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' REBUTTAL ARGUMENT

BEFORE THE HONORABLE ADRIENNE NELSON

UNITED STATES DISTRICT COURT JUDGE

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TRANSCRIPT OF PROCEEDINGS

(September 17, 2024)

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Please be seated.

MS. MUSSER: Thank you, Your Honor.

PLAINTIFFS' REBUTTAL ARGUMENT

MS. MUSSER: So I don't have time to address all of my colleague on the other side's remarks, so I'm just going to pick a few, in the hopes to make this as efficient as possible. But I want to start on some arguments that could benefit from some clarity -- clarification regarding what the facts are, the law is, and what the plaintiffs' position is.

Once those smokes claim -- once that smoke is cleared on those claims, an analysis shows that many of defendants' arguments are quite meritless.

So starting, first, with one-stop shop, both Mr. Wolf and Ms. Mainigi mentioned that in their closing remarks, and there seems to be some confusion, so I want to make sure that this Court is completely clear.

First, I want to start with when one-stop shop was first mentioned in the case, and it's the day this complaint was filed. Because as I quote on paragraph 44 of

plaintiffs' complaint, supermarkets offer customers convenient one-stop shopping for food and grocery producers, which, in Kroger's words, is a simpler and more convenient alternative to multiple shopping trips. That has been part of this case and a description of plaintiffs' market since the day the complaint was filed.

I also want to address what a one-stop shop means.

One-stop shopping doesn't mean that customers only go to one-stop shop, rather, but as the witnesses explain, that when customers want that one-stop shopping experience, they are able to fulfill it at a supermarket.

Defendants also persist in ignoring the fact that plaintiffs account for Walmart -- Walmart, Target, Costco, and Amazon brick-and-mortar stores in various product markets.

Again, as I mentioned in my opening remarks, but to make sure it's completely clear, our supermarket product market includes Walmart, and it includes Target, and it includes Amazon Fresh.

Our large-format market includes Costco. It also includes Aldi and Lidl, who you heard mention of during their closing remarks.

Turning next to geographic market.

Again, I want to make sure the record is clear here. Dr. Hill didn't just look at that circle analysis that you

heard about during my colleagues' closing remarks, but rather he also looked where markets draw customers from.

And if these markets are a customer of a particular Kroger or Albertsons store, is willing to drive farther, that store is included. So if a customer says, and I quote, "Go to heck. I'm going to go farther away from Kroger and Albertsons," that would be included in that customer base analysis.

I also want to address some remarks about how our market share and market definition doesn't include the full ambit of competition.

First, it doesn't need to. Because what a market is designed to look at is whether there is sufficient inclusion within that market such that a price or increase or quality decrease isn't profitable.

And how do we know plaintiffs' market does that? Because that's what Dr. Hill's diversion analysis does. It asks that question. Where will consumers go if prices rise? And the answer isn't, and it doesn't need to be, that no customers will go to Trader Joe's, in the case of the supermarket market, just that there's an insufficient number that would go to offset the price increase.

And I also want to examine some attempts to manufacture dissension or some sort of discord between Dr. Hill's analysis and plaintiffs' allegations. As I explained

earlier, plaintiffs have defined supermarkets as a proposed product market, and the tool that lawyers and the Court has to look at the contours of that market is the *Brown Shoe* practical indicia that I walked through extensively, and that looks at what type of shopping experience do supermarkets offer, and is it sufficiently unique that other alternatives aren't as good an option?

So, too, did Dr. Hill analyze the same question just from an economist's perspective. And what he looked at, and I'm quoting from his testimony, is that when customers shop at Kroger and Albertsons, what do they view as reasonable alternatives? And to do that, he applied the hypothetical monopolist test.

These are two ways at giving -- getting at the same question and both are well-established under decades of longstanding legal precedent.

I also want to try and -- they also try to inject confusion and inconsistency in the two markets. I talked about, in my opening remarks, why our position is legally consistent with decades' worth of precedent, but I also want to nip in the bud any allegations that somehow their due process rights have been in any way implicated by the pleading in this case.

In our complaint, we allege both that one-stop shop, as I spoke to a minute ago, as well as to say that -- and,

again, I quote -- non-supermarket retail formats described above are included in the relevant product market. The proposed acquisition is still presumptively unlawful in most of the identified geographic markets.

This is at paragraph 57.

In other words, defendants have not only been on notice of plaintiffs' supermarket claims and how one-stop shopping relates to that, but also the large-format claims.

Now, in response to allegations that Dr. Hill somehow changed that analysis or its in contention, what Dr. Hill did when both analyzing how customers behave as well as looking at different format types, is respond to defendants' own arguments. Defendants, in their answer, asserted that our market may be too narrow.

In response, defendants' expert analyzed that.

Also in response and during the appropriate contours of discovery, Dr. Hill analyzed critiques by Dr. Israel. In those critiques, he provided a full analysis on time that every defendant in this -- in this litigation had an -- an opportunity to inquire into and to depose.

There has been no due process violations of any sort in this case.

And putting that aside, it's all just a bit beside the point. Because while plaintiffs have put on proof of their supermarket throughout this hearing, plaintiffs' prima facie

case does not rest on that. Rather, to the extent defendants are correct, and some of these other store formats, such as club stores or limited retail stores, are, indeed, in our large -- are in the market, our large-format market accounts for this.

And as a finder of fact, this Court, as explained in *Evonik* and *Rockwell* and *FTC v. RAG-Stiftung*, has the ability to find its own product market, whether that's a supermarket, product market, or the large-format market.

And, finally, we heard a lot about the benefits of this transaction and a bit about *Baker Hughes*, but I think it's appropriate and it's important to turn back to the *Baker Hughes* burden-shifting framework to look at where in the analysis those claims are relevant and what the standard is.

As *Baker Hughes* explains, you only get to allegations of benefit after harm has occurred, and those are -- those allegations have to be broken into strict categories. There's a high burden, whether you're looking at divestiture, whether you're looking at efficiencies claims, or whether you're looking at any other claims that might go towards rebutting the plaintiffs' market.

And the reason for that is because you only get to that step after harm has been found.

Now, turning specifically to the pro-competitive

benefits, those pro-competitive benefits, as I explained, a majority of them are not legally recognized.

I already spoke to the revenue benefits, and I already spoke to the benefits that are out of market that were referenced repeatedly through my colleagues' closing remarks.

But I want to address one more, and that's these price investments. And that is that these price investments are not cognizable efficiencies. Mr. Aitken admitted that. That should not be disputed in this matter, and those are not -- should not be part of that efficiencies analysis.

Now, turning over to the evidence you heard from defendants versus the evidence you've heard from plaintiffs. In this closing -- in their closing argument, defendants ask this Court to believe executives' view of competition and the impact of that transaction, but defendants' curated evidence presented at trial should be viewed with skepticism for three main reasons.

First, defendants' evidence presents only a picture of the complete landscape here, and that's due to three things. First, their decision to shield much of their post-merger discussions regarding the divestiture and privilege; second, the routine failure to preserve text messages depriving the Court with a full scope of ordinary course evidence regarding this transaction; and, third, by only selectively

producing post-discovery materials which impair the ability of plaintiffs to fully cross defense experts.

Second, in large part, defendants couple their executives' testimony with manufactured demonstratives. We just saw this in closing where defendants are relying on newspaper articles instead of ordinary-course documents.

As the court in *Chicago Bridge & Iron* explained, it is just this type of evidence that should be viewed with skepticism.

And third, even, considering the ordinary-course evidence that's presented, that evidence does not predict or contradict plaintiffs' claims of systemic competition in communities throughout this country and does not contradict plaintiffs' claims that this merger will impact that competition.

First, starting something with a demonstrative that we'd seen in closing today and we also saw in testimony throughout this hearing, and that's the share of wallet analysis.

As Dr. Hill explained, that share of wallet analysis, which is aggregated on a nationwide level, doesn't say much, if anything, about local competition.

And as Ms. Kinney admitted on the stand, defendants presented this impact skips over local markets and was manufactured, in part, by the attorneys in this case.

Second, the MULO+ or other tracking metric. These metrics, likewise, are not probative.

Defendants have shown that companies receive this; but, respectfully, that doesn't really say much, because it's not which data you receive, it's also how you use it.

And company after company has explained that, when supermarkets are looking at what other -- how to price, how to compete, that the key competitor -- or at least a key competitor are other supermarkets, including Walmart, which should be without dispute, but as well as other supermarkets such as, for Kroger, Albertsons and, for Albertsons, Kroger. That's why that extensive evidence of head-to-head competition is so important.

And just a moment on their experts.

First, you heard the testimony of Mr. Gokhale, who talked about certain efficiencies, but the same process that he used to assess efficiencies here has been rejected by the *Aetna* court.

Second, you also heard the testimony of Dr. Israel, but Dr. Israel has been critiqued his methodology and other circumstances in other courts.

And, third, you heard the testimony of Dr. Galante. Dr. Galante, however, does not have the -- is not a supermarket expert, and his testimony was largely focused on whether this was a good deal model, but whether or not there

is a good deal model says nothing about the risk of the divestiture in this case.

In contrast, defendants' ordinary-course evidence of competition shows that Kroger and Albertsons are responding to each other across various service and price competition.

They also show representations to shareholders, saying that they are their number one and number two competitors.

And, finally, that extensive evidence of ordinary-course documents, both by the parties and by third parties, is supported by testimony and analysis of Dr. Hill.

Now, I want to pause a minute, because during my colleagues' closing remarks, there was an empty chair with allegations that there was no customers who had been before this Court; but that, in part, is the purpose of an economic analysis. Economists look at the impact of customers of this merger, and that's what Dr. Hill did.

Specifically, when looking at customer base shares, he looked at customer shopping patterns and what customers do in order to be the voice of the consumers in this hearing.

So, respectfully, I disagree with my colleagues' contentions because those voices were certainly heard, and it's those voices that resonate in the markets that Dr. Hill found have a substantial or reasonable probability of substantially lessening competition.

And, finally, one final point on the topic of missing

witnesses. You've heard a lot from defendants about what their consultants did, what Mr. Cohen did, and what the investors did; but, respectfully, we haven't seen those people testifying, despite being deponents in this case and despite documents being collected from those folks here today in this hearing.

Similarly, you've heard contentions that the FTC somehow hadn't put on the testimony regarding Haggen, but it's important to understand who the former CEO of Mr. Haggen works for. It's not the FTC. It's Albertsons.

I want to turn really briefly to margins, and I won't belabor this point, but as this Court has heard, this has been a key dispute between Dr. Israel and Dr. Hill, and I want to provide the Court with both a grounding as to why this matters and then the three reasons that support Dr. Hill's assessment of margins.

First, these margins are important here because the incremental margin earned by a -- a firm and making an additional sale is an important input to the hypothetical monopolist test, the GUPPI, and the CMCR analysis. And the reason it's important is because the more margin or profit Kroger will make on a sale, the greater its post-merger incentives to raise prices.

Now, Dr. Hill used the parties' ordinary course gross margins, while defendants use margins obtained from Kroger's

corporate finance committee.

Dr. Hill's margins are correct for three reasons: First, Dr. Hill uses the margins that defendants use when making pricing decisions, and he uses the margins defendants use when reporting to shareholders.

In contrast, Dr. Israel's margins look at the corporate finance group, but this corporate finance group isn't making pricing decisions in the short term; rather, they're making capital investments in the long term, which is a fundamentally different type of analysis.

Second, Dr. Israel's position in this case is notably inconsistent with his prior testimony. In *Sysco*, Dr. Israel recommended, "Look to the parties. Look to their documents for the margins they referred to. I particularly think it makes sense to look at their financial documents, like when they report to the SEC, because they need to report how they analyze their business and to look at documents when they talk about pricing pressures and pricing documents."

And he further testified that the margin he cared about in *Sysco* was selling one more unit.

That's exactly what Dr. Hill looked at.

Third, Dr. Hill also conducted two separate econometric -- or economic analyses called "event studies" to demonstrate that Dr. Israel's margins were too low when compared to what happened in the ordinary course of

business.

The first is the King Soopers event study, and the second is Dr. Hill's correction to Dr. Israel's QFC store closure event. Both of which support Dr. Hill's use of margins and show that Dr. Israel's use is incorrect.

I want to turn back to efficiencies very quickly.

At bottom, the majority of defendants' efficiencies claim rests on a "both" -- "best of both" analysis. That starts with those consultants we haven't heard from, identification of certain suppliers, and assumes that post-merger the company will get the best of both.

Then defendants again assume that post acquisition, defendants will be able to achieve a certain percentage of those efficiencies. But in *Aetna* and as this Court heard during the hearing, that that court rejected this exact analysis.

There, a third-party consultant, PwC, reviewed the underlying provider contracts and interviewed a number of Aetna and Humana field managers about the prospects for switching, but the court criticized this same expert, Mr. Gokhale, for failing to wrestle with those conclusions. For instance, by examining the underlying provider contracts. Instead, he noted that PwC took a very large haircut to the total savings, which is exactly the assumption he makes here and exactly the assumption that was

criticized in *Aetna*.

The Court rejected Dr. Gokhale's analysis, explaining that, without a more robust analysis which the companies have not provided for, the Court cannot conclude that these network efficiencies are verifiable and likely to be passed on to consumers. This Court should similarly reject Mr. Gokhale's same analysis here, which, again, suffers from the same three fundamental flaws. It assumes "best of both" without any support. It also assumes -- it also ignores concerns of market participants, such as Smucker's. And with respect to my colleague, I don't -- Mr. Crane's testimony did not cast this into doubt at all; rather, he explained that, at least under Smucker's pricing programs, there was no reason to think that post-merger that one company would get a better price from the other.

And, third, instead of analyze these contracts or otherwise digging into the analysis, Mr. Gokhale did the exact same thing in *Aetna*, which is that he assumed "best of both" pricing would prevail without assessing whether the reduction was possible and certainly without assessing whether it could be done post merger.

Like this court -- like the Aetna court, plaintiffs urge this Court to reject Mr. Gokhale's analysis and find that the majority of efficiencies are not cognizable.

Now, Your Honor, you've heard from Albertsons that a

bunch of claims about what may happen in this so-called but-for world. You heard that they may lay off workers. They may close stores. They may exit markets if the merger doesn't go through. But Albertsons has failed to point to any ordinary-course documents showing that these plans had, indeed, prevented discussion on cross due to confidentiality concerns.

We do not understand Albertsons to be affirmatively raising a weakened competitor defense or a flailing or failing firm defense, but because they at least gave nod to those legal arguments in their closing, we want to take an opportunity to ground what the rhetoric means when applied to a legal standard.

The first argument that they could be making is the weakened competitor defense.

Mr. Duncan, if you could turn to page --

Thank you.

The weakened competitive defense, again, has a high standard, and the reason is the same for -- that there's a high standard for the divestitures. There's a high standard for remedy. It's because you only reach this defense if you found that the merger will harm competition.

So, essentially, what the weakened competitor defense does is say that you -- is an attempt to justify what would be an otherwise anti-competitor merger by asserting that

they will be a drastically different or weakened competitor in the future.

To meet that defense, defendants bear the burden to show, first, an imminent decline in market share, such that market concentration levels fall below levels that trigger the presumption of anticompetitive harm; and, second, that there is no less anticompetitive option to prevent that decline.

The second potential defense is what's called the failing firm defense, and this standard is even higher.

Again, they'd have to justify this merger by showing that, absent this merger, Albertsons would -- not "may" -- fail.

To meet this defense, defendants bear the burden to show, first, Albertsons' resources are depleted and face the grave probability of business failure, that there is a no less anticompetitive option to prevent that failure, and the prospect of a Chapter 11 bankruptcy reorganization is dim or nonexistent.

Looking at the evidence in this case, none of the requirements of a weakened competitor of failing firm defense apply.

First, Albertsons is maintaining or gaining market share in many markets.

As Albertsons' CEO told Congress, Albertsons has every

intention and the financial wherewithal to make investments to meet Albertsons' needs, pay employees, and compete effectively regardless of whether the merger is consummated.

And turning to the next slide, this is not old news. Rather, as Mr. Sankaran explained, it made 4.3 billion in EBITDA, 1.3 billion of net income, and 3 percent ID source sales increase, leading Albertsons to tell investors it was pleased with its 2023 financial results.

The evidence shows that Albertsons is succeeding. It holds the number one or number two position, by market share, in 70 percent of the 121 metropolitan statistical areas in which it operates. Up from 69 percent in 2022 and 68 percent in 2021. This is not a failing, flailing, or weakened competitor.

Instead, the evidence has shown that Albertsons will continue to adjust pricing and promotions to see if it can prove its value position to gain market share and continue to compete.

With respect to my colleagues, they cannot even approach the strict legal requirement to meet either the failing, weakened competitor, or sometimes called "flailing firm" defense.

Turning next to certain discussions that we've heard --

And you can go ahead --

Thank you, Mr. Duncan.

-- about the need for this merger because, in the "but for" world, there has to have this merger in order to compete with Walmart.

Defendants raise a specter of Walmart as a justification, but it essentially invites the conclusion that any time Walmart or Amazon are in the market, that this justifies consolidation between two or three firms. And, again, this conclusion has been squarely and soundly rejected by the Ninth Circuit in *RSR Corp*, which makes sense, when thinking about it, because the implication of such a harm's race to the bottom would eliminate choices and competition that customers depend on today.

Mr. McMullen explained that right now Kroger and Albertsons are corner grocery stores and they compete to be corner grocery stores and to provide choices for their competitors.

That is inconsistent with the argument that, absent this merger, both need to be competing to be the next Walmart.

Respectfully, it's this unique competition among Kroger and Albertsons, as corner neighborhood supermarkets, that's at stake in this litigation, and that's what -- why this competition matters, in addition to competition with Walmart.

Now, my colleague mentioned *United-Change*; and, quite

frankly, I was -- I was glad -- I was glad to hear it, because a full analysis into the *United-Change* position -- or decision, shows why here the circumstances are fundamentally different from the case -- that case.

That court looked at four main characteristics -- or four main characteristics of the divestiture in addition just to the employees that were moving over, that my colleague informed -- or spoke to the Court about.

First, the Court looked to the buyer's ability to preserve competition, and the Court found that the relevant question is, quote, "whether the buyer will preserve competition in the relevant market."

There the court found that the divestiture buyer had an incentive to maximize ClaimsXten's performance in that market.

By contrast here, C&S and SoftBank do not have the same incentive. Given that they stand to profit a disproportionate amount due to their wholesale profits regardless of the success of their grocery stores.

Second, the Court looked at the independence of the buyer, and the Court found that TPG will be an independent competitor.

Here, Mr. Winn acknowledged that C&S will not be decoupled from Kroger until the TSA services end. C&S also plans to run the same commercial programs as Kroger until

the rebannering is complete. The entanglements between these two companies post acquisition for years to come is a fundamental difference between the situation in the *United-Change* opinion.

Third, the court looked at purchase price, and the court found that nothing in the record provided any reason to doubt the adequacy of the purchase price.

In contrast here, C&S's presentation to SoftBank at DX2628 and Mr. Winn's testimony acknowledged that the divestiture has a low purchase price relative to the value of the assets. Again, this impacts C&S's comparative incentives post divestiture.

And, finally, and perhaps most importantly, the scope of the divestiture. The divested -- divested business in *United-Change* had been sold as a standalone company for a decade before being acquired by United in 2017. It was not an incomplete mix of assets between the two companies that were merging.

Here, even defendants' expert admits that the divestiture is not a standalone business.

Also, TPG's due diligence found that the scope of divestiture was sufficient to operate the ClaimsXten on a standalone basis. And by contrast, C&S here submitted letters to regulators about its concern about the scope of the package.

And, finally, addressing arguments made about the management team, putting Ms. Morris aside, there has been no management that will be coming over that is familiar with all of the 94 Kroger stores, and the corporate support groups, like data analytics and the pricing team, also are not going to C&S.

And, again, this goes to the fundamental -- or a fundamental difference between the *United-Change* case and the case here, and that's the amalgamation or hodgepodge nature of the assets being divested in this case, which is in stark contrast to the standalone business that was being divested in the United Change case.

Turning next to price investments, defendants have dedicated a lot of bandwidth in the hearing to making promises. They made promises about price investments, about increasing wages, about not closing stores, and not laying off workers. When presented with the defendants' -- or the Government's robust efforts -- evidence of the likely effects of the competence -- of competition of this merger, defendants' response is mostly, "Take our word for it. Look at our promises."

The question this Court may be weighing is what weight to give such promises. The law is very clear on this point: Absolutely zero. The need to ignore defendants' promises in this case is clear.

First, defendants admit that price investments are dependent, at least in part, on certain prerequisites that must materials -- materialize, that allow defendants to afford these investments, and these -- and these prerequisites are uncertain.

Second, as a matter of law, even where actual price investments actually occur following a transaction, such evidence has limited probative value where it arguably may be subject to possible manipulation in a manner that might impact an ongoing merger challenge. This was the express holding of the Fifth Circuit in 2008 in the *Chicago Bridge & Iron* case.

Here, this admonition carries even further weight because the promised price investments have not occurred yet and may never occur.

Third, as a matter of precedent and judicial experience, unenforceable promises of future price reductions are entitled to little weight no matter how strenuously the current management of a company believes they will fulfill their commitments.

In fact, in Kroger's case in Washington state court, Judge Ferguson just granted a motion in limine present -- preventing defendants from testifying in court about their promises to lower prices.

Recognizing the principle laid out in cases

like *H&R Block* --

MR. WOLF: Objection, Your Honor. We'll submit those papers to the Court, but that's not the court's ruling. I don't want her representing -- excuse me -- not "her" -- counsel representing what a judge has done, especially when he's invited further briefing on the topic that will be submitted later this week.

THE COURT: I'll sustain it.

You can submit additional information.

MR. WOLF: Thank you.

MS. MUSSER: Thank you, Your Honor.

But putting Judge Ferguson aside, the court in cases such as *H&R Block* and *Bertelsmann* have explained that a series of reasons why no weight should be given to such promises.

And Your Honor hasn't heard perhaps the most important one directly from Kroger's CEO, that they are not legally enforceable.

Make no mistake, a sophisticated executive like Mr. McMullen knows how to make a legally binding promise. He could have baked these guarantees into the purchase agreement of Albertsons stores, but instead he asked this Court and the American public to trust him.

And I am not suggesting that these executives' intentions are knowingly false or even insincere, but

experience tells us that promises can be broken and that even an executive's most well-intentioned plans can change under pressure from shareholders, board members, or a number of scenarios, which is why Congress passed the antitrust laws, because robust competition is the only surefire way to incentivize what these executives have promised.

Competitive pressure compels lower prices, higher wages, improved quality, so that consumers and workers don't have to just rely on the good word of a CEO.

Now, the promises made in this court are nothing new. In every -- in nearly every challenged merger in recent history, party executives have taken the witness stand and given similar tales as those heard in the past few weeks, and those recent cases provide a cautionary tale.

For example, in the *AT&T/Time Warner* case, AT&T's executives scoffed at DOJ's suggestions that the merger would result in raised price, calling it absurd, ridiculous, and defying logic; but within two months of the transaction closing, AT&T raised the price of its Direct TV streaming services by $5.00 a month.

Most recently, in the Novant and CHC merger, the president of CHC testified that, if the proposed merger was blocked, C&S would immediately close one of its North Carolina hospitals. But in a post-merger filing, defendants represented to the Court that no other bidder waited in the

wings to acquire that hospital.

But now, two months after that merger was abandoned, that hospital remains open and a new buyer has been announced.

These examples show why courts are skeptical of executives' promises in merger cases, not because these executives are lying, but because circumstances change and executives have a fiduciary duty, not to shoppers, but to shareholders, and that fiduciary duty is to maximize profits however possible, which can impact the ability of a company to hold fast to their promises, which is specifically what executives have admitted here, that in the past, Kroger has forgone price investments, when they need to, to meet particular earnings per share targets.

And as we've discussed, that's exactly why courts have explicitly disregarded executive promises in past cases.

The Court should hold Kroger and Albertsons to this same standard.

The American public, the tens of millions of Kroger and Albertsons customers, and the tens of thousands of Kroger and Albertsons employees should not have to bear the risk that, despite maybe the best of intentions, that these promises will be broken.

Your Honor, the Clayton Act was to stop anticompetitive mergers in their incipiency, meaning before shoppers have to

bear the risk of harm. This merger, the biggest supermarket deal in American history, combines two of the largest supermarkets, impacting communities across the country.

Here, this acquisition presents just the risk the Clayton Act was designed to prevent in thousands upon thousands of communities across the country: First, by increasing market concentration; and, second, by ending competition between two close competitors.

Defendants' own lawyers have recognized this risk, as have defendants' own employees. And while defendants have attempted to downplay this as watercooler talk, that watercooler talk was done without the curation of lawyers and without the scrutiny of the Court. At the very least, this watercooler talk illustrates the concern that the employees had over this transaction and the risk that it presents.

Now, defendants have tried to offset this risk through a divestiture to C&S, but as even just looking at this map shows, this divestiture is insufficient to -- to fill -- to offset that risk, given the gaps in what is being given and the steep hill that C&S is facing to transform from a wholesaler to a grocery company.

And like defendants' promises, maybe Ms. Morris and C&S really want to do their best to build this company and maybe investors really do think that this is a good risk,

considering the complete diversification of their portfolio, but common sense shows us that their best is not enough to justify placing the risk of this transaction on the shoulders of shoppers throughout the country.

Your Honor, the past shows the table stakes here. Looking at a snapshot of the evidence in this case, the Court has seen, regarding past divestitures -- it shows that running a grocery business is complicated and, despite best intentions, past divestitures have been riddled with store closures.

Given the likelihood of harm shown by plaintiffs throughout this hearing and the inability of defendants to sufficiently rebut this showing, plaintiffs ask this Court to issue a preliminary injunction to prevent American shoppers from bearing the burden of defendants' multibillion-dollar choice to merge and to prevent American shoppers from holding the bag.

Thank you, Your Honor. We appreciate your time throughout the course of this hearing, and we respectfully ask that this Court grant plaintiffs' preliminary injunction.

THE COURT: Well, understanding that I'm receiving post-hearing briefing, the Court will take this under advisement.

Thank you, all, for all of your professionalism and the

work that you did to present this to the Court. It is greatly appreciated, and I will work as quickly as possible.

I do not have a timeline as to when I will issue an opinion and make the decision, but I can tell you that I'm going to work very hard and as expeditiously as possible, because I know that everyone is anticipating a decision.

Court is adjourned.

(Day 15 concluded at 1:06 PM.)

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' Rebuttal 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

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MR. WOLF: [2] 3605/2 3605/10
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