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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, CO 80202
STATE OF COLORADO
ex rel. PHILIP J. WEISER, Attorney General,

Plaintiff,

v.

THE KROGER CO.; ALBERTSONS COMPANIES, INC.; and C&S WHOLESALE GROCERS, LLC,

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<tr><td colspan="2">PLAINTIFF’S MOTION AND MEMORANDUM FOR PRELIMINARY INJUNCTION</td></tr>
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C.R.C.P. 121 § 1-15, ¶ 8 Certification

Plaintiff's counsel has in good faith conferred with Defendants' counsel about this Motion and understands that Defendants will oppose the Motion. Defendants The Kroger Co. and Albertsons Companies, Inc. have agreed with the Federal Trade Commission ("FTC") that they will not close on their Proposed Merger (as defined below) before 11:59 p.m. Eastern Standard Time on February 28, 2024, and in the event the FTC files litigation to block the merger, that they would not close before the fifth day after an order on the FTC's application for a preliminary injunction. The Attorney General will further confer with the Defendants on a proposed scheduling order for this matter. If agreement cannot be reached, the Attorney General may seek a temporary restraining order to prevent the parties from closing until this Court issues an order on this Motion.

Plaintiff, the State of Colorado, upon relation of Philip Weiser, Attorney General for the State of Colorado (hereinafter the "Attorney General" or "Plaintiff"), by and through undersigned counsel, moves this Court for a preliminary injunction pursuant to C.R.C.P. 65(a) and (b) and C.R.S. § 6-4-112 to enjoin Defendants from consummating their Proposed Merger (as defined below) pending a final judgment on the merits because the Proposed Merger violates the Colorado Antitrust Act, C.R.S. § 6-4-107, as specified in Plaintiff's Complaint. Specifically, to prevent irreparable harm to Colorado consumers, workers, and suppliers, the Attorney General respectfully requests that this Court:

a. Set a date for a hearing on the Attorney General's motion for a preliminary injunction;

b. Enter an Order for reasonable expedited discovery;

c. Preliminarily enjoin the Proposed Merger until the Court enters a Final Judgment on the merits.

I. INTRODUCTION

Antitrust cases tend to be complex, but although this case contains complexities, at its core are some simple truths. Kroger and ACI are two of the largest Supermarket operators in Colorado. Combined, they account for over half of all Supermarket sales in the state.

They are fierce rivals who compete vigorously for sales. They do so by competing on price, leading to lower prices for consumers. They also compete on customer service, store quality, shopping experience, product variety, well-stocked shelves, availability of local supply, private label brands, customer loyalty and rewards programs, and data analytics. What one excels at, the other mimics and advances, all to the benefit of consumers.

This competition has other beneficiaries too. Workers benefit because the companies need to compete on quality and service, which requires strong employees. Competing to hire and retain those workers improves wages and benefits. Local farmers and suppliers also benefit because the companies compete for customers who want to buy local. This results in fair prices for local supply.

Kroger and ACI now wish to undo all that. Rather than continuing to compete, they propose to join forces by merging. Their Proposed Merger will lead to higher prices, reduced choices, and lower quality for consumers. It will also harm workers and suppliers. The Colorado Antitrust Act of 2023 prohibits this very kind of merger.

No doubt aware of the anticompetitive harm of the Proposed Merger, Kroger has proposed a divestiture of stores and limited other assets to C&S—a wholesaler with minimal retail experience. But their proposed remedy is like a cure worse than the disease itself. The divestiture package is barren of the assets necessary for C&S to restore the competition lost to the Proposed Merger. And even if the divestiture package were improved, C&S is unlikely to successfully operate them, as it lacks large-scale retail experience and the infrastructure needed to compete with the likes of Kroger. This proposed remedy places the risk of failure on the people of Colorado – not on the merging parties or on C&S, which would acquire the assets at a discount price, and stand to recoup its investment in the value of the real estate, even if it cannot successfully compete against the merged entity.

The Court should preliminarily enjoin the Proposed Merger to prevent irreparable harm to Coloradans, pending a final judgment on the merits.[1]

[1] The evidence presented with this motion sets forth the basic facts to establish the need for a preliminary injunction. An additional factual record will be developed after further discovery in advance of a hearing. The Attorney General will also present expert evidence at a hearing.

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III. BACKGROUND

A. The Parties

Philip J. Weiser is the duly elected Attorney General of the State of Colorado and is authorized under the Colorado State Antitrust Act of 2023 (the "Antitrust Act") to bring actions to prevent or restrain violations of the Antitrust Act, and to recover costs and attorney fees. *See* C.R.S. §§ 6-4-107, 112.

Defendant The Kroger Co. ("Kroger") is a publicly traded company incorporated in Ohio, and headquartered in Cincinnati, Ohio. Kroger owns and operates over 2,700 grocery stores under different banners across the United States, as well as over 2,200 pharmacies and 1,600 fuel centers.[2] Kroger operates 148 stores in Colorado under its King Soopers (116 stores) and City Market (32 stores) banners.[3]

Defendant Albertsons Companies, Inc. ("ACI") is a publicly traded company incorporated under the laws of Delaware, and headquartered in Boise, Idaho. ACI operates over 2,200 grocery stores under different banners across the United States, as well as over 1,700 pharmacies, and over

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[2] The Kroger Co., Annual Report (Form 10-K) at 4 (March 28, 2023), *available at* https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/0000056873/000155837023004767/kr-20230128x10k.htm.

[3] Kroger's other banners include Ralphs, Dillons, Smith's, Fry's, QFC, Owen's, Jay C, Pay Less, Baker's, Gerbes, Harris Teeter, Pick'n Save, Metro Market, Mariano's, Fred Meyer, Food 4 Less, and Foods Co.

400 fuel centers.[4] ACI operates 105 stores in Colorado under the Safeway (103 stores) and Albertsons (2 stores) banners.[5]

Defendant C&S Wholesale Grocers, Inc. ("C&S") is a privately-held company headquartered in Keene, New Hampshire. C&S is one of the largest grocery distributors in the U.S. However, its current retail grocery operations are relatively new and limited. Since selling most of its retail holdings approximately twelve years ago, C&S reentered retail grocery in 2021 and currently operates only 23 retail grocery stores under the Grand Union and Piggly Wiggly banners. Biller Decl.[6] Ex. 1 (FTC-CS-00004581) at -596, -605, -613. C&S also franchises the Piggly Wiggly banner in certain states and services those stores through its distribution business.[7] C&S has no operations or customers in Colorado—it does not own, operate, or franchise any stores in Colorado or have any distribution business in the state.

C&S has at various times in its history **REDACTED**

Historically, C&S's approach to retail grocery is **REDACTED**

[4] Albertsons Companies, Inc., Annual Report (Form 10-K) at 8 (April 25, 2023), *available at* https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/1646972/000164697223000045/aci-20230225.htm.

[5] ACI's other banners include Vons, Jewel-Osco, Shaw's, Acme, Tom Thumb, Randalls, United Supermarkets, Pavilions, Star Market, Haggen, Carrs, Kings Food Markets, and Balducci's Food Lovers Market.

[6] Citations to "Biller Decl." refer to the Declaration of Arthur Biller, dated February 14, 2024, and submitted in support of this motion.

[7] *C&S Wholesale Grocers Enters Into a Definitive Purchase Agreement with Piggly Wiggly Midwest*, C&S Wholesale Grocers, *available at* https://www.cswg.com/news/cs-wholesale-grocers-enters-into-a-definitive-purchase-agreement-with-piggly-wiggly-midwest/.

REDACTED

B. The Proposed Merger

Kroger and ACI entered into a merger agreement on October 13, 2022 (the "Merger Agreement"), and publicly announced the Proposed Merger the following day. Biller Decl. Ex. 4 (Merger Agreement). Kroger agreed to pay $24.6 billion to acquire all of the outstanding stock of ACI, amounting to $34.10 per share to ACI shareholders.[8] *See id.* at -242, -252. In connection with the Proposed Merger, ACI paid a $4 billion special dividend—$6.85 per share—to its shareholders[9]. Kroger's purchase price was then reduced on a per share basis by an amount equivalent to the special dividend pursuant to the Merger Agreement, resulting in a purchase price

[8] *See also* ACI Press Release, Oct. 14, 2022, *available at* https://www.albertsonscompanies.com/newsroom/press-releases/news-details/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx.

[9] *See supra*, note 4 at 49; *see also* ACI Press Release, Oct. 14, 2022, *available at* https://www.albertsonscompanies.com/newsroom/press-releases/news-details/2022/Albertsons-Companies-Announces-Special-Dividend-in-Connection-with-Signing-of-Merger-Agreement/default.aspx.

of $27.25 per share. *Id.* at -252. ACI incurred debt to pay the dividend (the majority of which was paid to its private equity shareholders)[10].

The Proposed Merger would result in Kroger owning all of ACI's stores in Colorado, including ownership of the Safeway and Albertsons banners, ACI's distribution center in Colorado, its dairy plant, its bakery, and all of ACI's other assets in Colorado. *See generally* Biller Decl. Ex. 4 (Merger Agreement). Kroger would also own ACI's private label brands, including its most profitable and popular Signature and O Organics brands. *Id.*

C. The Grocery Industry

1. Supermarkets are a distinct type of retail grocery store.

The retail grocery industry is comprised of a diverse array of players, ranging from local neighborhood stores to international giants. Different types of grocery retailers provide different shopping experiences and fulfill different needs. Most notable is the Supermarket, which is unique in providing consumers the convenience of one-stop shopping with diverse product offerings.

A Supermarket is any full-line retail grocery store that enables customers to purchase substantially all of their food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery

[10] *See supra*, note 9.

products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.[11]

Supermarkets often, though not always, include complementary departments that customers desire for one-stop shopping like pharmacies, general merchandise, and fuel stations. One-stop shopping sets Supermarkets apart from other types of stores and saves consumers time and money, especially at stores that carry private label products or that have customer loyalty programs.

At a preliminary injunction hearing through witness testimony, documents, and economic analysis, the Attorney General will show that Supermarkets are a distinct category of grocery retail store.

Although other stores may also offer food and grocery items, they have some key differences from Supermarkets.

For example, Club Stores like Costco and Sam's Club offer a different shopping experience than Supermarkets. Club stores typically do not stock a variety of national brand name items that many customers desire, and most of their selections are offered in bulk. Indeed, most Club Store

[11] The FTC has traditionally used this definition in prior grocery merger cases. *See, e.g.*, Complaint, *In the Matter of Price Chopper/Tops Markets*, F.T.C. Docket No. C-4753 (November 5, 2021), ¶ 10 *available at* https://www.ftc.gov/system/files/documents/cases/2110002pricechoppertopscomplaint.pdf. The FTC has also delineated Supermarkets as stores that carry more than 10,000 SKUs and more than 10,000 square feet of selling space. *See id.* at ¶ 11. The term "SKU" means Stock Keeping Unit and is a unique code assigned to a product, typically in the form of an alpha-numeric code and accompanied by a scannable bar code.

consumers only visit a Club Store once or twice per month, or less frequently.[12] And unlike most grocers, a paid membership is often required to shop at a Club Store.

Other stores are even more limited. Dollar stores like Family Dollar and Dollar General often stock only nonperishable items and budget-friendly household goods. Customers cannot satisfy all their food and grocery needs at a Dollar Store. Supermarkets offer a broad selection, including fresh produce, meat, and a wide range of brand choices. In Colorado, no Dollar Stores carry fresh produce or meat.

2. Private label brands are a key ingredient to a successful Supermarket.

Supermarkets typically stock private label products on their shelves. These products are sold under a brand that is owned by a particular company and exclusively sold in that company's stores. Private label products are sometimes manufactured by the company that owns the brand, and sometimes manufactured by a third party. Private label brands are very important to a Supermarket's success because they are trusted and highly valued by consumers and are often priced lower than competing national brands—which are more expensive for the store to acquire—making them more profitable for the Supermarket. Private label brands make up a substantial portion of a Supermarket's sales volume.

Kroger and ACI offer many private label products in their stores. These private label products are trusted and highly-valued by consumers. Some of Kroger's more popular private label brands include Kroger and Simple Truth. Kroger boasts that three of its private label brands

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[12] *See* Gabrielle Olya, *How does your Costco spending compare to the average member's?*, yahoo! Finance, July 13, 2023, *available at* https://yhoo.it/4btxY8Y.

are multi-billion dollar brands, which "generate three times the sales than those of the top five CPGs combined."[13] With more than $30 billion in sales in 2022, Kroger's private labels comprised over 20% of Kroger's total sales.[14] Kroger manufactures 30% of its own brand products in-house, to seek the lowest possible cost of goods.[15]

Similarly, ACI boasts having four billion-dollar-plus private label brands.[16] ACI's private label brands are highly profitable, making up over REDACTED of ACI's profits on a store-level EBITDA basis. Biller Decl. Ex. 5 (ACI2R-0004936348) at -540. ACI considers its private label brands—and in particular its Signature and O Organics labels—to be REDACTED

Private label brands are a key component of Supermarkets' competitive strategies, and Kroger and ACI have separately invested significant resources developing their private label products, which require massive national infrastructure. Kroger and ACI separately employ hundreds of employees at their corporate, regional, and manufacturing facilities to support their private label operations, including research & development personnel, quality assurance

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[13] The Kroger Co., 2023 Fact Book (2023), at 18, *available at* https://ir.kroger.com/files/doc_downloads/factbook/2023-pdf-fact-book.pdf.

[14] *Id.*

[15] *Id.*

[16] ACI Investor Relations Company Fact Sheet (2023), *available at* https://s29.q4cdn.com/239956855/files/doc_financials/2023/q3/CM_Corp_ACI_InvestorRelations_FactSheet_R2_Q3_2023.pdf.

personnel, consumer researchers, marketing and promotions personnel, financial analysts, designers, sourcing and supply chain personnel, manufacturing personnel, and executive staff.

3. Customer loyalty programs are a key ingredient to a successful Supermarket.

Supermarkets also rely heavily on customer loyalty programs, which provide key insights into customer preferences and behaviors that then inform a supermarket's pricing and promotion strategies. A robust customer loyalty program can provide essential data analytics to a supermarket and give it an edge against its competitors. Operating these data analytics businesses requires significant investment in technology and other resources.

Kroger's robust loyalty program gives customers personalized offers in the form of targeted coupons, mailings, and advertisements, and popular discounts on things like fuel. It is backed by a sophisticated and proprietary data analytics business, called 84.51.

Kroger boasts of its "advanced data science capabilities" and that its loyalty program captures 90% of Kroger's sales and covers 60 million households.[17] Kroger's data scientists and loyalty program personnel analyze 10 petabytes of customer data to come up with two trillion personalized customer recommendations annually, and to tailor its pricing strategy, sales planning, category management, and assortment.[18] The effect of its loyalty program is to "nearly doubl[e] the likelihood of a customer adding an item to their cart."[19]

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[17] The Kroger Co., 2023 Fact Book at 16, 39.

[18] *Id.*

[19] *Id.* at 17.

These data analytics departments also drive alternative sources of revenue. REDACTED

ACI also has a popular and profitable loyalty program through which customers can earn rewards, including discounts on fuel. ACI uses a data analytics platform to offer a customized shopping experience REDACTED

ACI's loyalty program is a huge driver of its revenues and profits. REDACTED

ACI's loyalty program produces over REDACTED

D. Kroger & ACI Are Fierce Competitors.

Kroger and ACI are fierce competitors in Colorado. The parties' internal documents confirm this fact. ACI views Kroger as REDACTED

Indeed, ACI employees were incredulous when the Proposed Merger was announced, decrying that "you are basically creating a monopoly in grocery with the merger . . . It's like AT&T and Verizon wanting to merge," and speculating that the deal would

never receive regulatory approval. Biller Decl. Ex. 9 (ACI2R-0018169689) at -694; Biller Decl. Ex. 10 (ACI2R-0014023936) ("with the similar footprints Kroger and [ACI] has I'm not sure how you get it past the FTC"); Biller Decl. Ex. 11 (ACI2R-0010009992) ("merger cant [sic] possibly go through due to monopoly right?"). The ACI Senior Director of Human Resources similarly commented, "I think the chances are still slim this happens." Biller Decl. Ex. 12 (ACI2R-0015501649) at -651.

The ACI Chief Operating Officer also commented on the intensity of competition between ACI and Kroger in Colorado. When answering questions about the Proposed Merger from employees of the ACI Denver Division, she noted that King Soopers "are our competitors . . . We are being bought by our enemy." Biller Decl. Ex. 13 (ACI2R-0009500752) at -753.

Consumers regularly compare prices between ACI and Kroger.

Kroger and ACI likewise check each other's prices and frequently adjust their own pricing accordingly. **REDACTED** In Denver, for example, **REDACTED**

REDACTED

Kroger similarly watches ACI very closely. In Colorado, REDACTED

Competition between the two firms extends well-beyond price. The Attorney General will show that Kroger and ACI compete vigorously for shoppers in other respects as well.

Kroger and ACI also compete to provide a superior customer experience. For example, they both regularly send employees to walk each other's stores. REDACTED

And to provide good customer service, Kroger and ACI compete for labor, particularly experienced and skilled labor such as district managers, store managers, department managers and supervisors, meat cutters, cake decorators, and pharmacists. Because of the unique features of Supermarkets—namely, full service, one-stop shopping—Kroger and ACI greatly value the experience of each other's employees when making hiring decisions.

In 2020, for example, Kroger **REDACTED** That is a textbook example of how competition for workers provides workers with higher wages, better training, improved working conditions, and enhanced opportunities; and that in turn leads to competition for better consumer experiences.

The vigorous competition between Kroger and ACI benefits the marketplace, including consumers, workers, and local suppliers. The Proposed Merger would end that competition.

E. The 2022 UFCW Strike Against King Soopers

In January 2022, the UFCW went on strike against 78 King Soopers stores in Colorado.[20] The strike provides an illuminating case study of what happens when people cannot shop at their local King Soopers stores: they go to the closest Safeway instead.

In advance of the strike, ACI/Safeway anticipated that REDACTED

A tremendous volume of sales diverted from King Soopers to Safeway stores during the strike. The Safeway Denver Division reported that REDACTED

Internal updates at ACI about the strike confirmed the impact of the Kroger strike on Safeway sales. REDACTED

[20] *See, e.g.*, Matt Bloom, *King Soopers workers ratify 3-year contract after striking across Denver metro*, CPR News, available at https://www.cpr.org/2022/01/25/king-soopers-workers-ratify-contract-after-denver-strike/.

REDACTED

F. The Proposed Divestiture Remedy

Nearly a year into the State's investigation of the Proposed Merger, Kroger and ACI proposed to divest retail stores, distribution centers, certain private label brands, and other assets to C&S, a large distributor with no operations or customers in Colorado. Pursuant to the Divestiture Agreement between the Defendants dated as of September 8, 2023, C&S will pay $1.9 Billion to acquire 413 stores, eight distribution centers, five private label brands, and three banners (QFC, Mariano's, and Carrs, none of which have stores in Colorado). Biller Decl. Ex. 29 (Asset Purchase Agreement); *see also* Biller Decl. Ex. 30 (9/8/23 Divestiture Presentation) at 3. C&S will also have an exclusive license to use the Albertsons banner in Colorado, Wyoming, Arizona, and California. Biller Decl. Ex. 29 (Asset Purchase Agreement) at Ex. I (Trademark License Agreement); *see also* Biller Decl. Ex. 30 (9/8/23 Divestiture Presentation) at 3. The Divestiture Agreement contemplates that C&S can acquire an additional 237 unidentified stores if requested by Kroger and ACI. *See* Biller Decl. Ex. 29 (Asset Purchase Agreement) at 52.

In Colorado, C&S will acquire 52 ACI stores—50 Safeway and two Albertsons bannered stores— REDACTED

C&S will not acquire the Safeway banner under the Divestiture Agreement, as Kroger will keep the Safeway banner for itself. C&S will have to re-banner the 50 Safeway stores it acquires into Albertsons stores.

The Divestiture Agreement does not include Kroger or ACI's largest and national brand-equivalent private label brands. Instead, C&S will acquire the following five private label brands: Open Nature (a natural products brand), Waterfront Bistro (seafood), Primo Taglio (premium meats and cheeses), ReadyMeals (ready-to-eat foods), and Debi Lilly Designs (floral). *Id.*

Although C&S will acquire 52 ACI stores, it will not acquire ACI's most popular private label brands: "Signature" and "O Organics." The Signature brand REDACTED

The separate "Signature Cafe" brand REDACTED The O Organics brand REDACTED

REDACTED

The Divestiture Agreement also contains a Transition Services Agreement (TSA) between Kroger and C&S in which Kroger agrees to provide support services to help prop up C&S as

Kroger's new direct competitor. The arrangement is a recipe for disputes and disaster—for several years C&S will be dependent on its direct competitor for key services and infrastructure.

This TSA will give Kroger access to and influence on C&S's proprietary information. For example, REDACTED

Similarly, REDACTED

As for store operations, C&S would rely on Kroger to REDACTED C&S would also rely on Kroger to REDACTED

In sum, the C&S divestiture creates only the appearance of "new" competition in Colorado markets soon to be even more dominated by Kroger.

Since announcing the Divestiture Agreement, Kroger and ACI have submitted modified divestiture proposals to the Attorney General and the FTC. Those proposals have mostly centered on changes to the list of stores to be divested, as well as some changes regarding other aspects of the divestiture package including the use of the Safeway banner in Colorado. However, C&S has not agreed to any of those proposed modifications and they do not ameliorate the overall concerns with the divestiture to C&S.

G. The Failed Divestiture of the ACI/Safeway Merger.

In 2015, ACI purchased Safeway for approximately $9.2 billion.[21] To secure approval, ACI divested 146 stores to Haggen, Inc., a regional grocer that operated 18 stores in Washington and Oregon.[22] The divestiture led to the eight-fold expansion of Haggen across five states, including three states where Haggen had no prior market presence: California, Arizona, and Nevada. *In re HH Liquidation*, *LLC*, *et al.*, 590 B.R. 211, 230, 251 (Bankr. D. Del. 2018). The divestiture was a failure that quickly led to Haggen's bankruptcy. ACI later reacquired most of the stores, including the Haggen banner itself. Other stores closed.

A private equity firm owned the majority of Haggen at the time. 590 B.R. at 225. The private equity owner knew that it could recoup its purchase price through a "sale/leaseback" strategy, whereby it would sell the real estate and then lease the stores back from the subsequent

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[21] Complaint, *In re Cerberus Inst. Partners, et al.*, F.T.C. Docket No. C-4504 (ACI/Safeway Merger) at ¶ 8, *available at* https://www.ftc.gov/system/files/documents/cases/150702cerberuscmpt.pdf.

[22] Decision and Order, *In re Cerberus Inst. Partners V, L.P., AB Acquisition LLC, and Safeway Inc.* (ACI/Safeway Merger), *available at* https://www.ftc.gov/system/files/documents/cases/150702cerberusdo.pdf.

buyer. *Id.* at 232-34. The sale proceeds could be diverted back to the private equity owner while the operating entity of the stores would be saddled with the lease payments.

Haggen later filed a lawsuit accusing ACI of anticompetitive conduct, violations of the FTC's divestiture order, attempted monopolization, breach of the purchase agreement between ACI and Haggen, fraud, and unfair competition, among other claims. Haggen Complaint, *Haggen Holdings*, *LLC*, *v. Albertson's* LLC, No. 1:99-mc-09999, 2015 WL 5138125 (D. Del. Sept. 1, 2015). Haggen claimed that ACI made false representations about the divested stores to induce Haggen to acquire the stores under an expedited timeframe; misused Haggen's confidential information to implement strategies to draw customers away from Haggen; provided inaccurate inventory data to disrupt the transition of the stores to Haggen; provided inaccurate and misleading pricing information to cause Haggen to overprice its goods; sabotaged inventory at the divested stores by, inter alia, overstocking the stores with perishable meat and produce; improperly removed store fixtures and inventory; disrupted Haggen advertising for the new stores; and failed to perform routine maintenance prior to transfer of the stores. *See id.*

Although there were no Haggen stores in Colorado, our state suffered from the ACI/Safeway merger in other ways. In the two years after the merger, ACI closed 20 stores in Colorado as it sought to consolidate its operations and eliminate so-called redundancies. Biller Decl. Ex. 33 (chart of re-bannering and store closures). That corporate consolidation all came at the cost of lost jobs, emptied shopping centers, and reduced consumer choice. Haggen's owner, however, had a different experience. Haggen reportedly paid $309 million for the assets it purchased from ACI. Biller Decl. Ex. 34 (ACI Draft Answer to Haggen Complaint) at 2. Quickly

thereafter, Haggen entered into sale/leaseback transactions for 59 of divested stores, for a reported $300 million.[23] ACI then paid over $100 million to buy stores back from Haggen.[24] But consumers and workers were harmed as stores were either permanently closed, ended up back with ACI in a step that undermined the goal of the remedy, or struggled during a bumpy transition.

IV. LEGAL STANDARDS

A. Standard for Injunctive Relief.

The court should issue a preliminary injunction if doing so would prevent irreparable harm and preserve the status quo pending final resolution on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982) (en banc); *City of Golden v. Simpson,* 83 P.3d 87, 96 (Colo. 2004). The Attorney General is authorized to "institute actions or proceedings to prevent or restrain violations of" the Antitrust Act. C.R.S. § 6-4-112(1). A court may enter a preliminary injunction pursuant to C.R.C.P. 65(a) when:

1) there is a reasonable probability of success on the merits;
2) there is a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
3) there is no plain, speedy, and adequate remedy at law;
4) the granting of a preliminary injunction will not disserve the public interest;
5) the balance of equities favors the injunction; and

[23] *See* Angel Gonzalez, *Haggen's risky expansion largely bankrolled itself*, Seattle Times, *available at* https://www.seattletimes.com/business/retail/haggens-risky-expansion-largely-bankrolled-itself/.

[24] *See* Jim Davis, *Haggen reaches $106 million deal to sell remaining stores to Albertsons*, HeraldNet, *available at* https://www.heraldnet.com/business/haggen-reaches-106-million-deal-to-sell-remaining-stores-to-albertsons/.

6) injunction will preserve the status quo pending a trial on the merits.

Rathke, 648 P.2d at 653-54; *Simpson*, 83 P.3d at 96.

B. The Colorado Antitrust Act.

Last year, the General Assembly enacted the Colorado State Antitrust Act of 2023. C.R.S. §§ 6-4-101, et. seq. (the "Antitrust Act"). In so doing, the General Assembly declared that:

> "Competition is fundamental to: [t]he free market system; and [a] healthy marketplace that protects workers and consumers; and [t]he unrestrained and fair interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality commodities and services, and the greatest material progress while at the same time providing an environment that is conducive to the preservation of our democratic, political, and social institutions and to the protection of consumers."

C.R.S. § 6-4-102(1) (subsection numbering omitted).

The Antitrust Act prohibits mergers or acquisitions "if the effect of the acquisition may substantially lessen competition or tend to create a monopoly." C.R.S. § 6-4-107(1).

This Court is authorized to interpret the Antitrust Act independently of any federal antitrust legal precedent. Indeed, in enacting the Antitrust Act, the Colorado Legislature expressly deleted a provision of the predecessor Colorado Antitrust Act of 1992 instructing courts to "use as a guide interpretations given by the federal courts to comparable federal antitrust laws." Former C.R.S. § 6-4-119. Nevertheless, federal decisions construing similar language in the federal antitrust laws,[25] although not controlling, may be "helpful to an understanding" of issues raised under

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[25] Section 7 of the Clayton Act prohibits mergers or acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

Colorado antitrust law. *People v. North Avenue Furniture & Appliance, Inc.*, 645 P.2d 1291, 1295–96 (Colo. 1982).

The phrase "may be substantially to lessen competition" relates to "'probabilities, not certainties.'" *F.T.C. v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 166 (3rd Cir. 2022) (quoting *Brown Shoe Co. v. United States.*, 370 U.S. 294, 323 (1962)). And because courts examine whether there is a mere probability that a merger will produce anticompetitive effects, Section 6-4-107(1) "creates a relatively expansive definition of antitrust liability" and "subjects mergers to searching scrutiny." *California v. American Stores Co.*, 495 U.S. 271, 284-85 (1990) (describing Clayton Act § 7). Courts must assess potential anticompetitive effects framed within the "'structure, history, and probable future'" of the particular markets that the merger will affect. *Brown Shoe*, 370 U.S. at 322 n.38. If the evidence suggests an "'appreciable danger'" of anticompetitive effects, *United States v. H&R Block*, 833 F. Supp. 2d 36, 49 (D.D.C. 2011), then this Court should "arrest [those] anticompetitive tendencies in their 'incipiency,'" *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 362 (1963). All "doubts are to be resolved against the transaction." *F.T.C. v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989).

C. The Burden Shifting Framework.

Federal courts apply a burden-shifting framework to determine merger challenges. *See*, *e.g.*, *United States v. Baker Hughes,* 908 F.2d 981, 982-83 (D.C. Cir. 1990); *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 423 (5th Cir. 2008); *United States v. Aetna Inc.*, 240 F.Supp.3d 1, 18 (D.D.C. 2017). Pursuant to that framework, the government must first establish a prima facie case showing that the effect of the merger is likely to be anticompetitive. *United*

States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.D.C. 2019) (prima facie case established if Government shows "that the merger is likely to substantially lessen competition"). The government makes a showing by demonstrating that the merger would create a firm controlling an undue percentage share of the relevant market and lead to "undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes,* 908 F.2d at 982. "Such a showing establishes a 'presumption' that the merger will substantially lessen competition." *F.T.C. v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015).

The burden then shifts to the defendants to offer proof that the evidence presented by the plaintiff, such as market shares provides an inaccurate account of the merger's probable effects on competition. *See Sysco*, 113 F. Supp. 3d at 23 (citations omitted); *United States v. Anthem*, *Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017). "The more compelling the [government's] prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991.

Finally, and only if the defendant successfully rebuts the presumption, the burden shifts back to the government to produce additional evidence of anticompetitive effects and merges with the government's ultimate burden of persuasion. *Baker Hughes*, 908 F.2d at 983. This burden-shifting framework is flexible, with the evidence and burdens often analyzed together. *Chicago Bridge & Iron*, 534 F.3d at 425-26; *Olin Corp v. F.T.C.*, 986 F.2d 1295, 1305 (9th Cir. 1993); *F.T.C. v. University Health, Inc.*, 938 F.2d 1206, 1218-19 & n. 25 (11th Cir. 1991).

In some cases, like this one, defendants may propose a divestiture to remedy the merger's anticompetitive effects. As explained below, divestitures are properly considered at the remedy

stage, not as a defense to liability. And in any event, defendants bear the affirmative burden to prove why a proposed divestiture will alleviate a merger's anticompetitive effects. In this case, moreover, with a similar remedy failing miserably in a prior case, the Court should evaluate any proposed divestiture with the utmost skepticism.

V. ARGUMENT

This Court should grant the Attorney General's Motion for Preliminary Injunction because the Proposed Merger is likely to substantially lessen competition, and the parties should not be permitted to close their proposed transaction before a trial on the merits.

A. There Is A Reasonable Probability Of Success On The Merits Because the Proposed Merger May Substantially Lessen Competition.

The fundamental purpose of Section 107(1) of the Antitrust Act, like its federal counterpart, is "to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappear[] through merger." *Philadelphia Nat. Bank*, 374 U.S. at 367. The General Assembly, like Congress, weary of the trend toward consolidation, "sought to assure . . . the courts the power to brake this force at its outset and before it gathered momentum." *Brown Shoe*, 370 U.S. at 317-18 (footnote omitted). Preliminary injunctive relief is routinely granted in government litigation challenging mergers. *See*, *e.g.*, *Aetna*, 240 F. Supp. 3d 1 (D.D.C. 2017); *Sysco*, 113 F. Supp. 3d at 87-88; *F.T.C. v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 74 (D.D.C. 2018); *F.T.C. v. Tronox Limited et al.*, 332 F. Supp. 3d 187, 219-20 (D.D.C. 2018); *F.T.C. v. Staples, Inc.*, 190 F. Supp. 3d 100, 138 (D.D.C. 2016) ("*Staples II*"); *United States v. JetBlue Airways Corp.*, No. 23-10511-WGY, ___ F.Supp.3d ___, 2024 WL 162876, *38 (D. Mass. 2024).

In the following sections, the Attorney General will: explain the relevant market in which to assess the Proposed Merger; demonstrate that the Proposed Merger is presumptively unlawful; show additional evidence of the Proposed Merger's anticompetitive effects; and show that Defendants cannot rebut the Attorney General's prima facie case.

1. The relevant market is food and other grocery products available for retail sale in Supermarkets in local geographic markets throughout Colorado.

The first step in merger analysis is to define the relevant market in which to assess the merger's potential effects. *See Sysco*, 113 F. Supp. 3d at 24. This has two components: the product market, which "identifies the product and services with which the defendants' products compete," and the geographic market, which "identifies the geographic area in which the defendant competes in marketing its products or service." *Id.*

A relevant market is "'not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether power exists.'" *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987). Relevant markets are the "area of effective competition" within which competition may be lessened. *Brown Shoe*, 370 U.S. at 324.

Relevant markets are useful heuristics but, as the Supreme Court recognized, they have an inherent element of "fuzziness" and "need not—indeed cannot—be defined with scientific precision.'" *Sysco*, 113 F. Supp. 3d at 48 (quoting *United States v. Connecticut Nat. Bank*, 418 U.S. 656, 669 (1974)).

a) The relevant product market is food and other grocery products available for retail sale in Supermarkets.

The general rule for defining a product market is: "The outer boundaries of product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325 (footnote omitted). Courts rely on contemporaneous business documents, economic expert testimony, and fact-witness testimony to determine whether a relevant market is valid. *See*, *e.g.*, *Sysco*, 113 F. Supp. 3d at 24-52. Product market definition focuses on demand substitution, i.e., the choices buyers and users make between products. "[T]he general question is 'whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.'" *F.T.C. v. Staples*, *Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) ("*Staples I*"). Buyers' choices inform market definition because a properly defined product market includes only those products that constrain a firm's behavior with respect to a distinct subset of consumers. *Sysco*, 113 F. Supp. 3d at 38-40. If market participants view a product as necessary or a "must-have," that product has low sensitivity to price changes, is unconstrained by other products' pricing, and is a relevant product market. *F.T.C. v. Surescripts, LLC*, 665 F. Supp. 3d 14, 41-42 (D.D.C. 2023).

Evidence of some substitution between two products does not require both products to be in a relevant product market. *See H&R Block*, 833 F. Supp. 2d at 54 ("[W]hile providers of all tax preparation methods may compete at some level, this 'does not necessarily require that [they] be included in the relevant product market for antitrust purposes.'"). For example, a car and an airplane will both transport someone from Denver to Chicago, and there may be some consumers

who would choose to drive if airfare to Chicago were to rise by $100, but that level of substitution is not sufficient to analyze cars and airplanes as if they were in the same product market. The question is thus not whether there is *any* substitution, but whether there is reasonable substitution between the products in the defined market to the extent that it would be unprofitable to wield market power, i.e., raising prices above competitive levels and continuing to make a profit doing so. *Id*.

The "'mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.'" *Sysco*, 113 F. Supp. 3d at 26 (quoting *Staples I*, 970 F. Supp. at 1075); *see also Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 612 n.31 (1953). For instance, fruit can be purchased at a grocery store or a fruit stand, "but no one would reasonably assert that buying all of one's groceries from a fruit stand is a reasonable substitute for buying from a grocery store." *Sysco*, 113 F. Supp. 3d at 26.

Under *Brown Shoe*, the contours of a market can be determined by examining such factors as "industry or public recognition[,] . . . the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325 (footnote omitted). A relevant market "can exist even if only some of these factors are present." *Staples I*, 970 F. Supp. at 1075. A product, moreover, can compete in multiple and concentric relevant markets. *See Sysco*, 113 F. Supp. 3d at 48 (holding that both broadline food service distribution and broadline food service distribution to national customers—entirely contained in the former—were relevant product markets); *United States v.*

Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 27-28 (D.D.C. 2022) ("[E]ven if alternative submarkets exist . . . , or if there are broader markets that might be analyzed, the viability of such additional markets does not render the one identified by the government unusable.").

Importantly, market definition is guided by the "narrowest market" principle, meaning that the market definition "'must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn.'" *See Sysco*, 113 F. Supp. 3d at 26 (citations omitted).

The relevant product market here is food and other grocery products available for retail sale in Supermarkets. A Supermarket is any full-line retail grocery store that enables customers to purchase substantially all of their food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.

Supermarkets provide an extremely broad and distinct set of products and services and offer consumers the convenience of one-stop shopping. Kroger and ACI recognize the distinct features of their Supermarkets set them apart. Kroger touts that its Supermarkets are "successful

because the stores are large enough to offer the specialty departments that customers desire for one-stop shopping, including natural food and organic sections, pharmacies, general merchandise, pet centers and high-quality perishables such as fresh seafood and organic produce."[26]

Supermarket pricing is constrained by pricing at other Supermarkets. In Colorado, Kroger REDACTED Kroger also REDACTED ACI, for its part, REDACTED

Defendants may argue that Club Stores should be included in the relevant product market. They should not because Club Stores do not offer the same depth and product variety as do Supermarkets. *See supra* Section II.C.1. Club Stores sell their food and grocery items in bulk or extra large sizes, which many Supermarket customers do not want or need, and may not be able to afford. Even if some customers shop at both Supermarkets and Club Stores, that does not mean they are in the same relevant product market.

Dollar Stores likewise are not in the relevant product market. In Colorado, Dollar Stores do not carry fresh produce, meat, or seafood. *Id*. They also have a far more limited assortment of grocery items compared to Supermarkets. *Id*.

Put another way, consumers would not mistake a Safeway for a Costco or a Family Dollar for a King Soopers. *See Staples I*, 970 F. Supp. at 1079-80 (finding that relevant market was "the

[26] The Kroger Co., Annual Report (Form 10-K) at 4 (March 29, 2022).

sale of consumable office supplies through office supply superstores" and explaining that "[n]o one entering a Wal-Mart would mistake it for an office superstore . . . You certainly know an office superstore when you see one.").

Economic analysis also demonstrates that food and other grocery products available for retail sale in Supermarkets is the relevant product market. To test the reliability of a product market definition, economists often use the Hypothetical Monopolist Test. This test asks whether a hypothetical monopolist in the proposed market could profitably impose a "small but significant and non-transitory increase in price" (referred to as a "SSNIP") on at least one product in the proposed market. U.S. Dep't of Justice & F.T.C. Merger Guidelines (2023) §§ 4.3A, B, C. The test assumes that prices for all products that are excluded from the market definition remain the same. *Id*. § 4.3.A at 41-42.

A SSNIP for this purpose is typically set at 5%, but varies depending on the case. 2023 Merger Guidelines § 4.3.B at 43 & n.84. The question becomes whether a hypothetical monopolist in the proposed market could profitably raise prices by at least 5%. To profitably raise prices means that even though the hypothetical monopolist would lose some customers if it were to raise prices by 5%, that loss of customers would be outweighed by increased profit on sales to customers who continue to purchase its product, such that the hypothetical monopolist would make more money after the price increase than before. *See id*. §§ 4.3.A & B at 41-42.

If the hypothetical monopolist cannot profitably impose a SSNIP, that means the proposed market is too narrow, because too many customers have found substitutes outside the defined market. If the hypothetical monopolist can profitably impose a SSNIP, the proposed market

contains a sufficient number of substitutes, because other potential products are not close enough substitutes for the hypothetical monopolist's customers. Put differently, it means that other products are not reasonable substitutes for those customers. 2023 Merger Guidelines § 4.3.A at 41.

Here, the vast majority of Supermarket customers are not likely to start shopping at other types of stores in response to a SSNIP. A relevant product market comprised of Supermarkets therefore passes the Hypothetical Monopolist Test.

b) The relevant geographic markets are highly localized throughout Colorado.

The same principles apply to the definition of geographic markets. Supermarket competition is highly localized because consumers do not want to travel unnecessarily far distances to do their grocery shopping. As a result, consumers overwhelmingly shop at stores close to where they live. Indeed, Kroger has publicly stated that its Supermarkets "typically draw customers from a 2-2.5 mile radius."[27] The bounds of each geographic market will vary based on the area and depend on factors such as population density, traffic patterns, and unique characteristics of a location, e.g., placement of highways or natural impediments like mountains.

For purposes of this motion, city areas serve as a very conservative approximation for the relevant geographic markets.[28] City areas are generally small, localized areas, and contain clusters

[27] *See supra* note 26.

[28] Additional discovery and expert analysis will be needed to further refine the relevant geographic markets, and the relevant product market. The Attorney General will present additional analysis on relevant markets at a hearing on the Motion.

of stores that consumers could plausibly choose between. These clusters of stores are typically located close to each other, and are generally removed from other clusters of stores. Using city areas as an approximation of relevant geographic markets yields a conservative estimate of the impact of the Proposed Merger because in some cities the geographic markets are likely even smaller than the city area.

The Attorney General will present evidence at a hearing related to the following 39 city areas: Southeast Denver, Southwest Denver, West Denver, North Denver, Downtown Denver, East Denver, Colorado Springs, Aurora, Fort Collins, East Littleton, Arvada, Longmont, Grand Junction, Broomfield, Pueblo, West Littleton, Boulder, Greeley, Loveland, North Englewood, Parker, Castle Rock, East Brighton, Durango, Montrose, Louisville, Steamboat Springs, Golden, Vail-Avon, Cañon City, Cortez, Alamosa, Lafayette, Evergreen, Woodland Park, Conifer, Windsor, Delta, and Gunnison.

While the use of city areas is a conservative approach, analyzing geographic markets using other frameworks, with broader or more narrow geographies, does not change the conclusion that the Proposed Merger is anticompetitive and should be enjoined.

2. The Proposed Merger is presumptively unlawful.

The United States Supreme Court has held that any transaction that results in "a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Philadelphia Nat. Bank*, 374 U.S. at 363. A

resulting market share of 30% by the post-merged firm crosses the presumptive threshold, as may shares less than that. *See id.* at 364 & n.41.

The Herfindahl-Hirschman Index ("HHI") is a well-established and widely accepted measure of market concentration used to evaluate the likely competitive effect of a proposed transaction. *See*, *e.g.*, *Sysco*, 113 F. Supp. 3d at 52; *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001). HHI scores are calculated by summing the squares of each individual firm's market share. Accordingly, HHI scores range from 0 in markets with no concentration to a high of 10,000 in markets where one firm has a 100% market share.[29] Sufficiently large HHI scores establish a prima facie case that a merger is anticompetitive and therefore unlawful. 2023 Merger Guidelines § 2.1 at 5-6.

The DOJ and FTC recently published updated Merger Guidelines on December 18, 2023 (the "2023 Merger Guidelines"). The 2023 Merger Guidelines provide guidance on how to interpret HHI scores. Under the 2023 Merger Guidelines, if the post-merger HHI score would be more than 1,800, and the merger would increase the HHI score by more than 100 points, then the proposed merger would result in a highly concentrated market and is presumed likely to enhance market power and substantially lessen competition.[30] 2023 Merger Guidelines § 2.1. Courts

[29] For example, a market with two participants who each have 50% market share would have an HHI of 5,000 ($50^2 + 50^2 = 5,000$. A market with three participants who have shares of 40%, 40%, and 20% would have an HHI of 3,600 ($40^2 + 40^2 + 20^2 = 3,600$).

[30] The Horizontal Merger Guidelines published by the DOJ and FTC, issued August 19, 2010 (the "2010 Merger Guidelines") preceded the 2023 Merger Guidelines. Under those 2010 Merger Guidelines, a transaction was considered presumptively unlawful if the relevant market would have a post-merger HHI score of 2,500 or more and if the merger would increase the HHI score

historically rely on DOJ and FTC guidance when considering merger challenges. *See*, *e.g.*, *H&R Block*, 833 F. Supp. 2d at 71-72 (enjoining merger that would have given combined firm only a 28.4% market share because HHI scores were presumptively unlawful pursuant to guidelines); *Aetna*, 240 F. Supp. 3d at 42 (post-merger HHI in more than 75% of the geographic markets would have been greater than 5,000); *ProMedica Health System*, *Inc. v. F.T.C.*, 749 F.3d 559, 568 (6th Cir. 2014) (noting that a 1,078-point increase to 4,391 and a 1,323-point increase to 6,854 "blew through [the presumption] barriers in spectacular fashion"); *Heinz*, 246 F.3d at 716 (510-point increase from 4,775 created a presumption of illegality "by a wide margin"); *Sysco*, 113 F. Supp. 3d at 61 (economic and other evidence "has shown that a merged Sysco-USF will significantly increase concentrations" and that the Government "therefore has made its prima facie case and established a rebuttable presumption that the merger will lessen competition in the local markets").

Here, the Attorney General will present expert economic evidence at a hearing showing that the Proposed Merger is presumptively unlawful. The HHI scores far exceed the presumption in all 39 city areas under the 2023 Merger Guidelines.[31] Across the 39 city areas, the post-merger HHI scores range from about 2,600 to 10,000, with an average post-merger HHI score of around 4,600. The change in HHI scores from pre-merger to post-merger range from around 400 to 4,300, with an average change of around 1,400. The Proposed Merger is therefore presumptively unlawful.

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by 200 points or more. § 5.3 at 19. The Proposed Merger is presumptively unlawful under both the 2023 and 2010 guidelines.

[31] The same is true under the presumption levels in the 2010 Merger Guidelines.

The Proposed Merger is also presumptively unlawful even if one were to test different market permutations. For example, if one were to (erroneously) include Club Stores and Dollar Stores in the HHI calculations, the Proposed Merger is still presumptively unlawful in all 39 city areas.

The same is true under different geographic market permutations. For example, if one were to apply a more narrow market using a three-mile radius around each store, the Proposed Merger would still be presumptively unlawful. In that scenario, there would be 253 geographic markets in Colorado (one circle around each of the parties' stores). The Proposed Merger would be over presumptive levels in 190 of those 253 areas. A transaction does not need to exceed the HHI thresholds in every relevant market to be presumptively unlawful as a whole.

3. Additional Evidence shows that the Proposed Merger would substantially lessen competition.

The above economic analysis establishes a presumption that the merger is unlawful, therefore satisfying the Attorney General's prima facie case. There is also abundant qualitative evidence of anticompetitive effects. *See Brown Shoe*, 370 U.S. at 329. Important qualitative evidence includes whether and to what extent the merger would eliminate head-to-head competition between the merging parties; whether the merger would harm consumers by raising prices, reducing consumer choice, or reducing quality; and whether the merger would increase the likelihood of coordinated effects in the relevant market. *See Sysco*, 113 F. Supp. 3d at 61-72; *Bertelsmann*, 646 F. Supp. 3d at 38-46.

a) The Proposed Merger would eliminate head-to-head competition between Kroger and ACI to the detriment of Consumers, Workers, and Suppliers.

The "'extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral effects.'" *ProMedica*, 749 F.3d at 569 (quoting 2010 Merger Guidelines § 6.1). Acquisitions "that eliminate head-to-head competition between close competitors often result in a lessening of competition." *Staples II*, 190 F. Supp. 3d at 131. "In such circumstances, a merger 'is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms.'" *Sysco*, 113 F. Supp. 3d at 61 (quoting *H&R Block*, 833 F. Supp. 2d at 81); *see also* 2023 Merger Guidelines § 2.2.

As explained above (Section II.D), Kroger and ACI employees are well aware that they are each other's closest competitors and are shocked by the idea that the companies could merge.

Consumers benefit from the intensity of head-to-head competition between Kroger and ACI. ***First***, Kroger and ACI compete with each other on price, which directly benefits consumers by keeping down the price of groceries.

ACI uses REDACTED

Kroger similarly REDACTED

This competitive dynamic benefits consumers in both ordinary times and times of turbulence. For example, in December 2020, the price of bananas spiked because of hurricane-induced shortages. This caused Kroger and ACI to pay higher prices to their banana suppliers. REDACTED

Similarly, during the post-pandemic period of high inflation, REDACTED

That price competition will be eliminated by the Proposed Merger, which means higher prices for consumers.

Second, Kroger and ACI compete on customer service and a quality shopping experience. To provide a good customer experience, Kroger and ACI must hire and retain strong employees

in their stores and at higher management levels to direct and oversee the stores. Indeed, REDACTED

Because Kroger and ACI are such close competitors in Colorado, they especially value the experience of each other's employees, particularly when it comes to experienced and skilled labor such as district managers, store directors, department managers and supervisors, meat cutters, cake decorators, and pharmacists. For example, REDACTED

This competition exists at the store level as well. Kroger recognizes that REDACTED This head-to-head competition for labor greatly benefits consumers because it ensures quality customer service and a positive shopping experience.

It also benefits workers through better wages and working conditions.[32] The benefits of that competition would be lost after the Proposed Merger.[33]

Third, Kroger and ACI compete for local supply. This benefits consumers because they have access to a wide variety of locally produced products that supports local businesses and farmers in and around their communities. It also provides access to fresher products (especially produce) because local products are brought to market more quickly due to the shorter travel times.

Local supply is particularly important to Colorado consumers,[34] so Kroger and ACI promote their local suppliers to draw customers. **REDACTED**

[32] This Court may also consider whether the Proposed Merger would harm workers. *See* C.R.S. § 6-4-102(1)(a)(II).

[33] ACI's CEO knows this will be the case, as he commented to employees of the Denver Division that the "reality" of the Proposed Merger is that "there will be jobs that go." Biller Decl. Ex. 13 (ACI2R-0009500752) at -753.

[34] *See generally* 2022 Public Perceptions & Attitudes About Colorado Agriculture Survey, available at https://drive.google.com/file/d/1F2A3baEZhJBMZMRqVo1MzB7shDN2XKjs/view (80% of Colorado consumers say knowing if produce is grown in Colorado influences buying decision).

REDACTED

Kroger and ACI stores feature prominent signage to draw attention to local Colorado products such as "Local Farms" and "Colorado Grown" that include photos of farmers; "Loyal to local. Proud partner to our local farmers"; and "Local Dairy." *See* Halladay Decl. (photos of retail stores). Certain stores also feature local products in so-called "end caps," which are shelves located at the end of product aisles that are highly visible to customers. *See id.* Other Supermarkets in Colorado like Walmart and Target do not feature or market local products to nearly the same degree.

These "buy local" programs at Colorado's two largest supermarkets also benefit Colorado producers. These programs create greater supply opportunities for their products and result in fairer prices for those products. A farmer is more likely to negotiate a fair price for their product when they can negotiate with both Kroger and ACI for the best deals.

Palisade peaches are a great example of this dynamic. Palisade peaches are iconic in Colorado and some would say are the best peaches in the world. The Palisade growing region has the ideal climate and soil for peach-growing. REDACTED Typically picked when tree-ripe, Palisade peaches are superior in flavor to other peaches and are a strong draw for Colorado customers. REDACTED Retail stores, especially Kroger and ACI, compete against each other to acquire Palisade peaches and by running promotions around these peaches to generate store traffic. REDACTED Due to the high perishability of Palisade peaches—and high freight costs—Palisade peaches are mostly sold in Colorado and

nearby states. REDACTED

Nevertheless, the availability of multiple retailers, who generally compete to buy product, benefits suppliers. Although there is great consumer demand for Palisade peaches, a post-merger Kroger could easily stock inferior peaches that generate higher margins if it has no competitors. The same is true for other popular local products. It would be rational for Kroger to likely consolidate its suppliers post-merger, eliminating some local suppliers from its shelves completely. Colorado suppliers and consumers will suffer as a result.

Last, it is clear from the 2022 UFCW strike against King Soopers that customers view Kroger and ACI stores as close substitutes. During that time, customers were largely unable or unwilling to shop at 78 King Soopers stores in Colorado. A few days after the strike started, ACI observed that its 43 Safeways located in proximity to the struck King Soopers stores were seeing a huge spike in sales, REDACTED When King Soopers stores became unavailable, customers overwhelmingly switched to Safeway stores.

b) The Proposed Merger Would Harm Consumers by Eliminating Customer Choice, Raising Prices, and Weakening Supply Chain Resiliency.

The Attorney General need not prove "'that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger

of such consequences in the future.'" *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System*, *Ltd.*, 778 F.3d 775, 788 (9th Cir. 2015) (quoting *Hospital Corp. of America v. F.T.C.*, 807 F.2d 1381, 1389 (7th Cir. 1986)). Moreover mergers like this one can create illegal harms beyond higher prices for consumers, including decreased product quality and reduced innovation. *C.f.*, *AT&T*, 916 F.3d at 1045.

Here, the Proposed Merger is likely to result in higher prices and other consumer harms. As to pricing, ACI currently serves as a constraint on Kroger's pricing because REDACTED Additionally, many consumers regularly check prices and available promotions and coupons at Kroger and ACI stores before deciding where to shop. A post-merger Kroger, no longer constrained by ACI and having significantly increased its market share, will be free to raise prices and will be less incentivized to invest in its stores, thus reducing quality and customer service.

As the ACI Senior Director of Human Resources put it, "It's all about pricing and competition and we all know prices will not go down. REDACTED therefore the conclusion that's easily drawn is overall prices will increase." Biller Decl. Ex. 12 (ACI2R-0015501649) at -651.

Consumers across Colorado will feel these effects, but certain areas will suffer acutely from the Proposed Merger. For example, Gunnison has only two supermarkets: City Market and Safeway.[35] The Proposed Merger will give Kroger a monopoly in that market; indeed, to reach a

[35] There is a Walmart in town, but it is not a Neighborhood Market or Supercenter, so it is not a Supermarket and does not offer fresh produce, meat, eggs, etc.

non-Kroger Supermarket, a Gunnison resident would have to drive about 65 miles to Salida or Montrose.

Grand County residents will likewise suffer. The only Supermarket options in all of Grand County are a Safeway in Fraser and a City Market in Granby. Residents there already suffer from marked-up “resort” pricing, and the Proposed Merger would surely make that even worse.

Many areas would face a Kroger/Walmart duopoly post-merger, which is also a bleak outcome for consumers. In addition to the market power that these two firms could wield against consumers to raise prices, the loss of consumer choice would be dramatic. Walmart Neighborhood Markets and Walmart Supercenters stock their shelves heavily with national brands and produce from outside of Colorado. Kroger places a much higher emphasis on local products in large part because ACI does, and vice versa. *See supra* Section IV.A.3.a. Examples of areas that would be dominated by Kroger and Walmart include Delta, Cortez, Durango, Alamosa, Canon City, Woodland Park, and Monument.

Consumers would also be harmed by a weakening of supply chain resiliency. Today, if Kroger has a supply chain problem resulting in a shortage in its stores—e.g., a shipment is delayed due to weather or a supplier is experiencing a shortage—a consumer can go to their nearest ACI store to look for the product, and vice versa. Residents of mountain areas are all too familiar with this dynamic and are used to having to visit multiple stores to find staples like milk and eggs when their primary store is out of stock. A post-merger Kroger would likely seek to consolidate its supply chain in the state and eliminate redundancies in the name of efficiency. That means any Kroger supply chain problem would have a much harsher effect on consumers, as they would no

longer have alternatives when supply issues arise. This would seriously threaten food supply in our state.

c) The Proposed Merger would increase the likelihood of anticompetitive collusion.

Another merger harm is the likelihood of "'coordinated effects,' which occur when market participants mutually decrease competition in the relevant market." *Bertelsmann*, 646 F. Supp. 3d at 44. In markets with few rivals, "'firms will be able to coordinate their behavior, either by overt collusion or implicit understanding,'" *F.T.C. v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009), or by "parallel accommodating conduct," *Bertelsmann*, 646 F.Supp.3d at 44. It is a central concept of merger law that concentration tends to produce anticompetitive coordination. *See Heinz*, 246 F.3d at 716. As a result, when the government shows that a merger will lead to undue concentration—as the Attorney General has done here—"the burden is on the defendants to produce evidence of 'structural market barriers to collusion' specific to this industry that would defeat the 'ordinary presumption of collusion' that attaches to a merger in a highly concentrated market." *H&R Block*, 833 F. Supp. 2d at 77 (quoting *Heinz*, 246 F.3d at 725).

Here, barriers to pricing collusion between Supermarkets are low because pricing is transparent. Supermarkets can— **REDACTED** —regularly check each other's prices by walking into each other's stores, looking at pricing online, and by regularly receiving price check data from third-party firms that collect retail price data. The Proposed Merger will eliminate one of the largest Supermarket competitors in Colorado, leading to higher concentration and increasing the likelihood of collusion.

Moreover, "[o]ther indicia of likely coordination" are present here, including that "[t]ransactions in the market are small, numerous, and spread among a mass of individual consumers, each of whom has low bargaining power; prices can be changed easily; and there are barriers to switching" due to consumers preferring to shop at stores close to home. *See H&R Block*, 833 F. Supp. 2d at 78-79.

Additionally, "a history of collusion or attempted collusion" in the relevant market is "highly probative of likely harm from a merger" because the merger may lead to so-called "coordinated effects." *Bertelsmann*, 646 F. Supp. 3d at 45 (citing *Hospital Corp. of America*, 807 F.2d at 1388; *Elders Grain*, 868 F.2d at 906).

Here, there is a history of collusion between Kroger and ACI in the form of unlawful no-poach and non-solicitation agreements. Leading up to the UFCW strike against King Soopers in January 2022, *see supra* Background Section II.E, Kroger and ACI agreed that ACI would not hire any King Soopers employees during the strike, and that ACI would not solicit any King Soopers pharmacy customers.

The agreement was expressly spelled out in an email between Kroger and ACI employees responsible for labor relations. On January 9, 2022, Daniel Dosenbach, the Senior Vice President of Labor Relations at ACI, wrote to his counterpart at Kroger, Jon McPherson, the Vice President for Labor & Associate Relations at Kroger, as follows:

From: Daniel Dosenbach REDACTED
Sent: Sunday, January REDACTED
To: McPherson, Jon K REDACTED
Cc: Brent Bohn REDACTED
Subject: RE: EXTERNAL EMAIL: Union Communications

Jon,

1. We don't intend to hire any King Soupers employees and we have already advised the Safeway division of our position and the division agrees.
2. With regards to Rx, we don't intend to solicit or publicly communicate that King Soupers employees should transfer their scripts to us. However, when a customer brings in a new or transferred script, we don't inquire as to why the customer is transferring or where they work, nor do we make it a practice to turn away customers.

Both Brent and I will be available to discuss the negotiations this week.

Dan

Biller Decl. Ex. 44 (ACI2R-0031896726).

Brent Bohn, ACI's Group Vice President, Labor Relations, forwarded the agreement email to other executives at ACI with the instruction "let's make sure the Denver team understands the below two things"—the no-poach agreement and the non-solicit agreement—along with the caution "Please don't forward the email." *Id*. The unlawful agreement then was communicated internally within the Denver Division of ACI (responsible for most of Colorado). *See id*. Denver Division President Todd Broderick approved of the agreement and even lamented that the agreement did not go even farther to indefinitely bar King Soopers from hiring higher-level ACI employees. *See* Biller Decl. Ex. 45 (ACI2R-0009293171).

News of the agreement spread to the very highest levels of both companies. Mr. Broderick informed the ACI COO, Susan Morris, that "we have agreed to not hire [King Soopers'] employees and not actively solicit their pharmacy customers[.]" Biller Decl. Ex. 38 (ACI2R-0006876258).

Mr. McPherson similarly made sure to tell Kroger's C-Suite, directly informing Rodney McMullen, the Kroger CEO; Gary Millerchip, the Kroger CFO; Christine Wheatley, the Kroger

General Counsel; Mary Ellen Adcock, Kroger SVP of Operations; Timothy Massa, Kroger Chief People Officer; and Joe Kelley, President of the King Soopers & City Market Division. Biller Decl. Ex. 46 (KRPROD-FTC-2R-005647435).

The illegal no-poach and non-solicit agreements in Denver are one example in a likely pattern of unlawful coordination—in an email between Mr. Dosenbach and Mr. Bohn on January 7, 2022, Mr. Dosenbach alluded to a similar agreement in Portland, Oregon: "Like with Portland we would not hire any employees from King Soupers [*sic*]." Biller Decl. Ex. 47 (ACI2R-0010069102).

The presence of illegal coordinated agreements between Kroger and ACI in Colorado underscores that the threat of collusion is real and not a merely hypothetical risk. And that collusive activity took place in an already concentrated market that is threatened to become more concentrated through this Proposed Merger.

4. There are no countervailing factors to rebut the prima facie case.

Having established that the Proposed Merger is presumptively unlawful—a conclusion buttressed by additional evidence of anticompetitive effects—the burden shifts to the defendants to "demonstrate that the market shares and the associated presumption of illegality inaccurately reflect competitive reality." *Bertelsmann*, 646 F. Supp. 3d. at 47. "The more compelling the government's prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991.

The U.S. Supreme Court has never recognized efficiencies as a defense to an illegal merger. *Sysco*, 113 F. Supp. 3d at 81; *F.T.C. v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible

economies cannot be used as a defense to illegality.”). Some courts, under very limited circumstances, have considered evidence of efficiencies in rebuttal to a prima facie case. Assertions of efficiencies must be “more than mere speculation and promises about post-merger behavior.” *Heinz*, 246 F.3d at 721. Rather, they must be merger-specific—meaning, the efficiencies “‘cannot be achieved by either company alone’”—and verifiable. *Sysco*, 113 F. Supp. 3d at 82 (citations omitted). And, when there are high concentration levels, as shown here, courts that consider efficiencies require “proof of extraordinary efficiencies.” *Heinz*, 246 F.3d at 720.

The Attorney General has shown that post-merger HHI scores would be well above presumptive levels, and has set forth compelling additional evidence on the anticompetitive effects of the Proposed Merger. Defendants cannot rebut that case. Kroger may attempt to claim that the Proposed Merger will benefit consumers and workers because it will operate more efficiently and pass that onto consumers in the form of lower prices. But any empty promises would not be merger-specific and would be lacking proof.

Defendants may also try to argue that new entry or expansion by existing competitors will mitigate an attempt by Kroger to exercise market power. To do so, defendants would have to show that such entry or expansion would be likely, timely, and sufficient in its magnitude, scope, or character to deter or fully offset the Proposed Merger’s anticompetitive effects. *F.T.C. v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019); *Aetna*, 240 F. Supp. 3d at 52-53; *Chicago Bridge & Iron*, 534 F.3d at 429-30; *JetBlue*, __ F. Supp. 3d __ , 2024 WL 162876, *30. Defendants cannot do so. Given the barriers to entry in this market, and the absence of entry in the face of past Supermarket closures in Colorado, this claim is untenable.

First, it is difficult to find real estate in a desirable area large enough to open new Supermarkets. Even where such space is apparently available, there may be use restrictions in shopping centers that prevent retail grocery stores of any kind from opening a location in the shopping center or taking over an empty space where a prior grocery store closed. Such restrictions can come in the form of restrictive covenants that run with the land or can be built into leases and continue in effect for years after a store closes or the lease expires. The Attorney General will show that grocery stores located in multi-tenant shopping centers typically benefit from use restrictions that prohibit any business from opening in the shopping center that sells any product sold by the grocery store. Thus, any business selling food or grocery items cannot open in the same shopping center.

Critically, such use restrictions often survive after a grocery store closes. Consequently, many former supermarket sites cannot be used to support a new entrant looking for efficient and cost-effective entry into a market. Because shopping centers cannot reuse these spaces for a new supermarket tenant, these sites tend to remain vacant or are used for unrelated businesses, such as retail clothing and fitness centers. For example, within two years after the Safeway/ACI merger, ACI closed 20 stores in Colorado. Today, none of those locations has a Supermarket. Rather, nine are fitness centers, five are vacant, three are retail stores in various non-grocery industries, one is a Target (with limited grocery), one is a 7-Eleven, and one is a community health center. *See* Biller Decl. Ex. 48 (Store Closure Photos).

Second, new entry or expansion requires a distribution chain that can support new or expanded locations. That can require finding warehouse space, purchasing trucks to move goods,

and hiring labor. This challenge is highly acute for any potential new entrants or competitors looking to open locations in mountain towns that present significant transportation issues and have limited locations for warehouse space.

Third, new entry or expansion would require high marketing costs to attract new customers, such as advertising, big discounts, and promotions. A new entrant would literally be entering the market blind, with no access to historical loyalty data, and no good will with consumers in an existing market.

5. Defendants' divestiture proposal does not remedy the anticompetitive effects of the Proposed Merger because the divested assets are inadequate and C&S lacks retail experience.

Knowing that their Proposed Merger is anticompetitive, defendants propose to divest stores and other assets to C&S to remedy an otherwise unlawful merger. The proposed divestiture is inadequate and potentially dangerous because it is highly likely to fail, which would lead to store closures, job losses, and devastation to communities in Colorado.

The defendants did not include a divestiture proposal in their Hart-Scott-Rodino Act ("HSR") filings presenting the Proposed Merger for approval.[36] The first time defendants presented the divestiture was on September 8, 2023, and Kroger and ACI thereafter suggested modifications to it several times, adding more stores, taking some stores out, and otherwise tinkering with the package. *See supra* Section II.G. None of those modifications appear to have

[36] Parties seeking to close a merger exceeding certain thresholds must submit a filing to the federal government pursuant to the HSR Act with certain information about the merging parties and the proposed merger. 15 U.S.C. § 18a.

been agreed to by C&S, and none will remedy the anticompetitive effects of the Proposed Merger. Because there is no agreement with C&S on any of the latter modifications, the Attorney General will discuss here the only divestiture proposal that is actually on the table—the one offered on September 8, 2023.

To adequately remedy the anticompetitive effects of the merger, a divestiture must, *inter alia*, i) include all assets necessary for the buyer to compete effectively and sustainably, ii) ensure the buyer is capable of using the divested assets as effectively as the seller does, and iii) leave the buyer with the incentive to compete as effectively as the seller does. *See*, *e.g.*, *Aetna*, 240 F.Supp.3d at 64-74; *Sysco*, 113 F. Supp. 3d at 73-77; *F.T.C. v. Libbey*, *Inc.*, 211 F. Supp. 2d 34, 48 (D.D.C. 2002); *United States v. Franklin Electric Co.*, 130 F. Supp. 2d 1025, 1033-34 (W.D. Wis. 2000). This divestiture proposal falls short on all three requirements.

a) A divestiture is properly considered at the remedy stage, not as a liability defense.

It merits emphasis that Defendants bear the burden of proving that their proposed divestiture remedies the anticompetitive effects of the Proposed Merger, if Defendants' position is that an order enjoining the merger should be denied.

The Supreme Court has long articulated that a proposed merger remedy must redress the antitrust violation and restore competition. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957); *Ford Motor Co. v. United States*, 405 U.S. 562, 576 (1972) (remedy ought to "restore the pre-acquisition competitive structure of the market"); *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950) (remedy must "cure the ill effects of the illegal conduct,

and assure the public freedom from its continuance"); *F.T.C. v. Weyerhaeuser Co.*, 665 F.2d 1072, 1086 (D.C. Cir. 1981) (merger remedy must "fully restore competition").

The presumptive remedy for an unlawful merger is a "full stop injunction."[37] *See, e.g., F.T.C. v. PPG Industries*, *Inc.*, 798 F.2d 1500, 1506-07 (D.C. Cir. 1986); *United States v. Energy Solutions*, *Inc.*, 265 F.Supp.3d 415, 446 (D. Del. 2017); *see also Philadelphia Nat. Bank*, 374 U.S. at 323-24 (unlawful merger "must be enjoined"). Courts routinely enjoin mergers when the government shows the effect of an acquisition may substantially lessen competition. *See*, *e.g.*, *Anthem*, 855 F.3d at 368-69 (affirming lower court's injunction of merger for Section 7 violation); *F.T.C. v. Penn State Hershey Med. Ctr.,* 838 F.3d 327 (3d Cir. 2016) (reversing lower court's denial of injunction for Section 7 violation and remanding for entry of injunction); *Aetna*, 240 F. Supp. 3d at 74, 99; *H&R Block*, 833 F. Supp. 2d at 92.

Any discussion of a proposed divestiture is only relevant, if at all, during the remedy stage of the proceedings, not as a potential "rebuttal" for determining whether the Proposed Merger is legal.

The Attorney General acknowledges that some courts, interpreting federal law, have recently viewed the issue of divestitures differently. For example, the Fifth Circuit determined that a divestiture proposed by the merging parties should be considered as a rebuttal, and that the merging parties are required to "'***affirmatively show***[]' why the [divestiture] undermined [the

[37] Similarly, the remedy most likely to restore competition related to a merger that has already been consummated is the undoing of the merger, i.e., a divestiture. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329-31 (1961); *American Stores*, 495 U.S. at 280-81 (1990) ("preferred remedy"); *ProMedica*, 749 F.3d at 573.

FTC's] prima facie showing to such an extent that there was no longer a probability that the . . . merger would 'substantially lessen competition.'" *Illumina*, *Inc. v. F.T.C.*, 88 F.4th 1036, 1058 (5th Cir. 2023). Doing so requires more than simply putting forth the terms of the divestiture. *See id.*

However, as noted above, the proposed divestiture here was presented late—nine months after the parties' HSR filings, and almost a year after the Proposed Merger was publicly announced. To complicate matters, defendants have continuously tried to alter the proposal, making it a moving target *even for their own divestiture buyer* despite the fact that the parties wish to imminently close the transaction. In such circumstances, courts may decline to hear the divestiture proposal at the liability stage because there is insufficient time to thoroughly investigate the proposal. *Cf.* Brian Mahoney, *Deal in Ardagh's $2B Merger Left Out of FTC Case*, *For Now*, LAW360, Sept. 24, 2013 (describing judge's decision in *F.T.C. v. Ardagh*, 13-cv-1021 (D.D.C. 2013) not to consider defendant's divestiture proposal, in part, because it could not be thoroughly investigated in time for the injunction hearing).

The proposed divestiture—whatever defendants eventually decide it looks like—should therefore be considered for what it is, a proposed remedy, to be examined after a determination of liability.

If the Court disagrees and believes that a proposed divestiture should be considered at the liability stage, then the Court should rule that the proposed divestiture is an affirmative defense for

which defendants bear the burden to prove that the divestiture alleviates the anticompetitive effects of the Proposed Merger.[38]

b) The divestiture has a high probability of failure because the quantity and quality of divested stores are inadequate.

The stores to be divested are insufficient to give C&S adequate scale to compete effectively and cure the anticompetitive effects of the merger. First, the number of stores does not give C&S adequate scale to compete and replace the competition lost in the disappearance of ACI. C&S will acquire only 52 stores in Colorado out of the 105 that ACI currently operates, which will be dwarfed by the 201 stores that Kroger would have post-merger.

Second, the quality of the divested stores endangers the divestiture. The divested stores in Colorado all come from the ACI side. Nearly all of those divested ACI stores underperform their competing Kroger stores; REDACTED

Kroger cannot simply divest the lowest-performing and least-desirable stores and claim that they can operate as effectively as they did before the merger.

c) The divestiture proposal is likely to fail because the execution risks are too high.

Besides the insufficiency of the divested stores, various other aspects of the divestiture package are woefully deficient and present an intolerably high risk that the divestiture will fail.

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[38] For additional discussion on this point, see Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165 (2010); John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement*, CPI Antitrust Chronicle (Aug. 2021).

First, re-bannering presents significant risks. C&S will be required to re-banner over 80% of the divested stores across the country. Here in Colorado, C&S will have to re-banner 50 out of 52 stores from the Safeway banner to the Albertsons banner. Re-bannering is an expensive process and can be very disruptive to consumers, causing them to shop elsewhere. Re-bannering requires physical changes to the store, inventory changes, loyalty program changes, and other infrastructure changes, plus strong marketing to keep consumers. It also requires closing the store for several days to make those adjustments. Lost sales are a huge risk of re-bannering, and those lost sales can be permanent. And the need to re-banner hundreds of stores outside of Colorado would consume resources and attention that C&S could otherwise devote to competing in Colorado.

C&S estimates that re-bannering will cost REDACTED and result in REDACTED lost sales. REDACTED Yet C&S is likely underestimating re-bannering costs. For example, REDACTED

The re-bannering risk is heightened here because Kroger will retain the Safeway banner and can lure loyal Safeway customers away from C&S. Kroger and ACI recognize the Safeway banner is much more valuable in Colorado than the Albertsons banner. Kroger's CEO REDACTED

Similarly, after ACI bought Safeway in 2015, it chose to re-banner 15 Albertsons stores to the Safeway banner, and eventually closed four other Albertsons stores. *See* Biller Decl. Ex. 33 (chart of re-bannering and store closures).

Further complicating the re-bannering risk is the fact that REDACTED

Second, C&S will lack a strong private label offering, which is essential to a Supermarket's business because it accounts for substantial sales volume and profit margin. *See* Background II.C.2. C&S's present private label program is paltry compared to sophisticated retailers like Kroger and ACI; REDACTED

Further, Colorado consumers are familiar with Kroger and ACI's private label products but have no familiarity with C&S's "Best Yet" brand and its other private label offerings.

REDACTED

Compare this to Kroger and ACI's private label operations, which are essentially stand-alone businesses within those companies that employ hundreds of people each, invest significant resources on developing and manufacturing products, and if combined would be one of the largest

consumer packaged goods companies in the nation. Indeed, if Kroger's Our Brands were a standalone business, it would be the ninth-largest consumer packaged goods company in the U.S.[39]

C&S is not getting anything close to what it needs to compete with existing private labels that will continue to appear on Kroger's shelves. It is only acquiring a handful of niche private label brands, and not any of the popular, center-store, national brand equivalents. Moreover, C&S is not acquiring any of the private label manufacturing capacity that Kroger and ACI have. In Colorado, for instance, it is not REDACTED C&S will not have this ability and will not be able to compete with Kroger on milk price, a key staple for consumers.

Third, C&S is not acquiring a stand-alone business line. Instead, it will be forced to mix and match different assets across the country from both Kroger and ACI. This complicates the transition and presents substantial risk that C&S will not be able to operate the assets successfully. Divestitures of a self-standing business are typically preferred and have been shown to be more effective. *Aetna*, 240 F. Supp. 3d at 60.

The current approach will require C&S to stitch together different stores, banners, IT systems, and employees from both Kroger and ACI. C&S faces significant risk that it will not be

[39] Russell Redman, Kroger Named SN's 2022 Retailer of the Year, Supermarket News, *available at* https://www.supermarketnews.com/retail-financial/kroger-named-sns-2022-retailer-year.

able to timely integrate all these different pieces into a cohesive whole. This risk is particularly amplified because of C&S's lack of experience running a large national Supermarket chain.

From an IT perspective, the national set of divested stores will come from both Kroger and ACI, and REDACTED That will create serious integration challenges for C&S.

Moreover, C&S will need to get a massive volume of information from Kroger and ACI, REDACTED

Fourth, C&S does not have enough employees to run the business. Because it only currently operates 23 stores, C&S does not have anywhere near the workforce needed to run 413 stores nationwide. To scale up, C&S plans to hire REDACTED new employees beyond the store level, hoping that about REDACTED employees will come from Kroger and ACI. But there is no guarantee that those employees will want to transfer to C&S and the more employees that refuse, the fewer knowledgeable people C&S will have to run the assets. And the fewer employees of Kroger and ACI that C&S can retain, the more it has to hire from other places. REDACTED This is a major risk to C&S's operational capabilities.

Fifth, C&S is not getting sufficient distribution assets across the country. C&S is not getting any distribution centers in REDACTED even though it would be acquiring stores in those states. C&S is also not receiving sufficient distribution assets in REDACTED

REDACTED These national issues impact ColorFado because they could lead to a collapse of the entire operation, including in Colorado.

Sixth, the divestiture package fails to provide C&S with the necessary tools to retain customers. C&S does not have a modern, proprietary, data-analytics driven loyalty program like Kroger and ACI have. REDACTED It has taken years for Kroger and ACI to build up their loyalty platforms, so C&S will be at a huge disadvantage.

Another problem for C&S is the data Kroger will retain post-merger. REDACTED Indeed, part of what led to Haggen's demise was that ACI targeted Haggen's customers with deep discounts to lure them away from the divested stores. *See* Haggen Compl. ¶ 8(b), *Haggen Holdings*, 2015 WL 5138125.

d) The divestiture will likely fail because C&S will be unable to effectively compete against Kroger.

A divestiture that seeks to cure the anticompetitive effects of a merger requires a strong buyer with sufficient incentive, resources, and experience to compete effectively against the

merged firm. A curative divestiture of assets requires that the divestiture buyer be independent. *Cf. CCC Holdings*, 605 F.Supp.2d at 59 ("'curative divestitures' must be made to a new competitor that is 'in fact . . . a willing, *independent* competitor capable of effective production in the . . . market.'"). C&S falls short in that regard.

First, C&S lacks the necessary experience and resources for this undertaking. Regardless of the scope of C&S's distribution business, it is a small retailer with only 23 stores, barely more than what Haggen had. Haggen could not scale up to take on 146 stores; C&S will attempt to take on 413.

C&S is not ready to operate these stores or to duplicate ACI's competitive intensity. For example, ACI employs approximately 290,000 associates in its over 2,200 stores,[40] which indicates that C&S will need to hire tens of thousands of store level, division, and corporate level employees, in addition to employees at the division or corporate level. C&S does not have a sophisticated loyalty program. It does not have a data analytics platform. It does not have a REDACTED It currently only operates one pharmacy. It does not have any manufacturing facilities to make private label products. It does not have a private label team and the other infrastructure needed to support a national brand equivalent private label program.[41]

[40] Albertsons Companies, Inc., 2023 Annual Report (Form 10-K) at 8, 11.

[41] Here again are echoes of the Haggen failure; Haggen's bankruptcy judge found that Haggen's partner, SuperValu, believed Haggen "'did not have . . . the talent nor the numbers of people in merchandising to adequately negotiate, make decisions, set up pricing, and manage a large chain.'" *HH Liquidation*, 590 B.R. at 238.

The risky nature of this divestiture is also evidenced by the extent of C&S's reliance on Kroger during the transition period. C&S will rely on its primary competitor, Kroger, for key functions such as REDACTED

This gives Kroger too much visibility and influence over C&S' development as an actual competitor and demonstrates the weakness of the purported competition that C&S will put up against Kroger.

Sysco is instructive on this point. In that case, Sysco proposed a divestiture to the third-largest distributor in the United States, Performance Food Group (PFG). The court rejected the divestiture because, among other reasons, PFG would have been beholden to the merged firm. The court concluded that PFG's years-long access to US Foods' private label products and database licensing post-merger "cut[] against the divestiture as a proposed fix," reasoning that PFG would "be dependent on the merged entity for years following the transaction" and thus "will not be a truly independent competitor." *Sysco*, 113 F. Supp. 3d at 77-78 (citing *CCC Holdings*, 605 F. Supp.

[42] The Haggen bankruptcy judge also found that Haggen's pricing problems, reliance on a third-party for pricing guidance, and its lack of marketing and merchandising capabilities, were "catastrophic" to the divestiture. *HH Liquidation*, 590 B.R. at 237-38.

2d at 59). The same is true of C&S. And in past transactions, this is a recipe for disaster—creating a dynamic that has undermined past divestiture remedies.[43]

Second, C&S has a troubling history of dealing with labor unions. For example, in 2004, C&S closed three unionized facilities that it acquired from Supervalu in New England and shifted the work to its non-union facilities in the region. All told, over 600 union jobs were lost.[44]

Similarly, C&S had a large warehousing operation in Woodbridge, NJ, from which it served facilities across the Tri-State Area (New Jersey, New York, and Connecticut). In 2011, despite the prime location, C&S shut down the union facilities and shifted the work to non-union facilities in Pennsylvania. This resulted in over 1,000 lost union jobs.[45]

In 2014, C&S acquired certain White Rose warehouses out of bankruptcy. C&S shifted the work to non-union facilities, resulting in over 400 union jobs lost.[46] Union employees currently

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[43] The CEO of Cable & Wireless reflected on this very issue in Congressional testimony, stating that "[d]ivestiture of a fully integrated business is much more complicated than simply selling off a separate operating division[or] wholly-owned subsidiary," and extended transition support from the seller "gives the divesting party an incentive to degrade service while providing it in the name of another company. Any problems are likely to cause former customers to migrate back to the original service provider." Mergers in the Telecommunications Industry: Hearing Before The Commission On Commerce, Science & Transportation, 107th Cong. 55-57 (1999) (statement of Mike McTighe, CEO, Cable & Wireless), *available at* https://upload.wikimedia.org/wikipedia/commons/c/c8/MERGERS_IN_THE_TELECOMMUNICATIONS_INDUSTRY_%28IA_gov.gpo.fdsys.CHRG-106shrg77325%29.pdf.

[44] Progressive Grocer, C&S Closing Three New England Warehouses, *available at* https://progressivegrocer.com/cs-closing-three-new-england-warehouses.

[45] *Town Responds to C&S Plan to Close N.J. Warehouse*, Progressive Grocer, *available at* https://progressivegrocer.com/town-responds-cs-plan-close-nj-warehouse.

[46] Jon Springer, *C&S to close White Rose facilities*, SupermarketNews, *available at* https://www.supermarketnews.com/retail-financial/cs-close-white-rose-facilities.

working at Kroger and ACI facilities justifiably fear that C&S will employ the same playbook with them.

Finally, the purchase price of the divestiture raises concerns about C&S's ability to compete successfully. A low purchase price calls into question a buyer's incentive and willpower to maintain the pre-merger level of competition after the merger is consummated. "[A]n inexpensive acquisition could still 'produce something of value to the purchaser' even if it does not become a significant competitor and therefore would not 'cure the competitive concerns.'" *Aetna*, 240 F.Supp.3d at 72 (citation omitted).

Here, C&S will acquire stores and other assets at a deeply discounted price of $1.9 billion. This low price represents the high execution risk of the deal. If C&S cannot compete effectively, it could still recoup money through the value of its acquired real estate and other assets, just like what happened with Haggen—likely resulting in more closed stores in Colorado. *See supra* Section II.G.

Alternatively, and unlike Haggen, C&S could franchise the stores, like it has done with its Piggly Wiggly banner. Either way, the risks to C&S are comparatively low, which is in stark contrast to the risks to consumers and communities who could lose their grocery stores and workers who could lose their jobs.

e) The proposed divestiture should be viewed with great skepticism in light of ACI's past conduct and the history of failed divestitures in the grocery industry.

This Court should view the divestiture plan with great skepticism in light of how it was announced and based on the Defendants' past conduct. Taking the Defendants' prior conduct into

account is appropriate when assessing whether this divestiture plan will cure the anticompetitive effects of the merger. Indeed, a retrospective of a given market and a review of historical conduct is routine in the merger context. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974). For instance, when reviewing mergers, courts examine whether there has been "a history of collusion or attempted collusion," as noted above. *Bertelsmann*, 646 F. Supp. 3d at 45.

Courts sitting in equity routinely scrutinize past questionable conduct to protect their equitable authority and to avoid harm to the parties and the public. In evaluating requests for equitable relief, for example, courts employ the doctrine of unclean hands. *See*, *e.g.*, *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) (en banc) ("One who comes into equity must come with clean hands.") (internal quotations and citations omitted).

ACI's prior conduct during the Haggen divestiture warrants heavy scrutiny of this divestiture. And the Court should be even more concerned with this divestiture in light of the numerous other failed divestitures in the grocery industry. The ACI divestiture to Haggen is the poster-child of failed divestitures, but other failures include:

- the Safeway/Carrs merger in Alaska, where all 7 divested closed after roughly a year;
- ACI's purchase of Buttrey Food and Drug Store Company, where 13 of 15 divested stores closed;[47]
- the Albertsons Inc./Cerberus Capital Management deal in 2006, where Cerberus acquired over 650 Albertsons stores under the Albertsons LLC entity, and almost immediately announced it was closing approximately 100 of those stores, and proceeded to close or sell hundreds more in the following years—many in Colorado; and

[47] *See* Don Day, *Albertsons cut a deal to clear a merger in '98. Most of them quickly closed*, BoiseDev, *available at* https://boisedev.com/news/2023/09/11/albertsons-kroger-buttrey/.

- the Albertsons Inc./SuperValu deal, where SuperValu acquired over 1,100 stores from Albertsons in 2006, and closed or sold over 200 of them before selling the balance back to Albertsons LLC (now owned by Cerberus) in 2013.

B. There is a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief.

The Attorney General is not required to plead or prove immediate or irreparable injury when a statute concerning the public interest is implicated. *See Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd.*, 553 P.2d 800, 808 (Colo. 1976); *Kourlis v. Dist. Court*, 930 P.2d 1329, 1334-35 (Colo. 1997); *Board of County Commissioners of County of Logan v. Vandemoer*, 205 P.3d 423, 431 (Colo. App. 2008).

Nonetheless, there is a danger of real, immediate and irreparable injury here if the Proposed Merger is not preliminarily enjoined. The Proposed Merger contemplates extensive integration of Kroger and ACI's operations, including warehouse and supply facilities, distribution systems, and customer data. The sharing of competitive information post-merger alone creates potential harm to competition. *See Sysco*, 113 F.Supp.3d at 77-78. But once Kroger acquires ACI assets, it will be almost impossible and highly disruptive to unwind the transaction. Employees will transition and assets will transfer. Moreover, stores and other facilities are likely to close and the merged entity will have to negotiate new contracts with suppliers.

Simply put, it is incredibly difficult to unscramble the egg in merger challenges. Absent relief from this Court, irreparable harm to competition could occur immediately, including increased prices and decreased store quality for consumers, loss of jobs, and harms to suppliers and supply chains.

C. There is no plain, speedy, and adequate remedy at law.

An injunction is usually the only sufficient remedy for unlawful mergers. *See PPG Industries*, 798 F.2d at 1506 ("having found that the acquisition was almost certainly illegal, the district court faced a difficult task in justifying anything less than a full stop injunction.").

There is no plain, speedy and adequate remedy at law to prevent the irreparable harm of allowing the parties to consummate the Proposed Merger. *See Rathke*, 648 P.2d at 653-54. The Colorado Antitrust Act clearly contemplates the equitable remedy of injunctions as the fastest and most adequate means to prevent or restrain an anticompetitive merger. *See* C.R.S. § 6-4-112.

D. The public would be served by, and a balance of equities favors, a preliminary injunction.

A preliminary injunction serves the public interest. ACI and Kroger compete directly with one another in Colorado, and each restrains the other's pricing and other behaviors important to Colorado consumers. Absent relief from this Court, substantial harm to competition could occur immediately, including an increase in costs at the grocery store.

As to the fifth *Rathke* factor, the balance of the equities weighs strongly in favor of the Attorney General's request for injunctive relief. *Rathke*, 648 P.2d at 654. Consummation of this unlawful merger would inflict serious harm on consumers, workers, and suppliers across Colorado. Delaying the merger at least until after a trial on the merits will not prejudice the Defendants.

E. A preliminary injunction is necessary to preserve the status quo pending a trial on the merits.

The status quo is defined as "the last peaceable uncontested status existing between the parties before the dispute developed." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 798, n.3 (10th Cir. 2019) (citing 11A Charles A. Wright & Arthur R.

Miller, Federal Practice & Procedure § 2948 (3d ed. & Nov. 2018 update); *Rathke*, 648 P.2d at 654 (an injunction should "preserve the status quo pending a trial on the merits").

If the Proposed Merger were consummated and later found anticompetitive by the Court, it would be difficult, if not impossible, to restore the status quo ante of competition. The integration of Kroger and ACI's operations would substantially impair any attempt to restore competition to pre-acquisition levels.

VI. CONCLUSION

The Attorney General respectfully requests that the Court grant this Motion and enter a preliminary injunction to prevent the Defendants from closing on the Proposed Merger.

Pursuant to Rule 65(c) C.R.C.P., the State is not required to provide a security bond.

Respectfully Submitted,

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