

MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2023

Tuesdays and Thursdays, 11:10 am – 1:10 pm
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CLASS 9 ASSIGNMENT—SECOND ASSIGNMENT—INSTRUCTOR'S ANSWER

Instructions

Submit by email before class on Tuesday, September 26
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Second Assignment for Class 9

Assignment

Time: Now

Calls for an answer to two questions. Bullet points are fine but do not spend the time writing a memorandum of law. Spend as long as you like on the assignment, but after you read the background and assignment, feel free to stop after 10 minutes of working on the problem.

Kroger/Albertsons: Divestiture Sale to C&S

*Background.*¹ As we discussed in Class 5, Kroger and Albertsons have entered into a definitive merger agreement pursuant to which Kroger will acquire all outstanding shares of Albertsons for \$24.6 billion. Kroger operates 2700+ stores under 28 banners, including Kroger, Ralphs, Harris Teeter, and Pay Less. Albertsons operates 2273 stores under 24 banners, including Albertsons, Vons, Acme, Pavilions, and Star Market.

The FTC reviews supermarket mergers. The competitive effects of supermarket mergers are analyzed using relevant local supermarket markets. In announcing the merger, Kroger said it expected to divest between 100 to 375 stores to alleviate any FTC Section 7 concerns. I suspect that Kroger was signaling to the FTC that Kroger believed that the divestiture of 100 stores was necessary to fix indefensible local markets and that an additional 275 stores were necessary to fix local markets that the FTC was likely to find seriously problematic. Kroger was also signaling the FTC that it was willing to give up to 375 stores without a fight. Kroger probably gave the FTC staff in the initial investigation—perhaps in the first meeting with the investigating staff—a white paper providing an analysis that the divestiture of these stores would fix all of the implicated local markets.

On September 8, Kroger, Albertsons, and C&S Wholesale Grocers, LLC announced that the merging companies agreed to sell C&S 413 stores, eight distribution centers, and two regional offices for \$1.9 billion contingent on the closing of the Kroger-Albertsons deal.² C&S is the

¹ You might also want to briefly review the [class slides](#) on the Kroger/Albertsons deal.

² Unfortunately, the divestiture agreement has not been publicly released. The companies, however, reported that the divestiture agreement contains a “put” option that allows Kroger to require C&S to purchase up to an additional 237 stores for a formula-based purchase price if the FTC finds additional problematic markets and requires further divestitures to avoid a litigation on the merits. This brings the total number of stores that might be divested to 650,

eighth largest privately held company in the United States. In 2022, it had revenues of \$33 billion and employed over 14,000 workers.³ C&S is the largest wholesale grocery supply company in the U.S., serving over 7,500 independent supermarkets, chain stores, and military bases. C&S also operates 11 Grand Union grocery stores in two states and 12 grocery stores it acquired from Price Chopper/Tops as the result of an FTC-required divestiture (to be rebranded as Grand Union stores. It also franchises and supplies 504 Piggly Wiggly grocery stores in 18 states.

C&S will finance the transaction with \$1.1 billion from a newly committed \$2.25 billion asset-based line of credit (ABL) from Softbank Group Corp. secured by the divestiture assets and \$800 million of new equity.

The companies structured the C&S divestiture deal in an effort to avoid the problems that arose in the divestiture of 146 stores to Hagggen Holdings LLC in the 2015 Albertsons/Safeway deal.⁴ In particular, C&S was a previously FTC-approved divestiture buyer of grocery stores in the Price Chopper/Tops Markets deal.⁵ Moreover, the divestiture includes not only stores but also distribution centers and regional offices and provides for expert district, division, and functional personnel to transfer to C&S.

I said in class that I thought the C&S divestiture arrangement was very well-designed and would likely put considerable pressure on the FTC to accept a consent decree at the end of the investigation rather than to litigate the fix against the merging parties. However, shortly after the announcement of the C&S divestiture agreement, a group of United Food & Commercial Workers local unions in fourteen states issued a press release raising alarms about the C&S divestiture.⁶ A week later, an article in Supermarket News elaborated on these concerns.⁷ While I still think that the C&S divestiture agreement is very well-structured, the concerns raised by UFCW could give the FTC pause about the adequacy of the divestiture.

Assignment: You are antitrust counsel to Kroger. You have read the UFCW press release and the Supermarket News article and are preparing to speak with the Kroger GC about them. You expect the conversation to center on two questions:

1. In what way, if any, could/should the UFCW's concerns cause the FTC pause about the adequacy of the C&S divestiture to maintain the premerger level of competition in the implicated markets?
2. In light of these concerns, what should you advise Kroger to do to respond and shore up the defense of the C&S divestiture?

Answer the two questions.

which is the number set in the qualified hell-of-high-water (HOHW) provision in the Kroger/Albertsons merger agreement. In this assignment, however, we are going to focus on the sale of the 413 stores to C&S.

³ [Profile: C&S Whole Grocers](#), Forbes.com (undated).

⁴ See [Unit 5: Merger Antitrust Settlements—Kroger/Albertsons](#) 16-18 (class slides).

⁵ See [Decision ¶ II\(A\), Golub Corp.](#), No. C-4753 (F.T.C. Jan. 20, 2022) (Price Chopper/Tops Markets).

⁶ Press Release, [Coalition of UFCW Local Unions Raise Concern and Caution About Kroger/Albertsons Divestiture Deal with C&S Wholesale Grocers](#) (Sept. 11, 2023) (attached).

⁷ Mark Hamstra, [UFCW Cites 'Echoes of Hagggen' in Proposed C&S Deal](#), Supermarket News.com (Sept. 20, 2023) (attached).

UFCW 3000

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Coalition of UFCW Local Unions Raise Concern and Caution About Kroger/Albertsons Divestiture Deal with C&S Wholesale Grocers

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UFCW LOCALS 5, 7, 324, 400, 770, 1564, 3000 COALITION OF UFCW LOCAL UNIONS RAISE CONCERN AND CAUTION ABOUT KROGER/ALBERTSONS DIVESTITURE DEAL WITH C&S WHOLESALE GROCERS

UFCW Locals 5, 7, 324, 400, 770, 1564, 3000

Des Moines, WA – Today, a coalition of United Food & Commercial Workers local unions in fourteen states and the District of Columbia representing more than 100,000 Kroger and Albertsons workers released the following statement regarding the [announcement](#) of a divestiture deal to sell hundreds of Kroger and Albertsons stores to C&S Wholesale Grocers:

“We have raised alarms about the proposed Kroger/Albertsons merger from the very beginning— from threats of store closures, higher prices and reduced competition, the harm to unionized workers’ ability to negotiate strong contracts, as well as the negative ripple effects lower union density would have on workers throughout the grocery industry. News of a possible deal with C&S to buy hundreds of stores as part of the proposed merger in no way reduces those alarms. Indeed, in many respects this announcement raises the level of concern for our members.

“Workers and shoppers have been seriously harmed by large-scale sell-offs in the past, orchestrated as part of a potential merger. It was only in 2015 that private equity-owned Haggen acquired a large number of stores as part of a divestiture scheme to appease antitrust regulators in the Albertsons/Safeway merger. It took less than a year for that company to go bankrupt and for Albertsons to pick up the very same stores it had divested for a fraction of what Haggen paid less than a year before, thus undoing the remedy to

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UFCW 3000

Another day of grocery workers educating their customers about what the consequences are for their families if the...
<https://t.co/Sbk9Wv7kjj>
Apr 5, 2023, 3:09 PM



UFCW 3000

RT @RWDSU: This [#Barbie](#) is leading a march on the boss. Who's with her?
<https://t.co/Z5c7Nnfe81>
Apr 5, 2023, 11:53 AM




UFCW 3000

Can confirm! Hey [@kroger](#) and [@Albertsons](#) we'll be here all week!
<https://t.co/V4HxlgYlak>
Apr 5, 2023, 11:50 AM




UFCW 3000

RT @stop_merger: Shout out to Safeway workers in DC for getting the word out! [#StopTheMerger](#) 
<https://t.co/Ua8ec9XmNS>
Apr 5, 2023, 11:49 AM



UFCW 3000

Workers and Customers agree - a merger will hurt our communities! [#StopTheMerger](#) 

resolve antitrust concerns. Moreover, thousands of workers lost their jobs and were forced to start over. Today's announcement of a nearly identical divestiture scheme is a troubling sign that history could repeat itself."

#unionstrong

[https://t.co](https://t.co/CmYYzNhCvB)

[/CmYYzNhCvB](https://t.co/CmYYzNhCvB)

Apr 4, 2023, 2:24 PM

The above statement can be attributed to the following UFCW local presidents:

- John Nunes, UFCW Local 5 President
- Kim Cordova, UFCW Local 7 President
- Andrea Zinder, UFCW Local 324 President
- Mark Federici, UFCW Local 400 President
- Kathy Finn, UFCW Local 770 President
- Greg Frazier, UFCW Local 1564 President
- Faye Guenther, UFCW Local 3000 President

Contact: Tom Geiger, UFCW 3000, 206-604-3421

📅 September 11, 2023 👤 UFCW 3000

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🏪 Grocery Store

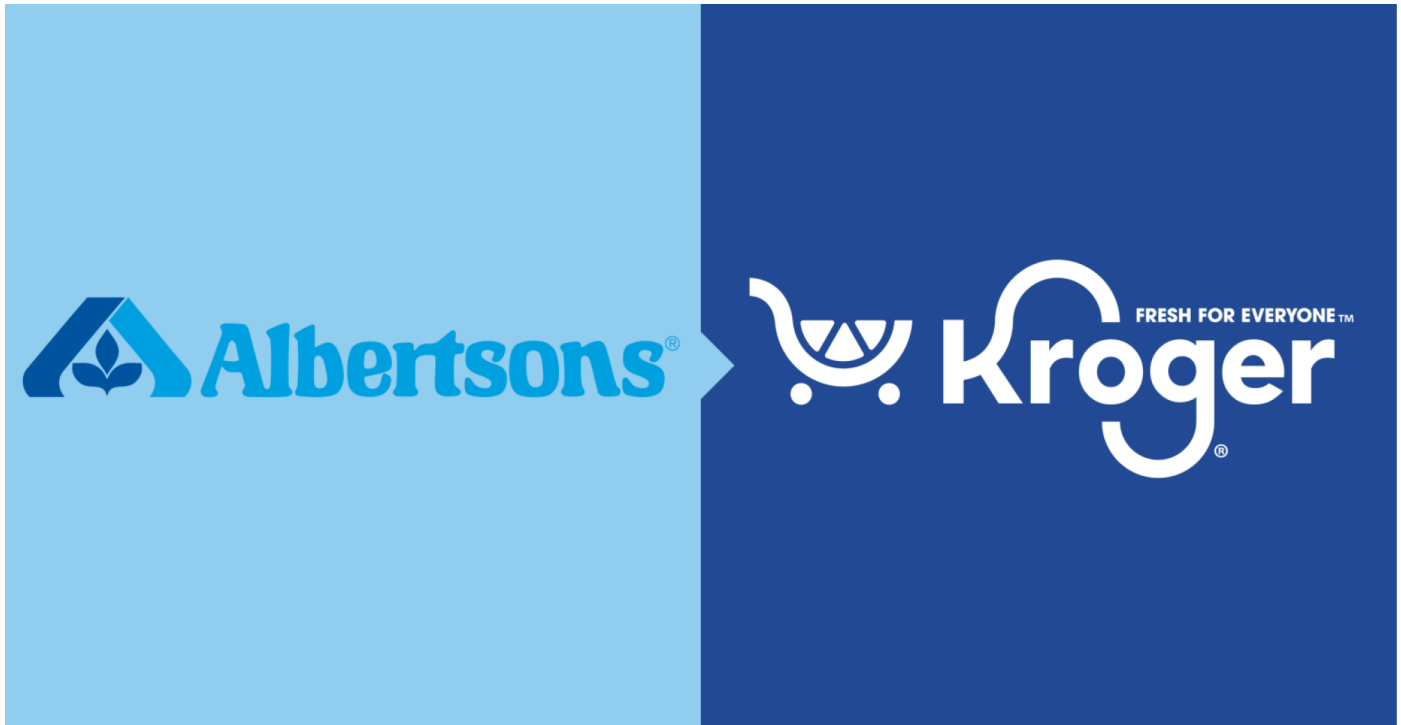
👇 Grocery Store, Stop The Merger, No Grocery Merger, Albertsons, Kroger

◀ TOWN HALL CALL MONDAY: IM PLANNED PARENTHOOD WE'RE IN



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"It looks like Haggren 2.0," said Kim Cordova, president of UFCW Local 7 in Colorado and Wyoming, referring to Haggren's 2015 implosion after acquiring 146 Safeway and Albertsons stores to satisfy antitrust concerns as part of the Safeway-Albertsons merger.

NEWS > RETAIL & FINANCIAL

UFCW cites 'echoes of Haggren' in proposed C&S deal

Proposed purchase of 413 Kroger, Albertsons stores could result in store sales, closures, union says

Mark Hamstra | Sep 20, 2023

The United Food and Commercial Workers union on Wednesday expressed deep concerns about the proposed acquisition of 413 Kroger- and Albertsons-owned stores by C&S Wholesale Grocers.

"It looks like Haggren 2.0," said Kim Cordova, president of UFCW Local 7 in Colorado and Wyoming, referring to Haggren's 2015 implosion after acquiring 146 Safeway and Albertsons stores to satisfy antitrust concerns as part of the Safeway-Albertsons merger.

Related: Kroger CEO: Merger is not an 'arm wrestle' with rest of the industry

She said she is doubtful that C&S will be able to compete effectively against a much stronger Kroger in her area, which could lead to the stores eventually being closed. She noted, however, that details about C&S's proposal, such as which specific stores and warehouses it will acquire, have not yet been disclosed.

As previously reported, C&S has agreed to acquire 413 stores, eight warehouses, and two offices from Kroger as part of that company's planned \$24.6 billion merger with Albertsons. The sale is designed to help satisfy potential antitrust concerns. Both deals are scheduled to be completed in 2024, pending regulatory approval.

John Marshall, a financial analyst working with the UFCW to oppose the proposed merger of Kroger and Albertsons, said the C&S agreement includes several similarities to the Haggen transaction. In particular, he said, the real estate value of the acquisition appears likely to exceed the purchase price, which would disincentivize C&S from continuing to operate the stores.

"The low sales price raises questions about the quality of the divested stores and about the incentives that C&S will have to operate the stores, or potentially monetize them at some time down the road," he said.

Marshall estimated that the assets C&S has proposed to acquire could be worth nearly double the proposed purchase price of \$1.9 billion. The eight warehouses could fetch at least \$400 million, and possibly upwards of \$800 million, he said, and the store assets themselves could be worth \$2 billion to \$3 billion.

Customer data seen as key

Marshall also raised concerns that the acquisition announcement made no mention of C&S buying the customer data from the stores it was buying.

"This is a critical missing piece that you would need to successfully operate these stores," he said, noting that after the Haggen acquisition, customers' loyalty cards no longer worked at the acquired stores.

Other concerns Marshall had included C&S's long history of eliminating union jobs, citing several union warehouse closings over the years that have eliminated thousands of Teamsters jobs.

He also said C&S's lack of retail operational experience — he estimated that the company currently owns and operates only 55 stores, with the remainder of the 160 stores the company cited in its acquisition announcement being franchised.

“The challenge of wholesalers trying to operate retail stores is very well understood in this industry,” Marshall said. “Lots of other wholesalers have tried it, and failed, and we are very concerned about C&S’s capacity to operate a significant chain of retail stores.”

He noted that C&S has a history of acquiring stores and then selling them off after establishing long-term supply agreements with the new owners.

In a statement, C&S told *Supermarket News* that it has “more than 104 years of food industry experience and a track record as a successful grocery retailer.”

“C&S has committed to honoring all collective bargaining agreements including industry-leading benefits and retaining frontline associates, and we are confident the associates joining the C&S family will have an amazing opportunity to continue building a thriving career,” the company said.

Members cite worries from past experience

UFCW members on the call described their concerns about C&S’s proposed acquisition, citing their experience in the Safeway-Albertsons merger.

Monique Hightower, a deli worker at Albertsons in Los Angeles and member leader at UFCW Local 770, said she was laid off from Haggen for almost a year after Haggen acquired her store location, and she still struggles to pay her bills.

“Now I am really worried about this merger,” she said.

Phillip Contee, a 40-year veteran at Safeway in Oxon Hill, Md., and member leader at UFCW Local 400, said he was concerned about ongoing cost-cutting reductions in service at acquired locations.

“After all the stress, fear, and anxiety of working through a global pandemic, now just as it was appearing things were returning to normal, we have yet another reason to worry about our future,” he said.

Marshall said he believes the Federal Trade Commission will be highly conscious of the Safeway-Albertsons merger and the failed Haggen acquisition as it considers the proposed sale of stores to C&S. He said that when Haggen filed for bankruptcy just months after its acquisition, the company cited the FTC’s approval in its own defense.

“I would expect they understand very well that they were used as an alibi for a transaction that hurt communities, hurt consumers and hurt workers, and I sincerely hope and expect that they won’t let that happen again,” Marshall said.

Meanwhile Andrea Zinder, president of UFCW Local 324 in California, said three bills seeking to guarantee severance pay for workers and provide other protections in the event of grocery industry mergers have passed both state houses, and are awaiting the signature of Gov. Gavin Newsom by Oct. 14.

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The United Food and Commercial Workers union on Wednesday expressed deep concerns about the proposed acquisition of 413 Kroger- and Albertsons-owned stores by C&S Wholesale Grocers. What do you think? Do you have concerns about the acquisition?

Let us know in the comments below, or email your thoughts to the SN staff at contactus@supermarketnews.com. Be sure to include your full name and work title.

Source URL:<https://www.supermarketnews.com/retail-financial/ufcw-cites-echoes-haggen-proposed-cs-deal>

CLASS 9 ASSIGNMENT—SECOND ASSIGNMENT—INSTRUCTOR’S ANSWER

Kroger/Albertsons: Divestiture Sale to C&S

Question 1. In what way, if any, could/should the UFCW’s concerns cause the FTC pause about the adequacy of the C&S divestiture to maintain the premerger level of competition in the implicated markets?

As Kroger’s antitrust counsel, the UFCW press release and the SN article raise two major new concerns:

1. Does the real estate value of the acquisition exceed the purchase price? The SN article indicates that the real estate value of the divestiture assets may be worth nearly double the acquisition price of \$1.9 billion. If so, the FTC will be concerned that C&S will not be fully committed to operating and investing in the divestiture business. If the business does not do well, C&S can simply bail into monetizing the assets by selling them to acquirers who may or may not continue to operate them in the supermarket business. Indeed, C&S may be looking to flip the stores as soon as possible.
2. Will C&S obtain the customer data from the stores it is buying? If not, C&S will not obtain critical information necessary to compete in the problematic markets. Moreover, if the merging companies retain that information, they will have a means of reaching out to customers of the divestiture stores with special promotions to incentivize them to switch back to competing Kroger/Albertsons stores.¹

Question 2. In light of these concerns, what should you advise Kroger to do to respond and shore up the defense of the C&S divestiture?

The continued operation of the assets in the supermarket business:

1. We need to ensure that C&S’ business plans and financial models (including any analyses of its investment bankers) fully support the conclusion that operating the divestiture assets in the supermarket business is the profit-maximizing use of the divestiture assets and that C&S has not considered the alternative option of selling off the stores. The FTC will subpoena all of these documents from C&S and their investment bankers as part of the vetting process of C&S as a divestiture buyer. We need to see all of these documents so that we know what they say.

¹ A number of students focused on the harm workers in the divestiture stores may suffer. Concern about significant harm to workers was raised immediately following the announcement, so the general concern is nothing new. The new worker concern here is that C&S may have an incentive to close some stores or other divestiture assets and fire their workers to monetize the assets at a higher value than they are worth in the supermarket business. But the antitrust concern here is the loss of competition from the sale/closing of the divestiture assets, not the loss of employment to the affected workers.

Caution: We need to approach this carefully since these are very competitively sensitive documents that Kroger and Albertsons personnel should see. Consequently, we should obtain these documents on an “outside counsel” only basis. The companies should expect the FTC to ask their representatives whether they or anyone else in the company have seen any of these C&S documents or whether C&S has otherwise disclosed any competitively sensitive business plans or financials to Kroger or Albertsons. We need to make sure that the answer is no.²

Note to students: The divestiture agreement should have a cooperation provision that allows the merging parties to obtain—on an outside counsel only basis if necessary—any and all of the documents in the hands of the divestiture buyer relevant to the defense of the divestiture sale. Kroger and Albertsons are represented by experienced counsel, and I assume that a suitable cooperation provision is in the divestiture agreement (which has not been made public). If not, Kroger will have to depend on C&S’ goodwill to provide the documents, which could be problematic.

In addition, there should be a representation in the divestiture agreement that C&S intends to operate the divestiture assets in the supermarket business for at least the next (say) seven years. If C&S breaches that rep, then C&S is open to a contract action by the merging party signatories.³

Finally, in today’s world, I would also require C&S in the divestiture agreement to agree to join as a party-defendant in any action by the FTC in connection with accepting a consent decree and to accept in the consent decree any obligations the FTC might reasonably require to ensure that C&S operates the divestiture assets in the supermarket business in the ordinary course for seven years and to accept a provision prohibiting C&S from closing or selling and divestiture assets with the FTC’s prior approval for the same time period. I would also include analogous provisions to deal with a litigation on the merits in which the parties “litigate the fix” so that the court, if it wanted, could bind C&S.

The provisions in this note were either included in the divestiture agreement or not. If not, it is probably too late to do anything about them now.

2. Moreover, C&S is using an asset-based line of credit (ABL) secured by the divestiture assets from Softbank to finance \$ 1.1 billion of the \$1.9 billion purchase price. The FTC may think that an ABL rather than a full recourse loan reduces C&S’ incentive to compete with the divestiture assets since, in the event of a failure, C&S simply gives up the stores that C&S largely purchased with the

² We may need to remind the client that knowingly making a false statement to a government investigator in the course of an investigation is felony under 18 U.S.C. § 1001 punishable by a fine of no more than \$250,000 and imprisonment not more than five years. An individual does not need to be under oath to violate Section 1001. Moreover, there is no recantation defense to a Section 1001 violation. The violation occurs the moment the false statement is knowingly made.

³ As an aside, I would also include a rep that the divestiture arrangement includes all of the assets, transfer of personnel, intellectual property, and customer data that C&S needs to operate all of the divestiture stores postmerger with the same competitive force as the divestiture seller operated them premerger.

Softbank line of credit anyway. I don't think this is a valid concern since the stores are worth considerably more than the loan amount. Still, the FTC may insist that the loan to C&S be full recourse. We should alert C&S to this possibility and get its reaction. I suspect that C&S, which is getting a great deal on the purchase price, would not resist changing the loan to full recourse if necessary to get the FTC's or court's approval of the fix.

3. The premise of the concern is that the real estate value of the divestiture assets is significantly greater than the purchase price. We should retain a qualified appraiser to evaluate an appropriate sample of divestiture assets to ascertain their real estate value. We would need to work with an economist or statistician to determine the right design for the study. We should retain both the appraiser and the economist/statistician as potentially testifying expert witnesses.
4. To backstop the argument that operating the divestiture stores as supermarkets is their profit-maximizing use, we should retain McKinsey, BCG, or Bain to evaluate the profit-maximizing deployment of the divestiture assets if the divestiture buyer were unconstrained in what it does with the assets after it acquires them. Again, we should retain the management consulting firm with the idea that the project leader would be a potentially testifying expert witness.

Note to students: By retaining the appraiser, economist/statistician, and management consulting firm as potential expert witnesses, we can ensure that none of their work is discoverable unless we advance them to present in the FTC investigation or provide testimony at trial. A retained nontestifying expert is not subject to discovery. Rule 26(b)(4)(D)(ii) of the Federal Rules of Civil Procedure provides in part:

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.

Fed. R. Civ. P. 26(b)(4)(D)(ii). The rule provides exceptions that permit discovery in exceptional circumstances, but I am aware of no instance in merger antitrust investigations or litigations where the exceptions have been invoked, much less applied.

The customer data for the divestiture stores

We need to confirm that the divestiture agreement provides that the divestiture seller will provide C&S all of the customer data for the divestiture stores and, upon closing, will not retain or use any of this data. This should be a standard provision in the divestiture agreement. If not, we should amend the divestiture agreement to provide for the transfer.