



1 Washington courts thereunder. *Lakey v. Puget Sound Energy, Inc.*, 296 P.3d 860, 864 (Wash.  
2 2013).

### 3 I. INTRODUCTION

4 The proposed merger between Kroger and ACI has always contemplated that Kroger  
5 would divest stores to a third-party buyer. After an extensive diligence process, Defendants  
6 reached an agreement to divest stores and significant other assets to C&S. Under Defendants'  
7 April 2024 agreement with C&S, C&S will acquire 579 stores, significant distribution capacity,  
8 rights to six banners, and access to seven private label brands, among other supporting assets.<sup>1</sup>  
9 This divestiture is a central and integral part of the merger transaction—without the divestiture,  
10 no merger between Kroger and ACI will occur.

11 Plaintiffs hired Dr. Dua, an antitrust economist, to assess the economic effects of the  
12 Kroger-Albertsons merger on competition and consumers in Washington. In his initial report,

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]. In doing so, he essentially overlooked the  
16 [REDACTED]. In doing so, he essentially overlooked the  
17 “elephant in the room” and opined on a transaction that does not exist. *FTC v. Arch Coal, Inc.*,  
18 CV-No. 04-0534 (JBD), 2004 WL 7389952 at \*3 (D.D.C. Jul. 7, 2024). Defendants’ economic  
19 expert, Dr. Mark Israel, criticized Dr. Dua’s analysis as unreliable for failing to consider the  
20 divestiture (among myriad other reasons). *See* Pfaffenroth Dec. Ex. 2 (Corrected Report of Dr.  
21 Mark Israel (“Israel Report”)) ¶¶ 200, 218.

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25 <sup>1</sup>“*See* Pfaffenroth Dec. Ex. 1 (Kroger Albertsons Companies and C&S Wholesale Grocers,  
26 LLC Announce an Updated and Expanded Divestiture Plan,” Apr. 22 2024,  
<https://ir.kroger.com/news/news-details/2024/Kroger-Albertsons-Companies-and-CS-Wholesale-Grocers-LLC-Announce-an-Updated-and-Expanded-Divestiture-Plan/default.aspx>.)

1 In Section V of his reply report, [REDACTED]  
2 [REDACTED]  
3 [REDACTED]. Pfaffenroth Dec. Ex. 3 (Reply Report of Dr. Nitin Dua (“Dua Reply  
4 Report”)) § V. *First*, Dr. Dua is an economist, not a business person or a financial or accounting  
5 expert. His experience provides no basis for him to assess the assets needed to operate a grocery  
6 store chain or the likelihood that C&S’s will manage those assets successfully. Indeed, Dr. Dua  
7 has never testified as an expert on any topic and his CV points to no experience predicting the  
8 success of a business venture, much less the success of a grocery chain. *Second*, Dr. Dua relies  
9 on no reliable economic analyses to reach his conclusions about the success of the divestiture  
10 business. Instead, Dr. Dua simply recites pages of basic facts about prior divestitures not  
11 probative of the likely effect of the divestiture to C&S, and then offers calculations based on  
12 unfounded assumptions. *Id.* ¶¶ 152–212.

13 Dr. Dua’s lay speculation about the purported effects of the divestiture would not aid  
14 the Court in assessing its viability and should be excluded from these proceedings.

## 15 II. LEGAL STANDARD

16 Washington Rule of Evidence 702 governs the admissibility of expert testimony. *See*  
17 *Lakey v. Puget Sound Energy, Inc.*, 296 P.3d 860, 864 (Wash. 2013). Under ER 702, testimony  
18 is excluded “where the expert fails to adhere to that reliable methodology.” *Lakey*, 296 P.3d at  
19 864. A party who proffers an expert must show that its expert is qualified to render expert  
20 opinion. *See Chervilova v. Overlake Obs. & Gyn.*, 543 P.3d 904, 906 (Wash. Ct. App. 2024).

21 The opinion of “[a]n expert must stay within the area of his expertise.” *Queen City*  
22 *Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 882 P.2d 703, 731 (Wash. 1994). There must be  
23 “evidence that the witness has the specialized training or experience necessary to draw the  
24 inference offered” and “the opinion must also be supported by sufficient foundational facts.”  
25 *Simmons v. City of Othello*, 399 P.3d 546, 551 (Wash. Ct. App. 2017) (citing *Queen City*  
26 *Farms*). “Where there is no basis for the expert opinion other than theoretical speculation, the

1 expert testimony should be excluded.” *Id.* (finding “the lack of foundational facts or any  
2 demonstration that the [experts stayed] within the area of their . . . expertise, their testimony was  
3 appropriately stricken”).

4 “To assist the trier of fact, ‘the expert’s opinion must be based on fact and cannot simply  
5 be a conclusion or based on an assumption.’” *Coogan v. Borg-Warner Morse Tec Inc.*, 490  
6 P.3d 200, 209 (Wash. 2021) (quoting *Volk v. DeMeerleer*, 386 P.3d 254, 273 (Wash. 2016)).  
7 “When an expert fails to ground their opinions on facts in the record, courts have consistently  
8 found that the testimony is overly speculative and inadmissible.” *Id.* “The problem with  
9 speculative testimony is that the trier of fact will be forced to speculate . . . without an adequate  
10 factual basis.” *Id.* at 210 (internal quotations and citations omitted).

### 11 III. ARGUMENT

12 Dr. Dua’s testimony concerning the impact of the divestiture and C&S’s likelihood of  
13 successfully operating the divested assets, Ex. 3 § V, should be excluded because it fails to  
14 satisfy ER 702. *First*, Dr. Dua lacks the expertise or background to assess the sufficiency of  
15 the divestiture package or C&S’s likelihood of business success operating those assets. *Second*,  
16 Dr. Dua’s opinion that the merger would be presumptively anticompetitive and harm  
17 consumers, even assuming the proposed divestiture to C&S is completely successful, fails to  
18 apply any reliable economic analysis, but instead relies on a series of hypotheticals and a  
19 recitation of facts about the proposed divestiture and past divestitures.

#### 20 A. Dr. Dua lacks expertise to testify about the likely success of the divestiture.

21 While Dr. Dua has experience providing support to economic experts in antitrust  
22 matters, he has no professional experience analyzing business ventures, including the business  
23 implications of grocery store divestitures. *See* Pfaffenroth Dec. Ex. 4 (Report of Dr. Nitin Dua  
24 (“Dua Report”)), App’x A. His CV also reveals no work involving the analysis of the grocery  
25 industry, grocery store mergers, grocery store operations, supply chain logistics, or grocery  
26 store re-bannering. *Id.* In fact, Dr. Dua has never been a testifying expert on *any* subject matter,

1 including any type of merger or any type of divestiture. Pfaffenroth Dec. Ex. 5 (Deposition of  
2 Nitin Dua) at 18:9-23. Despite his total lack of experience in analyzing divestitures or business  
3 ventures, Dr. Dua concludes in his reply report—after ignoring the divestiture entirely in his  
4 initial report—that [REDACTED]  
5 [REDACTED].” Ex. 3 § V. To support this conclusion, Dr. Dua calculates  
6 the number of presumptively anticompetitive markets and estimates harm post-divestiture in  
7 markets he has not defined, outlines “significant retail assets” that C&S will purportedly lack,  
8 and recounts basic facts about past divestitures and C&S’s prior acquisitions, which any  
9 layperson could do. Dr. Dua concludes based on that “analysis” that C&S will not successfully  
10 preserve competition.

11 “The expert testimony of an otherwise qualified witness is not admissible if the issue at  
12 hand lies outside the witness’s area of expertise.” *Simmons*, 399 P.3d at 551 (quoting *Queen*  
13 *City Farms*). Having the qualifications and experience to provide antitrust economic expert  
14 testimony about a merger does not mean that Dr. Dua has the experience necessary to testify  
15 about the likely success of the divestiture business, much less the divestiture buyer or asset  
16 package at issue here. Dr. Dua’s testimony related to the divestiture or C&S as a divestiture  
17 buyer goes outside his expertise and experience as an antitrust economist, and is not admissible  
18 expert testimony. *See, e.g., Queen City Farms*, 882 P.2d at 731; *Simmons*, 399 P.3d at 551.

19 **B. Dr. Dua’s opinion about the divestiture is speculative and unreliable**

20 Dr. Dua’s opinions about the divestiture are not based on any reliable economic  
21 analysis, but instead merely restate basic facts or provide analyses based on unfounded  
22 assumptions and speculative hypotheticals. “The opinion of an expert must be based on facts.”  
23 *Melville v. State*, 793 P.2d 952, 956 (Wash. 1990) (citation omitted). An expert must present  
24 opinions which are more than “simply a conclusion” or statements “based on an assumption.”  
25 *Id.* “When an expert fails to ground his or her opinions on facts in the record, courts have  
26 consistently found that the testimony is overly speculative and inadmissible.” *Volk*, 386 P.3d

1 at 273. Rule 702 requires an expert’s analysis “to adhere to a reliable methodology,” otherwise  
2 it should be excluded. *Lakey*, 296 P.3d at 864.

3 **1. *Dr. Dua’s claims about competitive harm accounting for the divestiture have***  
4 ***no basis in fact and are unsupported by any reliable economic analysis***

5 In his reply report, Dr. Dua’s discussion of the divestiture begins by claiming that the  
6 proposed transaction would be “presumptively anticompetitive” and result in consumer harm  
7 in various improperly defined markets even after accounting for the divestiture. *See* Ex. 3 §§  
8 V.A., V.C.5. However, many of Dr. Dua’s divestiture-related opinions relate to markets he has  
9 not even attempted to properly define. And most of his opinions about post-divestiture harm  
10 to competition<sup>2</sup> are predicated in a series of baseless predictions that C&S will lose sales or  
11 close stores.

12 *First*, Dr. Dua’s claims that the merger would be presumptively anticompetitive in his  
13 alternative metropolitan statistical area (“MSA”), [REDACTED]  
14 [REDACTED]  
15 [REDACTED]. Dr. Dua agrees that market definition is a “[REDACTED]  
16 [REDACTED]” Ex. 4 ¶ 84. But in  
17 his reply report, Dua explicitly “[REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED].” Ex. 3  
21 ¶ 198 (emphasis added).

22 <sup>2</sup> While Defendants strongly disagree with all of Dr. Dua’s calculations of the number of  
23 presumptively anticompetitive markets and his calculations of harm in those markets,  
24 Defendants do not seek to exclude Dr. Dua’s calculations in Section III of his reply report of  
25 the number of presumptively anticompetitive markets in his alleged “Supermarkets” markets.  
26 However, Defendants raise the same objections described herein to the portions of Figure 2  
purportedly calculating the number of presumptively anticompetitive “Supermarkets + Costco”  
and “Supermarkets Plus” markets or presumptively anticompetitive markets in alternative  
geographies not accounting for the divestiture.

1 While his initial report at least attempts to define a “ [REDACTED]  
2 [REDACTED], see id.  
3 § IV.D, Dr. Dua never does the work to properly define his alternative markets or assess their  
4 validity. Instead of attempting to properly define these alternative geographic and product  
5 “ [REDACTED].” See, e.g.,  
6 Ex. 4 ¶¶ 10, 126, Ex. 3 16, 24, 27 n.65. That is not enough. Dr. Dua *cannot* claim presumptions  
7 of harm in markets he has not even attempted to properly define. Relying on presumptions in  
8 markets that have not been properly established cannot possibly “assist the trier of fact to  
9 understand the evidence.” ER 702. On the contrary, allowing hypotheticals built on “markets”  
10 untethered from any factual support would be misleading to the Court.

11 *Second*, Dr. Dua’s presumption and harm “analyses” assuming that C&S will lose sales  
12 or close stores are not based on any record facts. [REDACTED]  
13 [REDACTED]  
14 [REDACTED], but he does not present  
15 any analysis supporting the underlying assumptions that C&S will lose sales at all, much less  
16 any of these percentages of sales. [REDACTED]

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]. Dr. Dua states that [REDACTED]  
22 [REDACTED], Ex. 3 ¶ 203, but he provides zero basis for  
23 assuming that that the exact same thing will occur here. In short, Dr. Dua’s opinions about  
24 presumptively anticompetitive markets and theoretical harm to consumers accounting for the  
25

26 <sup>3</sup> Pfaffenroth Dec. Ex. 6 (“Walnut Update,” July 27, 2023, FTC-CS-00002375, -379 C&S Slide Deck); Pfaffenroth Dec. Ex. 7 (“Walnut,” June 28, 2023, FTC-CS-00002332, -335).

1 divestiture are based on unsupported assumptions.<sup>4</sup>

2           Unsupported by any economic analysis based on any record facts, Dr. Dua’s opinions  
3 about presumptions of harm “accounting the divestiture” should be excluded. *See Volk*, 386  
4 P.3d at 273; *see also Lakey*, 296 P.3d at 864.

5           **2. *Dr. Dua’s review of past unrelated divestitures and C&S’s prior acquisitions is***  
6           ***not based on reliable economic analysis.***

7           Dr. Dua describes past divestiture transactions at length without offering an economic  
8 analysis of those transactions or any methodology for assessing whether those divestitures are  
9 probative of the likely effects of the proposed transaction here. *See Ex. 3 §§ V.C.1 to V.C.2.*

10 [REDACTED]  
11 [REDACTED] . *Id.* ¶¶ 164-175. [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED].

16           a. Haggen divestiture

17           Dr. Dua first discusses the divestiture to Haggen following the Safeway-Albertsons  
18 merger, Ex. 3 ¶¶ 166-175, but he applies no reliable economic analysis to compare or  
19

20 <sup>4</sup> Dr. Dua also misleadingly claims that there are three city areas “particularly vulnerable” to  
21 harm. *See Ex. 3 § V.B.* Dr. Dua performs no economic analysis to show how or why these  
22 areas are “particularly vulnerable”; he simply claims they are “particularly vulnerable”  
23 because if the divestiture in each of these areas does not occur or fails, there will be few other  
24 competitors left apart from Kroger. *Id.* But there is no factual basis for his claim that the  
25 divestiture may not occur or will fail. If the merger occurs, the divestiture necessarily will  
26 occur too. *See Pfaffenroth Dec. Ex. 8 (Amended Divestiture Agreement) Sec. 2.1(a), 3.1,*  
26 10.1(c) [REDACTED]

25 [REDACTED] Dr. Dua’s assumption that the divestiture to  
26 C&S will fail is purely hypothetical, based on analogies to prior transactions with no bearing  
on this transaction.

1 differentiate that transaction and the present transaction. He does not describe, let alone  
2 analyze, why Haggen’s struggled as a divestiture buyer and whether C&S faces those same  
3 challenges. For example, he does no analysis comparing the minimal assets, people, and  
4 transition support received by Haggen to the robust assets and support that C&S will receive.  
5 He does not compare C&S’s business plan (to invest in the business) to Haggen’s business plan  
6 (to take money out of the business); examine the risky structure Haggen’s private equity owners  
7 chose to finance the transaction; look at the relative capitalization of the two divestiture buyers;  
8 or assess the relative strength of the acquired banners (C&S is acquiring QFC, Haggen acquired  
9 none). Pfaffenroth Dec. Ex. 9 (Report of Daniel Galante (“Galante Report”)) ¶¶53-60. Nor  
10 does he reference the significant economic commitment from C&S shareholders to this  
11 divestiture—

12 [REDACTED]  
13 [REDACTED]” *Id.* at ¶ 56. Nonetheless, because the divestiture involves “[REDACTED]  
14 [REDACTED],” Dr. Dua concludes that the Haggen divestiture “[REDACTED]  
15 [REDACTED]  
16 [REDACTED]” Ex. 3 ¶ 175.

17 Without applying any economic principles or methods to his analysis, Dr. Dua’s  
18 simplistic recollection of past transactions is unreliable and unhelpful. *See also* Ex. 3 § V.C.1.

19 [REDACTED]  
20 [REDACTED]. Ex. 3 Fig. 34. That is not economic  
21 analysis. [REDACTED]  
22 [REDACTED]

23 [REDACTED]. But as discussed above, concentration metrics are meaningless without  
24 properly defined markets and Dr. Dua provides no analysis showing that the overlap cities or  
25 the vague categories of stores he includes constitute relevant antitrust markets. He also provides  
26 no tie linking his analysis of the Haggen transaction to the proposed C&S divestiture. Dr. Dua’s

1 recounting of the Haggen divestiture amounts to nothing more than an *ipse dixit* declaration  
2 that C&S will suffer the same fate as Haggen.

3 b. C&S acquisitions

4 Dr. Dua next discusses prior C&S acquisitions where stores underperformed, closed, or  
5 were sold. *Id.* ¶¶ 184-193. As in his earlier discussion of the Haggen divestiture, Dr. Dua lists  
6 facts about these acquisitions but performs no reliable economic analysis of these transactions  
7 and identifies no methodology to test whether the same result is likely to occur here or what  
8 measures would need to be in place to avoid similar outcomes. Critically, unlike Defendants’  
9 divestiture expert, Dr. Dua makes no attempt to analyze C&S’s strategic rationale for its prior  
10 retail acquisitions [REDACTED]

11 [REDACTED]”—or to consider the  
12 evidence showing that, more than a decade later and in response to the broader changes in the  
13 retail grocery industry, [REDACTED]  
14 [REDACTED].” Ex. 9 ¶ 44. Without acknowledging these real  
15 world facts, Dr. Dua cannot draw reliable conclusions about the divestiture, especially without  
16 any business expertise on which to draw.

17 Dr. Dua’s account of prior transactions also fails to consider what would have happened  
18 to these stores absent acquisition by C&S. Ex. 9 ¶ 46. In other words, Dr. Dua fails “[REDACTED]  
19 [REDACTED]  
20 [REDACTED].” *Id.* Devoid of the appropriate context and economic analysis, Dr.  
21 Dua’s recitation of statistics about prior C&S transactions offers no reliable expert opinion.

22 Dr. Dua’s attempts to tie C&S’s acquisition track record to the success of the divestiture  
23 here are nothing more than a recitation of basic facts or simple arithmetic masquerading as  
24 economic analysis. For example, [REDACTED]

25 [REDACTED]  
26 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 See *Coogan*, 490 P.3d at 209.

8 **3. Dr. Dua’s recitation of facts about the assets C&S will receive as part of the**  
9 **divestiture offers no expert analysis**

10 Finally, Dr. Dua alleges that C&S will “[REDACTED]  
11 [REDACTED].” See Ex. 3§.

12 V.C.3. Again, Dr. Dua provides no economic or expert analysis to support this claim. He  
13 merely recites “[REDACTED]” about assets that C&S will allegedly lack. Dr. Dua even states that  
14 “[REDACTED]  
15 [REDACTED].” Ex. 3 ¶ 177. But he provides no explanation of what expertise he  
16 offers beyond these industry experts.

17  
18 Apart from offering no economic analysis, Dr. Dua’s recitation of the facts related to  
19 the divestiture is misleading. Dr. Dua fails to consider the significant support that will be  
20 provided to C&S under the Transition Services Agreement, which will allow C&S to  
21 substantially mitigate the alleged potential risks that Dr. Dua identifies related to (a) pricing,  
22 (b) private label, and (c) re-bannering. Ex. 9 ¶ 12. Dr. Dua, in effect, attempts to masquerade  
23 as a fact witness, a financial or accounting expert, and a grocery industry business analyst. He  
24 is none of the above and his opinions on the viability of the assets that C&S will receive through  
25 the divestiture should be excluded.  
26

1 **IV. CONCLUSION**

2 For the reasons discussed above, Defendants respectfully request that the Court exclude  
3 Dr. Dua's testimony related to the effect of the proposed divestiture on competition.

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1 I certify that this document contains 3,710 words in compliance with LCR  
2 5(b)(5)(B)(vi).

3 RESPECTFULLY SUBMITTED this 27th of August, 2024.

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**CERTIFICATE OF SERVICE**

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DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

s/ Pallavi Mehta Wahi

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