

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

FEDERAL TRADE COMMISSION,

*Plaintiff,*

v.

TEMPUR SEALY INTERNATIONAL,  
INC.

and

MATTRESS FIRM GROUP INC.,

*Defendants.*

**Case No.: 4:23-CV-02508**

**PLAINTIFF FEDERAL TRADE COMMISSION'S NOTICE OF  
SUPPLEMENTAL AUTHORITY IN SUPPORT OF  
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Federal Trade Commission (the "FTC") respectfully submits this notice of supplemental authority in support of its Motion for Preliminary Injunction (ECF No. 143).

As referenced in the Joint Proposed Findings of Fact and Conclusions of Law (ECF No. 456), on December 10, 2024, Judge Nelson in the District of Oregon issued a preliminary injunction enjoining the proposed merger between The Kroger Co. and Albertsons Companies, Inc. *Fed. Trade Comm'n v. Kroger Co.*, 2024 WL 5053016, at \*1, No. 3:24-cv-00347 (D. Or. Dec. 10, 2024). That same day, Judge Ferguson of the King County Superior Court in Washington also issued a decision permanently enjoining the merger, and subsequently placed that order under seal. Amended Order Sealing

12/10/2024 Findings of Fact and Conclusions of Law, *Washington v. Kroger Co.*, No. 24-2-00977-9 SEA (King Cty. Sup. Ct. Dec. 17, 2024) (attached as Exhibit A). Plaintiff was thus unable to cite to that decision in its Conclusions of Law. On December 17, 2024, the King County Superior Court filed a redacted version of the decision. Court’s Findings of Fact and Conclusions of Law, *id.*

In *Washington v. Kroger*, the court (1) rejected the defendants’ criticism that the plaintiff’s expert used a 5% SSNIP in the Hypothetical Monopolist Test because that level is commonly accepted and the plaintiff’s expert also confirmed the HMT with a 10% SSNIP, slip op. at 106; (2) found that Kroger’s “price investment” commitment was an “unenforceable promise” that could not be credited, *id.* at 95, 116-17; and (3) rejected Dr. Mark Israel’s “results-oriented” market definition model, which the Court explained did not include any real-world data or rely on any regular course documents, “has never been used in antitrust analysis before” and provided results “completely inconsistent with the evidence in this case.” *Id.* at 29-35. The *Washington v. Kroger* decision is attached as Exhibit B.

Dated: December 20, 2024

Respectfully submitted,

/s/ Allyson M. Maltas

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Federal Trade Commission*

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing on all counsel of record who have appeared in this matter via the Court's CM/ECF system on December 20<sup>th</sup>, 2024.

*/s/ Allyson M. Maltas*

Allyson M. Maltas

Attorney-in-Charge