B. JOHN CASEY, OSB No. 120025
john.casey@stoel.com
RACHEL C. LEE, OSB No. 102944
rachel.lee@stoel.com
JACOB GOLDBERG, OSB No. 162565
jacob.goldberg@stoel.com
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Telephone: 503.224.3380

MATTHEW M. WOLF (*Pro Hac Vice*)
matthew.wolf@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: 202.942.5000

Attorneys for Defendant The Kroger Company
(Additional counsel on signature page)

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

FEDERAL TRADE COMMISSION,
STATE OF ARIZONA,
STATE OF CALIFORNIA,
DISTRICT OF COLUMBIA,
STATE OF ILLINOIS,
STATE OF MARYLAND,
STATE OF NEVADA,
STATE OF NEW MEXICO,
STATE OF OREGON, and
STATE OF WYOMING,
Plaintiffs,

v.

THE KROGER COMPANY and
ALBERTSONS COMPANIES, INC.,

Defendants.

Case No.: 3:24-cv-00347

DEFENDANTS' MOTION TO PARTIALLY EXCLUDE THE TESTIMONY OF DR. NICHOLAS HILL

REDACTED

CERTIFICATION PURSUANT TO LR 7-1(a)(1)

Defendants have conferred with Plaintiffs regarding this motion, and Plaintiffs oppose the relief sought herein. Pursuant to the Case Management and Scheduling Order, Plaintiffs' response to this motion is due on August 21, 2024.

MOTION

Defendants The Kroger Company ("Kroger") and Albertsons Companies, Inc. ("ACI") (together, "Defendants") hereby move this Court to exclude certain expert testimony and opinions of Plaintiffs' designated economic expert, Dr. Nicholas Hill. Dr. Hill has indicated an intent to testify to his opinion that the divestiture is a "complex and risky" business venture, but he has no expertise in business, much less the grocery business, and his analysis of the divestiture is not the product of reliable economic methods and principles or based on sufficient facts and data. Accordingly, for the reasons explained herein, Dr. Hill's testimony and opinions do not meet the reliability standards of Federal Rule of Evidence 702, as explained by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, and should be excluded.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs hired Dr. Hill, an antitrust economist, to assess the economic effects of the merger between Kroger and ACI on competition in the grocery retail market, including the impact of the proposed divestiture to C&S Wholesale Grocers, LLC ("C&S"). Defendants do not challenge Dr. Hill's qualifications to offer economic opinions but his opinion on the divestiture ventures far outside his expertise, and there will be other fact and expert witnesses to testify at the hearing about the divestiture. In analyzing whether the proposed divestiture should resolve Plaintiffs' competitive concerns, Dr. Hill opines that the divestiture is "complex and risky" and recites facts about the proposed divestiture and past divestitures without any supporting economic analysis.

Pfaffenroth Dec. Ex. 1 (Report of Dr. Nicholas Hill ("Hill Report")) §§ 8.2-8.3; Pfaffenroth Dec. Ex. 2 (Rebuttal Report of Dr. Nicholas Hill ("Hill Rebuttal")) §§ 13-14. But Dr. Hill's experience as an economist provides no basis for him to assess the assets needed to operate a grocery store chain or the likelihood that C&S's will manage those assets successfully. Dr. Hill's own report proves this point. While Dr. Hill uses economic tools and analysis on other matters, he applies no economic methods of any kind to support his opinions about the complexity and riskiness of the divestiture.

Dr. Hill's layperson speculation concerning the divestiture would not aid the Court in assessing its viability and should be deemed inadmissible and excluded from these proceedings.

II. LEGAL STANDARD

Federal Rule of Evidence 702 allows admission of "scientific, technical, or other specialized knowledge" by a qualified expert if four conditions are met: (a) the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue"; (b) "the testimony is based on sufficient facts or data"; (c) "the testimony is the product of reliable principles and methods"; and (d) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(a)-(d). In interpreting Rule 702, the Supreme Court charged district courts to act as "gatekeepers," applying a two-part test to ensure that all expert testimony is (1) reliable and (2) relevant—in other words, it fits the facts of the case at hand. *See Daubert*, 509 U.S. at 597-98. Trial courts have broad discretion to exclude expert testimony that does not meet this test. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151–52 (1999).

The focus of the inquiry into admissibility "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Under *Daubert*, "any step that renders the analysis unreliable...renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that

methodology." *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999) (quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir.1994)). The court must assess the expert's reasoning or methodology, using as appropriate criteria such as testability, publication in peer-reviewed literature, known or potential error rate, and general acceptance. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014). To demonstrate that the evidence given fits the matter at issue, the testimony must "logically advance a material aspect of the proposing party's case." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1315 (9th Cir. 1995). The proponent of the expert testimony bears the burden of proving its admissibility. *Id.* at 1316.

III. ARGUMENT

Dr. Hill's testimony concerning the sufficiency of the divestiture assets and C&S's likelihood of success operating those assets should be excluded because it fails to satisfy Rule 702. *First*, Dr. Hill lacks the expertise or background to assess the sufficiency of the divestiture package or C&S's likelihood of business success operating those assets. *Second*, Dr. Hill's opinion that the divestiture to C&S is "complex and risky" involves nothing more than a recitation of facts about the proposed divestiture and past divestitures, with no application of any reliable economic methods and principles to those facts. Hill Report §§ 8.2-8.3. *Third*, Dr. Hill's testimony related to the divestiture is mere advocacy.

A. Dr. Hill lacks expertise to testify about the divestiture

Dr. Hill has worked as an economist for federal antitrust authorities and testified as an economic expert on antitrust matters. *See* Hill Report, Appendix A. His curriculum vitae (CV) reveals no professional experience working in or around the grocery industry, nor any experience (much less expertise) with grocery store mergers or the business implications of grocery store divestitures. His CV also reveals no work that involved the analysis of grocery store operations, supply chain logistics, or grocery store re-bannering. *Id*. Unsurprisingly, as explained below, Dr.

Hill applies no economic analysis before rendering his opinion that the proposed divestiture is "complex and risky." Rather, in Sections 8.2 and 8.3 of his report, Dr. Hill simply recounts basic facts about the proposed divestiture to C&S and past divestitures, which any layperson could do, and then concludes that the proposed divestiture is "complex and risky." Having the qualifications to testify as an expert economist or even the experience to testify concerning the competitive effects of mergers does not mean that Dr. Hill is has the experience necessary to testify about the business prospects of a divestiture. Because Dr. Hill's business judgment that the divestiture is "complex and risky" is outside his expertise as an economist, his opinion on the divestiture is not admissible expert testimony. *See, e.g.*, *Payne v. C.R. Bard, Inc.*, 606 F. App'x 940, 942-43 (11th Cir. 2015) (affirming district court's exclusion of expert who lacked relevant experience with the device at issue); *In re Rezulin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 559 (S.D.N.Y. 2004) (striking expert because "*Daubert* …requires district judges to determine whether the experience of a particular witness warrants placing that individual's view before the trier of fact").

B. Dr. Hill's opinion about the divestiture is not the product economic analysis.

Dr. Hill fails to put forward a testable economic theory to support his bald claim that the divestiture is "complex and risky." Expert testimony must be the product of reliable principles and methods, but Dr. Hill's opinions about the effect of the divestiture on the merger and competition in the grocery retail market are not based on any economic principles or methods. Fed. R. Evid. 702(c); *see also United States v. Holguin*, 51 F.4th 841, 871 (9th Cir. 2022), cert. denied, 143 S. Ct. 2509 (2023) (quoting *United States v. Hermanik*, 289 F.3d 1076, 1094 (9th Cir. 2002) ("[T]the proffered expert must establish that reliable principles and methods underlie the particular conclusions offered."). Where expert testimony includes only opinions, criticisms, or readily distinguishable examples, that testimony is not sufficiently reliable as "it is not based on any technique that can be scientifically tested." *See Hall v. Baxter Healthcare Corp.*, 947 F. Supp.

1387, 1406 (D. Or. 1996) (expert's testimony cannot be tested as it "involves only her opinions and criticisms of others' work"); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137, 145 (1997) (affirming exclusion of an expert testimony that relied upon only four studies that were distinguishable from the facts at issue).

1. *Dr. Hill's critique of the proposed divesture lacks any economic analysis*

In this case, Dr. Hill's opinion that the proposed divestiture is "complex and risky" is not based on any economic methods or principles. In his initial report, Dr. Hill states: "There is ample evidence that [the divested stores will not continue to] function as they had prior to the divestiture…because of the structure of the divestiture and C&S's shortcomings as a buyer." Hill Report ¶ 203. Specifically, Dr. Hill critiques the structure of the divestiture in three ways: 1) the divestiture is allegedly "not part of a cohesive business unit"; 2) C&S will not obtain permanent rights to every single private label brand used in the divested stores; and 3) C&S will have to "re-banner" some divested stores (i.e., change the brand name).

For each of his critiques, however, Dr. Hill simply recites evidence from the record without applying any economic methods or analyses or any statistical calculations that require more than high school math. For instance, as the basis for his opinion that the divested assets are "not part of a cohesive business unit," Dr. Hill simply lists the assets that will be divested, broken down by banner and division. Hill Report §§ 8.2.4.[1] And as to his opinion regarding C&S, the only alleged "shortcoming" he identifies is the undisputed fact that C&S has a modest retail grocery business today and the divestiture would significantly increase the size of that business. Hill Report § 8.2.1.

[1] The six graphs and charts included in Section 8.2 of Dr. Hill's report reflect no economic analysis. Hill Rep. Figs. 47-52. For example, the two charts purporting to show that C&S is "poorly positioned" to operate the divested assets simply show the increase in grocery stores, daily grocery retail sales, and employees at C&S after acquiring the divested assets. Hill Rep. Figs. 47, 48. And the chart on re-bannering simply counts the number of stores that C&S will need to re-banner in each region. Hill Rep. Fig. 52.

Dr. Hill's recitation of facts is not expert economic analysis and provides the court with nothing to test. "The question whether a methodology is 'testable' comprises two parts: falsifiability and replicability. The former asks whether we are dealing with a proposition that can be subjected to some sort of observation or test that renders the proposition false. The latter asks whether someone else could repeat the exact methodology the expert used." *United States v. Adams*, 444 F. Supp. 3d 1248, 1259–60 (D. Or. 2020). Dr. Hill's opinions on the divestiture cannot be falsified because they are either facts not in dispute or his inexpert subjective views. What is complex or risky to one business may not be to another, but Dr. Hill offers no economic method to test whether this specific divestiture is "too complex" or "too risky." Nor is Dr. Hill's "method" replicable. Anyone purporting to opine on the divestiture could repeat Dr. Hill's "method" by simply repeating these facts, but whether they land at the same conclusion depends on their personal experience—not something replicable through economic analysis. Accordingly, Dr. Hill's testimony on the divestiture should be excluded. *Pierce v. Atrium TRS V, LLC*, No. 3:17-CV-00862-YY, 2018 WL 2977383, at *3 (D. Or. June 13, 2018) (expert testimony inadmissible where "[the expert] fails to do an analysis, or—if he has performed one—show the court what he did and what he relied on to reach his conclusion").

2. *Dr. Hill's review of past divestitures lacks economic analysis and real-world context*

The second part of Dr. Hill's assessment of the proposed divestiture recalls select past transactions without any economic analysis and omitting important context. Hill Report § 8.3. He first references prior acquisitions by C&S where stores underperformed, closed, or were sold. *Id.* ¶¶ 224-30. He states facts about these acquisitions but offers no economic methods or principles for analyzing them, undertakes no economic analysis of these facts, and identifies no method to test whether the same result is likely to occur here or what measures would need to be in place to avoid these results. Critically, unlike Defendants' divestiture expert, Dr. Hill makes no "attempt

to [redacted] Pfaffenroth Dec. Ex. 3 (Report of Daniel Galante ("Galante Report")) ¶ 45. Without acknowledging these real-world facts, Dr. Hill cannot draw reliable conclusions about the divestiture, especially without any business expertise on which to draw. Dr. Hill's account of prior transactions also fails to consider what would have happened to these stores absent acquisition by C&S. Galante Report ¶ 47. In other words, Dr. Hill fails "to distinguish between C&S's attempt to keep failing stores in business and stores failing as a result of C&S's ownership." *Id.* Devoid of the appropriate context and any economic analysis, Dr. Hill's recitation of statistics about prior C&S transactions offers no reliable expert opinion.

Dr. Hill next recites facts about the divestiture to Haggen following the Safeway-Albertsons merger, Hill Report ¶¶ 231-40, again without applying any economic analysis to compare or differentiate the two transactions. In particular, he fails to reference the significant economic commitment from C&S shareholders to this divestiture—[redacted] Galante Report ¶ 56. Hill also failed to consider any of the factors negotiated by Defendants and C&S in the revised Transition Services Agreement, which have allowed C&S to substantially mitigate its risks across a range of parameters, including (a) the scale of its retail business and the mix of Kroger and Albertsons assets, (b) re-bannering; (c) private label; (d) IT; (e) human capital; and (f) distribution centers and manufacturing. Galante Report ¶ 13. Nonetheless, because the merger involves "a significant

number of divested stores…, Albertsons, and some of the same geographies," Dr. Hill concludes that the Haggen divestiture is "likely to be informative about the risks posed by the proposed divestiture to C&S." Hill Report ¶ 231. Without engaging in basic comparative analysis and applying economic principles and methods to that analysis, Dr. Hill's simplistic recollection of past transactions is meaningless, not to mention untestable, unfalsifiable, and not replicable. *See also* Hill Rebuttal § 13.

As Dr. Hill offers no economic analysis linking any of the facts about the proposed divestiture or two prior divestitures to his opinion, his "complex and risky" theory is untestable and unreliable, and his testimony about the divestiture should be excluded.

C. Dr. Hill's testimony is merely advocacy for Plaintiff's view of the case

Without the use of any economic, scientific, or technical principles and methods to produce his opinions about the divestiture, Dr. Hill assumes the role of advocate. District courts do not abuse their discretion by excluding expert testimony where the proposed expert testimony was "being offered… more in the role of an advocate and not as a scientifically valid opinion." *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994); *see also Alves v. Riverside Cnty.*, No. EDCV192083JGBSHKX, 2023 WL 2983583, at *11 (C.D. Cal. Mar. 13, 2023) (expert model "exist[ed] to curate the particular moments relevant to [the party's] theory of the case"). Dr. Hill's speculative conclusion that the divestiture is "complex and risky" lacks any economic analysis and is based solely on a recitation of largely uncontroverted facts to fit Plaintiffs' theory of the case, while omitting key facts that undermine it. Accordingly, Dr. Hill's advocacy should be precluded. *Rincon*, 28 F.3d at 923-24.

IV. CONCLUSION

For the reasons discussed above, Defendants respectfully request that the Court exclude the testimony of Dr. Hill related to viability of the proposed divestiture.

ANGELI LAW GROUP LLC

/s/ David H. Angeli
DAVID H. ANGELI, Bar No. 020244
david@angelilaw.com
PETER D. HAWKES, Bar No. 071986
peter@angelilaw.com
121 SW Morrison Street, Suite 400
Portland, OR 97204
Telephone: 503.954.2232

AND

DEBEVOISE & PLIMPTON LLP

EDWARD D. HASSI (*Pro Hac Vice*)
thassi@debevoise.com
801 Pennsylvania Avenue NW
Washington, DC 20004
Telephone: 202.942.5000

MICHAEL SCHAPER (*Pro Hac Vice*)
mschaper@debevoise.com
SHANNON ROSE SELDEN (*Pro Hac Vice*)
srselden@debevoise.com
J. ROBERT ABRAHAM (*Pro Hac Vice*)
jrabraham@debevoise.com
NATASCHA BORN (*Pro Hac Vice*)
nborn@debevoise.com
66 Hudson Boulevard
New York, NY 10001
Telephone: 212.909.6000

AND

WILLIAMS & CONNOLLY LLP

ENU A. MAINIGI (*Pro Hac Vice*)
emainigi@wc.com
JONATHAN B. PITT (*Pro Hac Vice*)
jpitt@wc.com
A. JOSHUA PODOLL (*Pro Hac Vice*)
apodoll@wc.com
THOMAS W. RYAN (*Pro Hac Vice*)
tryan@wc.com
TYLER INFINGER(*Pro Hac Vice*)
tinfinger@wc.com
WILLIAM ASHWORTH (*Pro Hac Vice*)

STOEL RIVES LLP

/s/ B. John Casey
B. JOHN CASEY, OSB No. 120025
john.casey@stoel.com
RACHEL C. LEE, OSB No. 102944
rachel.lee@stoel.com
JACOB GOLDBERG, OSB No. 162565
jacob.goldberg@stoel.com

AND

ARNOLD & PORTER KAYE SCHOLER LLP

MATTHEW M. WOLF (*Pro Hac Vice*)
matthew.wolf@arnoldporter.com
SONIA K. PFAFFENROTH (*Pro Hac Vice*)
sonia.pfaffenroth@arnoldporter.com
JOSHUA M. DAVIS (*Pro Hac Vice*)
joshua.davis@arnoldporter.com
KOLYA D. GLICK (*Pro Hac Vice*)
kolya.glick@arnoldporter.com
JASON C. EWART (*Pro Hac Vice*)
jason.ewart@arnoldporter.com
MICHAEL E. KIENTZLE (*Pro Hac Vice*)
michael.kientzle@arnoldporter.com
MATTHEW M. SHULTZ (*Pro Hac Vice*)
matthew.shultz@arnoldporter.com
DAVID B. BERGMAN (*Pro Hac Vice*)
david.bergman@arnoldporter.com
MICHAEL L. WALDEN (*Pro Hac Vice*)
mike.walden@arnoldporter.com
YASMINE L. HARIK (*Pro Hac Vice*)
yasmine.harik@arnoldporter.com
ALLISON GARDNER (*Pro Hac Vice*)
allison.gardner@arnoldporter.com
BARBARA H. WOOTTON (*Pro Hac Vice*)
barbara.wootton@arnoldporter.com
CHRISTIAN SCHULTZ (*Pro Hac Vice*)
christian.schultz@arnoldporter.com
DAVID EMANUELSON (*Pro Hac Vice*)
david.emanuelson@arnoldporter.com
MEI-WAH LEE (*Pro Hac Vice*)
mei-wah.lee@arnoldporter.com
WILSON DELOSS MUDGE (*Pro Hac Vice*)
wilson.mudge@arnoldporter.com
601 Massachusetts Avenue, NW
Washington, DC 20001

washworth@wc.com
680 Maine Avenue SW
Washington, DC 20024
Telephone: 202.434.5000

AND

DECHERT LLP

JAMES A. FISHKIN (*Pro Hac Vice*)
james.fishkin@dechert.com
MICHAEL COWIE (*Pro Hac Vice*)
mike.cowie@dechert.com
ELENA KAMENIR (*Pro Hac Vice*)
elena.kamenir@dechert.com
1900 K Street NW
Washington, DC 20006
Telephone: 202.261.3300

HOWARD. M. ULLMAN (*Pro Hac Vice*)
howard.ullman@dechert.com
45 Fremont St, 26th Floor
San Francisco, CA 94105
Telephone: 415.262.4500

ROSS UFBERG (*Pro Hac Vice*)
ross.ufberg@dechert.com
YOSEF WEITZMAN (*Pro Hac Vice*)
yosi.weitzman@dechert.com
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
Telephone: 215.994.2422

Attorneys for Defendant Albertsons Companies, Inc.

Telephone: 202.942.5000

JOHN A. HOLLER (*Pro Hac Vice*)
john.holler@arnoldporter.com
250 W 55th Street
New York, NY 10019
Telephone: 212.836.8000

BRIAN K. CONDON (*Pro Hac Vice*)
brian.condon@arnoldporter.com
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017
Telephone: 213.243.4000

JEREMY T. KAMRAS (*Pro Hac Vice*)
jeremy.kamras@arnoldporter.com
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Telephone: 415.471.3100

AND

WEIL, GOTSHAL & MANGES LLP

MARK A. PERRY (*Pro Hac Vice*)
mark.perry@weil.com
LUKE SULLIVAN (*Pro Hac Vice*)
luke.sullivan@weil.com
JASON N. KLEINWAKS (*Pro Hac Vice*)
jason.kleinwaks@weil.com
2001 M Street, NW, Suite 600
Washington, DC 20036
Telephone: 202.682.7000

LUNA N. BARRINGTON (*Pro Hac Vice*)
luna.barrington@weil.com
767 Fifth Avenue
New York, NY 10153
Telephone: 212.310.8000

SARAH M. STERNLIEB (*Pro Hac Vice*)
sarah.sternlieb@weil.com
700 Louisiana Street, Suite 3700
Houston, TX 77002
Telephone: 713.546.5000

BAMBO OBARO (*Pro Hac Vice*)
bambo.obaro@weil.com

201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: 650.802.3000

THOMAS B. FIASCONE (*Pro Hac Vice*)
tom.fiascone@weil.com
REBECCA SIVITZ (*Pro Hac Vice*)
rebecca.sivitz@weil.com
100 Federal Street, Floor 34
Boston, MA 02110
Telephone: 617.722.8314

Attorneys for Defendant The Kroger Company