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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION, et)	
al.,)	
)	
Plaintiffs,)	Case No. 3:24-cv-00347-AN
)	
v.)	
)	
THE KROGER COMPANY and)	August 26, 2024
ALBERTSONS COMPANIES, INC.,)	
)	
Defendants.)	Portland, Oregon
)	

PRELIMINARY INJUNCTION HEARING
DAY 1 - MORNING SESSION
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

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TRANSCRIPT OF PROCEEDINGS

(August 26, 2024)

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Please be seated. Good morning.

So we are here in the matter of Federal Trade Commission, et al. v. The Kroger Company and Albertsons Companies, Incorporated. Case No. 3:24-cv-00347. This is the first day of a three-week preliminary hearing, an injunction, to determine what will happen with the proposed merger that has clearly gotten a lot of attention because of the large number of people that I have sitting in my courtroom.

I trust that everyone has received a copy of the courtroom management and decorum order. Just to reiterate, there will not be any beverages or food allowed. That does not include water. I will allow you to have water in here.

You cannot have any type of electronic devices. If someone somehow does possess one and they're sitting in the gallery, you will be removed and not be able to attend the hearing for the entirety of it. This is your warning.

If counsel will state their appearances for the record while I log on to my device, we'll begin with the pretrial matters that we are continuing to address from Friday's pretrial hearing.

1 MS. MUSSER: Good morning, Your Honor.
2 Susan Musser on behalf of the Federal Trade Commission, and
3 I'll let my co-counsel introduce themselves.

4 THE COURT: Absolutely.

5 MS. HALL: Laura Hall on behalf of the Federal
6 Trade Commission.

7 MR. DICKINSON: Good morning, Your Honor.
8 Charles Dickinson from the Federal Trade Commission.

9 MR. PAI: Good morning, Your Honor, Rohan Pai on
10 behalf of the Federal Trade Commission.

11 MR. ANDERSON: Barrett Anderson for the FTC.

12 MR. KAYSER: Chris Kayser on behalf of the State
13 of Oregon. And with me today I have Tim Nord from the
14 Oregon Department of Justice.

15 MR. NORD: Good morning.

16 THE COURT: Good morning.

17 MR. HERRERA: Good morning, Your Honor,
18 Jeff Herrera on behalf of the plaintiff, State of New
19 Mexico.

20 MR. YOUNG: Good morning, Your Honor. William
21 Young on behalf of the State of Wyoming.

22 MR. TUCKER: Good morning, Your Honor.
23 Lucas Tucker on behalf of the State of Nevada.

24 MS. TORRES PAEZ: Good morning, Your Honor.
25 Estefania Torres Paez for the District of Columbia.

1 MS. GORDON: Good morning, Your Honor.
2 Nicole Gordon for the State of California.

3 MR. WARREN: Good morning, Your Honor.
4 Byron Warren for the State of Maryland.

5 THE COURT: Good morning.

6 MS. WEBER: Good morning, Your Honor. Jamie Weber
7 for the State of Arizona.

8 MR. WOLF: Good morning, Your Honor. Matt Wolf
9 from Arnold & Porter for Kroger. With me, from Arnold &
10 Porter, is Sonia Pfaffenroth, Christian Schultz, Josh Davis.
11 From Stoel, John Casey. From a client, Christine Wheatley,
12 General Counsel.

13 THE COURT: Yes. We saw her in July.

14 MR. WOLF: And Yael Cosset, our Chief Information
15 Officer, in the gallery.

16 And from Weil Gotshal, Mark Perry.

17 MR. PERRY: Good morning.

18 THE COURT: Good morning.

19 MR. WOLF: Bambo Obaro.

20 MR. OBARO: Good morning.

21 THE COURT: Good morning.

22 MR. WOLF: And Luna Barrington.

23 THE COURT: Good morning.

24 MS. MAINIGI: Good morning, Your Honor.

25 Enu Mainigi from Willams & Connolly for Albertsons. Also

1 from Williams & Connolly are Beth Stewart, Joshua Podoll,
2 Jonathan Pitt, and Tyler Infinger.

3 From Dechert, Mike Cowie.

4 THE COURT: Good morning.

5 MS. MAINIGI: And from the Angeli Law Group,
6 David Angeli.

7 THE COURT: Yes.

8 MS. MAINIGI: And, Your Honor, from the client, we
9 have Tom Moriarty, General Counsel.

10 MR. MORIARTY: Good morning, Your Honor.

11 THE COURT: Yes, good morning.

12 MS. MAINIGI: Adwea Seymour, head of litigation;
13 and we also have Mr. Vivek Sankaran, CEO; as well as
14 Ms. Susan Morris, COO of Albertsons.

15 THE COURT: All right.

16 MS. MAINIGI: Thank you.

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1 THE COURT: I know you have been working over the
2 weekend. We had talked about your working to try to confer
3 around a number of issues. So if you can update the Court.

4 MS. MUSSER: Thank you, Your Honor. From -- on
5 behalf of plaintiffs, Mr. Anderson and Ms. Hall are going to
6 provide updates which I think will please this Court. We
7 have been able to resolve or at least narrow many of the
8 issues.

9 MR. ANDERSON: Good morning, Your Honor.
10 Barrett Anderson. As my colleague indicated, we have, I
11 hope, mostly good news here.

12 A couple of the issues that were left on the table, the
13 first one was the briefing by the parties on the scope of
14 the administrative record.

15 THE COURT: Yes.

16 MR. ANDERSON: I'm pleased to say the parties have
17 reached agreement. We'll be filing a joint stipulation and
18 order later today.

19 THE COURT: All right. And I look forward to
20 receiving it. I hope --

21 MR. ANDERSON: Yes, Your Honor.

22 THE COURT: -- to be able to sign off on it later
23 tonight. I too will be working around the clock, as are all
24 of the attorneys, because that's just the nature of
25 litigation, but it will happen as soon as possible.

1 MR. ANDERSON: Thank you, Your Honor. I can tell
2 you that it contemplates the parties filing things at the
3 end of the hearing, so no rush on that.

4 THE COURT: All right. Fair enough.

5 MR. ANDERSON: The parties also discussed a
6 variety of other issues. We've reached agreement on
7 disclosures of exhibits for direct examinations and
8 demonstratives, and we're going to continue to meet and
9 confer regularly on exhibits.

10 THE COURT: Great.

11 MR. ANDERSON: With respect to confidentiality,
12 which I know was front and center, we also have had
13 productive conversations on that over the weekend of the
14 scope of the defendants' confidentiality designations.
15 Based on the guidance that we received over the weekend from
16 the defendants, we believe there is a path forward here for
17 the parties to continue to work together.

18 THE COURT: Okay.

19 MR. ANDERSON: That will both protect the truly
20 confidential information while allowing plaintiffs to openly
21 discuss a broader scope of information than what defendants
22 had originally designated.

23 So our understanding, just so the Court is aware, is
24 that, consistent with what counsel for Kroger represented on
25 Friday at the prehearing conference, defendants are most

1 concerned with the specific numbers, the data, like prices
2 and margins. We can work with that sort of information,
3 along with the disclosure process, and the continued
4 meet-and-confers, we expect that we'll be able to present
5 most of our case without issue. Of course working with
6 Your Honor to remove any documents that should not be
7 displayed at the right time and otherwise arranging our
8 examinations and the courtroom appropriately.

9 With that in mind and with the idea that we'll continue
10 to work together, we don't believe there's reason for the
11 Court to rule on the defendants' motions to seal today.

12 THE COURT: All right.

13 MR. ANDERSON: Instead, recommend deferring ruling
14 on that.

15 THE COURT: Fair enough.

16 MR. ANDERSON: I'll pause there in case defendants
17 have anything to say, and I have one more issue after that,
18 Your Honor.

19 MR. OBARO: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. OBARO: Bambo Obaro, with Weil Gotchal, from
22 Kroger. We agree with the characterization from the FTC
23 about the nature of the conversations. With respect to the
24 confidentiality designations, as the FTC noted, we intend to
25 continue to work with them the day before -- before trial to

1 make sure that we're aligned on what needs to be sealed. We
2 do not intend to seal the courtroom and plan to work
3 cooperatively with them. That's the agreement that we have.

4 There's an issue that we want to discuss with respect
5 to the exhibits, and my colleague Josh Podoll will discuss
6 that issue with the Court.

7 MR. PODOLL: Yes, Your Honor. As Mr. Anderson
8 said and Mr. Obaro said, we reached agreement on the vast
9 majority of the issues.

10 The one sort of outstanding issue is -- revolves around
11 cross-examination exhibits, which is to say not rebuttal or
12 impeachment, but a document that either side affirmatively
13 intends to admit through cross-examination.

14 THE COURT: Okay.

15 MR. PODOLL: The defense's proposal as to those
16 documents is that, like direct exhibits, they should be
17 shared 48 hours in advance. The idea is that those
18 documents, no less than direct exhibits, have
19 confidentiality issues. There may be evidentiary issues.

20 I understand every lawyer wants to protect the secret
21 sauce of cross-examination, but the reality is there aren't
22 secrets at this point in this case. We've been through
23 extensive discovery. The record is well-known. So we think
24 the most efficient path forward would be for any document
25 that's going to be admitted. Be it on cross or be it on

1 direct, that document should be part of the regular
2 disclosure of exhibits.

3 THE COURT: So what was the agreement?

4 MR. PODOLL: The agreement is that exhibits that
5 will be used on direct with a witness will be disclosed 48
6 hours in advance.

7 THE COURT: Okay.

8 MR. PODOLL: And given to Your Honor, and the
9 parties will meet and confer and bring in any issues on
10 confidentiality or any evidentiary issues to you in advance.

11 The defense's proposal is to do the same thing with
12 cross-examination exhibits too, not just direct exhibits.

13 My understanding is the Government would limit the
14 agreement to sharing the direct exhibits.

15 THE COURT: How would that work in terms of the
16 timing of the witnesses, in terms of -- because if you -- if
17 you're not -- it can affect how quickly you can do
18 cross-examination, it seems like.

19 MR. PODOLL: Yes. Our position is that it would
20 be most efficient and would --

21 THE COURT: I understand that, but I'm just trying
22 to understand timing of witnesses. Because I also am
23 acknowledging that based on what was just shared as who's in
24 the courtroom, we have three witnesses here, and I'm not
25 sure witnesses are supposed to be present.

1 MS. MAINIGI: Your Honor, I believe the executives
2 from the companies are here just for opening statements, and
3 then they're intending to depart.

4 THE COURT: I see. Good. I just wanted to raise
5 that. I know there are a lot of moving parts, and I have
6 been trying to manage them all, and I'm trying to make sure
7 nothing gets past me, and that's why I'm raising it, because
8 I didn't want that to get past me. Fair enough.

9 Government's response?

10 MR. ANDERSON: Yes, Your Honor, two points. One
11 is, as my colleague Mr. Podoll indicated, sharing
12 cross-examination exhibits -- it's very unusual -- in
13 advance. Cross-examination is, by definition, flexible.
14 And, Your Honor, at this point there could be issues where
15 we have planned cross-examination. It may not even come up
16 because it doesn't come up on direct.

17 And, Your Honor, the last issue -- the concern about
18 confidentiality, we expect that, through the course of the
19 next few days and this week, we're going to better
20 understand even what the guardrails are with respect to
21 confidentiality. There's likely not going to be a lot of
22 necessity to review specific exhibits as we get further into
23 the case when cross-examinations from the Federal Government
24 actually proceed.

25 THE COURT: All right. Go ahead.

1 MR. PODOLL: I think, Your Honor, it's really just
2 an efficiency point. We appreciate -- I appreciate what
3 Mr. Anderson says. I don't really disagree with it. We
4 just think that, given the limited time we have, the more we
5 can do to streamline the operation, the better.

6 And by the way, we would be giving to the Government,
7 under our proposal, any documents we would use on
8 cross-examination during their case.

9 THE COURT: I believe that, for efficiency, I
10 think you all have done an incredible amount of work to try
11 and meet the requests of the Court, but I'm not going to
12 interfere with your ability to try your case. So I'm not
13 going to include cross-examination exhibits at this point.

14 MR. PODOLL: Thank you.

15 MR. ANDERSON: Yes, Your Honor.

16 One last issue before --

17 THE COURT: Did they have another?

18 MR. ANDERSON: No.

19 THE COURT: Go ahead.

20 MR. ANDERSON: The last issue is, Your Honor, we
21 did receive the Court's ruling with respect to Dr. Israel's
22 surrebuttal report, the motion to strike.

23 THE COURT: Yes.

24 MR. ANDERSON: I just wanted to make sure that we
25 were forthright as well. Plaintiffs -- we do intend to call

1 our expert, Dr. Hill, during our case-in-chief, but at this
2 point Dr. Hill would not plan to affirmatively address
3 Dr. Israel's new analysis. That came up in that surrebuttal
4 in our case-in-chief. At most, if he comes up to address
5 it, Dr. Hill would do so during our rebuttal case.

6 So to the extent that Dr. Hill, our expert, prepares a
7 surreply to the new analysis -- and I realize there's a lot
8 going on here, Your Honor, but to the extent he does that,
9 we would disclose that surreply 48 hours in advance of
10 Dr. Israel's testimony during defendants' case-in-chief.

11 MR. WOLF: We have no objection to that procedure,
12 Your Honor.

13 THE COURT: That will happen.

14 MR. ANDERSON: Now I hand it to my colleague
15 Laura Hall.

16 THE COURT: All right. No? Oh, okay.

17 MS. HALL: Your Honor, pursuant to your direction
18 on Friday, we met and conferred with counsel for C&S on
19 the -- on Saturday regarding their motion to seal. It was a
20 very productive discussion and resulted in C&S providing
21 narrowed redactions for a number of documents and deposition
22 transcripts, but we have two areas where we have reached an
23 impasse that we'd like Your Honor's guidance on, and they're
24 related. They are both related to the concept of
25 rebannered, which you're going to hear a lot about, which

1 is, at bottom, changing the name of the store.

2 THE COURT: Right.

3 MS. HALL: And so in preparation for operating the
4 divested stores, C&S's commissioned studies of different
5 consumer perceptions of different brands that they have
6 available to them, and they are taking the position that
7 some of the reports they received on consumer perception are
8 competitively sensitive and they want it to be sealed.

9 If Your Honor would like, I can hand up a document
10 that's an example of that.

11 THE COURT: Was it not already provided?

12 MS. HALL: It was. It's just, I believe, counsel
13 referred to 7,000 pages arriving.

14 THE COURT: All right. You can't --

15 MS. HALL: Like a one-page --

16 THE COURT: You can -- you may approach.
17 Absolutely.

18 MS. HALL: This is a page from PX3406. It's
19 page 8, and the green highlighted area is discussing
20 consumer perceptions of certain brands that C&S would be
21 acquiring in the divestiture.

22 Our view is that this is not confidential information
23 of C&S. C&S doesn't own these banners. It didn't do any of
24 the work that resulted in consumer perceptions of these
25 banners. And even if they did own the banners, this is

1 about the public perception. This is not internal,
2 confidential, or proprietary information.

3 I can stop here for C&S to respond on this issue, or I
4 can raise the related issue, whichever would be more
5 effective -- efficient for you.

6 THE COURT: Are they interrelated, or are they
7 separate?

8 MS. HALL: The other issue is also about
9 rebannering and which stores C&S plans to rebanner to
10 particular acquired banners.

11 THE COURT: You can go ahead and address it.

12 MS. HALL: Okay. So currently there is what I
13 understand to be tentative plans to rebanner the divestiture
14 stores to particular acquired banners in particular regions.

15 And I also can hand up an example of this, Your Honor,
16 which is from DX2905 at slide 49.

17 So this is a little hard to see at this scale, but this
18 shows the originating banner on the left and then a
19 description of an interim -- a potential interim state, and
20 then on the right a sort of destination banner they're
21 currently planning for particular stores in particular
22 states.

23 And we think that this is important to assess because
24 whether the particular destination banner, if you will, we
25 believe will affect the likelihood of success of those

1 stores being competitive.

2 For example, if it's a better known brand or similar to
3 the current brand, it is more likely to be accepted by
4 consumers. If it's totally unknown, if it's a very
5 different format and assortment, that's a riskier choice.

6 So we don't think this is competitively sensitive. We
7 understand that it's currently confidential, but the options
8 are known because the press releases state which banners
9 they're getting, either in whole or licensed in certain
10 jurisdictions, and we don't understand how the plan to use a
11 particular jurisdiction in a particular region is
12 competitively sensitive.

13 THE COURT: So let me make sure that I'm
14 understanding. You, on Friday, were wanting to mention this
15 in your opening statements.

16 MS. HALL: Yes.

17 THE COURT: I don't think that's necessary.

18 MS. HALL: I have edited my opening statement
19 already, Your Honor.

20 THE COURT: All right. I don't think it's
21 necessary.

22 MS. HALL: All right. But we would like the
23 ability to explore it with our expert, Dr. Fox, as well as
24 with C&S's witnesses later this week.

25 THE COURT: Oh, absolutely.

1 MS. HALL: Since we were at an impasse, we wanted
2 to bring it to you today.

3 THE COURT: Understood.

4 MR. PERRY: Your Honor, Mark Perry for Kroger.

5 I'm not here to argue that point but rather to
6 introduce Renata Hesse for C&S. And while she comes up,
7 it's very crowded today for openings. We may come back at
8 the next break to discuss whether C&S may have a place
9 somewhere in the courtroom with electronics since they will
10 be here for the entirety of the trial.

11 THE COURT: I wondered if they were. I know they
12 had local counsel here on Friday.

13 MR. PERRY: International counsel will be here for
14 the entire trial, but I don't think we have to do that right
15 now. I just wanted to alert the Court to that issue.

16 THE COURT: You see we're pretty tight. We have
17 to figure some things out because -- we may have to bring in
18 some less-than-comfortable chairs to make people -- to make
19 space.

20 MR. PERRY: Your Honor, my prediction is perhaps
21 this afternoon or tomorrow there might not be quite as many
22 people.

23 THE COURT: Oh, all right.

24 MR. PERRY: Ms. Hesse.

25 MS. HESSE: Good morning, Your Honor.

1 THE COURT: Good morning.

2 MS. HESSE: Renata Hesse for C&S from
3 Sullivan & Cromwell.

4 On the rebanner issue, the key point here for our
5 client is that -- what it is thinking about where it will be
6 rebanner and which banners it will use in which
7 jurisdiction is not public at the moment and is
8 confidential, and they feel that it is competitively
9 sensitive in the sense that, when it goes out into the
10 marketplace, assuming that it does acquire these stores
11 ultimately, what it will be doing, which banners it will be
12 picking, what the public perception of those banners are,
13 based on a confidential study commission on C&S, is
14 something our competitors, including Kroger, would find
15 valuable because it will allow them to figure out how to
16 better attack us in competition.

17 So we think it is competitively sensitive. We don't
18 believe that it's necessary for the FTC to be able to
19 describe our -- these plans in detail. We have told them
20 that it's fine for them to ask our witnesses about which
21 banners are known where and which banners could potentially
22 be used in other places, but we don't think it's appropriate
23 for them to question our witnesses or make public
24 information about where C&S plans to use particular banners,
25 particularly when that is still an unsettled question for

1 C&S.

2 THE COURT: Did you create this information -- how
3 was this -- let me start over.

4 The question is how was this information gathered, and
5 why do you feel it's confidential?

6 MS. HESSE: So there are two different sets of
7 information. One -- the first example that Ms. Hall gave
8 you is a portion of a study that we -- that we
9 commissioned --

10 THE COURT: Okay.

11 MS. HESSE: -- regarding the banners and
12 perception of banners.

13 And that was important for us to do because we wanted
14 to figure out what people thought about the banners so we
15 could figure out where we might use them.

16 The second is -- I believe is a piece of our business
17 plan, and so that is a confidential document where we go
18 through -- and it's an example of what we're thinking about
19 where we might use particular banners and what the approach
20 to rebannered might be.

21 So that's a -- that is a confidential internal document
22 that's an active business plan that is -- that C&S is
23 working.

24 THE COURT: Are you opposed that you would
25 acknowledge that you went through these two efforts to

1 determine the viability of taking on this project?

2 MS. HESSE: Not at all.

3 THE COURT: It's the details.

4 MS. HESSE: It's the details.

5 THE COURT: The locations?

6 MS. HESSE: Yes.

7 THE COURT: You're saying it's fluid? My word,
8 not your word.

9 MS. HESSE: It is fluid at the moment. We're
10 still actively working on determining where we will use
11 particular banners and how those will be rolled out and over
12 what timeline. That is fluid. We have no objection to the
13 FTC asking our witnesses about the banners and where they
14 are and anything like that.

15 THE COURT: Fair enough. Thank you.

16 MS. HALL: I have nothing further.

17 THE COURT: All right.

18 MS. HALL: On that issue, yeah.

19 THE COURT: I'm going to allow limited questions,
20 but I'm not going to allow the specifics.

21 If we don't know for sure, I don't want to put them in
22 a disadvantage at this point.

23 MS. HESSE: Thank you, Your Honor.

24 THE COURT: You're welcome.

25 MS. HALL: Ms. Hesse, you may want to stay up for

1 a second.

2 One other issue arose unexpectedly on Friday afternoon
3 when we received a new amended errata for Ms. Florenz, who
4 is a C&S executive and on plaintiffs' witness list. We
5 believe the delivery of errata two and a half months after
6 her deposition was inappropriate. We can address that with
7 the court now or we can address it during lunch so we don't
8 delay opening.

9 THE COURT: Let's have you discuss it over lunch,
10 and if you need to, let me know and we can come back a
11 little early.

12 MS. HALL: Oh, I think we need to discuss it with
13 the Court. We have met and conferred on the issue.

14 THE COURT: Let's talk about it.

15 MS. HALL: Now, Your Honor?

16 THE COURT: Yes.

17 MS. HALL: Okay. So Ms. Florenz testified on
18 June 6th as the corporate representative on a number of
19 topics, including the treatment of certain customer data in
20 the divestiture purchase agreement, and she testified that
21 she had personal knowledge of that provision, that she had
22 met with counsel the prior day to prepare for her
23 deposition, and she was represented by counsel during her
24 deposition.

25 Her testimony about that provision was consistent with

1 the plaintiffs' understanding of the provisions of the
2 divestiture purchase agreement.

3 She served errata on July 9th, which did not address
4 this particular page, page 163, of her deposition -- and I
5 can hand up the errata in question if it would be of
6 assistance. Basically, the errata that we received at
7 4:15 p.m. the last business day before trial completely
8 reverses Ms. Florenz's testimony about the meaning of the
9 contract provision. We believe that violates controlling
10 Ninth Circuit case law, which is *Hambleton Bros. Lumber v.*
11 *Balkin Enterprises, Inc.*, 397 F.3d 1217 at 1225. Ninth
12 Circuit, 2005, which requires substantial compliance with
13 the 30-day deadline in the Federal Rule of Civil Procedure
14 30(e) governing errata.

15 Ms. Florenz's July 9th errata includes items on pages
16 162 and 168. So bracketing the page in question. The
17 amended errata was accompanied by a cover letter stating
18 that they had only discovered her testimony was incorrect in
19 the course of preparing her to testify for trial.

20 And, Your Honor, we have no objection to her testifying
21 consistent with her current understanding of the provisions,
22 but giving effect to this errata would mean that we cannot
23 confront her with her prior inconsistent statement, and so
24 we think that that's unfair.

25 Our other concern is that defendants' expert,

1 Mr. Galante, includes in his report an observation about the
2 same provision of the divestiture purchase agreement.

3 We ask C&S whether they had conferred with defendants
4 on their understanding of this provision. They said yes.
5 So we now have a concern that Mr. Galante's report may also
6 be amended to change the interpretation given there.

7 So we are prejudiced by the belated disclosure of this
8 position. We know that the CEO of C&S, Mr. Winn, testified
9 in his personal capacity to a different understanding, but
10 we relied on the corporate representative's testimony up
11 until Friday afternoon, and so we just ask that this errata
12 be stricken so that we can confront Ms. Florenz with her
13 prior inconsistent statement under oath.

14 MS. HESSE: Your Honor, I think we were really
15 trying to do plaintiffs a favor here by letting them know
16 that the understanding of the contract terms that
17 Ms. Florenz articulated was incomplete. I would not say it
18 was incorrect. And that Mr. Winn's testimony on this same
19 issue was, in fact, more -- had more detail and was
20 therefore complete.

21 But what's -- the issue here is the meaning of
22 "customer data." That's the -- the key issue, and the
23 question is how -- how long and whether Kroger can retain
24 customer data after the close of the transition period. So
25 after the TSA, the transition services agreement, concludes.

1 We think we and Kroger have the exact same view on this
2 provision and the transition services agreement, and that is
3 that for customer data relating to customer demographics,
4 Kroger is able to retain that information after the close of
5 the transition period; so after day one starts. But for the
6 transaction data that Kroger collects during the
7 transition -- transition period, that data, consistent with
8 Mr. Winn's testimony, must be deleted.

9 The other issue that I think was somewhat confusing in
10 Ms. Florenz's testimony is that if you look at the complete
11 passage of the -- of the testimony, I believe what she was
12 talking about was about what would happen during the
13 transition period because she was asked immediately after
14 the part of the testimony that the FTC is quoting, doesn't
15 she have concerns that she would -- that Kroger would be
16 able to use this data, and she said, "No. Because
17 everything would be regular or go back to regular business
18 practices on day one."

19 So I don't think that there's -- I think this is a
20 little bit of a tempest in a teapot. They're free to ask
21 Ms. Florenz whatever they would like to ask her, but I think
22 the contract says what it says. The parties interpret it
23 the way they interpret it. We interpret it consistent with
24 the way the parties interpret it, and allow Mr. Perry to
25 talk about the potential inconsistency with Dr. Galante.

1 MR. PERRY: Thank you, Your Honor. Mark Perry for
2 Kroger. We were not notified of this issue by the FTC, but
3 C&S did tell us about it.

4 The contract provision -- the Court's going to hear a
5 lot more about this later, and this is, I don't think, a
6 today issue, by the way, but the transition services
7 agreement, the Court will hear a great deal about. It's a
8 very extensive negotiated document that goes with the asset
9 purchase agreement. They're two combined documents, and you
10 will hear testimony, lay and expert, about it.

11 This particular issue relates to a provision of the
12 APA, Section 7.7 (B) (3) (iii) that deals with the use and
13 retention, and so forth, of certain data.

14 The provision means what it says, is Kroger's position,
15 defendants' position, to be clear, and the witnesses may of
16 course be questioned about it.

17 Mr. Galante, our expert -- and by the way, Your Honor.
18 If I could detour. We do have three experts today in the
19 witness box; as you were looking around the courtroom, I'm
20 sure the Court was curious as to who it is.

21 THE COURT: Well, I recognize Dr. Israel.

22 MR. PERRY: Dr. Israel on the left; Mr. Galante,
23 who we're speaking about, in the middle, which is why I
24 would mention it; and Mr. Roger King on the right --

25 THE COURT: Good morning.

1 MR. PERRY: -- who you heard about on Friday.

2 So Mr. Galante does not intend to amend his report on
3 this issue, Your Honor, to the extent the Government raised
4 that issue, and as Ms. Hesse said, the witness has clarified
5 her testimony. I think that's -- the Court should have the
6 most complete and accurate representation from witnesses as
7 to their understanding of the facts.

8 Thank you.

9 MS. HALL: Well, thank you very much. I'm very
10 glad to hear about Mr. Galante.

11 We weren't sure whether to contact Kroger on this. I
12 had heard from Mr. Wolf on Friday. "Leave us out of it. Go
13 deal with C&S. We've got enough to do."

14 So I thought I was sparing you folks from yet another
15 thing to do over the weekend.

16 We have no objection to Ms. Florenz testifying in
17 whatever manner she believes is consistent with the
18 contract. We object only to errata that purports to change
19 what she said two and a half months ago, and that is all we
20 ask, is that that errata be stricken.

21 THE COURT: It will be stricken. Understanding
22 *Hambleton Bros. Lumber Company* and its holding, I -- I
23 have -- that that's my ruling.

24 So I know you know that we didn't start right at 9:00.
25 So I want us to have a truncated lunch just so that we can

1 stay on track. I am sure with all of the changes that I see
2 in my courtroom, and I know that we had a printer installed
3 at some point on Friday. That's what you told me. I'm
4 assuming that it happened. We may be able to make up our
5 time. Because I would rather us truncate today than trying
6 to push in other days. Because I am sure there are a lot of
7 people who've made plans to leave the city on
8 September 13th.

9 Is there any other pretrial matter that we need to
10 address?

11 MS. MUSSER: Nothing from FTC.

12 MR. WOLF: Nothing from Kroger, Your Honor.

13 MS. MAINIGI: Nothing, Your Honor.

14 THE COURT: All right. Let's transition to
15 opening statements.

16 MS. MUSSER: Good morning, Your Honor. Before we
17 get started, may my colleague approach the bench with copies
18 of our opening demonstrative?

19 THE COURT: Absolutely.

20 MS. MUSSER: And I'm also going to ask my
21 colleague, Mr. Anderson, to flip over this whiteboard if
22 Your Honor is okay with it.

23 THE COURT: I am fine with it. Thank you.

24 MS. MUSSER: And, Your Honor, in the binder in
25 front of you is an unredacted copy of the slides that

1 plaintiffs will be showing today.

2 THE COURT: Wonderful.

3 MS. MUSSER: In order to facilitate protection of
4 confidential information, per our discussions, we will be
5 showing the redacted version on the slides for the public
6 today.

7 THE COURT: We understand that now we have the
8 public line open, and it will be open through the opening
9 statements. So anyone who chose to call in on that number
10 can hear.

11

12 OPENING STATEMENT ON BEHALF OF FTC

13 MS. MUSSER: Thank you, Your Honor. My name is
14 Susan Musser, and I'll be presenting the opening statement
15 on behalf of plaintiffs, along with my colleague Ms. Hall.

16 Your Honor, Americans across the country are united by
17 the common experience of coming together over the dinner
18 table to break bread with their friends and family. Whether
19 they're paying by cash, putting groceries on credit, or
20 paying with an EBT, Americans depend on supermarkets to
21 provide affordable, quality groceries to feed their
22 families.

23 But feeding your family has gotten more and more
24 expensive over the last several years. Rising grocery
25 prices has squeezed budgets, making it more difficult for

1 Americans to put food on the table. In thousands of
2 communities across the country, Americans currently turn to
3 supermarkets run by Kroger and Albertsons, such as Kroger's
4 Fred Meyer or Albertsons Safeway stores here in Portland, to
5 get groceries for the week.

6 Kroger and Albertsons, in turn, compete to increase
7 foot traffic and the amount shoppers purchase at their
8 stores. They do this by enticing shoppers through lower
9 prices, promotion, increasing selection, and creating an
10 overall more enticing shopping experience.

11 American families, in turn, benefit by reaping the
12 fruits of this competition, by receiving better groceries
13 for less.

14 To serve their shoppers, Kroger and Albertsons employ
15 over 710,000 employees across the country. Many of these
16 employees are union workers. Currently, workers across the
17 country benefit from being able to leverage Kroger and
18 Albertsons' competition against each other when coming to
19 the bargaining table to get better benefits and wages for
20 workers.

21 Kroger has now entered into a \$25 billion deal to
22 purchase Albertsons. This is the largest American grocery
23 acquisition in history. This multibillion-dollar deal would
24 result in Kroger swallowing Albertsons and would eliminate
25 the competition between these two companies that shoppers

1 and union workers depend on in one fell swoop.

2 The FTC is joined by its co-plaintiff states: Arizona,
3 California, the District of Columbia, Illinois, Maryland,
4 Nevada, New Mexico, Oregon, and Wyoming, in seeking to block
5 this transaction.

6 Colorado and Washington have filed separate lawsuits in
7 their own respective state courts, similarly seeking to
8 block this deal.

9 This lawsuit is part of an effort aimed at helping
10 Americans feed their families. Stopping this
11 multibillion-dollar deal will keep in place the vigorous
12 competition that acts as a check on rising grocery prices
13 and spurs improvements in quality and innovation.

14 But plaintiffs are not asking this Court to stop the
15 transaction. That is an issue that will be resolved in the
16 related administrative proceeding, which is where the full
17 merits adjudication is happening.

18 Rather, plaintiffs are here today, in this proceeding,
19 to simply ask this Court to push pause on the transaction
20 and to prevent the defendants from closing the deal during
21 the time the FTC will meet -- will need to complete the
22 merits proceeding that it has asked to begin on October 1st.

23 To meet our burden here in this proceeding, plaintiffs
24 need only raise serious and substantial questions justifying
25 a full inquiry in the merits.

1 To meet that burden, plaintiffs will raise serious and
2 substantial questions in two ways: The first is by
3 producing evidence showing harm in thousands of local
4 supermarket product markets accounting for over \$70 billion
5 in sales; second, by producing evidence of harm in dozens of
6 markets for union grocery workers.

7 Defendants will not be able to meet their burden to
8 rebut this prima facie showing, either by showing evidence
9 of efficiencies or showing that their fixed -- and facts
10 fixes the problems with this deal.

11 But taking a step back is helpful to put the scope of
12 these companies' operations and competition in context. In
13 preview, some of the evidence this Court will hear.

14 On the screen in front of you and on the left,
15 demonstrative in front of the Court, shows the dozens of
16 banners or brands of supermarkets that Kroger and Albertsons
17 operate across the country.

18 Again, for example, here in Portland, Kroger operates
19 QFC and Fred Meyer's banners, and Alberts -- Albertsons
20 operates the Safeway and Albertsons stores. Kroger
21 acquired -- Kroger and Albertsons both acquired these
22 banners through a series of acquisitions following a general
23 trend of consolidation across the supermarket industry.

24 As a result of these acquisitions, these companies
25 today are two of the largest supermarkets in the country.

1 Separately, Kroger owns over 2,700 stores; 2,257
2 pharmacies; employs over 414,000 workers; and operates in 35
3 states and the District of Columbia.

4 In turn, Albertsons employs over 2,200 stores -- or
5 owns 2,200 stores; operates 1,725 pharmacies; and employs
6 285,000 workers. It also operates in 34 states and across
7 District of Columbia.

8 Collectively, these two companies would operate over
9 5,000 stores; 4,000 fuel centers; 4,000 pharmacies; 66
10 distribution centers; 52 manufacturing plants.

11 Together, defendants would control \$220 billion of
12 annual commerce and employ over 710,000 workers.

13 Today, Kroger and Albertsons compete in communities
14 spanning 22 states, running from -- ranging from D.C. to
15 southern states, like New Mexico, and all along the West
16 Coast.

17 Now, defendants like to use this map to argue that
18 these companies are complements, not competitors. And I'm
19 sure if you zoom out far enough from a boardroom in
20 Cincinnati or Boise, it may look like that. But antitrust
21 laws tell you to look closer to see where the competition is
22 occurring in order to understand the impact of an
23 acquisition.

24 So let's zoom in just a little bit. Let's zoom in to
25 here in Oregon. And when you zoom in, the picture becomes

1 just a little clearer, and you start to see the extent that
2 Kroger and Albertsons overlap in local communities across
3 the state.

4 After this merger, instead of having two options, these
5 Oregon stores will be owned by one company.

6 Now, the FTC has an email where the public can write
7 the FTC to express any antitrust concerns they may have.
8 After this merger was announced, over 100,000 members of the
9 public took time out of their day to email the FTC to say
10 that they were worried. This is an unprecedented number.

11 In Oregon alone, 4,961 Oregonians wrote to express
12 concern. But to understand where competition is
13 flourishing, you can't just look at Oregon. You need to
14 zoom in further, which makes sense, Your Honor, because, as
15 evidence throughout the course of this proceeding will tell,
16 grocery competition is local. And if a shopper in Portland
17 is faced with higher prices, they can't practically go to
18 somewhere in Eugene. So you need to focus on where the harm
19 is felt which is to zoom in further to local communities.

20 So let's do that. Zooming in further to Corvallis, for
21 example, here you see the Kroger and Albertson stores are
22 represented by blue and red teardrops.

23 Currently, Albertsons owns 33 percent of the market
24 share in this area and Kroger 27. If this acquisition is
25 allowed to go through, they collectively will own four out

1 of six supermarkets in this area and control 60 percent of
2 the market. That means less choices for the Corvallis
3 community and more power for the collective Kroger and
4 Albertsons entity.

5 Unsurprisingly, Corvallis shoppers are concerned about
6 the acquisition in their community. 107 took the time to
7 write to the FTC, and when you expand that to the
8 surrounding communities, that number jumps to 669.

9 But, of course, this harm just isn't about Corvallis or
10 even Oregon, but this dynamic and this story plays out in
11 community after community across the country. So let's look
12 at just one more example. Let's zoom into Santa Fe
13 represented by my co-plaintiffs' state.

14 Here, Santa Fe shows that pre-merger Albertsons has a
15 37 percent market share and Kroger has a 22 percent market
16 share.

17 Collectively, after this acquisition, that market share
18 will jump to a combined 59 percent, and the combined entity
19 will own five out of eight options in this local area.
20 Again, meaning less choices for customers and more power for
21 the merging form.

22 And, again, Santa Fe shoppers are concerned. 278 took
23 time out of their day to write to the FTC expressing that
24 concern over this transaction. In the upcoming weeks,
25 plaintiffs will show this Court evidence support its prima

1 facie case that validates these shoppers' concerns.

2 Let's start with the evidence plaintiffs will put
3 forward to show harm in the supermarket line of commerce.

4 Now, the supermarket line of commerce includes
5 traditional grocery stores, such as Kroger and Albertsons,
6 as well as supercenters, such as Walmart and Target.

7 And plaintiffs' supermarket case rests on two pillars
8 of evidence. First, plaintiffs will introduce documents and
9 testimony showing current robust head-to-head competition
10 between Kroger and Albertsons across multiple lines of
11 commerce.

12 Second, plaintiffs will show that this merger increases
13 market concentration in thousands of communities across the
14 country. Both types of evidence, both pillars, point to the
15 same conclusion, that this transaction will substantially
16 lessen competition and shoppers will face the risk of
17 increased prices, lower quality, and less innovation.

18 So let's start with some of the evidence that this
19 Court will see about head-to-head competition.

20 Courts have recognized that a merger that eliminates
21 head-to-head competition can result in a substantial
22 lessening of competition. When assessing the extent of
23 head-to-head competition, courts look at two buckets of
24 evidence. They look at ordinary course documents and
25 witness testimony.

1 Here, plaintiffs will present both types of evidence
2 throughout this hearing.

3 First, evidence will show that Kroger and Albertsons
4 compete both in non-price and price competition. Let's
5 start with some non-price examples.

6 On the screen in front of you are statements taken from
7 Kroger and Albertsons' 10-K. And what these statements show
8 is that they both go to market trying to provide better
9 products and better services for their shoppers across the
10 country in a lot of the same ways.

11 For example, evidence will show and their 10-Ks explain
12 that they can compete to provide fresh produce. They also
13 can compete by providing private label products called Our
14 Brands by Kroger and Own Brands by Albertsons. They compete
15 by offering promotions and lower prices to drive loyalty.
16 They also compete to provide convenient pickup and delivery
17 options. And, finally, they can beat by providing back-end
18 services to support their customer-facing efforts.

19 And shoppers benefit from that competition today. They
20 benefit with better choices at both stores. At Albertsons
21 stores and Kroger stores listed on these banners in front of
22 the Court. Benefits that they will lose if this acquisition
23 is allowed to go through.

24 Turning next to price competition, you will hear
25 testimony from -- today and tomorrow from two pricing

1 executives at Kroger and Albertsons, Andy Groff and
2 Tony Silva. These two executives will explain that
3 Albertsons and Kroger execute what they call "high-low
4 pricing." And this high-low pricing has two components. It
5 has a base price, and it has a promotional price. And these
6 promotions are certain discounts, such as coupons, off that
7 base price.

8 And Kroger's and Albertsons' witnesses and documents
9 will show that they both compete with each other on both
10 types of pricing.

11 Turning first to Albertsons, to set their base pricing
12 Albertsons uses two inputs: Walmart and what it identifies
13 as a primary food competitor. A Kroger banner in most
14 markets today.

15 Albertsons' goal with this primary food competitor is
16 to have an imperceptible price gap. In other words, they
17 try to match or reduce that gap as much as possible. They
18 compete. For example, witnesses will explain that here, in
19 Portland, Albertsons' primary food competitor or grocery
20 competitor is Fred Meyer, and when pricing products across
21 its stores, Albertsons tries to price as closely as possible
22 to its Fred Meyer competitor.

23 Indeed, throughout this hearing, the Court will see
24 evidence from data collected by the parties that show that
25 Kroger's banners account for 79 percent of Albertsons'

1 primary grocery competitor in overlap areas. So where
2 both -- where both companies have overlap, where they both
3 have a presence, 79 percent of the time that price that
4 they're trying to imperceptibly narrow that gap is a Kroger
5 banner.

6 The Court will also hear evidence that over the last
7 seven several years Albertsons has gotten increasingly
8 aggressive to try and match Kroger prices. Albertsons has
9 created a new program it calls the Price Advisor Program.
10 This program mechanizes the process of searching and
11 comparing Albertsons' prices to its primary grocery
12 competitors' prices, and it makes alerts and recommendations
13 based on that competitor's pricing. Again, Kroger banners
14 in areas where they overlap.

15 But absent this acquisition, Albertsons won't stop
16 there. Evidence will show that Albertsons will continue to
17 develop this program to make pricing against its primary
18 grocery competitor more and more automatic; in other words,
19 institutionalizing this price competition between Kroger and
20 Albertsons.

21 Now, Kroger's pricing is a little bit more complicated.
22 But, again, when you zoom in, you'll see that Kroger's
23 prices are also impacted by Albertsons'.

24 Now, Kroger uses two tools in order to set its pricing.
25 It use a parity pricing, which is simple. It means matching

1 the lowest price. So pricing at parity. And it uses what's
2 called the high-priced retail rule. Also called or referred
3 to as HPR.

4 Plaintiffs will present evidence in either scenario.
5 Kroger is lowering prices in response to competition from
6 Albertsons.

7 So turning to the slide in front of you, which has been
8 redacted -- and, Your Honor, just one admin note on these
9 slides: On the lower left of these slides you'll see a "PX"
10 number. That's the document that these exhibits have been
11 taken from. And on the lower right, you'll see which
12 company they come in as identified by their logo.

13 So looking at this document, you can see both types of
14 pricing in action. Under certain types of products, the
15 parity pricing, those are products that they are trying to
16 match the price of.

17 Frequently, Kroger tries to match Albertsons' pricing
18 or Walmart's pricing but not always.

19 Here in this market, as you see in the star in the
20 middle of the screen, QFC strategy is a Safeway match. So
21 in some markets, that parity pricing is set against an
22 Albertsons store.

23 You also see the floor-ceiling shown throughout this
24 graphic. That floor-ceiling shows the high-price retail
25 rule in action.

1 The next slide is an additional ordinary course
2 document which explains this HPR rule in greater detail. As
3 this slide explains, when using the HPR rule, Kroger uses
4 Walmart as a floor and Target's -- a particular spread or
5 range above Walmart.

6 That range, however, is capped by a ceiling. That
7 ceiling is set from pricing against a traditional or
8 supermarket competitor, called the HPR. This ceiling is
9 designed -- and I quote -- "To ensure they are not priced
10 significantly higher than a traditional retail competitor."

11 At bottom, what this sailing -- ceiling does is prevent
12 Kroger's from losing sales to its traditional supermarket
13 competitor.

14 And as this slide shows, to ensure that they are
15 pricing under the ceiling, Kroger invested millions of
16 dollars, which I'm not displaying because of the
17 confidentiality issues; but, again, what this document shows
18 is the millions of dollars that, in just this example, in
19 just this quarter, and in just this region, Kroger is
20 investing in order to reduce their price to match
21 competition from their high-priced retailer rule; so, in
22 other words, to not go above that ceiling.

23 On the right-hand side there's a couple of charts. And
24 these charts show that often Albertsons is the HPR. For
25 example, you can see throughout this -- these two charts

1 that Albertsons' banners, such as the Albertsons and Safeway
2 banners, are listed as the HPR.

3 Now, the graphic in front of you can --

4 You can turn to the next slide, please. Go ahead and
5 click on the animation.

6 The graphic in front of you shows the impact of this
7 HPR rule on prices. As I mentioned earlier, Albertsons is
8 trying to lower and lower that ceiling. Meaning, Albertsons
9 is putting downward pricing pressure by lowering that
10 ceiling and reducing the spread that our -- that Kroger can
11 price against Walmart. This is competition in action.

12 If this acquisition is allowed to go through,
13 Albertsons will no longer have that same incentive to
14 compete and to lower that ceiling. Kroger, in turn, will no
15 longer have the same pressure from Albertsons to also
16 compete to avoid losing shares by bumping up against that
17 lowered ceiling, which means, absent this merger -- or if
18 this merger is allowed to go through, there will be an
19 increased ability and incentive, by Kroger, to raise prices
20 post-merger, all competition that will be lost if this
21 acquisition proceeds.

22 In addition to Tony Silva and Andy Groff, this Court
23 will also hear evidence from division presidents from both
24 Kroger and Albertsons in charge of Alaska, Washington,
25 Oregon, Colorado, Idaho -- Idaho, Utah, southern California,

1 and Illinois. These division presidents will testify about
2 boots-on-the-ground pricing and non-pricing competition
3 between Kroger and Albertson banners.

4 For example, in this next slide, there is an email from
5 John Beretta reporting out on competition in particular
6 divisions around the Easter holiday. He is reporting to
7 Susan Morris, the CE -- COO, and one of defendants'
8 witnesses.

9 And in reporting on the progress of these different
10 divisions, there's a common theme here. And the common
11 theme is that when reading out on the status of competition
12 and how they're doing, that they're reading out on the
13 results of competition with a Kroger banner.

14 For example, you see Kings listed here, which is King
15 Soopers; FM, which is Fred Meyer; Mariano's, another banner;
16 and Ralphs and Fry's. In each case, they are discussing
17 beating or winning -- in some cases, losing -- against
18 Kroger.

19 These are all discussing the results of competition,
20 and this competition is what's at stake with this merger.

21 In addition, this Court will also see and hear evidence
22 about promotional pricing. And promotions can either be set
23 through a weekly printed ad or through access through an app
24 on a Kroger and Albertsons app on your phone.

25 Promos are often targeted at competition to try and

1 steal customers through lower prices, and here you can see a
2 division President, Todd Broderick, from the Denver
3 Division, comparing promo ads from Safeway's and Albertsons'
4 banners on the left, to King Soopers, a Kroger banner, on
5 the right.

6 These two ads show that they're offering promotions on
7 similar products. Mr. Broderick reports out the results of
8 this competition. He explains that the beating continues,
9 and his colleague, Tina Lucero, who produced these text
10 messages, responds, "Crush them."

11 He replies, "Their lower lips are quivering."

12 On the next slide is yet another example of the type of
13 documents and testimony this Court will see. This is
14 another business deck showing the plans to compete around
15 the holiday time.

16 Here, Albertsons -- Albertsons is assessing what its
17 competitor Fred Meyer's is trying to do around the holidays
18 and trying to predict trends in history in order to beat
19 that, in order to compete, to drive traffic to their stores.

20 And, finally, one additional example of non-price
21 competition: Here's an email CCing Todd Broderick, and this
22 email is planning for what to do in response to a
23 King Soopers entry in this particular market. Here, an
24 Albertsons employee is emailing Mr. Broderick a rough list
25 of items that they could do to better compete with the

1 impending King Soopers store. How can they make their store
2 better in order to respond to new competition from Kroger?

3 This brainstorming list includes everything from
4 polishing the floor to putting in a new kiosk to updating
5 various cases and delis.

6 Throughout this hearing, the FTC will show extensive
7 evidence of competition between Kroger and Albertsons and
8 markets across the country. But we are not relying on this
9 evidence alone, which leads to the second way that
10 plaintiffs will meet their prima facie burden in their
11 supermarket case.

12 Plaintiffs will also show that this acquisition is
13 presumptively anticompetitive due to changes in market
14 structure and concentration in communities throughout the
15 country.

16 As the Supreme Court explained in *Philadelphia National*
17 *Bank*, when a merger results in a significant increase in
18 competition, it is, and I quote, "inherently likely to
19 lessen competition substantially, that it must be enjoined,"
20 which makes sense, Your Honor, because the fewer choices
21 consumers have, the more likely consumers will suffer when
22 there is consolidation in a particular industry.

23 To determine whether there's an increase in
24 competition, plaintiffs must first define a product and a
25 geographic market, and the purpose of defining a market is a

1 very pragmatic one. Namely, it asks the question, "If this
2 merger is allowed to go through, are there sufficient
3 alternative products or services that customers can turn to
4 to avoid being harmed, but a small and a significant
5 increase in price or a decrease in quality?"

6 Here, plaintiffs define two markets: They define the
7 supermarket's product market on the left, which is composed
8 of two big buckets. The first is traditional supermarkets,
9 such as Stater Brothers, who you will hear from later today,
10 as well as Kroger, Albertsons, and Raley's. It's also
11 composed of supercenters, such as Walmart, Fred Meyer, and
12 Target.

13 Plaintiffs also expand that market to see whether harm
14 is occurring in a broader market. This market takes a
15 supermarket product market and adds club stores, limited
16 assortment stores, and natural and gourmet stores.

17 Starting first with plaintiffs' analysis and the
18 supermarket product market. Courts have made clear that a
19 market can be comprised of a set of stores that offer a
20 unique experience.

21 Here, the supermarket stores offer a unique one-stop
22 shop experience.

23 Now, defendants make two primary arguments against
24 plaintiffs' market definition. First, that because people
25 buy food at different places, plaintiffs have not properly

1 defined a market, but evidence -- as the evidence will show,
2 customers shop at different stores in different situations.

3 For example, a shopper may buy a Gatorade on the way
4 home from sports practice at a convenience store and also
5 purchase a case of water at a supermarket.

6 As Dr. Hill will explain, plaintiffs' expert, this does
7 not illustrate that these stores are in any way substitutes.

8 The second primary argument is that because you can buy
9 a Gatorade both at a convenience store and a supermarket,
10 those two formats must be in the same market. This is
11 commonly called cross-shopping. But courts have already
12 rejected this argument.

13 As the court explained in *Whole Foods* and the *Google*
14 court recently validated, the fact that a customer might buy
15 a stick of gum at a supermarket and a convenience store does
16 not mean there is no definable groceries market.

17 In support of its market, plaintiffs will produce three
18 buckets of evidence.

19 First, plaintiffs will introduce ordinary course
20 documents and testimony establishing the *Brown Shoe*
21 practical indicia, which assesses the characteristics of
22 products in and out of the market to draw distinctions
23 between the two.

24 Second, plaintiffs will present expert testimony
25 regarding the hypothetical monopolist test. This is the

1 gold standard used by economists and supported by case law
2 to define a market.

3 And, third, plaintiffs will present extensive evidence
4 of the head-to-head competition, such as the evidence that I
5 just walked through.

6 First, supermarkets are a one-stop shop. This Court
7 will hear evidence and see ordinary course documents
8 establishing what a one-stop shop is and that both Kroger
9 and Albertsons are such shops.

10 First, Ms. Morris explains that winning means having
11 the items our customer wants when they want them. And what
12 they are telling Albertsons is that they want one-stop
13 shopping.

14 Second, Kroger's own website says that early on people
15 had to shop at a butcher, a baker, and a grocer, and that
16 Kroger became the first grocer in the country to establish
17 its own bakeries, followed by integration of the meat
18 department.

19 Their innovation was one-stop shopping.

20 Now, to provide this one-stop shop experience,
21 supermarkets offer a breadth and depth of products. Breadth
22 refers to the range of products that a supermarket offers,
23 and depth refers to the range of products within a
24 particular type of category.

25 For example, you see on this screen an example of a

1 Kroger supermarket, and the breadth of products is shown by
2 the row after row after row of glass cases in the back
3 providing a myriad of options for shoppers to choose from.

4 The depth of product selection is shown by the three or
5 four options of tomatoes shown on the front of the screen.
6 A few additional examples of the depth and breadth of
7 product assortment include that supermarkets offer both
8 what's called a national brand, such as Coke or Pepsi, as
9 well as their private label brands.

10 These private label brands are specific to a certain
11 store. For example, O Organics at Albertsons or Simple
12 Truth at Kroger.

13 Second, supermarkets also provide a range of package
14 sizes. For example, you can choose between getting a
15 multipack bag of chips as well as just a single bag of
16 Tostitos.

17 Third, supermarkets also offer a wide range of meat and
18 seafood counters as well as grab-and-go snacks and other
19 meals.

20 Throughout the course of this hearing, this Court will
21 also hear from witnesses from a variety of store formats
22 that explain these differences in more detail.

23 For example, this Court will hear from Raley's and
24 Stater Brothers that explain how their supermarkets offer
25 the same one-stop shopping experience as Kroger and

1 Albertsons.

2 In contrast, witnesses from Dollar Tree, Sprouts, and
3 other store formats will explain how they provide a
4 fundamentally different shopping experience.

5 And their testimony is supported by common sense and an
6 observation of the different characteristics of these
7 formats.

8 For example, the store format on the right, at
9 Dollar Tree, has a smaller footprint and a much smaller
10 selection, as you can see. So too with convenience stores,
11 such as CVS. This common sense will be supported by
12 testimony from witnesses and other ordinary course
13 documents.

14 So too with the next store format, which is Natural
15 Grocers and Trader Joe's. Natural Grocers is an example of
16 a premium organic market, and these premium and organic
17 markets involve a different type of shopping experience.

18 Sprouts will explain that their stores offer what they
19 call a treasure hunt experience, and Trader Joe's executive
20 explained in deposition that they offer a much smaller
21 selection than what you would see at a supermarket.

22 So, for example, you're not going to find a box of
23 Lucky Charms at National Grocers or a Red Baron Pizza at
24 Trader Joe's.

25 Similarly, stores such as Aldi's, commonly referred to

1 as "limited assortment stores," also offer a different range
2 of options.

3 For example, as you can see here in the bakery, you
4 don't have the option to get a personalized cake for your
5 son's birthday, nor do you have the same selection of
6 national brands that you're going to find in a supermarket.

7 And, finally, club stores, such as Sam's Club or
8 Costco, also have a fundamentally different experience.

9 First, they require a membership, so you have to pay to
10 go in the store.

11 Second, they often provide purchases in bulk, as you
12 can see on the screen in front of you. As their witness
13 explained, you can't just get a single avocado at a Costco.

14 Throughout the course of this hearing, plaintiffs will
15 show that supermarkets differ from other store formats
16 across key characteristics. An analysis of those features
17 under the *Brown Shoe* practical indicia will show that
18 shoppers view supermarkets differently, and having to
19 replace their supermarket shopping with another store format
20 will simply not offer that same experience.

21 Turning quickly from product market to geographic
22 market, throughout the course of this hearing, plaintiffs
23 will also present ordinary course evidence showing that
24 competition is local.

25 For example, this Court will hear from both

1 Vivek Sankaran and Rodney McMullen who will explain that
2 customers prefer to shop local and, as such, their
3 competition is local, which, again, Your Honor, makes sense,
4 as I started this presentation with whether or not a shopper
5 has good grocery offers in Portland is irrelevant to a
6 shopper in Corvallis.

7 Plaintiffs' market definition will also be supported by
8 the testimony of Dr. Nicholas Hill. He will provide support
9 in both -- in support of the proposed markets as well as the
10 finding that this acquisition causes a reasonable
11 probability of substantially lessen competition.

12 First, Dr. Hill will assess data produced in the
13 ordinary course and maintained by defendants that shows how
14 frequently they price check other supermarkets.

15 For example, as you can see on the left, Albertsons
16 price checks other supermarkets 99 percent of the time. So
17 too with Kroger. In this particular category of items,
18 called EDE, they price check supermarkets 79 percent of the
19 time.

20 Dr. Hill will also provide evidence in support of his
21 application of the hypothetical monopolist test. This
22 hypothetical monopolist test is the standard -- the gold
23 standard that economists use to analyze a relevant product
24 market.

25 Again, Dr. Hill uses real ordinary course data to show

1 what would happen if all supermarkets raised their price.
2 And in applying the hypothetical monopolist test, Dr. Hill
3 will explain both the precise methodology that he will use,
4 which I won't get into here today, as well as his finding
5 that over 2000 local supermarket markets passed that test,
6 which means in those markets, supermarkets -- there's not
7 reasonable choices outside of those markets to offset a
8 potential small but significant increase in price.

9 Now, once the market has been defined, the next step of
10 the analysis, as described by case law, is to assess the
11 total market share and changes in concentration levels.

12 The FTC and DOJ merger guidelines provide certain
13 thresholds supported by case law that provide a rubric of
14 when the change in market structure, the change in shares
15 and concentration, is presumptively anticompetitive.

16 Dr. Hill will explain that, after looking at
17 concentration levels post-merger, 1,922 local supermarket
18 markets meet that threshold. The total sales of those
19 markets are \$73 billion, Your Honor.

20 Dr. Hill will not just offer the opinion regarding
21 changes in concentration levels. He analyzed this harm in
22 this case using an economic tool called CMCRs or
23 compensating marginal cost reduction. CMCRs assess the
24 incentive for the firm post-merger to increase price. Here,
25 Dr. Hill will explain both the mechanics of that rule in his

1 application of it as well as his results, which is that he
2 identified 1,472 supermarket local markets where the merger
3 would need to generate efficiencies of more than five
4 percent to offset the incentive to raise prices in those
5 local markets.

6 Dr. Hill will also talk about a second market, the
7 large-format market that I previously introduced. Here,
8 Dr. Hill will expand his market to include both
9 supermarkets, as well as club stores, limited assortment
10 stores, and natural stores. His results don't change
11 fundamentally.

12 He will show that even in the large format market,
13 which includes Costco and Whole Foods --

14 If you could go to the next slide, please.

15 -- that there are still harm in thousands of stores
16 affecting billions of dollars of sales.

17 Now, I expect that throughout the course of this
18 hearing you will hear much ado about Walmart, Target,
19 Amazon, and Costco, but plaintiffs account for each of these
20 competitors when defining markets and assessing harm.

21 So taking each of those in turn, Walmart and Target,
22 those two companies are included in our supermarket product
23 market. Amazon. Now, Amazon has two components of their
24 brick-and-mortar grocery business. The first is Amazon
25 Fresh. Evidence produced throughout the course of this

1 hearing will show that Amazon Fresh has quite a limited
2 footprint and that defendants will not be able to meet their
3 burden to show that Amazon Fresh is going to expand in a
4 timely, sufficient, and likely way to offset any of
5 Dr. Hill's conclusions.

6 And the second type of brick-and-mortar store that
7 Amazon owns is Whole Foods, and as I previously mentioned,
8 Dr. Hill accounts for that in his large format market.

9 And, finally, Costco. Similarly, Costco is accounted
10 in the plaintiffs' analysis of their large format market.

11 Over the upcoming weeks, plaintiffs will present
12 emails, text, and witnesses in support of his prima fascia
13 supermarket case, but plaintiffs will also produce evidence
14 in support of their labor case as well.

15 Today defendants are the two largest employers of union
16 grocery workers in the country. Currently, when unions are
17 negotiating with one company, let's say Albertsons, it can
18 leverage Kroger to obtain better terms at the bargaining
19 table. Plaintiffs will raise a serious and substantial
20 question that this acquisition will lessen competition for
21 union grocery workers by reducing that bargaining leverage.

22 Throughout the course of this hearing, plaintiffs will
23 put on testimony of both union witnesses and defendants' own
24 employees responsible for union bargaining. These witnesses
25 and ordinary course documents will support that there's --

1 the credible threat of strikes matter, that the threat of
2 being able to strike is an important tool for witnesses --
3 or for unions at the bargaining table.

4 Now, strikes can have an extraordinary impact on
5 stores. The stores can lose sales and suffer lasting
6 reputational harm. Unions, in particular, use what they
7 call a whipsaw strike. In a whipsaw strike, workers start
8 by targeting one employer, threatening that employer with a
9 strike. Once an agreement is reached, workers then go to
10 that employer's competitor to try and extract terms from
11 that competitor, or they say they will strike there, and all
12 of those shoppers will go to their competitor.

13 And because each company doesn't want to lose sales to
14 their main competitor, they're more likely to give in to the
15 union's request for better wages and working conditions.

16 Now, today Kroger and Albertsons negotiate separately.

17 Ordinary course documents will show that Kroger
18 attempts to align with Albertsons on negotiation tactics but
19 that Albertsons resists those efforts. Plaintiffs will
20 present ordinary course documents, such as this text chain
21 from Jon McPherson from Kroger, to say that Kroger's
22 frustrated by this because they, quote, get stuck with
23 their -- Albertsons' deal -- every time.

24 And I just want to take a pause here, and I want to be
25 clear that that deal, while worse for Kroger, is better for

1 workers, meaning higher wages or better benefits.

2 And this deal will allow Kroger a way out of having to
3 get stuck with Albertsons' terms.

4 Due to time constraints, plaintiffs are only presenting
5 a limited snapshot of evidence throughout this hearing.
6 Plaintiffs will be presenting the remaining witnesses at the
7 administrative hearing. But throughout the upcoming weeks,
8 plaintiffs will more than meet their burden to show a
9 serious and substantial question that this transaction will
10 have a reasonable probability of substantially lessening
11 competition by reducing bargaining leverage in the market
12 for union grocery worker -- workers in CBA areas throughout
13 the country.

14 Now, once plaintiffs meet their prima facie burden, the
15 burden then shifts to defendants to produce evidence in
16 response. Defendants will be unable to meet their burden.

17 Now, defendants' attorneys in the past have admitted
18 that defendants compete with each other and that this
19 proposed merger would raise competitive concerns absent a
20 divestiture. Defendants' lawyers' statements are supported
21 by boots-on-the-ground evidence from their workers.

22 Defendants' employees expressed concern when this
23 acquisition was announced. For example, Usman Humayun, the
24 group VP of Enterprise Marketing, said, "Unless you try to
25 argue that Walmart and Target would never let you have a

1 monopoly, you are basically creating a monopoly in grocery
2 with the merger. So it makes no sense." He goes on to say,
3 "It's like AT&T and Verizon wanting to merge."

4 Mike Brown, a senior category manager at Kroger,
5 explained that the FTC would be all over this.

6 Now, it's no surprise that defendants are now walking
7 away from their counsel's statements and their own
8 employees' statements, but plaintiffs are confident that
9 defendants will be unable to provide sufficient evidence
10 here to rebut plaintiffs' prima facie case. As such, their
11 case will hinge on their ability to meet their burden on
12 their purported efficiencies and the fix.

13 I'd like to focus briefly on their arguments regarding
14 efficiencies and the evidence you will see rebutting those,
15 and then my colleague will discuss defendants' proposed
16 divestitures.

17 First, defendants bear the burden to show cognizable
18 efficiencies. To show these efficiencies, defendants must
19 do four things: They must show they're verifiable,
20 merger-specific, pass on to customers, and sufficient to
21 offset the competitive harm. The reason that the law
22 requires the defendants to bear this burden is twofold:
23 First, under the burden-shifting framework, efficiencies are
24 only assessed once plaintiff had met their burden, meaning
25 they have raised a question of a likelihood of harm.

1 Because of that, the law requires evidence to provide
2 evidence sufficient to allow plaintiffs in the court to
3 recreate their efficiencies.

4 They also have to show that these efficiencies couldn't
5 be achieved in a non-anticompetitive manner, meaning that
6 they're merger-specific. The only way these efficiencies
7 will result is risking harm to shoppers.

8 And, third, they must be of sufficient scope to offset
9 the harm. Again, to ensure that the risk of an
10 anticompetitive transaction does not go to American
11 shoppers.

12 The second reason defendants bear the burden is because
13 they have unique access to the evidence needed to support
14 their claims. As such, the Supreme Court has counseled that
15 defendants in these cases should bear the burden to provide
16 facts in support of it.

17 Plaintiffs will present the evidence of Mr. Yeater to
18 analyze these purported efficiencies. Mr. Yeater will
19 explain that he will only -- was only able to validate or
20 verify a small percentage of them. Specifically, he will
21 explain that, at bottom, most of defendants' purported
22 efficiencies suffer from the same fundamental flaw.
23 Meaning, they look at Scenario B under Kroger, Scenario A
24 under Albertsons, and assume that the best case will happen;
25 and there's no basis for that assumption, as Dr. --

1 Mr. Yeater will explain.

2 Now, I want to address one related point separately,
3 and this is defendants' promise of a \$1 billion price
4 investment.

5 First, it's helpful to put that promise in context.
6 While a billion is a lot of money to ordinary Americans, in
7 the context of the state of this -- stakes of this
8 acquisition, it's pennies on the dollar. For example, it's
9 1/75th the amount of sales at the stores impacted by this
10 acquisition. It's less than .5 percent of Kroger and
11 Albertsons' total revenues, and it's only slightly more than
12 the amount of money that Kroger and Albertsons have spent to
13 push this acquisition through.

14 Second, these investments are contingent on the
15 realization of certain efficiencies; meaning, unless those
16 efficiencies that Mr. Yeater can't verify go through, this
17 billion-dollar promise won't happen.

18 And, third, these promises need to be weighed against
19 the competition that is already happening between these two
20 companies.

21 As I have previously explained and as the evidence will
22 show, the company, Albertsons in particular, are currently
23 investing in price investments to price max against
24 competition; and, in response, Kroger is also investing in
25 order to reduce prices and attract customers.

1 And as we walked through and as the evidence will show,
2 head-to-head competition between these two companies is
3 certain, and it's also certain that this acquisition will
4 eliminate that head-to-head competition.

5 That certainty must be weighed against unenforceable
6 promises by defendants based on assumptions and
7 contingencies that are not tailored to the scope of this
8 harm here on either a scale or where these promises
9 allegedly will be effectuated.

10 As such, with logic, evidence, and the law, we'll
11 explain where the scales should tip, which is towards
12 pushing pause on this merger.

13 As you can see from this text message on the screen,
14 this was a text sent from Matt Shores to Todd Broderick
15 while watching Rodney McMullen testify in Congress.
16 Mr. Shores writes: It's all about pricing and competition,
17 and we all know prices will not go down. A 500 million
18 investment and pricing in our company won't get our prices
19 down to Kroger's level, in my view. Therefore, the
20 conclusion that's easily drawn is overall, prices will
21 increase, as it's all about -- overall, prices will
22 increase.

23 As Matt Shore wrote to Broderick, defendants will be
24 unable to meet their burden to show cognizable efficiencies
25 to balance the certain harm this acquisition will cause.

1 I'll now turn it over to my colleague Ms. Laura Hall to
2 discuss divestiture.

3 MS. HALL: Your Honor, today I'd like to address a
4 number of reasons why the proposed divestiture of 579 stores
5 and other assets to C&S will not remedy the substantial
6 lessening of competition likely to be caused by the
7 acquisition.

8 Defendants say, "After the merger, prices will go down,
9 no stores will close, and all store employees will remain
10 employed." They claim that the proposed divestiture to C&S
11 will sufficiently remedy any harm to competition. They also
12 told the Part 3 administrative court that the prior
13 divestiture of 413 stores, quote, included all the assets
14 and personnel C&S will need to succeed.

15 Defendants say C&S will be able to improve poorly
16 performing stores in the divestiture package, has
17 experienced management to lead it through a transformative
18 acquisition, and has made conservative assumptions about
19 post-divestiture performance. We have heard these claims
20 before about prior divestitures, and they did not bear out.

21 In connection with the Safeway acquisition, Albertsons
22 represented to the FTC it would use efficiencies to cut
23 prices, but its corporate representative could not
24 specifically quote that that occurred.

25 About the divestiture of stores to Haggen, in

1 connection with the same merger, Albertsons told the FTC no
2 stores would close, poor performance would be improved, all
3 employees would keep their job, and Haggen had management to
4 lead it through a transformative acquisition.

5 Haggen was in bankruptcy within months of the
6 divestiture.

7 In seeking to acquire twelve stores divested from the
8 Tops grocery chain, in connection with the Tops Price
9 Chopper merger, C&S represented to the FTC that it had set
10 up the retail organization to succeed and had a conservative
11 deal model. The store's financial performance that
12 divestiture and rebannered them to Grand Union has been
13 challenged, to say the least. We will be calling
14 Mark McGowan, the current head of C&S's retail business, to
15 testify about this poor performance.

16 Defendants are primarily going to be relying on the
17 testimony of hand-selected executives from their companies
18 and C&S to testify to the divestiture's likelihood of
19 success.

20 Essentially, defendants argue that C&S's business
21 judgment should be trusted, but their proof stands in stark
22 contrast to the ordinary course documents and assessment of
23 past failures and an analysis of the deal package.

24 In ordinary course documents, C&S senior executives
25 have expressed skepticism about the quality and long-term

1 viability of the stores they are acquiring. The stores from
2 Kroger are their worst chains says Alona Florenz, whom we
3 will be calling to testify about her projections for the
4 divestiture.

5 Eric Kepner views the divestiture as a massive
6 undertaking for a wholesaler with limited retail capability
7 that poses more downside for C&S than for Kroger because C&S
8 will have to establish new brands in many markets while
9 trying to stand up a retail organization.

10 In response to a suggestion about reselling the
11 divestiture stores, Ms. Florenz says, "Just be careful with
12 FTC. We want to say we can run them."

13 Eric Winn, in talking points for notifying wholesale
14 customers of the divestiture, likewise, suggests the stores
15 may be for sale. Mr. Winn will also testify about C&S's
16 plans in our case-in-chief.

17 Current C&S's board member and Mr. Winn's predecessor,
18 Bob Palmer, commented on draft press release about the
19 divestiture. "Do we have to say that we won't close doors?
20 The 'all' is a problem. The trick is that they stay open as
21 they transition, but then what? Are we committed to this?"

22 Let's turn to the legal framework under which the court
23 evaluates the proposed divestiture.

24 Courts consider a structural remedy, like a
25 divestiture, under the Sysco test, requiring that the

1 defendants produce evidence showing that the divestiture
2 will restore all the competitive intensity lost as a result
3 of the merger.

4 In *Illumina*, considering a conduct-based remedy, the
5 Fifth Circuit held that it was sufficient for defendants to
6 show that the proposed remedy sufficiently mitigates the
7 merger's effect, such that it was no longer likely to
8 substantially lessen competition.

9 Defendants cannot meet either standard.

10 At this stage the Court is presented with a binary
11 choice: To pause the transaction pending the merits
12 proceeding or not.

13 When applying the *Illumina* and *Sysco* standards in cases
14 involving allegations of harm across multiple markets, a
15 likelihood of harm in any market warrants enjoining the
16 transaction, which makes sense. Whether or not the
17 divestiture is sufficient in Denver will not help Portland
18 shoppers if the divestiture is inadequate.

19 Antitrust law does not allow defendants to offset harms
20 to some communities with benefits to others. The Court
21 should enter a preliminary injunction if we show a serious
22 issue with respect to post-transaction harm in a single
23 geographic market and a single product market, whether
24 supermarket or labor.

25 To be clear, plaintiffs will show a serious issue with

1 many more markets.

2 The economic evidence in this case will show that
3 hundreds of markets are unremedied by the divestiture.

4 Dr. Hill's baseline calculation of the effect of the
5 divestiture uses defendants' assumption of a perfect
6 divestiture. That is, all of the stores continue their
7 current level of competitive operation, which is not what
8 C&S itself projects.

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

13 Let's look at how the divestiture affects the markets
14 Ms. Musser discussed earlier.

15 Santa Fe is an example where the market around the
16 Market Street at the top center of the map is presumptively
17 unlawful, but there is no divestiture in this market. In
18 fact, three other stores on this Santa Fe map are focal
19 stores of markets that defendants' economist, Dr. Israel,
20 concedes are presumptively illegal.

21 Corvallis, Oregon, is an example of a market where one
22 store is divested, but the market around this Fred Meyer
23 store, in the center, remains presumptively illegal.
24 Post-divestiture -- post-merger, the combined market share
25 is 60 percent, post-divestiture the combined market share is

1 51 percent. The C&S store is predicted to have 9 percent of
2 the market share.

3 In addition to the hundreds of markets that a perfect
4 divestiture would not remedy, the evidence will show that
5 competition is likely to be harmed in many additional
6 markets.

7 Returning to the legal framework, because plaintiffs
8 will be addressing the proposed divestiture remedy in our
9 case-in-chief, defendants' burden of production in rebuttal
10 is heightened.

11 In the face of the substantial evidence plaintiffs will
12 present on the infirmities of the divestiture package and
13 C&S as buyer, defendants have the burden of coming forward
14 with evidence from which the Court could conclude that the
15 divestiture will be successful.

16 Defendants' claims about the divestiture contradict
17 their claims about the merger. Defendants simultaneously
18 claim that the merger is necessary to improve Kroger's
19 ability to compete against Walmart and Amazon and that C&S
20 will be an effective competitor with a fraction of the
21 stores. Dependency on Kroger for transition services,
22 billions in extra cost, and an abysmal track record. Both
23 of those claims can't be true.

24 As we will show, C&S is unlikely to be an effective
25 competitor for a litany of reasons, including the failure to

1 even attempt to remedy hundreds of affected markets, as
2 discussed earlier.

3 I will touch on each of these items briefly in
4 connection with the product -- supermarket product market
5 before discussing the union labor market.

6 Historically, C&S has closed underperforming retail
7 stores and sold others to independent operators in
8 connection with wholesale supply contracts.

9 Post-divestiture, it has ample incentive to do the same.

10 C&S has never even operated 110 retail stores at any
11 one time. C&S's prior failures to operate in the same
12 market are probative of the likely outcome of the
13 divestiture; particularly, as it had then many of the same
14 advantages defendants tout now, such as being an experienced
15 wholesaler, having low debt, and hiring experienced retail
16 executives.

17 As recently as last year, C&S stated that it acquires
18 retail store locations in connection with strategic
19 transactions to maintain or expand our grocery wholesaling
20 and distribution business.

21 One glaring example of C&S's inexperience in retail
22 operations, its diligence request to Kroger for a call,
23 quote, "to discuss what it takes to operate a grocery
24 store."

25 C&S executives have acknowledged the divestiture is not

1 a standalone business and lacks many assets necessary to run
2 a successful retail grocery business.

3 As Mr. Winn testified, "The alternative is you buy a
4 company, a fully functioning company, and that's not what we
5 are buying here."

6 Turning to plaintiffs' expert evidence on the
7 divestiture, Dr. Edward Fox, an expert on retail operations
8 and customer behavior, has identified and assessed the
9 challenges that C&S must overcome to turn the hodgepodge of
10 stores, distribution centers, and various intellectual
11 property licenses into a competitive retail grocery
12 business.

13 Based on his expertise, Dr. Fox concludes that C&S will
14 struggle across a number of areas that are important to
15 attracting, retaining, and serving supermarket customers.

16 One of those areas is rebannered the acquired stores
17 where C&S does not have ownership of or a license to the
18 banner currently on the store. C&S will need to rebanner
19 hundreds of stores. Rebannered a supermarket can mean not
20 only changing the brand name on the storefront, but also the
21 layout and the product assortment, to correspond with the
22 brand identity. Rebannered on the scale required by the
23 divestiture agreement, 286 stores in three years is
24 unprecedented.

25 Moreover, C&S's currently plans to use banners

1 including QFC, Mariano's, and Carrs. Those are currently
2 present only in the markets of Oregon and Washington,
3 Illinois, and Alaska, respectively; but they plan to use
4 them in numerous states in which they are unknown.

5 As Dr. Fox will explain and C&S acknowledges,
6 introducing an unknown banner magnifies the risk of a
7 substantial sales decline in each market.

8 This next slide, for confidentiality reasons, is only
9 being shown to the Court and describes a transition services
10 agreement under which C&S will be dependent on Kroger for a
11 variety of services, including store operations, pricing,
12 distribution, and supply of private label products for up to
13 four years; and a license to the software backbone, known as
14 the tech stack, for five.

15 C&S is also dependent on Kroger to provide hundreds of
16 subject matter experts across a whole range of corporate
17 operations, including experts in Kroger and Albertsons
18 legacy systems it will need to operate.

19 These notes on C&S lists of requested IT employees make
20 clear that C&S cannot simply hire in the general market to
21 fulfill these needs.

22 This is a slide from a business plan that C&S produced
23 in late June, after the close of fact discovery. So we have
24 not had the opportunity to question any C&S witness about
25 it. Particularly, this last bullet. "We will run the same

1 program between where we share markets until banner brands
2 are separated. Pricing, promotion, loyalty, and other
3 customer-basing programs." What it means is pretty clear,
4 C&S does not intend to compete with Kroger on price for
5 either base or promotional for up to three years. The
6 deadline for C&S to complete rebannering. And under the
7 transition services agreement, Kroger has to supply those
8 base and promotional plans for at least a year.

9 C&S also has less incentive to compete aggressively
10 than Albertsons currently does, because the divestiture
11 purchase price is low compared to the value of the assets.
12 That means C&S can recover on its investment without turning
13 a profit in its retail operations. The store real estate
14 alone is valued at more than two-thirds of the purchase
15 price.

16 Together, with the benefit to C&S and its wholesale
17 business of gaining new distribution centers and the retail
18 stores as their captive customers, C&S can recoup its
19 investment without the retail stores having to perform
20 anywhere near as well as they currently do in defendants'
21 hands.

22 C&S will thus have less incentive to incur the
23 substantial costs to build out the infrastructure needed to
24 operate the divestiture assets effectively.

25 Even with making those investments, C&S predicts the

1 divested stores will be less competitive in the future than
2 they are now.

3 They predict that the -- that they will lose revenue
4 following the divestiture and grow slower than the retail
5 grocery market as a whole for the first three years.

6 C&S projects sales loss due to rebannering and over a
7 billion dollars in expense rebannering, building new
8 distribution centers, and creating a private label line of
9 products. None of which are risks or costs the stores face
10 today.

11 Not until eleven years after the divestiture, does
12 C&S's own deal model predict returning to the stores'
13 current level of profitability.

14 Turning to C&S's prior experience as a divestiture
15 buyer -- this slide is also only for the Court -- defendants
16 tout the FTC's approval of C&S as a divestiture buyer in
17 connection with twelve stores divested from the Tops Price
18 Chopper merger, but the post-divestiture performance of
19 those stores, shown on this slide, has been a failure.

20 As of the end of 2023, the stores had experienced a
21 30 percent loss of sales with little prospect for
22 improvement. C&S's sales volumes at these stores fell
23 another 13 percent as of March 2020. These are rural
24 stores, close to C&S's home base, all from one company. All
25 of which C&S already supplied. Some of which C&S had

1 previously owned and operated. Those should be easier to
2 run than the geographically dispersed package of stores that
3 C&S now seeks to acquire. Yet, C&S is struggling with those
4 stores.

5 If C&S struggles with operating the divestiture stores,
6 Dr. Hill shows that as the divested stores lose sales --

7 This can be for the whole courtroom.

8 -- the number of presumptive illegal markets rises.

9 Here, showing you the effect in the more conservative large
10 format market.

11 As the stores lose sales, lose market share to other
12 nearby supermarkets, many of which will be owned by Kroger,
13 and the resulting increase in share by the Kroger, combined
14 Kroger-Albertsons, increases the number of affected markets
15 and the value of affected commerce. A 30 percent reduction
16 in revenues at the divested stores, less than C&S has
17 experienced to date with the Grand Union stores, causes
18 nearly a 30 percent increase in presumptive illegal markets,
19 and nearly a 40 percent increase in the value of affected
20 commerce.

21 Turning to the labor product market, defendants do not
22 even attempt to contend that the proposed divestiture to C&S
23 will remedy the harms to labor markets caused by the
24 acquisition.

25 First, in many markets, Kroger will become the only

1 union grocery employer, rendering the whipsaw strike tactic
2 useless.

3 Second, Albertsons currently makes labor decisions,
4 including whether and how to cooperate with Kroger,
5 independently, and as Ms. Musser discussed, defendants
6 struggle to coordinate effectively, such as by entering into
7 mutual strike assistance agreements. Mr. McPherson says
8 he's never actually signed one. C&S's dependence on Kroger
9 for transition services is going to tilt the scales in favor
10 of letting Kroger take the lead.

11 C&S doesn't have the experience to do otherwise. It
12 has requested Kroger to provide it with labor relations
13 employees. Kroger has only filled half of C&S's requests.

14 Even if C&S wanted to take an independent approach to
15 labor -- to union negotiations, it will be too small in most
16 markets. It will be a minor, not a major, like Kroger and
17 Albertsons are today. The Court will hear from union
18 representatives, third parties, and the parties themselves,
19 that minors have little effect on the deals struck by the
20 majors.

21 Thus, the divestiture is not going to eliminate the
22 harm to competition in the supermarket product market or the
23 labor market product market and -- or render it
24 insubstantial.

25 Plaintiffs' proof will demonstrate the existence of a

1 substantial question worthy of further study in the merits
2 proceeding, warranting an injunction pending resolution of
3 the administrative proceeding.

4 The equities also favor an injunction. Defendants do
5 not face the loss of a unique time-sensitive opportunity.
6 If time were of the essence, defendants could have had
7 resolution on the merits sooner if they had not sought to
8 suspend the administrative merits proceeding.

9 They have already taken nearly two years from signing
10 the merger agreement to get to this day. They are already
11 enjoined from closing the transaction until a ruling by the
12 Colorado state court after a trial that commences over a
13 month from now.

14 The efficiencies that they claim are generic costs of
15 doing business and will be there in three months or next
16 year.

17 In any event, private equities have little weight in
18 the Section 13(b) analysis. The purpose of 13(b) and the
19 FTC Act is to serve the public interest in effective
20 enforcement of the antitrust laws by the antitrust agencies.

21 Allowing an acquisition to close where the parties are
22 direct competitors would be difficult to unwind and cause
23 immediate harm to competition.

24 In a competitive market, companies act zealously to
25 protect the confidential information. Their prices, their

1 discounts, their products and development.

2 We've seen that in this case, Your Honor, expressed
3 through the confidentiality claims of the parties and the
4 third parties. Irreversibly sharing that competitively
5 sensitive information may frustrate any remedy ordered at
6 the conclusion of the administrative proceedings.

7 Moreover, where the parties employ hundreds of
8 thousands of people and feed millions, extra care is
9 warranted. Consideration of the public equities means
10 considering the risk that divestiture stores close and limit
11 communities' access to fresh, healthy food.

12 Defendants claim an injunction would delay price cuts
13 that they plan to make, but the Court will hear that their
14 price investment plan starts with just a handful of products
15 in Albertsons stores. Four state Attorneys General have
16 submitted an amicus brief in support of the merger, but
17 their states' residents will see price investment, at most,
18 in one Jewel-Osco in Iowa. There are no Albertsons stores
19 in the other three states.

20 The total price investment will also be staged over
21 time, and Kroger has jettisoned to pass price investment
22 plans to make earnings per share targets.

23 Consideration of the public equities also means
24 considering employees, like Naomi Oligario, who wrote to the
25 FTC about losing her job when Haggen's bankruptcy closed the

1 supermarket she had worked at for decades. Your Honor will
2 hear directly from Ms. Oligario in these proceedings.

3 We respectfully submit, Your Honor, that the risk to
4 employees and communities across the country, as well as the
5 public interest in effective antitrust enforcement, weigh
6 heavily against the parties' claimed equities.

7 Defendants are trying to make the standard one of
8 absolute certainty that the merger will harm customers and
9 that the divestiture will fail, but that turns the
10 probabilistic standard of Section 7 of the Clayton Act on
11 its head. The purpose of the Clayton Act is to arrest
12 monopolies in their incipency, and that requires
13 considering whether a substantial lessening of competition
14 may occur if the transaction proceeds.

15 The risks of harm to the parties from not getting a
16 business deal through as quickly as they would like are
17 vastly outweighed by the risk of being unable to effectuate
18 a complete remedy if the merger is found to be unlawful and
19 the risk to communities of losing well-paying union jobs and
20 access to food to feed their families.

21 Because the divestiture is proposed to remedy the
22 substantial loss to competition that may occur due to the
23 acquisition, defendants bear the burden to establish it is
24 likely to be effective in every single market in which the
25 parties overlap.

1 THE COURT: Please, yes.

2 MR. WOLF: Thank you, Your Honor.

3

4 OPENING STATEMENT FOR KROGER

5 MR. WOLF: Matthew Wolf for Kroger.

6 The day after this merger closes, a shopper walking
7 into the Safeway on Southwest Jefferson Street, just a few
8 blocks away, will be in for a pleasant surprise. They will
9 find that prices have come down on dozens of their most
10 important purchases.

11 Those same reductions will be seen by folks around the
12 country when they shop at the more than 1,700 Albertsons
13 stores now owned by Kroger, and within 90 days, all of those
14 shoppers will see further price reductions on more than 600
15 items that matter to them.

16 Beyond that, Kroger will be ramping up to investing a
17 billion dollars every year specifically to bring down prices
18 for the former Albertsons customers who are now part of the
19 Kroger family.

20 Counsel minimized, attempted to diminish, the value of
21 \$1 billion annual incremental price investment in her
22 opening.

23 I suggest this betrays a fundamental misapprehension
24 and misunderstanding of how such an investment works and the
25 profound effect that investment will have on former

1 Albertsons customers throughout the country.

2 But Kroger is not just committed to bringing former
3 Albertsons customers lower prices. It will invest \$1.3
4 billion dedicated to Albertsons stores to enhance the
5 customer experience, and just as importantly, Kroger will
6 spend an additional billion dollars a year, every year, on
7 wages benefits for its associates.

8 All of this will only be possible if the merger goes
9 through. And all of this comes with additional commitments,
10 that there will be no store closures, no frontline job
11 losses, enhance local food sourcing. It benefits both the
12 farmer and the shopper. There will be 10 billion meals
13 distributed to combat food insecurity in our neediest
14 regions, and every single collective bargaining agreement
15 will be transferred and maintained when the merger goes
16 through.

17 Inexplicably, the plaintiffs in this case insist that
18 this must not be allowed. Plaintiffs have, outside of this
19 courtroom, and in, repeatedly and very publicly stated they
20 are working to bring prices down, but their decision to
21 bring this suit and the arguments they have made since
22 filing suggest that they neither understand the industry nor
23 the parties within it.

24 Now, I assume counsel misspoke earlier when she said
25 the difference between Albertsons' pricing and Kroger's

1 pricing is -- the word was used -- "imperceptible." That is
2 not reality. Kroger's prices are 10 to 12 percent lower
3 than Albertsons'. 10 to 20 -- 12 percent lower.

4 One would think the plaintiffs would be pleased that a
5 higher cost grocery store was going to be run by a lower
6 cost competitor, but plaintiffs insist, by bringing this
7 suit, by making the arguments they made this morning, that
8 current Albertsons customers should continue to be forced to
9 shop at stores with margins nearly a dozen percentage points
10 higher than Kroger.

11 And in so doing, inexplicably, plaintiffs refuse to
12 recognize the tectonic shift that has occurred in the
13 grocery industry over the last 20 years. Refusing to
14 acknowledge that, unless traditional grocers act, the
15 dominance of Walmart and Costco and Amazon, and their ilk,
16 will only grow with the inevitable and regrettable impact on
17 shoppers' choices, downtown communities, local farmers, and
18 union jobs.

19 And, inexplicably, we've heard just this morning
20 plaintiffs denigrate and claim to know more about groceries
21 than C&S, Kroger's divestiture partner. A 107-year-old
22 family grocer company servicing more than 7,500 stores.

23 Your Honor, I submit that C&S has more institutional
24 knowledge of the grocery industry in just one of its senior
25 executives than all of the experts that the plaintiffs have

1 chosen to present to Your Honor combined.

2 So let's dig a little deeper to understand the players,
3 the industry, and the deal.

4 First, Kroger.

5 Kroger was founded in 1883 in Cincinnati. And if you
6 walk the streets of Cincinnati, you will still see corporate
7 headquarters to this day. It has remained true to its
8 roots. It has remained true to its community.

9 It is now composed of 2,700 stores in 35 states under
10 28 different banners, as plaintiffs helpfully put up on the
11 board.

12 These are the folks you know. Fred Meyer, locally.
13 Around the country, some of the most trusted brands in
14 grocery.

15 And what is the guiding principle of Kroger? What is
16 its DNA when it comes to groceries?

17 Well, Rodney McMullen, the CEO and chair of Kroger, who
18 you'll hear from next week -- he'll be in this courtroom to
19 answer any of Your Honor's or any of the plaintiffs'
20 questions -- he said to the Senate last year, "Together,
21 with Albertsons, our principal, Kroger's current principal,
22 is allowing customers to stretch their grocery -- grocery
23 budget without compromise."

24 Well, what does "without compromise" mean? It means,
25 and this is a piece of a dec you'll hear from with

1 Mr. McMullen and Mr. Aitken as well, that, when it comes to
2 fresh foods, we want to be as good as Whole Foods. When it
3 comes to personalization, when it comes to knowing our
4 customers, to giving them what they want, what they need,
5 what matters to them the most, we want to be as good as
6 Amazon, and we are. When it comes to our brands, what we
7 call "private label," we want to be as good, we strive to be
8 as good, we are as good as Costco. And when it comes to
9 seamless. That means you can order in stores. You can get
10 your curbside delivery. You can get delivered to your home.
11 We want to be as good as Target, and we want to do all of
12 this and we do do all of this at prices competitive to
13 Walmart.

14 "Prices competitive to Walmart." What does that mean?

15 Well, you're going to hear also next week from
16 Stuart Aitken, the chief merchandising and marketing
17 officer. He's going to tell you, among other things, that
18 notwithstanding the extraordinary inflation and cost of
19 goods sold and fuel and everything else over the last three,
20 four, five years, that during that very window, when
21 inflation was pushing everyone to their limits, Kroger was
22 year after year after year bringing their prices more in
23 line with Walmart, bringing their margins down every year.

24 And they've done this, unlike many of our competitors,
25 with the help of our union associates. 83 percent of

1 in-store Kroger associates work in a unionized store. We
2 are a proud union shop, just as our merger partners,
3 Albertsons.

4 We are also proud of the communities we live in, work
5 in, and sell in.

6 Local food sourcing. We've talked about how critical
7 that is. Service member support. Top scorers in equity
8 indexes and otherwise. And the capstone of our community
9 involvement, the Zero Hunger, Zero Waste Project, that to
10 date has provided 3.5 billion meals to those in need, and
11 with this merger, we'll be able to provide another
12 6.5 billion, all while reducing our carbon footprint,
13 reducing waste. And all of this in what has been a tectonic
14 shift in the grocery market over the last 10 years.

15 Your Honor has seen these headlines, but I think *The*
16 *Wall Street Journal* summed it up best just last year:
17 Supermarkets are losing this food fight. And who are they
18 losing it to? Walmart, Costco, Amazon, among others.

19 You're going to hear a lot in the next three weeks
20 about what these companies have done to the market; what
21 they have brought to the market, in terms of
22 competitiveness; and what pressure they've put on Kroger and
23 Albertsons and others to remain competitive and to get ever
24 more competitive with pricing, quality, freshness,
25 community, labor, et cetera.

1 So Walmart, a brief snapshot: In 2003 there were 40 --
2 3,400 Walmart stores. By 2023 there were 5,300. Maybe
3 60 percent more. But their grocery sales have increased at
4 a much more rapid pace. 2003, 63 billion in sales; last
5 year, \$247 billion in sales. That's the focus -- the people
6 we should be worrying about. That's the competitor you're
7 going to be hearing about for the next three weeks. That's
8 the company that we all are trying to reach, in terms of
9 price, while at the same time maintaining commitments to our
10 associates, to our customers, and to our union employees,
11 which we have, unlike Walmart.

12 How about Costco?

13 2003: 318 stores. Roughly doubled by 2023. But their
14 grocery sales far more than outstripped that doubling. In
15 2003 \$25 billion in sales, by 2023, 128 billion in sales;
16 and, again, with trivial union involvement.

17 Amazon, similar.

18 2003, no brick-and-mortar grocery presence. Through
19 the acquisition of Whole Foods and the creation of
20 Amazon Fresh, they now have 600 stores. And what does that
21 mean in terms of grocery sales? They've gone from 3 billion
22 in 2003 to 36 billion in 2023. Remarkable growth. But,
23 again, with almost no union involvement. Unlike Kroger.
24 Unlike Albertsons.

25 And their competitive footprint is truly nationwide.

1 Walmart from coast to coast, Costco from coast to coast,
2 Amazon from coast to coast. Every address, every community,
3 every market.

4 And they're not alone. You're going to hear in this
5 case from -- about Aldi, and Dollar General, and Lidl.
6 Folks that hope that in the next five, ten years they're
7 going to have charts that look an awful lot like what I just
8 showed you for Walmart and Costco and Amazon. These folks
9 are taking enormous shares of the grocery market already and
10 are poised to do much more, all at prices much lower than
11 the incumbents'.

12 Now I'm going to talk very briefly about Albertsons
13 because in a few minutes, my colleague, Ms. Mainigi, is
14 going to talk about Albertsons' perspective. What brings
15 them to the courthouse today, what brought them to the
16 merger table last year.

17 But, briefly, Albertsons has 2,200 stores in 35 states.
18 In 2022, it became known to Kroger that Albertsons was on
19 the market, that Albertsons was potentially for sale, and we
20 reached out and said, "Hey, this looks like a match that
21 would make sense for us and, more importantly, would make
22 sense for consumers and our associates."

23 Why?

24 Well, part of it is simple geography. I showed you
25 that Walmart and Costco and Amazon are nationwide. The same

1 can't be said of either Albertsons or Kroger today.

2 Albertsons has a significant presence in the Northeast
3 and West Texas and Northern California but next to nothing
4 in the Midwest or the Southeast.

5 Kroger, on the other hand, almost the mirror image.
6 Significant presence in the Midwest, the Southeast;
7 significant presence in East Texas and the Plains states.
8 You put them together, we now have a footprint that can
9 compete against Walmart and Amazon and Costco. It is
10 clearly complementary. It gives us the opportunity to
11 benefit from scale, to benefit from savings, to pass that
12 along to customers, to compete more effectively against the
13 folks that have been dominating the market for the last 10
14 years.

15 But it's not just about scale. The savings that come
16 from the merger are obvious and intuitive. Kroger might
17 have the best price on Pepsi. Albertsons might have the
18 best price on Coke. Put them together, and we get the best
19 price on both, and then can pass that savings along to our
20 customers.

21 With supply chain, we avoid redundancies, expand it.
22 Not only are we cheaper and, therefore, less expensive for
23 our customers, but also faster, which means fresher for our
24 customers.

25 Technology. Rather than running these

1 extraordinarily -- extraordinarily expensive tech stacks one
2 to one, we combine them, save money, pass it along to
3 customers.

4 You're going to hear in this case from Mafaz Maharooof,
5 who's going to talk about the billions of dollars of savings
6 and efficiencies that this merger will bring. Billions of
7 dollars that will allow us to lower prices for our
8 customers, to bring them fresher food, to bring them more
9 local produce, to bring them competitive products.

10 Competitive not just on pricing to Walmart and Costco and
11 Amazon, but better, fresher, faster, broader.

12 Now, we recognize and we recognized then, at the time
13 we signed the merger agreement, that the map was not
14 entirely complementary, that there were some overlaps; that
15 we would need to divest some stores. And this trial, this
16 preliminary injunction proceeding, will, in part, be about
17 whether that divestiture will work.

18 You're going to hear from C&S Wholesale Grocers about
19 their extraordinary story. They started in 1918 as a
20 supplier of independent grocery stores. Now they have a
21 nationwide network. Notice that word "nationwide" again,
22 Your Honor. That's really important. That scale benefits
23 us in the merger. It benefits C&S now.

24 Scale of 7,500 independent stores, all the way up to
25 large chains. From the mom-and-pop and the bodega on the

1 corner, all the way up to nationally known brands they
2 service today. They are, in fact, the eighth largest
3 private company in the United States. They have more than
4 3,000 private label brands of their own today, and they
5 support roughly 200 stores as -- as -- runs -- excuse me --
6 not support, but run 200 stores. 20 or so as owners, about
7 180 as franchisees. They have the experience. They have
8 the infrastructure. They have the motivation. They have
9 the commitment. They have the customers already raised up
10 here in the Pacific Northwest they support. Holiday Market
11 as well, in addition to national stores like Winn-Dixie,
12 Target, and Giant.

13 And you're going to hear more later this week from Eric
14 Winn, the CEO of C&S, who's going to be able to respond to
15 counsel's suggestions at the end of her opening statement
16 about all the purported inadequacies of C&S, about their
17 lack of commitment, about their somewhat nefarious
18 motivations implied, and you're going to hear from Mr. Winn
19 directly about their excitement, their enthusiasm, their
20 commitment, and their competence in performing their duties
21 under this divestiture.

22 And you're going to hear about what C&S does today,
23 from providing fresh produce to store design, from retail
24 technology to digital marketing, from food shows and buying
25 programs to private label products. Everything that a

1 supermarket does, they do today. They have the skills
2 today.

3 But let's talk about what else the deal is going to
4 bring them tomorrow. With the deal, Kroger will run about
5 4,500 stores. C&S about 600 stores, complementing the 7,500
6 they already run. Mr. Cosset, who's in the courtroom now,
7 will explain the structure of the deal, explain what C&S is
8 getting, both from Kroger and from Albertsons, and what it
9 will allow them to do to compete successfully in those
10 markets where there is overlap, where the parties
11 acknowledge that there needs to be something done and there
12 is being something done creating a vital new competitor.

13 After the merger, C&S is not just getting stores,
14 they're getting people. You're going to hear from
15 Susan Morris -- Ms. Mainigi is going to tell her more --
16 tell us more about her in a few minutes -- who's the current
17 Chief Operating Officer of Albertsons. She is going to go
18 over and run the grocery facility. She's got four decades
19 of experience. Four decades of experience in the industry,
20 and she's enthused and excited about this opportunity.

21 But it's not just Ms. Morris. You're going to hear
22 about dozens of other senior executives, thousands of
23 specialists, and 60,000 frontline associates, all of whom
24 are working in stores today and will work in those same
25 stores the day after the merger.

1 You're going to hear that C&S is going to get more than
2 a half dozen private labels to expand their base, that
3 they're getting a dairy, they're getting a transition
4 services agreement to make sure that the handoff is
5 seamless, increased distribution centers; and, again, of
6 critical import, C&S is committed to a transfer of all
7 collective bargaining agreements. Union jobs will be
8 protected.

9 After the merger -- after the merger, you heard counsel
10 refer in her opening statement to majors and minors, and she
11 referred to C&S as a minor. And, respectfully, that's just
12 plain wrong. After the merger, C&S will be the eighth
13 largest grocery store in America. That's not minor.

14 They'll be bigger than H-E-B, Dollar General, Aldi,
15 Walgreens, Trader Joe's, BJ's, I could go on. A vital new
16 competitor both to Kroger and, just as importantly, Walmart,
17 Costco, and Amazon.

18 Now let's move on to what brings us here today: The
19 preliminary injunction standard.

20 And, Your Honor, you've read some of this in the
21 pretrial briefing. You'll read more of it after. But there
22 is a fundamental disagreement about what you're going to be
23 deciding. Because, respectfully, we believe that the
24 standard four-factor preliminary injunction test that
25 Your Honor has applied time after time, that applies here.

1 The Supreme Court told us that just a few months ago in
2 *Starbucks*. And so we're going to be talking about the test,
3 the preliminary injunction standard, the four factors
4 Your Honor is familiar with, and we're going to start with
5 public interest, the extraordinary public interest in making
6 sure that this merger happens for the benefit of consumers,
7 for the benefit of associates, for the benefit of
8 communities, for the benefit of unions.

9 First of all, the benefits to new Kroger customers and
10 communities: Lower prices from day one, ramping up to a
11 billion-dollar annual price investment. Revitalize
12 Albertsons stores. Remember that \$1.35 billion in
13 revitalized Albertsons stores and infrastructure? Fresher
14 foods. Excuse me while I take a sip, Your Honor. I'm
15 speaking too fast.

16 Enhanced stores and fulfillment networks. Improved
17 data so that customers are told when a sale occurs or asked
18 what they want to see prices lowered, that it's -- we're
19 more reactive, more responsive, that our customers have a
20 greater stake in how we price, how we ship, how we stock.

21 And a broader supplier base. More choices, more
22 opportunities -- both national brands and private label --
23 all of this as a result of the merger.

24 And, Your Honor, there was a little sleight of hand
25 that happened in plaintiffs' case. They talked about states

1 where there are overlapping stores, but their own expert,
2 Dr. Hill, acknowledges that throughout 34 states there's no
3 competitive risk, no competitive threat whatsoever.

4 Two-thirds of this country will experience all of the
5 benefits of the merger with none of the alleged risk that
6 counsel has been talking about.

7 Now, we're going to suggest to you in just a few
8 moments that risk is nonexistent. Certainly not sufficient
9 to justify a preliminary injunction. But, in any event,
10 when you're talking about the public interest, two-thirds of
11 this country has nothing but benefit with none of the
12 ascribed risk.

13 All right. Let's move on to the benefit to the new
14 Kroger associates. The folks that were at Albertsons.

15 They're going to see higher wages, greater benefits,
16 greater flexibility to transfer locations, a new tuition
17 reimbursement program and financial coaching for all the
18 associates. Up to \$21,000 an associate. And, again, a
19 transfer of all CBAs. All of these opportunities will be
20 presented to Albertsons' associates as a result of the
21 merger.

22 How about C&S's customers? They're going to see 1.2
23 billion in C&S's own commitment to improving the Albertsons
24 stores they're going to be acquiring. They're going to have
25 private label expansion. I mentioned that C&S has 3,000 of

1 their own label brands already, but they're taking over
2 seven -- some by license, some outright -- existing
3 Albertsons private label brands. All of those will be
4 accessible to their customers and extraordinary enhancements
5 to distribution supply chain, which not only lowers prices,
6 but it makes food fresher on the shelf.

7 Even current C&S customers -- remember you're on to
8 those 7,500 folks that -- and "folks," that's a strange way
9 to describe Winn-Dixie or Harris Teeter, but even the
10 current folks will experience benefits. Let's focus on
11 Ray's, for example. A small local Pacific Northwest grocery
12 chain. They currently use C&S. They rely on C&S. C&S is
13 their lifeblood, keeps them in business, keeps their prices
14 low, keeps their shelves stocked.

15 They're going to benefit too from this merger, even
16 though no one -- they're not changing hands. They're
17 staying with Ray's.

18 Why?

19 They're going to have access to those same private
20 label products that C&S is getting that they can put into
21 the old Albertsons stores. They can put into the -- C&S can
22 put into the 7,500 stores they currently service. That
23 enhanced distribution and supply chain, that lowers prices
24 and increases product availability. That becomes available
25 to the existing C&S customers, not just the new C&S stores.

1 All of the services they provide will be enhanced, and
2 so it will benefit not just Kroger stores and former
3 Albertsons stores, but 7,500 other grocery stores that are
4 striving to compete against the global behemoths: Walmart,
5 Amazon, Costco, et cetera.

6 Public interest, Your Honor, we will show you over the
7 next three weeks it unambiguously favors this merger. It
8 unambiguously suggests to Your Honor that a preliminary
9 injunction should not enter.

10 Now I want to talk about the middle two factors: The
11 likelihood of irreparable harm and the balance of harms.
12 Here's where we have a fundamental disconnect with the
13 Government -- well, maybe one of many places we have a
14 fundamental disconnect with the Government. This proceeding
15 will decide the fate of the merger. Let there be no
16 mistake. The suggestion that all you're being asked to do,
17 Your Honor, is tap the brakes, let the FTC do its job over
18 the next 12, 18, 24 months, let that process -- that's not
19 going to happen. It never happens.

20 If you look at the history, there's never a merger --
21 and by "never," I mean, I think once in history -- never a
22 merger if it has to go through the extraordinarily tortuous,
23 serpentine, labyrinthine, what other adjective could I come
24 up with, name for the FTC Part 3 process? It just doesn't
25 happen. Why? Because there are 60,000 people whose jobs

1 are currently in limbo. There's financing that Kroger has,
2 that C&S has, that expires if it doesn't happen quickly.
3 There are licenses you need to procure, whether it's
4 pharmacy or alcohol or otherwise, from state agencies.
5 Those transfers expire, and there are 85 million families
6 that are waiting to hear what will happen. This merger will
7 not occur if this injunction is in place.

8 Let's turn to the final factor: Likelihood of success
9 on the merits.

10 The fundamental question Your Honor has to ask is:
11 What is the chance of ultimate success? Really, what will
12 this merger do? Is it pro-competitive? Is it neutral? Or,
13 as the Government contends incorrectly, is it
14 anticompetitive?

15 And this is kind of interesting, Your Honor: There's
16 an established framework, it's called a Baker Hughes
17 framework, and counsel alluded to it but really didn't walk
18 us through it, and there's a pretty profound reason why.

19 The first step of the Baker Hughes framework is asking
20 the question, "Have plaintiffs properly, one, defined a
21 product market; two, defined a geographic market; and,
22 three, established a presumption of competitive harm?"

23 We're going to talk about product markets and the shell
24 game that's going on there. But, Your Honor, you heard
25 almost nothing about geographic market in counsel's opening

1 statements.

2 Literally, she said, "I will quickly turn to it." And
3 there's a reason that it was quickly turned to, and we'll
4 talk about that in just a few minutes. It's because there
5 is simply no way that plaintiffs' case, as to geographic
6 market, stands up to the law, the facts, the industry, the
7 circumstances, or common sense.

8 And if I am right in that statement, we are done. If
9 they can't establish an appropriate geographic market that
10 they are -- asserted market is right, then there is no
11 likelihood of success.

12 But if they manage to show you, which they can't, that
13 they've defined a proper product market and defined a proper
14 geographic market, the burden of production, not persuasion,
15 that always rests with the Government. The burden of proof
16 always rests with the Government. But if the burden -- if
17 they prove the markets, then the burden of production shifts
18 to defendants.

19 Is there a way to get that purple line on the screen
20 that I managed just --

21 THE COURT: No idea. Not me.

22 MR. WOLF: It was one hundred percent me, Your
23 Honor. I did not mean to graffiti your screen.

24 THE COURT: It is okay. It's gone.

25 MR. WOLF: Thank you very much. The burden of

1 production shifts to defendants to show that there's no
2 threat of substantial anticompetitive effect, and we'll show
3 you just that. And I'll talk about just that in a few
4 minutes. But at the end of the day, the burden rests with
5 the Government to show we're wrong.

6 All right. Let's talk about the first step. Have
7 plaintiffs properly defined a product market and a
8 geographic market?

9 And here, Your Honor, I have to confess to a little
10 bafflement, and we're going to be on a ride together
11 because, in the complaint, the Government asserted the
12 supermarket market. That's the market that excludes Amazon.
13 That's the market -- well, in fact, both markets exclude
14 Amazon.com, but they exclude Amazon Fresh, they exclude
15 Costco, they exclude Whole Foods, et cetera. That was in
16 the complaint.

17 Then we get Dr. Hill's expert report, and we think,
18 aha, they've gotten slightly more reasonable with regard to
19 the market, because he introduces the concept of a large
20 format market; that, in terms of product, is closer to the
21 facts on the ground. But then we get the preliminary
22 injunction brief and the preliminary injunction reply where
23 the Government shifts back to the supermarket market.

24 And then today we saw a slide with both of these
25 markets side by side, and I can't tell whether the

1 Government's picked one or not.

2 But we're not playing a game of whack-a-mole here. The
3 future of 60,000 employees and 85 million consumers just for
4 one of us is on the line, and we need to know now what their
5 alleged market is. And I ask them, when they bring Dr. Hill
6 up, for them to say, once and for all, which one of these
7 are they picking? But I'll tell you right now I don't know.
8 But I'm going to show you that either one will fail in light
9 of the evidence, the facts on the ground, and the law.

10 First, the supermarket market. This is the narrower
11 one, Your Honor. This is the one that's in the pleadings.
12 This is the one that's in the reply brief. It fails for the
13 simple reason that it excludes real world competitors. The
14 parties will -- the parties rely on third-party companies
15 for data, and one of these companies provides what's called
16 "share of wallet" and you're going to hear a lot about share
17 of wallet in this case, and it essentially says "For your
18 customers, the folks that actually walk into" -- in my case
19 Kroger stores -- "what percentage of their dollar, their
20 grocery dollar, spent is on you and is on your competitors?"

21 And the Government points to a world in which nearly
22 100 percent-- remember this one-stop shopping idea? --
23 nearly 100 percent must be with you, but that's not reality.

24 For our most loyal customers, a quarter of their
25 spending, only a quarter, is with us. Walmart is next, then

1 Costco, then Albertsons, Sam's Club, and about 40 percent
2 with other folks.

3 Now, what's wrong with the supermarket market? It just
4 disregards where more than half of our customers' grocery
5 dollars actually go. It excludes Costco. It excludes Sam's
6 and Whole Foods and Sprouts and all the -- and Amazon and
7 Trader Joe's and all the folks that intuitive we know --
8 intuitively we all know competes with Kroger, compete with
9 Albertsons. That doesn't make any sense.

10 Your Honor, this is from *The New York Times* less than a
11 week ago: How Costco Hacked the American Shopping Psyche.
12 More than 100 million people visit the retailer for their
13 groceries.

14 The Government is asking you to ignore those
15 100 million people. They're asking you to say they don't
16 count for the market. They don't put competitive pressure
17 on us. That if we raise our price of milk by \$0.20, that
18 those shoppers won't go to Costco and punish us for raising
19 that price. They're saying just ignore the effect of
20 Costco. They don't count. That doesn't make any sense.
21 That won't make any sense in light of the evidence you're
22 going to hear.

23 Similarly, with Amazon. This is a press release from a
24 few months ago: Amazon. Our goal is to build a best in
25 class grocery shopping experience, whether shopping in store

1 or online, where Amazon is the first choice for selection,
2 value, and convenience. And the Government says in their
3 preferred market, we shouldn't think about Amazon. That
4 Amazon isn't relevant to whether we can raise our prices or
5 not, whether we can decrease the quality of our products,
6 whether our freshness, if it slips, whether there isn't
7 someone to check us. That just doesn't jibe with the facts.

8 Your Honor, it's also in a bit of irony. We're, of
9 course, against the Federal Trade Commission, an instrument
10 of the United States Government. The FTC apparently hasn't
11 checked notes with the Council of Economic Advisers just
12 down the street in my hometown in D.C. This is from a press
13 release just a few months ago. Update: Grocery price
14 inflation has cooled substantially. Some of the most
15 prominent grocery retailers, including Aldi, who the
16 Government says shouldn't count for the market; Amazon, who
17 the Government says shouldn't count for the market; Target,
18 who they acknowledge; Walgreens, who the Government says
19 shouldn't count for the market, recently announced price
20 cuts.

21 So the very folks at the Council of Economic Advisers
22 at the White House say are part of the market, the
23 Government says you should disregard when deciding what the
24 proper geographic market is in this case.

25 And not to gild the lily, but to gild the lily,

1 Your Honor, Trader Joe's? Nope. Costco? Nope. Sam's
2 Club? Nope. Whole Foods? No. Aldi? Vallarta? H Mart?
3 Amazon? None of them are included in the market that they
4 asserted in the complaint.

5 There's another problem with the market asserted in the
6 complaint, and that's geography and the interrelationship of
7 geography and store in the unique complex grocery world.

8 You're going to hear a lot in this case about an
9 article by Paul Ellickson, Paul Grieco, and
10 Oleksii Khvastunov -- I practiced that last night. I don't
11 know if I got it right -- and I again smudged the screen --
12 that we find, the authors find, that club stores represent
13 significant competition -- to traditional grocers, due in
14 large part to consumers' greater willingness to travel to
15 them.

16 In other words, and in simple terms, customers,
17 shoppers are willing to drive farther for a Costco or
18 farther for a Target or farther for a Walmart than they are
19 for the corner grocery store, and I think that's consistent
20 with all of our experiences. It's certainly consistent with
21 my household, Your Honor.

22 And you need to take that fact into account when you're
23 asking about the second question, the geographic market.
24 Remember, product market, geographic market. They're
25 intertwined in this industry. And what does that mean?

1 What the Government says is -- and their typical
2 example is a five-mile boundary for geographic market.
3 That -- there -- that's the norm, the median, the mean of
4 their -- of their geographic markets. When we're asking
5 Albertsons, the Albertsons at the center of that circle,
6 who's putting pressure on them so they don't raise the price
7 of milk or eggs or bread?

8 First of all, they exclude Trader Joe's and Aldi and
9 Whole Foods because they say they're outside of the product
10 market, and we, of course, disagree with that, but they also
11 say we're going to disregard the Costco and Walmart and
12 Target that are just outside of the circle because they're
13 too far away, even though the evidence shows -- and you'll
14 hear evidence from the Government's own witnesses that
15 customers drive farther, are willing to drive farther for
16 these stores, and therefore these stores put price pressure
17 on Albertsons.

18 If Albertsons in that circle raises the price of milk,
19 of course customers will drive an extra quarter mile to get
20 to a Walmart just outside of that five-mile circle.

21 So the narrower market fails.

22 And if you hold the Government or the Government
23 insists to leaning on their narrower market, we are done
24 here. We can go home. We can have a nice Labor Day.
25 Because they cannot establish likelihood of success if they

1 cannot establish the appropriate product and geographic
2 market.

3 Let's turn, though, to Dr. Hill's large format market,
4 which includes more of the stores that plainly compete.

5 The problem with Dr. Hill's market and the reason that
6 counsel said "Let's quickly turn to geography," rather than
7 "Let's study geography," is because Dr. Hill's market, the
8 broader market, while better on product, fails when it comes
9 to geography.

10 You heard about the hypothetical monopolist test. And,
11 Your Honor, the hypothetical monopolist test is a check. It
12 says, "Did you get the right market?" And how do we know if
13 you get the right market?

14 If, in the market that we allege to be the right one,
15 if you can raise prices by five percent or more, then you're
16 a monopolist, and therefore we have the right market. If
17 you can't, if prices are less than five percent higher, then
18 you screwed something up. You've made a mistake. You've
19 excluded competitors either because of product or geographic
20 market. That's the monopolist test. It's a check. Did you
21 get it right? And we know in the real world they got it
22 wrong.

23 On the left is a representation, and you'll hear about
24 actual markets that look exactly like this, where there are
25 Albertsons or Kroger stores within the five-mile radius, but

1 Costco or Walmart stores are just outside, and therefore
2 excluded from whatever market the Government relies on, and
3 we can compare that in the real world markets where there
4 are admitted competitors.

5 And then we ask the question. The left-hand market.
6 The one where Costco and Walmart are just outside of the
7 geography, and therefore the Government says they don't
8 count, are prices higher five percent or more higher than
9 Albertsons? And the answer is, "No, they're not." They're
10 not statistically significantly higher at all.

11 And so the Government's markets, whether the narrow one
12 or their larger one, don't just fail the hypothetical
13 monopolist test. They fail the actual monopolist test. In
14 the real world, Costco and Walmart and Amazon put pricing
15 pressures at greater distances, and so you have to take that
16 into account, and the Government doesn't.

17 Again, they fail.

18 Here's a real world example. This is from Portland,
19 Oregon. There's a Fred Meyer that they've drawn a five-mile
20 circle around, and they say that that Costco that's
21 sixth-tenths of a mile outside the Fred Meyer circle
22 shouldn't be included.

23 In this case, you'll hear evidence that of course it
24 should be included. Of course it puts price pressure on
25 that Fred Meyer; that if the Fred Meyer jacks up its prices,

1 people will drive to that Costco even though it's six-tenths
2 of a mile further than the Government and the Government's
3 witnesses suggest. But it's not just under-inclusive;
4 bizarrely, it's also over-inclusive.

5 Here's the actual map the Government actually drew in
6 Dallas, Texas. Unlike the five-mile map they thought was
7 helpful to prove their case for Oregon, they drew a 26-mile
8 circle in Texas. That's how broad they wanted to get it,
9 they had to get it, to make their facts hold up, and that
10 26-mile circle now includes 561 total stores. It includes
11 competitively irrelevant stores. That's the way they have
12 to torture the data to make it sing the way they want it to.

13 The evidence will show that, when you define product
14 markets correctly, when you define geographic markets
15 correctly, this merger poses no risk, let alone a
16 substantial risk of anticompetitive harm. In other words,
17 they can't prove the first step. We are done.

18 But if we weren't, let's move on to the question of
19 substantial anticompetitive effect.

20 Defendants' evidence will show definitively there is no
21 threat of substantial anticompetitive effect. The first
22 reason is simple. Walmart keeps prices low.

23 And here I'm using Walmart. A bit of a shorthand for
24 Walmart and Amazon and Costco, but only a bit of a
25 shorthand, because I'm going to tell you we are really,

1 really focused on Walmart.

2 You're going to see from -- hear from Mr. McMullen, the
3 CEO; Mr. Aiken; and Andy Groff, who you're going to hear
4 from probably tomorrow or maybe even later today, who's the
5 senior director of pricing strategy, that Walmart is
6 singularly focused on being the leader in price.

7 Kroger, in turn, is monomaniacally focused -- that's
8 not my word. That's a word from one of the depositions. I
9 learned it in the deposition -- on closing the gap to
10 Walmart's prices. Simply put, Walmart at the corporate
11 level and it all but a handful of irrelevant divisions,
12 prices based on Walmart. Kroger based -- prices based on
13 Walmart. And that Kroger price investment in Albertsons
14 will narrow the Walmart price gap between Albertsons -- the
15 current Albertsons stores and Walmart, and the evidence is
16 unambiguous. I don't think Your Honor will be surprised
17 when you hear from Marc Lieberman at Walmart, the Vice
18 President of Walmart, that they believe price leadership is
19 a critical part of their business.

20 And you will see document after document, you will hear
21 witness after witness say that Walmart is the lodestar for
22 Kroger in setting prices.

23 Here's an actual document: Summary of Kroger's Pricing
24 Strategy for its Key Pricing Program.

25 And program after program after program, either match

1 Walmart's prices or stay within a band. And in yellow,
2 there's another. Match Walmart's prices, stay within a
3 band. We can see every place in yellow on this document.
4 That's what monomaniacal obsession looks like. It's
5 everything is based on Walmart.

6 And of course, when we invest a billion dollars
7 annually in lower -- lowering Albertsons' prices to bring
8 them closer to Walmart, that benefits consumers, that
9 constrains prices, that ensures competition.

10 Now, what is the Government's response to this?

11 I asked -- I took Dr. Hill's deposition. How does your
12 modeling take into account the prospect that Albertsons'
13 pricing model will change to Kroger's model upon
14 acquisition? In other words, Kroger is now going to own
15 Albertsons. It makes common sense that the old Albertsons
16 stores will now -- their strategy will be guided by their
17 new owners, their new management, and Dr. Hill pushed back
18 on that. He said, "The model looks at the current
19 incentives which are captured in the version and the
20 margin."

21 And I said, "Well, wait. What about choices made by
22 boards of directors and senior management?"

23 And his response was, "Neoclassical economics assumes
24 firms are profit maximizing."

25 Your Honor, this case isn't going to be decided by

1 neoclassical economics. This case is going to be decided by
2 facts and executives and the law, and the executives and the
3 facts and the law all say that Kroger will do what they say
4 they're going to do, that the efficiencies will allow them
5 to do what they say they're going to do, and that prices
6 will come down for current Albertsons customers.

7 And when I say "the facts," I also mean history. In
8 the last 20 years, our profit margin has gone down, down
9 five percent, resulting in \$5 billion in savings for current
10 Kroger customers.

11 When year after year -- here's a chart from our public
12 filings. From 2006 to 2021 our margin has declined every
13 year but three. The three crises year in that window.
14 Every single year we brought our margin down, brought it
15 closer to Walmart.

16 And when we've merged with companies, we follow the
17 same path. In 2014 we merged with Harris Teeter. We bought
18 prices down \$125 million annually. A 1.8 percent decline in
19 margin.

20 That's what will happen with Albertsons. With
21 Roundy's, the same thing. In 2016 we acquired them. We
22 brought the margin down 1.1 percent. \$100 million in
23 benefits to then Roundy's customers. The same thing will
24 happen.

25 The last thing I'll say about the data, the real world

1 data, we actually have markets where Kroger exists and
2 competes with other folks, but no Albertsons, and Kroger
3 competes with Albertsons.

4 Remember all those slides counsel showed you of price
5 checking Kroger and Albertsons? What's the effect of that
6 in light of Walmart? Remember, five percent is the
7 threshold?

8 The difference in prices between those markets where
9 Albertsons exists and it doesn't, is not five percent. It's
10 not five-tenths of one percent. It's five one-hundredths of
11 one percent.

12 In the real world, that's the effect that Albertsons
13 has on Kroger's pricing five one-hundredths of one percent.
14 That is not substantial anticompetitive injury. In the real
15 world, there is no threat of anticompetitive injury. In the
16 real world, there is no threat of anticompetitive injury.
17 In the real world, we will be bringing Albertsons' prices
18 ever closer to Kroger's prices, ever Kroger -- ever closer
19 to Walmart's prices.

20 Your Honor, we saw head-to-head slides over and over
21 and over again, head-to-head competition. You could say
22 that Albertsons is monomaniacally focused on Kroger. That
23 may be true, but Kroger -- it's not reciprocated, Your
24 Honor. It's a kind of a one-way love affair. The reason is
25 Kroger's looking ahead, trying to catch up with Walmart.

1 Albertsons -- and you'll hear more from Ms. Mainigi about
2 their financial situation. Their business situation is
3 focused on catching up with us.

4 And then, if they could, which they can't, they would
5 turn their attention to Walmart.

6 Albertsons is focused on us. We're focused on Walmart.
7 What the merger will allow us to do is Kroger will get ever
8 closer to Walmart and day by day, week by week, Kroger will
9 bring former Albertsons stores in line with Kroger pricing
10 and Kroger pricing collectively closer to Walmart.

11 Now let's talk about the neoclassical economics.
12 Because the real world disputes it, but it turns out the
13 neoclassical economics also isn't right here.

14 Dr. Hill tells us, and I don't think there's going to
15 be a significant dispute about this. He sets up a good
16 standard for us. The competitive harm caused by the merger
17 is measured by the number of stores that as a result of the
18 merger have a CMCR value greater than five percent.

19 You're going to hear about CMCR, and you're going to
20 hear about GUPPI. That distinction is Celsius and
21 Fahrenheit for our purposes. It's not going to matter.

22 What does matter?

23 Well, the experts use the same models. They start with
24 the diversion ratio, which is, simply, if we raise prices or
25 someone else raises prices, how many customers vote with

1 their feet and go to a store nearby? And you multiply that
2 times the variable margin. How much does that move voting
3 with their feet cost you? What is the effect of it in
4 dollar terms?

5 And the result is either CMCR or GUPPI, depending on
6 which -- what's the numerator and what's the denominator.

7 Again, that's going to be a pillow fight in this case,
8 Your Honor. You're not going to have to worry about
9 deciding which one of those is the right way to measure
10 things. The experts agree on this approach, but they
11 disagree on the inputs.

12 And the inputs the Government and their experts choose
13 to use are frankly a little bizarre. Dr. Hill, when it
14 comes to diversion ratios, he derives them from market share
15 approaches used for hospital mergers. Hospitals. A very
16 different kind of market, a very different textured market
17 than grocery stores.

18 Dr. Israel, on the other hand, uses diversions based on
19 grocery industry-specific, that EGK, that paper I told you
20 you're going to be hearing so much about, he uses a model
21 from there, a well-established, well-known, and, more
22 importantly, very appropriate model for the grocery
23 industry.

24 Now, how about the other inputs? Variable margin. All
25 the experts, indeed the entire economic community, agrees

1 you need to use variable margins; but, for some reason,
2 Dr. Hill uses gross margins, whereas Dr. Israel uses
3 variable.

4 Again, as to the diversion, Dr. Hill uses hospital
5 literature. Dr. Israel uses store-level census of the
6 grocery industry that identifies key determinants of store
7 choice and competitive overlap in the complex setting of
8 groceries.

9 In terms of the inputs, it's common sense, Your Honor.
10 If you sell more stuff, your hourly wages go up, your costs
11 of your employees goes up. The bags you bag the new
12 additional groceries, that costs more. The gloves the deli
13 workers use costs more. The cleaning products you have to
14 use to the increased traffic costs more. Your credit card
15 goes -- credit card fees go up, your warehousing costs go
16 up, your transportation costs go up. All of those are real
17 costs that really decrease your profit, and Dr. Hill ignores
18 all of them, despite the fact that the very model he uses
19 says you have to take into account.

20 Why does this matter?

21 You saw a very similar chart in plaintiffs' opening
22 statement.

23 Dr. Hill tells us that there are 1,513 problematic
24 stores, concerning stores, stores where the CMCR is at or
25 above five percent. But he admits, if you take into account

1 variable margins, Dr. Israel's margins -- this is adapted
2 from a chart that you're going to see that was in Dr. Hill's
3 report. These are his own columns. He admits, if you apply
4 variable margins, like the model suggests you have to, that
5 1,513 goes down to 693, or if you take into account
6 divestitures, the divestiture of the 579 stores, that number
7 of problematic stores goes from 1,513 to 234.

8 But what happens -- and for some reason Dr. Hill never
9 does that final column on his chart -- if rather than
10 considering how many stores are problematic, how many
11 anticompetitive risks are there if you have divestitures or
12 variable margins as inputs -- the proper divestiture -- what
13 happens if you do both? What happens if you consider both
14 the fact of the divestiture and variable margins?

15 The answer: If you combine Dr. Israel's margins, the
16 correct ones, variable ones, with the divestiture, there are
17 zero price zones of concern. There are zero price zones of
18 concern. There is zero anticompetitive effect based on
19 Dr. Hill's, based on the Government's own data, own
20 analysis, own model. Zero.

21 So even if the Government somehow convinces you that
22 they've chosen the right product market and the right
23 geographic market, they cannot -- they will not be able to
24 show you over the next three weeks any threat of substantial
25 anticompetitive effect. There is no likelihood of success.

1 There is no reason to block this merger.

2 I want to talk briefly about the labor theory and then
3 turn it over to my colleague Ms. Mainigi.

4 As I expressed to you, Your Honor, both companies,
5 Kroger and Albertsons, support union. The claim that there
6 is a unique labor union market is legally unprecedented, it
7 is economically unsupported, and it is factually wrong.

8 As to the first, this is more a subject of briefing,
9 Your Honor, than the evidence you're going to hear in the
10 case. This will be more in the post-trial briefing and what
11 you've seen to date. But Section 6 the Clayton Act talks
12 about the labor of human beings is not a commodity or
13 article of commerce. It's not subject to the Clayton Act.
14 End of story.

15 As for economic evidence, the experts, where is their
16 expert testifying -- where will there be expert testimony
17 that the union grocery labor market is a relevant antitrust
18 market? There will be none. Where is the Government's
19 expert testimony that the merger would substantially lessen
20 competition in any relevant labor market?

21 There will be none.

22 Where is the evidence -- expert evidence the merger
23 would cause a negative impact on union workers?

24 Again, there will be none.

25 And I bet you know what the next slide is going to

1 show. The merger -- where's the evidence the merger would
2 reduce bargaining leverage of union workers from the
3 experts?

4 There will be none.

5 There is no expert evidence to support the theory the
6 Government has put forward today, nor could there be,
7 because there is no such thing as a union grocery labor
8 market.

9 To understand in simple terms, look at our workforce.
10 A couple of key metrics.

11 70 percent of Kroger-Albertsons, their first job is at
12 the companies. 86 percent at Kroger. 97 percent at
13 Albertsons. The jobs have no particular education
14 requirement. 95 percent of workers are paid on an hourly
15 basis.

16 What does that mean?

17 It means that when we're competing for workers, we're
18 not competing against each other, primarily. We're
19 competing against the McDonald's and the Lowe's and the
20 Amazons, and the FedExes, and the Wawas, the Macy's and the
21 Taco Bells of the world, that's the relevant labor market.
22 There is no such thing as a tiny sliver called the union
23 grocery labor market. How do we know? Well, we can look.
24 We keep track.

25 First, if there were such a thing as a union grocery

1 labor market, you would expect that when an employee comes
2 to Albertsons or to Kroger and they have prior work
3 experience, that the most likely prior work experience would
4 be at the other company or at least at another union
5 grocery-based company. But, in fact, more than 99 percent
6 of our current employees come from folks outside the
7 Government's purported market. 99 percent come from UPS or
8 Lowe's or Home Depot or stores -- or companies like that,
9 not from the union grocery labor market, because no such
10 market exists.

11 Let's flip it around. Let's say where do our employees
12 go to when they leave us? Again, if there was a union
13 grocery labor market, you would expect them to go to another
14 union grocery company. But the facts say that more than 98
15 percent of them don't. They go to UPS or Lowe's or Home
16 Depot or Macy's or Subway. There is no union grocery labor
17 market.

18 There also -- their theory leads to bizarre results,
19 like folks would be willing to travel seven hours to get
20 another union labor job rather than go to their local Subway
21 or Macy's or Amazon.

22 Your Honor, you heard a bit about whipsaw bargaining.
23 What the evidence is going to show in this trial is whatever
24 you think of whipsaw bargaining -- and we're actually never
25 going to get here because they won't be able to establish a

1 market -- and, Your Honor, I'm wrapping up here. I've got a
2 few slides left.

3 The facts will show that a union labor force that is
4 double its current size exercises much more leverage than
5 one that's half its size. When the union forces of
6 Albertsons and Kroger get together, when it's -- when they
7 decide it's time to take a stand, they will have more
8 influence, more leverage than they do today. This merger
9 will be good for unions.

10 And, again, where the rubber meets the road, I told you
11 before in the real world we could compare prices when
12 Albertsons existed and when it doesn't -- when it didn't,
13 and there was no distinction, no difference.

14 Well, it's the same with the labor concept. We can
15 compare union wages where there's a Kroger but no Albertsons
16 versus areas where there's a Kroger and an Albertsons, and
17 we can compare union wages. And what's the difference?
18 None. None. There is no difference between those two
19 markets. What does that tell us? Even if they could
20 establish there was such a thing, which there isn't, of a
21 union grocery market, it would have no implications. It
22 wouldn't result in any change in wages.

23 Before I turn it over to Ms. Mainigi, I just want to
24 conclude. A billion dollars a year in price investments
25 await Albertsons' customers. \$1.3 billion in improved

1 stores and infrastructure await Albertsons' customers. A
2 billion dollars a year in union and nonunion wages and
3 benefits await our associates with no store closures, with
4 more given to the communities, no frontline job losses,
5 protection of union jobs, benefits to local farmers and
6 shoppers alike.

7 Your Honor, we respectfully request you allow this
8 merger to happen, allow it to benefit the hundreds of
9 millions of folks, the 85 million families that stand to
10 gain if this merger goes through.

11 Thank you for your time.

12 THE COURT: Thank you.

13 MS. MAINIGI: Your Honor, may I go up?

14 THE COURT: Yes.

15 MS. STEWART: Your Honor, may I approach with
16 copies?

17 THE COURT: Yes.

18

19 OPENING STATEMENT FOR ALBERTSONS

20 MS. MAINIGI: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MS. MAINIGI: My name is Enu Mainigi, and I
23 represent Albertsons. I have about 35 minutes.

24 THE COURT: That's fine.

25 MS. MAINIGI: But my goal, Your Honor, is to

1 highlight Alberstons' views of some of the upcoming points
2 that the Court is going to consider, as well as preview some
3 of the testimony from the Alberstons witnesses.

4 Now, I'm going to cover about eight separate points,
5 and I may have a little bit of overlap with Mr. Wolf, but
6 they really are the key points from Albertsons' perspective,
7 especially as Your Honor considers the facts that you will
8 hear at trial, matched up against the law.

9 So point one, Your Honor -- obviously, this is going to
10 be a big focus because everybody's talking about it, and
11 that is prices.

12 And we submit to you, Your Honor, that the first and
13 most fundamental point here is that, if the merger is
14 allowed to go through, prices will go down at Albertsons
15 stores around the country, and I can say that with 100
16 percent certainty, day one.

17 Now, the FTC, of course, is taking the position that if
18 two big grocery stores, like Kroger and Albertson, combine,
19 that automatically means prices are going to go up, that
20 that's what history tells us.

21 But there are multiple reasons why that will not be the
22 case, Your Honor. Let me start with the first.

23 Kroger's prices are already lower than Albertsons'.
24 This is an undisputed fact that you will hear about at
25 trial.

1 So even if all Kroger did was lower Albertsons store
2 prices to Kroger levels, that would be a win for the
3 Albertsons consumer.

4 And as you already heard from Mr. Wolf, there are plans
5 underway, if the merger is allowed to go through, to do
6 that.

7 But those price reductions, Your Honor, and certainly
8 price reductions of that magnitude, are only going to happen
9 if the merger goes through. Albertsons cannot provide those
10 price reductions on its own, in the absence of a deal.

11 But the next reason, Your Honor, that prices will go
12 down is scale. The Walmarts and the Targets of the world
13 have a scale that Albertsons, and even Kroger alone, do not.

14 And one of the things that scale allows them to do is
15 to buy for less and thereby sell for less.

16 Let me give you a real world example, Your Honor, that
17 we deal with. In some of Albertsons' markets, we sell one
18 type of Kraft Mac & Cheese for \$3.49. In the same markets
19 Walmart sells the same Kraft Mac & Cheese for \$2.98.

20 Now, the idea that Walmart is selling a product for
21 less than Albertsons may not be surprising, Your Honor, but
22 this is surprising. The cost at which Albertsons can buy
23 the Mac & Cheese is higher than the price at which Walmart
24 can sell it.

25 Now, due to confidentiality reasons, Your Honor, I

1 can't necessarily reveal that price, but what I will
2 represent to the Court is that starts with a 3 and falls
3 between the price that Walmart sells it and Albertsons sells
4 it.

5 And that's true not just for Mac & Cheese but for
6 dozens, if not hundreds, of products.

7 So how does Walmart do that?

8 Scale. They do it with scale.

9 And the same thing with Costco. When Costco goes out
10 and buys Cheerios, it's buying for a much larger scale of
11 stores than Albertsons.

12 Costco buys more of those Cheerios in bulk at a lower
13 cost, and it can sell them to customers at better prices,
14 and that's a big part of what makes people want to go shop
15 at Costco and why Albertsons is losing more and more
16 business to them.

17 And of course the same is true with Amazon and others.

18 Right now Albertsons cannot compete with that type of
19 scale, but the merger will give the combined company the
20 scale to help better compete with Walmart, Costco, and
21 Amazon.

22 And that's a fact that this Court should take very
23 seriously when considering whether it would be in the public
24 interest to enjoin this merger.

25 Now, one point that the FTC wants to make is, well, how

1 can we guarantee that a combined Kroger will keep prices
2 low, that they won't shoot back up next year or the year
3 after, when nobody is looking? Because the FTC says,
4 Your Honor, that you have to assume -- assume that a
5 combined Kroger will raise prices even beyond where they are
6 today.

7 And the reason is -- Your Honor, the reason they won't
8 is survival, and obviously you've heard a bit of that from
9 Mr. Wolf. The combined company will not be able to survive
10 in this world if it raises prices, and the reasons for that
11 have everything to do with the changed competitive landscape
12 that you will hear about at trial.

13 Now, why does that matter, Your Honor?

14 Well, one -- one of the cases that the plaintiffs
15 actually cite again and again, and I heard it from my
16 colleagues, is *Brown Shoe*, and *Brown Shoe* says you need to
17 look at commercial realities. And to understand the effects
18 of the merger, the Court needs to understand and take into
19 account the commercial realities that Albertsons deals with
20 every day.

21 Now, I do think I heard the FTC say, "Well, we are
22 accounting for the Costcos, the Targets, the Whole Foods,
23 the Walmarts in our economic analysis," but they have not
24 accounted for those entities, Your Honor, in their
25 commercial realities, and those commercial realities show

1 that Walmart is not going to raise its prices. Costco is
2 not going to raise its prices. Amazon is not going to raise
3 its prices. And other important competitors, like Target
4 and Aldi, are not going to raise their prices.

5 And as these companies have told the world over and
6 over again, their strategy is to lower prices, not raise
7 them, and they've done so even with -- in the face of record
8 inflation over the last several years.

9 And so I'll just quickly run through a few of their
10 statements, but the first thing is a Costco earnings report
11 from 2022. They're championing the fact that we're always
12 trying to push more into lowering the prices.

13 And then there's a Target press release from May
14 announcing that we are lowering everyday regular prices on
15 5,000 frequently shopped items. And then a Walmart earnings
16 release, Your Honor, from just two weeks ago, saying that
17 there's been real progress made related to value or lowering
18 prices.

19 So this is not just a theory. Scale and low prices are
20 actually the business models of these companies with whom
21 Albertsons and Kroger compete.

22 And if they were going to raise prices, they would have
23 done it by now. But, instead, they fight not to do that.

24 So if supermarkets are going to survive in this
25 completely changed industry, they're not going to be able to

1 do it by raising prices. They're going to have to lower
2 prices and keep them down.

3 That leads me to my second point, Your Honor, which is
4 this: The traditional one-stop shopping supermarket is a
5 thing of the past.

6 Now, Mr. Wolf referred to a tectonic shift. I'm going
7 to refer to a seismic shift. But there has been a seismic
8 shift in the competitive landscape, which has magnified the
9 importance of the scale and the prices, and it's the whole
10 reason that Albertsons is here seeking a merger, Your Honor.

11 But before I get into the facts, I want to take a
12 little bit of a detour to talk about one of the key elements
13 that the plaintiffs have the burden of proving in this case,
14 and that is the relevant market.

15 And as you know, Your Honor, the FTC is claiming the
16 relevant market here is limited -- sometimes the FTC is
17 claiming that the relevant market here is limited to just
18 traditional supermarkets and supercenters, and that's
19 primarily based on their view that customers are still going
20 to go to one store to get most of their groceries for the
21 week.

22 But I want to draw Your Honor's attention to their
23 reply brief, the recent reply brief that the plaintiffs
24 filed, and they said something very telling in that reply
25 brief.

1 The relevant antitrust question, the FTC said, is for
2 those consumers who value a one-stop shop supermarket
3 experience, which companies offer reasonably interchangeable
4 substitutes for that purpose.

5 Now, Your Honor, I had to read that a few times to make
6 sure that I followed along, but what they seem to be saying
7 is that very small group of customers who might still want
8 to engage in one-stop shopping should be the only people you
9 look at when you decide whether this merger is good for the
10 whole rest of the country.

11 Who are these consumers who only get their groceries at
12 supermarkets and supercenters? The plaintiffs don't say,
13 Your Honor, because they haven't actually tried to prove
14 their market with any data about that tiny sliver of U.S.
15 consumers, and you won't hear their experts talk about
16 market shares in terms of consumers who want to one-stop
17 shop. You'll hear them talk about consumers as a whole.

18 But for an overwhelming number of U.S. consumers, the
19 world looks a whole lot different than it used to.

20 And let me turn to some of the facts that you will hear
21 from Albertsons' witnesses at trial. So there was a time,
22 Your Honor, when Albertsons thought of itself as a one-stop
23 shop neighborhood supermarket, where people went once a week
24 to buy all of their groceries. And it was certainly true
25 back then, but it was even true 20 or 30 years ago, but it

1 is not the reality today.

2 Today, people might go to Albertsons to get some of
3 what they need for the week, but then they're going to do
4 their grocery shopping -- but they're also going to do their
5 grocery shopping at Target at the same time that they might
6 go there to get school supplies for their kids or clothing.

7 And depending on where they live in the country,
8 instead of going to Target, they may go to Dollar General.
9 At some point they may make a Costco run, and then they
10 might stop at CVS on their way home in their neighborhood.

11 And then when they get home, they may realize they have
12 forgotten a few things, and so they'll hop on Amazon or
13 Instacart to order online.

14 And there's a phenomenon that this is called, Your
15 Honor. You're going to hear witnesses refer to this as
16 channel blurring. And that's referring to a phenomenon
17 where retailers, who traditionally did not offer groceries,
18 are increasingly entering and growing market share in the
19 grocery space.

20 And the reason that's happening, Your Honor, is because
21 the consumers -- the consumers are blurring the lines of
22 where they buy groceries.

23 The Wall Street Journal recently wrote about this
24 phenomenon just a few months ago, and the title of this
25 article says it all. The title is: The Era of One-Stop

1 Grocery Shopping is Over.

2 And this article, Your Honor, points out that the
3 average consumer bought groceries from over 20 different
4 retailers in the last year, and that number was up
5 23 percent from just four years ago.

6 Now, do we wish that were different? Yes. But this is
7 the reality that Albertsons faces every day. And that
8 seismic shift that's happened has only been magnified in the
9 last decade.

10 Your Honor, Albertsons' witnesses will pinpoint two
11 especially critical moments in the last decade, moments when
12 they've really felt the Earth move underneath their feet.

13 The first was October 2015, when Walmart announced
14 several billion dollars in price reductions throughout its
15 stores, including grocery; the second, Your Honor, was 2017,
16 when Amazon announced it was buying Whole Foods. And the
17 day that Amazon made that announcement, stock prices of
18 so-called traditional grocers plummeted. And why was that?
19 Because their space was being invaded.

20 Now, since that time, the retail giants have doubled
21 down on grocery, and they show no sign of slowing down.
22 They have made it clear to their shareholders and the market
23 that they view grocery as a lucrative investment.

24 And so, again, Your Honor, in earnings call after
25 earnings call you will see Walmart, Amazon, and even names

1 that you may not have heard that often, like Dollar General,
2 talk about the importance of grocery to their economic
3 future.

4 And here's Amazon's saying that grocery is one of our
5 fastest growing categories. Walmart telling investors that
6 customers came to them less frequently in the past. They're
7 now coming to them to shop more frequently. And Dollar
8 General talking about the fact -- Dollar General talking
9 about the fact that they're in the process of expanding
10 many, many stores to fresh.

11 And of course that's also true, Your Honor, for Costco
12 and Target and the other competitors we've mentioned.

13 But Walmart and Amazon and some of these others have
14 succeeded, in part, because they've had the enormous
15 advantage of national scale, and they leveraged that scale
16 to gain additional consumers through lower prices.

17 And now they're being joined by names of other
18 so-called nontraditional grocers that you just would not
19 expect to see.

20 A startling fact, Your Honor, that we will learn about
21 a trial is that 80 percent of the \$130 billion economic
22 profit generated in the grocery sector since 2020 is
23 attributable to four retailers: Amazon, Walmart, Costco,
24 and Dollar General.

25 None of these are who any of us would say was a

1 traditional grocer a few years ago. And two of the four --
2 Amazon and Dollar General -- are not even fully captured by
3 even the broadest market offered by the plaintiffs' expert
4 Dr. Hill. The large format market.

5 Now, Your Honor, let me pause on Dollar General, and
6 you might be surprised to see it here, because I was
7 certainly surprised to see it here, but their presence does
8 not surprise the people at Albertsons who have been watching
9 Dollar General's ascent for several years.

10 Dollar General has more than 19,000 stores, and they
11 are aggressively expanding to offer fresh produce. Already
12 over 3,000 of their stores carry fresh, and that number is
13 going up to 5,000 by the end of this year.

14 And, by the way, Your Honor, I just want to make clear
15 that Dollar General is different than Dollar Tree, who the
16 FTC is bringing to testify this week at trial.

17 Now, Your Honor, there are other new names on the
18 market as well. New names to many of us. Value grocery
19 retailers, like Aldi and Lidl, who are already two of the
20 biggest grocers worldwide, have exploded in the United
21 States in the last several years. And Aldi, in particular,
22 is becoming a big threat to the grocery industry.

23 20 years ago they only had 680 stores, and today they
24 have 2,800, and they're just getting bigger and bigger.

25 They recently acquired 500 stores from Winn-Dixie.

1 And in March of this year they announced that they're
2 going to invest another \$9 billion over the next five years
3 to open 800 new stores by the end of 2028, including in
4 states where Albertsons competes.

5 So today, Your Honor, these players dominate the
6 industry, and in significant part, it's because they
7 dominate on price. And the impact of all of these new
8 entrants and channel blurring is that the traditional
9 supermarkets are losing out to these large national and
10 value players, and the data supports this fact.

11 As you will hear at trial, Your Honor, 20-plus years
12 ago, in 2003, supermarket grocers were the primary choice
13 for 79 percent of consumers for their groceries, and today
14 that is down to 38 percent.

15 Now, you're going to hear, Your Honor, about all these
16 industry shifts from Lisa Kinney, who's Albertsons VP of
17 Customer and Market Intelligence, and she's going to tell
18 you that she jokingly sometimes gets called the "Chief
19 Reality Check Officer" at Albertsons because her job is to
20 tell everyone the truth on what's happening in the industry,
21 what the trends are, what consumers are shopping.

22 She's also going to talk about share of wallet, which
23 you heard about a bit from Mr. Wolf, and share of wallet,
24 just as a refresher, Your Honor, tries to encapsulate
25 basically the idea that for every dollar an Albertsons

1 customer spends on groceries, how much do they actually
2 spend at Albertsons?

3 And what Ms. Kinney will testify to, Your Honor, is
4 that Albertsons' own customers are spending almost \$0.88 out
5 of every dollar they have for groceries somewhere else,
6 somewhere other than the Albertsons.

7 So Albertsons is losing -- or the word is "leaking" --
8 88 percent of its customers grocery dollars to competitors.

9 And where is that 88 percent going? It's actually
10 going to many of the same retailers that we've been talking
11 about. The two biggest being Walmart and Costco. Albertson
12 leaks about 15 percent of their customer share of wallet to
13 Walmart and 12 percent to Costco. Kroger, on the other
14 hand, Your Honor, takes about seven percent of Albertsons'
15 share of wallet.

16 So when the FTC says that Kroger is our number one
17 competitor, that's not what the data shows.

18 Now, the FTC will be able to show you some
19 cherry-picked documents where we are monitoring Kroger's
20 price or going back and forth about Kroger pricing in some
21 way. There's going to be documents about that. But for
22 every document they show you that mentions Kroger, there are
23 five others that mention Walmart and Aldi and Costco and
24 Target.

25 And Albertsons' witnesses will tell you some of the

1 focus on Kroger is explained by the fact that for a long
2 time there was actually not readily available data on the
3 big competitors that we've been talking about. There was
4 not data available as to who was shopping at Costco, for
5 example.

6 Now, one of the ways, Your Honor, that the FTC responds
7 to what our witnesses have to say about the changed
8 competitive landscape is to say that a lot of the big
9 competitors that Albertsons now faces are not important.
10 Because even if Albertsons' customers go somewhere like a
11 Costco for some things, like toothpaste, they're still going
12 to just get about everything else from their neighborhood
13 supermarket.

14 And I believe one of the ways that Ms. Musser
15 illustrated that was the Gatorade/water example.

16 But Ms. Kinney is going to explain to you why that's
17 wrong. Her team has looked at this exact question, and she
18 calls it the toothpaste phenomenon. And here's what that
19 means: There was a time when Albertsons' customers might go
20 to Costco or Target or Dollar General to buy basic goods,
21 like toothpaste, toilet paper, at a lower price, but they
22 would return to Albertsons to buy their tomatoes, their
23 milk, and their deli meats. But what Ms. Kinney's team has
24 discovered is that when the customer goes to buy the
25 toothpaste or the toilet paper at the cheaper store, they

1 often end up staying and buying their tomatoes and
2 everything else there as well.

3 So the FTC may come in here with its maps and its
4 circles and its charts, but the commercial reality,
5 Your Honor, is that Albertsons' competitors are all of these
6 different retailers who are taking money out of Albertsons'
7 customers' wallets.

8 Now, the third key point, Your Honor, that I would like
9 you to understand through this trial and our witnesses is
10 that Albertsons explored other alternatives before we got to
11 this point.

12 We did not arrive at the idea of a merger lightly. We
13 made tremendous efforts to compete with all of these
14 competitors that I've been discussing and that Mr. Wolf
15 discussed before we arrived at the merger as our best
16 opportunity for long-term competitiveness.

17 And there's going to be an interesting dynamic at this
18 trial, which I think we've already seen, because at the same
19 time you'll be hearing from Albertsons' employees about how
20 difficult it has been to compete in this changing industry.
21 The FTC may talk about how great Albertsons is. They'll
22 take documents out of context and suggest Albertsons is
23 crushing it against Kroger, against Walmart, and has
24 successfully brought down prices.

25 Now, the evidence at trial, Your Honor, will be that

1 Albertsons has tried to lower the costs at which it buys
2 goods, and it has tried to lower the prices it charges
3 customers, and you're going to hear about various
4 initiatives that they've undertaken to do so, and these
5 initiatives were designed to lower costs and achieve what
6 they needed to achieve without making the kind of huge
7 structural change that comes with a merger.

8 And you'll hear from Albertsons' witnesses, Your Honor,
9 that those efforts, and others like them, have had success
10 around the margins. They've taken costs down, but a lot of
11 those costs, those saved costs, have been offset by rising
12 prices and other things.

13 And over the last five years, in particular, it has
14 become clear, Your Honor, that Albertsons cannot compete on
15 price with these giants that have true national scale.

16 Now, if you ask the people at Albertsons, "Do you want
17 to merge with Kroger?" And if you ask that question in a
18 vacuum, they would say, "No. Of course not."

19 Who would want to be the company being acquired? This
20 is a company that was founded in 1939 and still bears the
21 name of its founder, Joe Albertson, and some of their
22 banners have been around even longer. 160 years.

23 But if you can't even by the Kraft Mac & Cheese for the
24 price that Walmart sells it at, there's a limit to what
25 you're going to be able to do.

1 And so after taking a look at all of their options,
2 Albertsons reluctantly made clear to the market that it was
3 interested in strategic partnerships in 2022. And the
4 option that presented itself and that actually turned out to
5 make a lot of sense was Kroger, as the evidence will show.

6 And if you look at the map, Your Honor, Kroger is in a
7 lot of places where Albertsons isn't, and Albertsons is in a
8 lot of places where Kroger isn't. So by combining these two
9 companies, we'll not only get the scale of a much bigger
10 company but also a national footprint that is complementary.

11 Now, Your Honor, let me take a detour for a minute.
12 Because one thing you might wonder about this national
13 footprint point, which has been made by Mr. Wolf, and you'll
14 hear through this trial, is, "Well, if Albertsons can't
15 compete effectively without national scale, then how do some
16 of these regional supermarkets do it, like H-E-B in Texas or
17 Publix in Florida? How do they do it so well?"

18 And one of the most important differences for those
19 regional players, Your Honor, is density.

20 So if you spent any time in Texas, you might have
21 noticed that there's an H-E-B nearly at every corner, and
22 that density gives them the advantages in their supply chain
23 and distribution network that Albertsons, which is more
24 dispersed throughout the country, as you can see, just does
25 not have.

1 And one way to think about it, Your Honor, is that
2 Albertsons is too big to be an H-E-B but too small to be a
3 Walmart; but by combining with Kroger, Albertsons will be
4 able to get more of that density nationally so it can
5 compete better with all of these other national players who
6 already have the benefit of the national scale.

7 So, Your Honor, my fourth point is this: What does
8 Albertsons do? What does Albertsons look like if there is
9 no merger?

10 And this point goes directly to one of the issues
11 Your Honor must consider, whether issuing an injunction
12 would be in the public interest, and here it would not be in
13 the public interest, Your Honor, because Albertsons' backup
14 plan, if the merger were enjoined, would be worse for
15 consumers, worse for employees, and worse for competition in
16 the long-term.

17 You're going to hear at this trial, Your Honor, next
18 week from Albertsons CEO, Vivek Sankaran, who's here with us
19 today, and he'll be testifying next week, I believe. He
20 joined the company in 2019 to help tackle the challenges
21 that it was facing competitively.

22 And as you'll hear, he and Albertsons have done
23 everything they can to try to set this company up for
24 long-term success, but what they ultimately realized is that
25 the merger is best thing for the company, its customers, and

1 its employees.

2 And he'll explain to you that if this merger doesn't
3 happen, of course the company will regroup and try to
4 compete and deliver value to its customers, associates, and
5 shareholders, and he and other Albertsons witnesses will
6 tell you, "We will do our best, and the next two to four
7 years will be okay, but there are limits to what we can
8 accomplish without the scale."

9 And he'll tell you that it will be difficult to compete
10 against the Goliaths who do have scale, like Walmart and
11 Costco, Target, and Amazon. These companies are always
12 going to have an incredible advantage on reducing costs and
13 buying at scale and, therefore, reducing prices for
14 consumers.

15 Mr. Sankaran will also tell you that, because of the
16 seismic shifts in the industry, if a go-it-alone Albertsons
17 is going to have a chance of competing effectively,
18 Your Honor, it will need to fundamentally change its cost
19 structure, and that could mean taking a hard look at a few
20 different options. It could mean layoffs. It could include
21 closing stores. It may include exiting certain markets
22 altogether. These are the kind of things that are on the
23 table if the merger does not go through, and we recognize as
24 a company the disruption that happens at the community level
25 and the impact on our customers, our employees, their

1 families, and the broader community with these kinds of
2 changes, and we hope we don't have to get there.

3 And, of course, if somehow Albertsons does not succeed
4 in those kind of measures, then it likely -- the likelihood
5 is that it is a candidate for a sale to somebody else. And
6 that's why, Mr. Sankaran will tell you, that it will be an
7 incredible loss for American consumers, Albertsons
8 employees, and the communities that Albertsons serves if
9 this merger doesn't go through.

10 You're going to hear his enthusiasm for the merger,
11 because after spending years working hard to reduce costs so
12 that Albertsons can deliver price reductions to customers
13 and higher wages to its employees, he will tell you that
14 this merger will make those changes possible by bringing
15 together two complementary companies that have the combined
16 wherewithal to do what Albertsons cannot do alone.

17 So let me shift gears again, Your Honor, for my fifth
18 and sixth points, and let me touch briefly on a couple of
19 the benefits of the merger that you'll hear about at trial
20 that I haven't talked about yet. Obviously, we've talked
21 about price reductions.

22 But as you heard from Mr. Wolf, the merger will also
23 bring benefits in terms of investments in employee wages and
24 store improvements, that Albertsons is not going to be able
25 to achieve but for the merger, and let me take those one at

1 a time.

2 So the first of these is the impact on our store
3 associates and their wages. Kroger has pledged that it
4 won't close any stores or distribution centers or
5 manufacturing facilities or lay off any frontline associates
6 as a result of the merger. And on top of that, it has
7 pledged that it will invest in employee wages and benefits.
8 Albertsons cannot make those same commitments on its own.

9 And, obviously, there are other options that may be on
10 the table if the merger does not go through.

11 Now, in addition to those points, Mr. Sankaran is going
12 to come in and add another layer to this conversation
13 because he's going to talk about the fact that Albertsons
14 and Kroger are both large union employers.

15 Now, this matters, obviously, Your Honor, from an
16 antitrust perspective, because the plaintiffs have tried to
17 suggest that one reason Your Honor should enjoin this merger
18 is because it's supposedly going to hurt union employees by
19 causing unions to lose their leverage. That's their harm in
20 the labor market theory.

21 But the reality is the opposite, Your Honor. This
22 merger is going to protect union jobs and make two of the
23 only handful of union grocery store employers stronger.
24 There's no way plaintiffs can show harm in a labor market.
25 And that will be discussed by Albertsons' witnesses at

1 trial.

2 But you know who does not have union labor or very
3 little union labor? Walmart, Amazon, and Costco. And
4 that's why we struggle to understand any union opposition to
5 this merger, because, in fact, this merger presents an
6 opportunity to reverse the multi-decade shift that we've
7 been seeing to shrinking union jobs.

8 The other point, Your Honor, my sixth point, is that,
9 if the merger does go through, Kroger is going to invest
10 over a billion dollars in store improvements.

11 Now, store improvements may not sound like a big deal,
12 but they are a win-win-win for the customers and the
13 employees and the communities around the stores. And we all
14 know that it's -- to be able to walk into a grocery store
15 with a nice layout, a nice setup, clean, well-stocked
16 product displays, is a pleasure, and that is what we are
17 trying to achieve with the merger. It matters to the
18 consumers who shop there. It matters to the associates who
19 work there, and it matters to the neighbors who live there.

20 And it's just one more benefit, Your Honor, that
21 frankly is not going to be achievable without the merger.

22 Seventh, Your Honor, I want to shift gears to the
23 divestiture and talk about why C&S is set up for success,
24 and Albertsons has a perspective on the divestitures because
25 most of the stores that would be going as part of the

1 divestiture are Albertsons' stores, and, of course, the
2 people who work there are our people.

3 The plaintiffs are trying to claim that C&S will fail
4 and it does not know how to operate stores, and they make
5 three basic points in a variety of ways.

6 Let me try to take some of those points on right now,
7 Your Honor.

8 One of the points that we've heard made by the FTC, and
9 we think they'll continue making, is that 579 stores, the
10 number of stores being divested, is not enough for C&S to
11 make a go of it, that that is not enough scale. But what
12 the FTC is forgetting, Your Honor, and that you will learn
13 about at trial, is that C&S has something that neither
14 Kroger nor Albertsons has right now. It has national scale.

15 And specifically what it has is a distribution network
16 that services 7,500 stores nationwide, and what that means
17 is when those stores want frozen food or cereal or some
18 other product category, C&S is the one that acquires it and
19 C&S is the one that puts it in the store.

20 Now, by supporting 7,500 grocery stores, C&S is
21 actually bigger than Kroger and Albertsons combined from
22 both a distribution standpoint and a buying standpoint right
23 now.

24 And Mr. Sankaran will tell you he wishes he had C&S's
25 supply chain scale and distribution power.

1 And you'll learn at this trial, Your Honor, that there
2 are times when the price at which C&S can get a product to
3 our store is cheaper than Albertsons can get it there by
4 itself.

5 Now, the next thing, Your Honor, the FTC will say is
6 that C&S isn't getting the right assets, as part of this
7 merger, to be competitive, and that is incorrect also.

8 Let me run through briefly some of the significant
9 assets C&S is getting from Albertsons, and of course they'll
10 be discussed at trial.

11 From Albertsons alone, they are getting ownership of
12 our Haggen and Carr banners and exclusive perpetual licenses
13 to our Albertsons and Safeway banners in certain states,
14 Your Honor.

15 And this is important because these are names that
16 customers know and have positive associations with today,
17 and C&S will be able to use those banners to retain and grow
18 their customers.

19 They're getting ownership of or licenses to a whole
20 bunch of private label brands, Your Honor, with loyal
21 followings. They're getting Open Nature, Signature Select,
22 and O Organics, and you're going to hear about those at
23 trial. And then there's the tech stack that C&S is getting
24 from Albertsons.

25 And at trial, Albertsons' employees will testify about

1 the plans they've been executing to ensure that C&S is ready
2 on day one from a technology standpoint, and that includes
3 giving C&S a clone of Albertsons IT system that will allow
4 all of the divested stores to run on the same system that
5 the Albertsons stores run on today.

6 Now, Your Honor, as far as people resources, C&S is
7 getting all of the frontline employees of Albertsons stores
8 and distribution centers that are being divested. So what
9 that means is that all of the same people who are running
10 those stores, the same people you see at the checkout line
11 the day before the divestiture will be there the day after
12 the divestiture also.

13 C&S is also getting, as Your Honor heard, Susan Morris,
14 who is currently Albertsons' Chief Operating Officer, and
15 has signed on to become CEO of C&S retail if the divestiture
16 happens, and Ms. Morris is here with us today.

17 Ms. Morris has spent her entire career, more than 39
18 years, in the retail grocery industry, and almost all of
19 that time has been at Albertsons. She's worked through
20 multiple grocery store mergers, and she's uniquely qualified
21 to help C&S grow and thrive because she has done exactly
22 that with Albertsons previously.

23 In 2010, Your Honor, Albertsons was a 200-store
24 company, and in the span of five years, Ms. Morris has
25 helped it grow into a 2,000-store company. And she's

1 already spent months conferring with C&S and planning for
2 how to be ready on day one.

3 And she won't go there alone. Many of the senior
4 leadership who are running the divisions Ms. Morris oversees
5 now would come with her to C&S in the event of a -- of a
6 divestiture.

7 Now, Your Honor, I think we've already heard the FTC
8 begin to focus on something called the Haggen divestiture,
9 which was associated with the Safeway merger. They're going
10 to want to characterize that as a failure and say that this
11 divestiture will be Haggen 2.0, but you are going to hear
12 from Albertsons' witnesses that this divestiture and the
13 Haggen are nowhere near the same.

14 Now, the biggest issue with that divestiture,
15 Your Honor, was that Haggen bought grocery stores, but the
16 people who are ultimately calling the shots and running the
17 stores were not grocers.

18 So they made a number of mistakes in terms of
19 rebannered, now they approached the supply chain, and how
20 they ran the business; but that's not what we have here with
21 Ms. Morris and the talented people that she's bringing with
22 her from Albertsons, if this divestiture goes through, who
23 are going to apply their decades of industry knowledge and
24 experience to help make C&S a success.

25 I think that there were some reference by Ms. Hall to

1 rebannered and -- and abrupt rebannered, and Ms. Morris
2 will discuss the concept of rebannered and the different
3 ways, for example, that you can mitigate a change of name,
4 and she's got a lot of ideas as to how to do that; but, more
5 importantly, she's got the experience in already doing that.

6 Your Honor, for my final point, I want to briefly
7 address the stakes involved and why time is of the essence.

8 I know we heard from the FTC that it was not; but,
9 respectfully, we disagree.

10 The FTC is going to continue to try to tell you that
11 this whole trial is just a prelude to the main event, their
12 administrative hearing, and that may be how the FTC would
13 like the world to be; but the reality is, Your Honor, that
14 the outcome of this hearing is going to most certainly be
15 dispositive of whether this merger goes through or not.

16 Mergers are fragile things, and what you decide is
17 going to determine what happens to these two companies.

18 Now, the plaintiffs will also say to the Court that you
19 can just freeze things in time, preserve the status quo, by
20 granting the injunction; but as you will hear at trial,
21 Your Honor, the status quo is just not going to be an option
22 for Albertsons. Change is coming one way or another for
23 this company, and it's for that reason, Your Honor, why
24 we're hoping, not just for a timely decision, but also a
25 decision that allows this merger to bring the benefits that

1 I've described to customers, employees, and the communities.

2 Thank you very much for your time, Your Honor.

3 THE COURT: Thank you. So we're going to take a
4 short recess. I would encourage counsel to check in so
5 they'll know where they are timewise, and we'll start up
6 again at 1:00. It's going to be a quick lunch.

7 MS. MAINIGI: Thank you, Your Honor.

8 (Morning session concluded at 12:38 PM.)

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C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 1 - AM Session

August 26, 2024

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

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

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 8/26/2024
CSR Expiration Date: 9/30/2026

<p>DEPUTY COURTROOM CLERK: [2] 7/4 82/21 MR. ANDERSON: [16] 8/11 11/9 11/16 11/21 12/1 12/5 12/11 12/19 13/13 13/16 16/10 17/15 17/18 17/20 17/24 18/14 MR. DICKINSON: [1] 8/7 MR. HERRERA: [1] 8/17 MR. KAYSER: [1] 8/12 MR. MORIARTY: [1] 10/10 MR. NORD: [1] 8/15 MR. OBARO: [3] 9/20 13/19 13/21 MR. PAI: [1] 8/9 MR. PERRY: [8] 9/17 22/4 22/13 22/20 22/24 30/1 30/22 31/1 MR. PODOLL: [7] 14/7 14/15 15/4 15/8 15/19 17/1 17/14 MR. TUCKER: [1] 8/22 MR. WARREN: [1] 9/3 MR. WOLF: [13] 9/8 9/14 9/19 9/22 18/11 32/12 82/14 82/19 82/24 83/2 83/5 101/22 101/25 MR. YOUNG: [1] 8/20 MS. GORDON: [1] 9/1 MS. HALL: [20] 8/5 18/17 19/3 19/12 19/15 19/18 20/8 20/12 21/16 21/18 21/22 22/1 25/16 25/18 25/25 26/12 26/15 26/17 31/9 66/3 MS. HESSE: [10] 22/25 23/2 24/6 24/11 25/2 25/4 25/6 25/9 25/23 28/14 MS. MAINIGI: [12] 9/24 10/5 10/8 10/12 10/16 16/1 32/13 123/13 123/20 123/22 123/25 151/7 MS. MUSSER: [8] 8/1 11/4 32/11 32/16 32/20 32/24 33/3 33/13 MS. STEWART: [1] 123/15 MS. TORRES PAEZ: [1] 8/24 MS. WEBER: [1] 9/6 THE COURT: [83]</p>	<p>\$1.35 [1] 96/12 \$100 [1] 113/22 \$125 [1] 113/18 \$130 [1] 133/21 \$2.98 [1] 125/19 \$21,000 [1] 97/18 \$220 [1] 37/11 \$247 [1] 89/5 \$25 [2] 34/21 89/15 \$3.49 [1] 125/18 \$5 [1] 113/9 \$70 [1] 36/4 \$73 [1] 57/19 \$9 [1] 135/2 ' 'all' [1] 68/20 . .5 [1] 64/10 / /s/Jill [1] 152/15 0 00347 [1] 7/8 0346 [1] 152/17 1 1,002 [1] 70/9 1,472 [1] 58/2 1,513 [3] 117/23 118/5 118/7 1,700 [1] 83/12 1,725 [1] 37/5 1,922 [1] 57/17 1.1 [1] 113/22 1.2 [1] 97/22 1.8 [1] 113/18 1/75th [1] 64/9 10 [5] 84/12 85/2 85/3 88/14 91/13 10-K [1] 41/7 10-Ks [1] 41/11 100 [2] 103/22 124/15 100 million [2] 104/12 104/15 100 percent [1] 103/23 100,000 [1] 38/8 1000 [1] 5/20 1014 [1] 4/17 10153 [1] 4/8 107 [1] 39/6 107-year-old [1] 85/21 109 [1] 3/24</p>	<p>10th [1] 2/22 110 [1] 72/10 11000 [1] 2/18 115 [1] 3/3 1162 [1] 3/20 12 [4] 85/2 85/3 99/18 136/13 121 [2] 3/17 5/3 1217 [1] 27/11 1225 [1] 27/11 128 [1] 89/15 12:38 [1] 151/8 13 [3] 76/23 79/18 79/18 13th [1] 32/8 15 [1] 136/12 15-minute [1] 82/18 160 [1] 139/22 162 [1] 27/16 163 [1] 27/4 168 [1] 27/16 18 [1] 99/18 180 [1] 93/7 1883 [1] 86/5 19,000 [1] 134/10 1918 [1] 92/19 1939 [1] 139/20 1:00 [1] 151/6 1st [1] 35/22 2 2,000-store [1] 148/25 2,200 [3] 37/4 37/5 90/17 2,257 [1] 37/1 2,700 [2] 37/1 86/9 2,800 [1] 134/24 2.0 [1] 149/11 20 [7] 85/3 85/13 93/6 113/8 130/25 132/3 134/23 20-plus [1] 135/11 200 [3] 3/6 93/5 93/6 200-store [1] 148/23 2000 [1] 57/5 20001 [2] 2/22 4/12 2001 [1] 4/14 20024 [2] 2/5 5/10 2003 [7] 89/1 89/4 89/13 89/15 89/18 89/22 135/12 20036 [1] 4/14 2005 [1] 27/12 2006 [1] 113/12 201 [1] 4/5 2010 [1] 148/23 2014 [1] 113/17</p>
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<p>4</p> <p>4,000 [2] 37/9 37/9 4,500 [1] 94/5</p>	<p>6</p> <p>6.5 billion [1] 88/12 60 [1] 39/1 60 percent [2] 70/25 89/3 60,000 [3] 94/23 99/25 103/3 600 [5] 2/9 4/14 83/14 89/20 94/5 601 [1] 4/11 60603 [1] 3/3 63 billion [1] 89/4 66 [1] 37/9 669 [1] 39/8 680 [2] 5/9 134/23 693 [1] 118/5 6th [2] 2/22 26/18</p> <p>7</p> <p>7,000 [1] 19/13 7,500 [8] 85/22 92/24 94/5 98/8 98/22 99/3 146/16 146/20 7.7 [1] 30/12 70 percent [1] 120/11 700 [1] 3/17 710,000 [2] 34/15 37/12 75th [1] 64/9 760 [1] 4/2 767 [1] 4/7 79 percent [4] 42/25 43/3 56/18 135/13 7th [1] 2/5</p>	<p>A</p> <p>ability [6] 17/12 21/23 46/19 62/11 71/19 82/10 able [26] 7/20 11/7 11/22 13/4 23/18 29/4 29/16 32/4 34/17 36/7 59/2 60/2 63/19 66/15 88/11 93/14 118/23 121/25 127/9 128/25 136/18 139/25 141/4 143/24 145/14 147/17 about [144] above [4] 45/5 45/22 117/25 152/10 above-entitled [1] 152/10 abrupt [1] 150/1 absence [1] 125/10 absent [3] 43/15 46/17 61/19 absolute [1] 81/8 absolutely [4] 8/4 19/17 21/25 32/19</p>

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