

# Plaintiffs' Rebuttal Closing Argument

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

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



## Standard

The weakened-competitor defense requires "a showing that 'the acquired firm's weakness[]':

- (1) "cannot be resolved by any competitive means'" and
- (2) "'would cause that firm's market share to reduce to a level that would undermine the [plaintiff's] prima facie case.'"

*FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1221 (11th Cir. 1991)

## The "Hail-Mary Pass" of Doomed Mergers

"A defendant can show this 'only in rare cases' . . . which is why the weakened-competitor defense has been described as 'the Hail-Mary pass of presumptively doomed mergers.'"

*ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 572 (6th Cir. 2014)



## Standard

**"A company invoking the defense has the burden of showing that its 'resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure ..., and further that it tried and failed to merge with a company other than the acquiring one.'"**

*Olin Corp. v. FTC*, 986 F.2d 1295, 1306-1307 (9th Cir. 1993) (citing *International Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930) and *United States v. General Dynamics Corp.*, 415 U.S. 486, 507 (1974))

**"Moreover, we know from the broad experience of the business community... that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies. The prospects of reorganization of [of the purportedly failing firm] would have had to be dim or nonexistent to make the failing company doctrine applicable to this case."**

*Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138 (1969)



# Albertsons is Neither a Weakened Competitor Nor a Failing Firm

FOIA-2025-01503

00000067086

"UNCLASSIFIED"

4/22/2025



**Vivek Sankaran,**  
Albertsons, CEO



17 Q You can put that document away. The last fiscal year  
18 Albertsons made \$4.3 billion in EBITDA; is that right?  
19 A In EBITDA, yes.  
20 Q And last year Albertsons made about 1.3 billion of net  
21 income; is that right?  
22 A That is correct.  
23 Q And Albertsons increased its identical store sales by 3  
24 percent last year?  
25 A That's correct.  
1788  
V. Sankaran - X  
1 Q And Albertsons told investors that it was pleased with  
2 its fiscal year 2023 results; is that right?  
3 A That's correct.

Our algorithm will increase share, drive growth in volume and sales, protect and expand gross profit even as we invest in everyday price, convert efficiency to operating profit, and improve ROIC. With this value creation plan, we believe we should set an ambition of \$100B in revenue by 2026, at a 6%+ EBITDA, and a higher valuation multiple as revenue becomes stickier and profit sources expand.

# Absent this Acquisition Albertsons Will Continue Investing

FOIA-2025-01503

00000067086

"UNCLASSIFIED"

4/22/2025



**Vivek Sankaran,**  
Albertsons, CEO

19 Q Has Albertsons made improvements in many different  
20 markets?

21 A Yeah. It would be many. We have many, many markets,  
22 and we've made difference in many markets.

6 Q And going forward, Albertsons expects to continue to  
7 adjust pricing and promotions all the time to see if it can  
8 improve its value proposition to gain market share?

9 A Again, is it a question or something you are reading?

10 Q A question.

11 A We are always striving to find a way to define  
12 productivity invest in different things. One of the things  
13 we try to invest in is pricing to see if we can improve our  
14 market share.

15 Q And going forward, Albertsons will continue to invest  
16 in price?

17 A That is always a philosophy to find ways to optimize  
18 pricing so that we can win market share.

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.



# The Court Gives No Weight to Unenforceable Promises

FOIA-2025-01503

00000067086

"UNCLASSIFIED"

4/22/2025



**"The Court gives no weight to [] unenforceable promise[s]."**

*United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1, 50 (D.D.C. 2022)

9 Q. So when you tell the investor community about the  
10 planned investments, does that have any effect on the  
11 enforceability, broadly speaking, of those commitments?  
12 A. Legally, no. But from a reputation standpoint,  
13 absolutely.

THE COURT: And you said "expected to". There is no regulatory agency that could require the company to do these things or no one could sue the company to make them do these things, is that correct?

MR. SCHULTZ: There isn't a legal obligation to follow through on the price investment, but this is a key part of Kroger's ethos. Mr. McMellen testified



# Defendants' Own Executives Explain that Price Investments are Uncertain

FOIA-2025-01503

00000067086

"UNCLASSIFIED"

4/22/2025



**Stuart Aitken**, Kroger,  
SVP and Chief Merchant  
and Marketing Officer



3 Q. And the merchandising department and team can make the  
4 decision not to spend all of the price investment funds; is  
5 that right?

6 A. That's right.

7 Q. And one reason they may do this is because Kroger, as a  
8 whole, may not want to spend that money. Is that fair?

9 A. That's correct.

10 Q. For example, Kroger may not spend all its price  
11 investment funds to help Kroger achieve certain targeted  
12 earnings per share for a quarter; is that right?

13 A. That's correct.

14 Q. And Kroger has, in fact, decided not to invest  
15 everything it had planned in order to meet certain earnings  
16 per share targets in the past; is that right?

17 A. That's correct too.

FOIA-2025-01503

00000067086

"UNCLASSIFIED"

4/22/2025



●  Kroger

●  Albertsons

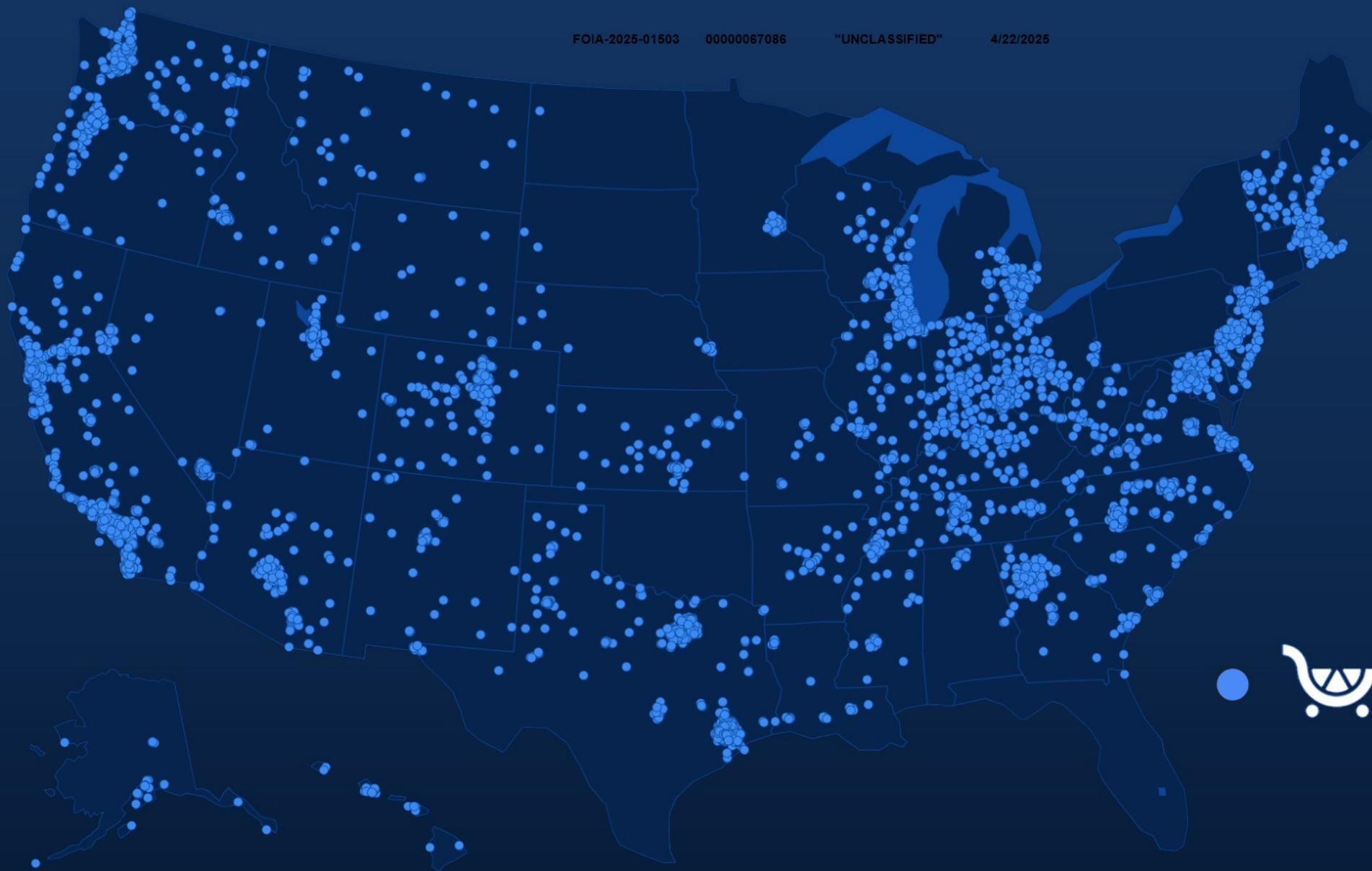


FOIA-2025-01503

00000067086

"UNCLASSIFIED"

4/22/2025



# Defendants' Ordinary Course Documents Admit that this Merger Raises Competitive Concerns

FOIA-2025-01503 00000067086

"UNCLASSIFIED"

4/22/2025



Usman Humayun, Albertsons, Group Vice President, Enterprise Marketing

Instant Message : Microsoft Teams

From 11:57:01  
Usman Humayun <Usman.Humayun@albertsons.com>

But issue is anywhere you go unless you try to argue that Walmart and target would never let you have monopoly, you are basically creating a monopoly in grocery with the merger so makes no sense

Instant Message : Microsoft Teams

From 11:57:16  
Usman Humayun <Usman.Humayun@albertsons.com>

It's like AT&T and Verizon wanting to merge

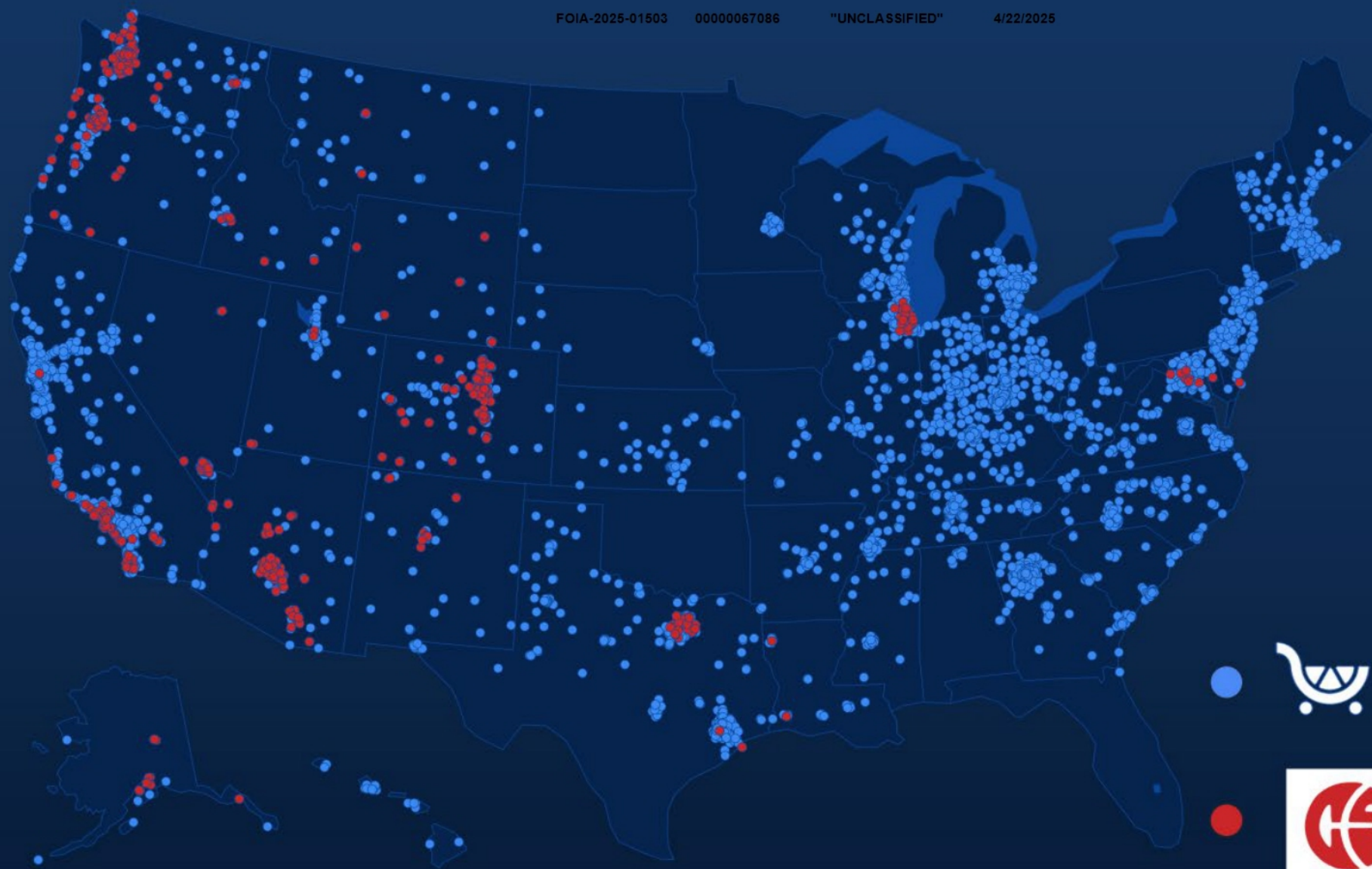


Lisa Kinney, Albertsons, Vice President of Customer and Market Intelligence

Instant Message : Microsoft Teams

From 12:04:56  
Lisa Kinney <Lisa.Kinney@albertsons.com>

There is no way that they could buy all of us - too many competing markets. They could feasibly buy East Coast with no monopoly issues...and maybe some of our smaller markets where they don't have a presence. I have the overlap map I can share with the group if we want to get deep into speculation. All I know is someone has to buy some of us to get the cash to buy our stock back from Cerberus in the next few days. I have to see where Fred Meyer overlaps too.





# Past Divestitures Show Risk of This Transaction

FOIA-2025-01503

00000067086

"UNCLASSIFIED"

4/22/2025



Merger	Divestiture	Result
Albertsons/American Stores (1999)	27 stores divested to Raley's failed	— Las Vegas stores sold to Kroger
		— New Mexico stores sold back to Albertsons
Albertsons/Safeway (2015)	146 stores divested to Haggen	— 56 reacquired by Albertsons Many closed
	22 stores divested to 3 large wholesale grocers	— Majority of stores failed/closed
Ahold/Delhaize (2016)	81 stores divested	— 30% closure rate
Price Choppers/Tops (2021)	12 stores divested to C&S (rebannered as Grand Union)	— Sales drop by ~30% end of FY 2023 Sales fall 13% in FY 2024