Hon. Marshall L. Ferguson
Hearing Date: September 10, 2024
Hearing Time: 9:00 am

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' REPLY IN SUPPORT OF THEIR MOTION TO PARTIALLY EXCLUDE THE TESTIMONY OF DR. NITIN DUA

The State of Washington fails to establish that its economic expert, Dr. Nitin Dua, is qualified to offer expert testimony about the likely success of the divestiture to C&S Wholesale Grocers or that his opinions about the divestiture are reliable and helpful to the Court. Dr. Dua's qualifications to opine on the divestiture is a threshold question, but the State buries its response to the end of its Opposition. If anything, the State's evasive response highlights Dr. Dua's lack of expertise to opine on divestitures, and its attempt to resuscitate his supposed "economic analysis" of the divestiture only highlights the unreliability of his opinions about it. Tellingly, the State fails to even address Defendants' arguments regarding Dr. Dua's misleading claims that certain city areas are "particularly vulnerable" to harm, Mot. at 8 n.4, or that his review of prior cherry-picked food retail divestitures is unreliable, *id*.

Reflecting the weakness of the State's position, the Opposition starts with and repeatedly returns to sideways criticisms of Defendants' economic expert, Dr. Mark Israel. *See*

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Opp. at 1, 3, 5, 7, 11–12. The State has not moved to exclude any part of Dr. Israel's report and these criticisms are irrelevant to Dr. Dua's qualifications or opinions about the divestiture. The State also spends considerable space discussing the Parties' stipulation regarding expert reports but admits Defendants have complied with it. *See id*. 4. The State's argument regarding the stipulation is misplaced, misstates the legal framework for analyzing divestitures, and only distracts from the issue of Dr. Dua's lack of qualification to offer divestiture-related opinions.

I. ARGUMENT

A. The State Fails to Rebut Dr. Dua's Lack of Expertise to Testify About the Divestiture

Dr. Dua's qualifications to opine on the success of the divestiture buyer is a threshold issue, yet the State does not address his qualifications until the end of its Opposition. The State admits Dr. Dua's lack of experience analyzing the grocery industry or even the retail industry generally. Opp. at 12 ("Dr. Dua's own experience spans healthcare, life sciences, telecommunications, music, and software."). And the Opposition confirms that Dr. Dua has never been a testifying expert on any merger case or any case involving a divestiture. To support his qualifications, the State points to his "work" on the Sprint/T-Mobile merger. Opp. at 11–12. Yet Dr. Dua conceded at his deposition that he only supported the testifying expert, and never explained what role, if any, he played in analyzing the divestiture. *See* Scott Decl. Ex. 6 at 67–68. The fact that Dr. Dua co-wrote a post-mortem article summarizing the legal proceedings around that merger and noting it involved a divestiture, does not transform him into a divestiture expert. *See* Scott Decl. Ex. 5. In short, Dr. Dua's "opinion" about the Sprint/T-Mobile divestiture, Opp. at 11–12, was mere lay opinion. While Dr. Dua provided written testimony in one case (but never oral testimony), that was a monopolization case in the health care industry, not a merger case involving a divestiture in the grocery industry. Scott Decl. Ex. 6 at 69.

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Contrary to the State's assertion, Opp. at 11–12, Defendants do not argue that no competition economist could ever be qualified to offer opinions about a divestiture in the grocery industry, only that Dr. Dua does not have such qualifications. Defendants have clearly shown that Dr. Dua is not qualified to opine on the success of the divestiture buyer and the State cannot establish otherwise by bootstrapping to the qualifications of Dr. Israel or the FTC's economic expert in the parallel federal district court litigation in Oregon. *See id*. at 13.

B. The State Fails to Justify Dr. Dua's Choice Not to Address the Entire Transaction at Issue in His Initial Report

The Parties' stipulation on expert report sequencing did not require the State to wait until its reply reports to have Dr. Dua or its other experts address the actual transaction at issue in this litigation, which the State concedes will include a significant divestiture. Opp. at 1. That was the State's choice and is contrary to the applicable legal framework. In *United States v. UnitedHealth Group, Inc.*, the court expressly rejected plaintiffs' argument that courts should treat an acquisition and divestiture as "separate transactions" or place the burden on defendants to show that "that the divestiture will replace the competitive intensity lost as a result of the merger." 630 F. Supp. 3d 118, 132–33 (D.D.C. 2022) (internal quotation marks omitted). The court explained that doing so would "contradict[] the text of Section 7 and the *Baker Hughes* framework," *id.* at 133, because the relevant transaction is "the proposed acquisition agreement including the proposed divestiture." *Id.* at 134 n.5. "[T]reating the acquisition and the divestiture as separate transactions that must be analyzed in separate steps" would improperly allow a plaintiff to "to meet its prima facie burden based on a fictional transaction and fictional market shares." *Id*.

As the State concedes, Defendants have not moved to exclude Dr. Dua's divestiture-related opinions on the basis that those opinions were not disclosed in his initial report. Defendants move to exclude his discussion of the divestiture business outcomes because they

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are unreliable and Dr. Dua lacks the expertise to offer them. Further, Defendants never agreed not to challenge whether the State has met its burden under *Baker Hughes* by choosing to ignore the correct legal framework and address the entire transaction only in its reply reports.

C. The State's Efforts to Defend Dr. Dua's Unreliable Divestiture Analysis Is Unavailing

The State fails to show that Dr. Dua provides any reliable economic analysis related to the success of the divestiture. At bottom, the State argues [redacted] *See* Opp. at 8–9. But Dr. Dua does nothing to connect the past "datapoints" underlying that "range" to the facts of this case.

Indeed, the State effectively concedes that its "sales loss" and "store closures" scenarios are not likely to be helpful to the Court. The State describes these scenarios as merely "a guide and not a precise prediction." Opp. at 9. Dr. Dua offers an [redacted] range of possible lost sales, but presents no opinion about where in this range the sales loss is likely to land (if sales fall at all). By providing "analyses" based on a range of scenarios untethered to facts in this case, Dr. Dua offers no reliable evidence the Court can use to evaluate the divestiture.

The State's arguments purporting to show that Dr. Dua is offering economic analyses or to support the reliability of those analyses are unavailing. Dr. Dua's assessment of [redacted] and falls squarely outside his wheelhouse as a competition economist. Opp. at 7–8. The State has not proffered Dr. Dua as a grocery industry expert nor offered any explanation of why his experience as a competition economist qualifies him to analyze the assets needed to run a grocery business.

The State also inflates or mischaracterizes the analyses Dr. Dua actually conducted. For example, the State claims that Dr. Dua [redacted] Opp. at 6.

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However, Dr. Dua's [redacted] A basic comparison like this says nothing about C&S's operation of its stores or the economic circumstances surrounding each store. *See* Scott Decl. Ex.4 at 44–45. Even if it did, Dr. Dua does not attempt to do any analyses comparing the current divestiture to those acquisitions. These purported market concentration calculations tell the Court nothing about competitive harm. And again, Dr. Dua does not perform any analyses of the key differences between the Haggen divestiture and the one here.

D. The State Cannot Now Offer New Relevant Antitrust Markets

In its Opposition, the State attempts to salvage Dr. Dua's arguments about his [redacted] Opp. at 10–11. While the State may want to present alternative markets given the plain insufficiency of its [redacted] markets, it cannot allege new markets via a motion *in limine* opposition. *Camp Fin., LLC v. Brazington*, 135 P.3d 946, 949 (2006).

In any event, the State's new product and geographic markets are entirely unsupported. The State's claim that the [redacted] markets are relevant product markets is directly contradicted by Dr. Dua's reports and testimony. *See, e.g.*, Pfaffenroth Decl. Ex. 1 ¶27 n.65 (discussing [redacted]); *id.* ¶198 [redacted]." (emphasis added)); Pfaffenroth Decl. Ex. 2

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at 184:4–186:15. In his deposition, [redacted] *Id.* at 186:10–15.

Similarly, Dr. Dua never claims – and the State admits – [redacted] Opp. at 11. And it does not even attempt to claim its [redacted] are relevant markets. The State offers no evidence – direct, indirect, or practical indicia, Opp. at 10 – establishing that these product and geographic "sensitivity tests" are relevant antitrust markets.

As explained in Defendants' Motion, Dr. Dua's attempt to offer market concentration statistics and "sensitivity checks" assuming the loss of sales or stores closures in undefined markets is meaningless and would be unhelpful to the Court.

III. CONCLUSION

For the reasons discussed above and in their Motion, Defendants respectfully request the Court exclude Dr. Dua's testimony about the effect of the divestiture on competition.

I certify that this document contains 1739 words in compliance with LCR 5(b)(5)(B)(vi).

RESPECTFULLY SUBMITTED this 6th of September, 2024.

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CERTIFICATE OF SERVICE

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