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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' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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FINDINGS OF FACT

1. This case concerns a merger between Kroger and Albertsons, two grocery retailers with largely complementary footprints. Although both are supermarkets, they have different go-to-market strategies. Kroger focuses its efforts on bringing its prices down as close to Walmart's as possible, choosing to compete strongly on price. It is able to do so in part because the increased customer traffic it receives from lower prices fuels its alternative profits, non-grocery businesses. *Infra* FOF ¶ 21. Albertsons, by contrast, typically prices its items 10 to 12% higher than Kroger—12.3% higher in Washington. *Infra* FOF ¶ 109. It has only a nascent retail media business.

2. The merger is necessary to help the combined firm compete with the large grocery retail giants—Walmart, Costco, and Amazon, chief among them. *Infra* FOF ¶ 101. By giving Kroger a national footprint, the merger will reduce costs for Kroger and allow it to bring its prices even closer to Walmart's, as it has done for decades. *Infra* FOF ¶¶ 99, 102. And the increased customer base will fuel Kroger's "flywheel" business model, through which Kroger reinvests revenue earned from non-grocery operations into lower prices. *Infra* FOF ¶¶ 20–24. All of this will be combined with billions of dollars in investments in associate wages and store improvements. *Infra* FOF ¶ 102.

3. The third party to this transaction is C&S, the country's largest private wholesaler. C&S is purchasing 579 stores from Kroger as part of a divestiture agreement. *Infra* FOF ¶ 127. 124 of those stores are here in Washington, and they include nearly the entire QFC banner as well as a substantial number of Haggen stores. *Infra* FOF ¶ 129. This "transformational" transaction will give C&S the assets, talent, and scale to fully enter the retail grocery market (as many of its wholesaler peers have already done) and compete vigorously with Kroger, Walmart, and many others. *Infra* FOF ¶¶ 132, 155–56. The divestiture agreement is the product of careful negotiation among the parties and includes a transition services

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agreement that will help to ensure a smooth and successful integration of the divestiture stores into C&S's business. *Infra* FOF ¶ 130.

4. The State's arguments against the merger are not supported by the facts. The State's narrow market definition comprising only "supermarkets" and "super centers" in "city areas" is contrary to the testimony, documents, and data admitted at trial. *Infra* FOF ¶ 211. Its arguments about competitive effects overlook Kroger's business model and its economic incentive—reflected in decades of past practice—to lower prices. *Infra* FOF ¶¶ 266–72. The data confirms that Walmart, not Albertsons, is the primary constraint on Kroger's prices. And the State's attacks against the divestiture are misguided and without factual basis. *Infra* FOF ¶¶ 266–72.

5. The facts show instead that the merger will benefit customers and associates nationwide, including here in Washington, where the merger will actually *increase* competition by bringing Kroger and Albertsons/C&S closer together in terms of the numbers of stores they each operate. *Infra* FOF ¶ 287–89. Washington consumers deserve the opportunity to enjoy the lower prices and greater quality that Kroger can provide through scale.

6. At trial, the Court heard from numerous witnesses of the interested parties, including the CEOs of all three parties to the transaction. Defendants also presented live testimony from third-party witnesses, including witnesses from Costco, Amazon, and Fiesta Foods. The State offered no live third-party testimony. The State presented one economic expert (Dr. Nitin Dua) and three divestiture experts (Joseph Welsh for rebannering, Richard Collison for IT, and Kusum Ailawadi for other issues). Defendants presented one economic expert (Dr. Mark Israel), one divestiture expert (Dan Galante), and one efficiencies expert (Rajiv Gokhale).

I. The Parties to the Transaction

7. The transaction at issue involves three parties—Kroger is the purchaser, Albertsons is the seller, and C&S is the buyer of divested assets.

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A. Kroger

8. Kroger, an Ohio Corporation[1] founded in 1883,[2] is a leading food retailer, but its business also includes retail pharmacies, fuel centers, and retail media.[3] Kroger operates more than 2,700 grocery stores, which are predominantly located in the Midwest, Southeast, and West.[4] Kroger operates 114 stores in Washington.[5]

9. Kroger operates in a fiercely competitive environment under a variety of banners and formats, including supermarkets, seamless digital shopping options, price-impact warehouse stores, and multidepartment stores.[6] Kroger's grocery banners in Washington include QFC and Fred Meyer.[7]

10. Kroger recognizes and responds to competition from many sources, including Whole Foods,[8] Amazon,[9] Aldi,[10] and Costco.[11] *See, e.g.*, *infra* FOF ¶¶ 44, 61, 70, 94. Kroger's CEO, Mr. Rodney McMullen, characterized Walmart, Costco, and Amazon, in particular, as "threatening" Kroger's "very existence."[12]

1. Kroger's Pricing Strategy

11. Kroger views Walmart as its "number one competitor."[13] Kroger sets its retail prices primarily by reference to Walmart, not other "supermarkets" like Albertsons.[14] Kroger

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[1] Tr. (Groff (Kroger)) 538:7–8.
[2] DX 1996, at R32036.
[3] DX 1996, at R32036–38.
[4] Tr. (Groff (Kroger)) 539:9–11.
[5] Tr. (Israel) 3318:4–6.
[6] Tr. (Groff (Kroger)) 412:9–11 ("Q. Now, today Kroger owns about 2,700 supermarkets in various states around the country, correct? A. Yes."); Tr. (Cosset (Kroger)) 2590:11–20; Tr. (McMullen (Kroger)) 1239:6–9.
[7] Tr. (Aitken (Kroger)) 2492:4–7.
[8] Tr. (McMullen (Kroger)) 1252:9–11; Tr. (Groff (Kroger)) 634:9–20; Tr. (Groff (Kroger)) 638:22–6 (noting that Kroger price checks Whole Foods).
[9] Tr. (McMullen (Kroger)) 1248:10–12; Tr. (Groff (Kroger)) 634:9–20; DX2731, at R51104 (listing Amazon.com as a competitor).
[10] Tr. (McMullen (Kroger)) 1253:17–1256:5; *see also* DX 148, at R2367 (comparing to Aldi and other key competitors).
[11] Tr. (McMullen (Kroger)) 1247:7–16 (Kroger has added more large-pack items in its stores to compete with Costco).
[12] Tr. (McMullen (Kroger)) 1246:24–1245:4.
[13] Tr. (McMullen (Kroger)) 1245:10–12.
[14] Tr. (McMullen (Kroger)) 1257:6–10.

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uses Walmart as the price target for nearly every pricing strategy in its key pricing program, and Kroger's strategy is to use Walmart as a baseline or benchmark for prices on effectively all of its items.[15]

12. As Chief Marketing Officer Stuart Aiken testified, Kroger is "monomaniacally focused on Walmart" and "[f]or 20 years [it] has been our business plan, our objective" to focus on Walmart prices."[16] From a pricing perspective, Kroger is "laser-focused" on Walmart.[17]

13. Kroger has been chasing Walmart's pricing for decades because customers view Walmart as the low price leader.[18] Kroger's Walmart price matching strategy is "culturally ingrained within Kroger" and the result of "20 years of working diligently to get [their] prices in line with Walmart."[19] As a result, Kroger has been steadily reducing its margins year over year in an effort to get closer to Walmart.[20]

14. In Washington, Fred Meyer (the only division Kroger is retaining post-merger) prices each of its items to be within a fixed percentage of Walmart's price for that item.[21] In fact, Kroger keeps detailed spreadsheets comparing Fred Meyer prices to Walmart on tens of thousands of items.[22]

15. Nationally, Albertsons' prices are 10 to 12% higher on average than Kroger's prices.[23] In Washington, Albertsons' prices are 12.3% higher than Kroger's.[24]

16. Kroger's national pricing strategy also identifies a "high priced retailer" as an upper guardrail, with Albertsons sometimes acting as a "point of reference" for those high priced retailers.[25] Because Albertsons' prices are consistently higher than Kroger's, it is "very

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[15] Tr. (Groff (Kroger)) 559:4–11.
[16] Tr. (Aitken (Kroger)) 2499:5–10.
[17] Tr. (Israel) 3199:1–3200:21.
[18] Tr. (Groff (Kroger)) 669:10–20; Tr. (Israel) 3241:2–20.
[19] Tr. (Aitken (Kroger)) 2497:17–22.
[20] Tr. (McMullen (Kroger)) 1261:9–1262:17.
[21] Tr. (Groff (Kroger)) 559:18–560:11.
[22] SX 2607, at P42654–55; Tr. (Groff (Kroger)) 560:15–563:12.
[23] Tr. (McMullen (Kroger)) 1216:14–17.
[24] Tr. (Aitken (Kroger)) 2498:13–15.
[25] Tr. (Groff (Kroger)) 675:11–15, 647:3–9.

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uncommon" for Albertsons' prices to affect Kroger's pricing.[26] As discussed below, data showing pricing correlation supports this testimony. *Infra* FOF ¶ 268.

17. Kroger's division leaders sometimes track Albertsons' promotional advertisements, but under the national pricing policy, Kroger does not lower prices in response to promotional advertisements or prices from Albertsons.[27]

18. By setting its prices primarily in reference to Walmart, Kroger is also able to target "a lot of the discount retailers," since Walmart "also does price checks at Costco and Aldi and Lidl."[28]

19. Currently, in Washington, Kroger's QFC banner does not follow the national pricing model and instead primarily price checks against the higher-priced Safeway.[29] Under this strategy, which is an outlier, QFC still remains 4–5% less expensive than Safeway in Washington.[30] As set forth in more detail below, the entire QFC banner is being divested to C&S,[31] and Kroger will be implementing its Walmart-focused pricing strategy at all acquired Albertsons stores.[32] *Infra* FOF ¶¶ 153, 265, 268.

2. Kroger's "Flywheel" Business Model

20. Kroger's effort at chasing Walmart's lower prices is also part of its longstanding "flywheel" business model.[33]

21. Kroger's alternative profits business provides an opportunity for Kroger to generate revenue other than through the sale of groceries or related goods.[34] A core part of Kroger's alternative profits business is retail media, in which consumer package good manufacturers ("CPG") (*e.g.*, Pepsi) pay Kroger to have their advertisements displayed to

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[26] Tr. (Groff (Kroger)) 672:21–673:2, 648:15–23, 681:13–16.
[27] Tr. (Aitken (Kroger)) 2567:24–2568:10.
[28] Tr. (McMullen (Kroger)) 1246:5–14; Tr. (Groff (Kroger)) 637:8–638:8, 669:10–20.
[29] Tr. (State Opening) 242:12–20; Tr. (Israel) 3318:10–3320:9.
[30] Tr. (Groff (Kroger)) 632:22–633:6.
[31] Tr. (Israel) 3312:23–3313:4; Tr. (Florenz (C&S)) 865:9–11.
[32] Tr. (Aitken (Kroger)) 2515:22–25.
[33] Tr. (Aitken (Kroger)) 2499:14–2500:7.
[34] Tr. (Aitken (Kroger)) 2506:14–2507:7.

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Kroger's customers.[35] Kroger can enhance that media offering by using information generated about a customer over many grocery visits to provide advertisements that are more relevant to that customer.[36] Customer traffic from Kroger's other lines of business (*e.g.*, grocery) generates this data, which Kroger can then use to give CPGs an opportunity for targeted advertising to the customers most interested in their products.[37]

22. The "flywheel" business model is essentially a feedback loop between Kroger's alternative profits and its core grocery revenues. The "flywheel" model begins with Kroger's core supermarket, fuel and pharmacy businesses.[38] Lower prices for those goods and services drive more customers to Kroger's stores.[39] That additional traffic generates more data that Kroger can use to create customer insights that are valuable to CPG manufacturers.[40] That increases the revenue Kroger earns from its alternative profits business, which Kroger can then reinvest into even lower prices for its core businesses to generate even more customer traffic and data for customer insights.[41] This cycle of price investment, customer traffic, and alternative profits forms the core of Kroger's business model today and for the last two decades.

23. Kroger's "alternative profit" businesses have much higher margins (and growth) than Kroger's grocery business.[42] For example, Kroger's retail media business is the company's fastest-growing alternative profit business and has margins that are ten times larger than the company's supermarket business.[43] The financial success of these alternative profit businesses directly allows Kroger to make investments in employee wages and customer experience.[44] Kroger therefore can (and does) make more money by lowering prices.[45]

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[35] Tr. (Aitken (Kroger)) 2506:14–2507:7.
[36] Tr. (Cosset (Kroger)) 2582:12–24.
[37] DX 1254, at R16536; DX 2981, at R60050; Tr. (Aitken (Kroger)) 2506:14–2508:18.
[38] DX 1254, at R16536.
[39] DX 2921, at R57777; *see also* Tr. (McMullen (Kroger)) 1262:3–9, 1266:2–21.
[40] DX 1254, at R16536; DX 2981, at R60050; Tr. (Aitken (Kroger)) 2506:14–2508:18.
[41] Tr. (McMullen (Kroger)) 1266:22–1267:3, 1267:16–19, 1270:1–6; Tr. (Aitken (Kroger)) 2569:3–9.
[42] Tr. (McMullen (Kroger)) 1261:23–1262:17; Tr. (Aitken (Kroger)) 2506:14–2508:18; DX2921, at R57783.
[43] Tr. (McMullen (Kroger)) 1266:15–21.
[44] Tr. (McMullen (Kroger)) 1266:15–21.
[45] Tr. (Aitken (Kroger)) 2518:23–2519:3.

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24. Because of Kroger's flywheel model, investing in lower prices is ultimately more profitable for Kroger in the long term.[46]

B. Albertsons

25. Albertsons, an Idaho corporation founded in 1939, is a leading food retailer that operates over 2,200 grocery stores under a variety of banners.[47] In Washington, Albertsons operates under the Haggen, Safeway, and Albertsons banners.[48]

26. Albertsons operates stores in 34 states and the District of Columbia, including 215 stores in Washington.[49] While Albertsons operates some production facilities to manufacture products for its "Own Brands" private label portfolio, most "Own Brands" products are manufactured by third parties.[50]

27. Albertsons faces intense competition from a variety of retailers. As Albertsons' CEO, Vivek Sankaran, explained, "[a]nybody who takes market share from us I view as a competitor."[51] Competition from Walmart and Costco is particularly fierce.[52] Mr. Sankaran further explained that Kroger is not Albertsons' "most important competitor," because Albertsons is "losing more of our customers' dollars to Costco and Walmart than [they are] to Kroger."[53]

28. Unlike Kroger, Albertsons' retail media business is relatively nascent.[54] There was no evidence that Albertsons is able to monetize customer insights or retail data at anywhere near the scale of Kroger, nor that Albertsons is able to maximize long-term profits by lowering

[46] Tr. (Aitken (Kroger)) 2518:11–2519:3; Tr. (Aitken (Kroger)) 2507:23–2508:9, 2518:8–2519:3.
[47] Tr. (State's Opening) 227:22–227:24.
[48] Tr. (State's Opening) 227:25–228:3; *see also* Tr. (Schwarz (Albertsons)) 465:12–15.
[49] Tr. (State's Opening) 227:25–228:1.
[50] SX 219, at P4085 (ACI Form 10-K February 26, 2022).
[51] Tr. (Sankaran (Albertsons)) 1383:12–15 (further testifying that Albertsons loses 30% of its share of wallet to "a number of different players.").
[52] Tr. (Sankaran (Albertsons)) 1367:12–14; *see also* DX1135, at R13891–99.
[53] Tr. (Sankaran (Albertsons)) 1367:12–14. Although Albertsons sometimes lists Kroger as a "Primary Food Competitor," that term is used simply to refer to the narrow "food" channel, which does not include retailers like Costco, Walmart, Target, and Amazon. *See* Tr. (Kinney (Albertsons) 1832:15–21.
[54] Tr. (Cosset (Kroger)) 2581:15–2582:3.

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prices in the same way as Kroger. Albertsons' retail media operations are therefore "much further behind" Kroger's.[55]

C. C&S

29. C&S is the largest private grocery wholesale distributor in the United States and the eighth largest privately owned company in the United States.[56]

30. C&S distributes more than 100,000 food and non-food products,[57] including more than 6,000 items through its private label, Best Yet, consisting of national brand equivalent items,[58] and brands it obtains through, Topco,[59] a consortium that serves over 15,000 retailers and specifically provides access to (and manufacturing of) private label brands that retailers do not produce in-house.[60] C&S is in the process of redesigning its Best Yet label and expanding its assortment, and working with Topco and Daymon, a private brand agency, to work on what the future Own Brands at C&S will look like.[61]

31. C&S is more than a wholesaler: Its retail customers look to it for every foundational service needed to run a successful grocery store, including procurement, private label merchandising, supply chain services, retail technology, digital marketing, store design and layout, pricing strategy, data insights, and more.[62]

32. C&S recently completed two acquisitions as part of its strategic plan to promote new channels of growth,[63] and it currently operates 25 retail supermarkets and is a franchisor of 165 additional locations.[64]

33. As of April 2024, C&S had over $21.1 billion in annual sales and operated 45 distribution centers across the United States, servicing 7,500 customers, including retail chains

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[55] Tr. (Gokhale) 3094:25–3095:6.
[56] DX 1058, at R11873 (Walnut Business Plan).
[57] Tr. (Winn (C&S)) 1512:1–4.
[58] Tr. (McGowan (C&S)) 1161:3–5; DX 1058, at R11919.
[59] Tr. (Winn (C&S)) 1512:22–1513:1.
[60] Tr. (Morris (Albertsons)) 2807:5–2808:3.
[61] Tr. (Morris (Albertsons)) 2808:17–2809:7.
[62] DX 2628, at R48613–16, 19–20; Tr. (McGowan (C&S)) 1162:2–19, 1178:23–1179:9.
[63] DX 2304, at R39810.
[64] DX 1058, at R11881; Tr. (McGowan (C&S)) 1158:6–7.

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and independent grocers, from 45 distribution center campuses.[65] The State's divestiture expert, Professor Ailawadi, recognized that C&S has "supply chain expertise" that will benefit the company as a retailer.[66]

II. The Modern Grocery Industry

34. Today's grocery industry looks far different from the industry 40, 20, or even 10 years ago. In today's grocery industry, customers no longer have allegiance to a single, corner supermarket. Instead, they increasingly split their shopping among many options. Grocery retailers in turn use a variety of formats and pricing strategies to fiercely compete for those customer's grocery dollars.

35. That evolution in competition is no more apparent than in Washington, which is home to the headquarters for both Costco and Amazon, two retail grocery innovators that are disrupting the industry and introducing new competitive pressure that smaller retailers like Kroger must aggressively respond to.

A. The Modern Grocery Consumer

36. Over the last 40 years, grocery shopping preferences and the scope of customers have changed "exponentially" with more competitors and the emergence of e-commerce.[67] Today, there is increasing consumer preference for varied shopping options, and most consumers no longer rely on "one-stop shopping."[68] In short, "[g]roceries are available everywhere today."[69]

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[65] DX 2628, at R48613; Tr. (Winn (C&S)) 1505:19–1511:4, 1516:23–24; Tr. (Florenz (C&S)) 980:16–19; Tr. (Morris (Albertsons)) 2780:8–2781:4; DX 1058, at R11873.
[66] Tr. (Ailawadi) 2024:17–24.
[67] Tr. (Street (Albertsons)) 431:25–432:13; DX 2921, at R57792 (Kroger 2018 investor conference presentation noting that the fastest-growing customer segment is "very price sensitive customers" and that "spend per item is growing driven by customers buying larger packs and premium products.").
[68] *See* Tr. (Sankaran (Albertsons)) 1361:11–1362:12; Tr. (McMullen (Kroger)) 1244:8–14; Tr. (Kammeyer (Kroger)) 820:7–21.
[69] Tr. (Street (Albertsons)) 430:23–24.

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37. In 2021, Albertsons conducted a Shopper Landscape study using customer feedback to determine what is most important to its Seattle Division shoppers.[70] Seattle Division shoppers did not find "one-stop shopping," "high-quality private-label brands," and "valuable loyalty and rewards" to be important to their shopping experience, instead caring more about total bill price and a stress-free shopping experience—areas in which retail formats like club stores and value stores excel.[71]

38. Younger generations in particular lack the traditional preference of going to supermarket retailers like Defendants to buy groceries; many shop at stores like Target and Trader Joe's.[72] For example, "[h]alf of Millennials who shop Costco consider Costco their primary retailer for products Costco sells."[73] 30 years ago, customers used to shop at supermarkets 70% of the time, but today that number has been reduced to 40%.[74]

39. Nationally, over 90 percent of grocery customers visit at least two different stores a month.[75] Kroger's customers go to 4.8 different stores a month.[76] Similarly, Albertsons' customers shop for groceries, on average, six times at nearly six different places in a given week.[77] In Washington, 95 percent of shoppers go to at least two different stores a month for groceries.[78]

40. Because consumers shop for groceries at so many different retail formats, there is intense competition for consumers' "share of wallet."

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[70] SX 1526, at P26710–11 (conducting an online survey of over 10,000 grocery shoppers "to understand where ACI stands in the market vs. competitors and where its strengths and weaknesses are to identify areas of focus").
[71] PX 1526, at P26727; Tr. (Cloward (Albertsons)) 3024:15–3026:11.
[72] Tr. (Kinney (Albertsons)) 1887:13–16 ("And for younger generations, they look at Target as a place to buy groceries. They look at Trader Joe's. There's just not that distinction like it was when we were young.").
[73] DX 1274, at R16661–63 (also finding that "[h]alf of Millennials who shop at ACI consider it one of a few sources for the products [they] sell").
[74] Tr. (Kinney (Albertsons)) 1886:24–1887:16.
[75] Tr. (Israel) 3240:4–10.
[76] Tr. (Aitken (Kroger)) 2493:5–24; SX 4846 (Stewart (Kroger)), at P3491–2 (28:22–29:11, 32:7–12) (QFC's shoppers shop at QFC 1.5 times a week and spend on average $15 a trip).
[77] Tr. (Kinney (Albertsons) 1934:6–11; SX 4448, at P55081; Tr. (Sankaran (Albertsons)) 1361:11–1362:12, 1363:8–16, 1379:6–1380:21; *see also* DX 2213, R38403–06.
[78] Tr. (Israel) 3240:4–10.

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41. Share of wallet is a metric used by retail grocers to measure how much a consumer's grocery spending is going to specific retailers. The share of wallet data demonstrates that consumers are spending a smaller percentage of their overall grocery budget at "traditional grocery" stores, instead opting to spend their grocery dollars at a variety of formats for convenience, price, quality, and value.[79] Indeed, Dr. Israel testified that the data shows that Costco "is capturing more of the spending on the same products that are purchased at Kroger, as Walmart or Albertsons."[80]

42. The data shows how customers spread their grocery budget across stores. For example, Albertsons typically earns only about 17% of its customers' share of wallet in its Seattle Division, meaning that its customers spend 83% of their grocery dollars at retailers other than Albertsons.[81] Costco captures 20% of Albertsons' Seattle customers' grocery dollars, Walmart 14%, Kroger 12%, Amazon 6%, and WinCo 4.5%, with the share of wallet for all retailers other than Kroger growing.[82] Other retailers competing for Albertsons' customers share of wallet include Target, Sam's Club, Ahold, Whole Foods, Trader Joe's, Grocery Outlet, and Dollar Tree.[83]

43. Based on customers' share of wallet, Kroger's competitors, in order of highest-to-lowest share, are Walmart, Costco, Sam's Club, Target, Meijer, Aldi, Safeway, CVS, Food Lion, Walgreens, Publix, Amazon.com, and Albertsons. For the Fred Meyer Division, the share of wallet competitor order is Costco, Walmart, Safeway, WinCo, and Albertsons.[84]

B. The Competitive Landscape

44. The State's evidence focused on an alleged market for "supermarkets,"[85] comprising only a limited number of grocery retailers that "offer consumers convenient 'one-

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[79] DX 1336, at R178300–1.
[80] Tr. (Israel) 3238:22–25.
[81] Tr. (Kinney (Albertsons)) 1934:6–11.
[82] Tr. (Kinney (Albertsons)) 1853:17–1858:7.
[83] DX 1135, at R13894–99; Tr. (Street (Albertsons)) 431:5–12; Tr. (Kinney (Albertsons)) 1937:22–1940:23.
[84] DX 11, at R135; Tr. (Aitken (Kroger)) 2491:4–25, 2492:15–22; DX 1135, at R13892 (Albertsons email re: Share of Wallet).
[85] Tr. (Dua) 1701:25–1702:10.

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stop shopping' for food and grocery products."[86] Competition certainly is fierce among "supermarkets," but the reality is that these retailers do not just compete against one another.[87] Rather, they compete with mass merchandisers like Target,[88] club stores like Costco,[89] premium stores like Whole Foods,[90] value stores like Grocery Outlet and Trader Joe's,[91] and online retailers like Amazon.com.[92] Indeed, Rosauers Supermarkets, a supermarket chain founded and headquartered in Spokane, testified that it competes with stores from a variety of grocery retail formats, including Costco,[93] Whole Foods,[94] and Grocery Outlet.[95]

1. Walmart and Target

45. Walmart is Kroger's and Albertsons' largest competitor and the nation's largest grocery retailer by sales volume; it operates 3,560 supercenters and 360 discount stores.[96]

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[86] Compl. ¶ 68.

[87] SX 1526, at P26746 (listing Walmart, Amazon, Costco, Whole Foods, and Trader Joe's as "Priority Competitors for Reporting" for Albertsons); DX 2221, at R38494 (listing Costco, Trader Joes, Walmart, and Whole Foods as "main competitors" of ACI); DX 1135, at R13892 (listing Albertsons share of wallet competitors including Walmart, Costco, Target, and Amazon.com); DX 2711, at R50328–29 (showing "competitive grocery landscape" includes national supermarkets, regional supermarkets, specialty supermarkets, value supermarkets, ethnic supermarkets, and online grocers); DX 3023, at R62718 (showing Kroger competitors including Walmart, HEB, Target, Costco, and Amazon.com).

[88] DX 148, at R2367; Tr. (Groff (Kroger)) 636:23–638, 640:16–641:21; *see also* Tr. (Groff (Kroger)) 646:2–14 (noting that at least one of Kroger's everyday essentials zones in Washington — which Kroger uses to set the prices of its five everyday essentials items — includes Target as a competitor).

[89] Tr. (Groff (Kroger)) 634:9–20, 669:7–20; DX 2221, at R38494 (measuring effect on ACI from competitive events by competitors including Costco); DX 1135, at R13892 (showing Costco competing with Albertsons for share of wallet); DX2731, at R51162 (listing Costco as competitor); DX 3023, at R62079 ([redacted]).

[90] Tr. (Schwarz (Albertsons)) 526:4–25; Tr. (Groff (Kroger)) 634:9–20; DX 2221, at R38494 (measuring effect on ACI from competitive events by competitors including Trader Joes); Tr. (Groff (Kroger)) 638:22–6 (noting that Kroger price checks Trader Joe's in "each zone because [Kroger] want[s] to insure that we are being ultra competitive with our competition on those items").

[91] Tr. (Groff (Kroger)) 634:9–20.

[92] Tr. (Street (Albertsons)) 434:8–17; Tr. (Groff (Kroger)) 634:9–20; DX 2731, at R51104 (listing Amazon.com as a competitor); Tr. (Groff (Kroger)) 646:2–14 (noting that at least one of Kroger's everyday essentials zones in Washington includes Grocery Outlet as a competitor).

[93] Tr. (Rigsbee (Rosauer's)) 2410:5–13.

[94] Third-party data sources also group those retailers in the same channel as Defendants. Tr. 1935:16–24 (Kinney) ("Aldi's in the food channel. Whole Foods is in the food channel. There's—it's not just conventional grocers, it's the food channel. The small pie that we were talking about from the Circana point of view, I think, would be grouped into there.").

[95] Tr. (Rigsbee (Rosauer's)) 2409:6–13.

[96] Tr. (McMullen (Kroger)) 1244:7–11; Tr. (Sankaran (Albertsons)) 1346:7–10; Tr. (Groff (Kroger)) 634:7–8 (noting that Walmart is "[b]y far and away… our primary competitor").

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Grocery sales are Walmart's number one source of revenue as it competes fiercely with grocery retailers.[97]

46. According to Walmart, "any retailer that sells grocery products would be a competitor of Walmart in the grocery category," including Costco, Amazon, Aldi, Lidl, Whole Foods, Instacart, and Sprouts, as well as ethnic category stores.[98] In a 2023 internal analysis, Walmart .”[99]

47. The foundation of Walmart's business model is its Every Day Low Price strategy, which it relies on to "meet competitive pressures within [the] industry."[100] Walmart also [redacted][101] Walmart further employs an "everyday low cost commitment to control expenses so [its] cost savings can be passed along to [its] customers."[102]

48. Walmart can leverage its scale to buy significant quantities of product from suppliers and in turn obtain pricing that "reflects the volume, certainty and cost effectiveness these arrangements provide to such suppliers, which in turn enables [Walmart] to provide low prices to [its] customers."[103]

49. Walmart will continue to invest in its everyday low price strategy and expansion plans, which will only increase Walmart's competitive threat to Kroger and Albertsons.[104] Indeed, one of Walmart's core merchandising strategies is to continue to "aggressively" invest in the shopping experience for its customers; Walmart intends to expand its reach, with plans to build 150 more stores in the next five years.[105]

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[97] DX 3049 (Lieberman (Walmart)), at R63789–90 (23:18–21, 25:09–11, 25:17–25:20).
[98] DX 3049 (Lieberman (Walmart)), at R63789–90 (22:25–23:23, 25:09–11).
[99] DX 1340, at R18102.
[100] DX 2087, at R36544 (Walmart Form 10-K for the Fiscal year ended January 31, 2024); *see also* DX 3049 (Lieberman (Walmart)), at R63794 (45:09–11)).
[101] DX 1341, at R18133.
[102] DX 2087, at R36544 (Walmart Form 10-K for the Fiscal year ended January 31, 2024).
[103] DX 2087, at R36549 (Walmart 10-K for year ending January 31, 2024).
[104] DX 3049 (Lieberman (Walmart)), at R63794 (45:07–09)).
[105] DX 3049 (Lieberman (Walmart)), at R63799 (117:01–14)).

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50. Like Walmart, Target is a chief competitor of Kroger and Albertsons.[106] Target's mass merchandise stores in Washington—which are excluded from the State's market—offer almost an identical grocery shopping experience as that offered by retailers like Kroger and Albertsons, and the State's expert agrees a customer can do a "full shop" at such Target stores.[107] The State's expert agreed, for example, that if a person wanted to make a spaghetti dinner for their family, they could purchase pasta, pasta sauce, ground beef, and spices at their local Washington Target.[108] Customers can also find the five every day essential items at Target stores in Washington: milk, eggs, head lettuce, sugar, and bananas.[109] Target stores in Washington also sell fresh vegetables and fruit, a range of beverages, cereal, granola, snack bars, breakfast bars, organic snacks, prepared foods, pre-made sandwiches, salads, and baked goods.[110]

51. Target considers Walmart, Sam's Club, Costco, BJ's, Giant, Dollar General, Whole Foods, Trader Joe's, and Amazon to be among its competitors.[111]

52. Target is "committed to growing the grocery business over the long term" and sees grocery as an important part of its business because it drives regular visits of customers to Target.[112] As part of growing the grocery business, Target plans to open more stores, extend into new trading areas, and expand its food and beverage offerings.[113]

2. Costco and Other Club Stores

53. Club stores, like Costco, have been expanding their grocery footprints, using a business model that allows for lower prices on wholesale and bulk grocery products.[114]

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[106] Tr. (Sankaran (Albertsons)) 1382:25–1383:9; DX 1135, at R13894 (showing Target as the 4th largest competitor for Albertsons shoppers' share of wallet).
[107] Tr. (Dua) 1625:17–19.
[108] Tr. (Dua) 1661:9–23.
[109] Tr. (Dua) 1662:16–1663:10.
[110] Tr. (Dua) 1663:11–1664:15.
[111] DX 3053 (Conlin (Target)), at R63915–6 (38:02–39:11).
[112] DX 3053 (Conlin (Target)), at R63912–3 (22:6–12, 25:8–11).
[113] DX 3053 (Conlin (Target)), at R63913 (30:21–31:11).
[114] Costco is able to charge lower prices due to efficiencies in the supply chain that are a result of Costco's business model. Tr. (George (Costco)) 2299:20–2300:20.

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54. Costco's business model has successfully allowed the company to take a large share of grocery sales, particularly from "supermarkets."[115] Costco's sales in the food category have grown from approximately $10 billion in 1994 to $128 billion in 2023.[116]

55. Costco's pricing strategy relies on high sales volume and rapid inventory turnover.[117] By carrying the best-selling items that a customer might be looking for in every category of product that Costco sells, Costco is able to increase its buying power with suppliers and "make the entire supply chain more efficient and lower the price of producing that good," which in turn leads to lower prices for Costco's customers.[118] This go-to-market strategy also allows Costco to operate with significantly lower gross margins than most other retailers.[119] For example, Costco *sells* rotisserie chicken for a price lower than what Albertsons can even *source* it.[120]

56. Costco has 34 stores in Washington, the third most of any state, and is headquartered here.[121] Costco plans to open between 120 and 150 new locations across the country in the next five years.[122]

57. Costco's food sales in Washington have steadily and significantly increased over the last five years.[123] Costco has been able to grow its business in part through its grocery delivery offerings, which include same-day, one-day, and two-day delivery options, including through Instacart and Uber Eats.[124] Costco has drawn customers from outside the geographic areas customers typically travel.[125]

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[115] DX 1274, at R16647–16649, R16655–16658; Tr. (George (Costco)) 2297:2–5.
[116] Tr. (George (Costco)) 2293:1–5.
[117] Tr. (George (Costco)) 2299:2–5.
[118] Tr. (George (Costco)) 2299:12–13, 2299:6–2300:1.
[119] Tr. (George (Costco)) 2302:2–5.
[120] Tr. (Street (Albertsons)) 442:14–17.
[121] Tr. (George (Costco)) 2284:13–19.
[122] Tr. (George (Costco)) 2303:15–19.
[123] Tr. (George (Costco)) 2294:17–24; DDX 22, at 1 (table showing annual Costco sales in Washington 2019, 2020, 2021, 2022, and 2023).
[124] Tr. (George (Costco)) 2302:6–24, 2303:9–11.
[125] Tr. (George (Costco)) 2303:4–8.

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58. Although it may have different square footage and floor plans from other grocery retailers, Costco confirmed that it competes with "traditional" supermarkets, like Kroger and Albertsons.[126] As described in Costco's publicly filed 10-K, "Walmart, Target, Kroger, and Amazon are among [Costco's] significant general merchandise retail competitors."[127] Costco's Senior Vice President of Corporate Foods and Sundries, Sarah George, characterized the grocery industry as highly competitive, because consumers "have a choice of where to shop for all of those categories that [Costco] offer[s]," and Costco "recognize[s] that choice as [its] competition."[128]

59. Costco price-checks [redacted].[129]

60. Kroger views Costco as its "second largest competitor."[130] Since Costco's founding more than 30 years ago, Costco has gained market share and added stores every single year.[131] Kroger's CEO, Mr. McMullen, characterized Costco's growth as "unrelenting."[132] In response to Costco's continued success, Kroger has added "a lot more big pack items" to compete with Costco.[133] Share of wallet data shows that Costco captures more of Kroger customers' grocery dollar than even Walmart or Albertsons.[134]

61. Albertsons' customers spend more money at Costco than at any other competitor, including Kroger.[135] For every $100 an Albertsons customer spends on groceries, about $20 goes to Costco, and only $17 to Albertsons.[136]

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[126] Tr. (George (Costco)) 2288:12–21; DX 3041, at R63526.
[127] DX 3041, at R63526; Tr. (George (Costco)) 2289:14–15.
[128] Tr. (George (Costco)) 2288:8–25.
[129] Tr. (George (Costco)) 2307:16–23; SX 4689, at R58346 [redacted]).
[130] Tr. (McMullen (Kroger)) 1246:15–17; *see also* Tr. (Groff (Kroger)) 634:9–12 (Kroger views Costco as a "large competitor").
[131] Tr. (McMullen (Kroger)) 1207:23–1208:7.
[132] Tr. (McMullen (Kroger)) 1246:24–1247:4.
[133] Tr. (McMullen (Kroger)) 1247:7–16.
[134] Tr. (Israel) 3238:18–25.
[135] Tr. (Kinney (Albertsons)) 1853:5–12.
[136] Tr. (Street (Albertsons)) 443:11–16; Tr. (Kinney (Albertsons)) 1853:20–1854:5, 1857:8–16.

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62. In May 2021, Albertsons conducted a deep-dive analysis into Costco, finding that "Costco is a grocery store," that 64% of Costco's sales are generated from the sale of groceries, and that Costco receives significant share of wallet in key categories such as dairy, produce, and meat.[137] The analysis also showed that 71.2% of Albertsons customers who go to Costco buy fruit, 67.8% buy vegetables, 60.1% buy meals, 58.6% buy cheese, 58.3% buy water, and 51.9% buy milk, cream, and milk substitutes.[138] The data further showed that 48% of stores in the Seattle-Tacoma-Bellevue, Washington area directly compete with nearby Costco stores, which is the second highest percentage of interaction across all Albertsons store regions.[139]

63. Likewise, in June 2021, Albertsons conducted an entry impact analysis of Costco, which found that "[t]here is a clear impact to us when a Costco opens" and "[Albertsons] stores see a negative impact on Dollars, Volume and Baskets."[140]

3. Whole Foods and Other Premium, Natural, and Organic Stores

64. Consumer demand for "natural" products has increased the volume of organic and fresh products offered by grocery retailers.[141] Whole Foods and other grocery retailers like Puget Consumers Co-Op ("PCC"), and Natural Grocers have capitalized on these consumer preferences by offering a wide variety of grocery products in those areas.[142]

65. Premium, natural, and organic grocers have experienced dramatic growth in recent years. For example, Whole Foods currently operates around 500 stores.[143] Whole Foods explained that it is "investing in price and promotion to increase affordability and accessibility of as many natural and organic products as [it] can to as many customers as [it] can touch."[144]

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[137] Tr. (Kinney (Albertsons)) 1862:3–1864:5; DX 2213, at R38398, R38404.
[138] DX 2213, at R38405.
[139] DX 2213, at R38400.
[140] DX 1274, at R16647; Tr. (Kinney (Albertsons)) 1870:20–1871:4.
[141] DX 2921, at R57792 (Kroger 2018 investor conference presentation noting that natural foods saw "5 consecutive years of double-digit growth" and that "50% of all households buy Natural Foods.").
[142] SX 4842 (Neal (Sprouts)) at R3440 (28:15–23); Tr. (Spear (PCC Community Markets)) 75:14–76:18; DX 3047 (Oblisk (Amazon Fresh / Whole Foods)), at R63772–3 (96:16–98:06).
[143] DX 3047 (Oblisk (Amazon Fresh / Whole Foods)), at R63756 (10:21–10:24).
[144] DX 3047 (Oblisk (Amazon Fresh / Whole Foods)), at R63770 (94:03–09).

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66. Like Kroger and Albertsons, most stores with a "natural" focus also offer national brands and mainstream grocery products.[145]

67. Premium grocery retailers and Defendants view each other as competitors. For example, Sprouts competes and [redacted] [redacted].[146] Additionally, PCC testified that it competes against Costco, Fred Meyer, Safeway, QFC, Grocery Outlet, Whole Foods, Target, Trader Joe's, Amazon Go, Amazon Fresh, WinCo, and dollar stores.[147] PCC documents further show that PCC competes with the Seattle market.[148]

68. Whole Foods likewise considers "all grocery stores within [their] trading areas" as competitors, including "key competitors" Fred Meyer, Safeway, and Walmart.[149] Whole Foods' share-of-wallet data shows that large portions of its customers shop [redacted]"[150] In Washington, Whole Foods competes with "Safeway, Costco, Target, Fred Meyer, Trader Joe's, Walmart, QFC, WinCo, H Mart, Grocery Outlet, PCC Community Markets, Albertsons, Total Wine & More, Metropolitan Markets, Town and Country Markets, Uwajimaya, Walmart Neighborhood Stores, Haggen, Sprouts," and more.[151]

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[145] Tr. (Spear (PCC Community Markets)) 2326:15–2327:19.

[146] SX 4842 (Neal (Sprouts)), at R3442 (43:23–44:15)); SX4842 (Neal (Sprouts)), at R3445, R3449–50 (57:23–59:15, 85:14–88:7) (noting that Sprouts [redacted] [redacted]).

[147] Tr. (Spear (PCC Community Markets)) 2328:23–2337:21; DX 925, at R10436–41 ( ).

[148] Tr. (Spear (PCC Community Markets)) 2328:23–2337:21; DX925, R10436–41 ( ).

[149] DX 3047 (Oblisk (Amazon Fresh /Whole Foods)) at R63764 (41:12–42:02); DX 2730, at R50969.

[150] DX 271, at R4111 (Whole Foods share of wallet competitors among Whole Foods shoppers [redacted]); DX 271, at R4118–24; DX 0272, at R4173–R4180 (performing a competitive deep dive into [redacted]); DX 0272, at R4161–72 (Central West division, including Washington, share of wallet competitors include [redacted]); DX 0275, at R4355 (Whole Foods quarterly analytics review noting that Whole Foods needs to [redacted]).

[151] DX 3047 (Oblisk (Amazon Fresh /Whole Foods)), at R63764 (41:12–42:02) (noting that Whole Foods competes with Albertsons, Walmart, Costco, Sam's Club, Target, BJ's, Aldi, Lidl, Trader Joe's, Sprouts, Wegmans, H-E-B, Publix, Dollar General, and other stores); DX 272, at R4172.

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69. Kroger views premium, natural, and organic stores as significant competitors, and [redacted][152] In response to the growth of Whole Foods, Kroger stopped charging premium prices for natural and organic products, instead "approaching that business the same as you would a grocery item."[153]

70. Albertsons also views premium, natural, and organic stores as significant competitors. Albertsons has conducted analyses of the impact when new organic natural stores, like Whole Foods, open near an Albertsons store. Albertsons found that these openings negatively impacted Albertsons stores more than even Walmart and that all types of shoppers—including price-motivated customers—changed how they shopped with Albertsons when a Whole Foods opened nearby.[154]

71. Albertsons conducted a competitive blunting campaign against the opening of a new Sprouts store by focusing on organic products and private labels, which it has since replicated in other locations.[155] Albertsons also regularly competes with Whole Foods to be the first to get new food products on the shelf.[156]

72. Third-party witness testimony and documents confirm that other retailers compete with these natural and organic food retailers. WinCo competes against Whole Foods and Sprouts,[157] and Target also competes against Whole Foods.[158]

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[152] DX 148, at R2372–73; DX 149, at 2489–90 (comparing [redacted]); Tr. (Groff (Kroger)) 634:9–20; Tr. (Groff (Kroger)) 638:22–6 (noting that Kroger price checks Whole Foods).

[153] Tr. (McMullen (Kroger)) 1250:19–1251:8, 1252:9–1.

[154] DX 2221, at R38494 (Albertsons study analyzing the impact of newly opened stores of competitors); Tr. (Kinney (Albertsons)) 1900:5–1901:9.

[155] Tr. (Schwarz (Albertsons)) 530:12–531:2.

[156] Tr. (Schwarz (Albertsons)) 527:1–10.

[157] DX 2462, at R44483; DX 3051 (Kimball (WinCo)), at R63887 (156:24–157:07).

[158] DX 3053 (Conlin (Target)), at R63916 (39:05–06).

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4. Trader Joe's, Aldi and Other Value, Ethnic, and Dollar Stores

73. Other types of grocery retailers who offer customers a curated assortment of products have established significant footholds in the grocery industry, too. Such value retailers include Trader Joe's, Aldi, and Grocery Outlet.[159]

74. Trader Joe's competes "with everybody else who sells food[.]"[160] Trader Joe's [redacted][161]

75. Aldi is the second fastest growing grocery retailer, opening "hundreds and hundreds of stores," with plans to expand into the West.[162]

76. Albertsons recognizes that there has been a shift of consumer spending toward these "value retailers" in the market.[163] Value retailers create new options for Albertsons' shoppers and present a significant threat to Albertsons.[164] Aldi is the number three grocer in the world with over 12,000 stores globally, which has led Albertsons to believe the company is "replicating [this] global grocery leadership in [the] U.S."[165]

77. Albertsons views Trader Joe's as a "primary competitor" with significant brand innovation and has also developed products to compete with product offerings available at Trader Joe's and other value food retailers.[166] Fred Meyer also considers Trader Joe's a

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159 Tr. (Kinney (Albertsons)) 1848:14–19.
160 SX 4828 (Cahan (Trader Joe's)), at R3254, R3256 (125:2–20, 149:24–150:11, 150:16–151:9)
161 SX 4828 (Cahan (Trader Joe's)), at R3241, R3243–4 (33:16–21, 41:22–44:22) (identifying nearest Trader Joe's competitors to certain stores including [redacted]).
162 Tr. (Kinney (Albertsons)) 1902:5–11; DX 2438, at R44174 (Albertsons study of Aldi's U.S. growth).
163 Tr. (Kinney (Albertsons)) 1888:6–1893:15; DX 1290, at R16911 (analyzing the impact of Aldi and other value retailers' share of wallet and store openings); DX 1331, at R17726 (Albertsons finding that one reason for the rapidly changing grocery landscape is the growth of national / discount grocers as these groups "have over 60% market share).
164 Tr. (Kinney (Albertsons)) 1890:13–1891:11; DX 1290, at R16923.
165 DX 1331, at R17727.
166 Tr. (Cloward (Albertsons)) 3027:1–24; Tr. (Schwarz (Albertsons)) 526:4–25; Tr. (McMullen (Kroger)) 1250:24–1251:19.

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competitor, making note of new Trader Joe's store openings in Washington.[167] Kroger price checks Trader Joe's in each pricing zone.[168]

78. "Ethnic" grocery retailers—including H Mart, 99 Ranch Market, Uwajimaya, and Fiesta Foods—also vigorously compete for grocery dollars in Washington, too.[169] Fiesta Foods, a Hispanic grocer, directly competes and price matches against Albertsons, Safeway, and other stores.[170] Ethnic stores—like H Mart and Cardenas—are also significant competitors to Kroger.[171] Kroger conducts competitive data surveys on Asian ethnic grocery competitors.[172]

79. These ethnic retailers "really have a proposition that pulls dollars . . . with [Albertsons'] shoppers."[173] Realizing the competitive threat of these grocery stores, Albertsons recently launched its "multicultural initiative" with the goal of better competing against ethnic grocery stores such as H Mart.[174]

80. Dollar stores like Dollar Tree and Family Dollar attract both high and low income customers, and these customers will often become repeat customers.[175] Family Dollar has also discussed [redacted].[176] Dollar stores also regularly have higher gross margins than other retailers, including Kroger and

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[167] DX 61, at R510 (Fred Meyer spreadsheet identifying numerous Washington competitors, including value and natural competitors, such as Albertsons, Safeway, Target Fresh, Trader Joe's, PCC, Carrs, Smart Food Service, Rosauers, Natural Grocers, Grocery Outlet, Ridley's Family Market, Sprouts, Costco Wholesale, Smart and Final, Walmart, Market of Choice, WinCo, Amazon Fresh, SARS Super Saver, Met Market, New Seasons, Three Bears, and Amazon Go); Tr. (Kammeyer (Kroger)) 842:1–844:2.

[168] Tr. (Groff (Kroger)) 639:4–6.

[169] Tr. (McMullen (Kroger)) 1254:6–19; Tr. (Tucker (WinCo Foods)) 2378:6–8 ("Q. Do you consider ethnic grocery chains to be traditional grocers? A. I consider ethnic grocery chains to be a competitor"); Tr. (Cloward (Albertsons)) 3030:1–3 ("Q. And what about ethnic, are there any competitors of Albertsons Seattle division in that category? A. Ranch 99 Market, Fiesta Foods, H Mart, Seafood City"); Tr. (Albi (Kroger)) 759:18–21 ("We also competed with Uwajimaya and H-Mart when it came to ethnic food because we had a pretty nice selection of ethnic foods in our stores.").

[170] Tr. (Gaylord (Fiesta Foods)) 772:3–775:22; DX 261, at R4054 (Price checking sheet comparing Fiesta prices to).

[171] Tr. (McMullen (Kroger)) 1254:7–19.

[172] Tr. (Aitken (Kroger)) 2489:9–21.

[173] Tr. (Kinney (Albertsons)) 1859:20–24 (identifying ethnic stores as one of the top competitors in the market).

[174] Tr. (Street (Albertsons)) 435:15–438:3.

[175] SX 4847 (Unkelbach (Dollar Tree)), at 3517 (49:24–50:6).

[176] SX 4847 (Unkelbach (Dollar Tree)), at 3520 (82:8–83:9).

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Albertsons.[177] Dollar General is opening a new store format called a Dollar General Market, which would combine elements of a traditional Dollar General and an Aldi.[178] In response to the growing competitive threat of dollar stores, Albertsons has added dollar stores to Albertsons' competitor tracker.[179]

81. Both Kroger's and Albertsons' CEOs testified that dollar stores, like Dollar General, are strong competitors, emphasizing that "anybody with 20,000 stores that carries products we carry is a competitor."[180]

5. Amazon and Other Online Grocery Options

82. In addition to brick-and-mortar retail, consumers are increasingly attracted to online grocery options.[181]

83. Since the launch of its consumables business in 2007, Amazon has grown its grocery sales by leveraging the company's massive online grocery platform, building brick-and-mortar grocery stores, and launching the Amazon Fresh business to "offer the world's largest consumables selection at affordable prices with great value through a fantastic shopping experience."[182] Amazon has "worked hard to consistently lower prices and make [] products more available to [and] more affordable to customers."[183]

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[177] DX 1331, at R17760 (identifying that Dollar General, Dollar Tree, and Family Dollar all have higher gross margins than Kroger. Albertsons, and most retailors).

[178] Tr. (McMullen (Kroger)) 1254:20–1255:6.

[179] Tr. (Cloward (Albertsons)) 3034:16–18; DX 121, at R985 (Albertsons email discussing the opening of a new Dollar General); DX 1331, at R17741–44 (identifying Dollar General, Dollar Tree, and Family Dollar as Albertsons competitors).

[180] Tr. (Sankaran (Albertsons)) 1383:16–25; Tr. (McMullen (Kroger)) 1254:20–1255:6.

[181] *See* DX 3053 (Conlin (Target)), at R63911–02 (15:10–15:19) ("Q. Have you noticed more people (edited) wanting to shop for grocery online? A. Yes. Q. Over what time period would you say you've seen that trend? A. We've seen growth in online grocery shopping. From what I can recall, as I started that site merchandising role, until now, there's been a consistent growth of digital -- groceries sold digitally at Target."); DX 2921, at R57792 (Kroger 2018 investor conference presentation noting that consumer "digital visits [were] up 40-50%" and that "eComm household growth [was] up 82%").

[182] Tr. (Heyworth (Amazon)) 3435:24–3437:8, 3445:11–3446:4 (noting that Amazon's consumables business is "quite robust" and "have worked hard to consistently lower prices and make those products more available . . . to customers").

[183] Tr. (Heyworth (Amazon)) 3445:16–3446:4.

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84. Amazon believes it faces "a broad array of competitors from many different industry sectors around the world," including "companies that sell grocery products online and in physical stores."[184]

85. Amazon strives to be "Earth's most customer-centric company" and "to provide any and all products that [its] customers are looking to purchase."[185] Consumers can access grocery products, including perishables and private label products, through Amazon.com, as well as the Whole Foods and Amazon Fresh storefronts through the website.[186] Amazon also provides access to third-party merchant grocery offerings, such as Metropolitan Market in Washington, through its website.[187]

86. Amazon views the grocery business as "intensely competitive" because "[t]here are a large number of retailers in this segment[,] [t]he operating margins . . . are quite lean[,] [a]nd . . . the strategic nature of the customer relationship in grocery is significant in that these are the products that customers purchase most regularly and most often, thus making the relationship quite strong and enduring."[188]

87. Amazon considers supercenters, club stores, hard discounters, and "traditional" grocery stores to be competitors.[189] Amazon pays attention to brick-and-mortar stores, including those stores' private label offerings, customer shopping experience, price, and online development as they work to "become [a] more effective omnichannel competitor themselves."[190] Amazon sells its own grocery private labels brands.[191]

88. Amazon also price matches against "traditional" grocery stores, including Kroger and Albertsons banners.[192]

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[184] DX 2403, at R42973; Tr. (Heyworth (Amazon)) 3446:17–3447:17.
[185] Tr. (Heyworth (Amazon)) 3435:24–3436:4.
[186] Tr. (Heyworth (Amazon)) 3436:13–3437:8, 3439:6–15, 3442:10–11.
[187] Tr. (Heyworth (Amazon)) 3439:16–3440:4.
[188] Tr. (Heyworth (Amazon)) 3448:3–13.
[189] DX 2403, at R42973; Tr. (Heyworth (Amazon)) 3447:18–3448:2.
[190] Tr. (Heyworth (Amazon)) 3448:14–3449:5.
[191] Tr. (Street (Albertsons)) 435:23–436:9
[192] Tr. (Heyworth (Amazon)) 3449:6–17.

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89. Amazon offers same-day delivery of perishable items on Amazon.com.[193] Customers can avail themselves of same-day delivery through the Whole Foods and Amazon Fresh storefronts.[194] Amazon also operates a sub-same-day node in Phoenix, Arizona that offers same-day delivery of perishable products through the traditional Amazon.com interface.[195]

90. Amazon has been working to expand its brick-and-mortar grocery offerings and plans to open more same-day fulfillment facilities.[196]

91. Grocery retailers understand the competitive threat Amazon poses. Club stores like Costco and larger retailers like Walmart and Target testified they view Amazon.com as a significant competitor.[197]

92. Albertson's CEO viewed Amazon's purchase of Whole Foods in 2017 as a "wake-up call" for Albertsons and the grocery industry of Amazon's competitive intent in the market.[198] Albertsons views Amazon and online retailers as "strong and relentless" competitors that Albertsons "can never take their eyes off" of.[199] In 2021, 25% of Albertsons customers were also purchasing some grocery items from Amazon.[200]

93. Kroger viewed Amazon's purchase of Whole Foods as a "signal to Kroger and the rest of the industry" that they must urgently accelerate their growth in e-commerce.[201] Kroger also believes Amazon will be "a bigger competitor in the future than today"[202] and finds it "unbelievable how quickly and rapidly the e-commerce business is impacting foods."[203]

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[193] Tr. (Heyworth (Amazon)) 3442:23–3443:3.
[194] Tr. (Heyworth (Amazon)) 3442:4–11.
[195] Tr. (Heyworth (Amazon)) 3442:4–11.
[196] Tr. (Heyworth (Amazon)) 3449:25–3450:18.
[197] Tr. (George (Costco)) 2289:25–2290:2; DX 3053 (Conlin (Target)), at R63912–3, R63921 (24:16–25:01, 71:04–08); DX 3049 (Lieberman (Walmart)), at R63791 (26:19–27:03).
[198] Tr. (Sankaran (Albertsons)) 1380:3–7.
[199] Tr. (Sankaran (Albertsons)) 1391:8–16; DX 31, at R395–6.
[200] DX 2711, at R50335; Tr. (Kinney (Albertsons)) 1893:17–1896:10.
[201] Tr. (Cosset (Kroger)) 2587:2–2588:2, 2588:20–2589:18.
[202] Tr. (McMullen (Kroger)) 1248:10–13.
[203] Tr. (Aitken (Kroger)) 2502:24–2503:9.

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While Kroger experienced only 2.5% growth in the grocery industry in 2023, Amazon experienced 23.2% growth during the same period.[204]

94. Many retailers have entered the digital competitive landscape for grocery customers including Walmart, Target, and Publix.[205] For example, Walmart is investing "[redacted] and is [redacted][206]

III. The Merger Transaction

95. This merger arose out of a need for all three transacting parties. Kroger has been moving ever closer to Walmart on pricing, but there is a limit to what it can do at its current scale and with its current resources. Albertsons recognized that the growth of new retail formats and its customers move away from "one-stop" shopping made it harder for Albertsons to compete without a fundamental change to its business. And C&S lost its largest wholesale customer, opening up new challenges and opportunities for C&S to develop its business. The merger provides opportunities on all three fronts.

A. Background

96. Since joining Albertsons as its CEO in 2019, Mr. Sankaran believed that "the biggest challenge Albertsons faces in the long term is the challenge of a Costco and an Amazon and a Walmart, and an Aldi, in particular. And that part of [Albertsons'] transformation should be about creating a company that is so modern that it can . . . compete with them in the long term."[207] Mr. Sankaran recognized that Albertsons' cost-saving initiatives would not be enough to remain competitive over the long term.[208] As Mr. Sankaran testified, Albertsons understood

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[204] DX 3023, at R62718; Tr. (Aitken (Kroger)) 2488:11–16.
[205] DX 3022, at R62661 (Kroger Board of Directors Meeting presentation further identifying third-party grocery delivery platforms influencing the marketplace like Shipt, Grubhub, DoorDash, Instacart, and UberEats).
[206] DX 2986, at R60156 (email "perspective" from Mr. Sankaran).
[207] Tr. (Sankaran (Albertsons)) 1352:22–1353:3.
[208] Tr. (Sankaran (Albertsons)) 1358:14–1360:10.

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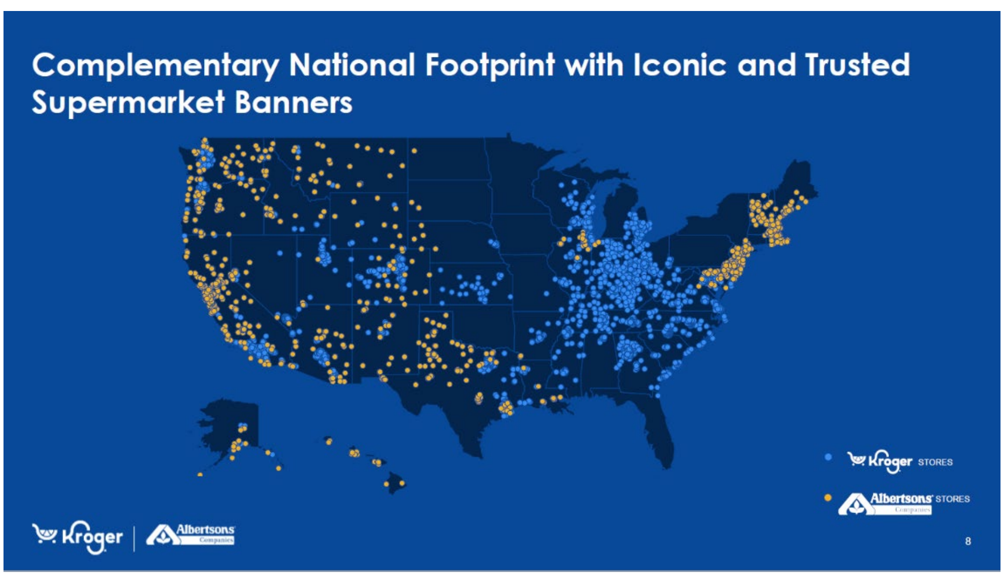
that "whatever we did within the company, we won't have the wherewithal over the long run to compete at that same scale."[209]

97. In November 2021, Albertsons launched a review of strategic alternatives to assess "everything [it could] do to improve the capital structure of the company," and it determined that a potential merger was the best opportunity.[210]

98. In February 2022, Albertsons announced that it was looking for a partnership or possible merger.[211] Thereafter, Kroger began analyzing whether merging with Albertsons made sense. Kroger ultimately contacted Albertsons in spring 2022.[212]

99. Chief among Kroger's considerations was that "Albertsons operates in many places where Kroger does not," and that Albertsons' complementary geographic footprint would give Kroger "national coverage" and allow Kroger to "better compete with companies like Walmart, like Amazon, who have established a significant competitive advantage."[213]

100. Whereas Albertsons has a strong presence in the Northeast, West, Texas and Northern California, Kroger is the near mirror image with a strong presence in the Midwest,



[209] Tr. (Sankaran (Albertsons)) 1399:22–1400:8.
[210] Tr. (Sankaran (Albertsons)) 1399:11–1400:8.
[211] Tr. (Sankaran (Albertsons)) 1400:9–19; Tr. (McMullen (Kroger)) 1159:1–1159:16.
[212] Tr. (Sankaran (Albertsons)) 1400:20–23; Tr. (McMullen (Kroger)) 1198:1–17.
[213] Tr. (McMullen (Kroger)) 1269:13–19; Tr. (Cosset (Kroger)) 2644:1–15.

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Southeast, East Texas, and the Plain States.[214] Their stores do not overlap in the majority of the country.[215]

101. The merger will enable Kroger to better compete against large grocery retailers like Walmart, Costco, and Amazon.[216] Kroger's ability to compete with these bigger industry players is critical to the long-term success of the company.[217] By expanding Kroger's reach from 60 million households to 85 million households nationwide, the merger will have a "dramatic impact on the number of . . . families that the merged company would be able to reach and serve."[218]

102. In addition to driving Kroger's core business, this expanded reach "generates additional data that ultimately fuels [Kroger's] business" through Kroger's longstanding "flywheel" business model.[219] Specifically, the additional data and customer traffic will allow Kroger to bridge the existing competitive gap against Walmart and Amazon[220] and allow Kroger to generate additional alternative profits through its retail media business.[221] These additional alternative profits, in turn, "directly feed[] into the core business and fund[] the investment in lowering prices,"[222] and allow further investments "in customer experience, [and] associate wages."[223]

103. Mr. McMullen testified that the flywheel model was a "fundamental" reason that Kroger is pursuing this merger.[224] Kroger needs the national coverage it will acquire from the

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[214] DX 1254, at R16527; DX 2626, at R48607; DX2627, at R48608.
[215] DX 1254, at R16527; DX 2626, at R48607; DX2627, at R48608.
[216] Tr. (Aitken (Kroger)) 2514:5–7.
[217] DX 2730, at R50969; Tr. (McMullen (Kroger)) 1249:20–1251:19; Tr. (Cosset (Kroger)) 2609:1–17.
[218] DX 1254 at R16537; Tr. (Cosset (Kroger)) 2613:1–11.
[219] Tr. (Cosset (Kroger)) 2609:1–11; Tr. (McMullen (Kroger)) 1265:18–1267:3; Tr. (Aitken) 2509:18–25; *see also* DX 2921, at R57783; DX 1254, at R16536–37.
[220] Tr. (Cosset (Kroger)) 2609:21–24.
[221] DX 2921 at R57783; Tr. (Cosset (Kroger)) 2582:15–24, 2608:14–19, 2609:21–2610:2.
[222] Tr. (Cosset (Kroger)) 2585:7–12.
[223] Tr. (Cosset (Kroger)) 2613:18–2616:1; Tr. (McMullen (Kroger)) 1265:21–1267:3.
[224] Tr. (McMullen (Kroger)) 1267:16–19; DX 1254, at R16537.

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merger in order to reach more households, execute its overall strategy, and match its most important competitors' national scale.[225]

104. Albertsons similarly was attracted by the prospect of creating a combined company with a "national footprint" and "significant growth potential" to achieve efficiencies that will enable the firm to compete with its fastest growing competitors.[226]

105. Albertsons saw the "opportunity to draw synergies, whether it is buying better or moving goods better or leveraging the cost of technology and all those investments. . . . All of these things . . . that a Walmart does. It's not at the scale of a Walmart, but at least at half the scale of a Walmart. And that affords . . . a different form of fuel to invest back into this business."[227]

106. Albertsons came to view a potential merger with Kroger as a business necessity if it was to effectively compete with Walmart, Costco, Amazon, Aldi, and other grocery retailers going forward.[228] As Mr. Sankaran testified, "[y]ou have to find the synergies and invest [them] in better pricing, more benefits for our customers," because Albertsons' competitors, "whether it's Aldi, Costco, Amazon or Walmart—all are fundamentally focused on better pricing. They begin with that and offer other services around it. So there's no option but to compete on price."[229] Competition on price is even more important now given the high rate of inflation.[230]

107. Without the merger, Albertsons will need to consider the possibility of layoffs, store closures, and even exiting certain markets.[231] Although it has seen some success in reducing costs, Albertsons has not been able to close the pricing gap with its competitors and lacks the scale to effectively compete with lower-priced retailers in the long term.[232]

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[225] Tr. (McMullen (Kroger)) 1197:19–1198:5, 1269:21–1270:25; Tr. (Cosset (Kroger)) 2609:1–2612:23, 2613:12–17; Tr. (Sankaran (Albertsons)) 1402:12–20.
[226] Tr. (Sankaran (Albertsons)) 1401:2–1402:20.
[227] Tr. (Sankaran (Albertsons)) 1408:4–1408:18; *see also* Tr. (Sankaran (Albertsons)) 1321:8–1322:8.
[228] Tr. (Sankaran (Albertsons)) 1363:12–1363:20.
[229] Tr. (Sankaran (Albertsons)) 1363:3–1363:20.
[230] Tr. (Sankaran (Albertsons)) 1339:23–1340:12.
[231] Tr. (Sankaran (Albertsons)) 1365:18–1367:7, 1406:17–1408:18.
[232] Tr. (Sankaran (Albertsons)) 1358:25–1361:8.

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108. On October 14, 2022, Kroger and Albertsons announced the merger, under which Kroger will acquire all of Albertsons' assets for $24.6 billion, subject to certain adjustments.[233]

109. Through the merger, Albertsons stores that were priced 10 to 12% higher than Kroger's prices will be put under Kroger's pricing structure.[234] That is true in Washington, where Albertsons' prices are approximately 12.3% higher than Kroger's.[235]

110. Kroger's post-merger business strategy to reduce prices is consistent with Kroger's flywheel model and includes a planned billion-dollar annual investment to reduce pricing in Albertsons stores, drive further customer traffic, and increase Kroger's long-term profits.[236] Further, as discussed below, Kroger has similarly planned a $1.3-billion investment to improve Albertsons stores and a billion-dollar annual investment to improve wages and benefits for its associates.[237]

B. The Divestiture

111. Divestiture was a critical component of the merger agreement from the start: the October 2022 agreement contemplated a divestiture of up to 650 stores and additional supporting assets.[238]

1. C&S

112. When Albertsons announced its interest in a possible merger in 2022, C&S was at a transition point in its business. In 2019, C&S lost one of its largest wholesale customers, which the company viewed as "a real watershed moment."[239] Ahold Delhaize, C&S's "largest customer at the time, represented 44 percent of [C&S's] revenues" when it "decided to move their business to self-distribution."[240] Ahold Delhaize's decision was part of a broader industry

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[233] DX 1254, at R16525.
[234] Tr. (McMullen (Kroger)) 1257:18–1258:2, 1271:6–25.
[235] Tr. (Aitken (Kroger)) 2498:13–15.
[236] Tr. (McMullen (Kroger)) 1257:18–1258:2, 1271:6–25.
[237] Tr. (McMullen (Kroger)) 1285:23–1286:4.
[238] DX 2552, at R45422 ("Material Divestment Event"), R45474 (§ 6.3(d)(3)).
[239] Tr. (Florenz (C&S)) 981:9–982:13.
[240] Tr. (Winn (C&S)) 1518:7–9.

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trend among large retailers towards self-distribution to better compete with low-cost players such as Walmart and Aldi.[241] In light of this substantial loss of revenue and disruption to its wholesale business model, C&S knew it had to evolve by finding new customers (which it did) and find new business opportunities through expansion and acquisitions.[242]

113. When "compar[ed] . . . to other large wholesalers in the United States," C&S is "actually the only one who doesn't have a large retail footprint."[243] C&S's other main wholesale competitors had already begun to diversify into retail.[244] The company accordingly made a "decision around transformation in our futures [that] included retail."[245] C&S made two smaller acquisitions (a retail acquisition and a strategic investment) prior to this transaction.[246]

114. After navigating the COVID pandemic, around 2021, C&S began looking for an opportunity to "transform" its business.[247] By mid-2022, C&S was assessing and had bid on an acquisition of retail stores from another seller, but when Kroger and Albertsons announced the merger and accompanying divestiture process in October 2022, C&S shifted its focus to acquiring the divestiture stores.[248]

2. Selection Process

115. Kroger began searching for a divestiture buyer soon after the merger was executed.[249] Finding the best available divestiture buyer was critical. Kroger knew "from the very beginning of the process" that "[w]ithout a compelling divestiture package and divestiture

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[241] Tr. (Winn (C&S)) 1517:6–1519:3; Tr. (Florenz (C&S)) 982:21–983:4.
[242] Tr. (Winn (C&S)) 1519:4–1521:16.
[243] Tr. (Winn (C&S)) 1521:5–7.
[244] Tr. (Winn (C&S)) 1521:9–12; Tr. (Florenz (C&S)) 983:8–11.
[245] Tr. (Winn. (C&S)) 1521:13–19.
[246] Tr. (Winn (C&S)) 1520:9–18.
[247] Tr. (Winn (C&S)) 1526:21–25 ("Given our intent to transform the business and our intent to shift, which included, of course, retail, we saw this as a great opportunity to do that for all the reasons -- I mean, it's got -- it has scale. It comes with assets. It's a business we can really build and thrive."); Tr. (Florenz (C&S)) 981:1–2 (testifying that C&S had "been looking for a transformational acquisition").
[248] Tr. (Winn (C&S)) 1521:14–16, 1526:15–20.
[249] Tr. (Cosset (Kroger)) 2624:12–2625:17.

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buyer, there is no merger."[250] Kroger therefore had "the biggest incentive to find the best and most compelling divestiture buyer."[251]

116. The process of selecting a divestiture buyer was led and managed by Kroger's bankers (Citibank and Wells Fargo), alongside other outside advisors, counsel, economists, and antitrust experts.[252]

117. After several rounds of offers, Kroger narrowed the field to four final bids from four potential buyers.[253] [redacted][254]

118. In addition to purchase price, Kroger also considered qualitative criteria in reaching its final decision.[255] Specifically, Kroger assessed the final divestiture bidders on three dimensions: (1) strategic commitment and alignment to operating the stores; (2) the experience of the bidders, including direct and indirect experience in the retail industry; and (3) the bidders' financial support.[256] Based on these criteria, at the culmination of this competitive, comprehensive selection process, Kroger selected C&S as the "best and most compelling divestiture buyer."[257]

119. *First*, it was important for Kroger that the divestiture buyer had a "long-term strategic commitment to running the business, maintaining employment, and operati[ng] the stores," as well as a commitment to assuming collective bargaining agreements.[258] Kroger determined that C&S demonstrated a long-term strategic commitment to running the divested business—evidenced through diligence by outside advisors into C&S's confidential business plans.[259]

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[250] Tr. (Cosset (Kroger)) 2625:25–2626:17.
[251] Tr. (Cosset (Kroger)) 2625:25–2626:17.
[252] Tr. (Cosset (Kroger)) 2621:8–15.
[253] DX 813, at R8978; Tr. (Cosset (Kroger)) 2622:16–2623:7.
[254] DX 813, at R8979.
[255] Tr. (Cosset (Kroger)) 2623:23–2624:17.
[256] Tr. (Cosset (Kroger)) 2623:23–2624:9.
[257] Tr. (Cosset (Kroger)) 2625:25–2626:17.
[258] Tr. (McMullen (Kroger)) 1283:25–1284:12; Tr. (McMullen (Kroger)) 1244:25–1245:12.
[259] Tr. (Cossett (Kroger)) 2624:10–2625:17.

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120. C&S has, in the past, acquired "small, struggling, non-profitable stores . . . [which] they improved to maintain their wholesale business," sometimes selling or closing the stores.[260] But C&S's CEO, Eric Winn, explained that the divestiture acquisition is part of a completely new strategy, and the sale or closure of the divestiture stores would be contrary to C&S's business plan.[261] Rather, "in order to have a good return on [its] investments" in the divestiture business, C&S "ha[s] to run these stores, run them really well, be really successful, and compete really hard."[262] "[T]he math would not work to do anything other than run this business successfully."[263]

121. Daniel Galante, Defendants' divestiture expert, explained that this transaction is "completely different" from the strategic, short-term retail acquisitions C&S has completed in the past, because this is a "transformational acquisition."[264] "It is going to change the profile of C&S."[265] "[C&S is] investing in an infrastructure . . . [and] you wouldn't do that if you weren't going to be able to run these businesses."[266] There is no economic comparison between the purchase of a few retail stores from the Grand Union bankruptcy,[267] and the acquisition of nearly 600 stores, tens of thousands of frontline associates, private label and store banner assets, IT infrastructure, and a host of transition services.[268]

122. *Second*, Kroger believed that it needed a buyer with "direct and indirect experience to properly and successfully operate the divestiture business."[269] C&S met this criterion based on its business track record and existing capabilities, particularly given its

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[260] Tr. (Galante) 2757:25–2759:1; Tr. (Winn (C&S)) 1521:17–1523:17.
[261] Tr. (Winn (C&S)) 1521:17–1523:17.
[262] Tr. (Winn (C&S)) 1522:24–1523:17.
[263] Tr. (Winn (C&S)) 1551:14–23, 1575:24–25.
[264] Tr. (Galante) 2757:25–2759:1; Tr. (Florenz (C&S)) 980:25–981:8; Tr. (Winn (C&S)) 1529:10–24.
[265] Tr. (Galante) 2757:25–2759:1.
[266] Tr. (Galante) 2757:25–2759:1.
[267] Tr. (Florenz (C&S)) 1028:22–1029:3.
[268] Tr. (Florenz (C&S)) 1032:19–24.
[269] Tr. (Cosset (Kroger)) 2623:23–2624:9.

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experience supporting over 7,000 independent retailers and its nationwide distribution network.[270]

123. Finally, C&S's financial backing bolstered Kroger's confidence in C&S. Working with its bankers, Kroger assessed and validated C&S's capability to fund the transaction and invest in the divested business over the long term.[271] This assessment was further supported by the significant equity investments funding the transaction.[272] Specifically, C&S's shareholders and SoftBank are committing $900 million in equity to fund the divestiture, $500 million of which reflects a personal investment by C&S's owner, Rick Cohen and his family.[273] This equity investment "de-risks" C&S by reducing the amount of interest it needs to pay on its debt, freeing those funds up for other investments.[274]

124. As described by Yael Cosset, Kroger's CIO and lead negotiator on the amended divestiture package, "making an investment of $3 billion demonstrates willingness and commitment to running a business that will be sustainable and profitable," and the substantial equity investment in the divestiture business exemplifies C&S's "long-term strategy commitment to that business."[275] Should C&S require more resources to invest in the divestiture business beyond the $2.9 billion allocated for this transaction, it already has secured additional financing capacity.[276]

125. Mr. Galante confirmed that C&S is a strong buyer that is well capitalized. Mr. Galante reviewed and analyzed five years of audited financial statements to assess C&S's performance history and financial health.[277] Mr. Galante determined that C&S has a "long track record of profitable performance,"[278] and that "C&S is a very strong buyer" with a "strong"

[270] Tr. (Winn (C&S)) 1504:6–13; Tr. (Cosset (Kroger)) 2624:10–2625:17.
[271] Tr. (Cosset (Kroger)) 2625:18–2626:17.
[272] Tr. (Cosset (Kroger)) 2625:18–2626:17.
[273] Tr. (Winn (C&S)) 1528:11–1529:5; Tr. (Galante) 2738:3–2738:17.
[274] Tr. (Winn (C&S)) 1529:10–24.
[275] Tr. (Cosset (Kroger)) 2625:18–2626:17.
[276] Tr. (Galante) 2738:3–2738:17.
[277] Tr. (Galante) 2681:7–12.
[278] Tr. (Galante) 2683:9–12.

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balance sheet.[279] "They have a long track record of profitable performance" and "they have a commitment from their existing shareholders for a significant piece of equity in this transaction."[280] Mr. Galante testified that the $2.9 billion investment support that C&S is receiving through equity and debt channels has created a transformational opportunity for the business.[281]

3. Structure of the Divestiture Package

126. In September 2023, Kroger, Albertsons and C&S executed an initial divestiture agreement including 413 stores and additional supporting assets, with the option to add up to 237 additional stores.[282] Following further discussions with regulators (including the State) about certain concerns, the parties entered into an amended Asset Purchase Agreement ("APA"), executed in April 2024.[283]

127. Under the APA, C&S agreed to pay nearly $2.9 billion in exchange for the following assets and support services:[284]

- 579 supermarkets in areas where Kroger and Albertsons overlap;
- exclusive ownership of the Carr's, Quality Food Centers, Haggen, and Mariano's brands nationwide;
- a royalty-free, exclusive, perpetual license to the "Albertsons" banner in California and Wyoming and the "Safeway" banner in Colorado and Arizona;
- 6 owned and leased distribution center campuses (including one in Washington);
- a dairy manufacturing plant in Denver;
- five Albertsons private label brands; a royalty-free, perpetual license to recipes and formulations for any products sold under such private label brands; and a two-year

[279] Tr. (Galante) 2683:8–12.
[280] Tr. (Galante) 2683:8–12.
[281] Tr. (Galante) 2676:9–15.
[282] Tr. (Cosset (Kroger)) 2647:5–2647:8; Tr. (Florenz (C&S)) 866:23–867:4. DX2552, at R45422 ("Material Divestment Event"), R45474 (65 § 6.3(d)(3)).
[283] SX 3748, at P49131.
[284] SX 3748, at P49131–P49247 (§§ 1.1, 2.3, 2.9, 2.10, 6.16, 6.15, 9.1); DX 915, at R57286 (Sched. 2.1(a)-K), R57297–309 (Sched. 2.1(c)-K), R57309–48 (Sched. 2.1(c)-A); DX 1058, at R11880, R11920.

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license, with the option for two 12-month extensions, for C&S to sell the Kroger-retained Signature and O Organics private label products;

- a clone of Albertsons' IT stack and Kroger's human capital management stack;
- a mechanism by which Kroger and Albertsons will transition key employees to C&S for corporate roles and thousands of other employees necessary to run the acquired stores;
- [redacted]; and
- [redacted]

128. After the merger, including the divestiture, Kroger will own 205 stores in Washington and C&S will own 124 stores in Washington (more than Kroger currently owns in Washington).[285]

129. The divestiture also includes a transition services agreement ("TSA") to ensure that C&S receives support from the merging parties while it integrates the divestiture stores into its existing business.[286] The agreement "defines the scope and . . . all the services that are being offered to C&S" to support it with the transition and operation of the divested assets.[287] Alongside the APA, the TSA is structured to give C&S everything it needs to operate the divested assets on day one following the transaction.[288]

130. The APA includes an obligation on Kroger and C&S to use [redacted] to consummate and make effective the transactions contemplated by the Agreement.[289]

4. Setting Up C&S for Success

131. The divestiture was designed to set up C&S for success.[290] Mr. Cosset, the architect of many aspects of the amended divestiture package, explained that the agreements

[285] Tr. (Florenz (C&S)) 864:25–865:8; 910:22–25; Tr. (Winn (C&S)) 1524:3–7.
[286] SX 3748, at P49295.
[287] Tr. (Cosset (Kroger)) 2627:15–19.
[288] Tr. (Cosset (Kroger)) 2642:15–20.
[289] SX 3748, at P49212–13 § 6.2(a), (d).
[290] Tr. (Galante) 2736:8–14.

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that make up the amended divestiture package contain five key "pillars": (1) stores and banners; (2) distribution; (3) private label; (4) technology and data; and (5) talent.

132. Stores and Banners. C&S will receive 124 stores in Washington, and banners that were "born in Washington."[291] C&S will acquire exclusive rights to the QFC and Haggen banners, *50* of the 55 QFC stores in Washington, and *12* of the 15 Haggen stores in Washington.[292] Thus, in Washington, C&S will need to rebanner only the 62 stores under the Albertsons and Safeway banners that it is acquiring.[293]

133. C&S recognizes and has planned for the challenges associated with rebannering. One such challenge is the potential disruption to customers and employees caused by an abrupt change in a store's banner.[294] Under the Asset Purchase Agreement, C&S will have 36 months to rebanner stores.[295] This will provide C&S with a "solid runway" for re-bannering.[296] This 36-month banner transition period allows C&S flexibility to rebanner stores on a reasonable timeline that will provide a smoother transition for customers.[297]

134. The State offered no evidence that C&S is unlikely to succeed in its efforts to rebanner the divestiture stores in Washington. Professor Ailawadi testified that the rebannering of the divestiture stores in Washington would be "challenging."[298] However, Professor Ailawadi admitted to knowing very little about the QFC and Haggen banners.[299] These banners have strong customer draw: QFC ranks better than average on Washington customers' stated priorities, including good deals and product variety[300]; and Haggen stores typically perform better on EBITDA, on average weekly sales, and with customer loyalty.[301] Professor Ailawadi

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[291] Tr. (Morris (Albertsons)) 2800:6–7; DX 1058, at R11892.
[292] Tr. (Morris (Albertsons)) 2798:19–2799:5; DX 1058, at R11892.
[293] Tr. (Florenz (C&S)) 865:7–866:21.
[294] Tr. (Morris (Albertsons)) 2795:6–19.
[295] SX 3748, at P49143 ("Buyer Banner Transition Period"); Tr. (Florenz (C&S)) 923:7–923:10.
[296] Tr. (Morris (Albertsons)) 2795:20–2798:10, 2808:17–2809:7.
[297] Tr. (Winn (C&S)) 1533:20–1534:6.
[298] Tr. (Ailawadi) 2066:13–2067:6, 2098:3–8.
[299] Tr. (Ailawadi) 2098:18–2100:7.
[300] Tr. (Florenz (C&S)) 1004:8–25.
[301] Tr. (Morris (Albertsons)) 2803:5–17.

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further admitted to knowing little about Susan Morris's previous experience with rebannering, which includes Albertsons' acquisition and rebannering of 70 bankrupt A&P stores.[302]

135. The opinions from Mr. Welsh on the potential challenges C&S may face with respect to rebannering are of little probative value. Mr. Welsh's direct examination testimony centered on an outdated version of C&S's business plan, despite the fact that the most current business plan directly addresses many (if not all) of Mr. Welsh's concerns.[303] In fact, he conceded that he did not "take any issue . . . with [C&S's] overall plan" for rebannering.[304] Moreover, Mr. Welsh fundamentally misunderstood C&S's deal model, which covers all of C&S's rebannering costs and accounts for sales degradation—both of which Mr. Welsh disregarded.

136. Distribution. C&S will receive "a large and really impressive distribution center in Auburn" that "services all of the Albertsons stores in Washington."[305] The number of stores currently supported by the Auburn distribution center "exceed[s] the number of stores that C&S will be [acquiring and] supporting in the Pacific Northwest."[306] The State offered no evidence that C&S will lack adequate distribution capabilities post-merger.

137. Private Label. C&S is receiving five Albertsons private label brands outright: Open Nature, Debi Lilly, Primo Taglio, Waterfront Bistro, and ReadyMeals.[307] Mr. Winn explained that "Open Nature is an example of a brand that we're acquiring that we're actually really excited about. It will become our free-from, organic brand across the whole store."[308] Regarding the Primo Taglio and Waterfront Bistro brands, Mr. Winn testified that consumers "love those brands" and that he sees them as having an even "broader application than what

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[302] Tr. (Ailawadi) 2100:8–24.
[303] Tr. (Welsh) 1126:16–25 ("Q. . . Do you recognize this document, Mr. Welsh? A. I don't know if I recognize this one. I think I recognized an earlier version, maybe, of this. Q. This one that is in front of you was cited in Exhibit B to your report as one of those things that you personally relied on and was in the universe --A. Yeah, this version --Q. This version, sir. A. Sorry. Yeah. Okay.").
[304] Tr. (Welsh) 1118:18–20.
[305] Tr. (Winn (C&S)) 1540:2–1540:13.
[306] Tr. (Cosset (Kroger)) 2629:21–2630:1.
[307] Tr. (Winn (C&S)) 1479:11–13; SX 3748, at P49173 (APA § 1.1); Tr. (Cosset (Kroger)) 2630:2–11.
[308] Tr. (Winn (C&S)) 1481:17–20.

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they have today."[309] C&S will have the exclusive rights to sell and potentially expand those private label brands starting on day one. [310]

138. Under the TSA, C&S will receive licenses to Albertsons' Signature and O Organic private brands for up to four years.[311] C&S may sell all Kroger private label products in certain of the divestiture stores for 18 to 24 months. By the end of the TSA periods, C&S will replace the Signature, O Organic, and Kroger private brand products with C&S's own private label products.[312] C&S intends to launch 2,000 to 3,000 of its own private label items for the divestiture stores, a task that C&S is confident it has the "time," "expertise," and "know-how" to accomplish.[313] Indeed, C&S has a head-start on its private label brand strategy, as it is already working with Daymon and other private brand agencies.[314]

139. Professor Ailawadi testified that C&S is disadvantaged in developing a successful private label program.[315] However, Professor Ailawadi admitted that she is aware of private label brands that have been developed in 18 months or less.[316] Furthermore, Professor Ailawadi conceded that it is "very common in the industry for retailers to outsource the manufacturing of their private label brands."[317] And Professor Ailawadi apparently did not consider the evidence introduced at trial of customer feedback demonstrating that a store's private label offerings are a relatively weak factor in attracting customers.[318]

140. <u>Technology and Data</u>. C&S will receive a "clone" of Albertsons' "tech stack," which is a copy of most of the technology systems that Albertsons uses to operate its business.[319] C&S has developed a plan to integrate these IT resources into its existing

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[309] Tr. (Winn (C&S)) 1538:13–16.
[310] Tr. (Winn (C&S)) 1479:5–13.
[311] SX 3748, at P49304 (TSA § 2.9); Tr. (Winn (C&S)) 1532:8–25; Tr. (Cosset (Kroger)) 2630:2–11.
[312] Tr. (Galante) 2729:14–2731:14
[313] Tr. (Florenz (C&S)) 1010:10–14.
[314] Tr. (Morris (C&S)) 2808:17–2809:7.
[315] Tr. (Ailawadi) 2104:5–8.
[316] Tr. (Ailawadi) 2106:16–2107:20.
[317] Tr. (Ailawadi) 2108:9–12; *see also* Tr. (Morris (Albertsons)) 2807:12–2808:12 (testifying that roughly 90 percent of Albertsons' Own Brands are produced by third-party partners).
[318] PX 1526 at P26727; Tr. (Cloward (Albertsons)) 3025:19–3026:3.
[319] SX 3748, at P49310 (TSA § 2.10).

capabilities to provide [redacted] and [redacted] following the merger.[320] The vast majority of the Albertsons stores that C&S will acquire are already running on the Albertsons tech stack and will not require a change of hardware.[321] Because divested Albertsons' stores already use this tech stack[322] (with the exception of the human capital management system coming from Kroger),[323] onboarding the divested Albertsons stores to the tech stack clone is a relatively simple process that will take "hours at most" for any given store.[324] Converting a Kroger store to the tech stack clone requires some additional preparation[325] and may take "a few more hours than in Albertsons stores . . . not days or weeks or months."[326] C&S will also receive a "clone" of Kroger's human capital management ("HCM") system.[327]

141. Mr. Richard Collison, the State's expert in retail grocery IT TSAs, believed that three months was not sufficient to convert the divestiture stores to the new tech stack.[328] But Mr. Collison later admitted that there is no three-month conversion requirement in the TSA,[329] and that the TSA requires that the parties work together to develop a reasonable plan for store conversions.[330] He testified that he was "certainly not offering an opinion that C&S is incapable of converting the divestiture stores in Washington on some timeline,"[331] and he never expressed the opinion that C&S cannot convert the 124 stores in Washington in the three months budgeted by C&S.[332] Mr. Collison admitted that he drew his initial conclusions about C&S's plans and capabilities without ever examining the Albertsons tech stack network architecture, going to

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[320] DX 1058, at R11937.
[321] Tr. (Collison) 2208:23–2209:4.
[322] Tr. (Collison) 2208:23–2209:4.
[323] Tr. (Collison) 2137:5–16, 2227:18–23, 2228:9–10.
[324] Tr. (Cosset (Kroger)) 2635:6–2636:1; DX 1058, at R11937.
[325] DX 1058, at R11938 ("Kroger/ACI will work with Third Parties to integrate Kroger, United, and Harris Teeter stores onto ACI tech stack which will require a change of equipment in non ACI stores").
[326] Tr. (Cosset (Kroger)) 2636:2–16.
[327] Tr. (Collison) 2228:1–13.
[328] Tr. (Collison) 2130:19–22.
[329] Tr. (Collison) 2215:24–2216:4.
[330] Tr. (Collison) 2215:13–16.
[331] Tr. (Collison) 2216:5–12.
[332] Tr. (Collison) 2216:23–2217:3.

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the divested Washington stores, examining the servers, or reviewing the detailed plans of how the conversion will be carried out by C&S.[333]

142. Data is "the lifeblood of [a grocery retail] company" and its "overall business model," and C&S will receive "100% of the data associated with the assets they are acquiring."[334] Specifically, C&S will receive [redacted].[335] The TSA and APA prevent Kroger from using [redacted].[336] Instead, Kroger may use [redacted].[337]

143. C&S will receive loyalty data, including historical data, which will help enable C&S to build a successful loyalty pricing and promotions system.[338] Professor Ailawadi acknowledged that there are successful grocery retailers that do not have customer loyalty programs and "many successful ones have other ways of getting customer-level data," including the option of outsourcing that work to a third party.[339]

144. The relevant agreements allow [redacted].[340] Additionally, the assets and support services included in the divestiture package will enable C&S to work with third-party vendors to develop its own systems and services. For example, although C&S will not receive certain loyalty, promotion, and pricing algorithms, the most important input for building those

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[333] Tr. (Collison) 2210:7–20.
[334] Tr. (Aitken (Kroger)) 2583:5–2583:19; Tr. (Cosset (Kroger)) 2628:3–2628:19, 2632:8–2632:17.
[335] SX 3748, at P49233–35 (APA § 7.7).
[336] *See* SX 3748, at P49234 (APA § 7.7(b)(iii)).
[337] SX 3748, at P49233–35 (APA § 7.7).
[338] Tr. (Cosset (Kroger)) 2632:8–2633:14.
[339] Tr. (Ailawadi) 2113:16–2114:11.
[340] *See, e.g.*, SX 3748, at P49409 (TSA Sched. 2.1(a), ME6.1).

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algorithms is the underlying data, and C&S will receive all the data it needs to build these tools on its own.[341] C&S has partnered with Nielsen, a global leader in information, data, and market measurement that Albertsons uses today,[342] to provide data insights and personalization in order to develop its own loyalty programs,[343] as well as NCR AMS to provide that loyalty solution.[344] As another example, C&S is working with Instacart to develop a robust, first-party e-commerce solution.[345]

145. Talent. C&S's plan for post-divestiture integration of talent is well under way.[346] Over 70,000 Kroger and Albertsons employees have already been designated to transition to C&S, including store-level employees, distribution-center and manufacturing plant staff, division- and district-level management, and subject matter experts requested by C&S who have the requisite skills and knowledge to perform the precisely defined functions needed to operate the divestiture stores.[347] For the divested Albertsons stores, C&S is receiving several key Albertsons leaders.[348]

146. Susan Morris, the current Albertsons COO with some forty years of relevant experience, will become the CEO of C&S retail and will have responsibility for overseeing all 579 divestiture stores.[349] Ms. Morris currently oversees operations at just under 2,300 stores for Albertsons, along with 270,000 associates who serve 30 million customers a week.[350] Ms. Morris is already leading the teams at 486 of the 579 (83.9%) divestiture stores, ensuring leadership continuity after the divestiture.[351]

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[341] Tr. (Cosset (Kroger)) 2632:18–2633:14.
[342] Tr. (Kinney (Albertsons) 1835:15–1836:3.
[343] Tr. (Ailawadi) 2115:3–6.
[344] Tr. (Collison) 2207:2–10.
[345] Tr. (Collison) 2203:24–2204:2.
[346] *See generally* DX 1058, at R11867–959.
[347] DX 3043, at R63543; Tr. (Cosset (Kroger)) 2638:18–20; SX 3748, at P49200–01 (§ 4.15); DX 2915, at R57571 (Sched. 4.15(a)(iii)); *see also* Tr. (Florenz (C&S)) 995:7–8.
[348] Tr. (Winn (C&S)) 1541:2–1547:7.
[349] Tr. (Winn (C&S)) 1541:11–16.
[350] Tr. (Morris (Albertsons)) 2763:16–2764:9.
[351] Tr. (Morris (Albertsons)) 2764:10–15.

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147. Ms. Morris is the "most respected leader" at Albertsons;[352] she "know[s] these stores and these people" and she has "knowledge of and continuity with this business and has taken it through change."[353] Given her reputation and experience in the industry, C&S is "very confident" about Ms. Morris's "leadership and ability to lead" C&S "into the retail business."[354] Alona Florenz, C&S's Senior Vice President of Corporate Development and Financial Planning, described Ms. Morris's commitment to run these retail stores as a "key component" to the divestiture.[355]

148. Ms. Morris is well prepared to lead the rebannering process for the minority of stores that will need to be rebannered. She has "spent her career rebannering stores."[356] For instance, when Albertsons acquired 877 stores from SuperValu in 2010, the then 200-store area expanded roughly five-fold overnight.[357] Ms. Morris was responsible for integrating the two teams that ultimately formed a single division and successfully led the acquired stores to 12 consecutive quarters of increased sales, earnings, and market share.[358] Ms. Morris also played a role in the Safeway-Albertsons merger, which involved expanding into markets where Albertsons had no existing presence.[359] As part of that transition, Ms. Morris "rebannered 70 [A&P] stores in . . . just over three months"—improving the poor performing stores within the first year.[360]

149. Ms. Morris has experience with brand transitions at both the store and product levels.[361] At Albertsons, Ms. Morris has had responsibility for developing new private label products, expanding private label penetration, and supporting new item launches.[362]

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352 Tr. (Sankaran (Albertsons)) 1412:3–17.
353 Tr. (Winn (C&S)) 1542:4–13.
354 Tr. (Florenz (C&S)) 1008:8–11.
355 Tr. (Florenz (C&S)) 1034:5–9.
356 Tr. (Florenz (C&S)) 995:7–8.
357 Tr. (Morris (Albertsons)) 2772:12–15.
358 Tr. (Morris (Albertsons)) 2772:2–2773:7.
359 Tr. (Morris (Albertsons)) 2773:15–2775:20.
360 Tr. (Morris (Albertsons)) 2797:11–13.
361 Tr. (Morris (Albertsons)) 2766:7–2767:12.
362 Tr. (Morris (Albertsons)) 2805:10–2806:4.

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150. Other talent will join Ms. Morris. Michelle Larson, who is currently running Albertsons' West Division, will join C&S as the chief merchant for the retail business.[363] Brent Stewart, the current head of the QFC division, will join C&S.[364] Paul Hertz, who currently ensures safety and quality at Albertsons, will be coming over to C&S to continue in a similar role.[365] Additionally, C&S will receive a team of pricing personnel from Albertsons.[366] At the store level, employees who work at a store before the divestiture will continue to do so afterwards.[367]

151. Professor Ailawadi admitted that her analysis never addressed the executives and employees that C&S will receive to manage the divestiture stores or the specific management structure that C&S expects to have in place for the divestiture stores.[368] Specifically, Professor Ailawadi admitted to never addressing the fact that Susan Morris, the current COO of Albertsons, will be running the retail side of C&S.[369] Professor Ailawadi further was not aware that Michelle Larson, the current executive vice president of Albertsons West, will be the head of merchandising for C&S.[370]

152. Mr. Collison argued that C&S had insufficient talent to successfully convert the stores from an IT perspective.[371] But Mr. Collison conceded that in addition to C&S's existing 350 person IT department,[372] and more than 300 consultants,[373] the divested business will be receiving 162 IT employees through the TSA on day one.[374] Mr. Collison also admitted that

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[363] Tr. (Winn (C&S)) 1542:17–25.
[364] Tr. (Winn (C&S)) 1543:14–1544:5
[365] Tr. (Winn (C&S)) 1544:6–20.
[366] Tr. (Winn (C&S)) 1545:16–18.
[367] Tr. (Cosset (Kroger)) 2637:4–2638:20.
[368] Tr. (Ailawadi) 2088:12–23.
[369] Tr. (Ailawadi) 2090:3–2093:21; *see also* Tr. (Florenz (C&S)) 949:16–20; Tr. (Morris (Albertsons)) 2792:13–19 ("Q. Now, I mentioned that the Court had already heard from a few other C&S witnesses besides Mr. Winn. One of those folks was Mark McGowan. Will Mr. McGowan be on your team in running these stores? A. No. Mark is part of the wholesale side of the business. He will not be on my team.").
[370] Tr. (Ailawadi) 2095:3–13.
[371] Tr. (Collison) 2130:17–19.
[372] Tr. (Collison) 2226:9–13.
[373] Tr. (Collison) 2226:14–18.
[374] Tr. (Collison) 2226:19–21.

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he did not consider that consultants from Tata Consulting Services, Deloitte, Truno, Pomeroy, Ernst & Young, and Cognizant Technology Solutions would join C&S as employees over time.[375]

153. Between these five pillars—and its existing distribution network and retail operations services—C&S is acquiring the functional equivalent of a stand-alone business.[376] In the Pacific Northwest, C&S will acquire nearly the entire QFC team, as well as the Haggen team (in all but a couple of the stores), which has its offices in Washington.[377] Carl Huntington and Todd Broderick, who currently lead Albertsons' Southwest and Denver Divisions, respectively, will continue at C&S in the same roles.[378] These leaders will oversee some of the approximately 67,000 associates that today run the stores, distribution centers, and plants—from pharmacists and technicians to fuel clerks and bakers—that will join C&S.[379]

154. Mr. Galante confirmed that after reviewing all of the diligence conducted by C&S and its consultants and analyzing the package, C&S is acquiring the assets, resources, talent, and people that it needs to be able to operate as a stand-alone business.[380]

5. C&S Understands and Has Planned for the Risks

155. Notwithstanding the comprehensive suite of assets that C&S will receive, no transaction is without risks. That is why C&S has undertaken extensive due diligence and planning in order to understand, quantify, and plan for the risks associated with the divestiture. The output of that effort is a detailed deal model and a business plan which outlines C&S's strategy for success.

156. C&S completed comprehensive due diligence.[381] C&S "started with their own corporate team of executives, and they complimented it with what they needed to be able to

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[375] Tr. (Collison) 2226:22–2230:10.
[376] Tr. (Galante) 2670:19–2671:2.
[377] Tr. (Winn (C&S)) 1546:3–16.
[378] Tr. (Morris (Albertsons)) 2791:4–12.
[379] Tr. (Morris (Albertsons)) 2788:1–21, 2816:1–13.
[380] Tr. (Galante) 2670:19–2671:2.
[381] Tr. (Galante) 2670:3–10

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thoroughly analyze the business from all aspects and the challenges they have identified."[382] C&S also had independent counsel that undertook legal diligence.[383]

157. C&S hired a varied team of consultants to assist with IT, commercial and integration, business, quality of earnings, day one preparation, and investment banking.[384] For instance, C&S worked with KPMG to validate C&S's starting point financials, performing the quality of earning analysis and assessing human resources expenses and tax circumstances.[385] C&S worked with Bain on commercial diligence, including evaluations of market dynamics, brand evaluation, price checks, and consumer surveys.[386] It utilized Tata Consultancy Services, an international IT services and consulting firm, to think through its IT expenses.[387] And it consulted Bastion and Jackman for market research and branding.[388]

158. C&S has budgeted [redacted] for advisors and consultants in connection with the divestiture transaction, [redacted] of which had already been spent as of July 1.[389]

159. The deal model was developed by C&S's corporate development and financial planning team with inputs from third-party advisors—including KPMG, whose quality of earnings analysis formed the basis for the conservative deal model.[390] The conservative model, like other deal models, "incorporates the diligence findings . . . from a performance perspective look in terms of what the transaction may look like for this particular buyer."[391]

160. In the deal model, C&S identified and addressed the risks and challenges from the transaction.[392] "[T]he conservative model, which [Mr. Galante] analyzed in detail, presents the lowest performance."[393] In Mr. Galante's words, "C&S has done their homework. . . .

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[382] Tr. (Galante) 2670:3–10
[383] DX 1058, at R11901.
[384] Tr. (Galante) 2687:1–20
[385] Tr. (Florenz (C&S)) 987:7–25; DX 1058, at R11901.
[386] Tr. (Florenz (C&S)) 987:7–25; DX 1058, at R11901.
[387] Tr. (Florenz (C&S)) 987:7–25.
[388] Tr. (Florenz (C&S)) 987:7–25; DX 1058, at R11902.
[389] Tr. (Galante) 2689:23–2690:17; DDX 24, at 9.
[390] Tr. (Galante) 2694:1–4, 2688:25–2689:12.
[391] Tr. (Galante) 2667:13–14.
[392] DX 1058, at R11868; Tr. (Galante) 2670:11–18.
[393] Tr. (Galante) 2697:18–21.

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They've identified and built on the challenges and the risks, which are incorporated in the deal model, as well as the business plan. And in my opinion, the plan that C&S has set out gives them the ability to operate successfully and compete in this industry."[394]

161. The deal model does not contemplate any scenario in which C&S sells or closes the stores.[395] Mr. Winn testified that, "given the amount of money we're spending . . . we couldn't possibly recoup that in any other way other than to be a great retail business. Selling the stores, the math doesn't work."[396]

162. Mr. Galante and his team scrutinized the deal model and did not find any broken formulas or errors.[397]

163. To account for rebannering risks, C&S included a conservative sales detriment in its business model based on feedback and analyses from Bain.[398] The initial impact of re-bannering is estimated to be [redacted] in Year 3, with an additional reduction of [redacted] in Year 4 after the remaining stores are re-bannered.[399]

164. Mr. Welsh testified that he believes C&S's sales degradation figure is too low and that the amount of sales degradation C&S will experience as a result of rebannering will be "significantly higher" than what C&S has estimated.[400] But Mr. Welsh conducted no independent analysis to reach that conclusion and could not explain a reasonable sales degradation amount would be.[401] Mr. Welsh's only basis for his opinion was his individual "expertise" and "walking through scores of stores."[402]

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[394] Tr. (Galante) 2739:8–14.

[395] Tr. (Winn (C&S)) 1522:19–1523:17 (selling stores "would be counter to our business plan. . . . [W]e're spending $2.9 billion to close this transaction, $900 million of which is equity investment, so real money from real people who will have something at stake. And then we're going to spend several hundred million dollars per year, particularly, over the first several years, but even on an ongoing basis to build this business up. . . . In order to have a good return on those investments, we have to run these stores, run them really well, be really successful, and compete really hard.").

[396] Tr. (Winn (C&S)) 1551:14–23.

[397] Tr. (Galante) 2696:10–23.

[398] Tr. (Galante) 2725:5–16.

[399] DDX 24, at 20.

[400] Tr. (Welsh) 1087:4–13, 1145:6–18.

[401] Tr. (Welsh) 1143:25–1145:18.

[402] Tr. (Welsh) 1144 2–5.

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165. In addition to the sales detriment, C&S included in its business model one-time rebannering costs per store,[403] which include costs for banner launch for a new banner,[404] grand opening expense, downtime EBITDA loss, a significant capital expense budget that C&S can draw upon for rebannering and remodeling, and one-time IT costs.[405] Beyond that, C&S has a significant capital expense budget it can draw upon for rebannering and remodeling costs.[406] C&S has committed to investing more than [redacted] over the next five years to support infrastructure development and an additional [redacted] on store improvements and other expenses.[407] Mr. Welsh conceded that C&S's rebannering "budget is actually 50 percent larger than" the budget per store he believes is necessary to rebanner every store in Washington.[408]

166. C&S accounted for technology costs in the deal model. The deal model allocates [redacted] "to transition the IT," which includes "licenses, consulting, support, everything . . . that they need to be able to transition these services after they receive the . . . Albertsons clone of the IT stack."[409] Mr. Galante confirmed that the capital expenditure budget [redacted] could also be used for the IT transition.[410]

167. The deal model likewise includes costs for C&S's private label launch.[411] Within the first four years, C&S will only need to transition 2% of its net sales to the C&S-owned private label brands, which Mr. Galante testified is "very achievable in a four-year period."[412] C&S has separately budgeted for the costs associated with transitioning out of these private labels.[413] Mr. Galante noted that while the State raised concerns regarding the

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[403] Tr. (Galante) 2725:17–19.
[404] DX 2913, at R56369 (Fig. 3).
[405] Tr. (Florenz (C&S)) 990:17–991:3, 992:4–14.
[406] Tr. (Florenz (C&S)) 989:9–15 (C&S has a base level of capital in each of the regions it will acquire stores that "acts as a place for additional monies to spend to invest behind [] the stores, whether it's remodeling or maintenance.").
[407] DDX 24, at 24.
[408] Tr. (Welsh) 1154:15–18.
[409] Tr. (Galante) 2731:19–2732:8.
[410] Tr. (Galante) 2732:12–19; *see also* DDX 24, at 25; Tr. (Florenz (C&S)) 989:9–19.
[411] DDX 24, at 24.
[412] Tr. (Galante) 2730:6–17.
[413] Tr. (Galante) 2730:18–20.

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"markups" of private labels during the transition period, such increasing costs are standard for a TSA because "a transition services agreement is transitionary[,] it's not intended to be . . . a permanent offering."[414]

168. Even if C&S has underestimated the total costs or financial risk of the divestiture and transition, any unexpected costs could be covered by the [redacted] in the store capital expenditure budget.[415] In the Pacific Northwest region alone, C&S has budgeted over [redacted] in store capital expenditures for the first five years.[416]

169. Professor Ailawadi admitted to having "not studied" the Transition Services Agreement—the central document governing the divestiture.[417] Rather, she "tried" to study it, but "drown[ed] in the details."[418] Professor Ailawadi further did not compare this TSA to any other TSA that is used within the grocery services industry.[419] And rather than "fully review and consider" C&S's most recent business plan for the divestiture, Professor Ailawadi only "browse[d] it" before filing her expert report.[420]

IV. Efficiencies from the Merger

A. Identification and Validation of Efficiencies

170. The merger will generate significant cost savings and increased revenue for the combined firm, which will in turn enable Kroger to invest in lower prices for customers, increases in wages and benefits for associates, and capital improvements for revamped stores.

171. Kroger expects to realize between [redacted] in annual efficiencies resulting from cost savings and revenue enhancements within four years of closing.[421]

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[414] Tr. (Galante) 27301:3–14.
[415] Tr. (Galante) 2734:11–16, 2735:2–2736:1; Tr. (Florenz (C&S)) 992:4–993:5.
[416] SX 2249, at "Capex D&A" tab.
[417] Tr. (Ailawadi) 2080:22–2081:3
[418] Tr. (Ailawadi) 2081:1–3.
[419] Tr. (Ailawadi) 2081:8–11.
[420] Tr. (Ailawadi) 2083:20–2085:18.
[421] DX 1727, at R27563 (noting [redacted]).

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172. These efficiencies were identified and subsequently validated through a rigorous and comprehensive process. Kroger first partnered with its investment bankers, Citi and Wells Fargo, to identify key categories of efficiencies, and a small group of Kroger executives determined efficiency ranges based on information available to them at the time,[422] accounting for what Kroger and Albertsons could do on a standalone basis without the merger.[423]

173. These efficiencies estimates were then validated through the work of leading outside consultants—Bain & Co., A.T. Kearney, and Boston Consulting Group—who extensively analyzed Kroger's and Albertsons' data, including their competitive data, in a restricted "clean room."[424] These consultants took a conservative approach in analyzing the merger's efficiencies to ensure a "high[] confidence" in achieving the efficiency numbers.[425]

174. The integration management office, consisting of employees from both Kroger and Albertsons, has also validated approximately 85–90% of the total efficiencies estimate.[426] To ensure the accuracy and integrity of its validation process, the integration management office uses a "holistic" methodology, reviewing detailed project-level information and ensuring that all inputs into the efficiencies estimates are accounted for and reviewed with the relevant functional teams.[427]

175. The integration management office has also developed plans to achieve the efficiencies, including, for instance, detailed templates consisting of products, pricing, and strategies to execute on delivering those efficiencies ("fact packs")—"a playbook" that any professional "can pick up and . . . execute . . . starting day one."[428]

1. Specific Efficiencies Resulting from the Merger

176. Kroger will realize both ongoing annual efficiencies as well as one-time cash

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[422] Tr. (Maharoof (Kroger)) 2968:10–17.
[423] Tr. (Maharoof (Kroger)) 2975:9–21.
[424] Tr. (Maharoof (Kroger)) 2968:10–2969:5, 2969:12–2970:3. Clean rooms ensure that people and systems apart from the business have access to detailed competitive information. Tr. (Florenz (C&S)) 923:16–21.
[425] Tr. (Maharoof (Kroger)) 2969:12–18.
[426] Tr. (Maharoof (Kroger)) 2957, 2970:6–12, 2972:11.
[427] Tr. (Maharoof (Kroger)) 2971:12–2972:8.
[428] Tr. (Maharoof (Kroger)) 2973:19–2974:6.

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benefits as a result of the merger.

177. Kroger expects to achieve the [redacted] in ongoing, annual efficiencies through cost savings and revenue enhancements.[429]

178. Cost Savings: Sourcing, Supply Chain, and Other Synergies. Kroger expects to improve margins by expanding the penetration and range of private label products at Albertsons stores (approximately [redacted]).[430]

179. Kroger also expects to lower a range of sourcing costs (approximately [redacted]) following the merger.[431] For instance, Kroger and Albertsons pay different prices for the same products, even when procuring that product from the same vendor.[432] The merger would allow the combined company to negotiate prices to reduce (although not necessarily eliminate) gaps between the two, lowering overall costs.[433]

180. The merger will result in supply chain and manufacturing efficiencies from combining the companies' complementary geographic footprints (approximately $500 million).[434]

181. Cost Savings: Administrative and Technology. Kroger will also achieve efficiencies by lowering administrative costs (approximately [redacted]) and through consolidation of technology contracts [redacted]), which include renegotiating contracts with companies like Oracle and Microsoft.[435]

182. Revenue Enhancements. Kroger anticipates efficiencies of up to [redacted] in revenue growth, alternative (non-grocery) profit streams, and health and wellness.[436] As to revenue growth (approximately [redacted]), the combined company will accelerate revenue

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429 Tr. (Maharoof (Kroger)) 2959:5–18; DX 1727, at R27563.
430 Tr. (Maharoof (Kroger)) 2964:7–17; DX 1727, at R27563.
431 DX 1727, at R27563.
432 Tr. (Maharoof (Kroger)) 2964:21–2965:14.
433 Tr. (Maharoof (Kroger)) 2965:15–18.
434 Tr. (Maharoof (Kroger)) 2965:22–2966:8.
435 Tr. (Maharoof (Kroger)) 2967:7–18; DX 1727, at R27563.
436 DX 1727, at R27563.

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growth through several merchandising strategies, including increasing private label offerings and quality.[437]

183. Efficiencies in the alternative (non-grocery) profit streams (approximately [redacted]) include retail media, where Kroger expects to expand the geographic platform through which CPG manufactures can advertise to Kroger's customers as a result of the national reach of the combined company.[438]

184. The health and wellness efficiencies (approximately [redacted]) primarily consist of increases in pharmacy revenue at Albertsons stores by, among other things, converting Albertsons' pharmacy to Kroger's pharmacy platform.[439]

185. One-Time Benefits. Kroger expects to achieve between [redacted] in one-time cash benefits.[440] These include, for example, immediate tax savings resulting from combining companies that currently maintain separate tax captives.[441]

2. These Efficiencies Will Help Fund Lower Price

186. These efficiencies will support Kroger's business investments across several areas, including most critically, $1 billion in lower prices on a run rate basis.[442]

187. As Mr. Aitken stated: "Literally day one we have 28 SKUs that we will be reducing prices on day one."[443] And "roughly 650 items 90 days later we'd be reducing the price on."[444]

188. Kroger's $1 billion annual investment in lowering prices—including planned price investments for Washington exceeding $100 million[445]—is not a promise; it is a "business strategy" that is integral to the "flywheel model" Kroger has used for more than two decades to

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[437] Tr. (Maharoof (Kroger)) 2961:20–2962:17; DX 1727, at R27563.
[438] Tr. (Maharoof (Kroger)) 2962:21–2963:14; DX 1727, at R27563.
[439] Tr. (Maharoof (Kroger)) 2963:18–2964:6; DX 1727, at R27563.
[440] Tr. (Maharoof (Kroger)) 2960:10–2961:5.
[441] Tr. (Maharoof (Kroger)) 2960:13–18.
[442] DX 2559, at R46131; Tr. (McMullen (Kroger)) 1278:11–21; Tr. (Aitken (Kroger)) 2519:8–2520:21.
[443] Tr. (Aitken (Kroger)) 2523:15–16.
[444] Tr. (Aitken (Kroger)) 2523:21–22.
[445] DX 2237, at R38699; Tr. (Aitken (Kroger)) 2531:17–21; Tr. (Gokhale) 3100:17–22.

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maximize long-term profits.[446] By lowering prices for its retail grocery business, Kroger generates more customer traffic and grocery sales, thus more data, thus more alternative revenue, and more money overall.[447]

189. For Kroger to be successful in the highly competitive grocery industry environment, it must lower prices in order to close the gap with Walmart and to keep pace with other competitors.[448] Reducing costs and lowering prices is critical for Kroger to compete with these competitors that operate on a "national scale."[449] Lowering costs has long been critical to Kroger's business model.[450] This is especially true as national retailers and super regional grocery chains have both significantly expanded near Kroger and Albertsons stores.[451]

190. The price investments Kroger has planned comport with its past practice. Since 2003, Kroger has invested more than $5 billion in lower prices for consumers—including, following its Harris Teeter and Roundy's acquisitions, investing over $100 million in each to lower prices.[452]

B. Expert Analysis of Efficiencies Under the Merger Guidelines

191. Rajiv Gokhale, Defendants' expert in financial economics, analyzed Kroger's projected synergies and estimated that [redacted] in efficiencies are merger-specific, meaning benefits that "the merged firm will realize as a result of the merger that" would not be realized "without the merger, as stand-alone companies" and verified.[453] He also conservatively estimated that of those merger-specific efficiencies, between [redacted] are verifiable.[454] No expert rebutted Mr. Gokhale's testimony.

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[446] Tr. (McMullen (Kroger)) 1280:22–1281:4.
[447] Tr. (McMullen (Kroger)) 1261:23–1262:9, 1266:2–1267:3.
[448] Tr. (McMullen (Kroger)) 1257:6–10, 1258:4–18; Tr. (Aitken (Kroger)) 2499:7–2500:10.
[449] Tr. (McMullen (Kroger)) 1241:22–1242:4, 1288:9–23.
[450] Tr. (Aitken (Kroger)) 2518:11–2519:3.
[451] Tr. (Groff (Kroger)) 673:16–21 ("Walmart has grown significantly over the last number of decades. Amazon has come to the scene. Club stores have expanded. In many parts of the country, discounters like Aldi and [Lidl] have come in and have grown and expanded tremendously, all growing a lot."); Tr. (Sankaran (Albertsons)) 1383:19–24, 1384:14–21; Tr. (Cloward (Albertsons) 3035:4–9.
[452] DX 2559 at R46136; Tr. (Aitken (Kroger)) 2514:15–2515:21.
[453] Tr. (Gokhale) 3049:1–5, 3050:1–11; DDX 25, at 3.
[454] Tr. (Gokhale) 3053:15–24; DDX 25, at 3.

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192. Mr. Gokhale's analysis focused on nationwide efficiencies for a nationwide merger. As Mr. Gokhale explained, in a nationwide merger, efficiencies will be realized on a nationwide basis and do not lend themselves to state-by-state analyses.[455] The efficiencies will benefit Kroger and Albertsons consumers nationwide, including those in Washington.[456]

193. Mr. Gokhale independently verified these efficiencies through "reasonable means" (2010 Merger Guidelines) or through "reliable methodology" (2023 Merger Guidelines).[457] Specifically, Mr. Gokhale determined that Kroger and its consultants' process for estimating synergies were likely to generate reasonable results.

194. Mr. Gokhale's determination was based on his detailed review of Kroger's and Albertsons' data; granular plans of strategies to achieve key synergies categories (*e.g.*, "fact packs"); the consultants' and Defendants' analyses and plans; the models underlying those plans and fact packs; deposition transcripts of relevant Albertsons' personnel; and interviews with Kroger's personnel and consultants.[458]

195. Mr. Gokhale did not, as the State's counsel suggested, uncritically adopt Bain's findings. Mr. Gokhale took extensive steps to confirm that Bain's analysis was accurate, including by testing and analyzing the models and assumptions used by Bain, conducting numerous interviews with Bain and others, and validating the extent to which the efficiencies identified by Bain are cognizable under the law.[459] Mr. Gokhale did not accept all of Bain's or Kroger's expected efficiencies as cognizable under the Merger Guidelines, instead finding cognizable only half of Bain's estimated efficiencies in private label sourcing and less than half

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[455] Tr. (Gokhale) 3153:22–3154:3.
[456] Tr. (Gokhale) 3154:17–24.
[457] Tr. (Gokhale) 3050:12–20. Under the 2010 Merger Guidelines, the likelihood and magnitude of the efficiency, how and when the efficiency would be achieved, how the efficiency would enhance the merged firm's ability and incentive to compete, and why the efficiency would be merger-specific must be verified through "reasonable means." And under the 2023 Merger Guidelines, efficiencies should be credited where they "have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties."
[458] DX25 at 4; Tr. (Gokhale) 3078:25–3079:15; *see also* Tr. (Gokhale) 3079:16–3082:6.
[459] Tr. (Gokhale) 3055:15–3056:19, 3152:11–21.

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of Bain's estimated efficiencies related to goods not for resale.[460] The State offered no evidence to discredit any of Bain's efficiencies work.

196. Mr. Gokhale's calculation of the synergies cognizable under the Merger Guidelines was conservative—a "minimum" of what the merger will likely achieve.[461] Mr. Gokhale testified that it is "very likely that the parties will actually achieve a number much closer" to the [redacted] in synergies that he found were merger-specific.[462]

197. Mr. Gokhale compared his estimate of cognizable efficiencies to benchmarks from prior transactions, which strongly suggest that Defendants will likely achieve efficiencies *higher* than what he was able to verify at the time of his report.[463]

198. With respect to sourcing cost savings from procuring grocery products for resale to consumers, Mr. Gokhale determined that all of the projected [redacted] savings in national brand sourcing, [redacted] in own brands sourcing, and [redacted] in fresh products sourcing were merger-specific and verifiable, and thus cognizable under the Guidelines.[464] Mr. Gokhale also determined that [redacted] to [redacted] savings in goods not for resale were merger specific and verifiable.[465]

199. These sourcing savings largely come from "price discovery" that otherwise cannot occur absent the merger.[466] These savings take into account Kroger and Albertsons' standalone plans to save sourcing costs independent of the merger; indeed, despite years of efforts in cost savings, "cost differences persist" between the two parties.[467]

200. The State repeatedly suggested that the savings estimated from the cost of goods were not cognizable because they are premised on the assumption that the combined firm will

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460 Tr. (Gokhale) 3153:10–16.
461 Tr. (Gokhale) 3053:15–24.
462 Tr. (Gokhale) 3053:15–24.
463 Tr. (Gokhale) 3059:1–3060:3.
464 DX 2912, at R56211–37, ¶¶ 74–132 & tbl.3; Tr. (Gokhale) 3060:20–3069:18.
465 DX 2912, at R56235–36, ¶¶ 128–131 & tbl.3; Tr. (Gokhale) 3079:5–3082:6.
466 Tr. (Gokhale) 3056:23–3057:25, 3060:20–3061:1, 3079:21–3080:3.
467 Tr. (Gokhale) 3081:10–3082:6.

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receive the lower price from manufacturers following the merger.[468] As Mr. Gokhale explained, the ability for Kroger to negotiate better prices from suppliers when it knows that Albertsons paid less for the same products is common sense: "knowledge of whether there's a price differential and how much is what enables the companies to extract some of it or take some of it as a reduction in price" paid to suppliers.[469] The State offered no testimony to contradict this fundamental proposition.

201. The State's counsel noted on cross-examination that manufacturers might not agree to give the merged firm the lower of the two pre-merger prices.[470] But the State failed to consider that the efficiencies model already accounts for that risk, and then some.[471] As Mr. Maharoof explained, the efficiencies analysis *starts* by identifying the difference in supplier prices paid by Kroger and Albertsons, but "that's not the efficiency number that [is ultimately] captur[ed]," because a series of adjustments are then applied to those initial estimated savings.[472] And as Mr. Gokhale explained, it is incorrect that the efficiencies modeling does not account for any supplier refusing to lower prices in post-merger negotiations: "When realization rates are applied in that last step that says contingencies, that's precisely sort of a mathematical adaptation of the fact that the parties and consultants realize that."[473]

202. Mr. Gokhale determined that [redacted] of supply chain and manufacturing synergies are cognizable under the Guidelines.[474] Combining "two networks that are independent but somewhat overlapping, and you combine that network, you can now design a more efficient network … mean[ing] lower cost" and "cost savings."[475]

203. Mr. Gokhale determined that Kroger would realize [redacted] in cognizable administrative labor efficiencies—that is, scale efficiencies achieved from combining the

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[468] Tr. (Gokhale) 3112:24–3122:14.
[469] Tr. (Gokhale) 3057:11–14.
[470] *See, e.g.*, Tr. (Gokhale) 3111:21–23, 3112:15–17, 3113:11–14.
[471] Tr. (Gokhale) 3114:22–3114:4, 3118:16–3119:5.
[472] Tr. (Maharoof (Kroger)) 3009:6–18, 3010:13–3011:1.
[473] Tr. (Gokhale) 3118:18–25.
[474] DDX 25, at 3; Tr. (Gokhale) 3089:16–21; *see also* Tr. (Gokhale) 3089:22–3092:7.
[475] Tr. (Gokhale) 3086:4–13.

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companies' administrative headcount—and [redacted] in cognizable fuel sourcing efficiencies.[476]

204. On the revenue side, Mr. Gokhale determined that [redacted] in revenue from alternative, non-grocery profit streams was merger-specific and verified.[477] Kroger has 20 years of data science capabilities, which enable CPGs to list ads or incentives on their websites or apps and provide better data insights into customers, which in turn generates incremental, non-grocery revenue for Kroger.[478] Albertsons launched a media initiative in 2022, replacing one launched just four years prior in 2018. Albertsons is therefore "much further behind" Kroger in its retail media operations.[479] Combining the companies will generate incremental non-grocery revenue by bringing Albertsons' data onto Kroger's platform.[480]

205. The State implied that the claimed efficiencies are not "merger-specific" because it is hypothetically possible for Kroger or Albertsons to obtain some of those efficiencies without the merger, such as by negotiating most-favored nation clauses or making greater investments into retail media.[481] The State's conjecture is incorrect: The State offered no evidence that the efficiencies validated by Mr. Gokhale could be recognized by either firm absent substantial investment of time and money beyond that required by the merger.[482]

206. Moreover, the State's suggestion that some of the parties' supplier contracts contain most-favored nation clauses is without support;[483] there is no evidence in the record that the parties' agreements with suppliers currently contain such clauses, or that suppliers would be willing to offer such clauses.[484]

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[476] DDX 25 at 3; Tr. (Gokhale) 3089:16–21; *see also* Tr. (Gokhale) 3089:22–3092:7.
[477] DDX 25 at 3; *see also* Tr. (Gokhale) 3094:7–3095:20.
[478] Tr. (Gokhale) 3094:15–24.
[479] Tr. (Gokhale) 3094:25–3095:6.
[480] Tr. (Gokhale) 3095:7–15.
[481] Tr. (Gokhale) 3139:21–25, 3145:22–3147:16.
[482] *See generally* Tr. (Gokhale) 3138:18–3150:9.
[483] Tr. (Gokhale) 3138:22–3129:25.
[484] Tr. (Gokhale) 3138:22–3129:25.

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207. As Mr. Gokhale explained, his conclusions regarding the efficiencies are the same under the 2010 Merger Guidelines and the 2023 Merger Guidelines.[485]

208. The State offered no expert testimony in opposition to Mr. Gokhale.

V. The State's Proposed Market

209. The State did not support its proposed "supermarkets" market in "city areas" with evidence of real world competition or data.

210. Dr. Dua's product market for "supermarkets" consists of "supermarkets" and "supercenters" that have more than 20,000 square foot of selling space and that on average sell more than $5 million in groceries annually.

211. Dr. Dua's geographic market for "city areas" was based on Dr. Dua's subjective assessment of "supermarket clusters," as well as the locations of features like city halls and highways.

212. The State and Dr. Dua did not establish either the product or geographic dimension of the proposed market.

A. Product Market

213. Dr. Dua's product market for "supermarkets" is not supported by evidence of reasonable interchangeability or evidence of substitution.

1. Reasonable Interchangeability Between Grocery Retailers

214. Market definition focuses on substitution—that is, which competitors are reasonably interchangeable substitutes for each of Defendants' stores. By focusing on substitution in local areas, each of Kroger and Albertsons' "significant competitors" can be defined.[486] But many grocery retailers the State excludes from its proposed market are reasonably interchangeable with "supermarkets," and consumers readily substitute among them.

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[485] Tr. (Gokhale) 3049:23–25, 3050:15–3052:3.
[486] Tr. (Israel) 3221:5–17.

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215. Dr. Dua's market excludes competitors that allow for a "full shop" of groceries and that meet the objective criteria Dr. Dua outlines. Customers can do "full shops" at numerous retailers excluded from Dr. Dua's market, including Whole Foods,[487] Trader Joe's,[488] Costco,[489] and Target.[490] And with the exception of Trader Joe's, all of these stores have at least 20,000 square feet of selling space. In fact, as Dr. Dua admitted, a Seattle customer could find a broad range of everyday grocery products at the Target just up the street from the courthouse.[491]

216. As set forth above, FOF ¶¶ 36–94, testimony and ordinary course documents show that traditional supermarkets; club stores; premium, natural, and organic stores; value, dollar, and ethnic stores; and e-commerce vendors consider grocery retailers of all formats to be competitors.[492] The State's own witnesses recognized that they compete with retailers excluded from the State's market.[493] As Walmart explained, "anyone that offers similar products or categories" is a competitor.[494] Witnesses from Costco, Whole Foods, Amazon, and Rosauers uniformly testified to the same.[495]

217. Rather than relying on "one-stop shopping," consumers divide their grocery dollars among different grocery retailers and formats.[496] "[M]ore than 90 percent of shoppers go to . . . at least two . . . different stores in a month."[497] Indeed, Kroger and Albertsons face

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[487] Tr. (Dua) 1657–58.
[488] Tr. (Dua) 1659.
[489] Tr. (Dua) 1659–60.
[490] Tr. (Dua) 1662–63.
[491] Tr. (Dua) 1662–63.
[492] *See, e.g.*, DX 0048, at R466; DX 0089, at R641–45; DX 0122, at R1018–021; DX 0129, at R1464; DX 1134, at R13890; DX 2213, at R38397–R38411.
[493] *See, e.g.*, Tr. (George (Costco)) 2289:14–15, 2289:25–2290:9, 2297:2–5, 2320:23–2321:2 (explaining that Costco competes with grocery retailers like Defendants); Tr. (Tucker (WinCo)) 2370:23–2372:14 (explaining that WinCo's competitors include Costco, Sam's Club, Whole Foods, Sprouts, Aldi, Trader Joe's, and Amazon).
[494] Tr. (Lieberman (Walmart)) 2429: 13–2430 ("We would consider anyone that offers similar products or categories as a competitor within the local market to one of our brick-and-mortar or online stores.")
[495] Tr. (Heyworth (Amazon)) 3447:18–5; Tr. (Rigsbee (Rosauers)) 2416:12–18; Tr. (Oblisk (Costco)) 2395:3–23.
[496] Tr. (Cloward (Albertsons)) 3031:7–23; Tr. (Aitken (Kroger)) 2489:18–2491:14; DX 90, at R646 (describing promotion to fight Costco leakage).
[497] Tr. (Israel) 3240:4–10.

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leakage from competitors like Costco.[498]

218. Further, share of wallet data show that many consumers are buying the exact same categories of products across a range of retailers.[499] This data confirms that customers shop at a variety of grocery retailer formats and can be attracted to different retailers by price, quality, or other differentiating factors.[500]

219. The State argued that "share of wallet" is not a proxy for market share and cannot necessarily predict reasonable interchangeability, because various retailer formats may be complements to one another rather than competitors.[501] But while grocery retailers provide differentiated offerings—different sized products, different brands, or distinct services, for example—those differentiated offerings are all ways in which these retailers are competing with one another, not reasons to exclude relevant competitors from the market.[502] For example, Costco tries to attract customers by offering better prices on wholesale or bulk products, like large bottles of soy sauce.[503] When a customer buys a bottle of soy sauce from Costco (of any size), that is a purchase that could have been made at a Kroger, Albertsons, Walmart, Whole Foods, Trader Joe's, or other retail format.[504] That is why Kroger, Albertsons, and many other firms rely on share of wallet data in the ordinary course of business to assess competition and their business strategy.[505] Plainly, these sophisticated firms believe there is some value from this data in assessing competition.

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[498] Tr. (Kinney (Albertsons)) 1853:9–12.
[499] Tr. (Israel) 3343:8–13.
[500] Tr. (Welsh) 1053:18–1054:1.
[501] Tr. (Israel) 3343:8–13.
[502] Tr. (Israel) 3224:5–3226:12; Tr. (Aitken (Kroger)) 2510:11–2513:23 (describing Kroger's go-to market strategy, which "articulates what the key differentiators" are between Kroger and competitors, such as Trader Joes and Walmart).
[503] Tr. (State's Opening) 232:23–7.
[504] Tr. (McMullen (Kroger)) 1294:3–6.
[505] DX0011, at R115, R135, R153; DX2213, at R38404; DX1290, at R16911, R16921, R16928; Tr. (Israel) 3239:9–3240:3; Tr. (Sankaran (Albertsons)) 1383:10–15; Tr. (Sanakran (Albertsons)) 1384:22–24 ("Q. And does ALDI take share of wallet from Albertsons in the areas where it does currently operate? A. Absolutely."); Tr. (Kinney (Albertsons)) 1842:2–12; Tr. (Maharoof (Kroger)) 3023:17–23; Tr. (Aitken) 2490:14–16.

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2. Substitution and Diversion

220. Reasonably interchangeable competitors are defined by demand-side substitution.[506] Specifically, economists look at whether customers would substitute to other firms in response to an increase in price or a reduction in quality at the target firm.[507]

221. Dr. Israel offered an analysis of substitution and diversion using an industry-specific, peer-reviewed model that accounts for thousands of data points. That model showed that there is significant diversion among retailers both within and outside of the State's proposed "supermarkets" market.

222. Dr. Dua, by contrast, relied on isolated events, divorced from context, that did not actually measure diversion among stores. His analysis was unreliable and unpersuasive.

a. Dr. Israel's EGK Diversion Analysis

223. To measure diversion, Defendants' economic expert, Dr. Israel, used a grocery industry-specific, peer-reviewed model ("EGK model") that enables the estimation of store-level diversion for each of the focal stores.[508]

224. The EGK model takes data across all types of grocery retailers, key characteristics of each of those stores, and local customer demographic data to model store-level diversion ratios.[509] The model produces store-level diversion ratios designed to answer the question: "If Kroger attempted to increase price or reduce quality/service after the merger, where would shoppers turn to buy **some or all of** their groceries."[510]

225. Dr. Israel's EGK diversion ratios show substantial cross-format competition.[511] In the aggregate, there is significant diversion to Costco, Target, Whole Foods, and others in Washington, often more than there is to competitors in the State's market. For example, in

[506] Tr. (Israel) 3221:18–20 ("Economists define close competitors by substitution, demand side substitution").
[507] Tr. (Israel) 3221:22–3222:12 ("[T]he idea is that shoppers are shifting some or all of their spending to other stores because they're not as satisfied with that store as they were before.").
[508] Tr. (Israel) 3224:9–3225:25.
[509] Tr. (Israel) 3224:9–3225:25.
[510] DDX 26, at 24; Tr. (Israel) 3321:22–3222:7.
[511] Tr. (Israel) 3235:23–3236:1.

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Washington, Kroger's aggregate diversion ratio to Walmart (in the State's market) is 9.5%, but its aggregate diversion ratio to Costco (outside the market) is 13.9%.[512] As another example, Albertsons' diversion ratio to Fred Meyer (in the market) is lower than the aggregate diversion ratio to Costco (outside the market), and Kroger's aggregate diversion ratio to Haggen (in the market) is smaller than Trader Joe's (outside of the market).[513] Similarly, Kroger's aggregate diversion ratio to Target (outside of the market) is larger than that of WinCo (in the market)[514]

226. The EGK model is a peer-reviewed model developed by independent economists with no stake in this litigation.[515] Other than himself, Dr. Dua could not identify a single critic of the EGK model.[516]

227. Dr. Dua argued that Dr. Israel's EGK diversion analysis is unreliable because it does not actually measure substitution between stores and it does not rely on data about where customers actually shop.[517] This critique is misguided: The EGK Model actually measures diversion and, unlike Dr. Dua's analysis, controls for myriad "real-world" considerations—demographics, store characteristics, and the like.[518] As set forth below, Dr. Dua's diversion analysis did not accurately measure diversion and did not control for these other factors.

228. Dr. Dua further criticized the EGK model for finding approximately 30% diversion to the "outside good"—that is, to stores outside of the set directly measured by the EGK Model—but offered no reliable evidence showing why a 30% diversion to the outside good would be inappropriate.[519] As Dr. Israel explained, the outside good here can include (1) online purchases, (2) purchases made at stores more than 15 miles way, (3) purchases made at

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[512] Tr. (Israel) 3236:2–14. The actual diversion ratio for any given store will vary.
[513] Tr. (Israel) 3236:18–3237:11.
[514] Tr. (Israel) 3237:7–15.
[515] Tr. (Israel) 3223:4–25, 3225:6–25.
[516] Tr. (Dua) 3533:20–3534:18.
[517] Tr. (Dua) 3476:19–3477:9.
[518] Tr. (Israel) 3225:6–25.
[519] Tr. (Israel) 3228:21–3229:7.

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certain store formats (e.g., dollar stores), and (4) reduced spending that is not diverted to any other firm.[520] It is far from implausible that those categories would add up to ~30%.[521]

229. The State also cross-examined Dr. Israel on certain updates he made to the EGK model in order to improve it and properly calibrate it for this case,[522] but neither the State nor Dr. Dua ever actually identified any issue with Dr. Israel's adjustments to the EGK model.

b. Dr. Dua's Diversion Analysis

230. Dr. Dua failed to accurately or reliably measure diversion. Dr. Dua's anecdotal analyses are unreliable and fail to support his conclusions on diversion.

231. As a threshold matter, Dr. Dua's diversion analysis failed to make any attempt to measure or quantify the actual diversion of customers to firms outside of the proposed markets. Dr. Dua artificially limited diversion to stores outside of his market in one of two ways: (1) under his "loyalty card" method, he allowed only a flat 10% diversion to non-supermarkets in every city area; and (2) under his "ADR share-based method" he allowed no diversion to stores outside his city areas.[523] Dr. Dua's arbitrary cap on sales to stores outside his markets renders his entire analysis unreliable.[524]

232. Dr. Dua' diversion analyses also assumed diversion would be proportional to market share—an assumption for which he offered no economic justification.[525] To compute market share, Dr. Dua took "statewide supermarket sales and parse[d] it out by population" and "just add[ed] 10 percent to it to account for non-supermarkets."[526] Dr. Israel found that this approach did not meaningfully estimate true market share and would not apply to any real-

[520] Tr. (Israel) 3229:19–3230:15.
[521] Tr. (Israel) 3229:8–18, 3230:16–23.
[522] Tr. (Israel) 3368:5–11.
[523] Tr. (Dua) 1697:19–25.
[524] Tr. (Israel) 3271:11–3272:1.
[525] Tr. (Israel) 3292:21–25.
[526] Tr. (Israel) 3292:25–3293:10.

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world local markets.[527] Because it relies solely on rough measures of market share, Dr. Dua's analysis "[i]s not really measuring diversion."[528]

233. Rather than using the grocery industry-specific EGK model, Dr. Dua relied on a series of unreliable "natural experiments."[529] Each of Dr. Dua's cherry-picked event studies is unreliable, provides no support for his assumptions, and is uninformative about the likely diversion in Dr. Dua's city areas.

234. First, Dr. Dua purported to analyze the impact of two QFC store closures that occurred in the Seattle area.[530] Dr. Dua acknowledged that Dr. Israel's diversion analysis relied on vastly more store data than two store closures.[531] On the other hand, Dr. Dua's study of these two QFC stores is purely anecdotal, and the conclusions that he draws from the study are not generalizable or representative of diversion in any other areas. Dr. Dua's effort to derive diversion data from two store closures is not reliable.

235. Second, Dr. Dua attempted to support his diversion analysis by discussing a 10-day labor strike that occurred in King Soopers stores in Colorado.[532] Setting aside that these Colorado stores are being divested as part of this transaction, Dr. Dua conceded that his analysis failed to control for the fact that striking workers were specifically encouraging customers to shop at Albertsons' stores.[533] The strike data therefore does not inform where shoppers would turn to in the event of a price increase *without* specific urging by striking workers. More broadly, Dr. Dua's reliance on the extremely short duration of the strike is not probative of what market participants would do on a *non-transitory* basis following the merger.[534]

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[527] Tr. (Israel) 3292:21–3293:15.
[528] Tr. (Israel) 3292:21–3293:15.
[529] Tr. (Dua) 1604:18–1605:1, 1624:17–1625:1, 1776:6–15.
[530] Tr. (Dua) 3520:5–15.
[531] Tr. (Dua) 3521:1–8; Tr. (Israel) 3224:11–3225:4.
[532] Tr. (Dua) 1626:13–20.
[533] Tr. (Dua) 3521:15–21.
[534] Tr. (Israel) 3280:1–10.

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236. Third, Dr. Dua relied on an Albertsons analysis of the hypothetical closure of 14 stores.[535] Albertsons' analysis did not measure diversion; it predicted diversion to other stores, primarily to forecast the volume of sales that Albertsons would recapture at its other stores if that store in question closed.[536] In the real world, only two of these 14 stores actually closed.[537] Dr. Dua further gerrymandered this analysis by excluding two stores that he considered "outliers" because they showed diversion to Trader Joe's and Target stores that Dr. Dua considered too high—i.e., they did not support his market.[538]

237. Fourth, Dr. Dua relied on a study of Albertsons' spreadsheets that analyzed the impact of competitor entry within 1 mile of Albertsons' stores.[539] While the data had information on entries out to five miles, Dr. Dua limited his analysis to competitor openings within only one mile, which is uninformative about diversion because the vast majority of overlapped stores between Kroger and Albertsons within one mile are being divested.[540] Beyond one mile, the data shows no effect of entry for nearly any store format.[541] Dr. Dua's analysis also failed to control for factors that could skew his results, including the possibility that a new competitor entered the market because the market was booming.[542]

238. Finally, Dr. Dua's analysis of diversion based on Defendants' loyalty card data was unreliable. Dr. Dua did not analyze loyalty card data from other grocery retailers; instead, he focused solely on loyalty card information from Kroger and Albertsons, which provides no information about diversion to other retailers.[543] The purpose of a diversion analysis is in large part to measure the amount of substitution to firms *other* than those already in the candidate

[535] Tr. (Dua) 1653:18–1654:2.
[536] Tr. (Israel) 3273:20–3274:8.
[537] Tr. (Dua) 1657:13–16.
[538] Tr. (Dua) 1654:3–1656:17.
[539] Tr. (Israel) 3277:4–3278:3.
[540] Tr. (Israel) 3277:4–3278:3.
[541] Tr. (Israel) 3277:4–3278:3.
[542] Tr. (Israel) 3277:4–3278:3.
[543] Tr. (Dua) 1697:11–14.

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market; Dr. Dua's failure to assess that question renders his analysis of loyalty card data unreliable.

B. Geographic Market

239. The State and Dr. Dua likewise failed to properly define a relevant geographic market.

240. Dr. Dua's geographic analysis relies on arbitrary line-drawing he performed himself based on features like the locations of "city centers," city boundaries, city halls, highways, rivers, or zip code boundaries.[544]

241. Substitution does not depend on those kind of artificial barriers.[545] There is no evidence that customers make shopping decisions based on these factors, and Dr. Dua even acknowledged that using these factors sometimes "artificially cut off markets."[546] Customers do not make shopping decisions based on their zip code or the location of city hall.

242. Geographic markets should be developed using economic tools, not by simply hand-drawing a map based on intuition about where competitive boundaries ought to lie.[547] Dr. Israel used the EGK model to avoid "defin[ing] markets ex ante"—as Dr. Dua did—and instead "capture the substitution patterns" of the stores.[548] Using substitution data and patterns obviates the need to draw arbitrary lines, and instead allows substitution to be measured by where customers actually shop for groceries.[549]

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[544] Tr. (Israel) 3243:14–3245:6.
[545] Tr. (Aitken (Kroger)) 2494:15–22; Tr. (Groff (Kroger)) 656:16–657:18.
[546] Tr. (Dua) 1726:8–10 ("[Y]ou artificially cut off markets in between clusters of stores, right? A. Yeah. Sometimes that can happen.").
[547] Tr. (Israel) 3227:20–3228:7.
[548] Tr. (Israel) 3223:4–3224:8.
[549] Tr. (Israel) 3227:2–19. *See also* Tr. (Dua) 1724:10–1725:3 ("To be clear, not a single grocer has come into this court or given a deposition and said that they define their markets by zip code, right? A. I don't think a single grocer for -- in the ordinary course, define relevant and address markets. That's not what their work is. Q. But they do define where their markets are, who their customers are, where their competition is, right. They do that every single day? A. Yes. All competitors across industries always think about who is their closest competitor, who is their more distant competitor, how to adjust their reactions to them. That's correct. Q. And nowhere in this record do they say that zip codes are important to their analysis, do they? A. I don't know if they say that or not, but, yeah, it's possible -- Q. All right. A. -- that they don't say zip code is important.").

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243. Dr. Dua's geographic line-drawing exercise fails to account for the fact that Walmart and Costco draw customers from much farther distances than Kroger or Albertsons, as shown by the EGK analysis.[550] Limiting diversion to a city area or allowing limited diversion to non-supermarkets outside the city areas fails to account for important competition from Walmart, Costco, and other non-supermarkets just outside of city areas.[551] Dr. Dua himself acknowledged that Walmart and Costco draw customers from longer distances,[552] but only Dr. Israel's EGK method accounted for this.[553]

244. Dr. Dua's artificial city areas fail to capture reliable evidence of store-level substitution. For example, the EGK model predicts that 95% of diversion from Safeway #1297 in Dr. Dua's Edmonds city area would be to stores outside of the city area.[554] Likewise, Dr. Israel's EGK analysis shows that 88% of sales diverted from Safeway #3305 would go to stores, like Costco and Walmart, outside of the city area.[555]

245. In rebuttal, Dr. Dua merely claimed that Dr. Israel's diversion statistics "do not make sense," but he provided no justification for his artificial limitations on diversion to his city areas or to non-supermarkets.[556]

C. Hypothetical Monopolist Test ("HMT")

246. To test his market definition, Dr. Dua performed a flawed hypothetical monopolist test ("HMT"). Dr. Dua's analysis suffers from at least five fatal flaws.

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[550] DDX 26, at 40; Tr. (Israel) 3246:24–3248:21.
[551] Tr. (Israel) 3228:14–19; Tr. (Sankaran (Albertsons)) 1453:11–14 ("Q. And is it fair to say that people will drive further for a Walmart than they would a QFC or an Albertsons? A. Absolutely. There's -- because -- because of the price benefit that people get, they will drive further, for sure."); Tr. (Kinney (Albertsons)) 1997:5–12 ("Q. Ms. Kinney, the question: Have you ever studied any consumer data showing how far customers drive to visit club stores? A: I believe research has shown that consumers are willing to drive further to go to other non- -- you know, non-neighborhood markets. They will drive further to go to a Costco or Walmart because of the value or the offering they believe they can offer.").
[552] Tr. (Dua) 1711:13–16.
[553] Tr. (Israel) 3228:8–20.
[554] Tr. (Israel) 3250:4–3252:19.
[555] Tr. (Israel) 3249:17–3250, 3252:20–3253:8.
[556] Tr. (Dua) 3487:4–3489:11, 3569:14–3573:2.

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247. First, Dr. Dua incorrectly assumed that a hypothetical monopolist could raise prices in all of its stores without increasing diversion to stores outside of his defined city areas.[557] Importantly, the core function of an HMT is to determine whether there is sufficient substitution to prevent a hypothetical monopolist from profitably raising prices.[558] But rather than analyzing the available economic data to calculate substitution, Dr. Dua simply assumed there was no substitution to any stores located outside his city areas and no substitution to non-supermarket formats of more than 10%.[559] Dr. Dua's deliberate choice to *assume* rather than *measure* the actual level of substitution is not a sound economic methodology.[560]

248. Second, Dr. Dua used a price increase threshold that was too low to accurately test whether a hypothetical monopolist would find it optimal to raise prices. Under the 2010 and 2023 Merger Guidelines, an HMT must generally evaluate whether a small price increase of 5% would be "profit maximizing" for a hypothetical monopolist.[561] Dr. Dua, however, evaluated whether a 5% price increase would allow the merging firm to break even, not whether it would be profit maximizing to raise prices.[562] In doing so, Dr. Dua departed from the Merger Guidelines and well-accepted economic and antitrust methodology.[563]

249. Third, Dr. Dua's HMT analysis relied on artificially high gross margins that do not accurately reflect all the relevant costs that would increase if sales increased. For example, by relying on gross margins—rather than variable margins—Dr. Dua excluded many relevant costs (such as labor, supply, and credit card fee costs) that vary with the quantity of products sold.[564] Dr. Dua agreed that the correct margin measure should cover variable costs, but he nonetheless used gross margins,[565] which Kroger executives testified fail to capture the

[557] Tr. (Israel) 3266:1–7.
[558] Tr. (Israel) 3265:8–13.
[559] Tr. (Israel) 3266:1–7, 3265:16–25.
[560] Tr. (Israel) 3266:5–9, 3268:24–3269:2.
[561] Tr. (Israel) 3267:23–3268:2.
[562] Tr. (Israel) 3268:3–11.
[563] Tr. (Israel) 3268:16–3269:2.
[564] Tr. (Israel) 3267:2–10.
[565] Tr. (Dua) 1700:14–23.

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company's variable costs.[566] Kroger's documents confirm that Kroger uses variable margins in the ordinary course of its business.[567] Kroger executives also testified that Kroger considers variable costs, such as labor and transportation, when making pricing decisions.[568] For example, Kroger's Senior Director of Pricing Strategy and Execution Andy Groff testified that Kroger created price zones in both Seattle and Western Colorado to account for the higher variable costs—particularly labor costs—in those areas.[569] By improperly relying on gross margins, Dr. Dua's HMT analysis again overstated the profitability of a price increase.[570]

250. Finally, Dr. Dua incorrectly assumed that if one store in his city area passes the HMT, then all other stores within the city area would also pass the HMT.[571] This assumption fails to quantify or evaluate the reality of whether a price increase would actually weaken those stores through lost sales from customers who substitute to other grocery retailers.[572]

251. Dr. Dua attempted to bolster his flawed HMT analysis by running what he called a "real-life version" of an HMT.[573] Dr. Dua looked at Kroger's margins in an eight-store "no / low comp zone" in Colorado where Kroger raised prices a small amount.[574] As a threshold matter, Dr. Dua's analysis of this price zone in Colorado is irrelevant to this case: the "fact that there was a price increase on eight stores in Colorado, where he hasn't even defined that as a geographic market, tells you nothing about his geographic markets" in Washington.[575] Mr. Groff confirmed that there are no "low / no comp" zones in Washington.[576]

252. Dr. Dua did not run an HMT to analyze whether the Colorado mountain zones were properly defined markets. Dr. Dua focused exclusively on Kroger's pricing decisions, but

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[566] Tr. (Maharoof (Kroger)) 2978:23–2799:5, 2987:18–2988:12.
[567] DX 2565, at R46182; *see also* DX 2640, at R48821.
[568] Tr. (Groff (Kroger)) 660:1–25.
[569] Tr. (Groff (Kroger)) 657:19–658:21; 659:2–16.
[570] Tr. (Israel) 3267:6–10.
[571] Tr. (Israel) 3269:16–25, 3270:3–13.
[572] Tr. (Israel) 3269:16–25.
[573] Tr. (Dua) 1605:13–25.
[574] Tr. (Dua) 1604:16–1605:1.
[575] Tr. (Israel) 3262:10–17.
[576] Tr. (Groff (Kroger)) 659:21–25.

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made no effort to analyze or control for Kroger's rising operational costs or the prices charged by other nearby grocery retailers, such as Costco.[577] As a result, Dr. Dua did not actually know whether Kroger raised its prices relative to other competitors, or whether costs were going up in the region. But Mr. Groff testified that labor and transportation costs *were* rising in the area and that prices were only increased to "cover those additional operational costs."[578] Moreover, Mr. Groff confirmed that none of the Colorado "no comp" zones that Dr. Dua examined exist in Washington.[579] And even setting these failures aside, Dr. Israel testified that the "no comp" zone analysis could not support Dr. Dua's proposed markets because the zones were not isolated to a single supermarket and thus could not be reliably used to estimate diversions.[580]

253. Taken together, these methodological errors and unsupported assumptions—which Dr. Dua never corrected—confirm that Dr. Dua's HMT analysis and conclusions are unreliable.[581]

254. After correcting for all the key flaws in Dr. Dua's analysis, Dr. Israel found that Dr. Dua's markets overwhelmingly failed the HMT.[582]

D. Dr. Dua's "Sensitivities"

255. Dr. Dua purported to support his methodology by running certain "sensitivities" on the product and geographic markets. Those efforts to rehabilitate his deficient markets fail.

256. As Dr. Israel pointed out, Dr. Dua never actually tested whether any of these "sensitivities" were cognizable antitrust markets.[583] Except for metropolitan statistical areas (which Dr. Dua admitted are not a relevant antitrust market[584]), Dr. Dua did not run an HMT to

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[577] Tr. (Dua) 1706:9–25, 3524:19–23.
[578] Tr. (Groff (Kroger)) 657:23–659:1.
[579] Tr. (Groff (Kroger)) 659:21–25.
[580] Tr. (Israel) 3262:18–3263:24.
[581] Tr. (Israel) 3271:12–3272:8.
[582] Tr. (Israel) 3260:5–9.
[583] Tr. (Israel) 3254:11–3256:1.
[584] Tr. (Dua) 1693:4–8.

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test the validity of any of these sensitivities. "[M]arket shares don't mean anything if you haven't defined a market."[585]

257. Dr. Dua's sensitivities thus do not solve the problem of his arbitrary product or geographic markets. As to product markets, the State argues that the "Supermarkets Plus" and "Supermarkets + Costco" qualify as cognizable markets because under the so-called "narrowest market principle," if the "supermarkets" market passes the HMT, markets that include a broader set of products will necessarily pass the HMT too.[586] However, as Dr. Israel showed, the "supermarkets" market fails the HMT. *See supra* FOF ¶¶ 255–58. Thus, any sensitivity on the "supermarkets" product market cannot be said to automatically to pass the HMT.

258. The State's geographic sensitivities fail too. Dr. Dua drew circles with a three-mile or five-mile radius around Defendants' stores, but he did not run an HMT to determine whether these areas form a relevant market.[587] Moreover, these circles were not drawn based on substitution, where the customers are, or anything tied to local competition around a specific store.[588] Dr. Dua's "sensitivities" for metropolitan statistical areas fare no better. As Dr. Dua emphasizes, competition is local,[589] so presuming that consumers would drive across the entire Seattle MSA to get groceries is implausible. In short, Dr. Dua's geographic "sensitivities" simply substitute one arbitrary geographic cutoff for another.[590]

VI. Competitive Effects

259. Separate from market definition and the resulting market shares, the parties' economists also analyzed the likely competitive effects from the merger using a variety of economic tools.

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[585] Tr. (Israel) 3254:12–22.
[586] Tr. (Dua) 1576:24–1577:6.
[587] Tr. (Dua) 1732:1–3.
[588] Tr. (Israel) 3255:2–8.
[589] Tr. (Dua) 1557:3–7.
[590] Tr. (Israel) 3244:8–3245:6, 3260:22–3261:4.

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A. Failure to Account for the Divestiture

260. Any competitive effects analysis must account for the "transaction as it stands."[591] The transaction under review will not occur without the significant divestiture to C&S.[592] Dr. Dua conceded that there is no possibility that Kroger will own all of Albertsons' stores post-merger, because the divestiture is part of the transaction, and that his non-divestiture analyses evaluate a post-merger world that simply will not exist.[593] And Dr. Dua further conceded that Kroger is divesting entire divisions, such as QFC, as part of the transaction.[594] Analyzing the transaction without the divestiture thus ignores the business, economic, and competitive realities of the merger.[595]

261. The State has criticized Dr. Israel and Defendants for assuming a "perfect" divestiture. That is not a fair characterization. There is always the possibility that changes in a how a store is operated will affect the prospective competitive impact of that store. But that is true for *all* stores, not just those that are being divested.[596] In that sense, Dr. Dua's models could be equally criticized for assuming "perfect" competition by *Kroger* post-merger. Neither criticism is fair—merger economic analysis must account for the existing data and make the best estimate for how the world will look in the future.[597]

262. The only purported economic analysis Dr. Dua offered related to the divestiture was a "retrospective" analysis on other divestitures and C&S's past history.[598] But Dr. Dua's analysis failed to compare those past events to this divestiture or make any attempt to quantify the vast amounts of available information related to this divestiture.[599] In fact, Dr. Dua disclaimed the need to analyze information about this divestiture because it was "not

[591] Tr. (Israel) 3195:22–3196:13.
[592] Tr. (Cosset (Kroger)) 2621:2–7 ("The merger agreement contemplates the need and creates parameters around the need for that divestiture.").
[593] Tr. (Dua) 1733:13–15, 1744:2–16.
[594] Tr. (Dua) 1732:19–24.
[595] Tr. (Israel) 3195:22–3196:13, 3197:3–12.
[596] Tr. (Galante) 2737:20–25.
[597] Tr. (Israel) 3199:3–8.
[598] Tr. (Dua) 1638:14–20.
[599] Tr. (Dua) 1766:2–1768:21.

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informative" and "not relevant" to his economic analysis.[600] As a result, Dr. Dua's retrospective analysis is an unreliable method of examining the competitive effects of the divestiture.

263. With respect to his consideration of C&S's prior history, Dr. Dua did not undertake any examination of C&S's *current* business strategy or plans, nor did he review or analyze C&S's deal model, to evaluate what economic motivations C&S has here.[601] Dr. Dua's failure to account for all of the available information makes his retrospective analysis unreliable.[602] However, Dr. Dua did acknowledge that C&S's prior experience would improve the ability of C&S to successfully operate the divestiture stores.[603]

B. Walmart Price Disciplining Power

264. The merger is not likely to result in a substantial lessening of competition, because Walmart disciplines Kroger's prices and will continue to do so post-merger. Dr. Dua conceded that a firm's pricing strategy must be considered when running an economic analysis.[604] As the firm who will control pricing post-merger, Kroger's pricing strategy is the most germane to analyzing competitive effects.[605]

265. Kroger uses Walmart as the price target for nearly every pricing strategy in its key pricing program. That is true for Fred Meyer (the only Kroger banner in Washington Kroger is retaining)[606] and true in Seattle (where there is no Walmart in the city limits).[607] Given Kroger's past business practices and economic incentives, Kroger is likely to adopt this more aggressive price matching to Walmart at the acquired Albertsons stores.[608]

266. The data supports this testimony. Kroger's price correlation to Walmart "is nearly identical whether or not there's an Albertsons present."[609] But "Albertsons' correlation

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[600] Tr. (Dua) 1755:22–25.
[601] Tr. (Israel) 3304:16–3305:4.
[602] Tr. (Israel) 3197:3–12.
[603] Tr. (Dua) 1764:15–23.
[604] Tr. (Dua) 3511:17–3512:8.
[605] Tr. (Israel) 3219:19–3200:2.
[606] Tr. (Groff (Kroger)) 559:18–560:11.
[607] Tr. (Israel) 3206:24–3207:13.
[608] Tr. (Israel) 3197:13–3200:21.
[609] Tr. (Israel) 3212:17–3213:13.

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is low[,] . . . lower than most stores" to Kroger.[610] And even for this low correlation, Dr. Israel explained that all Kroger stores have some degree of correlation to Albertsons because the companies both sell the same types of products, so the correlation is actually for "a given product over time."[611] Hence, the data demonstrates that Kroger's pricing is "laser focus[ed] on Walmart, not on Albertsons."[612]

267. The State pointed to testimony regarding a "pilot" Kroger is planning to roll out after the merger regarding pricing.[613] But that pilot is intended only to help Kroger calibrate the exact pricing levels of Albertsons stores and get the most "bang for the buck" on its price investments, not to decide on Kroger's overall pricing strategy, which Kroger has already settled on.[614]

268. The State has emphasized that QFC in Washington has a different pricing strategy today, instead primarily matching to the higher-priced Safeway.[615] But QFC is being divested to C&S.[616] Additionally, even with this different pricing strategy, QFC remains 4–5% less expensive than Safeway in Washington.[617]

269. The State argues that Kroger will adopt a similar strategy at different, non-QFC stores post-merger and will not adopt Walmart price checks at the acquired Albertsons stores or stop price matching against Walmart altogether.[618] But Mr. Aitken confirmed that applying the Walmart pricing strategy to the newly acquired Albertsons stores is "absolutely" important for Kroger's long-term success.[619] When asked whether it made sense for Kroger not to bring Albertsons' prices closer to Walmart, Mr. Aitken responded "absolutely not." [620] The State's

[610] Tr. (Israel) 3213:14–3214:6.
[611] Tr. (Israel) 3214:1–6.
[612] Tr. (Israel) 3213:14–25.
[613] Tr. (Aitken (Kroger)) 2556:3–2557:17.
[614] Tr. (Aitken (Kroger)) 2568:14–2569:9.
[615] Tr. (State Opening) 242:12–20; Tr (Israel) 3318:10–3320:9.
[616] Tr. (Israel) 3312:23–3313:4; Tr. (Florenz (C&S)) 865:9–11.
[617] Tr. (Groff (Kroger)) 632:22–633:6.
[618] Tr. (Israel) 3317:15–3318:3.
[619] Tr. (Aitken (Kroger)) 2515:22–25.
[620] Tr. (Aitken (Kroger)) 2518:8–2519:3.

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concern of Kroger raising prices goes against Kroger's focus on sacrificing "short-term profit for long-term profit."[621]

270. High priced retailers will also limit the State's concern of Kroger profit maximization. Kroger has traditionally operated with Walmart as its primary benchmark and a high priced retailer (sometimes Albertsons) as an upper guardrail.[622] Because Albertsons' prices are consistently higher than Kroger's, it is "very uncommon" for Albertsons' prices to affect Fred Meyer's, as reflected in the data.[623] Following the merger, C&S will likely fill Albertsons' "high priced retailer" role with its divestiture stores, including all but five of the QFC stores.[624] Dr. Israel concluded that he is not concerned with Kroger raising prices in the absence of Albertsons as a high priced retailer, because "Albertsons is not an example of an HPR that puts a lot of pressure on Kroger" due to the large price gap between the two companies.[625]

C. Albertsons' Lack of Price Disciplining Power

271. Because there are a large number of geographies today in which Kroger and Albertsons do or do not compete, the real-world data actually allows the Court to assess the extent to which the presence of an Albertsons results in lower prices at Kroger (or vice versa).[626]

272. The data shows that the presence of a nearby Albertsons has *no* effect on Kroger's prices. Dr. Israel ran a regression to determine whether prices are "higher for Kroger where they [] face competition [from Albertsons] and where they don't."[627] The analysis measured gross margins between Kroger and Albertsons while accounting for variables such as demand, total grocery sales in an area, local demographics, and time and price trends.[628] The

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[621] Tr. (Aitken (Kroger)) 2518:8–2519:3.
[622] Tr. (Groff (Kroger)) 675:11–15.
[623] Tr. (Groff (Kroger)) 672:21–673:2, 648:15–23, 681:13–16.
[624] Tr. (Groff (Kroger)) 645:14–19, 649:3–7.
[625] Tr. (Israel) 3211:4–21.
[626] Tr. (Israel) 3218:9–14.
[627] Tr. (Israel) 3217:7–19.
[628] Tr. (Israel) 3217:7–19.

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study found that "whether or not there's an Albertsons store within three miles or multiple Albertsons stores within three miles has no effect on those Kroger gross margins."[629]

273. Dr. Israel also performed a similar regression to "test Kroger's effect on Albertsons' pricing," which found Albertsons stores were only marginally affected (~1%) by nearby Kroger stores.[630] When accounting for the fact that stores in close competition will be divested, however, even this marginal effect on Albertsons' prices disappears.[631]

274. The State attempted to discredit this analysis by pointing out that the data specific to Washington does not show statistically significant pricing differences regardless of the number of competitors.[632] But as Dr. Israel explained, the absence of statistically significant data in Washington is precisely why he used national pricing patterns.[633] Moreover, a lack of meaningful change based on the number of competitors is consistent with Kroger's pricing strategy focused on a single competitor—Walmart.[634]

275. Dr. Dua offered no criticism of—or even response to—this data, effectively conceding that it discredits his indirect assessments of competition.

D. GUPPI Analysis

276. Dr. Israel and Dr. Dua both ran a Gross Upward Pricing Pressure Index ("GUPPI") analysis to determine whether the merger is likely to result in significant upward pricing pressure at Kroger stores.

277. Dr. Israel's GUPPI analysis showed that there are no stores post-merger in Washington with a GUPPI of greater than 5%, nor a GUPPI of greater than 5% in any of Dr. Dua's city areas; most store's GUPPIs are below 1%.[635] Dr. Dua's contrary analysis suffers from numerous defects.

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[629] Tr. (Israel) 3218:8–14.
[630] Tr. (Israel) 3218:15–3219:5.
[631] Tr. (Israel) 3219:6–24.
[632] Tr. (Dua) 1591:12–1592:20, 1688:13–1689:9.
[633] Tr. (Israel) 3330:16–23.
[634] Tr. (Aitken (Kroger)) 2499:5–13; Tr. (Israel) 3200:3–11.
[635] Tr. (Israel) 3302:20–3303:2 ("I found for all of the stores in Washington, the GUPPIs are below 5 percent. Most of them are below 1 percent. Just four stores are between 3 and 5. And the highest of those is 3.7. So they're

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278. Dr. Dua failed to account for the divestiture in his store-by-store GUPPI analysis, even though he admitted there is no scenario in which Kroger will own the suite of stores assessed in that analysis.[636] The only post-divestiture pricing pressure analysis Dr. Dua performed was at a statewide level, not at the city area level at which the State alleges harm.[637] His explanation for not performing a store-level or city-level post-divestiture GUPPI analysis was that "it didn't seem necessary to have more charts and tables."[638] Dr. Dua's analysis therefore does not give any actual information about the number of stores or city areas (if any) likely to face upward pricing pressure as a result of the transaction.[639] By ignoring the divestiture, Dr. Dua views the transaction "as though Albertsons is just selling all of its stores in Washington to Kroger."[640] But that is not the transaction that is at issue here.

279. Dr. Dua's statewide analysis treated all positive GUPPI results as indicative of anticompetitive effects no matter how small, even though a GUPPI test will *always* result in a positive number.[641] A 5% threshold helps to ensure that the upward pricing pressure will actually manifest in higher prices.[642]

280. Dr. Dua used the wrong margins. GUPPI requires a margin that incorporates all variable costs.[643] The principle is basic: Kroger incurs these costs for any sizable amount of diverted sales, so those costs should be considered in assessing whether Kroger could raise prices after the merger.

281. Dr. Dua relied on documents that discuss Kroger's decision to create a separate price zone for eight areas in Colorado where it determined that it faced either "limited" or "no"

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all well below 5 percent.").

[636] Tr. (Dua) 1732:19–1733:12.

[637] Tr. (Dua) 1747:9–12 ("Q. The only post-divestiture upward pricing pressure analysis in your report was at a statewide level, not at the city area level at which Plaintiffs allege harm, correct? A. Sounds right.").

[638] Tr. (Dua) 1708:5–8.

[639] Tr. (Dua) 1747:5–8.

[640] Tr. (Israel) 3195:25–3195:13.

[641] Tr. (Dua) 1711:2–4, 1735:16–22, 1749:5–9; Tr. (Israel) 3299:8–14, 3300:25–3301:4.

[642] Tr. (Israel) 3299:17–3300:15 ("The idea being . . . [that] a small amount of upward pricing pressure is unlikely at the end of the day to correspond to any actual post merger price increase. So 5 percent becomes the threshold to say the GUPPI is giving no evidence that there would actually be a price increase.").

[643] Tr. (Israel) 3297:10–11 ("It's a specific question to a GUPPI that you need to capture all variable margins.").

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competition, and thus where it determined that it could profitably increase prices and gross margins.[644] But Dr. Dua's gross margins "leave out some variable costs," subtracting only the "wholesale side of the costs" while keeping in all of the costs associated with the retail operation.[645] Gross margins do not include all variable costs.[646]

282. By relying on gross margins, Dr. Dua excluded many cost categories that are variable costs including hourly labor costs, supplies, and credit card fees.[647] These omissions led Dr. Dua to overstate the upward pricing pressure.

283. To conduct a proper GUPPI analysis, Dr. Israel used variable margins derived from Kroger's ordinary course documents, which actually analyze and use variable margins.[648]

284. The State has suggested that Kroger's price increase in the "low/no comp zone" in Colorado shows that Kroger will increase prices in the absence of competition. But as noted above, those price increases were the result of increased labor and transportation costs in the area.[649] And in any event, there are no "low/no comp" zones in Washington, and will not be any post-merger and post-divestiture.[650]

E. Coordinated Post-Merger Effects

285. There is no evidence that any anticompetitive coordinated effects will result from this transaction.

286. The nature of the grocery industry does not lend itself to coordination. The grocery industry is rapidly evolving as retail behemoths such as Amazon transform how consumers shop for groceries while other grocery formats such as club stores and discounters

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[644] Tr. (Dua) 3262:10–3263:11.

[645] Tr. (Israel) 3267:6–10 ("Dr. Dua, instead, only used the gross margin in this industry, which is defined as only subtracting out a subset of those costs. Talk about that more later. But that led him to use artificially high margins and this overstates the profitability of the SSNIP."), 3296:1–3297:4.

[646] Tr. (Maharoof (Kroger)) 2978:23–24 ("Q. Do Kroger's gross margins capture all the variable costs? A. No."); Tr. (Israel) 3296:6–12. Mr. Groff and Mr. Aitken agree that variable costs are what matters even for Kroger's pricing. Tr. (Israel) 3297:10–20.

[647] Tr. (Israel) 3296:13–3297:4.

[648] Tr. (Israel) 3295:12–22; 3297:5–20; DX 2640, at R48825.

[649] Tr. (Groff (Kroger)) 657:23–659:1.

[650] Tr. (Groff (Kroger)) 659:21–25.

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likewise continue to expand.[651] Moreover, retailers in the grocery industry adhere to a wide variety of pricing strategies for thousands of different products, further reducing the risk of post-merger coordination on pricing.[652]

287. The merger will actually *reduce* overall concentration Washington, making coordinated effects less likely.[653] That is because C&S will replace Albertsons and own more stores in Washington than Kroger does today, thereby shrinking the gap between Kroger and Albertsons/C&S. Dr. Israel further testified that the acquisition of Albertsons, currently a high-priced retailer, will also reduce the likelihood of coordinated effects post-merger.[654]

288. Dr. Dua's opinion on coordinated effects is rebutted by the evidence.[655] Dr. Dua testified that C&S will not be an independent competitor post-merger because "it will be dependent on Kroger for pricing."[656] That is not true: Schedule 2.1(a) of the TSA states that C&S [redacted][657] Moreover, the TSA creates a clean room process that will identify certain Kroger employees who can view C&S competitively sensitive information for the sole purpose of assisting C&S in executing C&S's pricing decisions for the divested Kroger stores. These clean room employees will be separated from the Kroger business while they are performing this role, and will be prohibited from sharing C&S's competitively sensitive information with anyone else at Kroger.[658]

289. Ms. Florenz further made clear that C&S is currently developing a different price implementation process for Albertsons stores, and that it may be possible for C&S to take over execution of pricing decisions sooner for those stores.[659] Taken together, the record evidence

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651 Tr. (Groff (Kroger)) 673:15–674:2.
652 Tr. (Groff (Kroger)) 679:2–15.
653 Tr. (Israel) 3280:18–23.
654 Tr. (Israel) 3280:24–3281:5.
655 Tr. (Israel) 3281:6–12.
656 Tr. (Dua) 3515:4–9.
657 PX 3748, at P49409.
658 PX 3748, at P49409–10; *see also* Tr. (Florenz (C&S)) 923:11–18.
659 Tr. (Florenz (C&S)) 923:22–924:1.

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clearly rebuts Dr. Dua's conclusory and unsupported statement that C&S will depend on Kroger for its pricing decisions.

CONCLUSIONS OF LAW

I. Legal Standards

1. RCW 19.86.060 makes it unlawful for a corporation to acquire corporate stock or assets "where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce." No court has ever enjoined a merger under RCW 19.86.60.

2. RCW 19.86.060 is one of Washington's "state antitrust laws," which "are patterned after their federal counterparts and [which] are guided by the same policy considerations." *Golob & Sons, Inc. v. Schaake Packing Co.*, 93 Wn.2d 257, 263 (1980); *see also* RCW 19.86.920 ("It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts . . ."). The language of RCW 19.86.060 mirrors the language of the federal Clayton Act. *See* 15 U.S.C. § 18. In the absence of any contrary Washington authority, the Court follows the well-established federal framework for Clayton Act claims.

3. Under that framework, the State bears the burden of proving a "reasonable probability" that the proposed merger will "substantially" lessen competition in a "line of commerce." *United States v. AT&T Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

4. This burden is significant: The "mere possibility" of harm to competition is insufficient. *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 189–90 (D.D.C. 2018) (citations omitted), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019). And the harm to competition must be "substantial"—merging parties need not "preserve exactly the same level of competition that existed before the merger." *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 133 (D.D.C. 2022), *dismissed*, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023); *see also Illumina, Inc. v. FTC*, 88 F.4th 1036, 1058–59 (5th Cir. 2023) (observing that a contrary standard "would

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effectively erase the word 'substantially' from [the statute]").

A. The *Baker Hughes* Framework

5. Courts typically analyze a horizontal merger's likely effect on competition using the three-part burden-shifting framework from *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), which the State agrees applies here. State Pretrial Br. 10. Under this framework, the burden of *production* shifts between the plaintiff and the defendant, but the ultimate burden of *persuasion* "remains with the [State] at all times." *Id.* at 982–83.

6. *First*, the State must produce evidence to "establish a prima facie case that a merger is anticompetitive." *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 (9th Cir. 2018) (citation omitted). To do so, the State must "accurately define the relevant market, which refers to 'the area of effective competition.'" *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018)). "[W]ithout a definition of [the] market there is no way to measure the defendant's ability to lessen or destroy competition." *Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 53 (2d Cir. 2016).

7. Then, the State must prove that the merger will result in "undue concentration" in a properly defined market. *Baker Hughes*, 908 F.2d at 982–83. In making that showing, the State must account for "the *entire* transaction in question," including any divestiture. *FTC v. Arch Coal, Inc.*, 2004 WL 7389952, at *3 (D.D.C. July 7, 2004) ("*Arch Coal* in Limine Order"); *see, e.g.*, *DeHoog*, 899 F.3d at 763 (finding no undue market concentration in light of divestiture).

8. *Second*, if the State establishes a *prima facie* case, the burden of production shifts to Defendants to introduce evidence that the merger would not substantially lessen competition. *Baker Hughes*, 908 F.2d at 982–83. At this stage, Defendants need only offer evidence tending to "show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition." *Baker Hughes*, 908 F.2d at 991. Defendants can satisfy that burden in many ways, including by offering evidence related to

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"industry structure," the relative "significance of market shares and concentration" in the industry, "ease of entry" by new competitors, or the prospect of efficiencies resulting from the merger. *Id.* 985–86.

9. *Third*, the burden then shifts back to the State, which must offer "additional evidence of anticompetitive effect[s]." *Baker Hughes*, 908 F.2d at 983.

10. The State at all times retains "the ultimate burden of proving [an antitrust] violation by a preponderance of the evidence." *AT&T*, 310 F. Supp. 3d at 189 (citations omitted). A failure of proof at any stage "in any respect" means the State loses. *Id.*

11. If the State discharges its burden of proof, "the superior court may order any corporation to divest itself of the stock or assets held contrary to this section." RCW 19.86.060; *see also* RCW 19.86.080 (Attorney General may also seek injunctive relief in appropriate circumstances).

B. *Baker Hughes* Requires Analysis of the Divestiture

12. Under the *Baker Hughes* framework, the antitrust analysis must account for "the *entire* transaction in question," including any divestiture to a third party. *Arch Coal* in Limine Order, 2004 WL 7389952, at *3.

13. Federal courts have rejected the contention that courts should treat an acquisition and divestiture as "separate transactions"; the burden is *not* on defendants to show that "that the divestiture will replace the competitive intensity lost as a result of the merger." *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 132–33 (quotation marks omitted). This is because "treating 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.* at 134 n.5; *see also FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1093 (N.D. Cal. 2023) ("the FTC must address the circumstances surrounding the merger as they actually exist"); *see also AT&T*, 310 F. Supp. 3d at 217 n.30 (post-merger arbitration agreements would have "real-world effect[s]" that should be considered prior to any

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liability determination).

14. Here too, the relevant transaction is "the proposed acquisition agreement *including* the proposed divestiture." *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 134 n.5; *see also id.* at 140 ("Under what the Court believes is the correct legal standard, [the divestiture] prevents the Government from meeting its *prima facie* burden."). To allow the State to ignore the divesture package in its case would be to permit it to redefine the very transaction that it challenges, "tantamount to turning a blind eye to the elephant in the room." *Arch Coal* in Limine Order, 2004 WL 7389952, at *3.

15. Importantly, even if divestiture need not be accounted for in the State's *prima facie* case, it still forms a part of the transaction under review and must be assessed as part of the Court's overall assessment of competitive effects. *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 134 ("In any event, UHG contends—and the Court agrees—that the evidence leads to the same result under either standard."). Regardless, the ultimate burden of *persuasion* "remains with the [State] at all times." *Baker Hughes*, 908 F.2d at 982–83.

II. The State Cannot Establish Its *Prima Facie* Case

16. The first element in a *prima facie* case requires the State to define a cognizable antitrust market and then to show that the merger will result in an undue increase in concentration in that market. *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974). The second step flows from the first—if the State does not properly define the market, its market concentration statistics are immaterial.

17. A "relevant market" consists of (a) a product market and (b) a geographic market. *Marine Bancorporation*, 418 U.S. at 618. "The proper market definition can be determined only after a factual inquiry into the *commercial realities* faced by consumers." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999) (emphasis added).

18. The State bears the burden to establish a cognizable market; "[f]ailing to define a relevant market alone is fatal to an antitrust claim." *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th

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948, 957 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 2526 (2024).

19. The State has attempted to define (a) a product market consisting of "supermarkets" and (b) geographic markets consisting of "city areas" hand-drawn by Dr. Dua using features such as city halls, highways, and zip codes. FOF ¶ 211. The State has not carried its burden to establish either of these market elements. Because the State did not provide its market definition, its analysis of increases in market concentration is immaterial. FOF ¶¶ 209, 212. *See FTC v. RAG-Stiftung*, 436 F. Supp. 3d. 278, 308–09 (an economic model is "of little use" where party "has not shown that the model's 'inputs' or 'outputs' are grounded in relevant product or geographic markets").

A. The State's "Supermarket" Product Market Is Unjustifiably Narrow

20. The boundaries of a product market are determined by the "reasonable interchangeability of use or the cross-elasticity of demand" between the product and its substitutes. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). "A properly defined market includes potential suppliers who can readily offer consumers a suitable alternative to the defendants' services." *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 136 (E.D.N.Y. 1997); *see also Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 (9th Cir. 1979) ("A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.").

21. The State's economic expert, Dr. Dua, contends that the relevant product market is "supermarkets and [s]upercenters" that "carry a wide assortment of food and other grocery products." FOF ¶ 210. Dr. Dua defines this product market to include the parties' stores and competitor-owned supermarkets of 20,000 square feet or larger as well as supercenters that sell groceries in addition to other retail items. FOF ¶ 210. Dr. Dua excludes from his product market grocery retailers that sell many of the same or competitive products, including certain

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mass merchandisers; club stores; premium, natural, or organic stores; value stores; ethnic stores; dollar stores; and online grocery retailers like Amazon.com. FOF ¶¶ 215-216.

1. Reasonable Interchangeability

22. The State's product market does not include all "potential suppliers who can readily offer consumers a suitable alternative to" Kroger's and Albertsons' grocery products. *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 136.

23. Party and third-party witnesses consistently testified that competition for retail grocery is fierce and spreads across numerous retail formats, including club stores, premium and organic retailers, value stores, ethnic grocers, and dollar stores—all of whom are excluded from the State's market. FOF ¶¶ 9, 27, 45–46, 51, 58, 67–69, 77–78, 84. That testimony is corroborated by ordinary course documents, which show that these various grocery retailers view each other as close competitors. FOF ¶¶ 10, 14, 27, 44, 46, 50, 58, 62–3, 68–70, 72, 76–8, 84, 87. And the evidence demonstrates that these retailers respond to competition from one another, including by lowering prices or improving quality and selection. FOF ¶¶ 10–14, 47, 60, 69, 79.

24. The State urges that even if the evidence shows two grocery retailers broadly compete with each other, that does not mean that those retailers are *close* competitors for purposes of the antitrust law, using as an example a fruit stand that sells peaches next door to a Safeway. Pls. Op. Slides at 33; State Pretrial Br. 17–18; *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015). That straw man stands far afield from this case: Target is not a fruit stand, and Defendants have never suggested that fruit stands, convenience stores, or drug stores should be included in the relevant product market. Under the governing standard, close competitors are those stores customers would turn to if a given store raised its prices or lowered its quality. FOF ¶ 222 n.507. And witness after witness testified, and document after document showed, that the key firms excluded from the State's market—Target, Costco, Whole Foods, Amazon, etc.—are in close, fierce competition with Kroger, Albertsons, and other firms within

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the State's "supermarkets" market for a wide basket of grocery items. *See, e.g.*, FOF 10, 27, 44, 46, 50, 58, 62–63, 68–70, 72, 76–78, 84, 87.

25. Costco, for example, publicly identifies Walmart, Target, Kroger, and Amazon as "significant competitors." FOF ¶ 58. Whole Foods similarly identifies Kroger, Albertsons, and many of Defendants' other banners including Fred Meyer, QFC, and Safeway, as "key competitors." FOF ¶ 68.

26. The State also has pointed to documents or analyses dividing various grocery retailers into "channels," implying that grocers in different channels do not compete closely with one another. FOF ¶ 44. But not even the State believes that argument: It admits that Walmart is in the relevant market, FOF ¶ 225, even though Walmart is typically classified as a "mass merchandiser" rather than a "supermarket," where Defendants are categorized. FOF ¶ 44. And the State excludes retailers like Trader Joe's, Grocery Outlet, and Whole Foods from its proposed market, FOF ¶ 44, even though third-party data sources group those retailers in the same channel as Defendants. FOF ¶ 44 n.94. These documents are helpful for establishing the wide range of competition grocery retailers face, but they do not (on their own) answer the question of which retailers are in or out of the relevant market. *See Nobel Sci. Indus., Inc. v. Beckman Instruments, Inc.* 670 F. Supp. 1313, 1318–19 (D. Md. 1986) ("[T]he fact that a company may refer to a 'market' [in its 'ordinary business reports and strategy papers'] does not necessarily mean that its reference will be to a market for purposes of the Sherman Act"), *aff'd*, 831 F.2d 537 (4th Cir. 1987).

27. Data confirms that consumers—like retailers—view a wide range of retail formats as competitors offering reasonably interchangeable products. Dr. Israel used an industry-specific, peer-reviewed model to evaluate diversion among grocery retailers and conclude that there is significant competition and substitution outside of the State's narrow market. FOF ¶¶ 223–225. The State's contrary diversion analysis was premised on limited data, ignored critical context for that data, and failed to consider more reliable and robust

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evidence of diversion. FOF ¶¶ 230–238.

28. The State's proposed market is not supported by the hypothetical monopolist test. Courts sometimes evaluate reasonable interchangeability through the "hypothetical monopolist test," which asks whether a hypothetical monopolist of the proposed market "would be 'substantially constrain[ed]' from increasing prices by the ability of customers to switch to other producers." *United States v. Am. Express Co.*, 838 F.3d 179, 198 (2d Cir. 2016) (alteration in original and citation omitted). Dr. Dua attempted to support the State's market with a hypothetical monopolist test, but as Dr. Israel explained, that analysis suffered from numerous, serious flaws, including the use of gross margins rather than variable margins. FOF ¶¶ 246–253. Correcting for just some of those flaws confirms that the hypothetical monopolist test does not support the State's uniform product market across all regions. FOF ¶ 254.

29. The State attempted to rebut the evidence showing reasonable interchangeability among retail formats by pointing to superficial differences in the purported shopping experience, such as the need for a store membership or the physical layout of a store.[660] But the fact that two grocery retailers offer somewhat different formats to consumers does not establish a separate product market: Product differentiation is an element of healthy competition within a market and therefore says nothing about whether consumers view those products as reasonably interchangeable. *See Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989) (interchangeability "presumes that consumers are willing to make tradeoffs on some of the very factors the [plaintiffs] attempt to use to define their market"). The question is not whether some store formats are "different" from others, but rather whether consumers view them as reasonably interchangeable. The data and testimony show that they do.

30. The State's reliance on *Sysco*, *Whole Foods,* and *Staples* for its product market is misplaced. The *Sysco* court analogized cross-shopping fruit from both a grocery store and a

[660] Tr. (State's Opening) 230:23–233:23; Tr. (Dua) 1586:25–1588:9.

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fruit stand to cross-shopping between broadline distributors, systems distributors, and specialty distributors. 113 F. Supp. 3d at 26. The gap the *Sysco* court perceived between the channels in that case is nonexistent here, where Kroger, Albertsons, and a breadth of third-party retailers across retail formats underscored at trial that they intensely compete for consumers' "share of wallet" on their trip to the grocery store.

31. The DC Circuit in *FTC v. Whole Foods Mkt., Inc.*, while suggesting that the evidence supported putting certain premium, natural, and organic grocery stores in their own market, recognized that in defining a market, courts must "take into account the realities of competition." 548 F.3d 1028, 1039 (D.C. Cir. 2008) (plurality op.).[661] The realities of the market have changed dramatically since 2008: Stores like Whole Foods and Sprouts testified and provided documents showing cross-format competition. FOF ¶¶ 67–68.

32. Finally, the *Staples* court focused largely on pricing evidence presented by the FTC that suggested that office superstore prices were affected primarily by other office superstores and not by non-superstore competitors. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1077 (D.D.C. 1997). The State cannot make the same showing here, where [redacted]. FOF ¶ 69. Kroger stopped charging premium prices for those products in order to compete with Whole Foods. FOF ¶ 69. The *Staples* court also noted evidence that defendants responded competitively only when faced with the entry of another superstore compared to other retailers, *Staples, Inc.*, 970 F.Supp. 1066. at 1077–78; here, not only has Albertsons conducted analyses of the impact of the entry of stores like Whole Foods, but also found that openings of new organic and natural food stores negatively impacted Albertsons stores *more than* even Walmart. FOF ¶ 70.

2. The *Brown Shoe* "Practical Indicia"

[661] There was no majority in *Whole Foods*, as each judge on the panel issued a different opinion. *Whole Foods*, 548 F.3d at 1063 ("concur[ring] in the denial of rehearing en banc because, there being no opinion for the Court, that judgment sets no precedent beyond the precise facts of this case."). Then-Judge Kavanaugh dissented, criticizing the FTC's case as "weak" and a "relic of a bygone era when antitrust law was divorced from basic economic principles." *Id.* at 1062 (Kavanaugh, J., dissenting).

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33. Under *Brown Shoe*, courts may also consider so-called "practical indicia" of an alleged product market by examining the "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325.

34. Importantly, however, the *Brown Shoe* practical indicia are an *aid*, not a *substitute*, for determining interchangeability. "Reasonable interchangeability sketches the boundaries of a market," and the *Brown Shoe* practical indicia are used only to "clarif[y] whether two products are in fact 'reasonable' substitutes and are therefore part of the same market." *Geneva Pharms. Tech. Corp. v. Barr Labs Inc.*, 386 F.3d 485, 496 (2d Cir. 2004). In other words, the *Brown Shoe* practical indicia are "evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986). Thus, where, as here, there is economic data showing *actual* interchangeability—in the form of the EGK model diversion ratios and "share of wallet" data—resorting to the *Brown Shoe* practical indicia is unwarranted.

35. But even if the State could use the *Brown Shoe* practical indicia (rather than evidence of interchangeability) to establish a relevant market, it has failed to do so here. Each of the *Brown Shoe* practical indicia shows that the State's artificial market has no support.

a. No Industry or Public Recognition

36. The grocery industry and the broader public do not recognize "supermarkets" as "separate economic entit[ies]" from other grocery retailers in Washington. *See Brown Shoe*, 370 U.S. at 325.

37. Industry lay witnesses throughout the grocery industry testified that there is fierce competition among the various retail grocery formats. FOF ¶¶ 45–95. The testimony and documents from third-party grocery retailers show the same. Costco's publicly filed 10-K confirms its view that, "Walmart, Target, Kroger, and Amazon are among [Costco's] significant

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general merchandise retail competitors." FOF ¶ 58. Amazon likewise testified that it competes with all companies that sell grocery products, such as supercenters, club stores, hard discounters, and "traditional" grocery stores. FOF ¶¶ 84, 86. Many other grocery retailers provided similar testimony and documents. FOF ¶¶ 72, 74, 78.

38. Moreover, that industry participants might occasionally refer to traditional supermarkets suggests only that retailers "are differentiated," which is insufficient on its own to establish a distinct antitrust market. *DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1343 (Fed. Cir. 2014). "Without a showing of the role that industry and public perception . . . play in motivating and shaping consumer decisions, the demarcation of a submarket . . . cannot be justified." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1376 (9th Cir. 1989). Here, extensive evidence shows that both retailers and customers recognize competition among different retail formats and that consumers readily substitute among them, regardless of the precise terminology they may use. FOF ¶¶ 41–43.

b. No Peculiar Characteristics and Uses

39. When competitors offer a varying mix of products, courts must "combine different products or services into a single market" when that "combination reflects commercial realities." *Am. Express*, 585 U.S. at 544 (alteration and quotation marks omitted).

40. The commercial reality in Washington is that consumers cross-shop at multiple grocery store formats to meet their grocery needs. FOF ¶¶ 41–43. Dr. Israel's analysis of economic data established that Costco "is capturing more of the spending on the same products that are purchased at Kroger, as Walmart or Albertsons." FOF ¶ 41. Albertsons' ordinary course documents show that Costco captures significant grocery spending from Albertsons across different grocery categories including for essential items like "fruits, vegetables, meats, and cheese." FOF ¶ 62.

41. Defendants' executives likewise testified that there is vast cross-shopping among different formats. FOF ¶ 39. For instance, Albertsons's Senior Vice President for

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Customer and Market Intelligence testified that Albertsons loses more of its grocery sales to Costco than any other competitor—including Kroger. FOF ¶ 62. Albertsons' ordinary course documents confirm that its customers shop at many other grocery retail formats. FOF ¶ 39. And Mr. Aitken similarly testified that the average Kroger customer shops at nearly 5 different store formats per month. FOF ¶ 39.

c. No Distinct Customers

42. There are not "distinct customers" who solely shop at supermarkets. *See Brown Shoe*, 370 U.S. at 325.

43. Industry and "share-of-wallet" data establishes that supermarket customers in Washington—including those who shop at Kroger and Albertsons—regularly shop at different grocery retailers. FOF ¶¶ 41–43. Dr. Israel's analysis of industry data established that in Washington, "over 95 percent of shoppers go to at least two different stores in a month." FOF ¶ 39. This economic evidence makes clear there is not a "distinct" set of Washington shoppers for whom nothing but a traditional grocery store will do. *See Brown Shoe*, 370 U.S. at 325.

d. Price-Sensitive Customers and No Distinct Pricing

44. Any pricing variation among grocery retailers is not strictly attributable to differences in format. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (pricing variation may reflect a "lower cost structure" and thus "represent[] competition on the merits"). Kroger's prices, for instance, are consistently lower than Albertsons'. FOF ¶ 15. In Washington, Albertsons prices are 12.3% higher than Kroger's prices. FOF ¶ 15. That is because Kroger primarily sets its pricing strategy against Walmart. FOF ¶¶ 11–13.

45. Pricing variation extends to other grocery formats. Thus, even traditionally higher-priced formats (*e.g.*, organic/natural stores) are increasingly investing in price to compete with other grocery retailers. FOF ¶ 65. Whole Foods, for instance, testified that it is "investing in price and promotion to increase affordability and accessibility of as many natural

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and organic products as we can to as many customers as [it] can touch." FOF ¶ 65.

46. Accordingly, variation in pricing does not depend on which format a retailer falls into, but rather on each retail grocer's cost structure and independent business strategy.

47. Price differentiation is an element of competition. *See Brooke Grp. Ltd.*, 509 U.S. at 223–24. Grocery consumers are sensitive to price changes and will switch to formats outside of the State's gerrymandered market. For instance, Dr. Israel testified that consumers are likely to shift grocery spending to Costco in the event of a price increase given the high levels of cross-shopping between Defendants' stores and Costco. FOF ¶¶ 223–24. Dr. Israel further finds "strong substitution" among consumers to other grocery retailers such as Target and Trader Joe's that are entirely excluded from the State's narrow market. FOF ¶ 224.

e. No Unique Production Facilities or Specialized Vendors

48. Finally, the State has failed to establish that "supermarkets" have unique production facilities or specialized vendors that are unavailable to other grocery retailers.

49. Indeed, the evidence showed that many types of grocery retailers utilize overlapping third-party vendors. For instance, national brand manufacturers supply their products to many of Defendants' competitors. FOF ¶ 30. And Professor Ailawadi confirmed that it "is very, very common in the industry for retailers to outsource the manufacturing of their private label brands." FOF ¶ 139. This evidence underscores that grocery retailers have the means and capability to vigorously compete amongst one another.

50. In sum, the practical indicia evidence refutes, rather than supports, any distinct "supermarkets" submarket that is insulated from competition from other grocery retailers.

B. The State's Geographic Markets Are Arbitrary

51. The defects in the State's market analysis are equally apparent in its proposed geographic markets.

52. "Whether a geographic location is or is not an 'area of effective competition' is clearly a question of fact in every case. The burden is on the proponent to demonstrate that the

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patterns of trade and commercial realities of the industry sufficiently demarcate a particular section of the country." *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 192 (S.D.N.Y. 1960).

53. The Supreme Court has emphasized that the relevant geographic market must both "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe*, 370 U.S. at 336–37. "If buyers would respond to the SSNIP by shifting to products produced outside the proposed geographic market, and this shift were sufficient to render the SSNIP unprofitable, then the proposed geographic market would be too narrow." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 123 (D.D.C. 2004), *case dismissed*, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004) (citing Merger Guidelines § 1.21). Typically, "a monopolization claim succeeds or fails strictly on the definition of the product or geographic market." *Tenet Health Care Corp.*, 186 F.3d at 1052.

54. Dr. Dua defined his proposed geographic markets as 57 "city areas," which he developed principally by drawing circles of a given radius around each city's city hall. FOF ¶¶ 211, 240, 258. The State's proposed "city area" geographic markets are arbitrary in at least two respects.

55. *First*, they are unsupported by evidence. Although Dr. Dua claimed that narrow geographic markets are appropriate, he pointed to no evidence showing that customers base their shopping decisions on city boundaries and acknowledges that he "artificially cut off markets." FOF ¶¶ 241, 245. Dr. Dua failed to justify his "city areas" as the appropriate market; the "city areas" are simply Dr. Dua "arbitrar[ily]" drawing lines using rivers, highways, city halls, or zip codes." FOF ¶¶ 240–41.

56. Dr. Dua did not provide any economic methodology for drawing these city areas and was unable to identify any evidence that any grocers define their customer base or competition based on boundaries like zip codes or city limits. *See* FOF ¶¶ 240–43, 245. Courts have found that plaintiffs failed to identify a cognizable geographic markets when they relied

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on government borders without further evidence. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1017–18 (6th Cir. 1999) (finding that plaintiffs geographic market was "almost completely arbitrary" when using city or town lines as market boarders without further evidence); *United States v. Connecticut Nat. Bank*, 418 U.S. 656, 670 (1974) (finding the District Court cannot rely solely either on towns or Standard Metropolitan Statistical Areas which "are not defined in terms of banking criteria" nor "developed as a tool for analyzing banking markets" as the relevant geographic markets).

57. *Second*, Dr. Dua's city areas ignore real-world data regarding the location of customers and where customers will likely switch in response to price changes. FOF ¶¶ 243–44. By drawing his proposed markets based on a map of store locations alone, Dr. Dua neglected the key question for defining an appropriate antitrust market: which stores provide a "suitable alternative" to one another based on actual consumer behavior. *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 136.

58. Dr. Dua's flawed methodology results in gerrymandered geographic markets that cannot withstand even rudimentary scrutiny and do not "correspond to commercial realities." *United States v. Consol. Foods Corp.*, 455 F. Supp. 108, 111, 133 (E.D. Pa. 1978). In *Consol. Foods Corp.*, the court rejected geographical markets that did not "'correspond to commercial realities'" and were instead only "convenient devices" for measuring certain inventory withdrawals. *Id.* at 132–33 quotation marks omitted). Dr. Dua's proposed areas are likewise convenient devices but untethered to realistic limitations for where consumers can turn.

59. Dr. Israel's diversion analysis, based on real-world data, confirms that Dr. Dua's arbitrary circle-drawing is particularly ill-suited to the grocery industry because different banners and retail formats pull customers from different distances. For example, because Dr. Dua's proposed markets categorically exclude all stores that fall outside his arbitrary "city area" markets, he leaves out stores like club stores and supercenters that typically draw customers

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from farther away than other store formats. FOF ¶ 243. Dr. Dua also conceded that his "city area" markets would exclude a Costco or Walmart Supercenter located just outside the city area that draws customers from the city—even if that Costco or Walmart is mere miles from a Kroger or Albertsons store. FOF ¶¶ 243–44. A proper geographic market definition must capture stores where consumers "practicably turn for alternative sources" of their groceries. *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994). Dr. Dua's does not.

60. Dr. Dua's example of an East Tacoma market illustrates how the geographic markets are underinclusive. In the East Tacoma area, Dr. Dua excludes from his proposed "city area" market a Walmart and a Costco fewer than two miles away from Safeway #1297 for market concentration, even though customers drive farther to shop at such Costco and Walmart stores. FOF ¶ 244.

61. By excluding club stores and supercenters just outside a city area that cater to customers within the city area, Dr. Dua's analysis improperly and arbitrarily defines the relevant markets and overstates the level of market concentration that will exist after the merger. This approach defies the "commercial realities" of how customers shop. *Tenet Health Care, Corp.*, 186 F.3d at 1052.

62. In defense of Dr. Dua's hand-drawn maps, the State has argued that "fuzziness" is inherent in defining geographic markets, and sometimes geographic markets will exclude "outliers." State Pretrial Br. 19–20 (citing *United States v. Phila. Nat'l Bank*, 374 U.S. 360 n.37 (1963)). That is true to a point—no market analysis captures 100% of the relevant competition—but excluding *95%* of a focal store's competition is not an issue of "fuzziness." It is a fundamental defect in the way the State and its expert think about competition.

63. The State's cases are inapposite. In *Philadelphia National Bank*, the Court acknowledged that it "[t]heoretically" should "be concerned with the possibility that bank offices on the perimeter of the area may be in effective competition with bank offices within," but concluded that this factor ultimately was "of little significance" in the context of that case,

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observing that the areas outside of the proposed geographic market accounted for only *2%* of the merging parties' combined individual deposits. *Id.* at 359-60, n.37. The Court did not suggest that it would reach the same conclusion if the market excluded 95% of such deposits. And in *Sysco*, the geographic markets were drawn around "*each* Sysco and USF distribution center." 113 F. Supp. 3d at 50 (emphasis added). Dr. Dua has not done that here—his city areas do not measure competition for each focal store, but rather group all stores in a city area into one zone, even though stores at one end of the zone face completely different competition from those at the other end.

64. The State argued that Dr. Israel failed to provide an alternative geographic market for the court to use. State Pretrial Tr. Br. 12, 15, 18. However, the State bears the burden of establishing a cognizable market, not Defendants. *Coronavirus Rep.*, 85 F.4th at 957.

C. Dr. Dua's "Sensitivities" Do Not Salvage the State's Market

65. As set forth in more detail in Section V.D. above, Dr. Dua's attempts to support his methodology by running certain "sensitivities" do not remedy the deficiencies in his proposed markets. As Dr. Israel pointed out, Dr. Dua never actually evaluated whether any of these "sensitivities" resulted in cognizable antitrust markets[662] and "market shares don't mean anything if you haven't defined a market." FOF ¶ 256.

66. This is not only an economic principle but a legal one. Under the RCW 19.86.060, market definition is a *statutory element of the claim*: A merger is unlawful only if its effect "may be to substantially lessen competition or tend to create a monopoly *in any line of commer*ce." RCW 19.86.060 (emphasis added); *see also Marine Bancorporation*, 418 U.S. at 618 ("Determination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes the Clayton Act.") (quotation marks omitted). "Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition." *Am. Express*, 585 U.S. at 543 (citation and brackets omitted). Unable

[662] Tr. (Israel (Defendants)) 3254:11–3256:1.

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to satisfy this most basic first step, the State has failed to make out a *prima facie* case under the *Baker Hughes* framework.

67. But even if the Court could *in theory* adopt a market other than the one proposed by the State, it cannot *actually* do so here. That is because, as Dr. Israel pointed out, Dr. Dua did not actually apply any economic tools to analyze whether the "sensitivities" he tested could themselves comprise a relevant market. FOF ¶ 258. Dr. Dua chose the HMT as the tool to test his "supermarkets" product market, yet did not deploy that tool to test his "sensitivities. FOF ¶ 257. The only HMT run by Dr. Dua was run on supermarkets in city areas. FOF ¶ 256. Dr. Dua cannot claim presumptions of harm in markets he has not even attempted to properly define. And a half-baked "sensitivities" analysis cannot substitute for the State's burden to plead and prove a cognizable antitrust market.

68. Dr. Dua's "sensitivities" analysis also suffers from other fatal flaws. Most crucially, Dr. Dua's geographic markets are still arbitrarily drawn, and are therefore both over- and under-inclusive. FOF ¶¶ 246–54. Dr. Dua's geographic "sensitivities" are no less arbitrary than Dr. Dua's hand-drawn maps: They likewise overstate the significance of geographically distant competitors while understating the significance of a competing grocery retailer right across the street. FOF ¶¶ 255–58. Dr. Dua's geographic sensitivities do not solve any of the problems with Dr. Dua's arbitrary line-drawing: He simply substitutes one arbitrary shape for another. But as Dr. Israel emphasized, markets should be defined by diversion and substitutability.[663] FOF ¶ 225.

III. Defendants Met Their Rebuttal Burden of Production and the State Failed to Carry Its Ultimate Burden of Persuasion

69. Even if the State could establish a *prima facie* case under the first part of the *Baker Hughes* standard (it cannot), Defendants easily satisfy their modest burden of production

[663] Tr. (Israel (Defendants)) 3236:2–3237:22

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on rebuttal. *See Baker Hughes*, 908 F.2d at 989.

70. The ultimate burden of persuasion remains at all times with the State. *See Baker Hughes*, 908 F.2d at 982–83. "Conceptually, this shifting of the burdens of production, with the ultimate burden of persuasion remaining always with the government, conjures up images of a tennis match . . . ." *Illumina*, 88 F.4th at 1057 (quotation marks omitted). "In practice, however, the government usually introduces all of its evidence at one time, and the defendant responds in kind." *Id.* (quotation marks omitted). "Thus, the evidence is often considered all at once and the burdens are often analyzed together." *Id.* (quotation marks omitted).

71. Defendants have offered extensive evidence showing both that the flawed market shares Dr. Dua calculates are a poor indication of competitive harm in this case and that the merger will generate substantial efficiencies. The State has not carried its burden to prove that the merger is likely to substantially lessen competition in a line of commerce.

A. The Transaction Is Unlikely To Produce Anticompetitive Effects

72. The primary question on rebuttal is whether any evidence suggests that the State's presumptive case "inaccurately predicts the relevant transaction's probable effect on future competition." *Baker Hughes*, 908 F.2d at 991. Several factors show that any increase in market concentration here is unlikely to produce anticompetitive effects.

1. Kroger's Flywheel Model Incentivizes Kroger to Lower Prices

73. The evidence shows that Kroger's post-merger market share "inaccurately predicts the relevant transactions' probable effect on future competition," because that market share does not account for Kroger's price investment incentives and flywheel business model.

74. The unrefuted evidence shows that Kroger has an economic, financial, and business incentive to *lower* prices in order to drive customer traffic (i.e., increase output), thereby increasing its alternative profits and enhancing its ability to compete with large grocery retailers like Amazon, Walmart, and Costco. FOF ¶¶ 22–24. Witnesses testified that investing in price reductions—thereby increasing customer traffic and increasing alternative profits

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earned through retail media and customer insights—is profit-maximizing for Kroger in the long term. FOF ¶¶ 22–24. That is no promise: It is a matter of economic fact that Kroger has been consistently reducing its grocery gross margins for the past 20 years, precisely because this business model allows it to earn a greater long-term profit and better compete against large grocery retailers. FOF ¶¶ 22–23. As the State has urged, the antitrust laws presume that firms will engage in profit-maximizing conduct. State's Motion in Limine Re: Price Investment Evidence (Aug. 27, 2024) at 1; *see also Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013). Kroger's history is proof positive that reducing grocery prices in order to fuel the alternative profits "flywheel" is profit-maximizing for Kroger. FOF ¶¶ 23–24.

75. The State has argued—in briefing and in various objections—that Kroger's past and future investments in lower prices are relevant *only* to the issue of whether the merger will generate efficiencies sufficient to offset any anticompetitive effects from the merger. State's Supplemental Brief Re: Price Investment Evidence (Sept. 23, 2024) at 3–5 ("State's Supplemental Br."). But in *Baker Hughes*, the court explained that "[i]t is a foundation of section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case." 908 F.2d at 984. "The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition." *Id.*; *see also United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975) (Defendants may rebut the government's prima facie case by producing evidence that "show[s] that the market-share statistics [give] an inaccurate account of the acquisition['s] probable effects on competition."). "Relevant evidence may include unique economic circumstances and nonstatistical evidence that undermines the predictive value of market share statistics, such as…the continuation of active price competition." *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020). And most germane here, relevant evidence may include a company's "incentives to preserve its [existing] business model." *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 150.

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76. The "prospect of efficiencies from merger" is just one of many rebuttal factors recognized by "hornbook law." *Baker Hughes*, 908 F.2d at 985. And even where an efficiencies defense is properly rejected, courts should "nonetheless [consider] evidence of efficiencies in the context of the competitive effects of the merger." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-1055 (8th Cir. 1999). Thus, although Kroger *also* will be recognizing efficiencies through the merger that will allow for *additional* price investment, *see infra* Section III(A)(3), the evidence regarding its economic and business incentives for pricing is plainly relevant to Defendants' rebuttal case irrespective of any efficiencies arguments.

77. The State has similarly suggested that Kroger's pricing incentives are relevant only if those incentives are tied to a change or benefit that will result from the merger. State's Supplemental Br. at 3. That again is wrong as a matter of law and logic: A firm's incentives can be influenced by a number of external factors unrelated to the merger, including "industry structure" and "elasticity of industry demand." *Baker Hughes*, 908 F.2d at 985. But in any event, Kroger executives testified that the merger in particular gives Kroger greater ability and incentive to invest in lower prices and increase its alternative profits. FOF ¶¶ 102–03. Specifically, they explained that Kroger's alternative profits depend in large part on its ability to attract customers, and that the merger will give Kroger much greater scale than it could obtain through incremental organic growth. FOF ¶ 103.

78. The State has also objected that Kroger's longstanding business strategy and incentives are irrelevant unless supported by expert economic analysis that calculates the precise price impact of Kroger's alternative profits. State's Supplemental Br. at 7. That is not the law: There is no case that requires expert testimony regarding *any* rebuttal factor. *See F.B. Leopold Co. v. Roberts Filter Mfg. Co.*, 882 F. Supp. 433, 452 (W.D. Pa. 1995) ("While it appears as though many parties in antitrust cases utilize expert testimony in order to establish relevant market and market power, we have found no authority which indicates that expert testimony is required."), *aff'd*, 119 F.3d 15 (Fed. Cir. 1997). Instead, all Defendants need do

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is *produce* evidence of Kroger's economic and financial incentives. *See United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 213 (D.D.C.) ("The standard for the quantum of evidence defendants must produce to shift the burden back is relatively low."), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

79. The State bears the burden to prove that, notwithstanding this unrebutted evidence, the "totality-of-the-circumstances" show that the "transaction is likely to lessen competition substantially." *Baker Hughes*, 908 F.2d at 984–85. Yet the State's economic analysis from Dr. Dua is premised *entirely* on the incorrect assumption that Kroger's pricing incentives are dictated solely by his flawed market shares and diversion ratios for grocery revenue. FOF ¶¶ 230–31. *See RAG-Stiftung*, 436 F. Supp. 3d. at 308–09 (economic model is "of little use" where party "has not shown that the model's 'inputs' or 'outputs' are grounded in relevant product or geographic markets").

80. The economic tools Dr. Dua deployed may be useful in modeling the static profit-maximizing strategy of a firm with a single line of revenue, but they offer no insight into how a firm like Kroger, with at least two lines of revenues that are co-dependent on one another, is likely to price or compete post-merger. Even if Kroger could profitably raise prices on the *grocery* side by 5% while losing only 2% of its customers, that 2% loss in customers would also affect its alternative profits business and could make the price increase unprofitable (or at least less profitable) overall. Kroger's margins in its alternative profit businesses are almost 3 times more profitable than its grocery margins, and its revenues are also growing significantly faster than its grocery revenues. FOF ¶ 23.

81. Consideration of how Kroger's different revenue lines influence one another is not just important from an economic perspective; it is a legal imperative under the antitrust laws. Where a business "provides separate but interrelated services," any assessment of competition *must* account for both of those services. *Am. Express Co.*, 585 U.S. at 534, 544. For example, a credit card company "might well *lose* money on the cardholder side by offering

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rewards such as cash back, airline miles, or gift cards," but still remain highly profitable "because increasing the number of cardholders increases the value of accepting the card to merchants." *Id.* at 537. That is why "competition cannot be accurately assessed by looking at only one side of [a credit card] platform in isolation." *Id.* at 546.

82. The same is true for Kroger: Kroger can reduce margins on the grocery side of its business while still increasing its profitability overall by increasing customer traffic and therefore increasing its alternative profits. FOF ¶¶ 22–24. It would be legal error for the Court to ignore the interrelatedness of those business lines. The State's refusal to engage with this evidence—other than by improperly seeking to exclude it or confine it to the realm of "efficiencies"—undermines its entire theory of the case.

2. The Economic Evidence Undermines the State's Theories

83. Defendants provided the Court with a number of economic analyses showing the absence of any anticompetitive effects from the merger. The State had no persuasive response to any of them.

a. Kroger Will Continue To Be Constrained By Walmart's Pricing, Not Albertsons'

84. The State's market concentration statistics are also not an accurate predictor of competitive effects in this transaction because Walmart—not Albertsons—is the primary constraint on Kroger's pricing and the transaction will not affect that competitive pressure.

85. Kroger's nationwide pricing strategy is to set its prices principally by reference to Walmart (whose prices are lower than Kroger's) rather than Albertsons (whose prices are 10–12% higher). FOF ¶ 11. At bottom, the prices that Walmart sets drive Kroger's pricing, which is not affected by whether an Albertsons is present or not. FOF ¶ 265. There is no evidence that Kroger has any plan—or any economic incentive—to alter its pricing strategy post-merger. There also is no evidence that Walmart intends to alter its Everyday Low Pricing model after the merger. FOF ¶ 49.

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86. Kroger's pricing strategy for QFC is more focused on Safeway (an Albertsons banner), but as noted above, Kroger will not retain the QFC banner (or most of the QFC stores). FOF ¶¶ 152, 267. And Kroger will be implementing the Walmart-focused pricing strategy at all acquired stores. FOF ¶ 264.

87. The evidence additionally shows that, in contrast to Walmart, Albertsons exerts no measurable competitive pressure on Kroger. Dr. Israel's analysis concluded that in the markets where Albertsons does not compete, Kroger's prices are not any higher than in markets where Albertsons does compete, meaning that Albertsons does not discipline Kroger's pricing. FOF ¶ 265. This kind of "overlap" evidence has been used by prior courts to evaluate market definition and competitive effects. *See Whole Foods Mkt., Inc.*, 548 F.3d at 1039-40; *Staples*, 970 F. Supp. at 1082.

88. In response to this direct evidence of competitive effects, the State has urged that the Court should instead rely on documents showing Kroger and Albertsons monitoring pricing promotions by one another or discussing competition from one another. State Pretrial Br. 25–26.

89. The State's theory of direct competition contravenes precedent holding that "the mere fact that a merger eliminates competition between the firms concerned has never been a sufficient basis for illegality." *Dresses for Less, Inc. v. CIT Grp./Com. Servs., Inc.*, 2002 WL 31164482, at *12 (S.D.N.Y. Sept. 30, 2002); *see also United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1169 (N.D. Cal. Sept. 9, 2004) ("Simply because [the merging parties] often meet on the battlefield and fight aggressively does not lead to the conclusion that they do so in the absence of [another competitor].")

90. Additionally, the State offered no evidence that Kroger has ever lowered its prices in response to the Albertsons promotion offerings prominently displayed during trial. In fact, Mr. Aitken confirmed that Kroger *does not* adjust its pricing based on the promotions that Albertsons is running. FOF ¶ 17. And once again, what matters is Kroger's pricing strategy,

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as the acquiring firm. FOF ¶ 265.

91. Most crucially, though, the State's "head-to-head" theory neglects the divestiture, which will ensure continued direct competition between current Kroger and Albertsons stores in precisely those markets that the State highlights. FOF ¶ 261. The State points to purported direct competition on customer service between QFC and certain Albertsons banners in the Seattle area, for example. State Pretrial Br. 25. But the divestiture maintains this competition: Kroger is divesting all but 5 QFC stores, the QFC banner, and 16 additional Seattle stores. FOF ¶ 132.

b. A Proper GUPPI Analysis Makes Clear That The Transaction Will Not Result In Anticompetitive Harm

92. Market concentration statistics are not an accurate predictor of competitive effects in this transaction because economic analysis of competitive effects—when accounting for the divestiture—demonstrates there will be no significant upward pricing pressure.

93. To measure the competitive effects of the merger, both Dr. Israel and Dr. Dua employed the GUPPI model, but used different inputs for diversion ratios and margins. FOF ¶¶ 275, 279. Dr. Israel's GUPPI analysis, using margin data that reflected the parties' actual costs, produced the more reliable result. FOF ¶ 282.

94. Dr. Israel's analysis, accounting for actual store diversion ratios, variable margins, and the divestiture, demonstrates that the all of the stores in Washington have a GUPPI below 5 percent, which is understood to mean the transaction is unlikely to result in higher prices. FOF ¶ 276. Indeed, the vast majority of the stores have a GUPPI less than or equal to 1 percent. FOF ¶ 276. Dr. Dua conceded that there is not a single case or treatise that says that a 1 percent GUPPI establishes any anticompetitive harm, which is unsurprising given that a GUPPI analysis will *always* result in a positive number. FOF ¶ 278.

95. A proper GUPPI analysis confirms the direct evidence that the transaction will not result in anticompetitive harm. FOF ¶ 276.

2. The Merger Will Generate Significant Efficiencies and Lower

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Prices

96. The significant efficiencies and consumer benefits the merger will generate also rebut the State's *prima facie* case.

97. Courts have long recognized that mergers can create efficiencies that will enhance competition and consumer welfare. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 680 (D. Minn. 1990); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 146–49 (E.D.N.Y. 1997). The "trend among lower courts has … been to recognize or at least assume that evidence of efficiencies may rebut the presumption that a merger's effects will be anticompetitive." *Deutsche Telekom AG*, 439 F. Supp. 3d at 207; *see also Arch Coal, Inc.*, 329 F. Supp. 2d at 151 (efficiencies can affect "whether the proposed transaction will substantially lessen competition").

98. To be cognizable, efficiencies must be both merger-specific and verifiable. *See H & R Block*, 833 F. Supp. 2d at 89–90; *see also* 2010 Merger Guidelines § 10.[664] To determine whether efficiencies are merger-specific, courts look to whether the efficiencies could be recognized by the merged firm on a comparable timeline and with comparable investment as without the merger. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 722 (D.C. Cir. 2001). To be verifiable, efficiencies need only rise above the "speculative" level—Defendants need not prove the efficiencies with absolute certainty. *Deutsche Telekom AG*, 439 F. Supp. 3d at 213.

99. Kroger will realize both one-time cash benefits as well as ongoing annual efficiencies that are merger-specific. FOF ¶¶ 185. Kroger expects to achieve between [redacted] in one-time cash benefits, and up to [redacted] in ongoing, annual efficiencies. FOF ¶ 185. The one-time cash benefits include immediate tax savings resulting from combining companies that currently maintain separate tax captives. FOF ¶ 185. Meanwhile the ongoing, annual efficiencies will result from revenue enhancements and cost savings across

[664] The 2023 Merger Guidelines the State relies on have never been adopted by any court. In any event, the claimed efficiencies would be cognizable under either set of guidelines.

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numerous categories. FOF ¶¶ 176–84. These efficiencies would be realized without the merger. FOF ¶¶ 176–84.

100. Kroger—through leading outside consultants and the integration management office—has undergone a rigorous and comprehensive process to identify and validate these efficiencies to ensure that these efficiencies are verifiable. FOF ¶¶ 170–75. The work of the third-party consultant Bain was extensively scrutinized by Mr. Gokhale, who concluded that Bain's analyses were a reasonable estimate of the likely synergies Kroger will recognize through the merger. FOF ¶ 195. Meanwhile, the State failed to adduce any evidence to call Bain's work into question. FOF ¶ 195.

101. Mr. Gokhale independently verified these efficiencies and determined that Kroger and its consultants' process for estimating synergies was likely to generate reasonable results. FOF ¶¶ 191–99, 202–04. Mr. Gokhale further analyzed Kroger's projected synergies and estimated that up to [redacted] in efficiencies are merger-specific. FOF ¶ 196.

102. The State sought to discredit Mr. Gokhale's analysis by pointing to an opinion from *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017), in which a court declined to rely on Mr. Gokhale's opinion. But that discussion was premised on facts not present here, including that the efficiencies analysis (1) did not control for variations in promotional pricing, (2) arose "[i]n the provider context," which presented unique "impediments to fully implementing a best of the two contracts approach," and (3) was contradicted by testimony from the company itself about the unlikelihood of the efficiencies being realized. *See id.* at 97. In contrast, the unrebutted evidence here showed that Kroger expects to achieve significant cost savings and revenue synergies and to use those synergies to invest $1 billion in lowering prices at Albertsons stores on a run rate basis. FOF ¶ 186.

103. The evidence also showed that Kroger's estimated synergies are the result of a rigorous validation process, and expert analysis confirms that at least [redacted] of those efficiencies are cognizable under the Merger Guidelines. FOF ¶ 191. The State offered no

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evidence that the efficiencies validated by Mr. Gokhale could be realized by either firm absent substantial investment of time and money beyond that required by the merger. FOF ¶ 205. *See H.J. Heinz Co.*, 246 F.3d at 722. Moreover, the price investments Kroger has planned for comport with its past practice. Since 2003, Kroger has invested more than $5 billion in lower prices for consumers—including, following its Harris Teeter and Roundy's acquisitions, investing over $100 million in each to lower prices. FOF ¶ 190.

104. Even if the State had met its *prima facie* case, the efficiencies would rebut the *prima facie* case.

B. Other Factors Undermine the State's Theory

105. Other evidence in the record further confirms that the State did not prove that the transaction is likely to substantially lessen competition.

106. Market concentration is most likely to foster anticompetitive effects where there is a "likelihood of interdependent anticompetitive conduct." *H.J. Heinz Co.*, 246 F.3d at 715–16 (alteration and quotation marks omitted). Such "[t]acit coordination" can be "facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus." *Brooke Grp. Ltd.*, 509 U.S. 209, 238 (1993). "[A] strong presumption of anticompetitive effects based on market concentration is especially problematic" where these factors are not present. *Oracle*, 331 F. Supp. 2d at 1113, 1122; *see also FTC v. Lab. Corp. of Am.*, 2011 WL 3100372, at *19 (C.D. Cal. Mar. 11, 2011) (similar). Here, the overwhelming evidence shows that the merger will eliminate no meaningful pricing constraints. *See supra* Section III(A)(2).

107. The State has put forth no evidence to support a finding that the merger is likely to produce coordinated conduct between the remaining firms. The retail grocery industry is far from a stable market environment. The seismic shift in the industry from the emergence of Amazon to the entrance of club stores have redefined how consumers shop for groceries. FOF ¶¶ 38, 44. This has forced grocery retailers to adhere to a wide range of pricing strategies and

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to compete on price for thousands of products. FOF ¶ 189.

108. Additionally, market concentration is a poor measure of competition where, like here, "the threat of outside entry" constrains pricing. *H.J. Heinz Co.*, 246 F.3d at 717 n.13 (citation omitted). In the ten years leading up to the merger, national retailers (Walmart, Costco, etc.) and super regional grocery chains (Ahold Delhaize, Publix, H-E-B, etc.) have opened hundreds of stores near Kroger's stores. FOF ¶¶ 70, 80. And some of Kroger's fiercest competitors have plans to expand.[665] FOF ¶¶ 52, 56, 75, 77, 80, 90. "The ability and willingness of current competitors to expand their foothold in the market and/or reposition greatly reduces the anticompetitive effects of a merger, and is essentially equivalent to new entry." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 57 (D.D.C. 2009).

IV. The State Cannot Carry Its Burden with Regards to the Divestiture

109. Because the evidence shows that the transaction is not likely to have substantial anticompetitive effects once the divestiture is accounted for, *see supra* 98–107, the State's case falls entirely flat unless it can carry its ultimate burden of showing that the divestiture is not likely to prevent a *substantial* lessening of competition.

110. The State's primary analysis did little to address the divestiture. Dr. Dua, the State's economic expert, did not take the divestiture into account in his store-by-store GUPPI analysis. *See* FOF ¶ 278. This means the State is without any economic analysis of the competitive effects of the merger when accounting for the divestiture beyond market concentration statistics. The State's entire case therefore depends on its ability to prove that the divestiture should be excluded from consideration.

111. Differing approaches to a divestiture's role in the burden-shifting framework are immaterial if, as here, "the evidence leads to the same result under either standard." *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 134. There can be no dispute that the State at all

[665] *See, e.g.*, Tr. (Groff (Kroger)) 673:16–21 ("Walmart has grown significantly over the last number of decades. Amazon has come to the scene. Club stores have expanded. In many parts of the country, discounters like Aldi and [Lidl] have come in and have grown and expanded tremendously, all growing a lot.").

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times bears the ultimate burden of persuasion in showing that the transaction—including the divestiture to C&S—will substantially lessen competition. *Baker Hughes*, 908 F.2d at 982–83. It cannot carry its burden.

A. The State Misapprehends Its Burden

112. The State erroneously claims that Defendants must demonstrate that the divestiture will replace *all* competition allegedly lost as a result of the merger. State Pretrial Br. 31. The Fifth Circuit explicitly rejected this "total-negation standard" in *Illumina*, holding that requiring Defendants to show that the merger will preserve the same level of pre-merger competition would "effectively erase the word 'substantially' from Section 7." 88 F.4th at 1059 (quoting *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 133). The question is whether "the [Divestiture Package] [will] sufficiently *mitigate*[] the merger's effect such that it [is] no longer likely to *substantially* lessen competition." 88 F.4th at 1059.

113. The State argues that the Court should disregard the divestiture buyer's rigorous assessments and projections of its ability to compete because, in its limited view, the divestiture is doomed to fail. But it is not the role of this Court to stand in the shoes of C&S and assess whether the divestiture is a good or a bad transaction. C&S—the largest private grocery wholesale distributor in the United States with decades of industry experience and billions in annual sales—is sophisticated enough to decide for itself, after comprehensive due diligence, whether the divestiture (and the billions of dollars C&S is investing in it) is a viable business venture. FOF ¶¶ 29, 156–57. The same is true for C&S's investors—including Rick Cohen [redacted] and SoftBank [redacted]—who have committed hundreds of millions of dollars toward this venture. FOF ¶ 123. Courts do not typically second-guess the informed business judgment of disinterested companies, *see Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990), and the State offers no reason for this Court to do so here.

114. Indeed, divestiture is commonplace in grocery retail. Over the last 28 years the FTC approved at least 23 transactions in retail grocery subject, to the divestiture of certain

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grocery retail stores.[666] At least four of these divestiture transactions involved approved sales of grocery retail stores to grocery wholesalers.[667] Washington's criticisms of C&S as a buyer of the robust divestiture package is inconsistent with the law and divestiture precedent in retail grocery mergers and acquisitions. In many cases involving the Department of Justice ("DOJ"), an up-front buyer was not even required if the divestiture involved the sale of assets that effectively maintained competition.[668]

115. For decades, courts have approved divesture proposals without scrutinizing every detail of the buyer's plan for competition. Consent decrees entered into by the DOJ must be approved by courts as being in the public interest, *see* 15 U.S.C. § 16(e); *see also United*

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[666] Decision and Order, *In re Price Chopper/Tops Markets*, FTC Docket No. C-4753 (Jan. 24, 2022); Decision and Order, *In re Cerberus Institutional Partners V LP, AB Acquisition LLL, and Safeway Inc.*, FTC Docket No. C-4504 (July 2, 2015); Decision and Order, *In re Bi-Lo Holdings, LLC*, FTC Docket No. C-4440 (Jan. 15, 2015); Decision and Order, *In re AB Acquisition LLC*, FTC Docket No. C-4424 (Feb. 4, 2014); Decision and Order, *In re Koninklijke Ahold NV/Safeway Inc.*, FTC Docket No. C-4367 (Aug. 17, 2012); Decision and Order, *In re Tops Markets LLC*, FTC Docket No. C-4295 (July 5, 2011); Decision and Order, *In re Whole Foods Market, Inc. and Wild Oats Markets, Inc.*, FTC Docket No. C-9324 (May 29, 2009); Decision and Order, *In re Great Atl. & Pac. Tea Co. and Pathmark Stores, Inc.*, FTC Docket No. C-4209 (Jan. 4, 2008); Decision and Order, *In re Wal-Mart Stores, Inc., and Supermercados Amigo, Inc.*, FTC Docket No. C-4066 (Feb. 27, 2003); Decision and Order, *In re Koninklijke Ahold NV, and Bruno's Supermarkets, Inc.*, FTC Docket No. C-4027 (Jan. 18, 2002); Decision and Order, *In re Etablissements Delhaize Freres et Cie "Le Lion" S.A., Delhaize America, Inc., and Hannaford Bros. Co.*, FTC Docket No. C-3962 (June 5, 2001); Decision and Order, *In re Winn-Dixie Stores, Inc*., FTC Docket No. C-4001 (Feb. 16, 2001); Decision and Order, *In re Albertson's Inc. and American Stores Co.*, FTC Docket No. C-3986 (Dec. 8 2000); Decision and Order, *In re Shaw's Supermarkets, Inc.*, FTC Docket No. C-3934 (April 7, 2000); Decision and Order, *In re Kroger Co., and Fred Meyer, Inc.*, FTC Docket No. C-3917 (Jan. 14, 2000); Decision and Order, *In re Kroger Co., and John C. Groub Co. Inc.*, FTC Docket No. C-3905 (Nov. 12, 1999); Decision and Order, *In re Koninklijke Ahold NV, Giant Food Inc., and the 1224 Corp.*, FTC Docket No. C-3861 (April 14, 1999); Decision and Order, *In re Albertson's Inc., Locomotive Acquisition Corp., Buttrey Food and Drug Store Co., and FS Equity Partners II, L.P.*, FTC Docket No. C-3838 (Dec. 15, 1998); Order Reopening and Modifying Order, *In re Schnuck Markets, Inc.*, FTC Docket No. C-3585 (June 17, 1998); Decision and Order, *In re Jitney-Jungle Stores of America, Inc.; Bruckmann, Rosser, Sherrill & Co., L.P.*, , FTC Docket No. C-3784 (Jan. 30, 1998); Decision and Order, *In re Koninklijke Ahold NV, and Ahold USA, Inc.*, FTC Docket No. C-3687 (Oct. 1, 1996).

[667] Decision and Order, *In re Price Chopper/Tops Markets*, FTC Docket No. C-4753 (Jan. 24, 2022); Analysis of Proposed Consent Order, *In re Kroger Co./Fred Meyer Inc.*, FTC Docket No. C-3917 (May 27, 1999) (divesting stores to "Nash-Finch Company, one of the largest food wholesalers" and "Fleming Companies, Inc. the second-largest supermarket wholesaler in the United States"); Analysis of Proposed Consent Order, *In re Koninklijke Ahold NV, Giant Food Inc./ The 1224 Corp.*, FTC Docket No. C-3861 (Oct. 20, 1998) (divesting a store to "Fleming Companies, Inc. the second largest supermarket wholesaler in the United States"); Announced Actions, *In re Koninklijke Ahold NV, and Ahold USA, Inc.*, FTC Docket No. C-3687 (Oct. 29, 1996) (divesting four stores "to Bozzuto's[] a wholesaler").

[668] ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 3D-2 (9th ed.. 2017) (citing U.S. DEP'T OF JUSTICE, ANTITRUST DIV., MERGER REMEDIES MANUAL § III.B at 22 (Sept. 2020)).

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States. v. Alcoa, Inc., 152 F. Supp. 2d 37, 40 (D.D.C. 2001), and federal courts have therefore evaluated proposed divestitures many times in that context, *see, e.g. United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 10 (D.D.C. 2007); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014). Under that precedent, if a purchaser demonstrates that the "purchase is for the purpose of competing effectively" and the purchaser has the "managerial, operational, and financial capability" to "compete effectively" in the relevant market courts have approved divestiture transactions.[669] A similar standard should apply here.

B. The State Has Not Carried Its Burden With Respect to Divestiture

116. The facts firmly refute the State's speculation about C&S's retail business prospects. Courts limit their role to examining the basic features of the divestiture—such as "the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture[;] the independence of the divestiture buyer from the merging seller[;] and the purchase price"—to determine whether a divestiture will provide the buyer with the ability to compete post-merger. *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 135 (citation omitted). The merits of C&S's business judgment is beyond the purview of antitrust law.

117. Many of the "challenges" the State claims C&S will face post-merger—such as the successful promotion of banners and private label products, the acquisition and retention of talent, and the maintenance of customer loyalty programs—are simply elements of competition. C&S must *compete* on all of those fronts (and more), just as Kroger and many other grocery retailers do today. The fact that C&S, like all other retailers, will face those challenges does not mean the divestiture is a predestined failure.

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[669] *See, e.g.*, Final Judgment, *United States v. Stone Canyon Indus. Holdings LLC,* No. 21-01067-TJK (D.D.C. Aug. 10, 2021) ECF No. 14; Final Judgment, *United States v. The Dow Chem. Co. and E.I. Du Pont de Nemours and Co.*, No. 17-01176-APM (D.D.C. Oct. 19, 2017) ECF No. 16; Final Judgment, *United States v. BBA Aviation PLC,* No. 16-00174-ABJ (D.D.C. June 9, 2016) ECF No. 14; Final Judgment, *United States v. Gannett, Co., Inc,* No. 13-01984-RBW (D.D.C. Nov. 18, 2014) ECF No. 20; Final Judgment, *United States v. U.S. Airways, Inc. and AMR Corp.* No. 13-01236-CKK (D.D.C Apr. 25, 2014) ECF No. 170; Final Judgment, *United States v. Unilever, N.V.,* No. 11-00858-ABJ (D.D.C. July 19, 2011) ECF No. 8; Final Judgment, *United States v. Raycom Media, Inc.*, No. 08-01510-RMU (D.D.C. Dec. 4, 2008) ECF No. 9.

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118. On the limited factors courts consider, the State cannot carry its burden.[670]

1. Likelihood of Divestiture

119. The divestiture is a "virtual certainty" if the deal goes forward, *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 135, and the State identified no "significant obstacles to closing," *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 305 (D.D.C. 2020).

120. The parties have agreed to use "respective reasonable best efforts" to consummate and make effective the transactions contemplated by the Agreement. FOF ¶ 130; *see FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) ("For starters, the [] divestiture . . . is highly likely to occur. The parties to the divestiture…have agreed to use all commercially reasonable efforts to ensure the closing conditions are satisfied[.]"). The divestiture's only remaining condition is the merger's closure after resolution of this litigation.

121. C&S also is "capable of closing financially," *RAG-Stiftung*, 436 F. Supp. 3d at 304, and has the wherewithal to run a successful and competitive retail operation.

122. C&S has secured financing commitments for the nearly $2.9 billion purchase price, demonstrating both its ability and commitment to proceed. FOF ¶ 122. C&S has budgeted millions of dollars in one-time costs for rebannering, private label development, and IT conversion. FOF ¶¶ 165–67. Beyond factoring in one-time costs, C&S has a base level of budgeted capital in each of the regions in which it will acquire stores that "acts as a place for additional monies to spend to invest behind [] the stores, whether it's remodeling or maintenance." FOF ¶¶ 165, 168. Beyond that, C&S has committed to investing more than [redacted] over the next five years to support infrastructure development and an additional [redacted] on store improvements and other expenses. FOF ¶¶ 165, 168. In the Pacific Northwest region alone, C&S has budgeted over [redacted] for the first five years. FOF ¶ 168.

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[670] The viability of C&S's multi-billion-dollar investment currently is being litigated in the parallel federal court proceedings. *See FTC v. The Kroger Co.*, No. 24-347-AN (D. Or.). If the federal court concludes that the plaintiffs there—with virtually identical evidence and identical incentive—have not carried their burden to prove that the divestiture is not viable, the State cannot seek or obtain a different result here. *See Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) ("[A] nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit." (alteration and quotation marks omitted)).

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2. C&S's Experience

123. The record shows that C&S has the "experience necessary to compete effectively in the [retail grocery] industry." *RAG-Stiftung*, 436 F. Supp. 3d at 305.

124. As a wholesaler, C&S provides many of its retail customers the services that self-distributing retailers must typically handle for their own stores, such as wholesale procurement, private label merchandising, supply chain services, category management, vendor negotiations, retail technology, and digital marketing. FOF ¶ 31. C&S has direct grocery retail experience, too. C&S successfully completed two acquisitions as part of its strategic plan to promote new channels of growth, currently operates 25 retail supermarkets, and is a franchisor of 165 additional locations. FOF ¶ 32. Its entire customer base comprises approximately 7,500 stores. FOF ¶ 33.

125. In challenging C&S's experience in retail, the State overlooks the "wealth of experience" that C&S's post-divestiture retail management team has in grocery retail, which will be "an important component in helping [C&S] replace [Kroger's] competitive intensity." *RAG-Stiftung*, 436 F. Supp. 3d at 305 (highlighting executive who would oversee divestiture business if divestiture closes had years of management experience in the relevant industry); *see also UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 137 (crediting the buyer's "large team of individuals with extensive experience"). The State repeatedly emphasized that C&S's current management team operates only 25 retail stores and some 150 franchises, FOF ¶ 32, and it has suggested that C&S is incapable of successfully running the larger number of stores that it will acquire in the divestiture. But that simplistic argument overlooks that C&S has secured a new, experienced leadership team that will be responsible for much of its retail business. FOF ¶¶ 145–51. Indeed, the bulk of the leadership for C&S's new retail operations will come from Albertsons, Kroger, and outside hires. FOF ¶¶ 145–51.

126. That influx of talent includes Susan Morris, the current COO of Albertsons, who will serve as the CEO of retail at C&S post-merger. FOF ¶¶ 146–49. Ms. Morris is widely

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respected at Albertsons and in the grocery industry. FOF ¶¶ 146–49. Ms. Morris, and her team—including Michelle Larson, who runs Albertsons' West Division and will join C&S as Chief Merchant, and Brent Stewart, the Seattle Division president who runs the QFC stores today—will lead the rebannering efforts in Washington and will run similar operations on day one as they oversee today. FOF ¶ 150. C&S also will acquire the entire QFC team, as well as the Haggen team (in all but a couple of the stores), which has its offices in Washington. FOF ¶¶ 150, 153. In total, nearly 70,000 Kroger and Albertsons employees already have been designated to transition to C&S, including store-level employees, distribution-center and manufacturing plant staff, division- and district-level management, and subject matter experts. FOF ¶ 145. Professor Ailawadi admitted that her analysis did not account for this influx of talent, and admitted to knowing little about Ms. Morris's experience. FOF ¶ 151.

127. Finally, C&S's experience will allow it to harness the "incredible strength" of its supply chain, including 45 campuses across the country and approximately 7,500 independent retailers serviced today. FOF ¶ 33. As a wholesaler, C&S already "grapples with challenges much like those [that many retailers] face, such as security of supply, inventory, tracking, forecasting, and distribution." *RAG-Stiftung*, 436 F. Supp. 3d at 305. Indeed, Professor Ailawadi recognized that C&S has "supply chain expertise" that will benefit the company as a retailer. FOF ¶ 33. C&S's track record as the country's largest private grocery wholesaler provides it with a level of expertise previous divestiture buyers lacked.

128. Ultimately, businesses are run by people, supported by assets and infrastructure. Regardless of what experience C&S as an entity has today, the *people* that C&S has recruited and is continuing to recruit will be responsible for the retail success of the enterprise, and those people will be supported by a comprehensive suite of acquired and newly developed assets and infrastructure. The fact that the ultimate equity holder of that retail enterprise has less experience in retail operations prior to the divestiture says nothing about the likelihood of C&S's success in the future.

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3. Scope of Divestiture

129. The scope of the proposed divestiture "is more than sufficient" to enable C&S to replace Kroger and Albertsons "in effectively running" the divestiture stores. *RAG-Stiftung*, 436 F. Supp. 3d at 305. The evidence shows that the divestiture package provides "everything else that's needed to run a stand-alone business" and effectively preserve any competition lost through the merger. *Id.* at 305–06.

130. *Banners*. The divestiture provides C&S with the assets it will need to compete post-merger. C&S is acquiring 579 supermarkets and a host of other valuable assets, including 124 stores in Washington and banners that were "born in Washington." FOF ¶ 130. C&S will acquire *50* of the 55 QFC stores in Washington, and *12* of the 15 Haggen stores in Washington; thus, C&S will need to re-banner only the 62 stores under the Albertsons and Safeway banners that it is acquiring. FOF ¶ 130. Through the divestiture, in addition to the two distribution centers C&S already owns and manages today in the Pacific Northwest, C&S will add a third distribution center in Washington. FOF ¶ 136.

131. Professor Ailawadi contended that C&S's plans to rebanner some of the divestiture stores will require it to understand "what [it] want[s] this brand to stand for." FOF ¶ 134. But C&S will not have to rebanner *any* QFC or Haggen it will acquire stores in Washington. Both of these banners have strong customer draw: QFC ranks better than average on Washington customers' stated priorities, including good deals and product variety; and Haggen stores typically perform better on EBITDA, average weekly sales, and customer loyalty. FOF ¶ 131.

132. As for the stores that C&S will have to rebanner, the TSA allows C&S to be "thoughtful and methodical" about its rebannering process, rather than requiring it to quickly change store names and risk alienating associates and customers, which occurred with prior Albertsons' conversions. FOF ¶ 133. The time provided to C&S under the TSA allows C&S to study, understand, and build the brand equity necessary to succeed and to avoid any

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unnecessary deficiencies.

133. *Private Labels*. C&S is obtaining valuable private brand assets and further developing its own private label offerings that will provide it with the ability to compete with Kroger and other grocery retailers.

134. C&S will acquire five valuable Albertsons Own Brands, along with four years of access to the highly successful O Organics and Signature Brands while it builds out its own private label program. FOF ¶¶ 127, 137-38. These resources come *in addition* to the existing private label products that C&S already has. C&S currently sells [redacted] through its Best Yet brand, consisting of national brand equivalent items, along with several brands sourced from Topco. FOF ¶ 30. Roughly 90 percent of Albertsons' Own Brands are produced by third-party partners, and Professor Ailawadi recognized that outsourcing private label manufacturing is "very common" in the industry. FOF ¶ 139.

135. C&S has already jumpstarted its private brands strategy for the divestiture; it is currently in the process of redesigning its Best Yet label and expanding its assortment, and working with Topco and Daymon, a private brand agency, to work on what the future Own Brands at C&S will look like. FOF ¶ 30. With four years of private label access to O Organics and Signature Brands under the TSA, C&S has the "runway to make sure that [it's] taking great care of the customers" and providing a "seamless experience," while working extensively behind the scenes to build and expand its private label offerings. FOF ¶ 133.

136. *Technology*. C&S also will acquire a clone of Albertsons' information technology stack and Kroger's human capital management stack. FOF ¶¶ 127, 140. C&S has developed a plan to integrate these IT resources into its existing capabilities to provide "seamless and continued services for customer[s] and associates" and "[u]ninterrupted services and support" following the merger. FOF ¶ 140. The vast majority of the Albertsons stores are already running on the Albertsons tech stack and will not require a change of hardware. FOF ¶ 140. Onboarding the divested Albertsons stores to the tech stack clone is a relatively simple

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process that will take "hours at most" for any given store. FOF ¶ 140. Converting a Kroger store to the tech stack clone requires some additional preparation, but even then will only take "a few more hours than in Albertsons stores . . . not days or weeks or months." FOF ¶ 140. Mr. Collison suggested that three months was not sufficient to convert the divestiture stores onto the new tech stack, FOF ¶ 141, but later testified that he was not "offering an opinion that C&S is incapable of converting the divestiture stores on some timeline," and he confirmed that he never expressed the opinion that C&S cannot convert the 124 stores in Washington in the three months C&S has budgeted. FOF ¶ 141.

137. Professor Ailawadi likewise criticized what she saw as C&S's vulnerabilities related to loyalty programs, but then testified that "not every retailer has a loyalty program" and that "many successful ones have other ways of getting customer-level data," including the option of outsourcing that function to a third party. FOF ¶ 143. That option is underway at C&S. In addition to benefitting from customer data that Defendants have committed to share under the divestiture agreement, FOF ¶ 142, C&S has partnered with Nielsen—a global leader in information, data, and market measurement that Albertsons uses today—to provide data insights and personalization in order to develop its own loyalty programs, and NCR AMS to provide that loyalty solution. FOF ¶ 144.

4. C&S's Independence/Purchase Price

138. C&S is an independent buyer and will be an independent competitor in the grocery market.

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139. The divestiture buyer selection process was comprehensive and competitive. FOF ¶ 156. Kroger determined that C&S (i) demonstrated a long-term strategic commitment to running the business, maintaining employment, and operating the stores—evidenced through diligence by outside advisors into C&S's confidential business plans; (ii) has a track record of building and operating a successful distribution network supporting thousands of retailers; and (iii) possesses the financial wherewithal to run a large retail business, reinforced by equity invested by its owner Rick Cohen and SoftBank, which reinforces C&S's long-term strategy. FOF ¶¶ 116–25.

140. C&S had independent counsel that undertook legal diligence, FOF ¶ 156, and outside advisors and bankers for Kroger and C&S scrutinized the business approach and business plan for the divestiture. FOF ¶ 119.

141. The State has urged that the divestiture to C&S is unlikely to preserve competition in the relevant markets because in the past C&S has purchased small numbers of distressed stores, attempted (sometimes successfully) to improve their performance, and then either resold those stores to its wholesale customers or closed them due to poor performance.[671] The theory that C&S is destined to do the same here is based on nothing more than attorney argument and is entitled to no weight.

142. *First*, there is no evidence—not from any expert, any lay witness, or any document—that selling, leasing, or closing *any* of the divestiture stores would make economic, financial, or business sense for C&S. Instead, witnesses testified to the opposite, without contradiction from the State: "Q. So is the transformational acquisition you're talking about that represents this merger, this divestiture to C&S, is selling stores consistent with that business plan? A. No. Q. Is closing stores consistent with that business plan? A. It would be counter to our business plan."[672] The fact that it may have made business sense in *other* transactions for C&S to resell or close stores is uninformative: As the State reiterated throughout the trial,

[671] Tr. (State's Opening) 249:13–14; Tr. (Winn (C&S)) 1457:14–15.
[672] Tr. (Winn (C&S)) 1522:23–24.

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C&S has never undertaken a "transformational" transaction like this one.[673] There is no economic comparison between the purchase of a few retail stores from the Grand Union bankruptcy, and the acquisition here of nearly 600 stores, tens of thousands of frontline associates, private label and store banner assets, IT infrastructure, and a host of transition services. FOF ¶ 121.

143. *Second*, the unrebutted evidence instead shows that C&S has both a financial incentive and a strong business plan to run the divestiture stores as a retail operation. C&S is investing $2.9 billion into the purchase price of the divested assets. FOF ¶¶ 122, 127; *see, e.g.*, *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 128, 139–40 (finding purchase price was adequate absent evidence to the contrary). That purchase price is funded in substantial part by equity investments of $900 million [redacted]). FOF ¶ 123. This kind of equity commitment is significant, because equity can *only* be repaid if the business is profitable. FOF ¶¶ 123–24. On top of the purchase price, C&S also will be investing more than [redacted] through a variety of capital and infrastructure improvements. FOF ¶¶ 165, 168. Crucially, although some of those investments may increase the value of the underlying assets (such as by refurbishing the stores), many of them are investments into the infrastructure C&S needs to build out in order to run the stores successfully—these investments will not help C&S resell the divestiture stores, but instead will only help C&S *operate* them. *See* FOF ¶ 165.

144. All of C&S's planned investments and the data obtained from its business diligence feeds into C&S's deal model and business plan, which were left largely unchallenged (and untouched) by the State during the trial.[674] The deal model does not contemplate any scenario in which C&S sells or closes the stores. FOF ¶¶ 120–21, 160–61. Instead, every iteration of the deal model analyzes the economic, financial, and business opportunities for

[673] Tr. (Galante) 2758:5–17.

[674] Tr. (Ailawadi) 2079:24–2080:4 ("Q. And it's fair to say you did not read the entirety of that agreement for this transaction, right? A. Very fair to say. Q. You tried, but you found yourself drowning in the detail. Is that your words? A. That sounds very familiar to me.").

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C&S from operating the stores for an extended period of time (at least 11 years[redacted]). FOF ¶¶ 160–63. The undisputed evidence, accordingly, shows that C&S has every financial incentive to compete aggressively with Kroger post-merger.

145. C&S's motivation to run a successful retail operation is strengthened by recent external factors. In 2019, C&S's largest customer—Ahold Delhaize—advised that it was going to be transitioning away from C&S and would start providing its own wholesale services. FOF ¶ 112. That departure of business forced C&S to rethink its business strategy across numerous areas. FOF ¶ 112. One of the ways C&S will seek to "transform[]" its business and adapt it to the modern competitive landscape is through this retail acquisition. FOF ¶¶ 115, 121. Indeed, C&S was contemplating a different retail acquisition when the opportunity with Kroger arose. FOF ¶ 115. The evidence thus shows that C&S *must* successfully operate the retail stores in order to compete in the new environment it faces.

C. The Divestiture Does Not Change Kroger's Business Incentives

146. Even if, however, the State were correct (it is not) that C&S will fail as a retail grocer and provide none of the competitive force that Albertsons did pre-merger, the State still could not prevail. That is because the evidence continues to show that regardless of whether an Albertsons (or, post-merger, C&S) store is nearby, Kroger's motivation remains to lower prices (as part of its flywheel model) and compete with Walmart. That is the model Kroger has determined provides the greatest long-term profits, and the data confirms that Albertsons exerts no meaningful pricing constraints on Kroger. Thus, the merger "would result in significant economies and . . . these economies ultimately would benefit competition and, hence, consumers." *Univ. Health, Inc.*, 938 F.2d 1206 at 1222. This is all that is needed for Defendants to overcome a presumption of anticompetitive harm. The State's arguments regarding the viability of the divestiture do not change this.

V. The Court Should Not Enjoin the Transaction

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147. Even supposing the State could prevail on all of the elements of its claim, the Court should not block the merger based solely on the possibility of competitive harm in a small number of Washington geographies.

A. Divestiture, Not an Injunction, Would Be the Proper Remedy

148. If the Court were to conclude after trial that the State has met its burden to show that the merger is likely to substantially lessen competition in one or more markets in Washington, the proper remedy is not to block the merger in its entirety, but rather to address those specific markets with a targeted divestiture remedy.

149. "An injunction is frequently termed the strong arm of equity, or a transcendent or extraordinary remedy, and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Huff v. Wyman*, 184 Wn.2d 643, 648 (2015) (quotation marks omitted). "Injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law." *Kucera v. Wash. Dep't of Transp.*, 140 Wn.2d 200, 209 (2000). Because injunctions are equitable in nature, their propriety "must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public." *Rabon v. City of Seattle*, 135 Wn.2d 278, 284 (1998).

150. In keeping with this equitable practice, the statute makes clear that a divestiture is the preferred remedy for an unlawful merger: "[T]he superior court may order any corporation to divest itself of the stock or assets held contrary to this section, in the manner and within the time fixed by said order." RCW 19.86.060. That is consistent with federal law, where "Congress [has] made express its view that divestiture [is] the most suitable remedy" in a merger challenge. *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

151. "It is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." *Tyler*

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Pipe Indus. v. Dep't of Revenue, 96 Wn.2d 785, 792 (1982). "[S]ince injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public." *Id.* To establish a clear right, the State must prove its likelihood of prevailing on the merits, which it has not, and an injunction "will not issue in a doubtful case." *Id.* at 793.

152. Even if the State could raise some question under economic theory as to whether the merger could give rise to competitive concerns in a small number of discrete localities within the Court's jurisdiction, that would not justify an order enjoining the merger in whole or in part. That is because the undisputed evidence shows that Kroger (just like other large grocery retailers, including Walmart and Costco) makes more money over the long term by lowering prices. That is why Kroger consistently has lower grocery prices than Albertsons, including in the State of Washington. Kroger's planned price investments for Washington, which exceed $100 million is not a promise, but rather a business strategy integral to Kroger's business model to maximize long-term profits. FOF ¶¶ 188, 190. For Kroger to be successful in the highly competitive grocery industry environment, it must lower prices in order to close the gap with Walmart and to keep up with other competitors that operate on a national scale. FOF ¶¶ 103, 189. In addition to lower prices, the efficiencies resulting from the merger will also help fund Kroger's $1 billion incremental investment in associate wages and $1.3 billion investment in capital improvements. FOF ¶¶ 110, 179. The public equities in favor of the merger can outweigh the State's likelihood of success on the merits.

153. Likewise, the State cannot establish any irreparable injury. There was not a single reference to "irreparable injury" at the trial; rather, in the State's pre-trial brief, the State argued that, "in proving its case on the merits, the State will also prove an irreparable injury." State Pretrial Br. 44. But the Supreme Court has rejected assumptions that irreparable harm flows from a likelihood of prevailing on the merits—instead, the standard requires plaintiffs to demonstrate that irreparable injury is likely in the absence of an injunction. *Winter v. Nat. Res.*

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Def. Council, Inc., 555 U.S. 7, 22 (2008).

154. The preferred remedy would be an incremental divestiture of some additional assets to address those discrete areas of concern. And it is the State's obligation, as the plaintiff, to propose such a targeted divestiture remedy in Washington. The State entirely failed to do so, instead choosing to stand on its demand for a nationwide injunction. Having failed to seek relief that comports with statutory design or basic equitable principles, the State is entitled to no remedy at all. At most, the Court may identify those areas of concern in Washington and require the State, in the first instance, to propose an appropriate remedy.

B. A Nationwide Injunction Would Be Inequitable and Unconstitutional

155. Even if some injunctive relief might be proper, the *nationwide* relief the State seeks would be inequitable and unconstitutional. This Court previously observed on Defendants' motion to dismiss: "I have serious doubts about my authority as a state court trial judge to issue an injunction that bars this transaction from going into effect nationwide." Hr'g Tr. 66:23–67:1 (Apr. 26, 2024). Those doubts are well founded.

156. *First*, nationwide injunctive relief would be inequitable. Injunctive relief must be "tailored to remedy the specific harms shown," *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143 (1986), and must be no "more burdensome to the defendant[s] than necessary to provide complete relief to the plaintiff[]," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Even taking all of the State's allegations as true, enjoining the transaction nationwide is not necessary to provide complete relief to the State as to the limited areas in which the State claims anticompetitive effects. Any injunction must instead be limited only to the transaction as it relates to Washington specifically.

157. *Second*, a nationwide injunction would be unconstitutional. Under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, a state may not "legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pac. Emp'rs. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306

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U.S. 493, 504–05 (1939); *see also Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1135 (W.D. Wash. 2011) (analyzing potential conflicts with other state laws under Full Faith and Credit Clause). Put otherwise, a state cannot "determin[e] the extraterritorial effect of [its] own laws and judgments." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality). Principles of federalism and interstate comity point in the same direction. "Laws have no force of themselves beyond the jurisdiction of the state which enacts them." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

158. The Dormant Commerce Clause similarly restricts states' ability to burden commerce in other states. The Constitution prohibits states from imposing "burdens" on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Courts applying this precedent have held that while a state may "conclude that its own unfair competition law has been violated, and it may prohibit any future conduct within its borders that would cause continued violation of its law," a state "is not permitted . . . to extend its unfair competition law to other states." *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013); *see also Hyatt Corp. v. Hyatt Legal Servs.*, 610 F. Supp. 381, 385 (N.D. Ill. 1985) (concluding a nationwide injunction concerning advertising practices would place an "excessive burden on that commerce in light of the interest sought to be protected").

159. A nationwide injunction blocking the entire transaction based on allegations of localized harm in Washington would impermissibly give Washington's antitrust laws extraterritorial effect and would clearly constitute an "excessive" burden on interstate commerce. The transaction is an out-of-state contract involving out-of-state companies governed by out-of-state law. Other than the transfer of certain Washington-specific assets, no aspect of the transaction will occur in Washington. Washington law cannot dictate the lawfulness of the transaction in the numerous other jurisdictions with just as great—if not more—of an interest in the transaction. Were it otherwise, the states with the strictest merger

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laws would become the national arbiters of antitrust policy. Meanwhile, citizens in other states throughout the country would lose the procompetitive benefits of the transaction based on a suit brought by an attorney general who does not represent them and under the laws of a state in which they cannot vote.

CONCLUSION

For the foregoing reasons, the State has not met its burden to show that the merger is likely to substantially lessen competition in any relevant markets. Judgment should be entered in favor of Defendants and the merger should be allowed to proceed.

* * *

I certify that this document contains 124 pages, in compliance with the Court's order.

RESPECTFULLY SUBMITTED this 18th day of October, 2024.

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