The Honorable Marshall L. Ferguson
Hearing Date: September 10, 2024
With Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. THE KROGER CO., ET AL., Defendants.	NO. 24-2-00977-9 SEA STATE OF WASHINGTON'S OPPOSITION TO DEFENDANTS' MOTION TO PARTIALLY EXCLUDE THE TESTIMONY OF DR. NITIN DUA

I. INTRODUCTION AND RELIEF REQUESTED

Defendants have staked their case on the notion that the divestiture of 579 stores and other assets to C&S Wholesale Grocers would restore the competition lost as a result of their presumptively anticompetitive merger. But they have a problem. Their expert economist, Dr. Mark Israel, has done *nothing* to assess whether C&S, which today struggles to operate **25** retail grocery stores, will succeed in expanding the size of its retail grocery operation to **604** stores overnight. Instead, Dr. Israel's analysis of the competitive effects of the merger simply *assumes* that C&S will not just succeed in operating the acquire assets, but will succeed in operating them *as effectively as grocery retail giants Kroger and Albertsons* do today. The State's expert economist, Dr. Nitin Dua, intends to offer an opinion that Dr. Israel's incomplete analysis is misleading. Dr. Dua relies on real-world facts to actually assess C&S's likelihood of success,

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and shows that the very real possibility that C&S will not *perfectly* succeed in operating the divested assets materially impacts the post-divestiture competition analysis.

Defendants' motion to exclude Dr. Dua's divestiture testimony fails to identify any reason to take this useful evidence away from the trier of fact. Instead, it peddles a range of facially dubious or irrelevant claims. The motion asserts that a competition economist like Dr. Dua is unqualified to opine on whether Defendants' proposed divestiture will restore competition. It misrepresents Dr. Dua's professional experience. It presents distorted or incomplete descriptions of the analyses contained in his reports in an attempt to portray them as devoid of economic analysis. And it quibbles with the sequence in which Dr. Dua presents his opinions. None of these contrived criticisms warrants exclusion of Dr. Dua's testimony.

First, the motion's repeated critiques of Dr. Dua for presenting his divestiture analysis in his reply report—rather than in his opening report—are disingenuous. The sequencing of Dr. Dua's analysis comports with the legal standard for assessing divestitures, which places the burden of producing evidence of a successful divestiture on Defendants. More importantly, it comports with *the parties' express agreement* as to how this analysis should be presented—an agreement Defendants now flirt with violating by filing this motion.

Second, Dr. Dua's thorough analysis of the divestiture is likely to help the trier of fact. In addition to identifying C&S's critical deficiencies as a potential competitor, Dr. Dua assesses how C&S's relative success or failure as a retail grocery operator in Washington would impact the level of competition in the market under a variety of scenarios. This analysis allows for the possibility that this Court may find that C&S's performance will fall somewhere between roaring success and abject failure, and will need to determine what that means for the level of competition in the market. Indeed, Dr. Dua's testimony may prove especially useful in light of Dr. Israel's decision not to perform *any* meaningful analysis of the divestiture.

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Third, competition economists are well qualified to opine on the likely competitive effects of divestitures. In fact, the federal district court overseeing a separate challenge to this merger recently found the FTC's expert competition economist to be qualified to testify *on this very divesture*. As a well-credential competition economist with thirteen years of experience analyzing mergers for governments and private parties, Dr. Dua is likewise qualified to provide expert testimony on this subject.

For all these reasons, Dr. Dua's expert opinions on the divestiture meet the standard set out by ER 702 and he should be permitted to testify to them at trial.

But Defendants' motion does not, in fact, stop with Dr. Dua's divestiture analysis. It also seeks exclusion of Dr. Dua's sensitivity analyses, which relate to the issue of market definition. *See* Mot. at 6-7. Dr. Dua's sensitivities expose another shortcoming in the analysis of Dr. Israel, who attacks Dr. Dua's market definition without purporting to define a relevant market himself or otherwise account for the implications of his critiques. Dr. Dua's sensitivities show that—even accounting for the divestiture *and* for Dr. Israel's approach to market definition—this merger remains anticompetitive. This thorough economic analysis will likewise assist the trier of fact.

The State therefore respectfully requests that the Court deny Defendants' motion to partially exclude Dr. Dua's testimony.

II. LEGAL STANDARD

"[U]nder the general framework governing the admissibility of expert testimony, such testimony is admissible if the expert is qualified and relies on generally accepted theories and the testimony would be helpful to the trier of fact." *Johnston-Forbes v. Matsunaga*, 181 Wn. 2d 346, 355 (2014). "Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases." *State v. King Cnty. Dist. Ct.*, 175 Wn. App. 630, 638 (2013).

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III. ARGUMENT

A. Dr. Dua's reports analyze the divestiture in accordance with the parties' agreement

Defendants' criticism of Dr. Dua for "ignor[ing]" the proposed divestiture in his opening report is misleading and irrelevant. Dr. Dua did not, in fact, "ignore[] the proposed divestiture to C&S entirely" in his opening report. Mot. at 2. Instead, he expressly acknowledged the proposed divestiture and explained that he would present his analysis of it in his reply report. *See* Scott Decl. Ex. 1 at 7-8. Dr. Dua proceeded this way because this is precisely the sequencing that all parties agreed to in a May 24, 2024, joint stipulation, which states in pertinent part:

- "The State need not address (a) Defendants' proposed divestiture . . . in its Opening Expert Report(s)."
- "The State shall address issues, if any, concerning (a) Defendants' proposed divestiture . . . in its Reply Expert Report(s)."
- "Defendants shall not seek to exclude expert opinion regarding (a) Defendants' proposed divestiture . . . on the basis that the opinion was not disclosed in the State's Opening Expert Report(s)."

Scott Decl. Ex. 2 at 19. Defendants' motion conveniently omits any reference to this stipulation. Instead, it misleadingly depicts Dr. Dua's compliance with the parties' agreement as a substantive shortcoming of his analysis—as something he was forced to "rehabilitate" in his reply report. Mot. at 3. To the contrary, the sequencing of reports agreed to by the parties and which Dr. Dua followed aligns with the applicable legal framework, which places the burden on Defendants to produce evidence that the divestiture will restore the competitive intensity lost as a result of the merger. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017). Defendants' motion stops short of seeking exclusion specifically on this basis—presumably to avoid violating the terms of the stipulation—yet it nonetheless uses this disingenuous criticism as the backdrop for a request to exclude Dr. Dua's testimony. The Court should reject Defendants' transparent attempt to make an end-run around the parties' binding agreement.

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B. Dr. Dua's opinions are based on economic analysis and will assist the trier of fact

At bottom, Defendants' motion seeks to prevent this Court from considering *any* thorough assessment of how competition might be affected by C&S's relative success or failure in operating the divested assets. It asks this Court to consider only the analysis of Defendants' expert economist, Dr. Israel, who purports to calculate the post-divestiture competitive impact of the merger using a model that simply *assumes away any operational differences* between the divestiture assets' present-day owners and C&S.[1] As Dr. Dua explains:

[redacted]

Scott Decl. Ex. 4 at 31. That is precisely the sort of "analys[is] based on unfounded assumptions and speculative hypotheticals," Mot. at 5, that Defendants seek to ascribe to Dr. Dua.

In response to Dr. Israel's misleading and incomplete analysis, Dr. Dua intends to offer an actual assessment of the divestiture—one that is thorough and grounded in expert economic analysis, and that takes account of "real world facts." Mot. at 10; *see* Scott Decl. Ex. 4 at 32-48. Dr. Dua begins by using his economic expertise to identify and evaluate the factors that inform C&S's ability to successfully compete in retail grocery. Based on his analysis of these factors, Dr. Dua concludes that C&S is unlikely to be *perfectly* successful, and presents a range of likely outcomes in terms of C&S's ability to retain existing sales in the acquired stores. Scott Decl. Ex. 4 at 49. Finally, Dr. Dua conducts various empirical analyses to calculate the levels of concentration and consumer harm that follow from each scenario in the range. *Id.* at 48-52. Each

[1] *See* Scott Decl. Ex. 3 at 26 (Deposition of Dr. Mark Israel, 281: 2-7) ("Again, these issues about the operations of the C&S assets are outside the scope of what I'm testifying to. You know, I -- the court can decide to what extent they're relevant or not, but my opinion that – that's not in the scope of my opinions.").

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of these steps—along with Defendants' erroneous criticisms of them—are described in further detail below.

1. Analyses of past divestitures

A divestiture buyer's prior failures to compete in a market are plainly informative of the likelihood that it can successfully operate in that same market today. In *United States v. Aetna*, the court held that a proposed divestiture buyer was unlikely to succeed in restoring the competitive intensity of the market, in part because the divestiture buyer had "repeatedly tried to enter the [relevant market] but ha[d] not succeeded." 240 F. Supp. 3d at 73.

Dr. Dua's analysis of prior transactions similarly focuses on C&S's limited, unsuccessful forays into the retail grocery market. For instance, he examines C&S's most recent retail grocery acquisition—[redacted]—and assesses the performance of the stores before and after C&S's acquisition. Defendants' motion describes this assessment as "simply a list of pre- and post-divestiture sales figures," which "provides no economic analysis." Mot. at 11. But this criticism is misplaced—*of course* Dr. Dua's expertise does not lie in *listing* the sales figures. Instead, his expertise lies in deciding which numbers bear on the question at hand and determining what those numbers mean. Here, for instance, Dr. Dua first determines that sales volumes are a relevant proxy for competitive intensity. He then verifies that the sharp declines in sales volumes after C&S's acquisition were attributable to C&S's deficient operation of those stores—rather than to market-wide forces—by comparing C&S's sales declines to changes in sales at nearby competitors and to the prevailing rate of inflation. *See* Scott Decl. Ex. 4 at 45-46 & n.415; *id.* at 49. Dr. Dua also considers the factors that C&S claims are responsible for its prior failures in grocery retail and concludes that most of those same factors are present in this deal. *Id.* at 47-48.

Dr. Dua's assessment of the Haggen divestiture will likewise be useful to the trier of fact. The Haggen divestiture involved significant assets in Washington; one of the same merging

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parties; and a company that sought to exponentially increase the size of its retail grocery operation overnight. *Id.* at 35-39. Dr. Dua uses empirical analysis to show the lasting consequences of such a failed supermarket divestiture, and to demonstrate that the resulting harm to competition has been particularly severe in Washington.[2] *Id.* at 37-38. Nowhere in Dr. Dua's reports, however, does he opine that C&S will necessarily fail as spectacularly as Haggen. Defendants' argument that this analysis "amounts to nothing more than an *ipse dixit* declaration that C&S will suffer the same fate as Haggen" therefore attacks a straw man. Mot. at 9-10. Instead, Dr. Dua presents the Haggen divestiture as but one useful data point about the range of outcomes possible following divestiture, and as a further reason to reject Dr. Israel's unsupported assumption that C&S will be perfectly successful in operating the divestiture assets.

2. C&S's lack of assets necessary to effectively compete

In addition to examining a divestiture buyer's competitive history, courts consider whether a divestiture transaction will provide the buyer sufficient assets to be an effective competitor. In *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015), for example, the court exhaustively described the assets that the proposed divestiture buyer—PFG—would lack as it attempted to compete with the merged entity. *Id.* at 76 (listing access to fewer products for resale; fewer human resources; fewer value-added services).

Dr. Dua's analysis includes just such a direct comparison of C&S's post-merger assets and capabilities and those of pre-merger ACI. Yet Defendants' motion characterizes it as "merely recit[ing] facts" and "provid[ing] no economic or expert analysis." Mot. at 11. Once again, the motion misrepresents the actual content of Dr. Dua's report. Dr. Dua plainly employs expert economic analysis in determining which assets are relevant to effective competition in this

[2] The motion's insistence that this empirical analysis of market concentration does not "apply[] any economic principles or methods" is puzzling, as is its formalistic insistence that every analysis be conducted on "properly defined markets." Mot. at 9. Dr. Dua does not seek to re-litigate the Haggen transaction—only to provide a sense of its disastrous consequences. He need not prove a relevant market to do so.

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market. For instance, Dr. Dua compares C&S's private label brands to those of pre-merger ACI. Why? Because he concludes [redacted] Scott Decl. Ex. 4 at 41-42.

Defendants' motion also incorrectly claims that Dr. Dua's analysis fails to account for the "Transition Services Agreement" ("TSA") under which C&S will receive support from Kroger in operating the acquired assets for a limited time. Mot. at 11. In fact, Dr. Dua does consider the TSA. He concludes, *inter alia*, that the TSA will amplify the likelihood of anticompetitive coordination post-merger, [redacted] Scott Decl. Ex. 4 at 52-53; *cf. Sysco*, 113 F. Supp. 3d at 77-78 (concluding that the divestiture buyer "will not be a truly independent competitor" due to TSA-related entanglements).

3. Scenario-based assessments of post-divestiture competitive effects

In presenting his ultimate analysis of the divestiture's impact on competition, Dr. Dua provides assessments of consumer harm under a variety of scenarios. He presents, for example, the number of presumptively anticompetitive markets that would result from C&S retaining each of 100%, 90%, 70%, or 50% of the sales at the stores it will acquire in Washington. Scott Decl. Ex. 4 at 50 (Figures 38, 39). Defendants' motion assails this approach, arguing first that Dr. Dua does not "present any analysis supporting the underlying assumptions that C&S will lose sales at all." Mot. at 7. But Dr. Dua has done just that. As discussed above, Dr. Dua assessed C&S's track record, its existing retail operations, and its dearth of critical assets in concluding that C&S is unlikely to perfectly succeed in operating the divested stores.

The motion then argues that Dr. Dua provides no analysis supporting the *particular* sales percentages for which he presents analyses about post-divestiture competitive effects. But this is

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also wrong. First, the sales loss scenarios are clearly a meant as a guide and not a precise prediction—that is why there is a range, after all. Second, Dr. Dua grounds these scenarios in specific datapoints from his analysis of C&S's likelihood of success. [redacted] Scott Decl. Ex. 4 at 49.

This scenario-based analysis is especially likely to be useful to the trier of fact. It provides the Court with the evidence to determine the extent of harm to consumers in the event that C&S is able to operate the acquired assets, but cannot do so as effectively as their existing owners. Without this analysis, the Court would lack evidence of the extent of harm to consumers in any divestiture scenario other than the extreme outcomes of perfect success or absolute failure.

4. Sensitivity analyses

Much like his scenario-based analyses, Dr. Dua's sensitivity analyses are plainly grounded in economic analysis and are specifically designed to be useful to the trier of fact. Dr. Dua has asserted that the markets for Supermarkets in 57 City Areas in Washington are relevant markets to assess the transaction. Defendants' expert has leveled criticisms against those markets. Dr. Dua's sensitivity analyses show the court that even if Defendants' market definition critiques were correct—and they are not—they would not change his overall conclusion.

The motion's criticisms of Dr. Dua's sensitivity analyses proceed from a false premise. Specifically, the motion alleges that Dr. Dua never "does the work" to "assess the[] validity" of his sensitivity markets, which the motion suggests would involve "using record evidence" and "running the hypothetical monopolist test." Mot. at 7. But Dr. Dua does, in fact, "do the work" to show that the Court could conclude that each of the sensitivities he assesses is a component of a relevant antitrust market—Defendants simply misunderstand what "work" is required.

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Market definition is a flexible exercise—the law is clear that a plaintiff need not "delineat[e]…[each market] by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). And the hypothetical monopolist test on which Defendants' motion fixates is simply one of several tools used to assess whether a market is a relevant antitrust market. *See* U.S. Dep't of Justice & FTC Horizontal Merger Guidelines § 4.3 (2023). Other widely used tools include evaluation of direct evidence of competition or market power and evaluation of whether the "practical indicia" of a relevant market, such as industry recognition, are present. *Id.* Employing a combination of these tools, Dr. Dua's analysis provides sufficient basis for the court to determine that any of his sensitivities are relevant antitrust markets.

Defendants do not dispute that Dr. Dua "does the work" to assess the validity of his Supermarkets market, including by conducting the hypothetical monopolist test. Mot. at 7. Each of Dr. Dua's product market sensitivities [redacted]—simply *adds* products to the Supermarkets market. It is axiomatic that if a narrower product market passes the hypothetical monopolist test, so too does a broader market that merely adds additional products: if a company can profitably raise prices by controlling five different firms, it can *necessarily* profitably raise prices if it gains control of a sixth firm. Courts have accepted this basic principle in verifying relevant markets. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 346 (3d Cir. 2016) (because the government answered the "narrower question" of whether two merging hospitals could profitably raise prices, it necessarily answered the question of whether "all of the hospitals" in that area could profitably raise prices); *accord FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 170 (3d Cir. 2022). Accordingly, each of Dr. Dua's product market sensitivities is a relevant product market.

Dr. Dua similarly "does the work" on his geographic market sensitivities. Dr. Dua evaluates *substantial* documentary evidence to conclude that industry participants, including

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Defendants, [redacted] as relevant zones of competition. Scott Decl. Ex. 1 at 9-10. With respect to MSAs, Dr. Dua presents analysis showing that they *could be* relevant antitrust markets. [redacted] Scott Decl. Ex. 4 at 29-30. [redacted] *Id.* Dr. Dua disagrees with those specific inputs and their implications, but this analysis provides the court with the evidence necessary to reach its own conclusion.

C. Dr. Dua is qualified to opine on the divestiture

Dr. Dua is an accomplished competition economist with significant experience evaluating mergers, including mergers involving divestitures. Dr. Dua earned a Masters and a PhD in Economics from Florida State University as well as a Master of Business Economics degree from the University of Delhi. In thirteen years working as an antitrust economist, he has been retained to provide expert analysis on antitrust matters both by the government—including various State Attorneys General, the United States Department of Justice, and the Federal Trade Commission—and by private parties. Scott Decl. Ex. 1 at 14.

In an overzealous attempt to diminish Dr. Dua's qualifications, Defendants repeatedly misrepresent his experience. For example, Defendants claim that Dr. Dua has a "total lack of experience in analyzing divestitures or business ventures." Mot. at 5. That is not true. Among the many mergers Dr. Dua has analyzed, Dr. Dua worked on the Sprint/T-Mobile merger, which involved a proposed divestiture. Scott Decl. Ex. 6 at 67. Indeed, Dr. Dua testified about this experience in his deposition:

[redacted]

[3] [redacted] Scott Decl. Ex. 1 at 11-12 & n.230; *id.* at 13 & n.263.

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[redacted]

Id. at 68 (Deposition of Nitin Dua at 14:4-8). In addition, he published a retrospective on the merger that included analysis of the divestiture. Scott Decl. Ex. 5 at 62-63. Defendants also claim Dr. Dua has "never been a testifying expert on *any* subject matter." Mot. at 4. This too is wrong. [redacted] Scott Decl. Ex 6 at 69.

The motion's further suggestion that competition economists, generally, lack the expertise necessary to opine on proposed divestitures likewise misses the mark. There is nothing anomalous about an economist assessing a proposed divestiture, in particular where, as here, it complements testimony from industry experts. Competition economists are trained to assess the competitive dynamics of a range of industries. Dr. Dua's own experience spans healthcare, life sciences, telecommunications, music, and software. A competition economist's expertise lies in being able to examine a market—even an unfamiliar one—and assess how a merger of two market participants is likely to alter existing competition. This expertise lends itself equally well to analyzing the impact that a new entrant to a market, such as a divestiture buyer, will have on competition.

Indeed, Defendants' expert economist, Dr. Israel, testified about a divestiture in *FTC v. Sysco*. And Dr. Israel did not simply assume away any operational differences between the divestiture buyer and the merging parties, as he does here. To the contrary, he opined that the divestiture buyer in that case, PFG, would be a weaker operator because it would have less scale and therefore face higher costs. Scott Decl. Ex. 7 at 72. In fact, the *Sysco* Court expressly credited "Dr. Israel's opinion that, even with the divestiture, PFG is unlikely to make up the gap in [cost of goods sold] between itself and the parties today" in concluding that it had "concerns about PFG's ability to compete against the merged entity." *Sysco*, 113 F. Supp. 3d at 76.

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Underscoring this point, the federal court in Oregon assessing this same merger recently permitted a competition economist to testify on the divestiture over Defendants' objections. Defendants sought to exclude testimony from the FTC's expert, Dr. Nicholas Hill, by marshalling many of the same arguments they do here, including that "[h]aving the qualifications to testify as an expert economist . . . does not mean that Dr. Hill is has the experience necessary to testify about the business prospects of a divestiture," Scott Decl. Ex. 8 at 78, and that assessment of prior divestiture transactions is not "economic analysis," Scott Decl. Ex. 8 at 80-81. The court rejected these arguments, concluding that "Dr. Hill has sufficient experience to testify regarding the proposed divestiture and his opinion is underlaid by economic analysis." Scott Decl. Ex. 9 at 88. This Court should do the same.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Defendants' motion to exclude Dr. Dua's testimony on the divestiture.

DATED this 3rd day of September 2024.

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**The signing attorney certifies that this opposition contains _4,185_ words, consistent with the limits in the King County Local Rules.*

DECLARATION OF SERVICE

I declare that I caused the foregoing document to be electronically served through the Court's Electronic Filing System on all counsel of record in this action.

DATED this 3rd day of September 2024 in Sausalito, California.

s/Carson J. Scott
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