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' POST-TRIAL BRIEF

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INTRODUCTION

The State asks this Court to take the extraordinary step of blocking a private transaction designed to bring lower prices to grocery customers in Washington and across the nation. The State, however, has not carried its heavy burden to prove that the transaction is likely to *substantially* lessen competition in a defined line of commerce. The State failed to prove multiple aspects of its case, ranging from a failure to prove market definition, through a misunderstanding of the fundamental economic structure of Kroger's business, to an inability to rebut or explain direct economic evidence about how pricing in the real world works. Any one of these pitfalls would be sufficient to reject the State's claim; together, they leave no doubt that the claim must be rejected.

At every level, this case pits theory against facts. To support a product market limited to "supermarkets" and "supercenters," the State theorizes that subtle distinctions among grocery retail formats like different packaging or store layouts mean these retailers do not meaningfully compete with one another. This theory is in service of the State's claim that retail grocery giants like Costco, Whole Foods, Trader Joes, and Amazon.com exert no competitive constraints on Kroger. But the facts at trial showed otherwise. Every trial witness who actually works in the industry confirmed that there is fierce competition across retail formats. Both internal and public-facing documents likewise identified differing retail formats (e.g., club stores, value stores, natural and organic stores, etc.) as "key" or "significant" competitors. And industry-specific data models confirm that these different formats compete for the same dollars in the customers' grocery budgets. Everyone except the State and its paid economic expert recognizes the robust competition across grocery retail formats. And because product market is an essential element of the State's case, this failure alone is dispositive.

The State's proposed geographic market around so-called "city areas" is another example of how untethered from the evidence the State's case is. Dr. Dua, the State's economist, conceded at trial that the "city areas" he used to define his geographic markets were

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simply hand-drawn by himself, without any reference to economic data showing diversion or interchangeability. Instead, Dr. Dua theorized about the likely zones of competition by looking at things like where city halls are located or zip code boundaries. But these arbitrary geographies have nothing to do with reasonable interchangeability or competition. Again, the State's failure to prove its geographic markets means the State loses.

If, however, the Court goes on to analyze competitive effects, the State's arguments get only more confounding. The State's entire theory of the case incorrectly assumes that Kroger's sole mission is to maximize its profits from a single line of revenue for grocery sales. But that is not how Kroger has been operating its business—or maximizing its profits—for nearly two decades. Instead, under Kroger's longstanding "flywheel model," it has determined (and explained to the market) that the best *long*-term strategy is to reduce its prices, compete more effectively better with Walmart, increase customer traffic, maximize its non-grocery revenue from things like retail media, and reinvest profits into even lower prices on the grocery side. The State put in *zero* evidence—and in fact offered virtually no cross-examination—challenging Kroger's flywheel or suggesting that this model is not profit-maximizing for Kroger. It is therefore unrebutted and unrefuted that Kroger makes *more* money by chasing Walmart's pricing [REDACTED]. The State's failure to account whatsoever for this central aspect of both Kroger's business and the merger itself is another, independent reason to reject its theory.

But even if Kroger's business model and actual economic incentives could be set aside (they cannot), the economic data still shows no substantial lessening of competition. While the State relied on economic *theory* about how firms might act given certain market concentration levels and diversion ratios, Defendants put in *facts* about how Kroger behaves in the real world. Defendants' economist analyzed thousands of local markets and compared the pricing of those where Kroger currently faces competition from Albertsons to those where Kroger faces no competition from Albertsons. These scenarios provided real world evidence of how Kroger

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actually prices when there is no nearby Albertsons—the exact scenario the State claims will result in higher prices post-merger. And what that evidence conclusively proved is that there is *no* correlation (let alone causation) between the presence of an Albertsons and Kroger's prices—Kroger's pricing is the same whether there is an Albertsons nearby or not. That is unsurprising: Nationally, Albertsons' prices are 10–12% higher than Kroger's nationwide, and the difference is even greater in Washington.

Bereft of any evidence that Albertsons affects Kroger's pricing, the State relied at trial on anecdotal evidence that local employees at Kroger or Albertsons tracked, analyzed, or commented on promotions or ad circulars from the other regarding individual products. But Kroger's chief merchant unequivocally testified that at the corporate pricing level, Kroger *does not* alter its pricing based on ad circulars or promotional pricing from Albertsons, because Kroger focuses almost singularly on Walmart's prices. The State offered no contrary evidence. The direct economic evidence of competition cited above—in contrast to the State's selection of anecdotes—therefore provides yet another independent reason to rule against the State.

The evidence further showed that any theoretical harm to competition the State could show is far outweighed by the real-world efficiencies the merger will allow Kroger to realize and pass on to customers. Kroger and Albertsons *need* the merger in order to fully compete with global behemoths like Walmart, Costco, and Amazon. The merger will help Kroger lower costs across a number of areas and enhance its grocery and non-grocery revenue streams. All of this is in service of Kroger's ultimate mission of bringing its prices closer and closer to Walmart's, as it has been doing for nearly two decades. The significant efficiencies and customer benefits the merger will bring provide another ground for dismissing the State's claim.

Importantly, through almost all of its analysis, the State simply ignores the divestiture of 579 stores, supporting assets, talent, and transition services to C&S Wholesale Grocers, the largest private grocery wholesaler in the United States. That is a factual and legal error: Factual because the State's expert economist admitted there is no world in which Kroger will own all

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of Albertsons' stores (even though that is the focus of his analysis), and legal because precedent makes clear that the divestiture must be examined as part of the transaction at issue. And when the State did address the divestiture, its arguments amounted to second-guessing C&S's assessment of the time and cost required to address the "challenges" that everyone agrees the divestiture (like any transaction) entails. The law does not call upon (or permit) either the State or this Court to supplant C&S's considered business judgment about whether the divestiture makes good sense for C&S or whether C&S has accurately projected its sales and operations. Instead, the Court's role is to evaluate the elements of the divestiture package to check whether it has the essential features needed to allow C&S to compete. And here, the evidence unequivocally showed that C&S will have the talent, assets, capabilities, and financial wherewithal it needs to run the divested business.

Finally, even if the State could prove its liability case, it offered no evidence at trial to justify the sweeping injunctive relief it seeks. In fact, the State put in *no* evidence regarding that remedy at trial, effectively forfeiting the statutory remedy of divestiture. Having failed even to try, the State cannot ask for any other remedy. Moreover, the Constitution does not permit the tail to wag the dog; a single state to block a national merger negotiated and executed outside of its borders. This is a yet another, independent reason to reject the State's case.

The State's theory boils down to the simplistic knee-jerk reaction that Kroger and Albertsons are both large and the merger will make them larger, allowing the merged firm to raise prices. That narrow view ignores the facts. Indeed, Walmart and Costco are two of the largest grocery retailers in the country, yet both price below Kroger. The entire purpose of the merger is to bring Kroger and the acquired stores *closer* to those competitors, not farther away (where Albertsons is today at 10–12% above Kroger). And in fact, there will be *more* competition in Washington post-merger. The Court should not deprive consumers in Washington of the benefits of the merger. The State failed to prove its case, and the merger should not be enjoined.

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STATEMENT OF FACTS

The full set of facts established at trial are set forth in Defendants' Proposed Findings of Fact and Conclusions of Law. Defendants provide here only a high-level summary of the evidence at trial.

I. Competition for Retail Grocery

If the trial proved one thing beyond dispute, it is that competition for retail grocery is fierce and robust. In contrast to the State's myopic view of the relevant competitors as comprising only "supermarkets" and "supercenters," witnesses and documents confirmed over and over again that the range of competition is much broader.

A. The Competitors

The parties agree that various retailers described by the State as "supermarkets" and "supercenters"—which the State defines as grocery stores offering "one-stop shopping" for grocery products, with a broad set of loosely defined products and no less than 20,000 square feet of space per store—compete closely with one another.[1] Firms in that group include not just Kroger and Albertsons, but also Walmart Supercenters, Winco, Amazon Fresh, Rosauers, and Yokes.[2] And the State does not dispute (because it cannot) that Walmart is Kroger's and Albertson's largest competitor and the largest grocery retailer by sales volume.[3] That is largely where the parties' agreement ends.

The State identifies another group of grocery retailers it sometimes calls "mass merchandisers," which include non-supercenter Target stores in Washington, among others. The State excludes these Target stores even though many Target stores (including those in Washington) offer a grocery shopping experience almost identical to that offered by Kroger and Albertsons. And even Plaintiffs' economic expert conceded that customers can do a "full shop" at a Target in Washington, including by picking up the ingredients for a spaghetti dinner,

[1] Compl. ¶ 68; Tr. (Dua) 1586:25–1587:10.
[2] Tr. (Tucker (WinCo)) 156:3–157:14; DX 2462; SX 1587.
[3] Tr. (McMullen (Kroger)) 1244:7–11; Tr. (Sankaran (Albertsons)) 1346:7–10; Tr. (Groff (Kroger)) 634:7–8.

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purchasing sandwich ingredients, or buying the five every day essential items (milk, eggs, head lettuce, sugar, and bananas) that Kroger believes are most important to its customers.[4] And Target's grocery business is on the rise—between 2017 and 2023, Target's revenue for food and beverage grew by almost $10 billion dollars, and Target plans to open more stores and broaden its food and beverage offerings in the future.[5] Nonetheless, Targets in Washington are completely excluded from the State's alleged market.

Also excluded are club stores like Costco. These retailers compete strongly on price by offering grocery products to consumers at wholesale prices.[6] The most dominant is Costco, whose sales in the food category have grown from approximately $10 billion in 1994 to $128 billion in 2023.[7] Costco has 34 stores here in Washington (the third most of any state) and has its headquarters here.[8] Despite some differences in terms of square footage, go-to-market strategy, or floor plan, Costco confirmed in testimony and in ordinary course documents that "Walmart, Target, Kroger and Amazon are among [Costco's] significant general merchandise retail competitors."[9] Kroger similarly views Costco as its "second largest competitor" (after Walmart),[10] and Albertsons loses more of its Washington customers' grocery dollars to Costco than to any other competitor, including Kroger.[11]

The State further excludes from its market grocery stores that emphasize premium, natural, or organic products. Those stores include, most notably, Whole Foods, PCC Community Markets, Sprouts, and Natural Grocers.[12] These retailers have experienced dramatic growth in recent years, with Whole Foods now operating around 500 stores.[13] And

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[4] Tr. (Dua) 1662:16–1664:15.
[5] DX 3053 (Conlin (Target)), at R63912 (21:15–19, 30:12–31:11).
[6] *See, e.g.*, Tr. (George (Costco)) 2299:20–2300:20.
[7] Tr. (George (Costco)) 2293:1–5.
[8] Tr. (George (Costco)) 2303:15–19.
[9] DX 3041, at R63526; Tr. (George (Costco)) 2289:14–15.
[10] Tr. (McMullen (Kroger)) 1246:15–17; *see also* Tr. (Groff (Kroger)) 634:9–12.
[11] Tr. (Kinney (Albertsons)) 1853:5–12; *see also* DX 2213, at R38405.
[12] SX 4842 (Neal (Sprouts)), at R3440 (28:15–23); Tr. (Spear (PCC) 2325:10–12; DX 3047 (Oblisk (Whole Foods / Amazon Fresh)), at R63772–3 (96:16–98:06).
[13] DX 3047 (Oblisk (Whole Foods / Amazon Fresh), at R63756 (10:21–10:24).

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like the other formats the State excludes, the evidence consistently showed that these premium, natural, and organic retailers view themselves as being in close competition with Kroger and Albertsons. [REDACTED].[14] PCC testified that it faces competition from Costco, Fred Meyer, Safeway, QFC, Grocery Outlet, and many others.[15] And Whole Foods has identified Kroger, Mariano's, Fred Meyer, Safeway, Ralph's, Smith's, and Walmart all as "key competitors."[16]

Kroger and Albertsons do not just view these retailers as competitors; they react to them. For example, [REDACTED].[17] Albertsons has conducted research indicating that the opening of a Whole Foods has a greater negative impact on sales at Albertsons stores than the opening of any other kind of store, including both Walmart and Kroger.[18] As a response, Albertsons conducted a competitive campaign when a new Sprouts store opened nearby an existing Albertsons store and has deployed that strategy elsewhere too.[19] But the State continues to claim these retailers are irrelevant to the competitive landscape Kroger and Albertsons face.

The evidence is the same for value, ethnic, and dollar stores, all excluded from the State's alleged market. Trader Joe's competes "with everybody else who sells food," and [REDACTED].[20] Albertsons views Trader Joe's as a "primary competitor" and has developed products intended to directly compete with the offerings at Trader Joe's and other value food retailers.[21] Kroger considers Trader Joe's an important competitor in Washington.[22]

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[14] SX 4842 (Neal (Sprouts)), at R3442 (43:23–44:15).
[15] Tr. (Spear (PCC)) 2328:23–2337:21; DX 925, at R10436–41.
[16] DX 3047 (Oblisk (Whole Foods / Amazon Fresh)), at R63764 (41:12–42:02).
[17] DX 148, at R2372–73; DX 149, at R2489–90; Tr. (Groff (Kroger)) 634:9–20, 638:22–639:6.
[18] Tr. (Street (Albertsons)) 432:14–21; Tr. (Kinney (Albertsons)) 1900:5–1901:9; DX 2221, at R38494.
[19] Tr. (Schwartz (Albertsons)) 530:12–531:2.
[20] SX 4828 (Cahan (Trader Joe's)), at 3254, 3256 (125:2–20, 149:24–150:11, 150:16–151:9).
[21] Tr. (Cloward (Albertsons)) 3027:1–24; Tr. (Schwarz (Albertsons)) 526:4–25; Tr. (McMullen (Kroger)) 1250:24–1251:19.
[22] Tr. (McMullen (Kroger)) 1253:17–1256:5; *see also* DX 148, at R2367; DX 61, at R510; Tr. (Kammeyer

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Aldi is the second fastest growing retailer, with plans to expand into the West.[23] Yet again, the State views these competitors as irrelevant and excludes them from its market.

With respect to ethnic stores (including Fiesta Foods and H-Mart) and dollar stores (including Dollar General), the evidence is again uniform that these retailers are in direct competition with Kroger and Albertsons.[24] Both Kroger and Albertsons have responded competitively to these retailers. Albertsons, for example, recently launched its "multicultural initiative" with the goal of better competing against ethnic grocery stores.[25] Kroger conducts independent competitive data surveys on certain ethnic grocery competitors.[26] And Albertsons now tracks dollar stores as part of its competitive tracking work.[27]

Finally, left out of the State's market is the entire world of online grocery options—including, most notably, every grocery item sold through Amazon.com. This is a remarkable exclusion by the State of Washington, where Amazon is headquartered. Amazon experienced 23.2% growth in the grocery industry in 2023, with Kroger experiencing just 2.5% growth over the same period.[28] That growth coincides with metrics showing that consumers are increasingly turning to online options to purchase the groceries they once could get only at a local grocery store.[29] It is unsurprising, then, that grocery retailers like Costco and Target view Amazon as a significant competitor in this market.[30] Amazon sees itself the same way.[31]

* * *

(Kroger)) 842:1–844:2.

[23] Tr. (Kinney (Albertsons)) 1902:5–11; DX 2438, at R44174 (Albertsons study of Aldi's U.S. growth).

[24] 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; Tr. (Gaylord (Fiesta Foods)) 772:3–775:22; DX 261, at R4054 (Price checking sheet comparing Fiesta prices to Albertsons, Walmart, WinCo, and SuperMex).

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

[26] Tr. (Aitken (Kroger)) 2489:9–21.

[27] Tr. (Cloward (Albertsons)) 3034:16–18; DX 121, at R985–87 (Albertsons email discussing the opening of a new Dollar General); DX 1331, at R17740–44 (identifying Dollar General, Dollar Tree, and Family Dollar as Albertsons competitors).

[28] DX 3023, at R62718.

[29] DX 3053 (Conlin (Target)), at R63911–2 (15:10–15:19); DX 2921, at R57792.

[30] Tr. (George (Costco)) 2289:25–2290:6; DX 3053 (Conlin (Target)), at R63912–3, R63921 (24:16–25:01, 71:04–08).

[31] Tr. (Heyworth (Amazon)) 3448:3–13.

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Groceries are groceries. If a customer did not buy their bananas at Costco, they would buy them at Walmart, or Kroger, or Target, or Whole Foods. The customer may prefer some formats to others for various reasons, but that just proves the point: These retailers all compete with one another for customers' regular grocery spend. They compete not just on price, but also on quality and store experience. The superficial differences the State has pointed to throughout trial are elements of competition, not evidence of competitive insulation.

B. The Customers

The trend toward broader competition in grocery retail is consistent with the evolution of how customers shop. With the proliferation of e-commerce and a variety of grocery formats available to them, customers no longer rely on "one-stop shopping" for their grocery needs.[32] Indeed, a 2021 study that Albertsons conducted specific to the Seattle Division indicated that the availability of "one-stop shopping" was one of the least important factors to customers when choosing among grocery retailers, with total bill price being far more important.[33] The data bears that out—30 years ago, customers shopped at supermarkets for 70% of their grocery needs, but that number is now down to 40%.[34]

The consequence of these trends is that customers no longer visit a single store to shop for groceries. Kroger's customers visit ~4.8 retail formats a month,[35] and Albertsons' customers shop for groceries approximately six times at nearly six different places every *week*.[36] This increased competition is reflected in data showing "share of wallet"—a metric used by retail grocers to measure how much of a consumer's grocery spending is going to various retailers. The data shows that Albertsons earns only about 17% of its customers' share of wallet in Seattle, while Costco takes the largest share at 20% and Walmart following at 14%, with

[32] *See* Tr. (Sankaran (Albertsons)) 1361:11–1362:12; Tr. (McMullen (Kroger)) 1244:8–14; Tr. (Kammeyer (Kroger)) 820:7–21.
[33] SX 1526, at P26727; Tr. (Cloward (Albertson)) 3024:15–3026:11.
[34] Tr. (Kinney (Albertson)) 1886:24–1887:16.
[35] Tr. (Aitken (Kroger)) 2493:5–24; SX 4846 (Stewart (Kroger)), at 3491–2 (28:22–29:11, 32:7–12).
[36] 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, at R38403–06.

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Kroger trailing both.[37] Kroger's closest competitors by share of wallet include Walmart, Costco, Target, Aldi, and Amazon, with Albertsons trailing *all* of those retailers.[38]

II. The Parties to the Transaction

There are three parties to this transaction: (1) Kroger, the purchaser, (2) Albertsons, the seller, and (3) C&S, the divestiture buyer.

Kroger. Kroger is an Ohio corporation and a leading food retailer with more than 2,700 grocery stores nationally and 114 stores in Washington.[39] Kroger's grocery banners in Washington include QFC and Fred Meyer. Nationally, Kroger's pricing strategy is focused on Walmart.[40] In terms of pricing, Walmart "would be [Kroger's] number one competitor," and as Chief Marketing Officer Stuart Aitken explained, Kroger is "monomaniacally focused on Walmart."[41]

Retail grocery, however, is not Kroger's only business. Kroger also operates a non-grocery, "alternative profits" business, through which Kroger generates and anonymizes data from customers, creates customer insights, and monetizes those insights both directly and through retail media offerings.[42] The substantial revenues generated by these non-grocery operations help fuel Kroger's longstanding "flywheel" business model.[43] Through this model, Kroger invests in lower prices for customers of its grocery, fuel, and pharmacy business, which in turn generates greater customer traffic.[44] That customer traffic allows Kroger to generate additional data and customer insights, enhancing the revenues it recognizes through the alternative profits side of its business.[45] Kroger can then reinvest that additional revenue back

[37] Tr. (Kinney (Albertsons)) 1853:17–1858:7; Tr. (Kinney (Albertsons)) 1934:6–11; DX 1336, at R17831..
[38] DX 11, at R135; Tr. (Aitken (Kroger)) 2491:4–25, 2492:15–22.
[39] Tr. (Israel) 3318:4–6.
[40] Tr. (Groff (Kroger)) 539:9–11.
[41] Tr. (Aitken (Kroger)) 2499:5–10.
[42] Tr. (Aitken (Kroger)) 2506:14–2507:7; Tr. (Cosset (Kroger)) 2582:12–24; DX 1254, at R16536; DX 2981, at R60050; Tr. (Aitken (Kroger)) 2506:14–2508:18.
[43] Tr. (McMullen (Kroger)) 1261:23–1262:17; Tr. (Aitken (Kroger)) 2506:14–2508:18; DX 2921, at R57783.
[44] DX 1254, at R16536; DX 2981, at R60050; Tr. (Aitken (Kroger)) 2506:14–2508:18.
[45] Tr. (McMullen (Kroger)) 1261:23–1262:17; Tr. (Aitken (Kroger)) 2499:22–2500:7, 2507:23–2508:9, 2518:23–2519:3; DX 2921, at R57783.

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into lower prices for its grocery, fuel, and pharmacy business, thereby feeding the "flywheel" and continuing the cycle.[46]

This model is not conjecture or theory—this is how Kroger actually operates its business. For many years, the "flywheel" model has enabled Kroger to reduce its grocery margins (which are already slim), increase customer traffic, increase its revenue from alternative profits, reinvest that revenue in further reduced grocery margins, yet still grow its overall business and maintain strong profits.[47] Kroger's witnesses testified, without rebuttal, that as a consequence of this model, investing in lower prices ultimately is more profitable for Kroger in the long term.[48] And Kroger has presented this model to investors, including in connection with this merger.[49]

Albertsons. Albertsons is a food retailer with over 2,200 grocery stores nationally and 215 stores in Washington, operating here under the Albertsons, Safeway, and Haggen banners (and other banners elsewhere). Albertsons' prices are 10–12% higher than Kroger's nationally, and 12.3% higher in Washington.[50] And unlike Kroger, Albertsons' retail media business is relatively nascent.[51] Its model does not facilitate the kind of "flywheel" and non-grocery revenue that Kroger currently operates.

C&S. C&S is the largest private grocery wholesale distributor in the United States and the eighth largest privately owned U.S. company.[52] But C&S's wholesale business also includes a significant retail element—C&S provides its retail customers with a suite of foundational services needed to run a successful grocery store, including private label merchandising, retail technology, digital marketing, store design and layout, and data insights.[53]

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[46] Tr. (Aitken (Kroger)) 2499:22–2500:7, 2507:23–2508:9.
[47] Tr. (Aitken (Kroger)) 2507:23–2508:9; DX 2559 at 6 (R46127).
[48] Tr. (Aitken (Kroger)) 2518:11–2519:3; Tr. (Aitken (Kroger)) 2507:23–2508:9, 2518:8–2519:3.
[49] DX 1254.
[50] Tr. (Aitken (Kroger)) 2498:13–15.
[51] Tr. (Cosset (Kroger)) 2581:15–2582:3.
[52] DX 1058, at R11873 (Walnut Business Plan).
[53] DX 2628, at R48613–16, 19–20; Tr. (McGowan (C&S)) 1162:2–19; 1178:23–1179:9.

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As of September 2023, C&S had [redacted] [redacted], servicing 7,500 retail stores.[54]

III. The Transaction

A. Motivation and Design

The merger at issue in this case arose out of necessity for all three companies. From Kroger's perspective, it needs national scale in order to compete on price with large grocery retailers like Walmart and Costco.[55] From Albertsons' perspective, it faces even greater challenges of scale in order to compete over the long term and absent the merger it may face difficult decisions in the future, including layoffs and store closures.[56] And for C&S, the departure of its largest customer—Ahold/Delhaize, representing 44% of C&S's revenues—demanded diversification.[57]

The merger between Kroger and Albertsons, along with the divestiture to C&S, solves all of those problems. Kroger's and Albertsons' geographic footprints are largely complementary, and the merger will therefore give Kroger the kind of national scale its chief rivals already have today.[58] This larger footprint also will give more fuel to Kroger's flywheel business, providing more data and customer traffic that Kroger can use to increase its alternative-profits and reinvest into lower prices, better quality, and higher associate wages (as it has done for years).[59] For Albertsons, it will avoid the difficult choices that staying the course would require while allowing its customers to benefit from Kroger's lower price structure. The divestiture to C&S, meanwhile, gives C&S the opportunity to "transform" its business to adapt to and compete in the modern grocery environment.[60]

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[54] DX 2628, at R48613; Tr. (Winn (C&S)) 1505:19–1511:4; 1516:23–24; Tr. (Florenz (C&S)) 980:16–19.
[55] 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.
[56] Tr. (Sankaran (Albertsons)) 1399:22–1400:8.
[57] Tr. (Winn (C&S)) 1518:7–9.
[58] Tr. (McCullen (Kroger)) 1269:13–19; Tr. (Cosset (Kroger)) 2644:1–15.
[59] Tr. (McMullen (Kroger)) 1261:23–1262:17; Tr. (Aitken (Kroger)) 2499:22–2500:7, 2507:23–2508:9, 2506:14–2508:18; DX 2921, at R57783.
[60] Tr. (Winn (C&S)) 1526:21–25; Tr. (Florenz (C&S)) 981:1–2 (testifying that C&S had "been looking for a

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B. The Divestiture

From the outset, the merging parties understood that because of the limited areas in which their geographic footprints overlap, some divestiture of stores would be necessary.[61] Kroger therefore set out to find the "best and most compelling divestiture buyer."[62] With the help of third-party consultants and after a competitive bidding process among several potential buyers, Kroger ultimately selected C&S as the buyer.[63]

Kroger's selection of C&S was based on three criteria. First, Kroger wanted a buyer with a "long-term strategic commitment to running the business, maintaining employment, and operating the stores."[64] C&S evinced that commitment through the equity investments it solicited ($900 million) as well as its desire to undertake a transformational acquisition.[65] Second, Kroger wanted a buyer with "direct and indirect experience to properly and successfully operate the divestiture business."[66] Again, C&S met that criterion through its experience providing operational support to more than 7,000 independent retailers and its nationwide distribution network.[67] Finally, Kroger wanted a buyer with strong financial backing, which was confirmed by due diligence of C&S's financial capabilities and the significant equity and debt investments.[68] Defendants' divestiture expert, Dan Galante, concluded that C&S is a strong and well-capitalized buyer.[69]

The divestiture provides C&S a comprehensive suite of assets covering all of the primary areas of competition for a retail grocer. For ~$2.9 billion, C&S is acquiring 579 stores nationwide (124 in Washington); several distribution centers (including one in Washington);

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transformational acquisition").

[61] DX 2552, at R45422 ("Material Divestment Event"), R45474 (§ 6.3(d)(3)).

[62] Tr. (Cosset (Kroger)) 2625:25–2626:17.

[63] Tr. (Cosset (Kroger)) 2625:25–2626:17.

[64] Tr. (McMullen (Kroger)) 1283:25–1284:12; Tr. (McMullen (Kroger)) 1244:25–1245:12.

[65] Tr. (Galante) 2757:25–2759:1; Tr. (Florenz (C&S)) 980:25–981:8; Tr. (Winn (C&S)) 1529:10–24.

[66] Tr. (Cosset (Kroger)) 2623:23–2624:9.

[67] Tr. (Winn (C&S)) 1504:6–13.

[68] Tr. (Cosset (Kroger)) 2625:18–2626:17.

[69] Tr. (Galante) 2681:7–12.

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divisional offices (including two in Washington); ownership of the QFC, Haggen, Carr's, and Mariano's banners (two of which already operate in Washington); and five of Albertsons' private label brands (all of which already are available in Washington).[70] To support C&S's business and its transition, C&S also is receiving temporary licenses to several private label brands, a clone of Albertsons' IT stack and Kroger's human capital management system, and tens of thousands of store-level, distribution-level, and management-level employees.[71] C&S is receiving robust talent, including Susan Morris—the current Chief Operating Officer of Albertsons with a long track record of success and an enviable reputation in the grocery industry—as well as ~67,000 associates.[72]

C&S will also receive transitional service through a transition services agreement ("TSA"), under which Kroger will provide support while C&S integrates the divestiture stores.[73] The TSA spells out, in detail, "all the services that are being offered to C&S" to support it with the transition and operation of the divested assets."[74] Despite its centrality to the transfer of the divestiture stores, the State's lead divestiture expert admitted to having "not studied" the TSA, finding herself "drowning in the details."[75]

The divestiture is of course not without risk (no transaction is). C&S, however, has planned for those risks with the help of numerous third-party consultants.[76] C&S worked with these consultants on every part of the transaction, including IT integration, quality of earnings, market dynamics, and real estate.[77] The output of that work was a conservative deal model and

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[70] 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; Tr. (Florenz (C&S)) 864:25–865:8; 910:22–25; Tr. (Winn (C&S)) 1524:3–7.
[71] SX 3748, at P49304 (TSA § 2.9); Tr. (Winn (C&S)) 1532:8–25; Tr. (Cosset (Kroger)) 2630:2–11; Tr. (Galante) 2731:19–2732:8.
[72] Tr. (Winn (C&S)) 1541:11–16.
[73] SX 3748, at P49295 (Exhibit B).
[74] Tr. (Cosset (Kroger)) 2627:15–19.
[75] Tr. (Ailawadi) 2079:24–2080:4, 2080:22–2081:3.
[76] Tr. (Cossett (Kroger)) 2624:10–2625:17; DX 1058, at R11901.
[77] Tr. (Galante) 2687:1–20; Tr. (Florenz (C&S Wholesale Grocers)) 987:7–25; DX 1058, at R11901.

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a business plan outlining C&S's plan for operating the 579 stores post-merger and projecting the financial condition of its retail business for more than a decade out.[78]

C. Consumer Benefits from the Merger

The merger also will generate efficiencies that Kroger will pass on to customers in the form of lower prices. Kroger has estimated that it will realize between [redacted] [redacted] in annual efficiencies from the merger within four years of closing.[79] Those estimates were validated by numerous outside consultants.[80] The integration management office, consisting of employees from both Kroger and Albertsons, has so far validated [redacted] of the total efficiencies estimate.[81]

The efficiencies Kroger has identified fall into several categories. First, there are one-time cost savings between [redacted], which will be realized upon the execution of the merger.[82] Second, Kroger expects [redacted] in revenue growth,[83] including approximately [redacted] through its non-grocery alternative profit streams.[84] Third, Kroger estimates [redacted] in cost savings related to product sourcing, supply chain operations, and other operational synergies.[85] Finally, Kroger estimates [redacted] in cost savings arising from administrative and technology synergies.[86]

Of these synergies, Rajiv Gokhale, Defendants' expert in financial economics and efficiencies, conservatively estimated that between [redacted] [redacted] [redacted] [redacted] were merger-specific and verifiable under the framework articulated by federal regulators.[87] Among the tools and evidence Mr. Gokhale relied on were efficiencies recognized in prior

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[78] DX 1058, at R11868; Tr. (Galante) 2670:11–18.
[79] DX 1727, at R27563 ([redacted]).
[80] Tr. (Maharoof (Kroger)) 2969:12–18.
[81] Tr. (Maharoof (Kroger)) 2957, 2970:6-12, 2972:11.
[82] Tr. (Maharoof (Kroger)) 2960:10–2961:5.
[83] DX 1727 at R27563
[84] Tr. (Maharoof (Kroger)) 2962:21–2963:14; DX 1727 at R27563.
[85] Tr. (Maharoof (Kroger)) 2964:7–17; DX 1727 at R27563.
[86] Tr. (Maharoof (Kroger)) 2967:3–18; DX 1727, at R27563.
[87] DDX 25, at 3; Tr. (Gokhale) 3050:1–11.

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transactions,[88] data from Kroger and Albertsons, strategic plans drafted by Kroger, analyses prepared by third-party consultants, financial models underlying those analyses, relevant deposition transcripts, and interviews with Kroger's employees and consultants.[89] The State offered no expert testimony in response and proposed no alternative efficiencies estimate.

These efficiencies will support Kroger's business investments in prices, wages, and store improvements at the acquired stores. As described above, investment in price is part of Kroger's business model that it has adhered to for more than two decades, and Kroger plans to continue that model and its long-term maximization of profit with a ~$1 billion annual price investment.[90]

LEGAL STANDARD

No court has ever enjoined a merger under RCW 19.86.060, a statute that 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." The statute 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, and in the absence of any contrary Washington authority, the Court should follow the well-established federal framework for Clayton Act claims.

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) (citing 15 U.S.C. § 18). This

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[88] Tr. (Gokhale) 3059:1–3060:3.
[89] DDX 25 at 4; Tr. (Gokhale) 3078:25–3079:15; *see also* Tr. (Gokhale) 3079:16–3082:6.
[90] Tr. (McMullen (Kroger)) 1278:11–21; Tr. (Aitken (Kroger)) 2519:8–2520:21.

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burden is a significant one: 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); *see also Illumina, Inc. v. FTC*, 88 F.4th 1036, 1058–59 (5th Cir. 2023) (observing that a contrary standard "would effectively erase the word 'substantially' from [the statute]").

As the State has acknowledged, 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). 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.

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). 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).

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.

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Baker Hughes, 908 F.2d at 982–83. Defendants can satisfy that burden in many ways, including by offering evidence related to "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.* at 985–86. 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." *Id.* at 991.

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. 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.*

Notwithstanding this burden-shifting framework, the ultimate question remains at all times whether the State has carried its burden to prove that the merger is likely to substantially lessen competition in a defined line of commerce. "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).

ARGUMENT

The elements of the State's case—and the defects—can broadly be sorted into three categories: (1) market definition, (2) competitive effects, and (3) remedy. Within each of these categories, the State failed to carry its burden in numerous ways.

I. The State Did Not Establish a Cognizable Antitrust Market

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The first element of the State's case is to define a cognizable antitrust market. *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974). A "relevant market" consists of (a) a product market; and (b) a geographic market. *Id.* "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). "Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition." *Ohio v. Am. Express, Co.*, 585 U.S. 529, 543 (2018) (citation and brackets omitted). The State bears the burden to establish a cognizable market, and "[f]ailing to define a relevant market alone is fatal to an antitrust claim." *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 957 (9th Cir. 2023).

The State has offered just *one* product market (for supermarkets and supercenters) and *one* geographic market (for city areas). A failure to establish either aspect by a preponderance of the evidence is fatal to the State's case in the merger context, and the State proved neither.

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

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.").

The State's single product market encompasses "supermarkets and [s]upercenters" that "carry a wide assortment of food and other grocery products."[91] Other than the additional

[91] Tr. (Dua) 1586:25–1587:10.

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requirement that stores must be at least 20,000 square feet,[92] Dr. Dua provided little other objective criteria. Costco stores carry a "wide assortment of food and other grocery products" and are at least 20,000 square feet, but is out because its stores are too big or its packages too large. Whole Foods carries every category of product Kroger does, but is out because it is too organic or too boutique. And even Target, one of the largest retailers in the country whose stores in Washington carry all of the items a customer would need for a full grocery shop, is out because its selection is purportedly too limited. The State does not provide any principled explanation for why these retailers are excluded; it simply dismisses them as too different.

Under any mode of analysis, the State's product market arbitrarily excludes close competitors and ignores significant sources of competitive constraints.

1. An Analysis of Reasonable Interchangeability Shows the State's Market Is Too Narrow

The fundamental question for market definition is whether the proposed product market includes all "potential suppliers who can readily offer consumers a suitable alternative to" the defendant's products. *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 136. The testimony, documents, and data uniformly show that the State's narrow view of the market excludes numerous "suitable alternative[s]" to Kroger and Albertsons.

The perspectives of those in the industry are a good place to start when examining market definition, and the evidence here is undeniable. Not a single industry witness appeared in Court and testified that the market is as narrow as the State proposes. Instead, they said the opposite. Target views Costco, Whole Foods, and Trader Joe's as competitors.[93] Amazon gave similar testimony about supercenters, club stores, and so-called "traditional" grocery stores.[94] Costco publicly identifies Walmart, Target, Kroger, and Amazon.com as "significant

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[92] Tr. (Dua) 1586:25–1587:10.
[93] DX 3053 (Conlin (Target)), at R63915–6 (38:02–39:11).
[94] DX 2403, at R42973; Tr. (Heyworth (Amazon.com)) 3447:18–3448:2.

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competitors."[95] Whole Foods identifies Kroger and Albertsons as "key competitors."[96] Not one witness in Court—none—agreed with the State's market definition other than the State's paid expert.

The State urges that even if the evidence shows two grocery retailers compete with each other, this does not mean they are *close* competitors for purposes of the antitrust law, using as an example a fruit stand that sells peaches next door to a Safeway. State Pretrial Br. 17–18; *see also FTC v. Sysco Corp.*, 113 F.Supp.3d 1, 26 (D.D.C. Jun. 23, 2015). But separating fruit stands from grocery stores is a far cry from the State's exclusion of the largest grocery retailers in the country (including two headquartered right here in Washington), even as those retailers themselves describe Kroger and Albertsons as "significant" or "key" competitors.

Not surprisingly, the close competition evidenced by the testimony and documents is corroborated by the data. To test diversion among different grocery retailers, Dr. Israel used an industry-specific, peer-reviewed model (the "EGK Model").[97] In his competing method, Dr. Dua's diversion analysis assumed its own conclusion—by capping the diversion outside of the market to 10%—and depended on limited data sets that lacked important context.[98] By contrast, the EGK Model draws data from thousands of stores across the country and controls for factors like demographics and geography.[99] And what that diversion analysis showed is that some of the most significant sources of diversion from Kroger and Albertsons are being left out of the State's proposed market. For example, Kroger's aggregate diversion ratio to Walmart Supercenters (in the market) is lower than its aggregate diversion ratio to Costco (outside of the market).[100] Likewise, Albertsons' diversion ratio to Fred Meyer (a Kroger banner in the State's market) is lower than the diversion ratio to Costco (outside the State's market).[101]

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[95] DX 148, at R2372–73; DX 149, at R2489–90.
[96] DX 3047 (Oblisk (Whole Foods/Amazon Fresh)) at R63764 (41:12–42:02); DX 2730, at R50969
[97] Tr. (Israel) 3224:9–3225:25.
[98] Tr. (Israel) 3266:1–7, 3265:16–25.
[99] Tr. (Israel) 3224:9–3225:25
[100] Tr. (Israel) 3236:2–14. The actual diversion ratio for any given store will vary.
[101] Tr. (Israel) 3236:18–3237:11.

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The "share-of-wallet" data tells the same story. That data, a mainstay in the industry, shows that Kroger and Albertsons face intense competition from Costco, Target, Amazon.com, and others outside of the State's market.[102] The State has objected that share of wallet does not necessarily show reasonable interchangeability, because retailers may be complements rather than competitors.[103] That is true in the abstract, but here, these retailers are selling *the same goods* to *the same customers*.[104] The distinction among retailers is not the product they are selling (such as air travel vs. bus travel), but in competitive factors like price, quality, and store experience.[105] A customer who buys a bottle of soy sauce from Costco could have gotten that soy sauce from any number of grocery retailers, including Kroger.[106] The product is the same; the difference is in the "go-to-market" strategies that retailers pursue.

The State's misunderstanding about the significance of differentiation permeates much of its case. Superficial differences in a shopping experience—such as a membership program or the physical layout[107]—are actually elements of competition. That is, the facts and data show that "consumers are willing to make tradeoffs on some of the very factors the [State] attempt[s] to use to define [its] market." *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989). That is evident from the State's own theory: Kroger is defined by the State as a "supermarket" whereas Walmart is a "supercenter," yet the State concedes they are in direct competition with one another.

In short, every tool the Court has at its disposal to test reasonable interchangeability—witness testimony, ordinary-course documents, economic data—points toward the same conclusion: The State's product market is too narrow.

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[102] Tr. (Israel) 3343:8–13; Tr. (Kinney (Albertsons)) 1853:17–1858:7, 1937:22–1940:23; DX 1135, at R13894–99; DX 11, at R115; Tr. (Aitken (Kroger) 2491:4–25, 2492:15–22; DX 1135, at R13892.
[103] Tr. (Israel) 3343:8–13.
[104] Tr. (Aitken (Kroger)) 2564:18–22.
[105] Tr. (Israel) 3224:5–3226:12; Tr. (Aitken (Kroger)) 2510:11–2513:23; DX 1336, at R178300–1.
[106] Tr. (McMullen (Kroger)) 1294:3–6.
[107] Tr. (State's Opening) 230:23–233:23; Tr. (Dua) 1586:25–1588:9.

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2. The *Brown Shoe* Practical Indicia Reject the State's Market

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. Importantly, 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 Lab'ys 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, resort to the *Brown Shoe* practical indicia is unwarranted.

But even if the State could use the *Brown Shoe* practical indicia (rather than evidence of interchangeability) to establish a product 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.

First, the grocery industry and the broader public do not recognize "supermarkets" with a certain square footage as "separate economic entit[ies]" from other grocery retailers in Washington. *See Brown Shoe*, 370 U.S. at 325. Witnesses and documents consistently confirmed that the industry views competition as spanning across numerous retail formats.[108] The evidence on this factor goes against the State's product market.

Second, there are no peculiar characteristics and uses of supermarkets that point toward a separate market. Evidence regarding customer diversion and share of wallet show that customers view many different grocery retail formats as interchangeable with one another.[109]

[108] *See, e.g.*, Tr. (Rigsbee (Rosauer's)) 2407:14–2408:13, 2409:6–13, 2410:5–13.
[109] Tr. (Israel) 3234:24–3240:24.

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The average Kroger customer shops at nearly 5 different store formats per month,[110] and Albertsons customers take about 6 trips per week to a variety of formats.[111] And while the State has tried to emphasize the supposed importance of one-stop shopping, the data shows that customers do not in fact place high value on such an experience.[112]

Third, there are no "distinct customers" who solely shop at supermarkets. *Brown Shoe*, 370 U.S. at 325. Once again, the data showing customer substitution and share of wallet confirms as much. In Washington alone, "over 95 percent of shoppers go to at least two different stores a month."[113] This factor does not support the State's market either.

Fourth, pricing variation among grocery retailers is not strictly attributable to difference in format. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (observing that price differences may "represent[] competition on the merits"). Even though Kroger and Albertsons both operate primarily "supermarket" formats, Albertsons' prices are consistently 10–12% higher than Kroger's nationally (more in Washington).[114] And even traditionally higher-priced formats like organic and natural stores are beginning to focus on and invest more in price.[115] Price is therefore not a prime distinguishing factor among formats.

Finally, the State made no effort to prove that "supermarkets" have unique production facilities or specialized vendors unavailable to other grocery retailers. *See Brown Shoe*, 370 U.S. at 325. In fact, the evidence showed that all types of grocery retailers purchase goods from national brand manufacturers and source a substantial percentage of their private label products from third parties.[116] This factor again cuts against the State.

[110] Tr. (Aitken (Kroger)) 2493:5–11.
[111] SX 4448.
[112] DX 1526, at P26727; Tr. (Cloward (Albertsons)) 3024:15–3026:11.
[113] Tr. (Israel) 3240:4–10.
[114] Tr. (Israel) 1756:20–22; *see also* Tr. (McMullen (Kroger)) 1216:14–17; Tr. (Sankaran (Albertsons)) 1367:15–16; Tr. (Aitken (Kroger)) 2514:8–11; *see also* Tr. ((Groff (Kroger)) 678:9–15.
[115] DX 3047 (Oblisk (Whole Foods / Amazon Fresh)), at R63770 (93:12–94:9).
[116] Tr. (Winn (C&S)) 1504:18–25; Tr. (Ailawadi) 2108:9–12.

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To the extent it is even helpful given the extensive evidence of reasonable interchangeability available, the practical indicia evidence refutes, rather than supports, any distinct “supermarket” or “supercenter” market.

B. The State’s Geographic Markets Are Arbitrary

The State’s approach to the geographic aspect of its proposed market fares no better. Rather than determine the competition faced by each grocery store that Kroger owns or will own—as the law demands—Dr. Dua grouped various stores into arbitrary hand-drawn “city areas.”[117] Dr. Dua defined those city areas by looking at the locations of “city centers,” city boundaries, city halls, highways, rivers, or zip codes.[118] He then assumed that all of the stores in those city areas face the exact same level of competition (regardless of geography) and that the stores face no competition outside the city area.

Dr. Dua’s approach is not an exercise in economics. The question for geographic market is which stores provide a “suitable alternative” to one another based on actual consumer behavior. *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 136. Dr. Dua’s approach fails to do that, because it is not based on any economic data regarding the competition faced by each store within a city area. Courts have rejected similar efforts to define geographic markets by reference to arbitrary government boundaries in lieu of evidence. *See 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 borders); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 749 (3d Cir. 1996) (finding plaintiffs state-based geographic market of New Jersey or Northern New Jersey “dubious”).

Rather than “defin[ing] markets ex ante,” the proper approach is to analyze “the substitution patterns” of the stores, defining the geographic market by looking at where consumers at *each* store would turn to in the face of a price increase or quality decrease.[119]

[117] Tr. (Israel) 3243:14–3245:6.
[118] Tr. (Israel) 3243:14–3245:6.
[119] Tr. (Israel) 3223:4–3224:8.

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Accordingly, a proper geographic market analysis requires a review of diversion ratios store by store, taking into account the demographics of the customers, the distance and retail format of other competitors, and other factors that may affect the zone of competition. That is what the EGK model measures; Dr. Dua's city areas measure nothing.[120]

One example illustrates the problem at the core of Dr. Dua's city areas. In Edmonds, Dr. Dua defines a geographic market that includes, near its edge, Safeway #1297. Rather than analyze the competition that particular Safeway faces, Dr. Dua included it within the larger Edmonds city area and assumed it competes equally with all other grocery retailers in that area. The consequence is that the geographic market Dr. Dua has attempted to define excludes the grocery retailers that account for *95%* of the diversion of sales from that Safeway.[121]

Beyond these conceptual problems, Dr. Dua's city area approach has no basis in the facts. It is true (and undisputed) that grocery competition is largely "local," but that does not mean that Dr. Dua's geographic market is correct simply because it purportedly focuses on "local" competition. Grocery retailers do not look toward municipal or regulatory boundaries like zip codes to determine competition.[122] And customers will drive farther to reach a Walmart or a Costco than they will to shop at a Kroger.[123] A market must account for these kinds of "commercial realities." *Tenet Health Care*, 186 F.3d at 1052. A geographic market analysis therefore must assess how far customers actually are willing to go in order to seek out alternatives. Dr. Dua's analysis does not even try to conduct that analysis.[124]

In defense of Dr. Dua's hand-drawn maps, the State has argued that "fuzziness" is inherent in defining geographic markets. 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 captures 100% of the competition—but excluding *95%* of a focal store's competition is not an issue of

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[120] Tr. (Israel) 3250:4–3252:19.
[121] Tr. (Israel) 3250:4–3252:19.
[122] Tr. (Aitken (Kroger)) 2494:15–22.
[123] Tr. (Israel) 3228:14–19; Tr. (Sankaran (Albertsons)) 1453:11–14; Tr. (Kinney (Albertson)) 1997:5–12.
[124] Tr. (Israel) 3250:4–3252:19.

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“fuzziness.” It is a fundamental defect in the way the State and its expert have approached this litigation. None of the cases on which the State relies suggested that exclusion of such a significant portion of the competition is acceptable when defining a geographic market. *See Phila. Nat’l Bank*, 374 U.S. at 359–60 & n.37 (finding no issue with geographic market that excluded 2% of the merging banks’ customer deposits); *Sysco*, 113 F. Supp. 3d at 50 (approving market that captured 75% of each focal store’s sales).

C. The Hypothetical Monopolist Test Does Not Support the State’s Markets

The State’s markets are not supported by the hypothetical monopolist test. Courts often confirm that markets have been properly defined by using 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). Here, Dr. Dua attempted to conduct such a test, but committed numerous errors in doing so, such as assuming that a hypothetical monopolist in his proposed market could raise prices in all of its stores without increasing diversion to stores outside of his defined city area and relying on artificially high gross margins that do not accurately reflect the actual costs of doing business.[125] Dr. Israel corrected these and other errors, and reran the hypothetical monopolist test using diversion ratios from the EGK model.[126] His conclusion was that virtually no iteration of the State’s proposed markets passed the hypothetical monopoly test.[127]

D. Dr. Dua’s “Sensitivities” Cannot Save the State’s Market Definition

A failure to prove either aspect of a relevant antitrust market—product or geography—is dispositive and fatal. *See Coronavirus Rep.*, 85 F.4th at 957. Accordingly, if Dr. Dua’s “supermarkets” product market is wrong (it is) *or* if his “city area” geographic market is wrong

[125] Tr. (Israel) 3266:1–7, 3267:2–10, 3268:3–3269:2.
[126] Tr. (Israel) 3266:10–15.
[127] Tr. (Israel) 3260:5–9.

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(it is), the State has failed to establish the first element of its case and therefore loses. The Court may end the analysis there.

In a transparent but clumsy attempt to shore up the obvious weaknesses in his market analysis, Dr. Dua purported to run certain "sensitivities" on his proposed markets. In pretrial proceedings, the State urged that the Court could enjoin the merger using these "sensitivities" even if the State failed to prove its proposed "supermarkets" market, because the law allows the Court to define its own antitrust market. That is wrong as a matter of merger law. Under 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 commerce*," 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)). A merger plaintiff that fails to prove its proposed market is no more entitled to a favorable judgment than a negligence plaintiff that fails to establish duty or a contract plaintiff that fails to establish a meeting of the minds.

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 apply any economic tools to analyze whether the "sensitivities" he tested could themselves comprise a relevant market.[128] Moreover, as Dr. Israel made clear, Dr. Dua's "sensitivities" analysis still suffers from fatal flaws. Most crucially, Dr. Dua's geographic markets are still arbitrarily drawn, and are therefore both over- and under-inclusive. Dr. Dua's geographic "sensitivities" rely on trade circles of three or five miles, but those circles are no less arbitrary than Dr. Dua's hand-drawn maps.[129] And Dr. Dua's metropolitan statistical areas are untethered from anything that could be called an economic or competitive analysis: Those areas stretch across large regions, roping in (and giving full competitive weight) to stores miles away from

[128] Tr. (Israel) 3254:11–3256:1.
[129] Tr. (Israel) 3254:12–22, 3255:2–8.

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a focal store. The State's flawed market definition cannot be salvaged by the half-measure "sensitivities" Dr. Dua offered. That Dr. Dua even offered these "sensitivities" exposes his lack of confidence in the market he attempted to define.

* * *

The State chose to go all in on a "supermarkets" market in "city areas." It failed to prove either aspect of that proposed market, and as a consequence, its analysis of market shares lacks any meaning.[130] *See FTC v. RAG-Stiftung*, 436 F. Supp. 3d. 278, 319–20. Because the State failed to prove an essential element of its claim, it loses. Period.

II. Defendants Carried Their Rebuttal Burden and the State Failed to Carry Its Ultimate Burden as to Competitive Effects

Market definition and market concentration statistics are not the end of the case, however. Concepts like market share and HHI are only "prox[ies] for predicting the ability of firms in the market to exercise market power." *FTC v. Occidental Petroleum Corp.*, 1986 WL 952, at *7 (D.D.C. Apr. 29, 1986). They are, in effect, a "short cut" to predicting competitive effects. *AT&T*, 916 F.3d at 1032.

In fact, establishing a substantial increase in market concentration is the *minimum* a plaintiff must do to even *start* the inquiry into the competitive effects of the merger. Under *Baker Hughes*, all market concentration statistics do is establish that a merger is worthy of closer examination by the Court. If no other evidence of competitive effect is available, then market concentration statistics may carry the day. But where, as here, there is actual evidence of competition and competitive effects, that is where the Court must focus its attention.

That analysis must account for the *entire* transaction at issue, which includes the divestiture. It is a fundamental rule of merger law that the plaintiff "must address the circumstances surrounding the merger as they actually exist." *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1093 (N.D. Cal. 2023); *see also United States v. Atl. Richfield Co.*, 297 F. Supp.

[130] Tr. (Israel) 3254:12–22.

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1061, 1067–68 (S.D.N.Y. 1969) (criticizing complaint that "carefully avoid[ed] even a mention" of a planned divestiture as presenting less than "the complete picture"), *aff'd sub nom. Bartlett v. United States*, 401 U.S. 986 (1971). That is because determining whether a "challenged transaction may substantially lessen competition in violation of [the antitrust laws] requires the Court to review the *entire* transaction in question," including any "divestiture" of assets to a third party. *Arch Coal* in Limine Order, 2004 WL 7389952, at *3.

Courts have therefore rejected the contention that courts should treat the acquisition and the divestiture as "separate transactions" and place the burden on defendants to show that "that the divestiture will replace the competitive intensity lost as a result of the merger." *UnitedHealth*, 630 F. Supp. 3d at 132–33 (quotation marks omitted). That is because doing so would "contradict[] the text of [the antitrust laws] and the *Baker Hughes* burden-shifting framework," *id.* at 133, as the relevant transaction is "the proposed acquisition agreement *including* the proposed divestiture," *id.* at 134 n.5; *see also Arch Coal* in Limine Order, 2004 WL 7389952, at *2.[131]

The circumstances here make clear why consideration of the divestiture is paramount. Dr. Dua conceded that the world he primarily analyzed for competitive effects—*which did not include the divestiture*—did not and will never reflect the reality of the transaction.[132] But after the transaction *including* the divestiture, the combined firm will own 205 stores in Washington, fewer than what Albertsons (the firm with the larger presence in Washington) currently owns. And C&S, as the divestiture buyer, will own 124 stores in Washington, more than what Kroger (the firm with the smaller presence in Washington) currently owns. In other words, the merger will actually *increase* overall competition in Washington by reducing the delta in store count between the two post-merger grocery retailer firms.

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[131] The parties dispute whether divestiture must be accounted for in the State's *prima facie* case or only at the second and third steps of *Baker Hughes*. That difference is academic, where Defendants plainly have *produced* evidence regarding the divestiture and the State therefore retains the ultimate burden of persuasion, which must account for the divestiture. *See UnitedHealth*, 630 F. Supp. 3d at 134.

[132] Tr. (Dua) 1732:19–1733:15.

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The competitive effects and efficiencies analyses set forth below therefore account for the divestiture. It is up to the State to prove that the divestiture should be excluded from consideration, and it did not do so. *See infra* Section III.

A. The State's Case Fails to Account for Commercial Realities

At the most basic level, the State's case fails because it rests on a fundamental misapprehension of the facts: That Kroger's economic and business motivations rest solely on the revenue it earns from grocery sales. That premise is wrong, and once corrected for, there is little left of the State's case.

The principal question after the State has made out its *prima facie* case is whether the state's market share analysis "inaccurately predicts the relevant transaction's probable effect on future competition." *Baker Hughes*, 908 F.2d at 991. Factors relevant to that inquiry include a company's "incentives to preserve its [existing] business model." *UnitedHealth*, 630 F. Supp. 3d at 150. That is in part because evidence "that it could be possible to act in accordance with the Government's theories of harm is a far cry from evidence that the merged company is likely to do so." *AT&T*, 310 F. Supp. 3d at 210.

Here, the incentives for Kroger to "preserve its [existing] business model" are clear and undisputed: Kroger makes more money over the long term by investing in lower prices, because doing so feeds its higher margin non-grocery revenue. Numerous witnesses testified as much,[133] and the evidence bears that out: Kroger has been lowering its margins for decades pursuant to this strategy, yet still maintaining strong profits.[134] Put simply, lower prices allow Kroger to attract more customers, thus generating more data and customer insights that fuel its alternative profits business, which then generates more revenue that can be reinvested in lower

[133] Tr. (Aitken (Kroger)) 2508:7–9, 2517:25–2519:3; Tr. (McMullen (Kroger)) 1260:17–1261:8.
[134] DX 2559, at R46127; Tr. (McMullen (Kroger)) 1261:23–1262:17, 1208:5–12; Tr. (Cosset (Kroger)) 2584:10–2585:25.

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prices.[135] The incentive therefore is always to lower prices, in part because of the higher margins Kroger earns from its alternative profits business.[136]

The State has not rebutted this evidence, but instead, tried to sidestep it. First, the State moved to exclude evidence about Kroger's post-merger price investment plans.[137] It won that motion only to the extent that such plans are untethered from Kroger's economic, financial, or business incentives,[138] and plainly they are not. It also has argued that Kroger's investments in price can be analyzed only through the rubric of efficiencies.[139] That is wrong: The "prospect of efficiencies from merger" is just one of many competitive effects factors recognized by "hornbook law," *Baker Hughes*, 908 F.2d at 985, and courts have expressly recognized that a company's incentive to preserve its current "business model" is a relevant factor, *UnitedHealth*, 630 F. Supp. 3d at 150. Next, the State argued that Kroger's pricing incentives are relevant only insofar as they are tied to a benefit or change arising out of the merger.[140] Wrong again: 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. And in any event, the merger in fact will give Kroger greater ability to invest in lower prices and feed its flywheel.[141] And finally, the State has intimated that Kroger's business and financial incentives from the flywheel are irrelevant unless supported by expert economic analysis.[142] There is no precedent for that standard. *See New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020) ("Relevant evidence may include unique economic circumstances and nonstatistical evidence that undermines the predictive value of market share statistics . . . ."); *F.B. Leopold Co. v. Roberts Filter Mfg. Co.*, 882 F. Supp. 433, 452 (W.D. Pa.

[135] DX 1254, at R16536; Tr. (Aitken (Kroger)) 2499:14–2500:7; DX 2921, at R57783; Tr. (Cosset (Kroger)) 2584:10–2585:15.
[136] Tr. (McMullen (Kroger)) 1265:18–1266:21.
[137] State's Motion in Limine Re: Price Investment Evidence (Aug. 27, 2024).
[138] Order Granting State's Motion in Limine Re: Price Investment Evidence (Sep. 18, 2024).
[139] State's Supplemental Brief Re: Price Investment Evidence (Sept. 23, 2024) at 3–5 ("State's Supplemental Br.").
[140] State's Supplemental Br. 3.
[141] Tr. (Cosset (Kroger)) 2608:14–19, 2609:21–2610:2.
[142] State's Supplemental Br. 7.

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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).

In fact, far from prohibiting this Court from considering the incentives generated by Kroger's multi-revenue business model, antitrust law *requires* that it be taken into account. Where a business "provides separate but interrelated services," any assessment of competition *must* account for both of those services. *Am. Express*, 585 U.S. at 534, 544. For example, a credit card company "might well *lose* money on the cardholder side by offering 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. 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.[143] It would be legal error for the Court to ignore the interrelatedness of those business lines.

Once Kroger's business model and actual economic incentives are accounted for, the State's case crumbles. Every analysis Dr. Dua ran was based on the idea that Kroger's *only* economic motivation comes from seeking to maximize its profits from the grocery retail line of business. He never once considered if Kroger may have economic incentives outside of retail that could influence his decisionmaking. But the State carries "the ultimate burden of proving [an antitrust] violation by a preponderance of the evidence." *AT&T*, 310 F. Supp. 3d at 189 (citations omitted). Kroger has produced evidence undermining the predictive value of the State's market share analysis, and the State has no response whatsoever. This is a complete failure of evidence on the part of the State, and it compels rejection of the claims.

B. Economic Evidence Confirms There Are No Substantial Anticompetitive

[143] Tr. (Cosset (Kroger)) 2569:3–9; Tr. (Aitken (Kroger)) 2507:23–2508:3; 2509:18–2510:4.

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1 **Effects**

2 Even if the Court were to disregard the commercial realities of Kroger's economic
3 incentives, the State still has not carried its ultimate burden of showing that the transaction is
4 likely to substantially lessen competition. Kroger has produced economic analyses showing
5 that there is no evidence that prices will increase or quality will decrease after the merger.

6 **1. Walmart, Not Albertsons, Drives Kroger's Prices**

7 The State's focus on the competitive relationship between Kroger and Albertsons is
8 misplaced because *Walmart*, not Albertsons, is the driver of Kroger's prices. Kroger uses
9 Walmart as the price target for nearly every pricing strategy in its key pricing program.[144] And
10 Kroger price checks Walmart in every single pricing zone in which both it and Albertsons
11 compete, including in Seattle, where there is not a Walmart in the city limits.[145] As Dr. Dua
12 conceded, a firm's pricing strategy must be considered when assessing competitive effects.[146]

13 To test this evidence, Dr. Israel analyzed the extent to which Kroger's price spread to
14 Walmart is affected by the presence of a nearby Albertsons. That analysis showed that there is
15 no measurable difference: Kroger prices just as closely to Walmart regardless of whether there
16 is an Albertsons nearby.[147] In contrast, there is low correlation between Albertsons' prices and
17 Kroger's—even lower than most other grocery retailers.[148]

18 Dr. Israel went even further, though, and assessed whether Albertsons has any
19 independent impact on Kroger's prices. Because Kroger and Albertsons do *not* compete in
20 most geographies, there is a rich cache of data about what happens when Kroger and Albertsons
21 do or do not compete with each other.[149] Controlling for various factors such as demand, total
22 grocery sales in an area, and local demographics, Dr. Israel analyzed thousands of markets and

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[144] Tr. (Groff (Kroger)) 559:4–11, 559:18–560:11.
[145] Tr. (Israel) 3206:1–23, 3206:24–3207:13.
[146] Tr. (Dua) 3511:17–3512:8.
[147] Tr. (Israel) 3212:17–3213:13.
[148] Tr. (Israel) 3214:1–6.
[149] Tr. (Israel) 3218:9–14.

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1 concluded that Kroger's pricing (measured by its margins) is not affected in any statistically
2 significant way by whether it is competing with a nearby Albertsons.[150] In other words, if all
3 of the Albertsons stores simply disappeared tomorrow, the economic data suggests that
4 Kroger's prices would not go up *at all*. This kind of overlap analysis is precisely the kind of
5 data courts historically have looked for when assessing competition. *See FTC v. Whole Foods*
6 *Mkt., Inc.*, 548 F.3d 1028, 1039–40 (D.C. Cir. 2008); *Staples*, 970 F. Supp. at 1082.

7 The State's response to that data is to point to a smattering of documents demonstrating
8 instances in which Kroger or Albertsons have monitored or discussed promotional pricing or
9 services at the other. At the outset, "the mere fact that a merger eliminates competition between
10 the firms concerned has never been a sufficient basis for illegality." *Dresses for Less, Inc. v.*
11 *CIT Grp./Com. Servs., Inc.*, 2002 WL 31164482, at *12 (S.D.N.Y. Sept. 30, 2002); *see also*
12 *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1169 (N.D. Cal. 2004) ("Simply because
13 [the merging parties] often meet on the battlefield and fight aggressively does not lead to the
14 conclusion that they do so in the absence of [another competitor]."). All horizontal mergers
15 eliminate head-to-head competition between the parties: The critical question is what
16 competition will be leftover. That is what the data analyzes. Moreover, Mr. Aitken testified
17 that Kroger does *not* adjust its pricing based on promotional offers by Albertsons.[151]

18 The State's other response is that QFC—a Kroger banner in Washington—has not
19 historically followed Kroger's Walmart-focused pricing strategy. But QFC is being divested
20 to C&S, and so Kroger's current pricing policies there are uninformative of post-merger
21 competition.[152] Moreover, Kroger's Walmart pricing strategy is "culturally ingrained within
22 Kroger," and the merger gives Kroger the opportunity to "compete with long-term with
23 Walmart, Costco, and Amazon.[153] That it is "possible" for Kroger today to price QFC
24 differently does not prove it is "likely" to change its national pricing policies post-merger.
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[150] Tr. (Israel) 3217:7–19, 3218:9–14.
[151] Tr. (Aitken (Kroger)) 2499:5–2500:14
[152] Tr. (Israel) 3312:23–3313:4; Tr. (Florenz (C&S) 865:9–11; Tr. (Groff (Kroger)) 645:14–19, 649:3–7.
[153] Tr. (Aitken (Kroger)) 2497:17–22; Tr. (Aitken (Kroger)) 2514:5–7.

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AT&T, 310 F. Supp. 3d at 210. There simply is no evidentiary basis for the State's speculation that an anachronistic pricing policy at one banner that is being divested to C&S somehow suggests a substantial lessening of competition.[154]

2. There Will Be No Measurable Upward Pricing Pressure

The absence of any measurable effect of Albertsons on Kroger's prices is confirmed by the General Upward Pricing Pressure Index (GUPPI) analyses conducted by both Dr. Israel and Dr. Dua. This metric assesses whether a change in market structure is likely to result in upward "pricing pressure" (not necessarily a price increase) in a given area. A GUPPI test will *always* result in a positive number in the context of a merger,[155] and a modest GUPPI of less than 5% suggests that the merger is unlikely to actually result in higher prices.[156]

Using diversion ratios derived from the EGK model and margins derived from the parties' ordinary course documents, Dr. Israel's GUPPI analysis concluded there are no stores or "city areas" in Washington with a post-merger GUPPI greater than 5%.[157] These results indicate that Kroger is not likely to have any economic motivation—even setting aside its flywheel business model, its focus on Walmart, or the lack of any measurable effect of Albertsons on Kroger's prices—to raise prices after the merger.

Dr. Dua's competing GUPPI analysis fell well short of establishing otherwise. As an initial matter, the only store-level or city-level GUPPI analysis Dr. Dua ran excluded the divestiture, even though he admitted there is no world in which the post-merger firm will actually own all of the assets he attributed to Kroger in his analysis.[158] Dr. Dua conducted no store-level or city-level GUPPI analysis accounting for the divestiture,[159] which means that although the parties agree that competition for grocery retail is "local," Dr. Dua did not run any

[154] As the firm that will control pricing post-merger, it is Kroger's pricing strategy that matters. Tr. (Israel) 3219:19–3200:2.
[155] Tr. (Dua) 1735:16–22.
[156] Tr. (Israel) 3299:17–3300:15.
[157] Tr. (Israel) 3302:20–3303:2.
[158] Tr. (Dua) 1732:19–1733:12, 1747:9–12.
[159] Tr. (Dua) 1747:9–15.

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analysis of the likely pricing effect of the merger including the divestiture on "local" competition. His analysis therefore did not address the statutory question of whether the merger will substantially lessen competition "in any line of commerce." RCW 19.86.060.

Setting aside Dr. Dua's failure to consider the divestiture, the key difference between Dr. Israel's GUPPI analysis and Dr. Dua's is margins: Dr. Israel used *variable* margins, while Dr. Dua used *gross* margins. Gross margins accounts only for the "wholesale side of the costs," while ignoring all of the variable costs that increase or decrease depending on sales volume (e.g., labor, goods not for resale, etc.).[160] But GUPPI requires the use of margins that incorporates all variable costs.[161] That makes intuitive sense: A firm's ability to raise prices must account for the effect of those prices on *all* of its costs, not just those accounted for in gross margins.[162] Dr. Israel's variable margins were derived from ordinary course Kroger documents (not created for litigation, as the State intimated), reflecting that Kroger in fact uses variable margins in the course of its business.[163] The right diversion ratios (from the EGK Model) and the right margins foreclose any argument that the merger is likely to generate any significant upward pricing pressure sufficient to result in an increase in prices.

C. The Efficiencies Greatly Outweigh Any Modicum of Competitive Harm

The significant efficiencies and consumer benefits the merger will generate also rebut the State's *prima facie* case, an independent basis to reject the State's claims.

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). 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." *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207 (S.D.N.Y.

[160] Tr. (Israel) 3267:6–10, 3296:13–3297:4; DDX 26 at 58.
[161] Tr. (Israel) 3297:10–11.
[162] Tr. (Israel) 3297:5–20.
[163] Tr. (Israel) 3295:12–22; 3297:5–20; DX 2640, at R48821.

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2020); *see also FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 151 (D.D.C. 2004) (efficiencies can affect "whether the proposed transaction will substantially lessen competition.").

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.[164] To evaluate whether an efficiency is merger-specific, courts consider whether the efficiencies could be recognized on a comparable timeline and with comparable investment 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 show they will be realized with absolute certainty. *Deutsche Telekom*, 439 F. Supp. 3d at 213.

The evidence established that between [REDACTED] of Kroger's estimated synergies are merger-specific and verifiable.[165] The State offered no expert testimony otherwise. And although the State quibbled that Mr. Gokhale's analysis depended on the reliability of the work done by third-party consultants,[166] the State did not criticize *that* work either. The only efficiencies the State examined in any depth were with respect to price discovery—the reality that once Kroger discovers the prices Albertsons paid for the same products, it will be in a better position to negotiate where Kroger paid more for the same products. The State suggested that Kroger and Mr. Gokhale assumed that the combined firm will invariably receive the lower of the two prices currently paid by the merging parties for goods.[167] As both Mr. Maharoof and Mr. Gokhale repeatedly explained, that is *not* how the efficiencies model works—the model accounts for the risk that manufacturers will resist efforts to obtain the lower pricing, ultimately predicting that Kroger will capture only a *fraction* of the total possible savings from price discovery.[168]

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[164] *See* Tr. (Dua) 1693:21–1694:4; Tr. (Gokhale) 3049:1–5, 3050:1–11; DDX 25, at 3. The 2023 Merger Guidelines are not materially different in this respect. *See* 2023 DOJ FTC Merger Guidelines § 3.3.
[165] DDX 25, at 3; Tr. (Gokhale) 3050:1–11.
[166] Tr. (Gokhale) 3128:11–3129:14.
[167] Tr. (Gokhale (Defendants)) 3112:24–3122:14.
[168] Tr. (Maharoof (Kroger)) 3009:6–18, 3010:13–3011:1; Tr. (Gokhale) 3118:18–25, 3122:1–14; *see also* Tr. (Maharoof (Kroger)) 2965:9–18.

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The evidence shows that Kroger will pass on the efficiencies from the merger to customers. As described in detail above, that is not a bare promise—Kroger has a business incentive (and, in fact, a business *need*) to pass on those efficiencies so because doing so is an integral part of Kroger's flywheel business model that it has adhered to for decades, including in past corporate transactions involving Harris Teeter and Roundy's.[169] This case is therefore far afield from those cited by the State in which a party made a hollow promise to take pro-competitive actions contrary to their own economic interest after the transaction. *See United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 50 (D.D.C. 2022); *H & R Block*, 833 F. Supp. 2d at 82. Kroger's price investments are profit-maximizing, and there is no reason to speculate that it will change its model going forward.

D. Other Factors Undermine the State's Theory

Finally, other context-specific factors confirm that the State has failed to carry its ultimate burden of persuasion.

First, retail grocery faces a strong threat of entry or expansion. Market concentration is a poor measure of competition where, like here, "the threat of outside entry" constrains pricing. *H.J. Heinz*, 246 F.3d at 717 n.13 (quotation marks omitted). Likewise, "[t]he 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) (emphases added). Here, the evidence shows that Kroger's closest competitors—including Target,[170] Costco,[171] Amazon,[172] and Aldi[173]—are all expanding rapidly. Kroger therefore cannot afford to raise prices or reduce quality: Its competitors are already waiting to pounce.

[169] DX 2559, at R46136; Tr. (Aitken (Kroger)) 2514:15–2515:21.
[170] DX 3053 (Conlin (Target)), at R63912–13 (30:21–31:11).
[171] Tr. (George (Costco)) 2303:15–19.
[172] Tr. (Heyworth (Amazon)) 3449:25–3450:18.
[173] Tr. (Kinney (Albertsons)) 1901:25–1902:11; DX 2438, at R44178.

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Second, there is no threat of increased coordinated conduct. *See Oracle*, 331 F. Supp. 2d at 1113, 1122 (a "strong presumption" of competitive effects improper if no threat of coordinated conduct). In arguing otherwise, the State and Dr. Dua once again ignored the divestiture and overlook the basic reality that the merger will actually *reduce* overall concentration in the State of Washington, making coordinated effects less likely, not more.[174] After the merger, C&S will own more stores in Washington (124) than Kroger does today (114), thus shrinking the current gap between Kroger and Albertsons/C&S.[175] Additionally, the nature of the grocery industry does not lend itself to coordination. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 238 (1993) (coordinated conduct can be facilitated by "a stable market environment" and "a small number of variables upon which the firms seeking to coordinate their pricing may focus"). There is rapid evolution in retail formats and customer services that make lockstep pricing impossible,[176] and even among existing retailers, there is significant variation in pricing strategies.[177] The State urged that the merger presents a threat of coordinated pricing because C&S "will be dependent on Kroger for pricing" post-merger,[178] but that is simply not accurate: The TSA gives C&S full autonomy from day one to make pricing decisions.[179]

III. The State Cannot Carry Its Burden to Show that the Divestiture Will Fail

The above competitive analysis considers, as it must under the law, the transaction *including* the divestiture. When properly accounted for, the divestiture ends any case the State could muster.

That is why the State has worked hard to all but exclude the divestiture from the case by picking at aspects of the divestiture, challenging C&S's commitment to retail grocery, and scrutinizing the business judgment of dozens of experienced consultants and executives. But

[174] Tr. (Israel) 3280:18–23.
[175] Tr. (Israel) 3318:4–6; Tr. (Florenz (C&S)) 864:24–865:8.
[176] Tr. (Groff (Kroger)) 673:15–674:2.
[177] Tr. (Groff (Kroger)) 679:2–15.
[178] Tr. (Dua) 3515:4–9.
[179] SX 3748, at P49409.

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the law does not call upon courts to decide whether a proposed divestiture (or other corporate transaction) is a good deal or bad deal, whether the buyer budgeted too much or too little for a project, or whether the buyer's marketing plans are perfectly calibrated to appeal to customers. All of those questions involve the exercise of business judgment, and courts do not typically second-guess the informed business judgment of sophisticated parties. *See Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990).

Instead, the role of the Court is to make a *legal* judgment about whether the divestiture plan *enables competition* by the buyer such that the merger is not likely to substantially lessen competition. That requires the Court to consider basic factors about 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." *UnitedHealth*, 630 F. Supp. 3d at 135 (citation omitted). These factors are not an invitation for courts to substitute their judgment for the divestiture buyer's, but rather a checklist of the kinds of things courts should confirm have been accounted for, evaluated, and planned for by the divestiture. The State cannot carry its burden on any of those factors.

A. The Divestiture Is Part and Parcel of the Transaction

The divestiture is a "virtual certainty" if the deal goes forward, *UnitedHealth*, 630 F. Supp. 3d at 135, and the State has identified no "significant obstacles to closing," *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 305 (D.D.C. 2020). The transaction agreements require the parties to use their "reasonable best efforts" to consummate the transaction, and contemplate the "divestiture" of some assets in order to resolve "any and all impediments under Antitrust Law."[180] *See id.* at 304 (noting that "[t]he parties to the divestiture . . . have agreed to use all commercially reasonable efforts to ensure the closing conditions are satisfied"). And with its $900 million equity commitment and additional debt funding, C&S is more than "capable of closing financially." *Id.* This factor strongly cuts against the State.

[180] DX 2552, at R45473–75.

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B. C&S and the Incoming Talent Have Significant Experience

The evidence shows that C&S has the "experience necessary to compete effectively in the [retail grocery] industry." *RAG-Stiftung*, 436 F. Supp. 3d at 305. Through its wholesale business, C&S provides to retail customers the same services that will be necessary to operate the retail stores.[181] And C&S has its own, admittedly modest, grocery retail experience, currently operating 25 retail supermarkets and franchising over 150 retail stores.[182] Beyond that retail experience, C&S also has a nationwide supply chain network, which even the State's expert recognized will benefit C&S as a retailer.[183] In all of these aspects, C&S already "grapples with challenges much like those [that retailers] face, such as security of supply, inventory, tracking, forecasting, and distribution." *Id.*

More significant than C&S's existing experience, however, is the experience of the team that will actually be operating the C&S retail business post-merger. There is no talismanic significance to the identity of the nominal equity holder of the divested assets: What matters is who will actually be running the business. *See UnitedHealth*, 630 F. Supp. 3d at 137 (crediting the buyer's "large team of individuals with extensive experience"). And here, the management team C&S is inheriting from the merger—along with its own acquired talent—has a "wealth of experience" in grocery retail, which will be "an important component in helping [C&S] replace [Albertsons'] competitive intensity." *RAG-Stiftung*, 436 F. Supp. 3d at 305.

It starts at the top with Susan Morris, the current Chief Operating Officer of Albertsons and the future CEO of retail at C&S. Ms. Morris has some 40 years of relevant experience, currently oversees operations at just under 2,300 stores at Albertsons, and is already leading operations at 83.9% of the divestiture stores.[184] Joining Ms. Morris will be many of the Albertsons division presidents,[185] Michelle Larson (from Albertsons) as the chief merchant for

[181] Tr. (Winn (C&S)) 1513:13–1516:17.
[182] Tr. (Winn (C&S)) 1515:5–1516:17.
[183] Tr. (Ailawadi) 2024:17–24.
[184] Tr. (Winn (C&S)) 1541:11–16; Tr. (Morris (Albertsons)) 2763:22–2764:15.
[185] Tr. (Winn (C&S)) 1541:2–1547:7.

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the retail business,[186] Brent Stewart (from Kroger) to continue leading the QFC division,[187] Paul Hertz (from Albertsons) to continue working on safety and quality,[188] and a pricing team from Albertsons.[189] Most crucially, the ~67,000 store-level associates who work on the ground to operate the stores today will continue to do so after the merger.[190]

These are the actual people who will be operating the divestiture stores—not the existing retail employees at C&S with more limited or smaller scale experience. Viewed in that light, the State's arguments about C&S's alleged lack of retail experience simply make no sense.

C. C&S Is Receiving the Functional Equivalent of a Standalone Business

The assets C&S is receiving through the divestiture package are "more than sufficient" to enable C&S to "effectively run[]" the divestiture stores. *RAG-Stiftung*, 436 F. Supp. 3d at 305. Indeed, the evidence shows that the assets provide C&S "everything else that's needed to run a stand-alone business." *Id.* at 305–06.

First, C&S is acquiring nearly 600 stores, along with several distribution centers and division offices right here in Washington, a dairy manufacturing plant in Denver, and thousands of talented associates.[191] The State has not argued (and could not argue) that the number of stores, distribution centers, supporting assets, or conveying associates is insufficient.

Second, C&S is acquiring several valuable retail grocery banners, including QFC and Haggen.[192] As a result, C&S will need to re-banner only 62 stores in Washington.[193] The TSA provides C&S sufficient time—three years—to be "thoughtful and methodical" about its re-bannering plans,[194] exactly the kind of planning Professor Ailawadi urged will be

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[186] Tr. (Winn (C&S)) 1542:17–25.
[187] Tr. (Winn (C&S)) 1543:14–1544:5.
[188] Tr. (Winn (C&S)) 1544:9–20.
[189] Tr. (Winn (C&S)) 1545:16–18.
[190] Tr. (Morris (Albertsons)) 2788:1–21; 2816:1–13.
[191] SX 3748, at P49131–247 (§§ 1.1, 2.3, 2.9, 2.10, 6.16, 6.15, 9.1); DX 2915, at R57286 (Schedule 2.1(a)–K), R57297–7309 (Schedule 2.1(c)–A), R57309–48 (Schedule 2.1(c)–K); DX 1058, at R11880, R11920.
[192] Tr. (Morris (Albertsons)) 2798:19–2799:5; DX 1058, at R11892.
[193] Tr. (Morris (Albertsons)) 2800:17–19.
[194] Tr. (Morris (Albertsons)) 2787:23–2798:10.

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necessary.[195] The State's rebannering expert, Joseph Welsh, conceded that he did not "take any issue . . . with [C&S's] overall plan" for rebannering.[196]

The State has objected that C&S will face "challenges" in re-bannering some of its stores and that it has not budgeted enough money for the project. C&S will of course face challenges: That is the essence of competition, and it is why the deal model estimates a significant drop in sales immediately following rebannering.[197] As for the budget, Mr. Welsh all but admitted that his testimony was directed at the wrong version of the business plan, with the most recent business plan addressing many of his concerns.[198] And in any event, C&S has a [redacted] capital expenditure budget it can draw upon for rebannering, if necessary.[199] Any disagreements at the margins about the proper amount to budget for rebannering are well beyond the scope of this Court's inquiry into the divestiture.

Third, C&S is receiving five Albertsons private label brands and also will receive licenses to other Albertsons and Kroger private label brands for up to four years.[200] The State has criticized the depth of C&S's private label portfolio, but that level of line-item scrutiny is precisely the kind of inquiry the law does not call upon courts to make. Moreover, the data shows that a grocery retailer's private label brands are not a significant factor in attracting customers,[201] making any dispute on this issue largely academic. As for the time C&S will need to develop and transition to more of its own private label brands, Professor Ailawadi admitted that private label brands can be developed in as little as 18 months and manufacturing

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[195] Tr. (Ailawadi) 2066:13–2067:6.
[196] Tr. (Welsh) 1118:18–20, 1112:5–8.
[197] SX 2249, at "Inputs" tab. Mr. Welsh contended that C&S's estimated sales degradation for rebannering was too low, but conducted no independent analysis to reach that conclusion and did not offer any alternative number. Tr. (Welsh) 1087:4–13, 1145:6–18.
[198] Tr. (Welsh) 1133:3–1135:4, 1136:11–1137:23.
[199] DDX 24, at 25; Tr. (Galante)) 2734:11–16, 2735:2–2736:1; Tr. (Florenz (C&S)) 992:4–993:5.
[200] SX 3748, at P49173; Tr. (Cosset (Kroger)) 2630:2–11; SX 3748, at P49304; *see also* DDX 21, at 4.
[201] SX 1526, at P26727.

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can (and very frequently is) outsourced to a third party.[202] And again, the deal model accounts for the costs associated with transitioning private label brands.[203]

Fourth, C&S will receive significant IT assets in the form of a "clone" of Albertsons' tech stack (which is already in use at the great majority of divestiture stores),[204] all of the customer data for those customers who shop at the divestiture stores,[205] and historical loyalty data.[206] C&S will not be receiving the proprietary loyalty, promotion, and pricing algorithms, but the underlying data (which C&S is receiving) is the most important component, and C&S can work with third parties to develop those algorithms.[207] The State's IT expert, Richard Collison, objected that three months was not sufficient to convert the divestiture stores onto the new tech stack,[208] but admitted on cross-examination there is no three-month requirement in the TSA.[209] And he offered no opinion about the timeline for C&S to convert the stores in *Washington*.[210] Mr. Collison also argued that C&S lacked the talent needed to convert the IT systems,[211] but again was forced to concede that he had misapprehended the facts, excluding or simply overlooking hundreds of existing and future IT personnel and consultants.[212]

The combination of these assets led to Mr. Galante's ultimate conclusion that C&S is acquiring the assets it needs in the divestiture to be able to operate the stores as a standalone business.[213] That is the *legal* standard for assessing the assets provided in a divestiture, *RAG-Stiftung*, 436 F. Supp. 3d at 305–06, and for all of its efforts to point out various challenges C&S will face after the merger, the State never offered any evidence or expert opinion contradicting Mr. Galante's conclusion.

[202] Tr. (Ailawadi) 2106:16–2107:20, 2108:9–12.
[203] SX 2249; Tr. (Galante) 2730:18–20.
[204] SX 3748, at P49310; Tr. (Collison) 2208:23–2209:4.
[205] SX 3748, at P49233–35.
[206] Tr. (Cosset (Kroger)) 2632:8–2634:6.
[207] Tr. (Cosset (Kroger)) 2632:8–2634:6.
[208] Tr. (Collison) 2130:14–2131:1.
[209] Tr. (Collison) 2215:24–2216:4
[210] Tr. (Collison) 2216:23–2217:3.
[211] Tr. (Collison) 2130:17–19.
[212] Tr. (Collison) 2226:9–2230:10.
[213] Tr. (Galante) 2670:19–2671:2; DDX 24, at 27.

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D. C&S Will Be a Fierce and Independent Competitor from Day One

Finally, the evidence shows that C&S will be an independent competitor and is paying a competitive price for the assets. Contrary to Dr. Dua's assertion otherwise,[214] C&S will have full autonomy from the outset to make its own pricing decisions.[215] C&S has developed a detailed business plan—unchallenged by any of the State's witnesses—outlining its strategy for competing vigorously with Kroger and other grocery retailers.[216] And there is no evidence that the purchase price C&S is paying is the product of anything less than a competitive bidding process.[217] *See UnitedHealth Grp.*, 630 F. Supp. 3d at 128, 140 (finding purchase price was adequate absent evidence to the contrary).

The State has challenged C&S's motivation to compete post-merger because of past instances in which it purchased financially distressed retail grocery stores and then closed or resold them.[218] Any contention that C&S is likely to do the same here is simply attorney argument founded only on speculation. Not one witness (lay or expert) or document indicated that selling, leasing, or closing *any* of the divestiture stores would make financial or business sense for C&S. Mr. Winn testified to the opposite, without contradiction from the State.[219] And that makes sense: C&S is pursuing this divestiture as a "transformational" opportunity to diversify its business in response to a shift in the wholesale industry.[220] It would not be rational for C&S to purchase nearly 600 stores and plan for billions of dollars in operational investments if it intended simply to flip the stores (for an apparent loss).[221] Nor would sophisticated entities be committing hundreds of millions of dollars in equity.[222] All of this is mapped out by the deal model and business plan, neither of which contemplates any scenario in which C&S does

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[214] Tr. (Dua) 3515:4–9.
[215] SX 3748, at P49409.
[216] *See* DX 1058, at R11867–R11959.
[217] Tr. (McMullen (Kroger)) 1283:13–1284:12; Tr. (Cosset (Kroger)) 2621:8–15.
[218] Tr. (State's Opening) 249:13–14; Tr. (Winn (C&S)) 1457:14–16.
[219] Tr. (Winn (C&S)) 1522:23–24.
[220] Tr. (Galante) 2758:5–17.
[221] Tr. (Galante) 2733:12–15, 2758:18–22, 2759:2–19; Tr. (Winn (C&S)) 1564:12–20.
[222] Tr. (Galante) 2676:16–2677:2.

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not operate the divestiture stores competitively.[223]

* * *

The factors courts consider in assessing a divestiture uniformly confirm that C&S is well positioned to purchase and operate the stores post-merger, that the divestiture must be considered as an integral part of the transaction, and that all of the State's efforts to analyze the transaction without the divestiture amount to nothing more than an academic exercise.

The State has gestured at one decidedly non-legal argument regarding the divestiture, making an uncritical comparison between this divestiture and a prior divestiture of stores to Haggen several years ago. The State effectively abandoned this argument at trial, except through Dr. Dua's so-called "retrospective" analysis. That "analysis," however, did nothing beyond observe that Haggen struggled and ultimately failed as a divestiture buyer, and therefore it is possible C&S could meet the same fate.[224] Expert testimony that amounts to nothing more than a "mouthpiece" for the plaintiff's theory of the case is not reliable. *Marine Travelift, Inc. v. Marine Lift Sys., Inc.*, 2013 WL 3289076, at *1 (E.D. Wis. June 28, 2013). By simply reciting the history of the Haggen divestiture with no economic analysis, Dr. Dua did just that.

It bears noting, however, that even if the State were right about the divestiture—that is, even if the divestiture to C&S turns out to be a colossal failure of unprecedented proportions—that would affect only the parties' competing GUPPI analyses, which differ in significant part based on whether the divestiture is accounted for or not. It would not affect the evidence showing (1) that Kroger's business model makes it more profitable in the long-term to lower prices, (2) that Kroger's pricing is disciplined by Walmart, not Albertsons, or (3) that the merger will generate significant efficiencies that dwarf any claimed competitive harm. All of that evidence and analysis carries just as much force without the divestiture as with it.

IV. The State Did Not Justify Injunctive or Nationwide Relief

[223] *See* DX 1058, at R11687; SX 2249, at P32462.
[224] Tr. (Dua) 1639:20–1640:20.

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Even if the State had carried its high burden on the merits—it has not—it has made no effort to justify the sweeping, injunctive relief it seeks here.

A. The State Did Not Justify the "Extraordinary Remedy" of a Permanent Injunction

Injunctive relief is the exception, not the rule. "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 invoke the equitable powers of the Court, 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).

The State put in no evidence to justify the "extraordinary" remedy of an injunction preventing two private parties (and one non-party) from exercising their property rights. 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, 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. There is no equitable basis on which abstract economic theory could justify depriving all Washington consumers of access to these lower prices at their local grocery stores.

That does not mean the State is without a remedy. In fact, the merger statute expressly contemplates that a divestiture of assets is the proper remedy. Under Washington's merger statute, "the superior court may order any corporation to divest itself of the stock or assets held

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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).

But the State has made no effort to propose an appropriate divestiture. It offered no economic testimony about whether measures short of a complete injunction could resolve any alleged competitive harm. And it offered no layperson or expert testimony about the feasibility or effectiveness of a Court-ordered divestiture. As it did on market definition, the State went all in on one theory of relief. Having failed to justify that remedy, it is entitled to none.

B. A Nationwide Injunction Would Be Inequitable and Unconstitutional

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.

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 geographic areas in which the State claims anticompetitive effects. Any injunction must instead be limited only to the transaction as it relates to Washington specifically.

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

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consequences of acts within it." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504–05 (1939). 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). The Dormant Commerce Clause similarly 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). 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 Cosms., 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).

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. 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.

CONCLUSION

The State failed to establish numerous elements of its claims. Judgment should be entered in favor of Defendants.

* * *

I certify that this document contains 50 pages, in compliance with the Court's order.

RESPECTFULLY SUBMITTED this 18th day of October, 2024.

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