Plaintiffs' Closing Argument

Federal Trade Commission, et al. v. The Kroger Company and Albertsons Companies, Inc.

Docket No. 3:24-cv-00347-AN

Burden-shifting Framework

Step 1: Plaintiffs must first establish a *prima facie* case that a merger is anticompetitive.

Step 2: Defendants must produce facts to rebut the *prima facie* case.

Step 3: If Defendants rebut the Plaintiffs' *prima facie* case the burden of production shifts back to the Government and merges with the ultimate burden of persuasion.

St. Alphonsus Med. Ctr. –Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015)

Supermarket and Large Format Markets are Properly Defined

The Supreme Court has recognized that, within a broader market, **"well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."** *Brown Shoe*, 370 U.S. at 325 (citation omitted) (emphasis added).

- While aluminum and insulated copper conductors could be analyzed as a **"single product market," that "does not preclude their division for purposes of [Section 7] into separate submarkets").** *United States v. Aluminum Co. of Am.*, 377 U.S. at 274-77 (emphasis added).

- **"[R]elevant submarkets are common in merger analysis."** *Olin Corp. v. FTC*, 986 F.2d 1295, 1301 (9th Cir. 1993) (rejecting Defendants' argument that it was "inconsistent" to identify a larger market once a narrower market had been identified and explaining "[that] is not true as a matter of federal antitrust law.").

- **A "broad product market . . . may contain smaller markets . . . which themselves 'constitute [relevant] product markets for antitrust purposes.'"** *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 885 (E.D. Mo. 2020) (quoting *Brown Shoe*, 370 U.S. at 325).

Plaintiffs' Product Markets

Supermarkets Product Market

TRADITIONAL SUPERMARKETS

Kroger (Fresh for Everyone), Albertsons, Safeway, Stater Bros., Raley's, amazonfresh

SUPERCENTERS

Walmart, Fred Meyer, Target

Large Format Product Market

TRADITIONAL SUPERMARKETS

Kroger (Fresh for Everyone), Albertsons, Safeway, Raley's, Stater Bros., amazonfresh

SUPERCENTERS

Walmart, Fred Meyer, Target

CLUB STORES

Costco Wholesale, Sam's Club

LIMITED ASSORTMENT STORES

Lidl, Aldi

NATURAL/GOURMET

Whole Foods Market, Trader Joe's, Sprouts Farmers Market

Supermarket Product Market Has Been Recognized

California v. Am. Stores Co., 697 F. Supp. 1125, 1129 (C.D. Cal. 1988), *rev'd on other grounds*, 872 F.2d 837 (9th Cir. 1989) (**the fact that other outlets sell groceries does not mean that "grocery shoppers seriously consider, for example, gasoline service stations or department stores as competing sources with supermarkets for their grocery needs."**).

Brown Shoe Factors

"However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as **industry or public recognition** of the submarket as a separate economic entity, the product's **peculiar characteristics and uses**, **unique production facilities**, **distinct customers**, **distinct prices**, **sensitivity to price changes**, and **specialized vendors.**"

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)

Peculiar Characteristics and Uses

Keith Knopf, The Raley's Company, CEO

A. Very similar to the description I provided of Raley's and Bashas': A store that offers a wide variety of categories and SKUs, that offers full-service counters, a reasonably high degree of service and assistance; the ability to produce custom offerings in meat, prepared foods, bakery, with a meaningful offering of center store packaged goods that consist of national brands or private label products.

Peculiar Characteristics and Uses: One-Stop Shop

	SKUs	Size	Specialty Counters	National Brands	Source
Supermarkets (e.g., Raleys, Kroger, and Albertsons)	40,000-50,000	25,000-60,000 sq ft	Several Staffed	Full Selection	162:22-163:9; 518:23-519:1; 807:19-20; 866:25-867:9; 933:2-13
Limited Assortment (e.g., Aldi & Lidl)	1,200-2,000	Typically smaller than supermarkets	None	Limited	170:17-25; 940:10-25
Club Stores (e.g., Costco)	<4,000	140,000+ sq ft	Unstaffed	Limited	2034:9-14
Dollar Stores (e.g., Dollar Tree)	8,000	8,000 sq ft	None	Limited	459:5
Natural/Organic Stores (e.g., Sprouts)	20,000+	23,000-30,000 sq ft	Limited	Limited	371:12

Distinct Customer Needs | Shopper's "Need State" Drives Format Choice

Q. Now, the kind of trip the shopper has in mind, or the needs state, will determine what kind of store the shopper will travel to; right?
A. That's correct.
Q. For example, if I have a list of ingredients I need to cook a meal, I'm looking for a store that can satisfy that need; right?
A. That's correct.
Q. A traditional supermarket, like Walmart Neighborhood Market, could satisfy that need; right?
A. Yes, that's right.
Q. And a Walmart Supercenter could also satisfy that need; right?
A. Yes, that's correct.

Hr. Tr. (Lieberman), 2360:11-24

Distinct Customer Needs | Customers Look for a One-Stop Shop

Peter Van Helden,
Stater Bros. Markets,
Chairman & CEO

Q Mr. Van Helden, do you find that other traditional supermarkets offer similar services to the ones you just described?
A I do.
Q Does Stater Brothers offer customers a unique shopping experience that they can't get at other types of retail formats?
A Well, as it relates to some other types of formats, yes, I would say we are similar to a conventional supermarket.
Q How would you describe the differences between a conventional supermarket and other formats in terms of the customer base?
A Well, you can pick the competitor, but let me talk about a couple. Let's use an Aldi, for example. The price is very, very inexpensive, virtually no service. They don't even publish their telephone number so you could call the store if you wanted to. They only carry 1,200 items across the stores compared to our 30,000 items, and they don't have the service departments that we offer. So for a customer looking for service and the service departments and someone there to help them with their needs, they wouldn't go to an Aldi.

171

P. Van Helden - D

Dollar Store is similar as well.

Q So does this concept of a one-stop shop still have salience for Stater Brothers' business today?
A Absolutely.

Distinct Customer Needs | Dollar Stores

DOLLAR TREE

Kurt Unkelbach, Dollar Tree, Vice President of Merchandise Strategy & Analytics

Q Are you familiar with the term "fill-in shop"?
A Yes.
Q What is that?
A It is kind of like an in between your stock-up trips. So maybe you're going to a big box store or a grocery store once a week, but maybe in the middle of the week you need to get a few things.
Q And when you say "stock-up trip," what do you mean?
A It can be just a larger basket of goods. Maybe it's $50, maybe it's a hundred, maybe it's $200 worth of goods.
Q Does Dollar Tree offer a fill-in shopping experience for shoppers?
A It can be.
Q Are you familiar with the term "treasure hunt"?
A Yes.
Q What does that mean to you?
A To me, that's where Dollar Tree is focused and sells with

K. Unkelbach - D

the seasons. So again, right now we are going into harvest and Halloween, and so there is a treasure hunt feel of different products that Americans are excited to see in a Dollar Tree. So that's kind of a heritage of Dollar Tree.
Q And based on your experience, is it typical for Dollar Tree shoppers to get their weekly groceries at a Dollar Tree?
A No.
Q Why not?
A Dollar Tree doesn't carry a lot of -- there is no produce. There is very limited frozen products. There's just not enough available.

Q We previously spoke about "fill-in shop" when referring to Dollar Tree. Is Family Dollar also a fill-in shop?
A Yes.
Q And typically do Family Dollar customers get the majority of their weekly groceries at a Family Dollar?
A Not typically.

Hr. Tr. (Unkelbach), 463:9-464:11; 467:6-11

Distinct Customer Needs | Club Stores

Sarah George, Costco, Senior Vice President of Food and Sundries

2045

S. George - X

Q If you could read silently to yourself lines 15 through 20 and then look up at me when you're completed. In the meantime, Mr. Dunkin is showing that to the Court and counsel only, not the public.

Okay. Ms. George, is it fair to say that this answer remains approximately accurate today?

A Yes.

MR. ANDERSON: At this time we offer this section, page 78, lines 15 through 20 into evidence.

MR. OBARO: No objection.

THE COURT: It will be received.

BY MR. ANDERSON:

Q It is fair to say that on those trips the average Costco member buys enough groceries to last them for more than a day?

A Yes.

Q In fact, Costco has a name, a special term for the types of larger stock-up trips that its members take. Are you familiar with that term?

A I'm familiar with what I call it, yes.

familiar with that term?

A I'm familiar with what I call it, yes.

2046

S. George - X

Q What does Costco refer to those larger stock-up trips?

A "Making a Costco run."

purchase a membership; is that right?

A That's correct.

Q And just a few days ago Costco raised its membership fees; is that right?

A Yes, they did, a few days ago.

Q So the cost of a base membership now is $65 a year?

A Yes.

Q And the higher tier is now $130 per year; is that right?

A Correct.

Q Okay. If we could look at DX1456, the Costco 2023 annual report, the page ending in 011, again, a page that we have been on frequently, I would like to look at the second paragraph, the last sentence, where it says, "By strictly controlling the entrances and exits and using a membership format, we believe our inventory losses (shrinkage) are well below those of typical retail operations."

Is that still an accurate statement for Costco warehouses today?

A It is.

Q And "by strictly controlling entry," that means a member must scan or show a card to get into the warehouse at all; is

Distinct Customer Needs | Natural/Organic Stores

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

John Scott Neal, Sprouts Farmers Markets, Chief Merchandising Officer

Q. So what kind of a shopping trip does Sprouts position itself to be?

A. We position it to be -- it can be a primary shop for some customers, but primarily it's a secondary shop; and we want it to be a treasure hunt.

So the purpose of our stores are, is we have smaller boxes, we have cleaner sightlines, which means that our -- you know, the racking and things that we have are lower, so you can see across the store and it's more easily navigable. Right?

And as customers go through and buy the products, they -- you know, it's an environment where our team members are there to help. They're there to discover products and find things that they didn't know that they necessarily wanted.

375

Neal - D

And that's part of the magic of what we believe Sprouts is.

SPROUTS FARMERS MARKET

Unique Production Facilities

Club Stores

- Warehouse feel
- Pallets

See, e.g., Hr. Tr. 173:4-6; 2028:19-2032:5

Limited Assortment Stores

- "No frills" experience
- No specialty departments

See, e.g., Hr. Tr. 170:14-171:1, 940:10-25, 2196:6-8, 2362:23-2363:10

Dollar Stores

- Often smaller store size
- No specialty departments

See, e.g., Hr. Tr. 458:25–459:2, 459:11-15, 462:22-463:2, 464:19-24, 466:23-24

Natural/Organic Stores

- Often smaller store size
- More of a "farmers market feel"

See, e.g., Hr. Tr. 367:18-368:7; 381:9-15; 382:1-21; 383:5-10

Distinct Prices

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

Club Stores

- Large pack pricing
- Membership fee required

See, e.g., Hr. Tr. 2046:3-13; 2366:23-2367:2

Limited Assortment Stores

- Prices reflect private label focus, lower quality, and lack of service
- Charge for basics like shopping carts

See, e.g., Hr. Tr. 170:14-25; 174:13-20; 940:10-941:6

Dollar Stores

- Most priced in the dollar range
- Not over $5.00

See, e.g., Hr. Tr. 457:19-458:24; 465:22-466:8

Natural/Organic Stores

- Premium pricing relative to supermarkets
- Do NOT price to supermarkets

See, e.g., Hr. Tr. 389:7-21; 941:25-942:5

Distinct Prices | Supermarkets price off other supermarkets

Todd Broderick, Albertsons, Denver Division President

"Q. And Albertsons, in fact, most frequently indexes its pricing against Kroger and Walmart in your division; correct? A. Yes.
Q. Specifically for Kroger, Albertsons seeks to be competitive with Kroger on regular items or white tag pricing; correct? A. Yes."
Hr. Tr. 1367:10-17

Peter Van Helden, Stater Bros. Markets, Chairman & CEO

"Q. Which competitors does Stater Brothers most frequently adjust prices in response to? A. **Albertsons, Vons, and Ralphs.**"
Hr. Tr. 180:5-7 (emphasis added)

Andy Groff, Kroger, Senior Director of Pricing Strategy and Execution

For 9 of Kroger's 10 core pricing programs, Kroger benchmarks prices vs Walmart plus conducts check on traditional competitors, including Albertsons, to ensure Kroger is in line.
Hr. Tr. 271:15-272:11

Keith Knopf, The Raley's Company, CEO

"Q. Which banners does Raley's price-check most extensively in Nevada? A. Raley's price-checks most extensively against Safeway and Smith's, and on some occasions, Save Mart. . . .
Q. And what retailers does Bashas' set prices in reference to for key value items? A. Specifically, Fry's, Safeway, and Albertsons."
Hr. Tr. 944:13-16, 953:2-13

Industry Recognition | Industry Participants Recognize Supermarkets

Peter Van Helden, Stater Bros. Markets, Chairman & CEO

“Stater Bros., Albertsons, Ralphs, Vons are all traditional supermarkets.” “Other formats are different, like club, large discounters, ethnic, and organic stores.” 171:5-14; 171:24-172:14

Tony Silva, Albertsons, Vice President, Strategic Initiatives

“Albertsons’ “primary food competitor” is a “traditional supermarket.” 257:9-11

Mark McGowan C&S, President of Retail

“C&S will be “[o]ne of the largest traditional food retailers, not one of the largest food retailers.” “If you look at a traditional food retailer, it's what would be considered a traditional grocery store, whereas food retail is anything but that today. But when you look at the market, you see it described as all food and then traditional food.” 1074:19-20; 1074:22-1075:1

Geographic Market | Supermarket Competition is Local

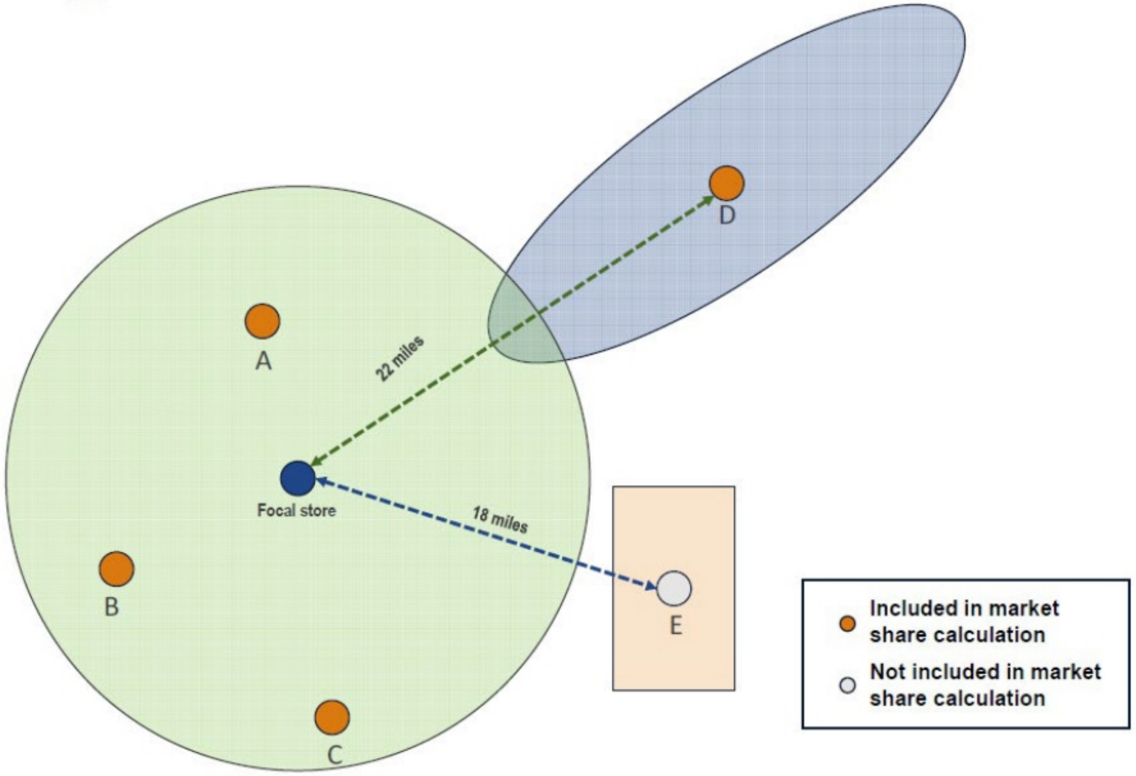
Rodney McMullen, Kroger, President and CEO

Q. And do you consider Kroger's offering corner grocery stores?
A. Some of our stores.
Q. But you would agree that Kroger tries to be focused on the local communities; is that right?
A. Yes.
Q. And you would agree that Albertsons also, in some cases, offers corner grocery stores; correct?
A. Correct.
Q. And you would agree that Albertsons also tries to be focused on its local communities; is that right?
A. Yes.

Hr. Tr. (McMullen), 1648:9-20

BATES WHITE

Illustration of the customer-based geographic market approach



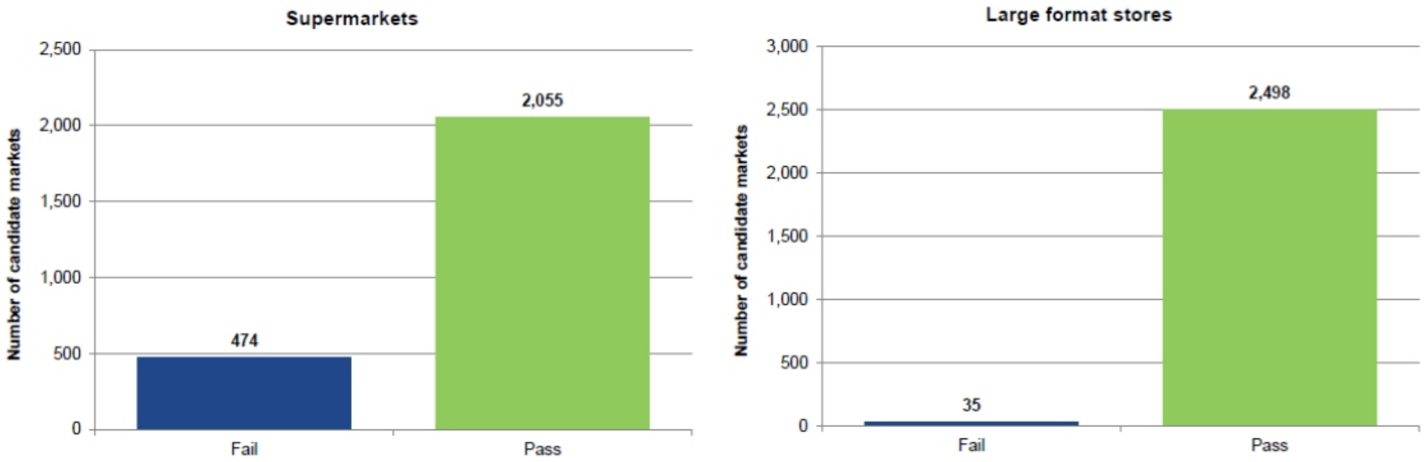
3 September 2024 23

PDX12-023

Dr. Hill's Application of the HMT Supports Plaintiffs' Markets

BATES WHITE

My candidate markets robustly pass the hypothetical monopolist test

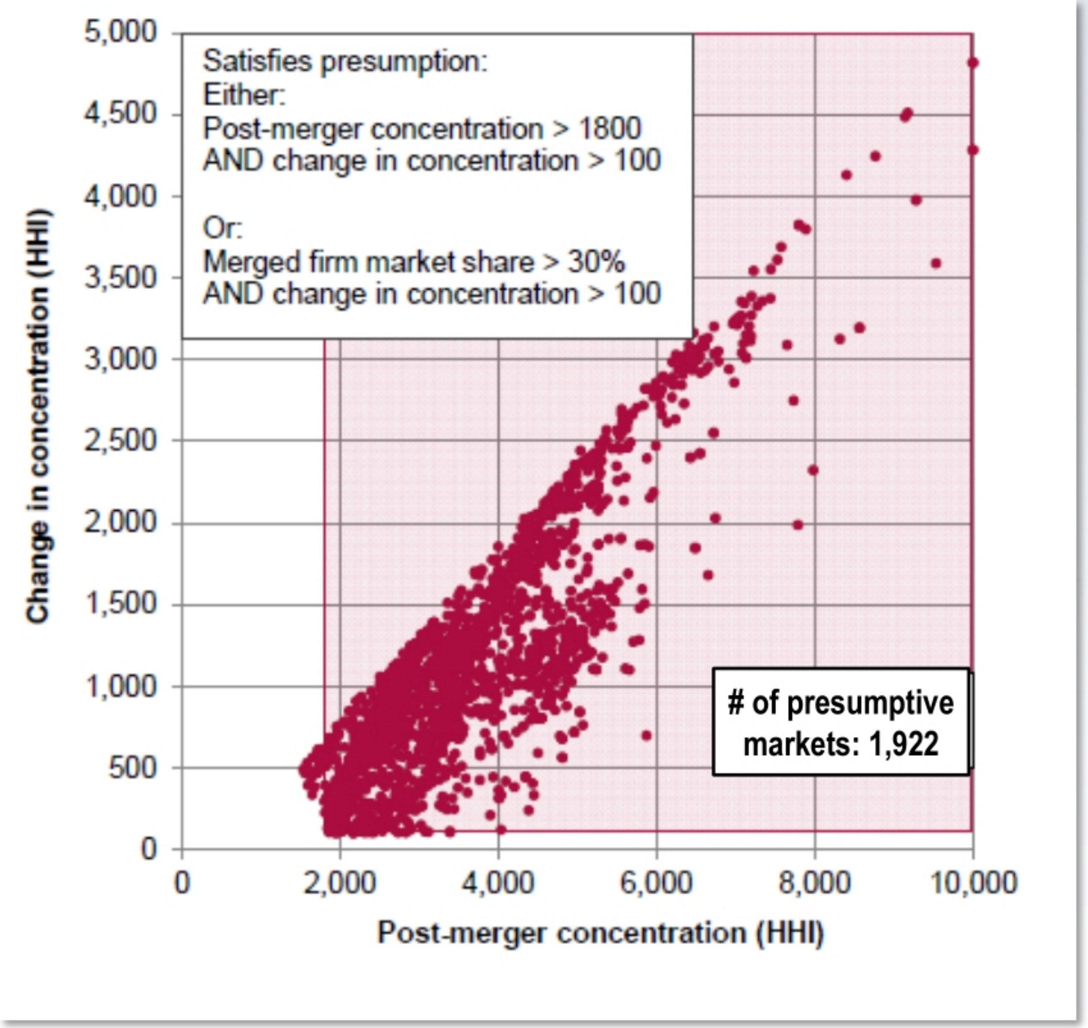


Source: Consolidated 2022 CBG-level sales data.
Notes: 2,533 Large format candidate markets. 2,529 supermarkets candidate markets. The difference of four markets is due to the four Balducci's owned by Albertsons, which are under natural and gourmet food category and included in large format store markets only.

PDX12-026

The Merger is Presumptively Anticompetitive in 1,922 Local Supermarket Markets

Hill Rebuttal Report Fig. 42. Presumptive supermarket markets, 2022

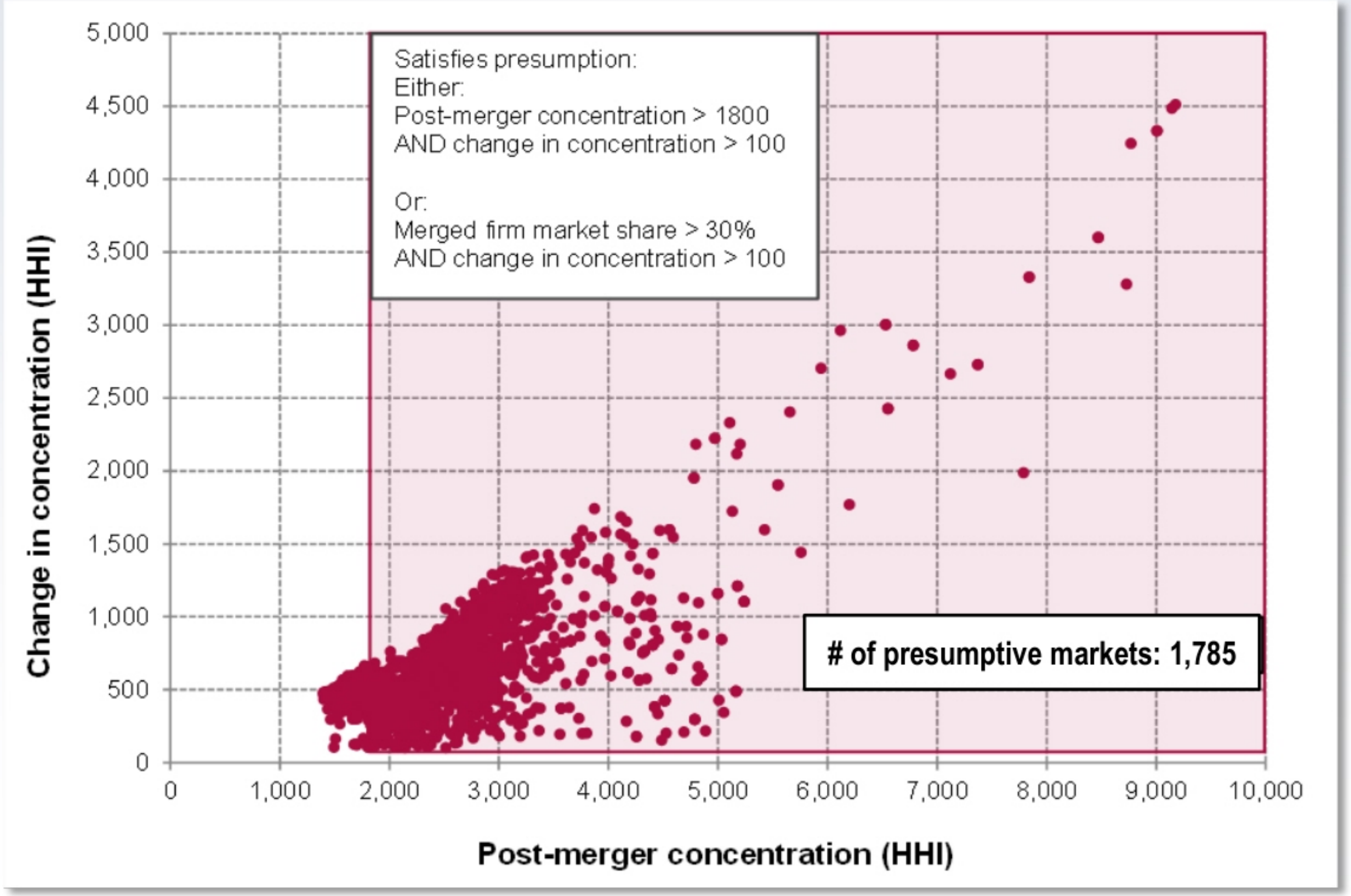


$73 Billion in annual sales at these 1,922 stores

This Merger Is Presumptively Anticompetitive in 1,785 Large Format Markets

Market concentration for presumptive large format store markets, 2022.

Includes ***supermarkets***, ***supercenters***, ***club***, ***natural***, *and* ***limited assortment*** *stores*



$73 billion in annual sales at these 1,785 stores

Just Because Other Formats Sell Groceries Doesn't Make them Substitutes

- **A market can be comprised of a set of stores that offer a unique experience**. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1078 (D.D.C. 1997) (finding "that office superstores are, in fact, very different in appearance, physical size, format, the number and variety of SKU's offered, and the type of customers targeted and served than other sellers of office supplies.").

- "**The fact that a customer might buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market**." *FTC v. Whole Foods*, 548 F.3d 1028, 1040 (D.C. Cir. 2008); *see also United States v. Google,* 2024 WL 3647498, at *70-74 (D.D.C. Aug. 5, 2024).

Sometimes a Banana is Not Just a Banana

Rodney McMullen, Kroger, President and CEO

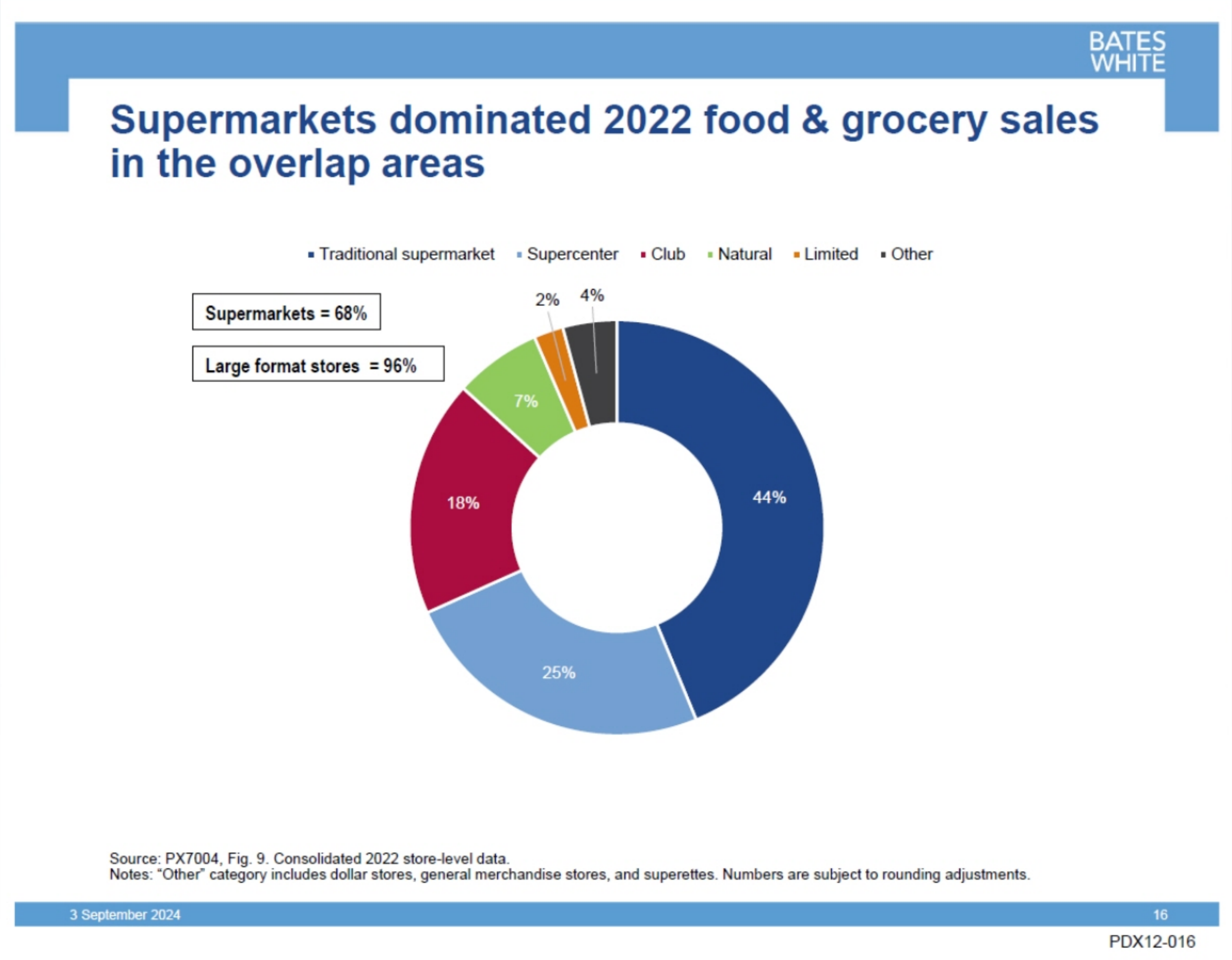
Q. But you would agree that for a busy shopper looking to go on her weekly grocery shop between kids' soccer games, going to one store to buy her week's worth of groceries is more convenient than having to go to three stores to buy Gatorade, fresh produce, cold cuts for school sandwiches,

1648

McMullen - X

and a pasta salad to have at Sunday dinner?
A. Certainly more convenient. Not always what they do.

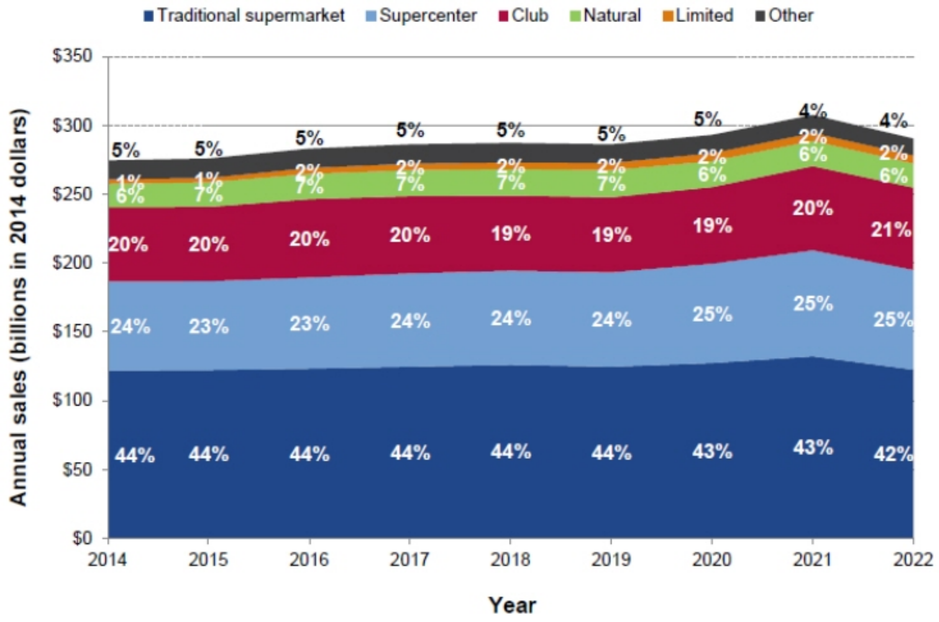
Shoppers Predominantly Shop at Supermarkets for Food



Evidence Does Not Show a Change in Shopper Habits

BATES WHITE

Share of sales by store format have been stable over time



Source: PX7004, Fig. 10. Nielsen TDLinx; BLS CPI (food and beverages in U.S. city average, all urban consumers, seasonally adjusted).
Notes: "Other" category includes dollar stores, general merchandise stores, and superettes.

PDX12-018

Kroger Touts Itself as a One-Stop Shop to Investors

2015 Kroger 10-K

"We believe this format is successful because the stores are large enough to offer the specialty departments that customers desire for **one-stop shopping**, including natural food and organic sections, pharmacies, general merchandise, pet centers and high-quality perishables such as fresh seafood and organic produce."

2023 Kroger 10-K

"We believe this format is successful because the stores are large enough to offer the specialty departments that customers desire for **one-stop shopping**, including natural food and organic sections, pharmacies, general merchandise, pet centers and high-quality perishables such as fresh seafood and organic produce."

2024 Kroger 10-K

"We believe this format is successful because the stores are large enough to offer the specialty departments, including natural food and organic sections, pharmacies, general merchandise, pet centers and high-quality perishables such as fresh seafood and organic produce."

Walmart

early '90s

COSTCO WHOLESALE

1990s

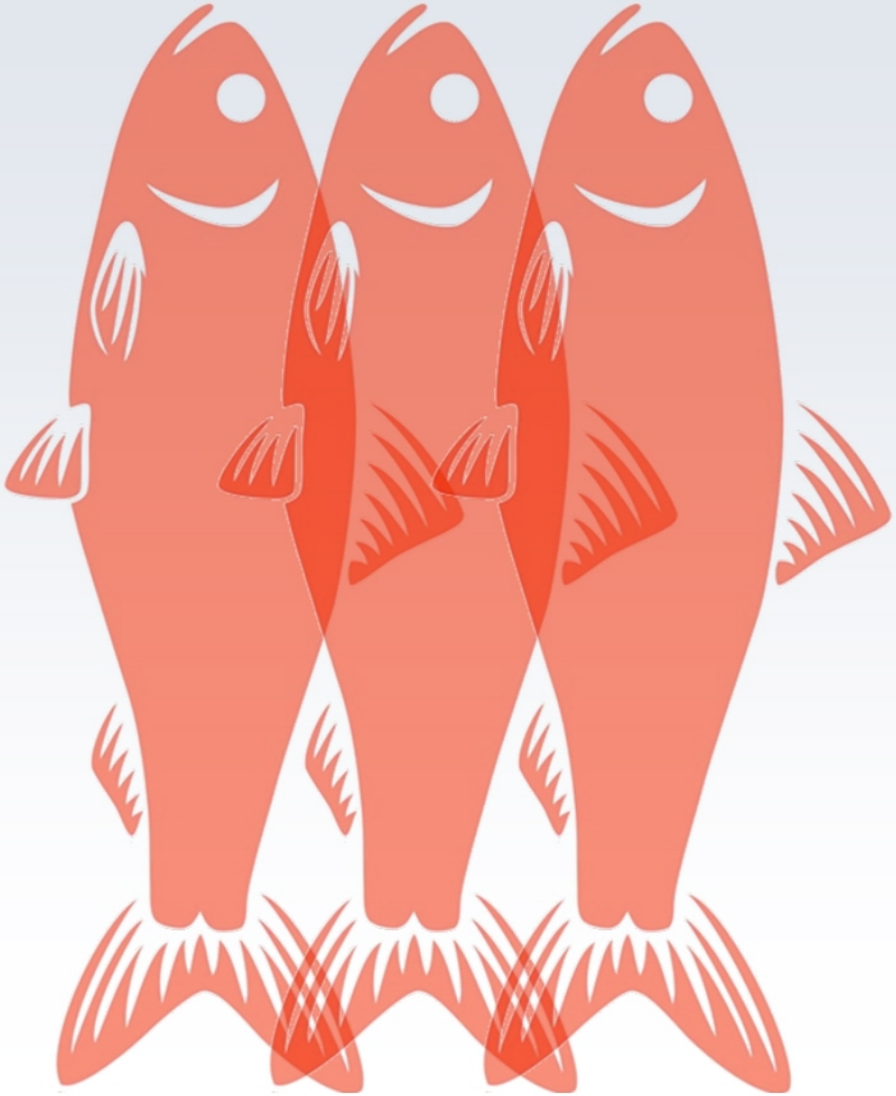
amazon

2017

Complaint Filed

Feb. 2024

Walmart, Costco, and Amazon are Red Herrings



Walmart

- Included in both the supermarket and large format product markets

Amazon

- Whole Foods is included in large format product market
- Amazon Fresh is included in both the supermarket and large format product markets
- eCommerce
  - Many customer still prefer brick and mortar stores
  - Share of less than 4%

Costco

- Included in the large format product market

Entry or Expansion Must be Timely, Likely, and Sufficient

“[C]ourts have frequently relied on their formulation of timely, likely, and sufficient to guide the analysis concerning entry.”
United States v. Aetna Inc., 240 F. Supp. 3d 1, 52 (D.D.C. 2017) (internal quotes omitted).

1,513 Large Format Focal Stores Have a CMCR > 5%

Q Dr. Hill, why did you decide to use the CMCR methodology to evaluate the competitive effects of this transaction?

A So there are two things I like about the CMCR methodology. One is it builds in the efficiencies or the claimed deficiencies directly into the methodology. It is trying to compare the loss in competition to potential efficiencies, and so it is nice to bring those things together in one framework. Two, compared to the methodology that Dr. Israel used, the GUPPI, the CMCR captures an important feedback effect, and that's the feedback between the parties. So if a Kroger store were to raise price, it softens the competitive environment, it reduces competitive pressure, for example, on an Albertsons store, and so that Albertsons store may also raise its price in response. So that dynamic is captured in the CMCR.

the lower right summarizes the number of dots. We have 1,513 such markets, and the focal stores in those markets

N. Hill - D

Q And why did you use compensating marginal cost reduction threshold of 5 percent here?

A So that's a conservative threshold. So it is saying if the compensating marginal cost reduction is not 5 percent or greater, then I'm going to say in that market, the transaction is likely to have an anticompetitive effect. If I compare that to the potential efficiencies that have been identified by the parties, Mr. Yeater estimates they're less than 1 percent. And if I take their claimed cost efficiencies, they are less than 1 percent of combined total cost. So 5 percent is conservative in the sense that it is significantly larger than 1. So I'm giving something of a grace period between 1 and 5.

Head-to-Head | Kroger and Albertsons Compete Across Multiple Dimensions

Rodney McMullen,
Kroger, President and CEO

Q. And Kroger competes with Albertsons to offer fresh produce?
A. Yes.
Q. And Kroger competes with Albertsons to offer a friendly in-store experience; is that right?
A. Yes.
Q. And Kroger competes with Albertsons on price?
A. Yes.

1650

McMullen - X

Q. And Kroger competes with Albertsons to offer different rewards or loyalty programs. Is that fair?
A. Yes.

Head-to-Head | Kroger and Albertsons Are Close Competitors

	Market	# Stores	Division	#1 or #2	Type	Major Competitors	
1	Los Angeles-Long Beach-Anaheim, CA	187	Food 4 Less, Ralphs	Yes	Major Market	Albertsons Safeway/ South Ca Div	Trader Joes Co
3	Houston-The Woodlands-Sugar Land, TX	100	Kroger Houston	No	Major Market	HEB Grocery Co.	Walmart Supercenter
4	Phoenix-Mesa-Scottsdale, AZ	98	Fry's Food and Drug	Yes	Major Market	Walmart Supercenter	Albertsons Safeway/ Southwest Div
5	Dallas-Fort Worth-Arlington, TX	95	Kroger Dallas	Yes	Major Market	Walmart Supercenter	Albertsons Safeway/ Southern Div
7	Seattle-Tacoma-Bellevue, WA	84	Fred Meyer Stores, Quality Food Centers (QFC)	Yes	Major Market	Albertsons Safeway/ Seattle Div	Walmart Supercenter
8	Denver-Aurora-Lakewood, CO	82	King Soopers/City Market	Yes	Major Market	Walmart Supercenter	Albertsons Safeway/ Denver Div
11	Chicago-Naperville-Elgin, IL-IN-WI	60	Food 4 Less, Roundy's, Ruler Foods*	No	Major Market	Albertsons Safeway/ Jewelosco Div	Walmart Supercenter
16	Washington-Arlington-Alexandria, DC-VA-MD-WV	43	Harris Teeter	No	Major Market	Giant Of Maryland Llc	Albertsons Safeway/ Mid Atlantic
18	Riverside-San Bernardino-Ontario, CA	41	Food 4 Less, Ralphs	No	Major Market	Stater Bros Markets	Walmart Supercenter
19	Portland-Vancouver-Hillsboro, OR-WA	41	Fred Meyer Stores, Quality Food Centers (QFC)	Yes	Major Market	Albertsons Safeway/ Portland Div	Winco Foods/North-west Div
21	Las Vegas-Henderson-Paradise, NV	37	Smith's	Yes	Major Market	Albertsons Safeway/ Southwest Div	Walmart Supercenter
24	San Diego-Carlsbad, CA	31	Food 4 Less, Ralphs	Yes	Major Market	Albertsons Safeway/ South Ca Div	Walmart Supercenter
25	Salt Lake City, UT	25	Smith's	Yes	Major Market	Walmart Supercenter	Associated Food Stores/Retail
30	Tucson, AZ	18	Fry's Food and Drug	Yes	Major Market	Albertsons Safeway/ Southwest Div	Walmart Supercenter
33	Albuquerque, N	16	Smith's	Yes	Major Market	Walmart Supercenter	Albertsons Safeway/ United Div
39	Colorado Springs, CO	12	King Soopers/City Market	Yes	Major Market	Walmart Supercenter	Albertsons Safeway/ Denver Div
45	Oxnard-Thousand Oaks-Ventura, CA	10	Food 4 Less, Ralphs	Yes	Major Market	Albertsons Safeway/ South Ca Div	Trader Joes Co

PDX9-001

Kroger FRESH FOR EVERYONE™

Head-to-Head | Kroger and Albertsons Are Close Competitors

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

Vivek Sankaran
Albertsons, CEO

1755

V. Sankaran - X

A 12. In addition, one more.
Q So for eight of those twelve divisions Albertsons' primary food competitor is a Kroger banner?
A For the purpose of this price analysis, yes.
Q And you testified about competition with nontraditional food retailers on direct.
Do you recall that?
A All the time. We compete all the time with them, yes.
Q You would agree that those competitors you talked about -- Walmart, Aldi, Costco, Amazon, et cetera -- they

Q So for eight of those twelve divisions Albertsons' primary food competitor is a Kroger banner?
A For the purpose of this price analysis, yes.

don't have transparency into that.
Q You don't know Amazon's share of fresh meat is?
A I don't know Amazon's share of fresh meat in the marketplace.
Q You don't know what Amazons' share of seafood is?
A I do not know what Amazon's share of seafood is in the marketplace.
Q Do you know what Amazon's share of frozen food is?
A I do not know what Amazon share of frozen food is in

CONTROLLED

Primary Food competitors for Albertsons divisions:

Denver – King Soopers
Intermountain – Fred Meyers
Jewel Osco – Mariano's
Mid-Atlantic – Giant
Northern California – Lucky's / Foodland (Hawaii)
Portland – Fred Meyers
Seattle – Fred Meyers
Shaw's – Stop N Shop
Southern – Kroger
Southern California – Ralphs
Southwest – Fry's

12

PX12375-014

Kroger Competes with Albertsons to Innovate

Stuart Aitken, SVP and Chief Merchant and Marketing Officer

From: Aitken, Stuart W <Stuart.Aitken@kroger.com>
Sent: Wednesday, January 12, 2022 8:14 AM
To: Adcock, Mary Ellen <maryellen.adcock@kroger.com>; Cosset, Yael <yael.cosset@kroger.com>
Subject: FW: Week 49 Digital Exec Summary

Mary Ellen and Yael,

I want to keep this email to a small group who can make things happen. I need your help. I am growing increasingly concerned on PickUp. We need to do something differently, I am not sure what it is so I am reaching out to you to see if we can get scrappy. The why and some ideas are below. Would love your thoughts. We are losing share and have to turn this around quickly.

Albertsons said yesterday in their earnings announcement that 80% of customers can get a pick up slot in 2 hours, that is amazing and we are not even close to this. I read that as a direct hit at us.

Q. Meaning, from a technology perspective, you wanted to see how Kroger could innovate to get scrappy in response to Albertsons; is that correct?

A. Ms. Adcock is operations as well, and so I wanted to get scrappy both from a technology standpoint --

Kroger FRESH FOR EVERYONE™

Head-to-Head | Kroger Is Albertsons' Primary Food Competitor

Tony Silva, Albertsons, Vice President, Strategic Initiatives

A. Silva - D

Q And the goal is that the divisions will achieve prices within these CPI ranges in price advisor, right?

A That is the goal. We are not there yet. We have a ways to go, but that is the goal.

Q And as we talked about earlier, Kroger's pricing is the most frequent of the primary food competitors to be an input for these CPI ranges, right?

A For the primary food competitor.

Q So the plaintiffs asked you a number of questions. Mr. Smith asked you some questions about a tool called price advisor. Just so you have an opportunity, in your own words, what is price advisor? What's its function?

A It is a rules-based pricing engine that was designed to provide recommended price points for our divisions to price and execute pricing, and the division is designed to do some of the heavy lifting in fact-based/data driven to provide focus on the items that matter most to our customers', including price so we

259

A. Silva - X

can price right in the market too.

Head-to-Head | Kroger and Albertsons Compete on Price

Q But you would acknowledge for items in certain geographies Albertsons might be priced lower than Kroger?
A That is always the case at any point in time at any category against different competitors and different markets. Prices are always moving.
Q And this slide talks particularly about critical items.
Do you see that?
A I see that.
Q What do you understand "critical items" to refer to?

V. Sankaran - X

right?
A It is. You could have snapshots at different points in time that will reflect very different pictures. These are targets that are always moving in the markets, and we are always trying to adjust it. And in general we typically end up at a higher price.

Q But you would acknowledge for items in certain geographies Albertsons might be priced lower than Kroger?
A That is always the case at any point in time at any category against different competitors and different markets. Prices are always moving.

Vivek Sankaran
Albertsons, CEO

Hr. Tr. (Sankaran), 1758:7-1759:6

Head-to-Head | Albertsons is Investing to Close the Gap

Q And going forward, Albertsons expects to continue to adjust pricing and promotions all the time to see if it can improve its value proposition to gain market share?
A Again, is it a question or something you are reading?
Q A question.
A We are always striving to find a way to define productivity invest in different things. One of the things we try to invest in is pricing to see if we can improve our market share.
Q And going forward, Albertsons will continue to invest in price?
A That is always a philosophy to find ways to optimize pricing so that we can win market share.

Vivek Sankaran
Albertsons, CEO

Q Has Albertsons made improvements in many different markets?
A Yeah. It would be many. We have many, many markets, and we've made difference in many markets.

lower margin rate on COVID-19 vaccines. In addition, the benefits from our productivity initiatives allowed us to provide incremental targeted price investments to our customers during fiscal 2023.

Hr. Tr. (Sankaran), 1762:19-22; 1764:6-18; PX6153 at 041

Head-to-Head | Kroger Competes with Albertsons on Price

Andy Groff
Kroger, Senior Director of Pricing Strategy and Execution

Q Mr. Groff, this email from Mr. Bottoms accepted the pricing rule at Kroger called the HPR rule, right?
A Yes.
Q HPR is short for "high-price retailer"?
A Yes.
Q And the HPR rule ensures that Kroger's prices aren't higher than the prices of traditional competitors, right?
A Yes. That is the reason for the rule.

Q And the section amount for 40 million is Kroger's anticipated investment over a full year, right?
A Yes. That's correct.
Q And that's, again, the investment Kroger would make to lower prices under the HPR rule, right?
A Yes.

Hr. Tr. (Groff), 276:5-12; 282:20-25

Head-to-Head | Division Presidents Are Aligned with Local Conditions

Rodney McMullen, Kroger, President and CEO

Q. And being close to community helps Kroger understand as local shoppers within that community. Is that fair?
A. Yes.
Q. It also helps Kroger understand competition in that local community; is that right?
A. Yes.
Q. And those divisions you spoke to, they are headed by division presidents. Is that fair?
A. Yes.
Q. And you would agree that those division presidents' purpose is to be a liaison between the local community and Kroger corporate; is that right?
A. That would be one of their responsibilities.
Q. And you would agree that competition differs by local community. Is that fair?
A. Yes.

Head-to-Head | Competition in Illinois

Eggs are going down $0.14 per dozen starting this upcoming Sunday.
Jewel stayed the same. Wal-Mart and Meijer's both lowered their pricing, but we are in line with them.
Staying at our current TPR prices, which are what Jewel is at as well.

Good plan

Thanks
Mike

Michael Marx,
Roundy's Stores,
President

Q. Mr. Marx, you approved that plan to keep Mariano's price at the same price as Jewel, didn't you?

A. I did.

Kroger
FRESH FOR EVERYONE

Head-to-Head | Competition in Southern California

Q And then there is an Albertsons' price and a Vons' price. They are the same at 6.49, correct?
A Yes.
Q So the difference is 1.20, correct?
A Yes.
Q The recommendation is to move up in price for Ralphs, correct?
A Yes.

Q And so for all these items, Albertsons and Vons is acting as a price ceiling, correct?
A In this case.

Date:	Tuesday, May 16 2023 07:38 PM
Subject:	Fwd: White Tag Price Changes Next available 5/24
From:	Schwilke, Tom
To:	Peters, Laura L <laura.peters@ralphs.com>;
Attachments:	image001.gif

Great finds LP!!! Keep em coming

Sent from my iPhone
Begin forwarded message:

From: "Piersma, John L" <john.piersma@ralphs.com>
Date: May 16, 2023 at 4:32:35 PM PDT
To: "Peters, Laura L" <laura.peters@ralphs.com>, "Schwilke, Tom" <tom.schwilke@ralphs.com>
Subject: Fwd: White Tag Price Changes Next available 5/24

Laura - here is the list.

Thanks,

John

Begin forwarded message:

From: "Velasquez, Leo" <leo.velasquez@ralphs.com>
Date: May 16, 2023 at 10:18:52 AM PDT
To: "Silva, Ed" <ed.silva@kroger.com>
Cc: "Piersma, John L" <john.piersma@ralphs.com>
Subject: White Tag Price Changes Next available 5/24

Ed,
Please move on the items below next available 5/24 on White Tag. None of these are Price Program items.
John- we were able to move on 70 items including Tampons.

Head-to-Head | Competition in the Pacific Northwest

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

Q And Fred Meyer will sometimes change its prices in response to Albertsons' price changes, right?
A Through that everyday essentials program -- again, that the general office team oversees and implements, it is my -- I'm aware that prices would change based on Albertsons/Safeway, along with other retailers within the market.

Todd Kammeyer
Kroger, Division President, Fred Meyer

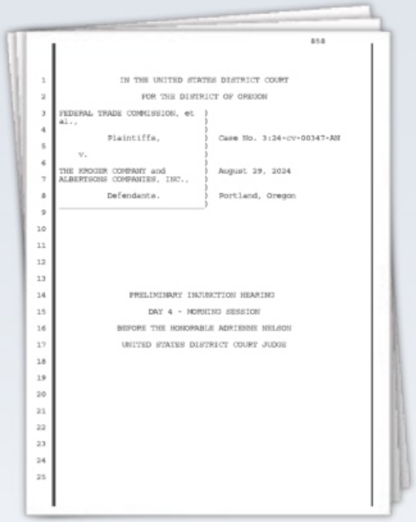
Q And what was this email about?
A This email was an interesting instance where it was Super Bowl week. Super Bowl is the biggest beer sales holiday or sales week of the entire year. We received notification that Safeway/Albertsons had advertised beer at a shockingly low retail, and this note, as I recall, was correspondence about that.
Q And that shockingly low retail was below cost, right?
A Yes.
Q And this is what you would call a promotional price, correct?
A Yes.

Q It states, "On eggs we are using Safeway/Albertsons' as a ceiling," right?
A Yes.
Q By "ceiling," you understood that to mean that was a price that Fred Meyer would not exceed, right?
A Yes.
Q So if that price goes up, Fred Meyer could go up, right?
A In a sense. If there was a ceiling, we would not exceed what they were priced at within those markets they may be.

Kroger FRESH FOR EVERYONE

Hr. Tr. (Kammeyer), 485:15-20, 489:3-11, 493:14-25

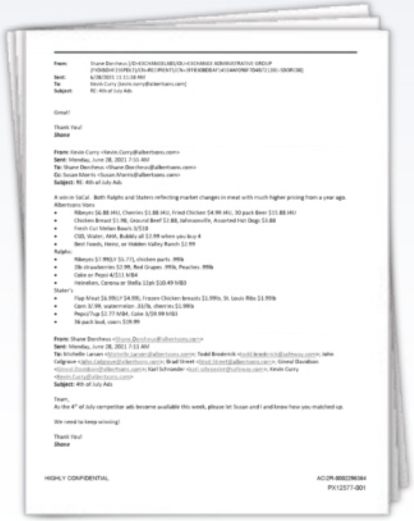
Head-to-Head | Competition in Southern California


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
August 29, 2024
Portland, Oregon
PRELIMINARY INJUNCTION HEARING
DAY 4 - MORNING SESSION
BEFORE THE HONORABLE ADRIENNE NELSON
UNITED STATES DISTRICT COURT JUDGE

Q. Okay. And you write, "A win in So. Cal"; correct?
A. My perception, yes.

Q. Because you view Ralphs as one of your closest competitors and one that you do monitor closely for both price and other factors to ensure that Albertsons' stores are competing as best as they can to attract other customers; correct?
A. Yes.

Kevin Curry
Albertsons, President, Southern California Division



Team,
As the 4th of July competitor ads become available this week, please let Susan and I and know how you matched up.

We need to keep winning!

Thank You!
Shane

Head-to-Head | Competition in the Portland Division

Carl Huntington
Albertsons, President, Southwest Division (formerly Portland Division)

539

C. Huntington - D

A Yeah. Brent, amongst others, helped lead negotiations f
Albertsons Companies, so he's provided an update.
MR. KAYSER: Your Honor, I would like to move Exhib
PX2248 into evidence.
MS. MAINIGI: No objection, Your Honor.
THE COURT: It will be received.
BY MR. KAYSER:
Q And if you look back at the first page of this exhibit,
the second email is an email from you to Chris Lanoue dated
December 11, 2021.
Do you see that?

Q You say, "Keeping you in the loop on this one. Nothing you need to do on your end yet. This would be massive for us if they actually went on strike," right?
A Yes, sir. I see that.
Q And it could be massive for you, because it could drive a lot of sales to Albertsons, right?
A Potentially any strike like this from a competitor could deliver more sales and more customers to our stores. Yes, sir.
Q And, in fact, an analysis was done of the actual potential sales upside to Albertsons if the strike went through, wasn't it?
A I think Chris provided me with his form of analysis at some point, if I remember correctly. Yes, sir.

From: Carl Huntington <Carl.Huntington@albertsons.com>
Sent: Saturday, December 11, 2021 12:25:25 PM
To: Christopher Lanoue <Christopher.Lanoue@albertsons.com>
Subject: Fwd: Portland -- UFCW 555 Negotiation Update

Keeping you in the loop on this one. Nothing you need to do on your end yet. This would be massive for us if they actually went on strike...Think COVID 2.0, but with the knowledge we already have under our belt. Keep very confidential please.

Thanks,

Carl

From: Carl Huntington <Carl.Huntington@albertsons.com>
Sent: Saturday, December 11, 2021 9:09:29 AM
To: Ryan Kidwell <Ryan.Kidwell@safeway.com>
Cc: Brent Bohn <Brent.Bohn@albertsons.com>
Subject: Fwd: Portland -- UFCW 555 Negotiation Update

Ryan,
Just jumped off the phone with Brent. The note below is an overview of our conversation (please do not forward).

I need assistance with two things-

1. Brent needs to address our team with a high level overview of this information on Monday's staff call. Please forward him the invite and give him a 10 minute time slot to speak somewhere near the end.

2. We need to create a separate, confidential 30 minute call on Monday afternoon with just the DMs, Daryl Kidd and Chris Lanoue to get into the specific implications to our business. While nothing has happened yet, we need to start thinking of solutions and keep everyone up to date.

Please reach out to me with any questions.

Thanks,

Carl

From: Brent Bohn <Brent.Bohn@albertsons.com>
Sent: Friday, December 10, 2021 8:06:30 PM

HIGHLY CONFIDENTIAL

ACI2R-0000229964
PX2448-001

Hr. Tr. (Huntington) 539:13-23; PX2448 at 001

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

Todd Broderick
Albertsons, President, Denver Division

CONTROLLED

From: Todd Broderick [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=baddcbd02cb049589eeb7f4c9e9ff520-TBROD00]
Sent: 1/27/2022 9:14:33 AM
To: Shane Dorcheus [shane.dorcheus@albertsons.com]
Subject: Re: King Soopers / Joe Kelly Voice Mail to Employees

I totally agree!

I think we can really leverage the upcoming employee appreciation (I decided to hold off our division level ($30 off $30) we were thinking about doing - didn't want to take a chance of doing something like that would hamper negotiations - timing works out great since we will be announcing our company emp appreciation.

We gained over 800 transferred prescriptions from Kings and I'm going to continue with the ramped up 7 day grocery / fresh orders through Super Bowl. They are struggling get their stores stocked so this will be an

These guys are spiraling down and I need to push my foot on the back of their neck (in a friendly way of course).

you through in advance of remodels / need some of your thoughts on design (big ol monster deli's - Starbucks hidden in corners etc

My calendar is pretty tight the first week of March (holding what we call dept strategic planning meetings where each dept reviews the annual strategies - been doing these for 5 years and always get a lot out of them - you're welcome to join but they are pretty much all day in office meetings.

2) planning on being off tomorrow - I'll be around town until 2 then heading to KC returning Sunday morning.

Have a great day!
Get Outlook for iOS

From: Shane Dorcheus <Shane.Dorcheus@albertsons.com>
Sent: Thursday, January 27, 2022 6:58:05 AM
To: Todd Broderick <todd.broderick@safeway.com>
Subject: RE: King Soopers / Joe Kelly Voice Mail to Employees

Todd,
I am catching up and just listened to this, also all of the correspondence around it.

Man, they really are tone def and it's our opportunity.

Crazy!
Shane

From: Todd Broderick <todd.broderick@safeway.com>
Sent: Wednesday, January 26, 2022 8:34 AM
To: Daniel Dosenbach <Daniel.Dosenbach@albertsons.com>; Brent Bohn <Brent.Bohn@albertsons.com>; Robert McLauchlin <robert.mclauchlin@safeway.com>; Andy Lukes <Andy.Lukes@albertsons.com>

HIGHLY CONFIDENTIAL ACI2R-0009142103
PX2395-001

1404

T. Broderick - D

you gained these 800 prescriptions from Kings during the strike, correct?
A Yes.
Q Then you write: "And I'm going to continue with the ramped up seven-day grocery/fresh orders through Super Bowl. They are struggling to get their stores stocked, so this will be a competitive advantage for us," correct?
ng Soopers,
Q And you write: "These guys are spiraling down, and I

Q And you write: "These guys are spiraling down, and I need to push my foot on the back of their neck (in a friendly way, of course)," correct?
A Yes.
Q And "these guys" is referring to Kroger or King Soopers, correct?
A Yes.

and Kroger is fierce?
A Just as fierce as what it is with Walmart, Costco,

Albertsons

Other Competitors Do Not Offset Harm

The "merger of the second and fifth largest firms in the secondary lead market is not the merger of 'two small firms.'" *RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979).

"'[M]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition….' And this is true even where the merging parties are not the only two, or even the largest, competitors in the market." *US v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017) (collecting cases).

"The acquired firm need not be the other's closest competitor to have an anticompetitive effect; the merging parties only need to be close competitors." *US v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

"[T]he merging parties need not be the top two firms to cause unilateral effects…." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 62 (D.D.C. 2015).

"The fact that Intuit may be the closest competitor for both HRB and TaxACT also does not necessarily prevent a finding of unilateral effects for this merger." *US v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 83 (D.D.C. 2011).

Pricing Today (Defendants' Opening Slide)

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

Kroger's Opening Slides, Slide 84

Pricing After Merger

"RSR next contends that, even if some anticompetitive effects are felt as a result of the merger, competition in the overall secondary lead market will increase because the enlarged RSR will be better able to compete with the industry giant, NL Industries...We [] reject RSR's attempt to justify the RSR/Quemetco merger on such grounds." RSR Corp. v. FTC, 602 F.2d 1317, 1325 (9th Cir. 1979).

Kroger | Albertsons is "doing all the right things"

Stuart Aitken
Kroger, SVP and Chief Merchant and Marketing Officer

②

From everything we have learned over the last couple months
I belive they are now doing all the right things just a couple of years behind us.

KRPROD-FTC-2R-015135173
PX1502-006

From everything we have learned over the last couple months
I belive they are now doing all the right things just a couple of years behind us...

Labor | Unions Leverage Competition During Negotiations

Andrea Zinder
UFCW Local 324, President

Q During a strike or a boycott or another type of job disruption, does Local 324 direct customers where to buy their groceries?

A We need to have suggested locations that we think are comparable to the store that we're targeting so that customers aren't put in a position of crossing our line and going into the store. So we definitely try to find another union grocery store in the area, and we say, "Please go to shop there right now during this dispute. You'll get the same experience there, and you will have the union employees. You will have the same shopping experience, the

A. Zinder - D

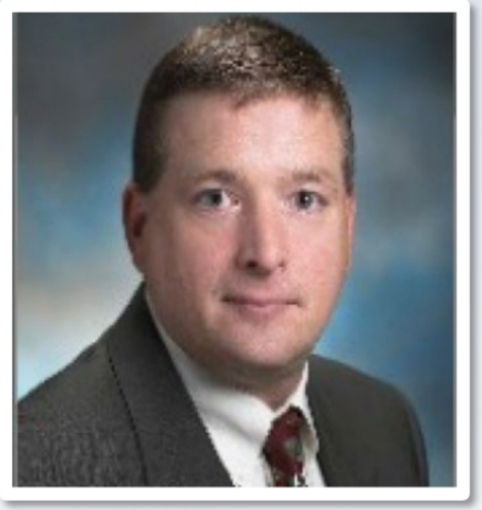
same customer service. But for right now, we just ask you to switch your shopping patterns." We hope they'll come back. But they don't always come back. It may be permanent, which is one of the fears that the companies have.

Q And I heard you say that you direct customers to a union grocery store. Did I hear you correctly?

A Our goal is to direct customers to a union grocery store; to make the shopping experience as comparable as possible. And also, if we are out on strike, we want those other companies to have the business because sometimes then need extra employees, because their business picks up. So when our members aren't picketing, maybe they can pick up some hours to supplement the strike benefits that they're receiving.

STRONGER TOGETHER

Labor | Whipsaw Strikes are an Important Tool Unions Use for Leverage



Jon McPherson,
Kroger, VP of Labor Relations

Q. And what is a whipsaw strike?
A. It's one where we're negotiating at the table and there's at least two employers involved where the union reaches an agreement with one employer and then threatens to strike the other employer if they don't agree to those terms.

Dan Clay
President, UFCW Local 555

Clay - D

Q. What is your understanding of what it means, in the context of labor negotiations, to whipsaw a company?
A. I would -- I would describe it as negotiating the best terms you can with one employer and then using that as leverage to get the other employer to match those benefits.

Labor | Whipsaw Strikes in Action

Dan Clay
President, UFCW Local 555

Q. After Local 555 and Kroger reached an agreement on the new wages to be paid in the December 2021 agreement, did Local 555 use that information to negotiate higher wages

684

Clay - D

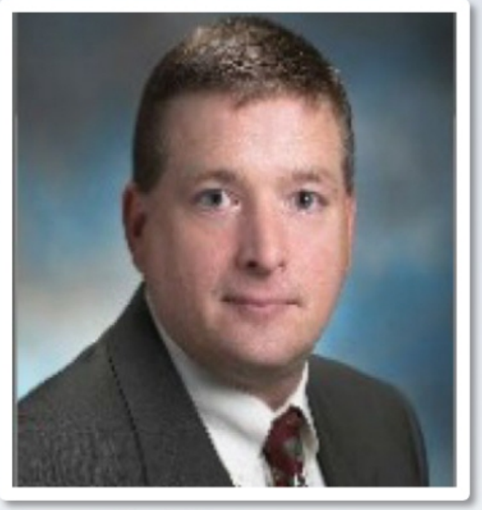
with Albertsons for Bend, Oregon, locations?
A. Yes.

Q. When you said you reached an agreement, were you successful in leveraging the wage increases achieved with Kroger in Bend, Oregon, to negotiate higher wages for Local 555 members at Albertsons stores in Bend, Oregon?
A. Yes.

UFCW LOCAL 555
Dan Clay, President Sandy Humphrey, Secretary-Treasurer

Hr. Tr. (Clay), 683:23-684:2; 684:13-17

Labor | Kroger's and Albertsons' Strategies Are Not Aligned



Jon McPherson,
Kroger, VP of Labor Relations

McPherson - D

Q. Today Kroger and Albertsons may have different business strategies that would cause you to not be aligned?

A. Correct.

Q. For example, you typically feel that Albertsons takes a more short-term view than Kroger when it approaches union negotiations?

A. I do, correct.

Labor | Whipsaw Strikes are an Important Tool Unions Use for Leverage

Jon McPherson,
Kroger, VP of Labor Relations

McPherson - D

Q. In a market where there is only one employer who is unionized, unions cannot use the tactic of a whipsaw strike; correct?
A. Correct. A whipsaw strike? They cannot.
Q. And why is that?
A. Because they would -- they could -- they would having an offer with another employer.
Q. So there needs to be at least two unionized employers negotiating with the union in order to use that tactic?
A. Correct.

Labor | Post-Acquisition the Threat of Strikes is *de minimis*

Andrea Zinder
UFCW Local 324, President

Q So based on this experience, do you expect that the acquisition today will affect your ability to credibly threaten a strike or a boycott?
A If the acquisition were to go through, the credibility of the threat would be minimized. It would be de minimis.

UFCW324 STRONGER TOGETHER

Labor | Union Workers Throughout the Country Oppose the Merger

- OPPOSE **UFCW Local 555** (OR, ID, WA)
- OPPOSE **UFCW Local 3000** (WA, OR, ID)
- OPPOSE **UFCW Local 7** (CO, WY)
- OPPOSE **UFCW Local 400** (DC, MD, VA)
- OPPOSE **UFCW Local 770** (Southern CA)
- OPPOSE **UFCW Local 324** (Southern CA)
- OPPOSE **UFCW International**
- OPPOSE **And more…**

Labor | Union Jobs are Different Than Non-Union Jobs

Andrea Zinder
UFCW Local 324, President

Q So the longer a worker stays with their union job, the better benefits they get over time?
A Yeah. They vest in their pensions. They get the most affordable healthcare benefits. They've got a certain number of holidays and vacation days. So that's all based on seniority. So the longer they stay, the more they're attached to their company because they have all of these benefits that were based on years of service.

Q And if an employer went to go to work for a nonunion grocery store, would they be contributing to a pension fund or a healthcare fund?
A No. The benefit plan -- it's a Taft-Hartley benefit plan. It's only for the union, not employers. So another company may have some kind of medical benefits, but they're not anywhere near as comprehensive as the benefits our members get through the trust fund. And I am not aware of any other employer in the grocery industry that is not union

763

A. Zinder - D

that offers a defined benefit pension plan.

Dan Clay
UFCW Local 555, President

Q. Is it your impression, when you're negotiating with employers on behalf of your members, that Walmart and Amazon provide non-wage benefits to their employees that are similar to the non-wage benefits that Local 555 has been able to secure for its members?
A. I mean, they're only similar in that they're benefits, but as far as the quality of the benefit and what it provides for the employees working there, I don't think they're comparative at all.
Q. And when you say they're not comparative at all, in your view, is Local 555 providing -- able to secure superior non-wage benefits than those offered by Walmart and Amazon?
A. Yes.

UFCW 324 STRONGER TOGETHER

UFCW LOCAL 555 Dan Clay, President Sandy Humphrey, Secretary-Treasurer

Hr. Tr. (Zinder), 750:5-12; 762:17-763:1; (Clay), 679:10-22

Labor | Some Grocery Store Jobs Require More Skill or Training

Andrea Zinder
UFCW Local 324,
President

Q Is it right to say that some jobs at a grocery store require more skills or training than some others?

A Yes. Meat cutters require more training. Pharmacy jobs require more training. Department heads. Definitely experience is necessary for a department head. They do

751

A. Zinder - D

ordering, rotating of product, et cetera. So they need to have that experience. Receivers are more experienced. Front-end managers, who we also represent, are a little more experienced than the workers in the check stand necessarily or stocking. But there are definitely higher-scaled positions.

UFCW 324
STRONGER TOGETHER

Labor | Ordinary Course Evidence Supports Plaintiffs' Geographic Market

Jon McPherson,
Kroger, VP of Labor Relations

Andrea Zinder
UFCW Local 324, President

Q. Okay. You would agree that the majority of Kroger's collective bargaining agreements will specify a geographic area of coverage; right?
A. In some cases. That's correct.
Q. And, in fact, it's a majority of cases?
A. I would say a majority. I would.

Q. Okay. The geographic area where Kroger competes for labor is a local area; right?
A. I think it depends on collective bargaining agreement.

A. Zinder - X

A We use the term CBA jurisdiction.

Hr. Tr. (McPherson), 599:9-14; 598:4-6; (Zinder), 797:1

Defendants’ Efficiencies Do Not Address Harm

“It is not enough to show that the merger would allow St. Luke’s to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facia case is inaccurate.” *St. Alphonsus Med. Center-Nampa, Inc. v. St. Luke’s Health System Ltd.*, 778 F.3d 775, 791 (9th Cir. 2015).

“If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating §7, embark on a series of mergers that would make it in the end as large as the industry leader.” *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 370 (1963).

“[A]nticompetitive effects in one market cannot be offset by procompetitive effects in another market.” *RSR Corp. v. FTC*, 602 F.2d 1317 at 1325 (9th Cir. 1979).

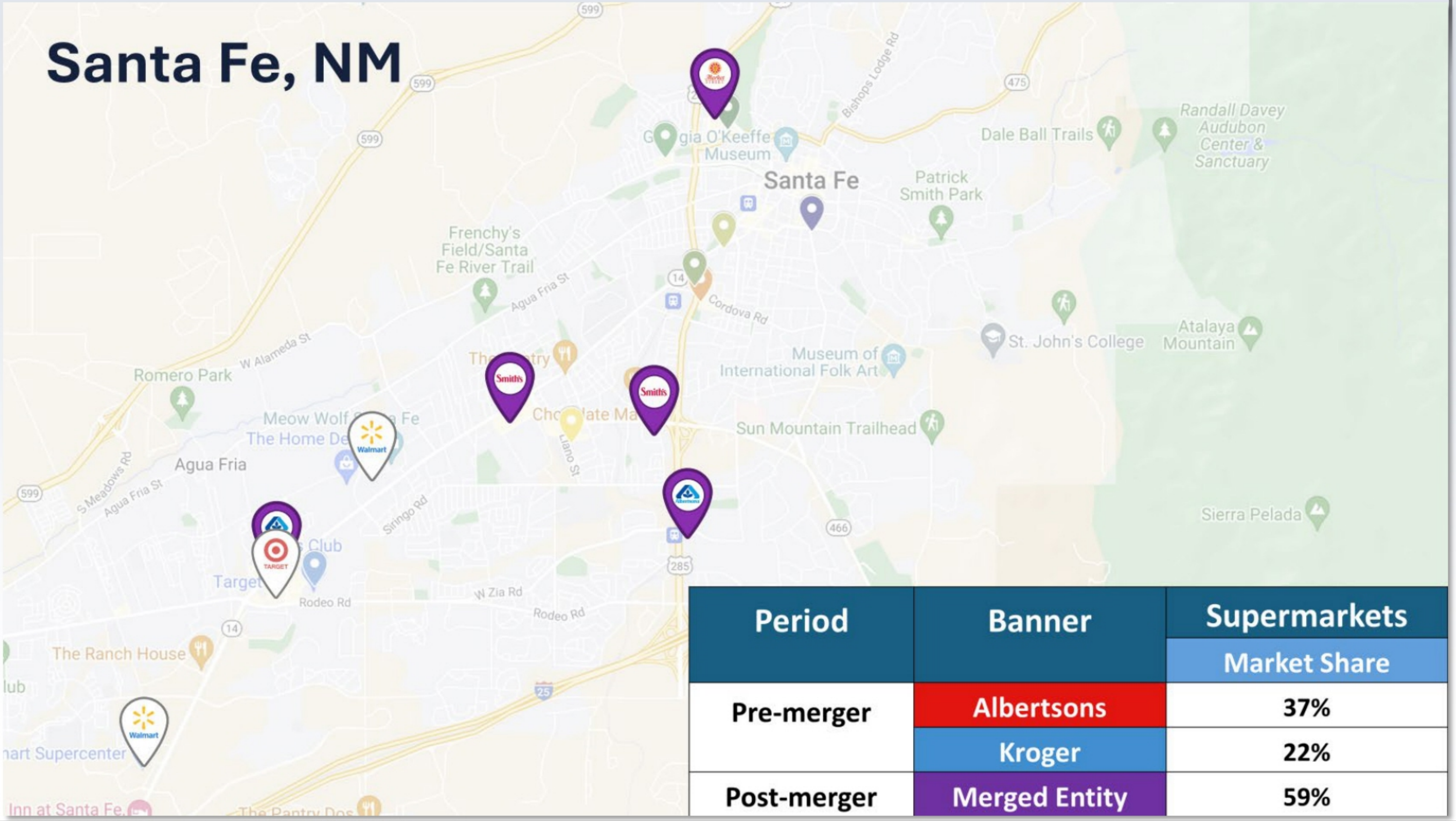
Increased Profits are Not Cognizable Efficiencies

"[R]evenue 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 [defendant's] bottom-line." *FTC v. ProMedica Health*, 2011 WL 1219281, at *36 (N.D. Ohio Mar. 29, 2011).

"While reducing the costs of doing business provides several advantages for the merged firm, these advantages could show up in higher profits instead of benefitting customers or competition." *FTC v. CCC Holdings, Inc.*, 605 F.Supp.2d 26, 73-74 (D.D.C. 2009).

Proposed Divestiture to C&S Will Not Remedy Substantial Lessening of Competition

Dr. Israel: “The four stores that are above 5 percent are all in Santa Fe, New Mexico.”



Period	Banner	Supermarkets Market Share
Pre-merger	Albertsons	37%
	Kroger	22%
Post-merger	Merged Entity	59%

Divestiture Made for Litigation, Not Business Success

Yael Cosset
Kroger, Senior Vice President and Chief Information Officer

Eric Winn
C&S, CEO

Q Now, I understand you can't testify about whether you were consulted regarding the stores included in the divestiture package. So I'll leave that aside and make that clear.
In the April 2024 divestiture package, C&S was not consulted regarding the stores Kroger and Albertsons chose to include in that package, right?
A That is -- that was known by outside counsel and the experts.

Q So C&S did not have the option to carve out one store that was in the wrong spot in Delaware and say, "I don't want that store," right?
A That was the package. There was no contemplated alternative, if you will, if that's what you're implying.

Q. Did C&S have a role in selecting the 579 stores in the package?

1170

Winn - D

A. We did not.

Divestiture Footprint Shows Lack of Business Input

PX1641 (list of stores to be divested to C&S)

Legal Standard for Divestiture Defense

Divestiture must "restore competition" and "replac[e] the *competitive intensity* lost as a result of the merger."

FTC v. Sysco, 113 F. Supp. 3d 1, 72 (D.D.C. 2015)

Defendants must show that the proposed remedy "sufficiently *mitigate*[*s*] the merger's effect such that it was no longer likely to *substantially* lessen competition."

Illumina, Inc. v. FTC, 88 F.4th 1036, 1059 (5th Cir. 2023)

Roadmap

1. **Defendants' Claims Are Contradictory**
2. **Divestiture Leaves Hundreds of Markets Unremedied**
3. **Competition Likely Harmed in Additional Markets**
4. **No Remedy for Harms to Labor Markets**
5. **Equities Favor Injunction**

Defendants' Claims Are Contradictory

- **Scale Is Necessary for Kroger, But Not C&S**
- **The Acquisition is About Scale, But Kroger Won't Divest Assets Irrelevant To Scale**
- **Kroger Claims Purported Efficiencies from Assets It Says C&S Doesn't Need to Compete**

C&S Lacks Scale

Daniel Galante
Berkeley Research Group, Managing Director

Q And I believe you stated just now to my colleague that the divestiture would open up markets for C&S as a wholesaler where it is not currently present today. What are those geographies?
A Currently we don't operate in Southern California as a wholesaler. We are in Northern California. We are not in Arizona. We are not in Colorado. We are not really in any of the InterMountain areas at all. We are certainly not in

1078

M. McGowan - ReD

Alaska.

Q And the revenue from serving those 7,500 stores is less than a quarter of C&S's revenues, correct?
A Yes. That's correct.

Mark McGowan
C&S, President of Retail

C&S Wholesale Grocers

From Defendants' Opening

Defendants' Supermarket Banners

Kroger FRESH FOR EVERYONE

Fry's Food Stores
Dillons Food Stores
QFC Quality Food Centers
Ralphs
Mariano's
King Soopers
Jay C Food Stores
Roundy's
Pick 'n Save
Ruler Foods By Kroger
metro market
Gerbes Super Markets
Baker's
Smith's
Pay Less Super Markets
Foods Co
Food 4 Less
City Market
Fred Meyer
Harris Teeter Your Neighborhood Market

Albertsons

Andronico's Community Markets
Shaw's
Market Street
ACME
star market
VONS
CARRS
Amigos
KINGS
United Supermarkets
Tom Thumb
United Express
Jewel Osco
PAVILIONS
SAFEWAY
Lucky
Haggen
Randalls
Balducci's

Defendants' Supermarket Banners

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

Kroger FRESH FOR EVERYONE™

Ralphs
Dillons FOOD STORES
United supermarkets
Albertsons
fry's FOOD STORES
SAFEWAY
Jay C FOOD STORES
Lucky
KINGS
KING Soopers
Andronico's COMMUNITY MARKETS
Jewel Osco
metro market
ROUNDY'S
Pick 'n Save
ACME
star market
VONS
Baker's
Gerbes Super Markets
Ruler FOODS By Kroger
Amigos
shaw's
Foods Co
Smith's
Pay Less Super Markets
Tom Thumb
Market Street
Fred Meyer
Food 4 Less
City Market
United Express
Harris Teeter YOUR NEIGHBORHOOD MARKET
Randalls
PAVILIONS
Balducci's

C&S Wholesale Grocers

WA & PDX
QFC Quality Food Centers

Chicago
MARIANO'S

CARRS
AK

Haggen
WA

Albertsons
SAFEWAY

Licensed to C&S In 2 States Each

From Defendants’ Opening

Defendants' Private Label Brands

FOIA-2025-01503 00000067086 "UNCLASSIFIED" 4/22/2025

Kroger FRESH FOR EVERYONE™

smart way™

Kroger FRESH FOR EVERYONE™

simple truth

FREE FROM[*] UNWANTED INGREDIENTS

HOME CHEF

PRIVATE SELECTION

HERITAGE FARM Fresh Value Grows Here

BAKERY FRESH

ABOUND

Comforts

BLOOM HAUS

LUVSOME

Pet Pride

Albertsons

O organics

Signature SELECT

Lucerne DAIRY FARMS SINCE 1904

readymeals

open nature

WATERFRONT ESTD BISTRO 2009

Signature RESERVE™

debi lilly design

PRIMO TAGLIO FIRST CUT QUALITY SAY: PREE-MO • TAHL-YO

Value corner

Soleil

overjoyed

Defendants' Private Label Brands

Kroger FRESH FOR EVERYONE™

smart way™

Kroger FRESH FOR EVERYONE™

simple truth FREE FROM UNWANTED INGREDIENTS

HOME CHEF

PRIVATE SELECTION

overjoyed

BAKERY FRESH

ABOUND

Soleil

LUVSOME

HERITAGE FARM Fresh Value Grows Here

BLOOM HAUS

Pet Pride

Value corner

Lucerne DAIRY FARMS SINCE 1904

O organics

Signature SELECT

Licensed to C&S
For 4 Years
(2 Years at Cost)

C&S Wholesale Grocers

readymeals

WATERFRONT ESTD BISTRO 2009

FIRST CUT QUALITY PRIMO TAGLIO SAY: PREE-MO • TAHL-YO

open nature

debi lilly design

BEST YET SINCE 1893

Topco

From Defendants' Opening

Defendants’ Technology Assets

Kroger FRESH FOR EVERYONE™

Albertsons

Kroger PRECISION MARKETING

84.51°

Kroger PLUS

boost

ALBERTSONS MEDIA COLLECTIVE

for U

fresh pass

Defendants’ Technology Assets

Kroger FRESH FOR EVERYONE™

C&S Wholesale Grocers

Kroger PRECISION MARKETING

84.51°

boost

ALBERTSONS MEDIA COLLECTIVE

Kroger PLUS

fresh pass

for U

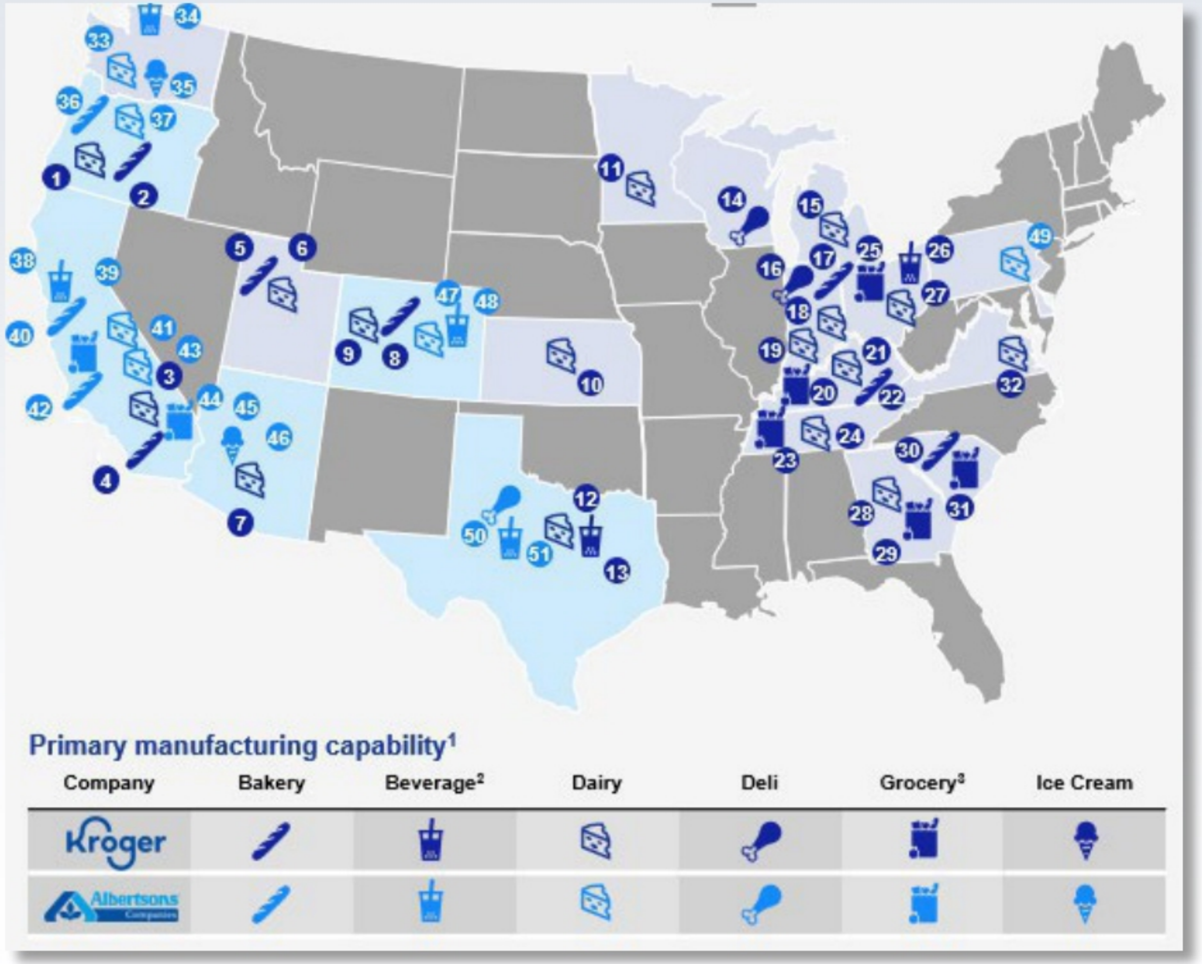
Licensed to C&S
For Up to 1 Year

Pig Points Buy. Earn. Redeem.

RED DOT SAVINGS SHOP · EARN · REDEEM

Defendants' Purported Efficiencies

Manufacturing



Own Brands

Kroger FRESH FOR EVERYONE
Signature SELECT
Lucerne DAIRY FARMS SINCE 1901
O organics
PRIVATE SELECTION

Retail Media Network

Kroger PRECISION MARKETING
84.51°
ALBERTSONS MEDIA COLLECTIVE

Defendants Bear the Burden to Show Divestiture Will Succeed

Where the "*prima facie* case anticipates and addresses the respondent's rebuttal evidence, as in this case, the *prima facie* case is very compelling and significantly strengthened," and "the respondent's burden of production on rebuttal is also heightened."

Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 426 (5th Cir. 2008)

Susan Morris's Testimony

Susan Morris
Albertsons, Executive Vice President and COO

Q. And what are the limits of the kind of information that you haven't been able to access?
A. So things I wouldn't go deep into detail on is getting into specifics of financials. I've seen an overview of a financial model, but it's never broken down into markets and certainly never to stores. I'm not able to access customer-specific data, loyalty data, those kinds of things, which I don't need to at this point in time. We don't engage in deep discussions on strategy, outside of organizational design, how divisions might be set up; the ins and outs of running stores.

Q. But you don't know the timeline on which C&S plans to rebanner; correct?
A. There are certain levels of conversation I've not been able to have with C&S, for the reasons I mentioned earlier.

Dr. Israel Offers No Opinion on Divestiture Performance, Effect of Lower Sales, or Store Closures

Mark Israel,
Compass Lexecon,
President

Q And just to be very clear about what analysis you did do and didn't do, your implementation of EGK and your calculation of GUPPI does not account for operational changes at divested stores, correct?
A I don't know how you would put them in a GUPPI, because GUPPIs are based on current diversions and therefore whatever competition might be lost. So I'm not sure how they would go in a GUPPI, but I agree I didn't do that.

Q Sure. Your GUPPI analysis, using your implementation of the EGK model, does not account for whether any specific store might close, right?
A I think it's the same answer as before. GUPPIs are based on current diversions, current competitive pressures, and how that changes when you changes overlaps. So I don't know how you would put that in a GUPPI in particular, but I agree it is not in there.

Q The EGK model doesn't account for changes in product assortment or product availability, correct?
A I'm trying to think through the variables that are in there. In all cases it's a model of how they substitute today, because that's what you need for the GUPPIs. So I think it's right that it doesn't account for post-transaction changes in either direction.
Again, the EGK model, as it feeds into the GUPPIs, is what's the substitution today, and then what would the implications of that be for what competition might be affected by combining certain stores under common ownership.

Mr. Galante Offers No Opinion on Competition

Daniel Galante
Berkeley Research Group, Managing Director

Q Let's start with what opinions you're not offering in the case. You do not offer an opinion about competitive intensity, correct?
A Yes. That's correct.
Q And you do not offer an opinion about whether the merger will result in a loss of competition?
A Yes. That's correct.
Q You do not offer an opinion about whether the proposed divestiture will restore competition loss due to the merger?
A Yes.
Q You do not offer an opinion about harm to consumers?
A Yes.

3190

D. Galante - X

Q You do not offer an opinion about consumer welfare?
A Yes.

Role of the Court in Evaluating Divestiture

The Court cannot simultaneously consider the board's ultimate approval of the transaction as evidence that [divestiture buyer] can compete successfully, yet disregard contemporaneous statements to the contrary.

United States v. Aetna Inc., 240 F. Supp. 3d 1, 70-71 (D.D.C. 2017)

Divestiture Is Insufficient to Remedy Acquisition's Harms

- **Leaves Hundreds of Markets Unremedied**
- **C&S's Poor Track Record of Operating Supermarkets**
- **Divestiture Is Not a Standalone Business**
- **C&S Will Need to Rebanner Hundreds of Stores**
- **C&S Will Depend on Kroger for Up to Four Years**
- **C&S Will Not Compete on Price for Up to Three Years**
- **C&S Will Have Less Incentive to Compete than Albertsons**
- **C&S Predicts Declining Sales and Increased Costs**
- **C&S's Failure with Prior Divestiture**

Harm in a Single Market Is Sufficient Basis for Injunction

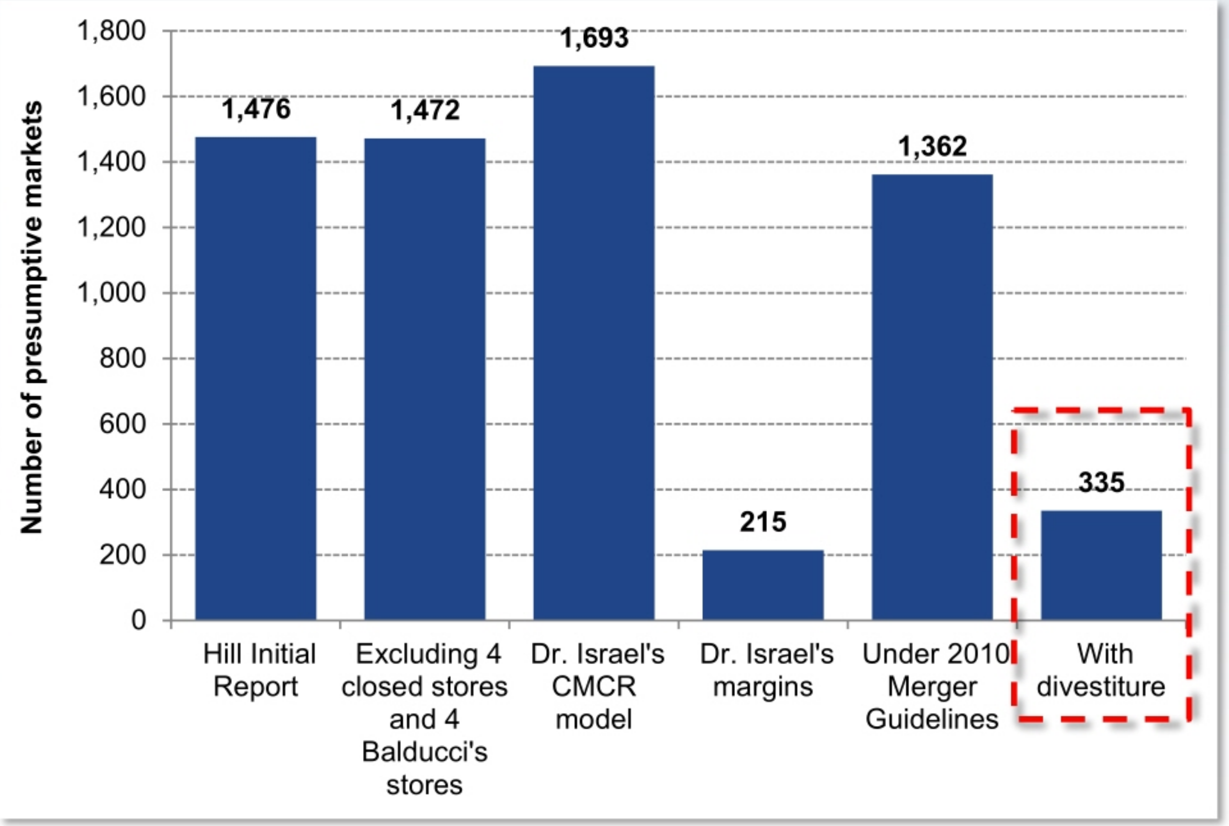
"[T]he district court did not abuse its discretion in enjoining the merger on the basis of **the merger's anticompetitive effects in the Richmond market**. And, as previously noted, this holding provides **an independent basis for the injunction**, even absent a finding of anticompetitive harm in the fourteen-state national accounts market."

United States v. Anthem, 855 F.3d 345, 368 (D.C. Cir. 2017) (emphasis added).

“Perfect” Divestiture Leaves Hundreds of Markets Unremedied

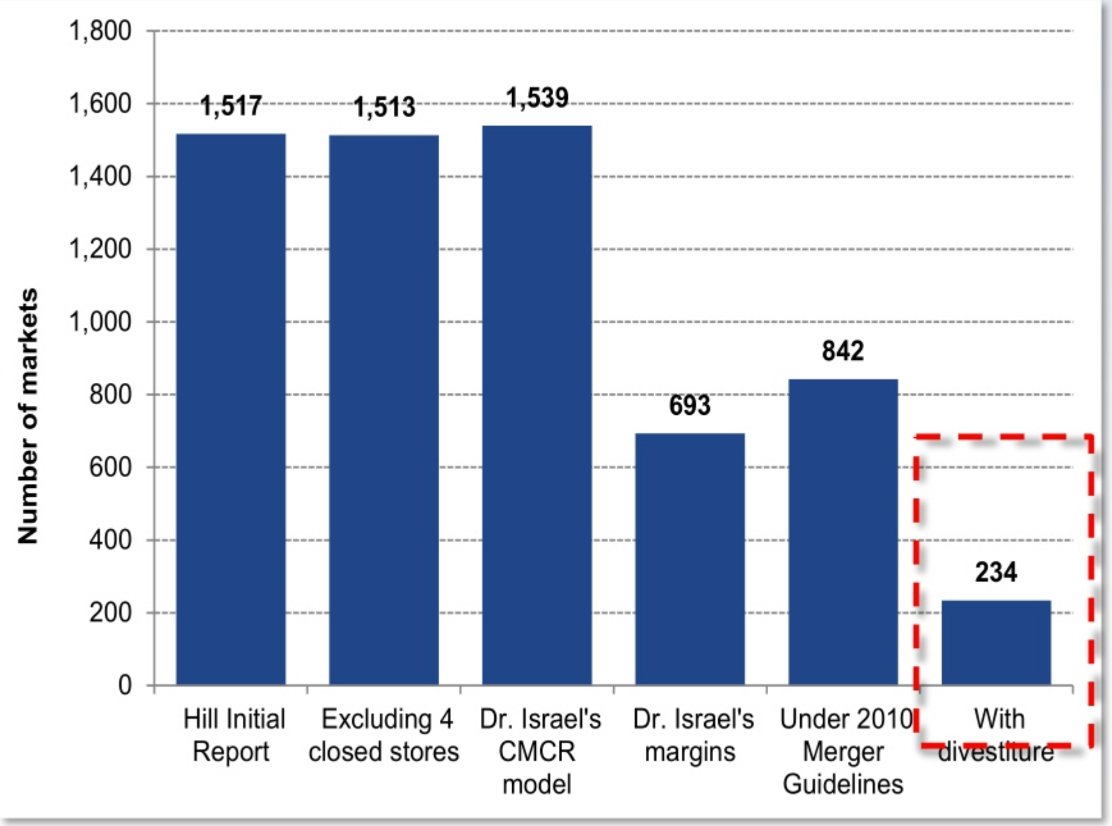
Supermarket Market

Number of presumptive >5% CMCR markets



Large Format Store Market

Number of presumptive >5% CMCR markets

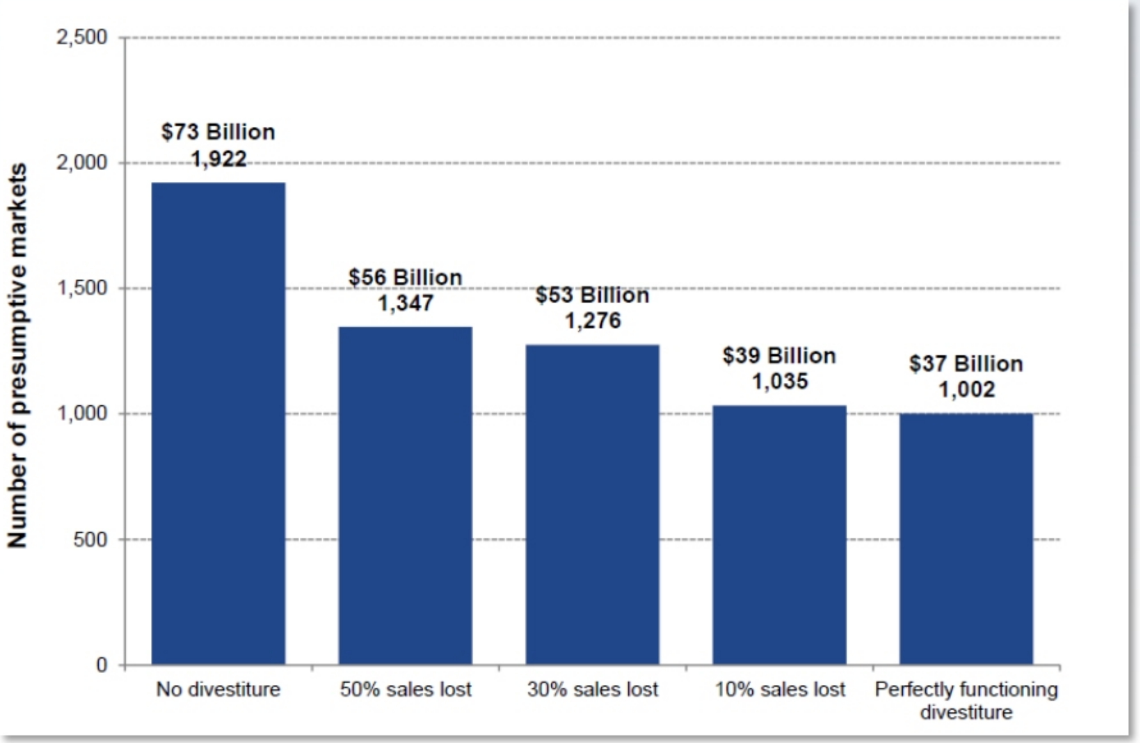


PX7006 at 040, Fig. 13; PX7006 at 106, Fig. 46.

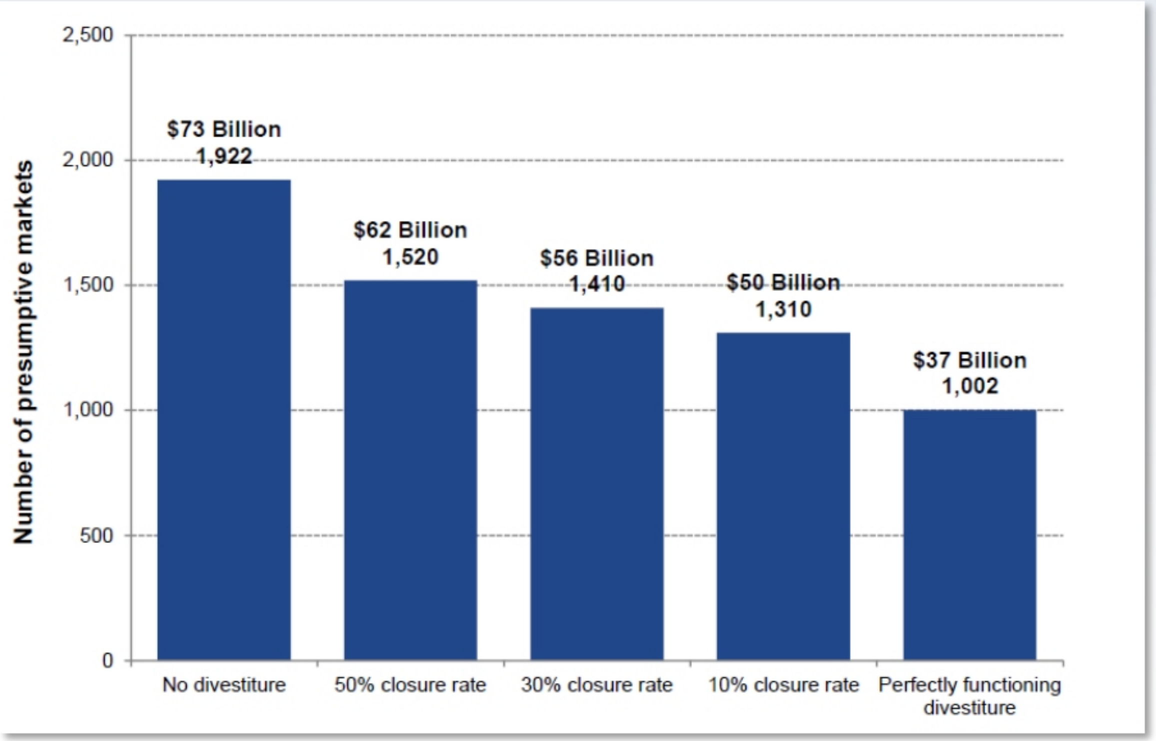
Likely Harm to Competition Increases with Sales Loss or Store Closures

Supermarket Market

Sales Loss Scenarios (presumptive supermarket markets and total annual sales of focal stores)

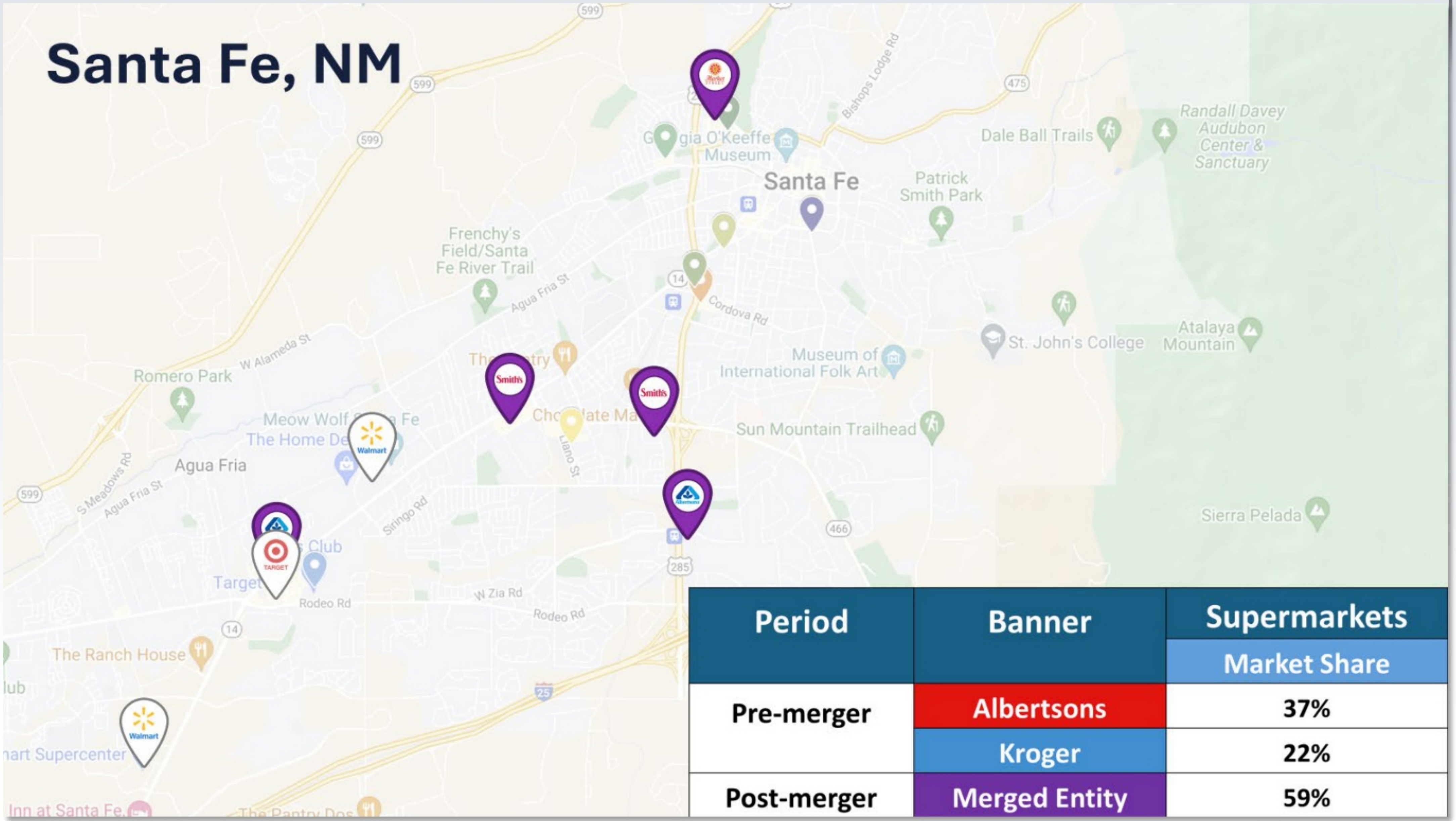


Store Closure Rate Scenarios (presumptive supermarket markets and total annual sales of focal stores)



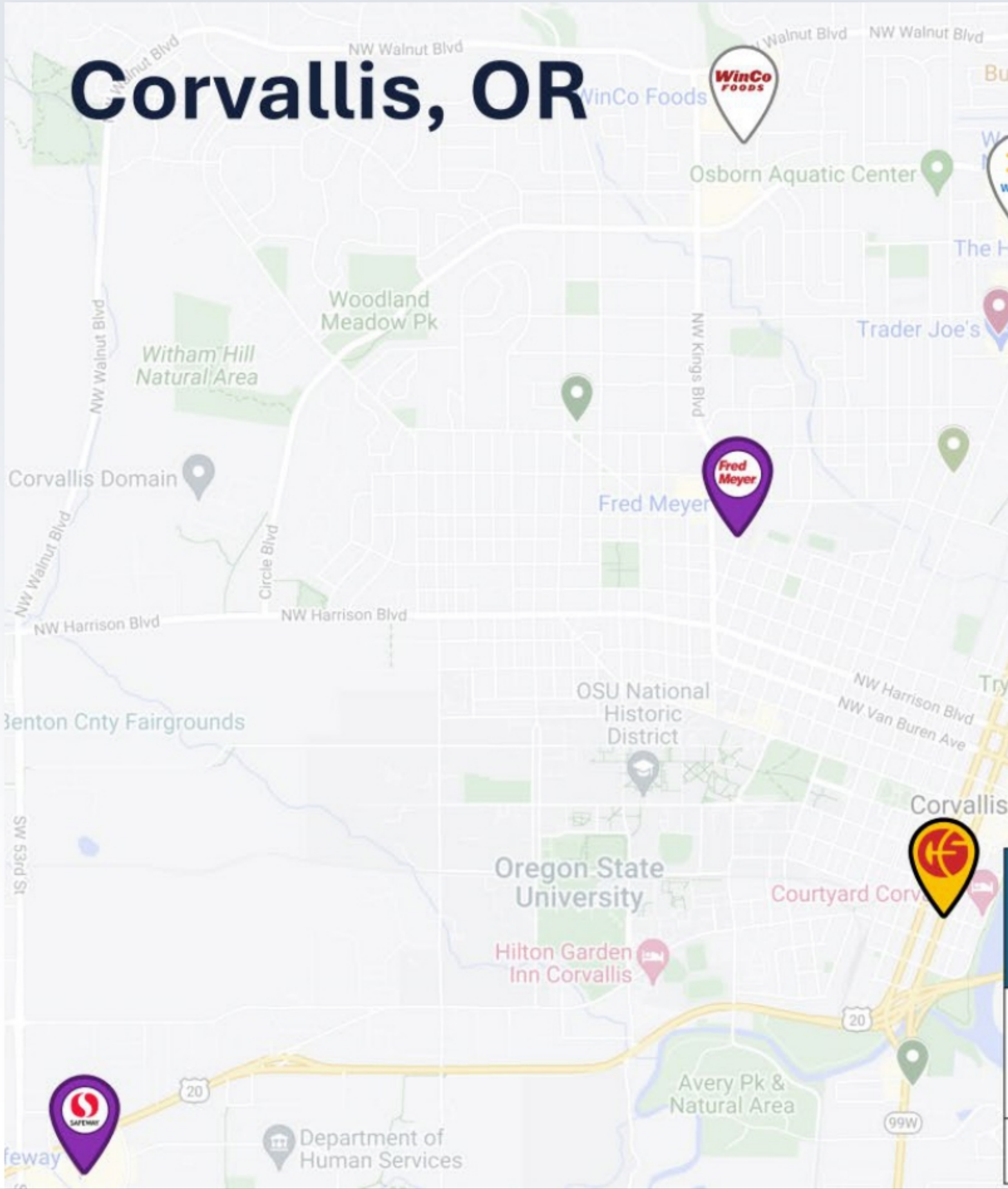
PX7006 at 110, Fig. 51; PX7006 at 111, Fig. 52

Zoomingin on Santa Fe



Period	Banner	Supermarkets Market Share
Pre-merger	Albertsons	37%
	Kroger	22%
Post-merger	Merged Entity	59%

Zooming in on Corvallis



Period	Banner	Supermarkets Market Share
Pre-merger	Albertsons	33%
	Kroger	27%
Post-merger	Merged Entity	51%

C&S's Poor Track Record of Operating Supermarkets

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Mark McGowan
C&S, President of Retail

Eric Winn
C&S, CEO

Q And is it true that if you exclude the wholesale profits, the Grand Union stores lose approximately

M. McGowan - D

$3 million annually?
A Approximately. As I said, improving. But that's reflective of what I testified to, yes.

Q Did C&S close that Piggly Wiggly Midwest store because it was underperforming?
A C&S closed -- well, Piggly Wiggly Midwest, which operated that store, closed it because it had invested numerous months in an improvement plan, which did not work. The store needed a tremendous amount of capital. It was not profitable, and we were approached by the landlord to return the building because he had a better use for it. That's why we closed the store.
Q And was that store meeting an acceptable level of profitability?
A No, it was not.

Q. So one percent of C&S's total revenues come from its 23 owned and operated stores?
A. Yes. I apologize. My math was fuzzy this morning.

C&S Wholesale Grocers

Divestiture Is Not a Standalone Business

Divestiture Assets Are Not a "Standalone Business"

In the Divestiture, C&S receives:	"Mixed Bag"
579 Divested Stores: • 485 from Albertsons • 94 from Kroger	Stores currently rely on **four different IT systems and various supporting assets and services**
Banners and PL Brands: • Kroger banners (QFC, Mariano's) • Albertsons banners (Carrs, Haggen, Safeway license AZ + CO, Albertsons license CA + WY) • Five Albertsons PL brands (15% of PL sales)	**Not** receiving many of Kroger's and Albertsons' key assets
Limited Supporting Manufacturing Assets: • One Albertsons dairy manufacturing plant in CO	**Not** receiving any bakery, grocery, beverage, or ice cream facilities; Kroger retains its 33 plants + Albertsons' other 18
Limited Supporting Distribution Assets: • Three distribution centers + leases/rights to three	**Not** acquiring the primary distribution center **for 267 of the 579 stores**
Limited Supporting Capabilities: • Copy of Albertsons tech stack minus marketing and competitive functionalities	Tech stack provision **will require C&S to build out competitive marketing program largely from scratch** (pricing, loyalty, RMN)

Source: Expert Report of Daniel Galante, ¶ 68; PX7008 (Expert Rebuttal Report of Edward J. Fox), ¶ 58; PX7002 (Expert Report of Edward J. Fox), ¶¶ 93, 169, 205, Figure 24.

PAGE 54

C&S Will Need to Rebanner Hundreds of Stores

Alona Florenz
C&S, SVP Corporate Development

Q. Did C&S include Bain's worst-case scenarios for rebannering sales impact in its conservative model?
A. No, we did not.

Winn - D

Q. And did C&S rebanner those stores from Tops to Grand Union?
A. Yes.
Q. And did rebannering the stores cause any losses in store sales?
A. That would be one of the contributors, yes.

Eric Winn
C&S, CEO

C&S Wholesale Grocers

Hr. Tr. (Florenz) 1144:11-13; (Winn) 1175:1-6

C&S Will Depend on Kroger for Up to Four Years

“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.”

United States v. Aetna Inc., 240 F.Supp.3d 1, 60 (D.D.C. 2017) (internal citations omitted).

C&S Will Depend on Kroger for Up to Four Years

Eric Winn
C&S, CEO

Q. So will C&S be completely independent from Kroger until all of the TSA services cease?
A. No.
Q. Is the longest TSA service private label supply active for up to four years?

1195

Winn - D

A. Yes.
Q. So for up to four years, will C&S be decoupled from Kroger?
A. No.

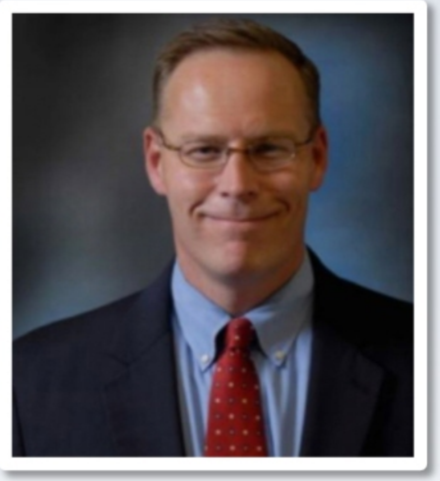
C&S Wholesale Grocers

C&S Will Have Less Incentive to Compete

"[S]tatements by [buyer] executives indicate that [the buyer] might decide to withdraw from several of the divestiture [markets] in short order, and instead only compete in some . . . . The low purchase price thus further supports the conclusion that [the buyer] has serious doubts about its own ability to manage all the divestiture [assets] but is willing to try given the low risk to the company reflected in the bargain price. That does not give the Court confidence in [the buyer's] ability to effectively replace the competition lost by the merger."

United States v. Aetna Inc., 240 F.Supp.3d 1, 72 (D.D.C. 2017) (internal citations omitted).

C&S Will Have Less Incentive to Compete



Mark McGowan
C&S, President of Retail

Eric Winn
C&S, CEO

Q And what do you mean by the "geography"?
A Well, if you look at -- we were all looking at the map that was up on the wall. C&S is pretty much a perimeter company when you look at the United States. So we're coastal. We've got Texas and the southeast and Wisconsin, and we get a little bit in off the Pacific. But this gives us an opportunity to get into Arizona, Colorado, the InterMountain areas and a much broader area in the West

1048

M. McGowan - X

Coast as well as a bigger presence in the Chicago market.
And why is this such an amazing opportunity for us, we absolutely believe it's going to make us a successful retailer, but equally a better wholesaler. Our wholesale footprint with the distribution centers that we're going to acquire and build as part of this transaction will open up more markets for us as a wholesaler. It will allow us to help independents.

-We are committed to being a much larger wholesaler than retailer so we are focused on excellence in being a wholesaler and growing our wholesale business

C&S Predicts Declining Sales and Increased Costs

Alona Florenz
C&S, SVP Corporate Development

Q. In its deal model, has C&S modeled any impact on sales from the loss of transition services?
A. We did not put an impact on sales, but we built in costs.
Q. In its deal model, has C&S modeled any impact on sales after customers can no longer use Kroger or Albertsons loyalty cards at C&S?
A. No, we did not.
Q. In its deal model, has C&S modeled any impact on sales after C&S customers are no longer able to use the current Kroger and Albertsons ecommerce apps to order from C&S stores?
A. No, we did not on sales.
Q. Has C&S modeled any impact on sales after C&S no longer receives TSA support relating to store operations?
A. No, we did not.
Q. Has C&S modeled any impact on sales after C&S no longer receives support from Kroger for promotions?
A. No, we do not.
Q. Has C&S modeled any impact on sales after C&S no longer receives support from Kroger for pharmacy services?
A. No, we did not.

C&S Wholesale Grocers

No Remedy for Harms to Labor Markets

Andrea Zinder
UFCW Local 324, President

Jon McPherson,
Kroger, VP of Labor Relations

A. Zinder - D

Q And based on your experience will the proposed divestiture to C&S allow you to successfully leverage C&S against Kroger?
A No. We wouldn't be able to, because Kroger would not make any changes to their bargaining stance because of the CVS contract. Even if we were able to negotiate something, Kroger will not pay attention to -- Kroger does not care what a small employer negotiates. They know they have a much greater market share throughout Southern California, and they're going to be able to withstand any kind of work disruption.

Q. So you've tried at least three times in the last five years to enter MSAAs with Albertsons in Portland, Denver, and Southern California, and each time you have not been able to agree with Albertsons; is that correct?
A. Correct.

UFCW 324 STRONGER TOGETHER

Kroger FRESH FOR EVERYONE

Equities Favor Injunction

Eric Winn
C&S, CEO

but we're in business to have fun and be successful, and I think that's what we're gonna do.

C&S Wholesale Grocers

Mark McGowan
C&S, President of Retail

energized. And I also know that grocers want to win. And grocers compete. And I know the people that are going to join that C&S team are going to want to be on the winning side.

C&S Wholesale Grocers

Susan Morris,
Albertsons, Executive Vice President and COO

I'm excited to take a subset of the stores and go do something really unique and special, excited to weave the Kroger banners into it because I think they have that potential as well. I believe Rick Cohen is sincere in his

Albertsons

Equities Favor Injunction

Dan Clay
UFCW Local 555, President

Q. Did you form an understanding, as of March 2023, as to the reasons that the members of Local 555 were concerned about this merger and did not want it to proceed?
A. So there's concern around -- there were concerns around too much -- too much power. There were concerns about there not being another place to work that's similar, if an employee wasn't able to work at one or the other, and -- and my members that work at Albertsons and Safeway would rather work at Albertsons and Safeway than Kroger.

Q Mr. Clay, do you have any cause to doubt that Kroger will not follow through on its supposed commitment to invest in wages and benefits in a way that will benefit the members of Local 555?
A Yeah. Based on the conversations that were had in part, I guess, candidly, we just don't believe that it's something that they're going to do.

UFCW 555
Dan Clay, President Sandy Humphrey, Secretary-Treasurer

Andrea Zinder
UFCW Local 324, President

Q Why do you think that your customers -- your workers wouldn't take that risk to work for C&S?
A Because they've got too much time in the industry to give all of that up. If somebody was in the middle of their career, it would be basically having to start all over again if they got laid off -- if C&S was not successful or didn't have enough stores in the area and one failed, they'd have no place to go. Our members stay with their companies because of what they've earned and what they've gained. They like their jobs. They really like their jobs, and they really like the fact that because they have been there for a while, they've achieved more over time than they would if they just left and went to someplace else.

UFCW 324
STRONGER TOGETHER

Offsetting Risks of Store Closures

Vivek Sankaran
Albertsons, CEO

Q And you said something about -- that you may have to do more with less. Are layoffs something you might have to consider?
A I would have to consider that.
Q And store closures? Is that something --
A I would have to consider that.

Rodney McMullen
Kroger, CEO

Q. And Kroger is only committing to not closing stores at the initial time of the merger; is that correct?
A. Correct.
Q. And, in fact, Kroger may, indeed, close stores later; is that right?
A. Yes.

Eric Winn
C&S, CEO

Q. Have Kroger, Albertsons, and C&S made a public commitment -- or a public announcement that no stores will close as a result of the merger?
A. Yes.
Q. Does that announcement have binding effect?
A. No.

Hr. Tr. (Winn), 1199:15-20; (McMullen), 1661:10-15; (Sankaran), 1728:12-17

Claims that Defendants Will Abandon the Merger Are Irrelevant

"[E]ven accepting [Defendants'] assertion that they would abandon the merger following issuance of the injunction, the result—that the public would be denied the procompetitive advantages of the merger—would be [Defendants'] doing."

FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 353 (3d Cir. 2016)

"If the merger makes economic sense now, the [Defendants] have offered no reason why it would not do so later."

FTC v. H.J. Heinz Co., 246 F.3d 708, 726 (D.C. Cir. 2001)

Public Interest in Effective Antitrust Enforcement

"The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. **For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it**."

United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 323 (1961) (emphasis added).