

B. JOHN CASEY, Bar No. 120025
john.casey@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

MARK A. PERRY (*Pro Hac Vice*)
mark.perry@weil.com
WEIL, GOTSHAL & MANGES LLP
2001 M Street, NW, Suite 600
Washington, DC 20036
Telephone: 202.682.7000

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-AN

**DEFENDANTS' MOTION TO
PARTIALLY EXCLUDE THE EXPERT
TESTIMONY OF AARON YEATER**

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 partially exclude certain testimony and opinions of Plaintiffs' expert, Aaron Yeater, on issues relating to Kroger's estimated efficiencies from the merger and the efficiencies analysis of Defendants' expert, Rajiv V. Gokhale.¹ Mr. Yeater's background and experience are insufficient to support his efficiencies opinions, which are not grounded in any financial or economic methodology or principle. These opinions are simply *ipse dixit* advocacy for Plaintiffs' view of Kroger's estimated efficiencies. Accordingly, for the reasons explained in greater detail below, Mr. Yeater's testimony about Defendants' efficiencies analysis should be excluded.

MEMORANDUM OF LAW

I. INTRODUCTION

Mergers often enable the merging parties to gain "efficiencies," whether in cost savings or increased revenue, that allow the merged firm to lower prices, improve quality, enhance services, or offer new products. To that end, courts have long recognized that mergers can create efficiencies that will enhance competition and consumer welfare. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011). The "trend among lower courts has . . . been to recognize or at least assume that evidence of efficiencies may rebut the presumption that a

¹ Defendants are not moving to exclude Mr. Yeater's response to Defendants' divestiture expert, Daniel Galante.

merger's effects will be anticompetitive." *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020); *see also FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 151 (D.D.C. 2004) (efficiencies can affect "whether the proposed transaction will substantially lessen competition."). To be cognizable, efficiencies must be both merger-specific and verifiable. *H & R Block, Inc.*, 833 F. Supp. 2d at 90; *see also* 2010 Merger Guidelines § 10.² But those efficiencies need only rise above the level of the "speculative"—Defendants need not show they will be realized with absolute certainty. *Deutsche Telekom*, 439 F. Supp. 3d at 213.

In the present case, Kroger has invested significant time and resources to identify and estimate efficiencies that will result from its proposed merger with ACI. Kroger's internal target is to achieve at least [REDACTED] in cost savings and revenue synergies by merging with ACI, and to use those synergies to make an [REDACTED] investment in lowering prices at Albertsons stores within [REDACTED] of closing. Kroger intends to achieve these efficiencies by lowering sourcing, supply chain, and manufacturing costs, and by improving Albertsons' private label offerings, product selection, and data analytics, among other things. The [REDACTED] estimate is the result of Kroger and ACI's rigorous quantitative analysis and reflects the substantial input of the parties' subject matter experts. The estimate has also been validated by multiple consultants, including Bain & Co. ("Bain"), A.T. Kearney ("Kearney"), and Boston Consulting Group ("BCG"). Defendants' efficiencies expert, Rajiv V. Gokhale, analyzed these estimates and

² Kroger's analysis addresses both the Department of Justice's ("DOJ") and FTC's 2010 Horizontal Merger Guidelines that have been adopted by courts, *see H & R Block, Inc.*, 833 F. Supp. 2d 36 at 89, and the 2023 Merger Guidelines. Pfaffenroth Dec. at Ex. 1 (Report of Rajiv Gokhale ("Gokhale Rep.") 10 ¶ 15). In contrast, Plaintiffs rely primarily upon the enforcer-friendly 2023 Merger Guidelines, which have not been adopted by any court. In any event, Kroger's claimed efficiencies would be cognizable under either the 2010 or 2023 Merger Guidelines.

confirmed that [REDACTED] of those projected efficiencies are cognizable under the Merger Guidelines because they are verifiable and specific to the merger.³ Gokhale Rep. 9 ¶ 13.

To take just one example, Kroger estimates that it will be able to lower sourcing costs associated with national brand products [REDACTED] by reducing the current differences between what it and Albertsons pay to purchase the same goods. *See* Gokhale Rep. 34 ¶ 75. This estimate is based upon a rigorous comparison of Kroger’s and Albertsons’ actual cost data, and is the product of collaboration between Kroger, Albertsons, and Bain subject-matter experts. *See id.* 34-42 ¶¶ 75-93. It also includes several conservative adjustments to account for the effect of the divestiture, the timeline of expected savings, and differences in Kroger’s and Albertsons’ merchandising practices. *Id.*

To reach his conclusion that these cost savings are merger-specific and verified, Defendants’ efficiencies expert, Mr. Gokhale, analyzed the underlying calculations and spoke to the teams that had built the analyses. *Id.* 34-45 ¶¶ 75-99. Mr. Gokhale concluded the analyses were performed correctly, using the correct data, and the opportunity for cost savings had a reasonable economic rationale, *i.e.* the combination of the two companies will allow for “price discovery” that otherwise would not be possible. Mr. Gokhale also referred to third-party research that shows these types of cost savings are typically achieved in similar mergers. *See id.* 33-34 ¶¶ 72-73.

Plaintiffs hired Mr. Yeater, a financial and economic consultant, to purportedly “evaluate the verifiability and merger specificity of Kroger’s claimed synergies arising from the proposed acquisition [of ACI].” Pfaffenroth Dec. at Ex. 2 (Report of Aaron Yeater (“Yeater Rep.”)) 7 ¶ 16.

³ Mr. Gokhale evaluated the consultants’ methodologies and analysis to assess the accuracy of their work and made his own estimates for Kroger’s estimated efficiencies. His analysis resulted in a conservative estimate that [REDACTED] efficiencies are verifiable and merger specific. Gokhale Rep. 9 ¶ 13.

On June 18, 2024, Mr. Yeater produced a report in which he observed that Defendants “have yet to complete their own estimates” of the claimed synergies and “have not presented analyses demonstrating that the claimed synergies are verified costs savings or quality improvements.” *Id.* 8 ¶ 21. Then, on July 12, 2024, Plaintiffs produced Mr. Yeater’s rebuttal report, which fails to rebut any of Mr. Gokhale’s financial computations or economic analysis.

In his rebuttal report, instead of evaluating the likelihood or magnitude of the claimed efficiencies, per his charge, Mr. Yeater reviewed the work of Mr. Gokhale and—without engaging in any financial or economic analysis of his own—merely opined that he (Mr. Yeater) did not see sufficient support for the assumptions underlying Mr. Gokhale’s analysis. Based on that assertion, he opined that [REDACTED] of Kroger’s [REDACTED] in claimed efficiencies must be disregarded. Pfaffenroth Dec. at Ex. 3 (Rebuttal Report of Aaron Yeater (“Yeater Rebuttal”)) 4 ¶ 8. It is unsurprising that Mr. Yeater’s analysis, or lack thereof, is insufficient, because he has never before prepared an expert report or testified in an antitrust case, much less in any case about merger efficiencies. As Mr. Yeater lacks sufficient experience to testify about merger efficiencies and does not engage in any financial or economic analysis to support his opinions, his testimony on both the projected efficiencies from this merger and Mr. Gokhale’s report 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 any and all expert testimony is (1) reliable and (2) relevant (i.e., that it “fits” the facts of the case at hand). See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597-98 (1993). Trial courts have broad discretion to exclude expert testimony that falls short of these standards. *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 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) (“*Daubert II*”). The proponent of the expert testimony bears the burden of proving its admissibility. *Id.* at 1316.

III. ARGUMENT

A. Mr. Yeater lacks expertise to testify about merger efficiencies.

Mr. Yeater does not have sufficient expertise to “evaluate the verifiability and merger specificity of Kroger’s claimed synergies arising from the proposed acquisition [of ACI].” Yeater

Rep. 7 ¶ 16. While Mr. Yeater has an MBA degree and claims to “specialize in applying financial and economic analyses to complex business litigation and regulatory matters involving antitrust concerns,” *Id.* 1 ¶ 3, the vast majority of his work has been in a supporting role assisting other testifying experts. *Id.* Appendix A. Mr. Yeater has never before prepared an expert report or testified in an antitrust case, much less in a case with detailed merger efficiencies analyses like those at issue here. Further, none of the four cases where Mr. Yeater actually prepared or coauthored an expert report and/or provided expert testimony had anything to do with mergers or merger efficiencies. *Id.* Because Mr. Yeater lacks any expertise to offer testimony related to the verifiability and merger specificity of the claimed efficiencies, his testimony on these topics should be excluded. *See, e.g., Payne v. C.R. Bard, Inc.*, 606 F. App’x 940, 943 (11th Cir. 2015) (affirming exclusion of expert who lacked training and experience with the issues in question); *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. Mr. Yeater’s efficiencies opinions are unreliable advocacy for Plaintiffs that rest on no financial or economic analysis.

Expert testimony must be the product of reliable scientific or technical principles and methods, which the expert has reliably applied to the facts of the case. Fed. R. Evid. 702(c)-(d); *Daubert*, 509 U.S. at 589, 594–95. The “trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert’s testimony must be grounded in an accepted body of learning or experience in the expert’s field, and the expert must explain how the conclusion is so grounded.” *SiteLock LLC v. GoDaddy.com LLC*, 562 F. Supp. 3d 283, 326 (D. Ariz. 2022) (citing Fed. R. Evid. 702, advisory committee note to 2000 amendments). “Experts must follow some discernable methodology, and

may not be a black box into which data is fed at one end and from which an answer emerges at the other.” *Id.* at 327.

In the present case, Plaintiffs offer Mr. Yeater as a financial and economics expert. But nowhere in his reports or testimony does he articulate any financial or economic basis, framework, methods, or standards on which he relies to determine that certain efficiencies “assumptions” by Mr. Gokhale or Kroger’s consultants lack evidentiary support. Indeed, while Mr. Yeater’s rebuttal report provides pages of detailed recitation of Mr. Gokhale’s efficiencies analyses and assessment of work performed by Kroger’s consultants, Mr. Yeater does not apply *any* of his own financial or economic analysis to rebut the work of the consultants or Mr. Gokhale.

In contrast to Mr. Gokhale, who undertook a detailed, independent analysis of the work performed by Kroger and its consultants, Mr. Yeater merely opines that he does not see evidence to support the assumptions underlying Kroger’s and its expert consultants’ efficiencies estimates, so virtually all claimed efficiencies should be excluded. For example:

- When looking at Bain’s assessment of sourcing savings related to national brand products and Mr. Gokhale’s conclusion that [REDACTED] of estimated efficiencies in this category is conservative, *see* Gokhale Rep. 38 ¶ 83 n. 113, Mr. Yeater undertakes no financial or economic analysis to justify rejecting the entire category of efficiencies. Instead, Mr. Yeater states that the claimed efficiencies are unverifiable because he believes that “negotiations with sophisticated suppliers *are likely to be complex and idiosyncratic*,” any assumptions about price concessions “*seem unsupported at best, and likely unrealistic*,” Yeater Rebuttal 24 ¶ 38(b),⁴ and the likelihood Kroger and ACI would be successful in negotiating best-of-both pricing was “an *unsupported aspect* of the analysis provided.” Pfaffenroth Dec. Ex. 4 (Deposition of Aaron Yeater (“Yeater Dep. Tr.”)) at 106:5-14 (emphasis added).⁵

⁴ Mr. Yeater criticizes Mr. Gokhale’s approach to analyzing Bain’s analysis, but does not explain what the requisite analysis should be or evaluate the methodology Bain undertook in making its determination. Instead, Mr. Yeater claims Mr. Gokhale did not investigate the explanation for the observed price differences and therefore the claimed efficiency is not merger-specific. Yeater Rebuttal 37 ¶ 51.

⁵ Mr. Yeater testified that sufficient support would look like vendor declarations or testimony “acknowledg[ing] that they saw places where the two companies could, in fact, realize lower pricing, that might be supportive evidence of the likelihood that negotiations would be productive.” Yeater Dep. Tr. 106:15-21. Specifically, Mr. Yeater said “[i]f

- When reviewing Mr. Gokhale’s conclusion that [REDACTED] of efficiencies related to private label (i.e., Own Brand) products are verifiable and merger specific, Gokhale Rep. 51 ¶ 110, Mr. Yeater employs no financial or economic analysis and rejects the entire amount on his subjective view that the “assumption regarding what are *complex, nuanced negotiations* with individual suppliers *is unrealistic*.” Yeater Rebuttal 42 ¶ 56(c) (emphasis added).⁶
- When considering Mr. Gokhale’s conclusion that [REDACTED] of efficiencies related to fresh products are verifiable and merger specific, Gokhale Rep. 57 ¶ 130, Mr. Yeater performs no financial or economic analysis and simply rejects this category of efficiencies because it “includes unsupported and untested assumptions,” Yeater Rebuttal 48 ¶ 68, that “are not verifiable based on the information provided by the Parties, their consultants, or Mr. Gokhale.” *Id.* 49 ¶ 69.
- When considering Mr. Gokhale’s analysis that [REDACTED] of supply chain and manufacturing efficiencies are verifiable and merger specific, Gokhale Rep. 116 ¶ 260, Mr. Yeater does no financial or economic analysis and instead reviews supporting documentation to conclude these synergies “are not verifiable based on the information provided by the Parties, their consultants, or Mr. Gokhale.” Yeater Rebuttal 62 ¶ 87.

When asked during his deposition about the absence of any economic and financial analysis in his reports, Mr. Yeater confirmed that he did not conduct any “independent analysis of the likelihood” that Kroger will achieve its claimed efficiencies. Yeater Dep. Tr. at 37:18-20. Specifically, Mr. Yeater conceded that he did not independently analyze, evaluate, or calculate the likelihood or magnitude for several categories of claimed efficiencies, including:

- National brand sourcing cost savings (Yeater Dep. Tr. 86:25-88:19)
- Supply chain and manufacturing cost savings (Yeater Dep. Tr. 139:12-25)
- Merchandising cost savings and revenue increases (Yeater Dep. Tr. 73:21-74:21)

a vendor was willing to say that they expected the merger would improve the pricing that they offered to one or the other of the parties, for some reason that would seem supportive of the conclusion that they might be able to achieve improved pricing.” *Id.* at 122:6-11. This is an impossibly high standard that would likely prevent courts from ever recognizing sourcing cost savings.

⁶ Incredibly, Mr. Yeater faults Mr. Gokhale for not “cit[ing] any conversations that the Parties had with any third-party Own Brand suppliers to substantiate their claim that they are likely to be able to negotiate these cost savings.” *Id.* 44 ¶ 58. Of course, Kroger cannot legally engage in such negotiations until after the merger is finalized.

- Health and wellness revenue increases (Yeater Dep. Tr. 74:22-75:9)
- Revenue increases in alternate profit streams (Yeater Dep. Tr. 82:5-82:20)

Additionally, while Mr. Yeater alleges in his report that many “assumptions” underlying the Defendants’ efficiencies estimates are “unsupported,” he frequently does not even attempt to demonstrate that they are actually incorrect. For example, while he criticizes the manner in which Kroger and Mr. Gokhale accounted for the effect of the divestiture, Yeater Rebuttal 23 ¶ 38(a), he admits that he did not attempt to calculate an alternative adjustment. Yeater Dep. Tr. at 94:13-16; 96:6-11. And while his report attempts to undermine Kroger’s commitment to reduce prices at Albertsons stores by [REDACTED], Yeater Rebuttal 82-90 ¶¶ 131-141, he admits that he did not independently assess the how the merger will affect prices. Yeater Dep. Tr. at 78:24-79:14.

Mr. Yeater’s analysis falls far short of the standards for admissibility under Rule 702. “An expert should demonstrate to the court his analysis and what he relied on in reaching his conclusion.” *Pierce v. Atrium TRS V, LLC*, No. 3:17-CV-00862-YY, 2018 WL 2977383, at *3 (D. Or. June 13, 2018) (finding “[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”). “The reasoning between steps in a theory must be based on objective, verifiable evidence and scientific methodology of the kind traditionally used by experts in the field.” *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002). Where, as here, expert testimony includes only opinions and criticisms without any independent analysis, 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) (holding expert’s testimony cannot be tested and must be excluded when it “involves only her opinions and criticisms of others’ work”). To be sure, “conclusions and methodology are not entirely distinct from one another. Trained experts

commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Domingo ex rel. Domingo*, 289 F.3d at 607.

Moreover, whether or not an expert’s proffered theory is testable is a key indicator of whether the expert has relied upon scientific or technical principles or methods. *See Daubert*, 509 U.S. at 593 (“[A] key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.”). But Mr. Yeater’s opinions about the supposed lack of support for the assumptions made by Kroger’s consultants and Defendants’ efficiencies expert cannot be tested or duplicated because, as he effectively conceded at his deposition, they are merely his own subjective opinions. In his view, “the assumptions employed to produce those estimates are not sufficiently supported, ... in certain cases inconsistent with testimony given in the case and in certain instances incomplete and, therefore, in my opinion, they are unverifiable.” Yeater Tr. at 114:22-115:3.

When pressed, Mr. Yeater made no attempt to ground his opinions in finance or economics, and instead laid bare the purely subjective nature of his opinions:

Q: How are we supposed to determine objectively what satisfies sufficient support for verifiability, what rule, decision rule, did you use?

A: In assessing this claimed efficiency and the assumption in these claimed efficiencies, I looked to see whether the assumptions had a basis in something other than, I believe what is referred to in one of the documents I cited, as the subjective opinions of the parties and their consultants. And absent additional information about the manner in which that experience, as you describe it, informs these assumptions, then it’s my opinion that they don’t reach the level of what would be considered supported or verified. Yeater Dep. Tr. at 115:17-116:7 (objection omitted).

Of course, experts may differ in their views of what constitutes sufficient support for claimed efficiencies—but Mr. Yeater offers *no* financial or economic analysis, framework, or principle that one could use to test his conclusions, nor does he offer any “method” that is replicable. Anyone could repeat Mr. Yeater’s “method” by simply repeating these same facts, but whether they land at the same conclusion depends on their personal experience—in Mr. Yeater’s case, no meaningful experience—not something replicable through financial or economic analysis. When an expert’s opinion is connected to the existing data only by his *ipse dixit*, a district court is not required to admit the opinion evidence under *Daubert* or the Federal Rules of Evidence. *Joiner*, 522 U.S. at 146; *Domingo ex rel. Domingo*, 289 F.3d at 607. Where, as here, expert testimony includes only opinions and criticisms, that testimony is not sufficiently reliable as “it is not based on any technique” that can be tested. *See Hall*, 947 F. Supp. at 1406.

In failing to apply any financial or economic method to produce his opinions, and instead weighing the evidentiary support for assumptions underlying the analysis and conclusions of Defendants’ efficiencies expert, Mr. Yeater assumes the role of advocate. The Ninth Circuit has held that 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. 5:19-cv-02083, 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”). Mr. Yeater’s view that there is insufficient evidence to support the claimed efficiencies is not an objective financial or economic analysis of the available evidence but rather a subjective critique of Mr. Gokhale’s work that merely supports Plaintiffs’ theory, driven by results, not methods. Accordingly, Mr. Yeater’s advocacy should be excluded. *Rincon*, 28 F.3d at 923-24.

IV. CONCLUSION

For the reasons discussed above, Defendants respectfully request the Court exclude Plaintiffs' expert, Aaron Yeater, from testifying about the verifiability and merger specificity of Kroger's claimed efficiencies.

DATED: August 14, 2024

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

Respectfully submitted:

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
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Telephone: 503.224.3380

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
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*)

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*)
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

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
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