: And that's why we
11 have you here. That's why we have you here,
12 so we are not passing the message, you know,
13 along the line and it gets distorted.

14 MR. SMUCKER: I -- well, okay.
15 Whatever has been distorted or not distorted,
16 at no point has anyone ever told me that these
17 areas are being counted in this larger number.

18 MEMBER ALBERTI: I understand.

19 MR. SMUCKER: We have had numerous
20 opportunities for that to be passed along.
21 And now that we are here, when I calculated
22 out, okay, we have 38 square feet of non-

1 alcoholic beverages. Technically, that is 4.8
2 percent. You know, we could probably do
3 wiggle room here. You know, maybe we actually
4 have 80 percent of something if this were the
5 other way.

6 I mean, we have done everything in
7 good conscience.

8 MEMBER SILVERSTEIN: No doubt.

9 MR. SMUCKER: Everything.

10 MEMBER ALBERTI: And that's why we
11 are willing to work with you.

12 MR. SMUCKER: I don't think we
13 are --

14 MEMBER ALBERTI: But we can't --
15 but we have a regulation and we have to make
16 sure that everyone meets that regulation, but
17 we are willing to work with you and we
18 understand.

19 Would it be helpful if Mr. Jones
20 gave you the square footage that he came up
21 with for all of the categories?

22 MR. SMUCKER: Sure.

1 MEMBER ALBERTI: Would that be
2 helpful?

3 MR. SMUCKER: Absolutely.

4 MEMBER ALBERTI: As a benchmark.

5 MR. SMUCKER: Thank you.

6 MEMBER JONES: So --

7 MEMBER ALBERTI: So you know the
8 information that we are working off of.

9 MR. SMUCKER: But I mean, the last
10 time we had these measured, we were -- we had
11 -- when we were given the scaled drawings,
12 going over the math that was presented to me
13 previously, we had tables that were 8 x 4
14 being measured as 7 x 4.

15 MEMBER JONES: And that has been--

16 MEMBER ALBERTI: That has been
17 addressed.

18 MEMBER JONES: So the reason why
19 the Director came to you and asked you to
20 provide discretely the dimensions for each of
21 the display cases is because I was taking a
22 ruler to try to make a determination based on

1 a non-scale scale drawing to try and figure
2 out exactly what the size of those dimensions
3 were.

4 So the drawing is to scale, but
5 the printout that I received was at 100
6 percent. So if you can give me a ruler.

7 MR. SMUCKER: The -- I'm sorry,
8 but the drawings that we submitted were to
9 scale.

10 MEMBER JONES: But you are not
11 listening. So let me make sure I say this
12 clearly. I had a scale drawing. A scale
13 drawing is only good when you print it out at
14 100 percent or some multiple thereof in order
15 to take a ruler to then be able to trace that
16 out and be able to calculate and make that
17 determination.

18 CHAIRPERSON MILLER: Yes.

19 MR. SMUCKER: These are the
20 drawings that you had received from us?

21 MEMBER JONES: Yes.

22 MR. SMUCKER: Okay. The drawings

1 that you had received from us, I also had a
2 copy of those. When I measured the exact same
3 thing, it was 2 inches on some of those.

4 MEMBER JONES: And what size is
5 the drawing printed out? When you hit print--

6 MR. SMUCKER: I'm sorry, it was
7 the exact same printout.

8 MEMBER JONES: Okay. What I'm
9 communicating to you is I didn't have a
10 printout. I had a soft copy. And we had
11 printouts that weren't printed out at 100
12 percent.

13 MR. SMUCKER: Could we submit one?

14 MEMBER JONES: It was printed out
15 on 8.5 --

16 MEMBER ALBERTI: He had a reduced
17 copy.

18 MEMBER JONES: It's a reduced
19 size.

20 MEMBER ALBERTI: The reduced copy
21 to scale, you know, a quarter inch doesn't
22 equal -- when you reduce your drawing to

1 something like this, a quarter inch doesn't --

2 MR. SMUCKER: That's why --

3 MEMBER ALBERTI: -- equal what is
4 1 foot.

5 MR. SMUCKER: -- we submitted it
6 in hard copies to scale.

7 MEMBER ALBERTI: You submitted
8 this, right.

9 MR. SMUCKER: We submitted this.

10 MEMBER ALBERTI: I understand.

11 MR. SMUCKER: Three times.

12 MEMBER ALBERTI: Unfortunately,
13 Mr. Jones was not working off of this
14 previously. He is now. He is now and he is
15 working with your measurements. So that's why
16 we have updated measurements and I have asked
17 him to give them to you.

18 MR. SMUCKER: Okay.

19 MEMBER ALBERTI: Because now we
20 are all working off of the same measurements
21 and the same scale. He is just explaining to
22 you why we didn't have this before.

1 And look, I understand -- you
2 shake your head and you are right. We
3 probably should have.

4 MR. SMUCKER: I mean this -- I
5 mean, at least have somebody on -- like a
6 professional staff member that can do this.

7 MEMBER ALBERTI: I understand.

8 MR. SMUCKER: I'm not sure why you
9 guys are wasting your time.

10 MEMBER ALBERTI: All right. Okay.
11 Okay.

12 MEMBER JONES: So I'm glad you
13 pointed that out.

14 MEMBER ALBERTI: Move forward.

15 MEMBER JONES: Well, I'm not going
16 to say we are working to exactly what you
17 said, but I do agree with you that I shouldn't
18 be up at 3:00 in the morning with a slide rule
19 trying to guesstimate what your scale
20 measurements are on your drawing for something
21 that's so important.

22 MR. SMUCKER: Well, I'm really

1 sorry. I apologize.

2 MEMBER JONES: No, no, no.

3 MR. SMUCKER: I actually --

4 MEMBER JONES: No, I don't want an
5 apology.

6 MR. SMUCKER: -- wanted to
7 resubmit --

8 MEMBER JONES: I am not looking
9 for an apology.

10 MR. SMUCKER: -- somebody didn't
11 do what was --

12 MEMBER JONES: I'm just trying to
13 explain --

14 MR. SMUCKER: -- submitted.

15 MEMBER JONES: I think what you
16 are missing is that --

17 MR. SMUCKER: I know.

18 MEMBER JONES: -- we are really
19 trying to effect a positive outcome in this
20 endeavor and I am putting forward a lot of
21 energy. I think each individual Board Member
22 is putting forward a lot of energy and time to

1 try and make sure we are all comfortable with
2 what it is that we are getting as we set this
3 precedent going forward.

4 That being said, you were
5 concerned and you questioned the 7 feet versus
6 the 8 feet, that was my error. But I put that
7 in as a placeholder to get the model setup, so
8 that when we got the updated and corrected
9 information from you, then we could easily and
10 quickly plug it into that model and then make
11 the determination as to where you fell within
12 the 5 percent test or Test No. 2.

13 So those things have been updated.
14 Thank you for providing a drawing with the
15 actual dimensions noted in terms of your
16 display cases and your walls, etcetera. And
17 we were able to us that to make a
18 determination across the board.

19 We corrected the 7 foot and made
20 it 8 feet. We corrected some of the display
21 cases where they were 1.5. We made them 1
22 point something, whatever the measurements are

1 in the --

2 MR. SMUCKER: On the top row you
3 might be --

4 MEMBER JONES: -- 2.2 or it's 2
5 feet 2 inches.

6 MR. SMUCKER: Right.

7 MEMBER JONES: Excuse me.

8 MR. SMUCKER: Okay.

9 MEMBER JONES: So we had assumed
10 those were 2 before, you know, but so those
11 things have been made. They have been
12 adjusted. They have been corrected in the
13 model. Okay?

14 MR. SMUCKER: Okay.

15 MEMBER JONES: So that being said,
16 and we also took heed to your consideration of
17 what we call the diagonal, which is that space
18 off the diagonal of the display cases in the
19 square which we weren't properly accounting
20 for before, as you pointed out.

21 So we are not closed minded to the
22 things that you are bringing to the table as

1 we work through this. But that being said, it
2 needs to meet the 5 percent test. It has to
3 be 5 percent for at least six of the seven
4 categories.

5 And right now, as we calculate it,
6 it's not there. And I think there --

7 MR. SMUCKER: I was told last week
8 that it did or something.

9 MEMBER JONES: What?

10 MR. SMUCKER: To what we added
11 things in. I'm not -- I mean --

12 MEMBER JONES: Right.

13 MR. SMUCKER: -- I keep hearing
14 different things all the time.

15 MEMBER ALBERTI: Just give him the
16 measurements.

17 MEMBER JONES: I'm trying, man.

18 MR. SMUCKER: Yes, I mean, I come
19 up with 4.8 percent, because you added
20 everything back in. But I'm sure that I could
21 chip away certain little measurements that you
22 had and we could do the external --

1 MEMBER ALBERTI: Mr. Smucker? We
2 actually expect that you can.

3 MR. SMUCKER: Okay.

4 MEMBER ALBERTI: And that is why
5 we are here today.

6 MR. SMUCKER: Okay. Great.

7 MEMBER JONES: Right.

8 MEMBER ALBERTI: So that you know
9 exactly --

10 MR. SMUCKER: Exactly.

11 MEMBER ALBERTI: -- so when you --

12 MEMBER JONES: I'm trying to tell
13 you.

14 MEMBER ALBERTI: -- so you have an
15 idea of what you need to do.

16 MEMBER JONES: Right.

17 MEMBER ALBERTI: And we have every
18 confidence that you can do it.

19 MEMBER JONES: Right.

20 MR. SMUCKER: Well, we'll wait
21 another week. I mean, i --

22 MEMBER SILVERSTEIN: Mr. Smucker,

1 we want to give you a way forward where you
2 understand how far (audio malfunction)
3 standard. That's the whole purpose of this
4 exercise.

5 MR. SMUCKER: Sure.

6 CHAIRPERSON MILLER: But --

7 MEMBER JONES: And we wanted to
8 tell you directly, so that we could mitigate
9 some or the issues that you have expressed in
10 terms of the third party, second party, third
11 hand, second hand, miscommunication that you
12 have been having with whomever, right?

13 So we, the Board, the ones who are
14 looking at this and making the assessment, are
15 discussing with you what our concerns are
16 regarding what we have seen and what we have
17 determined, so that you can then look us in
18 our eyes and say, but when we sat down and we
19 talked, this is what you said before as
20 opposed to the third-party, second-party,
21 whatever you want to call it. Okay?

22 MR. SMUCKER: Go ahead. Give me

1 whatever --

2 MEMBER JONES: All right.

3 MR. SMUCKER: -- measurements you
4 have.

5 MEMBER JONES: For category -- so
6 there are three categories that are below the
7 5 percent threshold.

8 MR. SMUCKER: Three now?

9 MEMBER JONES: Yes.

10 MEMBER ALBERTI: Why don't you
11 just give him all of them?

12 MEMBER JONES: Okay. I'll just
13 give them.

14 MR. COOK:

15 MEMBER ALBERTI: I just want to
16 have a concept of where we are.

17 MEMBER JONES: I'll give him all
18 of them.

19 MEMBER ALBERTI: Yes.

20 MEMBER JONES: Category A, fresh
21 fruits and veggies, 10.75 percent.

22 MEMBER ALBERTI: Give him the

1 square foot. I'm sorry. I apologize.

2 MEMBER JONES: Category A, fresh
3 fruits and veggies.

4 CHAIRPERSON MILLER: I think that
5 is a good idea though, yes.

6 MEMBER JONES: All right.

7 CHAIRPERSON MILLER: You don't
8 want to give him the information?

9 MEMBER JONES: Any more peanut
10 gallery comments?

11 CHAIRPERSON MILLER: I don't think
12 this is --

13 MEMBER JONES: Can you let me
14 finish? Can you let me finish before you
15 comment on the --

16 CHAIRPERSON MILLER: Okay.

17 MEMBER JONES: -- my delivery?
18 Category A, fresh fruits and veggies,
19 determined to be 10.75 percent. The area
20 square footage 85 square feet.

21 Category B, fresh and uncooked
22 meat, 4.93 percent, area 39.

1 C, dairy products, 6.09 percent,
2 area 48.2.

3 D, canned goods, 11.85 percent,
4 75.1 area. These are all in square feet.

5 Category E, frozen foods, 2.28
6 percent, 18 square feet.

7 Category F, dry groceries and
8 baked goods, 34.16 percent, 270.2 square feet.

9 Category G, non-alcoholic
10 beverages, 4.51 percent, 35.65 square feet.

11 Now, I'm done.

12 MEMBER ALBERTI: My apologies.

13 CHAIRPERSON MILLER: So it's not
14 just the measurements, which is good for Mr.
15 Smucker to have and the percentage, but then
16 it's to be clear why there is this diversion
17 and that was discussed earlier, but I just
18 want to make sure it is understood before we
19 conclude the hearing.

20 And I think the confusion from
21 what I heard Mr. Smucker say and I -- is that
22 in the regulation we define selling area as

1 meaning the area in a retail establishment
2 that is open to the public and does not
3 include storage areas, preparation areas or
4 restrooms.

5 But when we get to the
6 instructions for measuring, that's where we
7 get into the 3 feet, it says "Store selling
8 area includes those areas of retail
9 establishment that are open to the public. It
10 does not include storage areas, prep areas or
11 restrooms. In calculating the square footage
12 of the selling area, the measured floor space
13 shall be inclusive of the footprint of the
14 display case hosting the grocery items, plus
15 half of the width of the aisle providing
16 public access to and directly in front of the
17 display case, provided the aisle space does
18 not exceed 3 feet."

19 So before we leave, I just want to
20 make sure that Mr. Smucker understands how the
21 Board is defining the selling area for the --

22 MR. SMUCKER: I think it is

1 defined --

2 CHAIRPERSON MILLER: -- different
3 purposes.

4 MR. SMUCKER: -- improperly.

5 CHAIRPERSON MILLER: Huh?

6 MR. SMUCKER: I think it is
7 defined improperly. I think this is wrong,
8 because the percentages that you get up to are
9 74.57 percent. That's -- and I know you are
10 dividing that out of your 791. I completely
11 understand that. That is improper.

12 I mean, that is just plain wrong
13 that I can't then -- I mean, you know what?
14 If -- I should be able to get up to 100
15 percent or else what is the point of having a
16 minimum of 5 percent of each of these? What's
17 the point of having that?

18 I mean, this is -- I also add up
19 that you get 572.95 square feet calculated of
20 the selling area. Obviously, we had 657
21 square feet that we calculated as selling
22 area. So there is a pretty big discrepancy

1 there. I'm going to trust my CAD drawing on
2 this.

3 MEMBER JONES: Okay.

4 MR. SMUCKER: I know you are not
5 going to like me saying that and that's fine.
6 That's fine.

7 MEMBER JONES: Okay.

8 MR. SMUCKER: Now, I dispute what
9 you are doing.

10 CHAIRPERSON MILLER: Okay. Can
11 you --

12 MR. SMUCKER: I think it is
13 improper.

14 CHAIRPERSON MILLER: -- articulate
15 that a little more specifically --

16 MR. SMUCKER: Yes.

17 CHAIRPERSON MILLER: -- what you
18 think that the Board Members are doing wrong
19 to come up with this?

20 MEMBER JONES: And break it down
21 into two categories. So there is wrong math
22 and then there is wrong -- like a

1 philosophical difference.

2 MR. SMUCKER: Sure.

3 MEMBER JONES: Right? So let's
4 deal with the math.

5 CHAIRPERSON MILLER:

6 Interpretation.

7 MR. SMUCKER: Dealing with the
8 math, according to all of ours, all of product
9 -- in Category 2, right? We are talking about
10 -- or Test 2.

11 We are talking about all the
12 different categories. When we add up A, B, C,
13 D, E, F, G, when we add all of those up, when
14 we tell CAD this is that area, this is that
15 area, CAD tells us 657 square feet.

16 You have measured outside of that
17 architectural design program and come up with
18 572.95 square feet. I don't understand that
19 and I don't think that is proper.

20 MEMBER JONES: So in CAD, don't
21 you -- you define what the defined areas are,
22 correct?

1 MR. SMUCKER: That's right.

2 MEMBER JONES: You define. You, a
3 human, define what the defined areas are.

4 MR. SMUCKER: That's correct.

5 MEMBER JONES: So you define it
6 one way, right? I, another human, can take
7 that same CAD application and define it a
8 different way where I draw the lines, where I
9 use that CAD to define what a certain area of
10 category is, that is a human element that uses
11 -- that is defining that which CAD is
12 operating against.

13 So you are telling me that you
14 defined the area and then CAD did the
15 calculation.

16 MR. SMUCKER: Right. We defined
17 it according to --

18 MEMBER JONES: Right. So --

19 MR. SMUCKER: -- regulations.

20 MEMBER JONES: -- I can define
21 that area as I have defined it as was done
22 with the calculations that we are doing if you

1 are saying are wrong.

2 MR. SMUCKER: Yes.

3 MEMBER JONES: And CAD could
4 possibly come up with the same number if we
5 defined it the same way as we did with the
6 math that we used here.

7 MR. SMUCKER: Yes, but I don't
8 know what your math is, because the last time
9 that we did it, you were cutting out certain
10 areas of the selling area. You were cutting
11 out the cuts.

12 You know, you were saying well, we
13 are just going to measure out from here and
14 down from there and we are not going to -- we
15 are going to exclude that portion, that
16 portion -- that little area that is the -- on
17 the corner.

18 MEMBER JONES: Which we now --
19 which we are now defining as the diagonal.

20 MEMBER ALBERTI: Which is now
21 included.

22 MEMBER JONES: Right. Which is

1 not included.

2 MR. SMUCKER: So now it's
3 included, but, I mean, time and time again we
4 keep coming back and I don't know what your
5 math is coming from. I don't -- I didn't see
6 you do it. I don't know how you are defining
7 it.

8 MEMBER JONES: Would you -- well,
9 would you relish an opportunity to sit down
10 with me --

11 MR. SMUCKER: I don't think I
12 would.

13 MEMBER JONES: -- and go through
14 it?

15 MR. SMUCKER: No. I'm sorry.

16 MEMBER JONES: Okay.

17 MR. SMUCKER: I would like -- I
18 would relish the opportunity to do it with
19 someone who has the experience with CAD and is
20 employed by the city.

21 MEMBER JONES: Hey, that's all I
22 need to hear. Thank you.

1 MR. SMUCKER: But I -- if that's
2 you, great. But I mean --

3 MEMBER JONES: No, it's clearly
4 not based on what you just said.

5 MEMBER ALBERTI: Well, Mr.
6 Smucker?

7 MEMBER JONES: So thank you.

8 MEMBER ALBERTI: I will tell you
9 from my perspective --

10 MR. SMUCKER: I know you are not
11 going to like me, but --

12 MEMBER JONES: No, it's cool.

13 MEMBER ALBERTI: CAD is a tool--

14 MEMBER JONES: I appreciate you
15 telling me.

16 MEMBER ALBERTI: CAD is a tool.
17 It's not the only way to add up. It's not the
18 only way to use a scaled drawing, but it is a
19 tool. You use that tool one way. We used the
20 scale drawing, according to how we define the
21 areas.

22 Now, the dispute you may have with

1 us is how we define the areas. So let's start
2 with the storage, cleaning, HVAC or the
3 remaining total selling area, which we have at
4 1,100 square feet.

5 MR. SMUCKER: Sure.

6 MEMBER ALBERTI: Do you think that
7 that -- that we are wrong there?

8 MR. SMUCKER: If you are --

9 MEMBER ALBERTI: Because the
10 total --

11 MR. SMUCKER: -- including these
12 three spaces --

13 MEMBER ALBERTI: What three
14 spaces?

15 MR. SMUCKER: You are including
16 the three cutouts where it is not hatched.

17 MEMBER ALBERTI: Yes, we are.

18 MR. SMUCKER: So, you know, we are
19 going from 937, we are adding on.

20 MEMBER ALBERTI: Right. I will
21 tell you, it may not be clear in the
22 regulations --

1 MR. SMUCKER: Right, but --

2 MEMBER ALBERTI: -- to you.

3 MR. SMUCKER: -- I understand.

4 MEMBER ALBERTI: But it is there.

5 It is.

6 MR. SMUCKER: That's fine.

7 MEMBER ALBERTI: It says total

8 area accessible to the public.

9 MR. SMUCKER: Right.

10 MEMBER ALBERTI: All right.

11 MR. SMUCKER: I was told to

12 exclude those spaces.

13 MEMBER ALBERTI: All right. All

14 right. So -- all right. All right.

15 MR. SMUCKER: It doesn't matter,

16 that is included. That's totally fine.

17 MEMBER ALBERTI: Right.

18 MR. SMUCKER: So we are at the

19 1,100. Now, we are excluding the non-food

20 selling area which you are calculating as 309

21 square feet?

22 MEMBER ALBERTI: Right. Which is

1 a larger number than you had, which is to your
2 advantage.

3 MR. SMUCKER: That's correct.

4 MEMBER ALBERTI: All right.

5 MR. SMUCKER: And then --

6 MEMBER ALBERTI: So we have a
7 total food selling area of 791 and we can
8 agree to start with that as a basis?

9 MR. SMUCKER: Sure.

10 MEMBER ALBERTI: All right.

11 Great.

12 MR. SMUCKER: And then -- but then
13 that 791, obviously, you are never going to
14 get -- you are losing 25 percent of your floor
15 space.

16 MEMBER ALBERTI: We are never --
17 we -- in this case, we are never going to get
18 there. Well, I wouldn't say that. We -- the
19 way we designed this and I will tell you this
20 is the way we designed it from day one, we
21 knew that there was no guarantee that the area
22 that you measure as being dedicated to each

1 item, the collective of all those
2 measurements, there is no guarantee the way we
3 have designed this that it would equal the
4 total food selling area. We recognized that
5 from the beginning.

6 MR. SMUCKER: I was not aware.

7 MEMBER ALBERTI: And that's -- I
8 understand why you weren't. I absolutely --
9 I can put myself in your shoes and understand
10 why you wouldn't.

11 MR. SMUCKER: Is it -- is that
12 logical, though?

13 MEMBER ALBERTI: Yes.

14 CHAIRPERSON MILLER: Do you want
15 to explain it?

16 MEMBER ALBERTI: To this Board it
17 is.

18 CHAIRPERSON MILLER: Well, do you
19 want to explain it?

20 MEMBER ALBERTI: All right.

21 CHAIRPERSON MILLER: So --

22 MEMBER ALBERTI: Because we

1 recognize in a food store that the total food
2 -- the -- look, we started from the premise.

3 MR. SMUCKER: Oh --

4 MEMBER ALBERTI: We started from
5 the premise that there was a general idea that
6 a full-service grocery has to have a variety
7 of products. We said, okay, let's define what
8 that means to have a variety and we came up
9 with seven categories.

10 I mean, put the items that we --
11 that people would expect, the general public
12 would expect to be in a full-service grocery
13 store and put it into seven categories.

14 And then we said okay, well, what
15 guarantee do we have that the store actually
16 has a substantial amount of any one of those
17 products? I mean, you know, they could say
18 they have them, but, you know, what is -- what
19 criteria could we use to say that they have
20 some substantial amount?

21 And we said well, let's make it
22 low, 5 percent. 5 percent. That leaves seven

1 categories times 35 leaves 35 percent of the
2 area has to be used up with those seven
3 categories, which means -- or actually only
4 six.

5 So we are only requiring you to
6 use 6 -- we are only requiring you to use --

7 MEMBER JONES: 30 percent.

8 MEMBER ALBERTI: -- 30 percent of
9 the food selling area. The other 60 percent
10 can be blank.

11 MEMBER JONES: The other 70.

12 MR. SMUCKER: Right.

13 MEMBER ALBERTI: Pardon?

14 MEMBER JONES: The other 70
15 percent.

16 MR. SMUCKER: 70 percent.

17 MEMBER ALBERTI: The other 70
18 percent, excuse me, yes, I'm sorry. My
19 mistake.

20 MEMBER JONES: You are only
21 required --

22 MEMBER ALBERTI: My math skills

1 are going at the end of the day. The other 70
2 percent of the food selling area could be
3 blank. We understood that.

4 So from that perspective, you have
5 to understand that we really only are putting
6 requirements on 30 percent of your total food
7 selling area.

8 MR. SMUCKER: I --

9 MEMBER ALBERTI: When I think
10 about that, my -- as a Board Member, I say,
11 you know, that is a pretty low bar for someone
12 to come up with that they only have to account
13 for 30 percent of their floor space.

14 MR. SMUCKER: But then we get
15 into, you know, there are vast differences,
16 you know. And if you go into a Giant and
17 under these types of things, you are counting
18 all of the food selling area, but how big is
19 that meat counter? It's not that large
20 overall compared to the dry goods store -- dry
21 goods or --

22 MEMBER ALBERTI: Probably not.

1 MR. SMUCKER: -- anything --

2 MEMBER ALBERTI: Probably not.

3 MR. SMUCKER: -- else. It is --
4 you know, that Giant is probably coming in at
5 3 percent of the main selling --

6 MEMBER ALBERTI: I doubt that.

7 MR. SMUCKER: -- of the meat, of
8 the fresh meat.

9 MEMBER JONES: And you know what?
10 That's exactly why we have this text, because
11 if the Giant came in and only met 3 percent,
12 they wouldn't get that food category counted
13 towards theirs and they wouldn't get it.

14 MEMBER ALBERTI: Right.

15 MEMBER JONES: They wouldn't get
16 approval.

17 MEMBER ALBERTI: That's correct.

18 MEMBER JONES: It's the same
19 thing.

20 MEMBER ALBERTI: If they came in
21 with the same percentage as you, I guarantee
22 I would be sitting here saying the same thing

1 to them.

2 MEMBER JONES: Saying the exact
3 same thing.

4 MEMBER ALBERTI: I don't care
5 whether it is Giant, Walmart, I don't care who
6 it is. I have a set of criteria and I think,
7 as a Board Member, I decided that if you can't
8 show me that 5 percent of your selling area is
9 dedicated to a particular product, then you
10 don't really have a substantial amount of that
11 product in your store.

12 MR. SMUCKER: But you are
13 counting --

14 MEMBER ALBERTI: And you know, we
15 haven't gotten comments. We haven't gotten --
16 this has been out there for a while and no one
17 has commented on that.

18 MR. SMUCKER: It's because I don't
19 know if anybody knows what you are -- how you
20 are going to interpret the measurements. I
21 certainly didn't.

22 MEMBER ALBERTI: I know.

1 MR. SMUCKER: And when you are
2 counting, you know, entrance and walkways, so,
3 you know, when you have an entrance and a
4 walkway in a lot of these places, you are
5 going to be counting that, but it's going to
6 go against the meat area and, I mean --

7 MEMBER ALBERTI: And that's why we
8 had 607.

9 MR. SMUCKER: Okay.

10 MEMBER ALBERTI: So the meat
11 counter in Giant may not be big, but I can --

12 MR. SMUCKER: Their freezer --

13 MEMBER ALBERTI: -- guarantee you
14 that their frozen and uncooked -- their frozen
15 food section is much bigger than their meat
16 counter. And their fresh vegetable counter is
17 usually much bigger than that. And their
18 canned goods is huge and their dairy products
19 is probably pretty big. I mean, I'll go on
20 and on. I know they are not -- their beverage
21 section is huge.

22 So I expect that a Giant could

1 work with our criteria and make it work
2 easily.

3 MR. SMUCKER: Right. But it's
4 just -- it seems really counter-intuitive that
5 you would exclude something like this because
6 of you are adding on areas in one test, but
7 they don't count for selling area in the
8 second test.

9 And so I'm then coming up with a
10 percentage that is less than 100 percent of a
11 selling area that you are counting for one
12 thing, but you can't count it for the other
13 thing. And that -- I mean, if you would just
14 do that, if it could be counted for both, if
15 I can count, you know, the -- if I can count
16 all of that selling area and say, you know
17 what, fine that selling area -- people are
18 looking at this when they are standing there
19 or they are looking at this when they are
20 standing there. Then that would be fine.
21 There is no issue.

22 But we have been told we can't

1 count that as our selling area, so there is no
2 way that I could ever comprehend that that
3 would be counted as the denominator or the
4 divisor.

5 MEMBER JONES: Well, you can't
6 count it as your selling area. You just can't
7 count it as an area dedicated to a particular
8 food category.

9 MR. SMUCKER: Right. Which is
10 ridiculous. I would love --

11 MEMBER JONES: That's your
12 perspective on it.

13 MR. SMUCKER: It absolutely is.
14 And this is just -- we sat here eight weeks
15 ago, right? Nine weeks ago? When was that?
16 When did I come back --

17 CHAIRPERSON MILLER: I don't know.

18 MR. SMUCKER: -- for a Fact-
19 Finding Hearing.

20 MEMBER ALBERTI: I don't know.

21 CHAIRPERSON MILLER: May 8th, May
22 8th.

1 MEMBER ALBERTI: It doesn't really
2 -- I mean, the time doesn't matter.

3 CHAIRPERSON MILLER: Yes.

4 MEMBER ALBERTI: You were --

5 CHAIRPERSON MILLER: May 8th.

6 MEMBER ALBERTI: We will recognize
7 that you were here.

8 CHAIRPERSON MILLER: May 8th.

9 MEMBER ALBERTI: All right.

10 MR. SMUCKER: It certainly matters
11 to me.

12 MEMBER ALBERTI: Okay.

13 MR. SMUCKER: Three weeks ago.
14 I'm sorry. When we were told, okay, we need
15 scale drawings of this to determine this, but
16 we are not exactly sure how we are going to
17 measure it.

18 All right. We have provided you
19 everything in good faith. You are coming up
20 with different interpretations of what we
21 interpreted, fine, but in my mind we meet all
22 of these minimum --

1 MEMBER ALBERTI: I will tell you
2 just to set the record straight, in case you
3 are curious.

4 MR. SMUCKER: Sure.

5 MEMBER ALBERTI: That when we told
6 you we hadn't decided, it was because some
7 Board Members were proposing the method that
8 we are using today and others hadn't decided
9 that they agreed with that proposal.

10 So it wasn't that we didn't have a
11 method in mind, we were pretty far along. We
12 just didn't have agreement amongst the Board
13 that that was the way we were going to go. So
14 just to set the record straight.

15 It's not like, you know, we were
16 so clueless when you came in on May 8th. We
17 weren't clueless.

18 MR. SMUCKER: I'm not saying that.

19 MEMBER ALBERTI: Many of us knew
20 exactly what we would like to see as the
21 criteria, but the Board had to come to
22 agreement, at that time.

1 CHAIRPERSON MILLER: All right.

2 MR. SMUCKER: Now, if you want, I
3 can fiddle with this drawing all you want. I
4 can do anything you want to it and it will
5 meet all of the criteria, but I was honest
6 about what we were doing.

7 MEMBER ALBERTI: You -- nobody is
8 accusing you of that.

9 MR. SMUCKER: No, no, I'm saying
10 we were honest about what we were doing
11 because we were doing it under what our
12 interpretation of what we were told --

13 MEMBER ALBERTI: Absolutely.

14 MR. SMUCKER: -- and we did it --
15 that and we were like oh, we are fine.

16 MEMBER JONES: Which is why we are
17 asking or had you come before us today, so
18 that you are not getting a third-party -- so
19 you can get a clear, concise understanding of
20 what the individuals', that are making the
21 decisions, interpretation is, so that you can
22 be clear on this.

1 And just you weren't on the
2 calendar today. You weren't scheduled to be
3 here today. Right? We recognized that this
4 was an opportunity that we wanted to have with
5 you directly, so that we could communicate
6 that to you directly.

7 It wasn't a requirement that you
8 sit before us today. We brought you in
9 because we feel that we want to convey this to
10 you, so that you have every opportunity --

11 MR. SMUCKER: Yes.

12 MEMBER ALBERTI: Mr. Smucker?

13 MEMBER JONES: -- to come under
14 compliance with the reg.

15 MR. SMUCKER: Every time I'm told
16 this is all you need, then I'm told this is
17 something else you need.

18 MEMBER ALBERTI: Here --

19 MEMBER JONES: How many times have
20 you been before us directly in this form, this
21 fashion --

22 MR. SMUCKER: Well --

1 MEMBER JONES: -- where those
2 things have occurred? And even if it was,
3 right now, this is where we are today.

4 MEMBER ALBERTI: Mr. Smucker, we
5 have had a process here where, you know, the
6 phrase "nailing jello to the wall" is probably
7 what you feel like we have asked you to do,
8 because we have not been able to come up with
9 rules and interpretations at a time when you
10 were trying to figure out how you could comply
11 with these rules and interpretations.

12 The goalposts haven't changed.
13 They just weren't put in the ground by when
14 you started the game. And we want to have
15 rules that apply to everybody and you are the
16 first person who has tried to get through this
17 with something other than a massive clearly
18 old definition full-service grocery store like
19 the 1950s version.

20 It has been very difficult for you
21 and every one of us understands that. I hope
22 that you can look at what Mr. Jones has told

1 you, understand that the differences aren't
2 that great, that you can arrange something
3 here, move something there, add a little
4 something and have it comply.

5 We are not here -- we don't want
6 to put roadblocks in front of you. We simply
7 have to set a precedent for all applicants and
8 show you a way forward. If you want to go
9 home and have an Excedrin, go ahead, because
10 I know this has been difficult for you. And
11 it has been difficult --

12 MR. SMUCKER: I don't want --
13 (audio malfunction).

14 MEMBER SILVERSTEIN: Okay. Good.
15 Thank you.

16 MR. SMUCKER: But I would love to
17 get it done.

18 CHAIRPERSON MILLER: Okay.

19 MR. SMUCKER: And you know what?
20 All I'll do is I'll add in places to block out
21 aisles and to fill up this with that or this
22 and the other and make my store awkward to

1 walk through if that's what gets me a beer and
2 wine license, that's fine.

3 MEMBER SILVERSTEIN: World without
4 end. Amen.

5 MR. SMUCKER: But that's
6 ridiculous.

7 MEMBER SILVERSTEIN: That's it.

8 MR. SMUCKER: It's ludicrous. I
9 mean, this is the best story I have heard all
10 year.

11 CHAIRPERSON MILLER: The best
12 what?

13 MR. SMUCKER: The best story I
14 have heard all year.

15 CHAIRPERSON MILLER: Oh, okay. So
16 this is what I have to say. I mean, I
17 certainly understand your frustrations and you
18 have expressed them to us. You will have an
19 opportunity to express it to the Council. But
20 in the meantime, I think it would be useful,
21 number one, to make sure you understand the
22 way the Board has, you know, interpreted

1 selling area or whatever, so that you can do
2 the measurements in the same way and try to
3 make it happen for your store.

4 And if it is ridiculous, if it
5 ends up having absurd results, you know, I
6 would be interested in your letting us know
7 that, too, or whatever.

8 MR. SMUCKER: I mean, I'm just
9 curious why some of my numbers are being cut
10 down? I don't know why.

11 CHAIRPERSON MILLER: Well --

12 MEMBER JONES: The offer and
13 opportunity was extended and you declined, so
14 given that, you indicated you would prefer to
15 work with a professional that was employed by
16 the District of Columbia that knows CAD to
17 come up with an understanding of why those
18 discrepancies were there.

19 MR. SMUCKER: You like to cat
20 fight?

21 MEMBER JONES: So I would --

22 MR. SMUCKER: I'm sorry if I hurt

1 your feelings.

2 MEMBER JONES: -- suggest that you
3 work with the Director on that aspect of it.

4 MR. SMUCKER: I mean, if this is
5 offending your sense of -- I'm not sure, but--

6 MEMBER JONES: No. I mean, I'm
7 just -- the offer was extended, you declined.
8 And you indicated what your preference would
9 be.

10 MR. SMUCKER: Yes.

11 MEMBER JONES: So the Director is
12 here sitting behind you. Feel free to make
13 him aware of your preference and we, the
14 Board, will work with the Director to help
15 support that to the best of our ability. So
16 you can have that level of comfort with how it
17 is that those calculations were determined and
18 arrived at.

19 CHAIRPERSON MILLER: So I would be
20 interested if when you do this, if it doesn't
21 work for some reason, to know well, why isn't
22 it working. Is it not working because there

1 is something wrong with the regulation or is
2 it not working because -- show that it's not
3 working because you -- it's not that you are
4 not a full-service grocery store. It's not
5 that you don't have these things.

6 MR. SMUCKER: My --

7 CHAIRPERSON MILLER: Because that
8 could be a conclusion that could be reached,
9 too.

10 MR. SMUCKER: There is something
11 wrong with the regulations and that's the way
12 it is.

13 CHAIRPERSON MILLER: It's --

14 MR. SMUCKER: And it's not that we
15 are not a full-service grocery store. There
16 is something -- I mean, I don't do frozen
17 foods. You know, we have frozen meats. So we
18 just wipe that one out right off the window.
19 That's a big typically grocery store thing.
20 Fine. We do a lot of non-alcoholic beverages.
21 We don't do bottled water and we don't do
22 typical sodas.

1 So it makes it a little bit more
2 difficult, but we have a lot of other stuff to
3 make up for it. You know, in my mind, we meet
4 every single one of these regulations. In
5 your mind, we do not. I mean, if we have a
6 vote today that says like -- I would love to
7 see a vote saying, you know, Smucker Farms
8 does not meet these regulations.

9 MEMBER ALBERTI: Whew.

10 CHAIRPERSON MILLER: But you don't
11 know right now why you don't, because you said
12 you don't know how he arrived, Mr. Jones, at
13 that number. Is that the stumbling block or
14 is the stumbling block the different
15 definitions of selling area?

16 MR. SMUCKER: The stumbling block
17 is that we have met every answer and we have
18 provided everything that has been asked of us.
19 And I think in a prompt and succinct fashion.
20 And I think that we just keep -- you guys
21 haven't quite figured it out and it's not my
22 fault. That's not my fault. I mean, if --

1 MEMBER ALBERTI: We have figured
2 it out.

3 MR. SMUCKER: Okay.

4 CHAIRPERSON MILLER: So --

5 MEMBER ALBERTI: You may not think
6 we have, but we have. We know exactly what
7 our requirements are. We may not be conveying
8 them to you, you can argue that, but I will
9 tell you that we are confident that we know
10 exactly what our requirements are.

11 MR. SMUCKER: If you are going to
12 require percentages of something, they should
13 probably add up to 100 percent though. I'm
14 not sure why it doesn't.

15 MEMBER ALBERTI: We can disagree
16 on that, but we know what we have decided.

17 MR. SMUCKER: Okay.

18 MEMBER ALBERTI: Explain to you
19 what we have decided.

20 MR. SMUCKER: Okay.

21 MEMBER ALBERTI: Tried to explain
22 the rationale. You can either buy or not, but

1 there is no question about what our criteria
2 are.

3 MR. SMUCKER: So I'm off by like a
4 1/2 percentage point on some things and I'm
5 going to be denied a license because of
6 interpretations of a drawing.

7 MEMBER ALBERTI: Well, if you
8 don't want to come back to us, you will be.
9 But we are giving you an opportunity.

10 MR. SMUCKER: Sure.

11 MEMBER ALBERTI: This issue has
12 not been -- we have not made a decision here.

13 MR. SMUCKER: Okay. So I
14 basically have to redo the -- my store and
15 plans to get a beer and wine license.
16 Understood.

17 CHAIRPERSON MILLER: Okay. It's
18 not clear though. You need to redo some
19 calculations, based on what you heard as to
20 how the Board is interpreting selling area or
21 food selling area first. And then there might
22 be some minor adjustments. It's not clear.

1 MEMBER ALBERTI: No, no.

2 CHAIRPERSON MILLER: No?

3 MEMBER ALBERTI: I mean, he needs
4 to -- I mean, if the measurements on this
5 drawing are correct --

6 MR. SMUCKER: Correct.

7 MEMBER ALBERTI: -- I'm confident
8 in the way we have used it, then he needs to
9 adjust his displays, his product displays in
10 a manner that meets the criteria. That's the
11 question here. Not that he redoes
12 measurements, that he actually reconfigures.

13 CHAIRPERSON MILLER: The
14 calculations because I don't think there is a
15 question about the measurements. I thought
16 there was a question that I heard about what
17 was counted towards certain areas and that
18 will affect the calculations.

19 MEMBER ALBERTI: Right.

20 MR. SMUCKER: Well, I'm not
21 allowed to count 25 percent of the food
22 selling area in Test 2, according to these

1 calculations. So 25 percent of the overall
2 selling area is gone. So I have to fill them
3 in.

4 MEMBER ALBERTI: You can look at
5 it that way, but --

6 MR. SMUCKER: Right.

7 MEMBER ALBERTI: -- it's --

8 MR. SMUCKER: We will protest how
9 it is gone.

10 MEMBER ALBERTI: But the bottom
11 line is --

12 MEMBER JONES: Your interpretation
13 of it and you are not --

14 MEMBER ALBERTI: Right.

15 MEMBER JONES: -- open minded to
16 the fact that there is a different
17 interpretation that is on the table and that
18 interpretation rests with the individuals that
19 make the final decision with that.

20 So you are -- I sincerely
21 understand and appreciate that you are
22 frustrated. I think hopefully you will walk

1 away from this, take a minute, gather
2 yourself, recognize that there is very little
3 change that you will have to do in order to
4 accomplish the objectives if you recorded the
5 information appropriately.

6 MR. SMUCKER: I think I will.

7 MEMBER JONES: And then you will
8 come back to us as you see fit and we will
9 process that information accordingly.

10 MR. SMUCKER: What are --

11 MEMBER JONES: And in those
12 instances, I believe that there is very little
13 that you would need to do if you just walk
14 away from this, gather yourself, I think you
15 will see that there is very little that you
16 need to do.

17 MR. SMUCKER: Okay. A question.
18 On the fresh and uncooked meat, we are coming
19 in at 39 square feet, according to your
20 calculations, which would be 4.93 percent of
21 791. I don't really want to buy a whole other
22 meat case right now. Am I --

1 MEMBER JONES: So with all due
2 respect, I'm not going to get into -- or I
3 should say me, as an individual Board Member,
4 I'm not going to get into your business model,
5 your business plan, what you need to do, how
6 you need to do it.

7 Point blank, you need to get to 5
8 percent and how you choose to get to 5 percent
9 for six of those food categories is up to you.
10 You make that business decision.

11 MR. SMUCKER: So six times six.
12 Okay. Sure.

13 CHAIRPERSON MILLER: I would say,
14 you know, he is speaking as one Board Member.
15 There may be many Board Members that feel that
16 way, but I, for one, and I may be in the
17 minority, as I sometimes am, you know, might
18 give a margin of error if there is a, you
19 know, compelling case to be made. I don't
20 think you should buy another meat case.

21 MR. SMUCKER: Am I allowed now to
22 count the area behind the meat cases, the

1 selling area? Because I have been told both
2 ways.

3 MEMBER ALBERTI: Okay. Well,
4 let's talk about -- are you talking about the
5 Bs? Just so we know if there is any
6 ambiguity. Well, right. We -- I think from
7 the outset, Mr. Silverstein said when we are
8 looking at this drawing, we are looking at if
9 you are facing the front of the store to the
10 right hand wall, there are some cases going
11 along that wall, just in front of the utility,
12 right?

13 MR. SMUCKER: Sure.

14 MEMBER ALBERTI: I think we said
15 that we would -- and I think actually, Mr.
16 Jones, you included that, didn't you?

17 MEMBER JONES: Okay.

18 MEMBER ALBERTI: Mr. Jones did
19 include -- in his measurements included the
20 area behind B. He included that as part of
21 the display area.

22 MR. SMUCKER: Gotcha.

1 MEMBER ALBERTI: So it has already
2 been accounted for.

3 MR. SMUCKER: All right. All
4 right. Well, I will go change my store up,
5 move some shelves around, do a new drawing,
6 resubmit, we will have it to you by tomorrow
7 afternoon.

8 CHAIRPERSON MILLER: Okay.

9 MEMBER ALBERTI: Great.

10 CHAIRPERSON MILLER: Okay.

11 MR. SMUCKER: Fresh meats. I'll
12 just take it out of the dairy, I guess.

13 CHAIRPERSON MILLER: As long as
14 you don't have any other questions, just so
15 you know what to work with?

16 MR. SMUCKER: I do not, Chair.

17 CHAIRPERSON MILLER: You do not
18 have any other questions?

19 MR. SMUCKER: I -- no.

20 CHAIRPERSON MILLER: Okay. All
21 right. Well, I apologize if it has been such
22 a hard experience. I hope we can resolve it--

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MR. SMUCKER: I'm sure we --

CHAIRPERSON MILLER: -- so there
is a last step.

Okay. Thank you. All right.
Okay. That ends this Fact-Finding Hearing for
Smucker, yes, and the Board is adjourned.
Thank you.

(Whereupon, the Fact-Finding
Hearing in the above-entitled matter was
concluded at 4:18 p.m.)

CAD 10:11,12 19:15,15,19 45:1 46:14,15,20 47:7 47:9,11,14 48:3 49:19 50:13,16 70:16	62:8 certain 3:6 16:5 17:1 25:19 37:21 47:9 48:9 76:17 certainly 59:21 63:10 69:17 Chair 4:8,14 81:16 Chairperson 1:15 1:18 2:3 3:14,17 4:9,12 24:8 27:9 30:18 39:6 41:4,7 41:11,16 42:13 44:2,5 45:10,14 45:17 46:5 54:14 54:18,21 62:17,21 63:3,5,8 65:1 68:18 69:11,15 70:11 71:19 72:7 72:13 73:10 74:4 75:17 76:2,13 79:13 81:8,10,13 81:17,20 82:2	57:12 62:16 64:21 65:17 66:13 67:8 70:17 75:8 78:8 comes 20:19 comfort 71:16 comfortable 35:1 coming 8:22 49:4,5 58:4 61:9 63:19 78:18 comment 41:15 commented 59:17 comments 4:3 41:10 59:15 communicate 66:5 communicated 21:6 communicating 31:9 communication 21:1 compared 57:20 compelling 79:19 completely 44:10 compliance 66:14 comply 67:10 68:4 comprehend 62:2 Computer 10:13 concept 17:7 40:16 concerned 35:5 concerns 39:15 concise 65:19 conclude 42:19 concluded 82:10 conclusion 72:8 conclusions 2:18 confidence 38:18 confident 74:9 76:7 confirm 5:22 confused 26:11,13 confusion 26:21 42:20 conscience 28:7 consider 22:11 consideration 36:16 continuation 2:4 continue 4:17	Control 1:2,13,13 convey 66:9 conveying 74:7 COOK 40:14 cool 50:12 copies 32:6 copy 5:12 31:2,10 31:17,20 corner 48:17 correct 7:14 12:8 12:18 14:16,20,22 15:15 16:20 18:15 18:21 19:4,11 21:1 25:16 46:22 47:4 53:3 58:17 76:5,6 corrected 35:8,19 35:20 36:12 Council 69:19 count 9:4 10:6 13:22 14:4,18 18:5 20:21 61:7 61:12,15,15 62:1 62:6,7 76:21 79:22 counted 8:9,10 12:3,4,6 27:17 58:12 61:14 62:3 76:17 counter 9:22 23:1 57:19 60:11,16,16 counter-intuitive 61:4 counting 27:5,7 57:17 59:13 60:2 60:5 61:11 counts 18:16 County 1:6,7 2:5 3:13 criteria 55:19 59:6 61:1 64:21 65:5 75:1 76:10 cry 6:14 curious 64:3 70:9 customers 22:13 cut 12:9 70:9 cutout 8:19	cutouts 51:16 cuts 48:11 cutting 48:9,10 <hr/> D <hr/> D 42:3 46:13 dairy 42:1 60:18 81:12 date 5:8 day 53:20 57:1 deal 46:4 dealing 2:9 46:7 decided 59:7 64:6,8 74:16,19 decision 75:12 77:19 79:10 decisions 65:21 declined 70:13 71:7 dedicated 13:12 16:17 18:1 53:22 59:9 62:7 dedicating 17:13 define 42:22 46:21 47:2,3,5,7,9,20 50:20 51:1 55:7 defined 7:5,7,8,11 7:13 12:16 14:21 15:4 16:2 19:5 20:1 21:22 23:12 44:1,7 46:21 47:3 47:14,16,21 48:5 defining 43:21 47:11 48:19 49:6 definition 2:9 18:17 21:3 67:18 definitions 73:15 delivery 41:17 denied 75:5 denominator 16:1 16:14 17:2,3 62:3 design 10:13 46:17 designed 53:19,20 54:3 determination 6:20 21:12 29:22 30:17 35:11,18 determine 7:16
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63:15 determined 2:19 6:12 39:17 41:19 71:17 deviate 6:21 diagonal 36:17,18 48:19 diagram 6:22 11:22 12:5 23:10 dialogue 2:21 4:18 difference 19:18 46:1 differences 57:15 68:1 different 2:17 10:12 11:12 19:20 21:3 37:14 44:2 46:12 47:8 63:20 73:14 77:16 difficult 67:20 68:10,11 73:2 dimensions 27:4 29:20 30:2 35:15 directly 7:6 8:3 39:8 43:16 66:5,6 66:20 director 5:11 14:18 29:19 71:3,11,14 disagree 74:15 discrepancies 70:18 discrepancy 2:16 6:8,18 11:5 20:19 44:22 discretely 21:22 29:20 discussed 42:17 discussing 39:15 discussion 5:3 display 8:9 9:1,22 10:5 12:21 13:8 13:20,21 17:11 18:3 20:17 24:3 29:21 35:16,20 36:18 43:14,17 80:21 displays 5:16 76:9	76:9 display/storage 8:5 dispute 45:8 50:22 distorted 27:13,15 27:15 District 1:1 70:16 diversion 42:16 divide 11:12 19:18 divider 15:21 24:13 dividing 22:17 25:13 44:10 divisor 62:4 document 5:1,2,6,7 5:9,13 6:1,5,15 documentation 2:13 doing 45:9,18 47:22 65:6,10,11 DONALD 1:19 door 20:4 doubt 28:8 58:6 draw 23:16,21 47:8 drawing 18:8 30:1 30:4,12,13 31:5 31:22 33:20 35:14 45:1 50:18,20 65:3 75:6 76:5 80:8 81:5 drawings 2:12,17 4:22 29:11 30:8 30:20,22 63:15 drawn 11:17 dry 42:7 57:20,20 due 79:1 D.C 1:14	employed 49:20 70:15 endeavor 34:20 ends 70:5 82:5 energy 34:21,22 entire 22:7 entrance 9:18 60:2 60:3 equal 26:5 31:22 32:3 54:3 Eric 3:12 error 35:6 79:18 essentially 22:4,7 23:7 establishment 43:1 43:9 etcetera 35:16 evaluating 3:21 evaluations 19:21 everybody 67:15 exact 31:2,7 59:2 exactly 30:2 33:16 38:9,10 58:10 63:16 64:20 74:6 74:10 example 20:4 Excedrin 68:9 exceed 43:18 exception 22:8 exchange 3:19 exclude 17:2 48:15 52:12 61:5 excluded 15:21 16:6,10,13 23:1 excluding 17:7 52:19 excuse 15:2 21:8 36:7 56:18 exercise 39:4 exist 13:21 expect 38:2 55:11 55:12 60:22 experience 3:8 49:19 81:22 explain 34:13 54:15,19 74:18,21 explaining 32:21	explanation 10:17 express 69:19 expressed 39:9 69:18 extended 70:13 71:7 external 37:22 extrapolated 21:2 eyes 39:18	figured 73:21 74:1 fill 68:21 77:2 final 77:19 Finding 1:7 62:19 fine 3:17,18 11:14 22:15 45:5,6 52:6 52:16 61:17,20 63:21 65:15 69:2 72:20 finish 41:14,14 first 4:15 6:6 67:16 75:21 fit 78:8 five 7:15 floor 24:4 43:12 53:14 57:13 food 9:6 11:2,10 13:12,12 14:21 16:2 17:13 18:2,5 18:13 19:3,3,8 20:3 21:4,12,14 24:10,19 25:9 26:4,6 53:7 54:4 55:1,1 56:9 57:2,6 57:18 58:12 60:15 62:8 75:21 76:21 79:9 foods 42:5 72:17 foot 32:4 35:19 41:1 footage 16:8 24:2 26:3 28:20 41:20 43:11 footprint 43:13 form 66:20 forth 2:11 forward 33:14 34:20,22 35:3 39:1 68:8 free 71:12 freezer 60:12 fresh 40:20 41:2,18 41:21 58:8 60:16 78:18 81:11 front 2:22 5:13 8:3 9:22 12:9 20:4,4 22:5,6,11 23:22
			F	
			F 42:7 46:13 facing 23:18 80:9 fact 1:6 20:1 62:18 77:16 Fact-Finding 2:4 82:5,8 fair 15:10 faith 63:19 far 6:14 7:1 39:2 64:11 Farms 1:6,6 2:5 3:13 73:7 fashion 66:21 73:19 fault 73:22,22 feel 66:9 67:7 71:12 79:15 feelings 71:1 feet 6:13 8:4,8,21 9:2,17,21 10:5,8 10:10,14,15 11:7 11:17 12:20 13:8 13:11 14:3,11 17:9,10,18 18:1,3 18:3 19:14,16,20 19:21 20:17 21:13 25:5,15 27:22 35:5,6,20 36:5 41:20 42:4,6,8,10 43:7,18 44:19,21 46:15,18 51:4 52:21 78:19 fell 35:11 fiddle 65:3 fight 70:20 figure 30:1 67:10	
	E			
	E 9:13 42:5 46:13 earlier 42:17 easily 35:9 61:2 effect 34:19 effectively 21:6 efficient 2:20 eight 62:14 either 3:1 9:21 11:13 74:22 element 47:10			

43:16 68:6 80:9 80:11 frozen 42:5 60:14 60:14 72:16,17 fruits 40:21 41:3,18 frustrated 77:22 frustrations 69:17 full-service 2:10 55:6,12 67:18 72:4,15 further 9:21 20:17	68:14 goods 42:3,8 57:20 57:21 60:18 Gotcha 80:22 gotten 59:15,15 great 38:6 50:2 53:11 68:2 81:9 groceries 42:7 grocery 2:10 43:14 55:6,12 67:18 72:4,15,19 ground 67:13 guarantee 53:21 54:2 55:15 58:21 60:13 guess 81:12 guessing 23:2 guesstimate 33:19 guys 33:9 73:20	hope 67:21 81:22 hopefully 77:22 hosting 43:14 huge 60:18,21 Huh 44:5 human 47:3,6,10 hurt 70:22 HVAC 51:2	instances 78:12 instructions 43:6 interested 70:6 71:20 interior 5:20 interpret 59:20 interpretation 10:3 10:19 11:6 12:13 13:3 15:11 20:15 46:6 65:12,21 77:12,17,18 interpretations 63:20 67:9,11 75:6 interpreted 8:7 20:2 25:18 63:21 69:22 interpreting 75:20 issue 17:21 61:21 75:11 issues 39:9 item 11:10 13:12 54:1 items 43:14 55:10	36:7,9,15 37:9,12 37:17 38:7,12,16 38:19 39:7 40:2,5 40:9,12,17,20 41:2,6,9,13,17 45:3,7,20 46:3,20 47:2,5,18,20 48:3 48:18,22 49:8,13 49:16,21 50:3,7 50:12,14 56:7,11 56:14,20 58:9,15 58:18 59:2 62:5 62:11 65:16 66:13 66:19 67:1,22 70:12,21 71:2,6 71:11 73:12 77:12 77:15 78:7,11 79:1 80:16,17,18
G	H	I	J	K
G 42:9 46:13 gallery 41:10 game 67:14 gather 78:1,14 general 55:5,11 getting 35:2 65:18 Giant 57:16 58:4 58:11 59:5 60:11 60:22 give 6:16 19:15 24:15 25:2 30:6 32:17 37:15 39:1 39:22 40:11,13,17 40:22 41:8 79:18 given 6:5 29:11 70:14 giving 75:9 glad 33:12 go 4:6 8:12 23:22 39:22 49:13 57:16 60:6,19 64:13 68:8,9 81:4 goalposts 67:12 going 3:9,18,22 4:5 9:8 16:5,7 25:13 29:12 33:15 35:3 45:1,5 48:13,14 48:15 50:11 51:19 53:13,17 57:1 59:20 60:5,5 63:16 64:13 74:11 75:5 79:2,4 80:10 good 28:7 30:13 41:5 42:14 63:19	H 18:9,11,17 22:8,9 24:3,5,6 half 13:10 17:10 43:15 hand 39:11,11 80:10 happen 70:3 hard 26:20,20 32:6 81:22 hatched 8:14,17 9:19 51:16 head 33:2 hear 49:22 heard 42:21 69:9 69:14 75:19 76:16 hearing 1:8,14 2:5 37:13 42:19 62:19 82:5,9 heed 36:16 help 6:16 71:14 helpful 28:19 29:2 HERMAN 1:20 Hey 49:21 hit 31:5 home 68:9 honest 65:5,10	idea 38:15 41:5 55:5 identified 21:17 identify 3:10 ignoring 22:9 important 33:21 improper 44:11 45:13 improperly 44:4,7 inch 31:21 32:1 inches 31:3 36:5 include 7:20 8:18 9:7 12:19 13:7,10 15:7 17:1,6,8,9,22 21:15 25:14 43:3 43:10 80:19 included 8:2 10:7 11:18 17:17 18:18 18:19 19:1,2 24:7 24:10 48:21 49:1 49:3 52:16 80:16 80:19,20 includes 43:8 including 51:11,15 inclusive 43:13 incongruence 10:18 incredibly 26:10 indicated 70:14 71:8 individual 34:21 79:3 individuals 65:20 77:18 information 6:3 29:8 35:9 41:8 78:5,9	jello 67:6 Jones 1:20 3:19 4:5 4:7,13 5:15,18,21 6:11 7:4,10,15,20 8:1,15 9:11,13,15 10:9,16 11:4,20 12:1,5,11,16,19 13:2,9,16 14:16 14:20 15:1,4,10 15:15,17 16:1 17:12,16 18:11,16 18:21 19:1,10,22 20:8,10,18 22:18 22:21 23:4,7,16 23:21 24:9,15,16 24:21 25:4,8 28:19 29:6,15,18 30:10,21 31:4,8 31:14,18 32:13 33:12,15 34:2,4,8 34:12,15,18 36:4	keep 8:22 9:8 27:3 37:13 49:4 73:20 kept 14:14 knew 53:21 64:19 know 4:2 8:21 9:8 9:22 10:1 11:15 14:11 18:11 26:14 27:12 28:2,3 29:7 31:21 34:17 36:10 38:8 44:9,13 45:4 48:8,12 49:4,6 50:10 51:18 55:17 55:18 57:11,15,16 58:4,9 59:14,19 59:22 60:2,3,20 61:15,16 62:17,20 64:15 67:5 68:10 68:19 69:22 70:5 70:6,10 71:21 72:17 73:3,7,11 73:12 74:6,9,16 79:14,17,19 80:5 81:15 knows 59:19 70:16
				L
				Lancaster 1:6,7 2:5 3:13

language 13:4
15:12
large 57:19
larger 25:20 27:17
53:1
leave 43:19
leaves 55:22 56:1
leaving 25:10
left 8:13,22 9:9
22:4 23:18
letting 70:6
let's 46:3 51:1 55:7
55:21 80:4
level 71:16
license 1:9 2:6 3:16
69:2 75:5,15
line 23:17 27:13
77:11
lines 47:8
listening 30:11
little 8:18 37:21
45:15 48:16 68:3
73:1 78:2,12,15
LLC 1:6
located 2:6
logic 6:21
logical 54:12
long 81:13
look 6:22 9:18
16:22 21:9 33:1
39:17 55:2 67:22
77:4
looking 15:19
23:10 34:8 39:14
61:18,19 80:8,8
losing 53:14
lot 14:14 15:20
34:20,22 60:4
72:20 73:2
love 62:10 68:16
73:6
low 55:22 57:11
ludicrous 69:8

M

Madam 4:7,13
main 58:5

major 7:16
making 39:14
65:20
malfunction 39:2
68:13
man 37:17
mandating 17:20
manner 76:10
margin 79:18
massive 67:17
math 29:12 45:21
46:4,8 48:6,8 49:5
56:22
matter 1:5 10:18
12:12 52:15 63:2
82:9
matters 63:10
mean 9:22 14:2,4,9
15:18 19:3 21:3
24:12 25:17,21
26:10,15 28:6
29:9 33:4,5 37:11
37:18 38:21 44:12
44:13,18 49:3
50:2 55:10,17
60:6,19 61:13
63:2 69:9,16 70:8
71:4,6 72:16 73:5
73:22 76:3,4
meaning 43:1
means 55:8 56:3
measure 8:8 11:7,9
48:13 53:22 63:17
measured 5:17
29:10,14 31:2
43:12 46:16
measurements
2:13 4:21 5:10
6:3,4 32:15,16,20
33:20 35:22 37:16
37:21 40:3 42:14
54:2 59:20 70:2
76:4,12,15 80:19
measuring 43:6
meat 9:10 41:22
57:19 58:7,8 60:6
60:10,15 78:18,22

79:20,22
meats 72:17 81:11
meet 3:2,6 4:1,1
37:2 63:21 65:5
73:3,8
meeting 1:3 15:20
meets 2:14 19:17
28:16 76:10
member 1:18,19,20
1:22 4:7,11,13
5:15,18,21 6:11
7:4,10,15,20 8:1
8:15 9:11,13,15
10:9,16 11:4,20
12:1,5,11,16,19
13:2,9,16,18 14:6
14:16,20 15:1,4
15:10,15,17 16:1
16:9,12,16,21
17:12,16 18:11,16
18:21 19:1,10,12
19:22 20:8,10,18
22:3,18,21,22
23:4,5,7,10,16,21
24:9,11,14,16,17
24:21,22 25:4,8
25:16,21 26:2,12
26:17 27:2,6,10
27:18 28:8,10,14
29:1,4,6,7,15,16
29:18 30:10,21
31:4,8,14,16,18
31:20 32:3,7,10
32:12,19 33:6,7
33:10,12,14,15
34:2,4,8,12,15,18
34:21 36:4,7,9,15
37:9,12,15,17
38:1,4,7,8,11,12
38:14,16,17,19,22
39:7 40:2,5,9,10
40:12,15,17,19,20
40:22 41:2,6,9,13
41:17 42:12 45:3
45:7,20 46:3,20
47:2,5,18,20 48:3
48:18,20,22 49:8

49:13,16,21 50:3
50:5,7,8,12,13,14
50:16 51:6,9,13
51:17,20 52:2,4,7
52:10,13,17,22
53:4,6,10,16 54:7
54:13,16,20,22
55:4 56:7,8,11,13
56:14,17,20,22
57:9,10,22 58:2,6
58:9,14,15,17,18
58:20 59:2,4,7,14
59:22 60:7,10,13
62:5,11,20 63:1,4
63:6,9,12 64:1,5
64:19 65:7,13,16
66:12,13,18,19
67:1,4 68:14 69:3
69:7 70:12,21
71:2,6,11 73:9
74:1,5,15,18,21
75:7,11 76:1,3,7
76:19 77:4,7,10
77:12,14,15 78:7
78:11 79:1,3,14
80:3,14,17,18
81:1,9
Members 2:20 4:2
45:18 64:7 79:15
message 27:12
met 1:13 2:11
58:11 73:17
method 64:7,11
middle 21:17
MIKE 1:22
Miller 1:15,18 2:3
3:14,17 4:9,12
24:8 27:9 30:18
39:6 41:4,7,11,16
42:13 44:2,5
45:10,14,17 46:5
54:14,18,21 62:17
62:21 63:3,5,8
65:1 68:18 69:11
69:15 70:11 71:19
72:7,13 73:10
74:4 75:17 76:2

76:13 79:13 81:8
81:10,13,17,20
82:2
mind 63:21 64:11
73:3,5
minded 36:21
77:15
minimum 44:16
63:22
minor 75:22
minority 79:17
minus 24:1 25:5
minute 78:1
miscommunicati...
11:5 39:11
misled 19:7
missing 34:16
mistake 56:19
mitigate 39:8
model 35:7,10
36:13 79:4
morning 33:18
move 33:14 68:3
81:5
multiple 30:14

N

nailing 67:6
need 14:7 19:8
38:15 49:22 63:14
66:16,17 75:18
78:13,16 79:5,6,7
needs 37:2 76:3,8
never 53:13,16,17
new 1:10 2:8 3:7,7
27:4 81:5
NICK 1:18
Nine 62:15
non 20:2 27:22
non-alcoholic 42:9
72:20
non-food 9:5 18:20
19:2 20:7 25:1,6
25:10 52:19
non-inclusive
21:22
non-items 17:19

non-scale 30:1
non-selling 6:9,13
 7:5,7,17 8:11,17
 9:7,20 20:6 25:6
non-storage 8:19
noted 35:15
notice 8:13
number 3:16 5:8
 6:8,14 16:8 18:6
 22:17 27:17 48:4
 53:1 69:21 73:13
numbers 3:21
 11:12 25:2,3
 26:18 70:9
numerator 16:13
 16:16 17:1,5,8,9
 17:17
numerous 20:16
 27:19
N.W 1:8,14 2:6

O

objectives 78:4
obviously 44:20
 53:13
occurred 67:2
offending 71:5
offer 70:12 71:7
oh 12:11 14:2 55:3
 65:15 69:15
okay 2:3 3:9,14
 4:12 5:15,18 8:1
 8:16 9:15 10:9,16
 11:11 14:3 15:3,9
 15:15 16:4 22:15
 24:14 27:14,22
 30:22 31:8 32:18
 33:10,11 36:8,13
 36:14 38:3,6
 39:21 40:12 41:16
 45:3,7,10 49:16
 55:7,14 60:9
 63:12,14 68:14,18
 69:15 74:3,17,20
 75:13,17 78:17
 79:12 80:3,17
 81:8,10,20 82:4,5

old 67:18
ones 39:13
open 9:3 14:12,13
 14:15 43:2,9
 77:15
operating 47:12
opportunities
 27:20
opportunity 3:5
 6:16 49:9,18 66:4
 66:10 69:19 70:13
 75:9
opposed 39:20
order 11:8 30:14
 78:3
outcome 34:19
outset 26:19 80:7
outside 46:16
overall 6:7 14:5
 16:7 19:4 21:5
 57:20 77:1
owner 3:13

P

page 5:5
Pardon 56:13
part 8:10 13:20
 80:20
particular 11:10
 13:12 16:18 17:13
 20:22 59:9 62:7
party 39:10,10
pass 11:1 22:14
passed 27:20
passing 27:12
peanut 41:9
people 10:1 14:14
 55:11 61:17
percent 10:22 11:9
 28:2,4 30:6,14
 31:12 35:12 37:2
 37:3,19 40:7,21
 41:19,22 42:1,3,6
 42:8,10 44:9,15
 44:16 53:14 55:22
 55:22 56:1,7,8,9
 56:15,16,18 57:2

57:6,13 58:5,11
 59:8 61:10 74:13
 76:21 77:1 78:20
 79:8,8
percentage 19:8
 42:15 58:21 61:10
 75:4
percentages 11:13
 14:5 44:8 74:12
Perfect 5:18
person 67:16
perspective 21:10
 21:11 50:9 57:4
 62:12
philosophical 46:1
phrase 67:6
picking 17:6
pieces 17:6
placed 22:13
placeholder 35:7
places 8:17 60:4
 68:20
plain 44:12
plan 15:19 79:5
planned 7:18
plans 2:21 75:15
plug 35:10
plus 9:10 43:14
point 2:19 26:7,7
 27:16 35:22 44:15
 44:17 75:4 79:7
pointed 23:11
 33:13 36:20
points 10:17
portion 25:19
 48:15,16
positive 34:19
possibly 48:4
potentially 6:17
precedent 35:3
 68:7
prefer 70:14
preference 71:8,13
premise 55:2,5
prep 15:7 22:2
 43:10
preparation 43:3

PRESENT 1:17
presented 4:22
 29:12
presiding 1:15
pretty 44:22 57:11
 60:19 64:11
previously 29:13
 32:14
primarily 3:20
print 30:13 31:5
printed 31:5,11,14
printout 30:5 31:7
 31:10
printouts 31:11
probably 23:1 28:2
 33:3 57:22 58:2,4
 60:19 67:6 74:13
problem 24:21
process 4:19 6:21
 67:5 78:9
produce 9:9
product 15:5 16:18
 19:7 20:22 22:13
 46:8 59:9,11 76:9
products 20:13
 21:14 22:14 42:1
 55:7,17 60:18
professional 33:6
 70:15
program 10:13
 46:17
prompt 73:19
proper 46:19
properly 36:19
proposal 64:9
proposing 64:7
protest 77:8
provide 29:20
provided 5:12
 43:17 63:18 73:18
providing 35:14
 43:15
public 14:12,14,15
 15:6 20:12 21:15
 21:19,20,21 43:2
 43:9,16 52:8
 55:11

purpose 39:3
purposes 44:3
put 35:6 54:9 55:10
 55:13 67:13 68:6
putting 34:20,22
 57:5
P-R-O-C-E-E-D-...
 2:1
p.m 2:2 82:10

Q

quarter 31:21 32:1
question 75:1
 76:11,15,16 78:17
questioned 35:5
questions 4:3 81:14
 81:18
queuing 10:1
quickly 35:10
quite 73:21

R

raise 4:3
rationale 74:22
reached 72:8
read 2:16 15:11
really 17:7 33:22
 34:18 57:5 59:10
 61:4 63:1 78:21
rear 22:6
reason 29:18 71:21
receive 5:1
received 30:5,20
 31:1
recognize 25:22
 26:5,6,14,19 55:1
 63:6 78:2
recognized 54:4
 66:3
reconcile 6:17
reconfigures 76:12
record 3:11 64:2,14
recorded 78:4
redo 75:14,18
redoes 76:11
reduce 31:22
reduced 31:16,18
 31:20

Reeves 1:14	52:13,14,14,14,17	19:5,9 20:3,7,9,11	2:12,20 3:1,5,10	72:6,10,14 73:7
reference 5:6	52:22 53:4,10	20:13 21:4,4,12	3:12,12,13,15	73:16 74:3,11,17
reg 10:20 13:3,5	54:20 56:12 58:14	21:14,18 22:12	5:14,16,19 6:10	74:20 75:3,10,13
15:12 66:14	61:3 62:9,15 63:9	24:7,10,18,19	7:3,9,14,19,22 8:2	76:6,20 77:6,8
regarding 39:16	63:18 65:1 66:3	25:1,4,9,11 26:6	8:16 9:12,14,16	78:6,10,17 79:11
regulation 2:9,11	67:3 72:18 73:11	42:22 43:7,12,21	10:10 11:3,11,22	79:21 80:13,22
28:15,16 42:22	76:19 77:6,14	44:20,21 48:10	12:2,8,15,18,22	81:3,11,16,19
72:1	78:22 80:6,10,12	51:3 52:20 53:7	13:6,14,19 14:2,9	82:1,6
regulations 8:6	81:3,4,21 82:4	54:4 56:9 57:2,7	14:17,22 15:3,9	sodas 72:22
10:4 47:19 51:22	roadblocks 68:6	57:18 58:5 59:8	15:13,16,18 16:4	soft 31:10
72:11 73:4,8	room 1:14 7:11,12	61:7,11,16,17	16:11,15,19 17:15	sold 21:19
related 2:8	24:2 28:3	62:1,6 70:1 73:15	18:10,15,19,22	somebody 33:5
relish 49:9,18	row 36:2	75:20,21 76:22	19:6,13 20:5,9,14	34:10
remaining 51:3	rule 33:18	77:2 80:1	22:15,19 23:3,6	sorry 30:7 31:6
requested 5:11	ruler 29:22 30:6,15	sense 6:18 71:5	23:15,20 24:6,12	34:1 41:1 49:15
require 74:12	rules 14:10 67:9,11	set 2:11 4:22 35:2	25:7,12,17 26:1,9	56:18 63:14 70:22
required 56:21	67:15	59:6 64:2,14 68:7	26:16,22 27:3,7	space 8:12 17:17,21
requirement 66:7	Ruthanne 1:15,18	sets 5:20	27:14,19 28:9,12	18:8 21:5 24:4
requirements 57:6		setup 35:7	28:22 29:3,5,9	36:17 43:12,17
74:7,10	S	seven 37:3 55:9,13	30:7,19,22 31:6	53:15 57:13
requiring 56:5,6	sat 39:18 62:14	55:22 56:2	31:13 32:2,5,9,11	spaces 12:9 51:12
resolve 81:22	saying 12:14 17:22	shake 33:2	32:18 33:4,8,22	51:14 52:12
resolved 2:22	24:13 45:5 48:1	shelf 8:5	34:3,6,10,14,17	speaking 79:14
respect 79:2	48:12 58:22 59:2	shelves 81:5	36:2,6,8,14 37:7	specific 2:11
restrooms 43:4,11	64:18 65:9 73:7	shoes 54:9	37:10,13,18 38:1	specifically 45:15
rests 77:18	says 43:7 52:7 73:6	shoots 19:21,22	38:3,6,10,20,22	square 6:13 8:21
resubmit 34:7 81:6	scale 30:1,4,9,12,12	show 2:13 3:2,3	39:5,22 40:3,8	9:17 10:7,10 16:7
results 70:5	31:21 32:6,21	12:2,6 59:8 68:8	42:15,21 43:20,22	19:14,19,21 21:13
retail 43:1,8	33:19 50:20 63:15	72:2	44:4,6 45:4,8,12	24:2 25:5 26:3
Retailer 1:8	scaled 29:11 50:18	side 23:13	45:16 46:2,7 47:1	27:22 28:20 36:19
reviewed 6:2	scheduled 66:2	Silverstein 1:22	47:4,16,19 48:2,7	41:1,20,20 42:4,6
revision 5:8	second 8:19 39:10	13:18 14:6 28:8	49:2,11,15,17	42:8,10 43:11
ridiculous 62:10	39:11 61:8	38:22 68:14 69:3	50:1,6,10 51:5,8	44:19,21 46:15,18
69:6 70:4	second-party 39:20	69:7 80:7	51:11,15,18 52:1	51:4 52:21 78:19
right 5:22 7:1 8:19	section 60:15,21	simply 10:11 68:6	52:3,6,9,11,15,18	squares 20:3 21:16
9:14 11:3,4 12:13	see 2:22 8:22 26:10	sincerely 77:20	53:3,5,9,12 54:6	staff 33:6
12:15,22 13:16	26:14 49:5 64:20	single 73:4	54:11 55:3 56:12	standard 39:3
16:11,14,18 17:15	73:7 78:8,15	sit 49:9 66:8	56:16 57:8,14	standing 61:18,20
18:17,22 19:12	seen 39:16	sitting 58:22 71:12	58:1,3,7 59:12,18	standpoint 13:4,5
23:13 24:11,12,15	segments 5:10 7:16	six 37:3 56:4 79:9	60:1,9,12 61:3	start 7:1 51:1 53:8
25:7 26:4,9,17	select 10:11	79:11,11	62:9,13,18 63:10	started 55:2,4
32:8 33:2,10 36:6	selling 8:10,20 9:5	size 30:2 31:4,19	63:13 64:4,18	67:14
37:5,12 38:7,16	9:5,6 10:4,6 11:2	skills 56:22	65:2,9,14 66:11	starts 6:9
38:19 39:12 40:2	11:9,15 12:14	slide 33:18	66:12,15,22 67:4	stated 6:14
41:6 46:3,9 47:1,6	14:1,21 15:2,5,20	small 22:8,9	68:12,16,19 69:5	step 82:3
47:16,18 48:22	16:2 17:4 18:4,6	smaller 25:19	69:8,13 70:8,19	storage 7:5,7 15:7
51:20 52:1,9,10	18:18,20 19:2,3,4	Smucker 1:6,6 2:5	70:22 71:4,10	22:1 43:3,10 51:2

store 2:10 6:7 7:2
22:5,7,11 23:13
23:18,19 24:1
43:7 55:1,13,15
57:20 59:11 67:18
68:22 70:3 72:4
72:15,19 75:14
80:9 81:4
story 69:9,13
straight 64:2,14
Street 1:8,14 2:6
stuff 73:2
stumbling 73:13,14
73:16
submit 31:13
submitted 2:12
30:8 32:5,7,9
34:14
substantial 55:16
55:20 59:10
Subtract 25:8
succinct 23:9 73:19
suggest 71:2
Suite 1:14
support 71:15
suppose 15:13
supposed 13:7
sure 3:16 5:4 24:16
28:16,22 30:11
33:8 35:1 37:20
39:5 42:18 43:20
46:2 51:5 53:9
63:16 64:4 69:21
71:5 74:14 75:10
79:12 80:13 82:1
surrounded 21:18
surrounding 24:4

T

table 36:22 77:17
tables 29:13
take 30:15 47:6
78:1 81:12
taken 10:11 20:10
talk 3:22 80:4
talked 39:19
talking 46:9,11

80:4
Technically 28:1
tell 6:19,20 38:12
39:8 46:14 50:8
51:21 53:19 64:1
74:9
telling 47:13 50:15
tells 10:12,13 46:15
terms 5:5 10:18
11:6 35:15 39:10
test 2:14 3:2,6,7
10:22 11:8,18
12:4,7,22 13:1,6,9
15:14,20 16:3,6,8
16:13,19,21 17:7
20:20,20,21 21:7
21:7,7,8 35:12,12
37:2 46:10 61:6,8
76:22
tests 2:11 10:21
25:17
text 58:10
thank 4:7,13,15
5:21 29:5 35:14
49:22 50:7 68:15
82:4,7
theirs 58:13
thereof 30:14
thing 31:3 58:19,22
59:3 61:12,13
72:19
things 35:13 36:11
36:22 37:11,14
57:17 67:2 72:5
75:4
think 10:14,17
20:18 22:22 26:7
26:13,20 28:12
34:15,21 37:6
41:4,11 42:20
43:22 44:6,7
45:12,18 46:19
49:11 51:6 57:9
59:6 69:20 73:19
73:20 74:5 76:14
77:22 78:6,14
79:20 80:6,14,15

third 39:10,10
third-party 39:20
65:18
thought 14:11
76:15
three 22:20 25:1
32:11 40:6,8
51:12,13,16 63:13
threshold 40:7
time 11:21 29:10
33:9 34:22 37:14
48:8 49:3,3 63:2
64:22 66:15 67:9
times 14:3 20:16
32:11 56:1 66:19
79:11
today 4:16 5:3 38:5
64:8 65:17 66:2,3
66:8 67:3 73:6
told 8:7 14:18 19:7
26:22 27:4,16
37:7 52:11 61:22
63:14 64:5 65:12
66:15,16 67:22
80:1
tomorrow 81:6
tool 50:13,16,19,19
top 23:17 36:2
total 6:9,12 7:17
17:4 22:16 24:18
24:19 25:1,4,6
26:5 51:3,10 52:7
53:7 54:4 55:1
57:6
totally 52:16
trace 30:15
tried 67:16 74:21
trust 45:1
try 23:9 29:22 30:1
35:1 70:2
trying 33:19 34:12
34:19 37:17 38:12
67:10
two 3:22 9:1 10:21
11:12 45:21
types 57:17
typical 72:22

typically 72:19
t/a 1:6

U

uncooked 41:21
60:14 78:18
understand 6:16
21:19 26:12,20,21
27:6,18 28:18
32:10 33:1,7 39:2
44:11 46:18 52:3
54:8,9 57:5 68:1
69:17,21 77:21
understanding
65:19 70:17
understands 43:20
67:21
understood 11:19
42:18 57:3 75:16
Unfortunately 5:7
32:12
updated 32:16 35:8
35:13
use 13:1,19 17:18
17:20 47:9 50:18
50:19 55:19 56:6
56:6
useful 69:20
uses 47:10
usually 60:17
utility 7:13 22:1
24:1 80:11

V

variety 55:6,8
vast 57:15
vegetable 60:16
veggies 40:21 41:3
41:18
venting 9:11 13:20
13:22
version 4:20 67:19
versus 11:2 35:5
vertical 23:16
vote 73:6,7

W

wait 38:20

walk 10:2,2 23:8,8
69:1 77:22 78:13
walkway 60:4
walkways 60:2
wall 5:10,20 22:10
23:11,12 67:6
80:10,11
walls 6:4 35:16
Walmart 59:5
want 4:8,9,15 5:4
34:4 39:1,21
40:15 41:8 42:18
43:19 54:14,19
65:2,3,4 66:9
67:14 68:5,8,12
75:8 78:21
wanted 4:20 5:17
5:22 6:15 34:6
39:7 66:4
Washington 1:14
wasn't 21:6,6 64:10
66:7
wasting 33:9
water 72:21
way 2:16 3:1 11:14
16:22 23:17,22
25:18 28:5 39:1
47:6,8 48:5 50:17
50:18,19 53:19,20
54:2 62:2 64:13
68:8 69:22 70:2
72:11 76:8 77:5
79:16
ways 80:2
week 37:7 38:21
weeks 62:14,15
63:13
weren't 31:11
36:19 54:8 64:17
66:1,2 67:13
we'll 38:20
We're 27:7
Whew 73:9
width 43:15
wiggle 28:3
willing 28:11,17
willingness 4:17

window 72:18	18 42:6	5		
wine 69:2 75:15	19 9:17 14:3	5 11:9 35:12 37:2,3		
wipe 72:18	1950s 67:19	40:7 44:16 55:22		
word 10:19		55:22 59:8 79:7,8		
wording 10:20	2	50 10:22		
words 10:19	2 11:8,18 12:4,7	506 6:13,20 25:6,8		
work 4:18 7:11,12	13:1,6,9 15:20	572.95 44:19 46:18		
24:1 28:11,17	16:6,13,19,21			
37:1 61:1,1 70:15	17:7 20:20,21	6		
71:3,14,21 81:15	21:7 31:3 35:12	6 56:6		
working 29:8 32:13	36:4,5,10 46:9,10	6,000 10:22		
32:15,20 33:16	76:22	6.09 42:1		
71:22,22 72:2,3	2.2 36:4	60 56:9		
World 69:3	2.28 42:5	607 60:8		
wouldn't 12:4 18:5	2000 1:14	657 19:14,21 44:20		
53:18 54:10 58:12	20009 1:15	46:15		
58:13,15	2013 1:12	669 10:7,10,14		
written 15:12	2118 1:8 2:6	669.2 10:14		
wrong 44:7,12	25 53:14 76:21 77:1			
45:18,21,22 48:1	270.2 42:8	7		
51:7 72:1,11	29 1:12	7 29:14 35:5,19		
		70 56:11,14,16,17		
X	3	57:1		
x 29:13,14	3 8:4,8 9:2,21 10:5	74.57 44:9		
	11:7,17 12:20	75.1 42:4		
Y	13:8,11 14:11	791 21:13 22:18,19		
year 69:10,14	17:9,10,18 18:1,3	25:10 44:10 53:7		
	19:16 20:17 25:14	53:13 78:21		
P	43:7,18 58:5,11			
p 1:4,10	3:00 33:18	8		
	3:15 2:2	8 29:13 35:6,20		
1	30 56:7,8 57:6,13	8th 62:21,22 63:5,8		
1 9:10 10:22 12:22	309 25:11 52:20	64:16		
14:3 15:14 16:3,8	34.16 42:8	8.5 31:15		
20:20 21:7 32:4	35 56:1,1	80 28:4		
35:21	35.65 42:10	85 41:20		
1,100 25:5,9 51:4	38 27:22			
52:19	39 41:22 78:19	9		
1.5 35:21		90945 1:9 2:7		
1/2 75:4	4	937 51:19		
10.75 40:21 41:19	4 8:21 18:3 29:13			
100 30:5,14 31:11	29:14			
44:14 61:10 74:13	4.51 42:10			
11.85 42:3	4.8 28:1 37:19			
14 9:10,17	4.93 41:22 78:20			
14th 1:8,14 2:6	4:18 82:10			
1606 6:7 25:5,9	400S 1:14			
17 9:10,17	48.2 42:2			