IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION, et al., Plaintiffs, v. THE KROGER COMPANY and ALBERTSONS COMPANIES, INC., Defendants.	Case No. 3:24-cv-00347-AN September 17, 2024 Portland, Oregon

PRELIMINARY INJUNCTION HEARING

DAY 15 - PLAINTIFFS' CLOSING ARGUMENT

BEFORE THE HONORABLE ADRIENNE NELSON

UNITED STATES DISTRICT COURT JUDGE

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TRANSCRIPT OF PROCEEDINGS

(September 17, 2024)

(In open court:)

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

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

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

THE COURT: Yes.

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

That's acceptable. Absolutely.

MR. WOLF: Thank you, Your Honor.

THE COURT: Okay.

MS. MUSSER: Good morning, Your Honor.

THE COURT: Good morning.

MS. MUSSER: May I proceed?

THE COURT: Yes, you may.

PLAINTIFFS' CLOSING ARGUMENT

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

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

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

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

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

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

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

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

Now, under the Clayton Act, courts analyze mergers

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

Your Honor, we have shown four.

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

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

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

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

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

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

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

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

But let's start first with the law.

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

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

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

submarket within that broader market.

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

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

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

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

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

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

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

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

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

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

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

Here, that's exactly what the evidence shows.

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

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

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

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

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

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

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

And because of these differences, other store formats

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

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

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

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

So, too, with club stores.

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

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

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

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

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

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

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

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

Turning first to that first factor: How supermarkets price.

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

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

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

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

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

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

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

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

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

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

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

course evidence supporting the geographic markets here are local.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

produce she was looking for.

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

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

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

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

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

purchased at either supermarkets or large-format markets.

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

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

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

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

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

In the first instance, this is belied by the

ordinary-course documents.

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

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

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

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

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

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

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

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

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

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

And defendants have not done that.

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

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

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

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

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

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

percent in cost.

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

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

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

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

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

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

competition.

So let's start first with nonprice competition.

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

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

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

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

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

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

Kroger, similarly, competes with Albertsons on price.

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

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

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

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

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

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

As Mr. McMullen explained, division presidents are most

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

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

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

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

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

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

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

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

But, Your Honor, neither argument prevails.

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

First, turning to defendants' arguments regarding Walmart.

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

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

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

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

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

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

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

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

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

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

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

between Kroger and Albertsons meaningless.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of benefits.

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

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

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

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

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

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

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

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

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

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

Defendants have done neither.

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

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

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

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

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

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

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

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

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

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

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

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

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

I'll give my colleague a minute.

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

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

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

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

MS. HALL: Good morning, Your Honor.

THE COURT: Good morning.

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

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

For that reason alone, the Court should enjoin this

merger.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

year.

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

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

First, banners.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

makes Kroger's retail media program so valuable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In markets like Corvallis, where Kroger will have over

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

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

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

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

label brands.

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

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

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

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

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

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

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

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

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

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

Kroger as we speak to get strong leaders."

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

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

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

This is private screens only.

Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

pre-divestiture levels until year 11."

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

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

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

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

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

member have discussed selling or closing the divested stores.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Kroger's acquisition of Albertsons should be enjoined.

Plaintiffs reserve the remainder of our time for rebuttal.

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

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

(Recess taken.)

C E R T I F I C A T E

Federal Trade Commission v. Kroger, et al.

3:24-cv-00347-AN

Preliminary Injunction Hearing - Day 15

Plaintiffs' Closing Argument

September 17, 2024

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

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

Official Court Reporter
Oregon CSR No. 98-0346

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