Hon. Marshall L. Ferguson

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

THE KROGER CO., ET AL.,

Defendants.

No. 24-2-00977-9 SEA

DEFENDANTS' RESPONSE TO BRIEFS OF *AMICI CURIAE*

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INTRODUCTION

Pursuant to the Court's direction, Defendants submit this response to the briefs of *amici curiae* Northwest Harvest, United Way of King County, and the Washington State Community Action Partnership, and *amici curiae* the City of Kirkland and the City of Covington. As set forth below, *amici*'s arguments are untethered from the facts in the case (and in some instances actually *misstate* the facts), rely on generalized arguments that are refuted by the evidence introduced at trial, and do little more than repeat arguments and claims raised by activists and members of the media. To the extent *amici* seek to introduce extrinsic evidence outside the scope of trial, this Court should ignore that evidence entirely. *See* Tr. 3870:7–18 (Oct. 22, 2024). *Amici*'s arguments should be afforded no weight.

ARGUMENT

I. *Amici Curiae* Brief of the City of Kirkland and the City of Covington

The *amici curiae* brief filed by the City of Kirkland and the City of Covington (the "Cities") makes two arguments. First, the Cities argue that any closure of stores will adversely affect their communities, and second, the Cities contend that the proposed divestiture to C&S is "[r]eminiscent" of the Haggen divestiture in 2015. Neither argument has merit.

First, there is no evidence that any stores are likely to close as a result of the merger. That speculation has been raised by the State of Washington (the "State") throughout this case, but as Defendants pointed out in their post-trial filings, there is no evidence that C&S plans to close any stores or that it would make economic sense to do so. *See* Defs.' Post-Trial Br. 46–47. Indeed, C&S's CEO, Eric Winn, testified that "frankly, the math would not work to do anything other than run this business successfully." Tr. (Winn (C&S)) 1536:22–25. That testimony is uncontroverted by any lay or expert witness. The entire premise of the Cities' first argument—that stores are likely to close in their jurisdictions following the merger—therefore lacks any evidentiary basis. Bare speculation provides no basis for a decision on the merits following a full trial.

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Second, the Cities' effort at comparing C&S to Haggen is contrary to the facts—so much so that not even the State was willing to press this argument by the end of trial. For example, the Cities describe C&S as "[u]ndercapitalized," Cities Br. 12, but that is squarely refuted by the evidence, which shows that unlike Haggen, C&S has raised hundreds of millions of dollars of new equity to fund the purchase, Tr. (Winn (C&S)) 1528:11–1529:5. And Daniel Galante, Defendants' divestiture expert, testified without contradiction that C&S is well capitalized and is a strong buyer. Tr. (Galante) 2681:7–12, 2683:8–12. Elsewhere, the Cities call C&S a "small wholesaler with no presence in Washington." Cities Br. 14. C&S is not "small"—it is the eighth largest privately owned company in the United States and has over $21.1 billion in annual sales. DX 1058, at R11873; DX 2628, at R48613. And C&S does have a presence in Washington—it provides retail services to independent stores in Washington, Tr. (Winn (C&S)) 1472:8–18, and has two distribution warehouses in Portland, Oregon, right on the border of Washington, Tr. (Winn (C&S)) 1475:19–1476:4.

Beyond these factual misstatements, the Cities' argument regarding Haggen overlooks a host of significant differences between the two transactions. While Haggen was undercapitalized, Cities Br. 13, as noted above, C&S is well capitalized and is funding the purchase through significant equity contributions, Tr. (Galante) 2681:7–12, 2683:8–12. While Haggen struggled to convert information technology and pricing systems, Cities Br. 13, C&S has a comprehensive transition services agreement with Kroger that will allow for significant support to C&S through the acquisition to convert and develop those systems, *see generally* SX 3748. And while Haggen alleged that Albertsons misused confidential information, Cities Br. 13—an allegation that Albertsons disputes—the transition services agreement provides C&S with valuable customer data and prevents Kroger from using much of that data in competition with C&S, SX 3748, at P49233–35; Tr. (Cosset (Kroger)) 2632:16–2633:14. Beyond the basic fact that both companies bought or are buying a number of retail stores in Washington, there is no comparison between the two.

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II. *Amici Curiae* Brief of Northwest Harvest, United Way of King County, and the Washington State Community Action Partnership

The *amici curiae* brief filed by the Northwest Harvest, United Way of King County, and the Washington State Community Action Partnership (the "Organizations") makes three arguments. First, the Organizations argue that the merger is likely to lead to higher prices and reduced food access; second, the Organizations contend that the merger is likely to degrade private sector support for nutrition assistance; and third, they argue the divestiture is likely to fail. Again, these arguments lack merit.

First, the Organizations' arguments regarding the likely effect of the merger on prices or food access are premised almost entirely on the kind of extraneous material the Court clarified it would not consider from *amici*. Tr. 3870:7–18 (Oct. 22, 2024). And much of that material is not even particularly germane to this case, as it asserts only at a high level that concentration in markets can sometimes lead to higher prices. Organizations Br. 4–5. As Defendants explained in their post-trial briefing, market concentration is only a "proxy for predicting the ability of firms in the market to exercise market power." *FTC v. Occidental Petroleum Corp.*, 1986 WL 952, at *7 (D.D.C. Apr. 29, 1986). "Evidence of market concentration simply provides a convenient *starting point* for a broader inquiry into future competitiveness . . . ." *United States v. Baker Hughes*, 908 F.2d 981, 984 (D.C. Cir. 1990) (emphasis added). The Organizations' speculation about higher prices resulting from the merger is not based on any record evidence.

The Organizations' arguments here also overlook the extensive evidence demonstrating that the transaction is likely to result in lower, not higher, prices. For example, the Organizations (much like the State) do not acknowledge or discuss Kroger's "flywheel" model, under which Kroger can actually make *more* money by reducing its grocery margins and driving customer traffic. *See* Defs.' Post-Trial Br. 31–33. They do not discuss the regression analysis showing that the absence of an Albertsons in a given area does not result in higher prices at

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Kroger—which is the *exact* theory of harm the State has proposed. *See id.* at 34–35. Nor do they address Dr. Israel's store-level and city area-level GUPPI analyses—the only GUPPI analyses performed by *either* side at the local level that accounted for the divestiture—showing no threat of harm in any locality. *See id.* at 36–37. The abstract economic theory that market concentration sometimes can result in higher prices is no answer to the evidence of how competition and pricing actually works in this market and at Kroger.

Second, the Organizations' concerns about the loss of Albertsons' positive effect on food access in Washington are unfounded. As Kroger's CEO, Rodney McMullen, described, Kroger supports its local communities through a philosophy called "Zero Hunger Zero Waste." Tr. (McMullen (Kroger)) 1198:11–1199:1. Kroger's aspiration is that "if we operate in a market, no one should go to bed hungry tonight." *Id.* One of the commitments Kroger made as part of this philosophy was to provide 3 billion meals in the markets where it operates. *Id.* If the merger goes through, Kroger intends to increase that commitment to 10 billion meals by 2030. *Id.* Thus far, Kroger has provided about three-and-a-half billion meals to the communities it serves. Tr. (McMullen (Kroger)) 1199:2–4. This support for customers is in addition to Kroger's investment in its associates, including through industry-leading benefits and programs that support associates seeking higher education. Tr. (McMullen (Kroger)) 1197:3–20. The evidence therefore shows that Kroger's expanded presence in Washington will have only a positive effect on communities.

Here again, *amici* misstate the facts. The Organizations assert that Kroger "intends ultimately to put those grocery stores it retains [in Washington] under the QFC banner." Organizations Br. 8. That is incorrect: Kroger is divesting the entire QFC banner to C&S and will operate *no* stores under that banner. *See* Tr. (Groff (Kroger)) 645:14–19, 649:3–7; Tr. (Florenz (C&S)) 865:9–11. The Organizations further contend that "in connection with the divestiture Kroger intends to require [the divestiture] stores to source at least 30% of their food from local producers." Organizations Br. 8. This assertion is based on hearsay-within-hearsay,

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and it is wrong: There is no such requirement in the divestiture agreement, *see generally* SX 3748, and it is not even clear that Kroger *could* impose such a requirement on C&S post-divestiture. Once the transaction closes, C&S will be an independent competitor and will make its own sourcing, distribution, and merchandising decisions.

Third, the Organizations' arguments about the success or failure of the divestiture are contrary to the evidence. The Organizations contend that C&S is "unprepared to operate a large-scale grocery chain," Organizations Br. 9–10, but they overlook the enormous talent that C&S will receive in connection with the transaction, including executive leadership and tens of thousands of associates that *already* operate "a large-scale grocery chain," *see* Tr. (Winn (C&S)) 1541:2–1547:7, Tr. (Morris (Albertsons)) 2763:22–2764:15, 2788:1–21, 2816:1–13. They argue that C&S will have to build its Washington presence from a "disjointed group" of stores, Organizations Br. 10, but miss (because of their misapprehension of the facts) that C&S is receiving complete ownership of the QFC and Haggen banners in Washington, both of which are established brands in this State, *see* Tr. (Morris (Albertsons)) 2798:19–2799:5, DX 1058, at R11892. And the Organizations repeat the State's claim that C&S "has a poor track record with similar acquisitions," Organizations Br. 11, ignoring the evidence that C&S can *only* make money on this transaction, which differs from previous transactions, by successfully operating the stores, because this is a "transformational acquisition" designed to open up new retail opportunities for C&S, *see* Tr. (Winn (C&S)) 1522:23–24, 1536:22–25.

CONCLUSION

The arguments of *amici* add nothing of substance to the case and should not inform the Court's analysis in any respect.

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I certify that this document contains 1,695 words in compliance with Local Civil Rules.

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RESPECTFULLY SUBMITTED this 31st day of October, 2024.

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