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The Honorable Marshall L. Ferguson
Trial Date: September 16, 2024

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. THE KROGER CO., ET AL., Defendants.	NO. 24-2-00977-9 SEA STATE'S POST-TRIAL BRIEF

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INTRODUCTION

Kroger's proposed acquisition of Albertsons violates established antitrust law and would be disastrous for Washington consumers. Millions of Washingtonians rely on Kroger and Albertsons for their grocery needs, from fresh produce to diapers to soap. Collectively, Kroger (through its QFC and Fred Meyer banners) and Albertsons (through its Safeway, Albertsons, and Haggen banners) account for around half of supermarket sales in the state.

The evidence at trial showed again and again that Kroger and Albertsons constrain each other on price, quality, and offerings to consumers. Kroger's QFC stores' entire pricing strategy is to "match . . . Safeway." Kroger's Fred Meyer stores use Safeway prices as a "ceiling." So for example, Fred Meyer will not raise prices on items like baby formula without first checking Safeway's prices. Albertsons benchmarks its prices to Fred Meyer's. Week after week, even senior level executives at each company review the others' weekly promotions. Defendants also compete to offer a wide variety of high-quality products and services to satisfy customers' desire for "one-stop-shopping."

A merger is unlawful under Washington law if its effect "*may* be to substantially lessen competition or tend to create a monopoly in any line of commerce." RCW 19.86.060. Longstanding antitrust principles demonstrate that the transaction before the Court will do just that. In fact, under the law, this transaction is presumed to be unlawful: It will raise market concentration well above every legally accepted threshold of undue concentration in cities across the state. This legal presumption is reinforced by ample evidence of intense head-to-head competition between Kroger and Albertsons—competition that would be extinguished by this merger. And critically, the merger is unlawful if it "*may* . . . substantially lessen competition." So the Court need only find that there is an appreciable risk of that the merger will substantially lessen competition for the merger to be unlawful.

Defendants' explanations for why their merger will not harm competition are unsupported by the record and settled principles of antitrust law.

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First, Defendants claim that their true competitors are Walmart and Costco. But the evidence showed intense head-to-head competition between Defendants notwithstanding any such additional competition from Walmart and Costco. Moreover, the proposed merger leads to high market concentrations and anticompetitive effects even considering competition from Walmart. Defendants' reliance on Costco is also misplaced. Costco is not a close substitute for Defendants' supermarkets: It requires a paid membership and sells a limited assortment of grocery products, predominantly in bulk sizes. The trial record also showed that Defendants' competitive responses to Costco are limited to non-existent. In any case, as Dr. Dua showed, the merger produces highly concentrated markets even accounting for Costco.

Second, Defendants propose to remedy the merger's obvious anticompetitive effects by offloading 579 stores, 124 of which are in Washington, to C&S Wholesale Grocers, Inc. C&S runs just 23 underperforming grocery stores, none of which are in Washington.

Kroger kept the best assets for itself, while denying C&S the assets and capabilities that are necessary to compete as effectively as Albertsons competes today. Courts repeatedly recognize that this kind of barebones divestiture is unlikely to restore competition. As a result of Kroger's hoarding of competitive capabilities and assets, C&S must undertake multiple monumental transitions to stand up this new business—each of which comes with enormous risks and each of which threatens C&S's ability to compete. The Court heard from multiple industry experts that these transitions are unprecedented and likely to cause substantial sales losses. And, because of the low purchase price, when push comes to shove, C&S can dust off its playbook of selling off stores to its wholesale customers while retaining the supply contract. For C&S, the downside risk is capped; for Washington consumers, it is not.

Third, Defendants will claim that the merger will generate cost savings that offset its anticompetitive effects. That defense is highly disfavored and will not succeed here. Even accepting Defendants' claimed efficiencies, those savings account for just [REDACTED] of their costs and represent just a tiny fraction of the harms generated by the merger. But there is also no

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reason to accept their calculations: Defendants' asserted efficiencies are overinflated and many do not actually involve any cost savings, or are not the product of the merger itself.

BACKGROUND

On October 13, 2022, Kroger agreed to pay almost $25 billion to acquire Albertsons. Findings of Fact (FOF) ¶ 4 (the "Proposed Transaction"). Together, Kroger and Albertsons account for almost $250 billion in annual sales. FOF ¶ 2. In Washington, Kroger owns 114 stores under two banners: QFC and Fred Meyer. FOF ¶ 1. Albertsons owns 215 stores in Washington under three banners: Albertsons, Safeway, and Haggen. FOF ¶ 1. Together, they own some of the most popular and recognizable private labels in the country. FOF ¶ 2.

A. The Merging Parties

1. Kroger

Kroger is the largest supermarket chain in the United States and the second-largest in Washington. FOF ¶ 2. In 2023, its 2,722 supermarkets generated more than $150 billion in revenue. *Id.* Kroger's scale is the product of decades of buying up competitors across the country, such as Harris Teeter, Roundy's, and Fred Meyer. FOF ¶ 3. According to Kroger, its stores are "successful because" they satisfy customers' "desire for one-stop-shopping"—the ability to buy high quality perishable and non-perishable groceries, health and beauty products, household supplies. FOF ¶ 16.

2. Albertsons

Albertsons is one of the largest retailers in the country and the largest supermarket chain in Washington. *See* FOF ¶ 2. Albertsons operates 2,271 supermarkets nationwide and generated $79.2 billion in revenue in 2023. *Id.* In 70% of the metropolitan areas where Albertsons has stores, it is either the largest or second largest grocery retailer by market share. FOF ¶ 91. In 2023, Albertsons turned a $1.2 billion profit. FOF ¶ 2.

Like Kroger, Albertsons offers a one-stop shopping experience. FOF ¶ 16. Albertsons also has grown its business by acquiring other grocery store chains, including in Washington.

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1 In 2015, Albertsons acquired Safeway. FOF ¶ 3. In that deal Albertsons divested 146 stores to
2 Haggen, a Washington-based grocery chain. *Id.* Those stores quickly went bankrupt. *Id.*
3 Albertsons bought back 29 stores in the bankruptcy. *Id.*

4 **B. Defendants' Proposed Divestiture and C&S**

5 Defendants recognized at the outset that their merger raises significant competition
6 issues. When announcing their merger, Defendants also announced a plan to spin off up to 375
7 Albertsons stores to an Albertsons subsidiary to obtain regulatory clearance. FOF ¶ 5.

8 Almost 11 months after announcing the merger, Defendants announced a new plan to
9 divest 413 stores to C&S Wholesale Grocers, Inc., a large grocery wholesaler. C&S currently
10 operates just 23 underperforming grocery stores—none of which are in Washington. FOF ¶
11 217. C&S also has a long history of buying grocery retail stores and then promptly closing or
12 selling them to its grocery wholesale customers. FOF ¶¶ 215-16.

13 C&S itself expressed concerns to regulators that the original divestiture package was
14 very risky. FOF ¶¶ 225-26. Among other risks, C&S specifically called out the large number of
15 stores it would need to rebanner and the lack of any "well-known" private label brands. *Id.*
16 C&S explained that it would "substantially reduce execution risk for C&S" if, among other
17 asks, C&S acquired and all-Albertsons package of stores, Albertsons' Signature and O
18 Organics private label brands and rights to certain Albertsons banners, including Safeway. *Id.*
19 C&S told the Washington Attorney General's Office that these areas of risk were "heightened"
20 in Washington because of the more even split of assets it would receive from both Defendants
21 in Washington. *Id.*

22 C&S did not get what it asked for. *See* FOF ¶ 228. On April 22, 2024, Defendants and
23 C&S announced that they had reached an amended asset purchase agreement ("APA"). *Id*.
24 Under the APA, C&S will acquire 485 Albertsons stores and 94 Kroger stores across the
25 country. *Id*. Those 579 stores bear 16 different banners. SX3750. In Washington, C&S will not
26 receive rights to the Safeway banner, but instead will acquire the QFC and Haggen banners. *Id*.

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In Wahington, C&S is receiving 50 QFCs from Kroger as well as 12 Haggens, 59 Safeways, and 3 Albertsons from Albertsons. *Id.* Within three years, C&S must rebanner 286 stores across 18 states and the District of Columbia, including 62 stores in Washington. *Id.* C&S is also receiving five niche private labels from Defendants. *Id.* But C&S is not receiving any of Kroger or Albertsons' marquee private labels.

The parties also entered into a Transition Services Agreement ("TSA"). For up to 12 months, C&S will rely on Defendants to provide many (though not all) of the services the divested stores require to continue operating. FOF ¶ 228. After a year, most support ends. But C&S will still rely on Defendants for private label products for up to four years. *Id.*

LEGAL STANDARD & BURDEN SHIFTING FRAMEWORK

The Consumer Protection Act ("CPA") prohibits mergers "where the effect of such acquisition may be to substantially lessen competition" in "any line of commerce." RCW 19.86.060. In construing the statute, courts are "guided by" federal court decisions interpreting analogous federal statutes. RCW 19.86.920.

RCW 19.86.060, like Section 7 of the Clayton Act on which it was modeled, bars any merger that "*may*" substantially lessen competition. RCW 19.86.060 (emphasis added); 15 U.S.C. § 18. The use of the word "may" means the focus is "on 'probabilities, not certainties.'" *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). That is because the law aims to "arrest anticompetitive tendencies in their incipiency." *Id.* (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963)). Thus, the State need not prove that the merger will "cause[] higher prices in the affected market"—just that it "create[s] an *appreciable danger* of such consequences in the future." *Id.* at 788 (emphasis added).[1]

A. Burden Shifting Framework

In light of the predictive nature of this inquiry, courts use a "burden-shifting

[1] *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 192 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017) (same).

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framework" to assess the legality of proposed mergers. *St. Alphonsus*, 778 F.3d at 783.[2] Under this framework, the State bears the initial burden of showing that the merger will lead to "undue concentration in the market for a particular product in a particular geographic area." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). Once the State shows undue market concentration in one or more relevant markets (i.e., the "prima facie case"), it has "establishe[d] a 'presumption' that the [merger] will substantially lessen competition." *Id.*

The burden then shifts to Defendants to show that the State's case provides an "inaccurate account of the [merger's] probable effects on competition" in the relevant market. *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975). "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991. Only after the State establishes the prima facie case does the court turn to Defendants' efficiencies, divestiture, and entry arguments as part of rebuttal.[3] *See*, *e.g.*, *Aetna*, 240 F. Supp. 3d at 60. If Defendants successfully rebut the presumption, "the burden of producing additional evidence of anticompetitive effect shifts" back to the State and "merges with the [State's] ultimate burden of persuasion." *Baker Hughes*, 908 F.2d at 983.

At every stage of the analysis, courts "pay close attention to the defendants' ordinary course of business documents." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 41 (D.D.C. 2015).[4]

B. The Proposed Divestiture is Properly Considered at the Rebuttal Stage

Defendants are incorrect that the divestiture should be considered when defining the relevant markets and assessing market concentration in the prima facie case. Defendants' Pre-Trial Brief (Defs.' PTB) at 26-27. The Fifth Circuit recently rejected a similar argument, holding divestiture was rightly considered in rebuttal. *Illumina, Inc. v. FTC*, 88 F.4th 1036,

[2] *See also, e.g.*, *Washington v. Franciscan Health Sys.*, 388 F. Supp. 3d 1296, 1299-1300 (W.D. Wash. 2019); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 18 (D.D.C. 2017) (both applying the burden-shifting framework).
[3] Defendants have pled each of these as an affirmative defense, in which case they bear the burden. *Grp. Health Co-op. of Puget Sound v. King Cnty. Med. Soc.,* 39 Wn.2d 586, 662, 237 P.2d 737, 778 (1951). The State prevails regardless of who bears the ultimate burden of proof on these issues.
[4] *See also id.* at 70-75 (relying on ordinary course documents when rejecting proposed divestiture); *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 385 (S.D.N.Y. 2024) (relying on ordinary course documents to assess head-to-head competition).

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1057 (5th Cir. 2023). Defendants' approach is inconsistent with the overwhelming weight of authority, which provides that "[i]n *rebuttal*, a defendant may introduce evidence that a proposed divestiture would restore the competition lost by the merger." *Aetna*, 240 F. Supp. 3d at 60 (emphasis added); *see also, e.g., Sysco.*, 113 F. Supp. 3d at 23-24; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016); *see also Baker Hughes*, 908 F.2d at 984-86 (entry and similar arguments about post-merger competition are for rebuttal).

Defendants' argument is also inconsistent with how courts assess the adequacy of the divestiture in two different ways. First, Defendants' approach assumes the complete success of the divestiture when defining the relevant markets and assessing concentration. But courts do not simply presume the success of a divestiture. *See Aetna*, 240 F. Supp. 3d at 73 (defendant must show in rebuttal that the divestiture is likely to "restore the competition lost by the proposed merger"); *see also* FOF ¶ 128 (Dr. Israel agreeing that courts cannot assume the success of a divestiture). Just the opposite: courts carefully scrutinize a divestiture's likely effect on competition before permitting an otherwise anticompetitive merger with a proposed divestiture to proceed. *See, e.g., Aetna*, 240 F. Supp. 3d at 60. Second, courts cannot assess whether a divestiture will "*restore* competition," without first understanding the extent to which the merger will *reduce* competition. *Sysco*, 113 F. Supp. 3d at 72 (emphasis added); *Aetna*, 240 F. Supp. 3d at 60.

Defendants' treatment of the divestiture in this litigation also confirms that it is a *proposed remedy* for an anticompetitive merger—not merely another business component of the merger with Albertsons.[5] Defendants have repeatedly claimed that the divestiture is *necessary* for the merger to close. *See, e.g.*, Opening 288:24-289:1-10 ("We know there is concentration in certain areas, that's what the divestiture is there for"); *see also* Opening 265:15-24, 266:5-16. Defendants negotiated the new divestiture package to respond to concerns by regulators, *including the Washington Attorney General's Office*. SX4483.

[5] Indeed, divestiture is the "customary form of relief" for already consummated mergers. *See also Saint Alphonsus*, 778 F.3d at 792.

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Consistent with their privilege assertions, Defendants have asserted that *antitrust*—not business—considerations drove their divestiture negotiations. *See* Cosset 2661:5-2662:10.

In their pretrial brief, Defendants cited no case in which a court has held that a proposed divestiture must be assessed as part of the plaintiff's prima facie case. The cases they do cite are inapposite. Defs.' PTB 14-15. In *UnitedHealth*, the lone case that Defendants contend specifically addresses this issue, the court ultimately assessed divestiture in rebuttal, *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 135 (D.D.C. 2022), making the portions of the opinion on which Defendants rely dicta. In *DeHoog*, the Ninth Circuit affirmed the dismissal of a complaint without assessing the merging parties' post-merger market share because the *plaintiff* alleged that a divestiture would transfer *100%* of one of the merging parties' market share to a third party. *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 (9th Cir. 2018), *affirming Dehoog v. Inbev*,, 2016 WL 5853733, at *3 (D. Or. July 22, 2016) (describing complaint's allegations). *DeHoog* merely confirms a party can plead itself out of court by alleging no change in market concentration.[6] That is not the case here.

ARGUMENT

II. THE PROPOSED MERGER IS PRESUMPTIVELY ANTICOMPETITIVE

The State has met its prima facie burden by showing that the merger of the two largest grocery retailers in Washington will lead to undue concentration in the supermarket market in 57 city areas across the state.

A. Supermarkets Are the Relevant Product Market

"The *outer boundaries* of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). But the "mere

[6] The other cases on which Defendants rely are even further afield. Defendants' also rely on a *motion in limine* ruling in *FTC v. Arch Coal, Inc.* in Limine Order, 2004 WL 7389952 (D.D.C. July 7, 2004), but that ruling considered only whether evidence of the proposed divestiture could be introduced at trial and did not address at what stage of the *Baker Hughes* framework it must be assessed. The other cases on which Defendants relied all involved vertical mergers and no divestiture. *See United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018); *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1093 (N.D. Cal. 2023).

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fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997). Rather, within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id*. (quoting *Brown Shoe*, 370 U.S. at 325). Accordingly, for antitrust purposes, a relevant product market is the "most narrowly-defined product or group of products" that the evidence will support. *Sysco*, 113 F. Supp. 3d at 26. Courts determine the relevant product market by starting with the narrowest group of goods or services. *Id.* Only if the evidence does not support that product market does the court broaden the proposed market. *Id.*

"Courts look to two main types of evidence in defining the relevant product market: the 'practical indicia' set forth by the Supreme Court in *Brown Shoe* and testimony from experts in the field of economics." *Sysco*, 113 F. Supp. 3d at 27. But there is "no requirement to use any specific methodology in defining the relevant market." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd.*, 20 F.4th 466, 482 (9th Cir. 2021). As such, courts have determined relevant antitrust markets using only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and economic evidence.[7] Here, both types of evidence confirm that supermarkets (including supercenters like Walmart that include supermarkets),[8] with their unique convenience and value proposition, are the relevant product market.

1. The *Brown Shoe* factors support a supermarket product market

"According to *Brown Shoe*, the boundaries of a product market may be determined by examining such practical indicia as industry or public recognition, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Sysco*, 113 F. Supp. 3d at 27 (cleaned up). Because these factors are "'practical indicia' rather than requirements," not all these

[7] *See, e.g., Lucas Auto. Eng., Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766-68 (9th Cir. 2001) (*Brown Shoe* factors alone); *Aetna*, 240 F. Supp. 3d at 20-21 (economic evidence and *Brown Shoe* factors).
[8] Some Target stores have expanded grocery offerings and qualify as Supercenters. FOF ¶ 74. No Target stores in Washington meet that definition. *Id.*

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factors must be present to find a relevant market. *Staples*, 970 F. Supp. at 1075; *IQVIA*, 710 F. Supp. 3d at 354. Nor are these factors "rigidly applied"—"the determination of the relevant market is ultimately a matter of business reality." *IQVIA*, 710 F. Supp. 3d at 354.

Peculiar Characteristics and Uses. Supermarkets offer a unique value to the broad base of consumers they serve: "one-stop shopping" for a wide array of everyday food and household items, including groceries, cleaning supplies, health and beauty products, and pet supplies. *See* FOF ¶ 11. They carry well-recognized national brands products like Oreo cookies and Lay's potato chips alongside lower-priced private label products. *See* FOF ¶ 12. They carry tens of thousands of products (or SKUs) and offer products in a variety of sizes and brands. FOF ¶ 12-14. Providing this one-stop-shop experience to a wide range of customers requires significant space, typically in excess of 20,000 square feet. *See id.*

Kroger and Albertsons' stores in Washington are all supermarkets, as are Walmart Supercenters, Walmart Neighborhood Markets, Rosauers, Yoke's, WinCo, and Amazon Fresh stores. *See* FOF ¶¶ 9-10. Supermarkets' "unique combination of size, selection, depth and breadth of inventory" distinguishes them from other grocery stores, even if those retailers offer overlapping products and services. *Sysco*, 113 F. Supp. 3d at 31; *see also infra*. p. 12-14.

Pricing. Kroger, Albertsons, and other supermarkets primarily check their prices against other supermarkets. *See* FOF ¶¶ 23-32. Albertsons and Kroger, respectively, price check supermarkets (not other store formats) 99% and 96% of the time. *See* FOF ¶ 28. WinCo and Rosauers—both supermarkets—also primarily price check *supermarkets*. FOF ¶ 32.

The evidence similarly showed that Kroger and Albertsons benchmark their prices to the prices of other supermarkets. Kroger's pricing strategy for its QFC stores is to "match Safeway." FOF ¶ 23. Fred Meyer uses Walmart as a "floor" and Safeway as a "ceiling" for key prices. FOF ¶ 24. The pricing philosophy of the Albertsons Seattle Division (which encompasses most of Washington) is to "price at an index against Fred Meyer." FOF ¶ 27. Defendants likewise benchmark their promotional prices to those of other supermarkets. *See*

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FOF ¶¶ 163-73; *see also infra* p. 26. (discussing competition on promotions). Such price "benchmarking" is powerful evidence of a supermarket product market. *See Sysco*, 113 F Supp. 3d at 30. By contrast, neither Albertsons nor Kroger sets target prices based on the prices of any non-supermarket store,[9] affirming that these alternatives are not in the same market. *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 55 (D.D.C. 2011) (absence of close price competition made clear other products were not in the market); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 165 (D.D.C. 2000) (a "dearth of documents" showing price competition suggests competitor is outside the market).[10]

Industry Recognition. Industry participants, including Defendants, recognize supermarkets as a distinct market. At trial, Defendants' own witnesses repeatedly distinguished "traditional grocery" stores from "club" and "specialty stores." *See* FOF ¶¶ 33-37. Similarly, corporate representatives from multiple third parties all described supermarkets as distinct store formats within the industry. *See id.* Likewise, even Albertsons has previously recognized—and represented to the FTC—that supermarkets are a distinct antitrust product market and that other grocery retail formats are outside that market. FOF ¶ 35. This consistent "industry . . . recognition" is strong evidence of a distinct market because "economic actors usually have accurate perceptions of economic realities." *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986).

1. Economic analysis supports a supermarket product market

Economic analyses based on real-world evidence and company documents confirm that supermarkets are the relevant product market. *First*, the Hypothetical Monopolist Test, discussed *infra*, p. 19-21, confirms that supermarkets are a properly defined product market.

[9] Kroger's internal pricing documents identify some areas as "no competition" or "no comp" zone documents confirm this point. Kroger reserves the "no comp" label for areas without competition from supermarkets, like a Safeway or Walmart supercenter. Areas can include stores of other formats—like Targets, Costcos, or natural grocers—and still qualify as "no comp," according to Kroger's pricing teams. See FOF ¶¶ 75, 102-05.

[10] Defendants' promotional pricing tells the same story: At trial, Defendants could scrounge up only one ordinary course document showing a time-limited promotion in response to a non-Supermarket's retail prices. See FOF ¶ 29. The State, by contrast, offered document after document showing that Albertsons and Kroger monitor and react to each other's promotions every single week. See FOF ¶¶ 163-73.

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1 *Second*, Albertsons' own analyses showed that if an Albertsons were to close, 90% of
2 its sales would divert to other nearby supermarkets and just 10% would go to all other store
3 formats combined. FOF ¶ 39. By contrast, Costco would get less than 5% of those sales, even
4 if it was located within five miles of the closed Albertsons store. *Id.*

5 *Third*, Dr. Dua's entry analyses showed that Kroger and Albertsons' stores experience a
6 15% to 20% sales drop when another supermarket opens within one mile. FOF ¶ 42. Entry by
7 other store formats had significantly smaller impacts—in many cases (e.g., for club stores) the
8 statistical equivalent of no impact at all. *Id.*

9 *Fourth*, Dr. Dua also measured diversion directly between Kroger and Albertsons using
10 loyalty card data provided by the parties, by conducting a regression analysis on the closure of
11 two QFC stores, and conducting a regression analysis on a strike at Kroger's King Soopers
12 stores in Colorado, *see infra* p. 27. The results were consistent across all three analyses:
13 diversions between Kroger and Albertsons are 50 to 70 percent. FOF ¶ 40-41. This degree of
14 close substitution between *just the party stores* supports a supermarket product market.

15 **2. Other grocery retailers are not in the market**

16 Defendants' witnesses repeatedly testified that they "compete with everyone" who sells
17 any overlapping products. Citing to "share of wallet" data reflecting the spending habits of
18 their customers, those witnesses testified that Kroger and Albertsons compete with pet stores,
19 high-end beauty products stores, ice cream shops, and anywhere that sells bananas. *See* FOF
20 ¶¶ 88-91. But Defendants' broad descriptions of competition is completely divorced from the
21 definition of a relevant product market for antitrust purposes.

22 **a. The market need not include all potential substitutes**

23 As Defendants' own expert testified, antitrust law focuses on the merging parties'
24 *closest* competitors. *See* FOF ¶ 38. In *Staples*, just like in this case, defendants Office Depot
25 and Staples argued that the relevant product market included other retailers that sold office
26 supplies, including Wal-Mart, Best Buy, club stores like Costco, and certain specialty stores.

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1 970 F. Supp. at 1074-75. The court acknowledged that office supply products are “undeniably
2 the same no matter who sells them,” but ultimately held that “the unique combination of size,
3 selection, depth and breadth of inventory offered by [office supply] superstores distinguishes
4 them from other retailers” and thus supported a narrower market of office supply superstores
5 that excluded other retailers. *Id.* at 1075, 1079. The court reached this result by assessing the
6 physical format of the stores, what competitor office supply superstores looked to when setting
7 prices, product offerings, clientele, and the extent to which superstores stores compete with
8 each other for business versus other retailers. *Id.* at 1075-78. As the Court emphasized, even a
9 “high degree of functional interchangeability” is not enough. *See Staple*s, 970 F. Supp. at 1074.
10 Relevant antitrust markets only include products that are reasonable substitutes and that
11 customers turn to for the same needs. *Id.*

12 This principle has been applied to markets involving grocery retailers. In *FTC v. Whole*
13 *Foods Market, Inc.*, the D.C. Circuit recognized that “conventional supermarkets” could be
14 excluded from the relevant product market in a proposed merger between Whole Foods and
15 Wild Oats—two “Premium Natural Organic Stores” (“PNOS”). 548 F.3d 1028, 1039-41 (D.C.
16 Cir. 2008) (Brown, J.); *accord id.* at 1042-43 (Tatel, J., concurring). Though conventional
17 supermarkets and PNOS both generally offered groceries, including some organic and natural
18 products, and consumers “cross-shopp[ed]” at both store formats, conventional supermarkets
19 nevertheless fell outside the market because they did not replicate the “whole package” offered
20 by PNOS stores. *Id.* at 1039-40. And because some consumers specifically shopped at PNOS
21 stores for that “whole package,” consolidation in that market would subject those customers to
22 an anticompetitive market. *Id.*

23 In *Sysco*, defendants argued that the relevant product market in a merger between
24 broadline foodservice distributors included the *entire* wholesale food distribution industry,
25 including specialty distributors and club stores, because “[a]ll of these modes of distribution
26 . . . compete for foodservice distribution customer spending.” 113 F. Supp. 3d at 24-25.

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Applying *Whole Foods* and *Staples*, the court rejected defendants' arguments and drew the product market to include only broadline foodservice distributors. Such distributors' "unique combination of size, selection, depth and breadth of inventory" distinguished them from other distributors, even if other distributors offered overlapping products and services. *Id.* at 31.[11]

As these cases make clear, as a legal matter, Defendants' "compete with everyone" rhetoric and "Share of Wallet" data are beside the point. Those arguments are flatly inconsistent with the reasoning of *Staples*, *Whole Foods*, and *Sysco* and with basic antitrust principles acknowledged by Defendants' own expert. *Sysco*, 113 F. Supp. 3d at 26 ("[T]he fact that buyers may cross-shop between modes of food distribution does not necessarily make them part of the same market."); FOF ¶ 89 (Israel) ("[J]ust the fact that there's some share of wallet doesn't mean they're in the same market. . . . [T]here's sellers in the share of wallet data here that I'm not saying are in the market.").

b. Other retail formats are not close substitutes

As discussed above, the *Brown Shoe* factors and economic analyses show that supermarkets are the relevant product market. Below, the State addresses some additional evidence confirming why some of the purported competitors identified by Defendants are not in the relevant market.

Costco. Costco requires a paid membership, it sells a small fraction of the SKUs offered by supermarkets, and it primarily sells in bulk sizes. FOF ¶ 50, 52. As one industry participant put it: "a couple with no children can't buy milk at Costco, because you have to buy two gallons at a time." FOF ¶ 52; *see Rothery Storage*, 792 F.2d at 218 n.4. Kroger and Albertsons, by contrast, very rarely sell items in bulk sizes. *See* FOF ¶ 13, 18. Costco tends to carry one or two brands for a product type like pasta sauce, rather than the variety of brands, prices, and sizes available in a supermarket. FOF ¶¶ 50, 52. Club stores like Costco also tend to

[11] In so holding, the court relied on expert testimony from Dr. Israel, Defendants' expert here, that supported this narrower market. See *Sysco*, 113 F. Supp. 3d at 34-35. And Dr. Israel has conceded here that the fact that consumers purchase from two competitors does not mean those competitors are in the same market. Israel FOF ¶ 89.

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1 be much larger than supermarkets and resemble a warehouse. FOF ¶ 51. "No one entering a
2 [Costco] would mistake it for [a supermarket]." *Staples, Inc.*, 970 F. Supp. at 1079.
3 Costco does not treat Defendants like other club stores when it comes to pricing.
4 Costco conducts regular price checks [redacted]
5 [redacted] *See* FOF ¶ 48. That is in part because club stores have a
6 different business model and pricing structure, which supports their exclusion from the market.
7 *See H&R Block*, 833 F. Supp. 2d at 55 (significant price disparities probative to market
8 definition).
9 Customers also do not see Costco and supermarkets as functionally interchangeable. As
10 discussed above, empirical economic evidence shows relatively little diversion between club
11 stores and supermarkets. *See supra* p. 11-12; FOF ¶¶ 39-44. Similarly, when a supermarket
12 exits the market near a Costco, Costco does not see a sustained change in its grocery and
13 bakery sales and when a supermarket opens near a Costco, Costco sees only a [redacted] change in its
14 grocery and bakery sales—and those sales rebound soon thereafter. *See* FOF ¶ 49.
15 ***Natural Organic and Gourmet Stores.*** Natural organic and gourmet stores, like PCC,
16 Trader Joe's, Whole Foods, and Sprouts, cater to higher-income households by focusing on
17 natural ingredients, fresh produce, and private label products. *See* FOF ¶¶ 59-67. These stores
18 often lack many of the most recognizable—and sought after—national brand products. A
19 customer cannot buy Doritos, Lay's potato chips, Kraft Mac and Cheese or Campbell's Soup at
20 stores like PCC, Trader Joe's, and Whole Foods, because those stores carry only natural or
21 organic products, and ban hundreds of ingredients from their stores. FOF ¶¶ 59, 60, 62, 66; *see*
22 *Whole Foods*, 548 F.3d at 1045 (Tatel, J., concurring) (highlighting these limitations as a key
23 "peculiar characteristic[]" under *Brown Shoe*).
24 ***Mass Merchandisers.*** Mass merchandisers like Target and Walmart have some stores
25 that contain supermarkets and some stores that do not: Walmart's Supercenters and
26 Neighborhood Grocery stores include supermarkets as do Target's Super Targets (although

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there are no Super Targets in Washington). FOF ¶¶ 9, 74. Supercenters with supermarkets are included in the market. By contrast, Target and Walmart's other store formats that do not contain supermarkets are properly excluded from the market. Mass merchandisers (without supermarkets) offer only a limited selection of groceries and instead focus on the sale of general merchandise. FOF ¶ 73; *see also* FOF ¶ 74 Defendants plainly recognize their differentiation from supermarkets: Kroger identified a "no comp" zone in Colorado with both a Walmart and Target mass merchandiser in the trade area. FOF ¶ 75; *Staples, Inc.*, 970 F. Supp. at 1079 (Defendants' identification of a "non-competitive" zone in which certain store formats operate is highly persuasive evidence for excluding those formats from the product market). Nor is there any evidence in the record of any supermarket adjusting its prices in response to a mass merchandiser.[12]

Online Only Grocery Retailers. Defendants refer generally to e-commerce, but Defendants' stores offer grocery purchases via ecommerce platforms that are then fulfilled in and by their brick-and-mortar stores. Simply making groceries available for purchase online does not create a new competitor. At trial, Defendants mentioned just one online-only retailer: Amazon.com, which is not to be confused with Amazon Fresh (in the market), Whole Foods (Amazon-owned Natural Organic and Gourmet Store), or Amazon Go (convenience store). Amazon.com does not offer a full complement of grocery retail products and services and is therefore not in the market. It has just *one* refrigerated warehouse nationwide (in Arizona). As a result, Amazon.com's consumers cannot reliably buy perishable products. FOF ¶ 85.[13]

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[12] Defendants also suggest that Dr. Dua should have included some or all dollar stores. That is wrong. Virtually every industry participant testified that dollar stores are distinct from supermarkets; some did not consider them to be grocery stores at all. See FOF ¶ 68. Dollar stores [REDACTED]. See ¶ 69. And there is no evidence that supermarkets react to dollar stores. FOF ¶ 72. Dollar General carries a fraction of the SKUs of a grocery store [REDACTED] FOF ¶ 71. Other dollar stores do not even reliability provide basic groceries like milk and eggs. *Id*.

[13] Defendants also criticize Dr. Dua for excluding a grab bag of other retail formats—including limited assortment stores like Aldi and Lidl and ethnic retailers like Fiesta Foods—from the market. Aldi and Lidl do not operate in Washington state. FOF ¶ 79. Fiesta Foods has just three stores in the state and are such a small player that the former president of QFC had never heard of it. FOF ¶ 78. As with other store formats that are not in the market, there is no evidence in the record that any supermarket adjusted its prices in response to any ethnic store or a limited assortment store. FOF ¶ 77.

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In sum, the record is clear and supports the State's product market: For customers wishing to buy a wide array of the most common groceries in the most common sizes, none of these other store formats permit them to do so. Only supermarkets and supercenters offer Defendants' "unique combination of size, selection, depth and breadth of inventory." *Sysco*, 113 F. Supp. 3d at 31; *see also, e.g., Whole Foods*, 548 F.3d at 1038-39 (Brown, J.) (referring to the "whole package" a store format provides); *cf. id.* at 1043-46 (Tatel, J., concurring).

In any event, Defendants' critiques regarding alternative store formats do not move the needle on whether this merger is presumptively anticompetitive in Washington. Dr. Dua explained that because the number of overlapping *party* stores is so high, even if all grocery retailers—including Costco, natural and organic stores, and limited assortment stores—are included in the relevant product market, the proposed merger would still be presumptively anticompetitive. FOF ¶ 143. Sensitivities (or "variations" as Dr. Israel called them in *Sysco*) demonstrate that Dr. Dua's analysis was robust and confirm the soundness of Dr. Dua's overall conclusion that the merger would produce highly concentrated markets. *See* FOF ¶¶ 142-146; *Sysco*, 113 F. Supp. 3d at 59 (describing Dr. Israel's variations in methods of defining the geographic market and indicating that "[t]he picture that clearly emerges" from them is that the merger "would lead to a significant increase in market concentration in many areas").[14]

B. 57 City Areas Are the Relevant Geographic Markets

The evidence at trial established that the relevant geographic market is the 57 city areas in the State of Washington.

Geographic markets need not be drawn by "metes and bounds." *Sysco*, 113 F. Supp. 3d at 52. The goal is to define areas where "the effect . . . on competition will be direct and immediate." *Phila. Nat'l Bank*, 374 U.S. at 357. There is, as the Supreme Court recognizes, "some artificiality" to drawing these markets, particularly for market participants "near the

[14] Courts more generally consider sensitivity analyses to bolster and confirm an expert's analysis. *See, e.g., Sysco* 113 F. Supp. 3d at 67 (discussing merger simulation model); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 65 (D.D.C. 2018) (crediting upward pricing pressure models run in eight different scenarios).

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perimeter." *Id.* at 359-60 & n.37. Because "such fuzziness" is "inherent in any attempt to delineate the relevant geographical market," it is not a basis for rejecting proposed markets. *Id.*

For example, in *Philadelphia National Bank*, the relevant market was simply the "four-county area in which [the Bank's] offices are located" based only on the fact that the "vast bulk" of its business came from that area. 374 U.S. at 359. In *Sysco*, the court adopted Dr. Israel's preferred method: simply drawing a circle around each of defendants' distribution centers that reflected 75% of the center's sales and then defining the overlap as relevant geographic markets. 113 F. Supp. 3d at 50. The court rejected the defendants' claim that this was "arbitrary" and "not reflective" of "industry realities," including that firms will drive farther "to compete for and deliver to customers."[15] *Id.* at 51.

Here, economic analysis and the Defendants' own documents show that grocery shopping is highly localized. *See* FOF ¶¶ 40, 92-95. Dr. Dua therefore defined the relevant geographic market by starting with the pre-existing, relatively narrow geographic boundaries of cities. FOF ¶ 95. In larger cities that included multiple clusters of supermarkets, Dr. Dua divided the relevant cities by zip codes and natural boundaries like rivers and highways to identify supermarket city areas. FOF ¶ 95. Dr. Dua validated his proposed city area geographic markets by using Kroger and Albertsons' loyalty card data to confirm that customers located within the geographic city area predominantly shopped at stores located in that city area market. FOF ¶ 96; *see also Phila. Nat'l Bank*, 374 U.S. at 359.

Defendants do not propose an alternative geographic market. Instead, they offer a series of critiques of Dr. Dua's geographic markets that demand a level of precision not required by the relevant case law. Defendants' primary objections to Dr. Dua's geographic markets are that they omit stores just beyond the perimeter of his city areas and do not adequately account for the shopping patterns of consumers who might live near the perimeter.

[15] Other courts have used Metropolitan Statistical Areas ("MSAs") as the relevant geographic market, which are governmentally-drawn geographic boundaries of particular metropolitan areas. *See, e.g.*, *Anthem*, 236 F. Supp. 3d at 254-55; *Staples, Inc.*, 970 F. Supp. at 1073. This measure is not driven by industry-specific competitive data.

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To be sure, some customers may drive beyond the city area for groceries and others may live near the boundary. But *Philadelphia National Bank* specifically rejected a nearly-identical argument based on behavior at the edges of a geographic market. 374 U.S. 359-60 & n.37. The Court recognized the likelihood that competitors might be located just beyond the market's edge and that consumer's might be located just within it, but made clear that this did not undermine the geographic market. *Id.* at 359-60 & 37. Rather, that is an inherent "artificiality" in defining *any* geographic market. *Id.* Put simply, there is nothing unacceptably "arbitrary" about excluding outliers, *Sysco*, 113 F. Supp. 3d at 51, or about focusing on where the "vast bulk" of business comes from when defining the market, *Phila. Nat'l Bank*, 374 U.S. at 359-60. And, as Dr. Dua testified, he performed a sensitivities analysis to assess whether the boundary definitions of the geographic markets affected market concentration results. Dr. Dua concluded that they did not, and Defendants have offered no contrary evidence on that point. As with Dr. Israel's geographic market sensitivities in *Sysco*, this confirms the soundness of the market definition. *Sysco*, 113 F. Supp. 3d at 59.

C. Supermarkets in City Areas Satisfy the Hypothetical Monopolist Test

The State's proposed markets satisfy the Hypothetical Monopolist Test ("HMT"). The HMT comes from the DOJ and FTC's Merger Guidelines, and courts rely on it to validate proposed markets. *See, e.g.*, *FTC v. Advocate Health Care Network*, 841 F.3d 460, 468-69 (7th Cir. 2016); *see also Sysco*, 113 F. Supp. 3d at 33; *Aetna*, 240 F. Supp. 3d at 20-21l; 2023 Merger Guidelines § 4.3. As Dr. Dua testified, he performed two different, generally accepted versions of the HMT—each of which validated all 57 of his proposed markets. *See* FOF ¶ 101.

Kroger's decision to create so-called "no-comp" zones, where it would then raise prices, further validates Dr. Dua's analysis and acts, effectively, as a real-life version of the hypothetical monopolist test. Each "no comp" zone did not have a supermarket within 3-5 miles of Kroger's store. The price increases were profitable—despite the presence of a Costco, a Target mass merchandiser (without a grocery store), a Walmart mass merchandiser (same),

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and multiple Natural Grocery Stores across the zones. *See* FOF ¶ 103 (Eagle, Colorado); FOF ¶ 104 (Glenwood Springs, Colorado). Those results affirm that a hypothetical monopolist of the State's proposed markets could profitably raise prices.

Dr. Israel levied a number of criticisms against Dr. Dua's HMT analysis, all of which are either spurious or irrelevant. Primarily, Dr. Israel testified that Dr. Dua used the wrong inputs—diversions, margins, and SSNIP level—for the HMT.

SSNIP Level. Dr. Israel argued that Dr. Dua's use of a 5% SSNIP (small but significant non-transitory increase in price) was inappropriate given his application of the "break-even" version of the HMT. But Dr. Dua also ran Dr. Israel's preferred "price maximizing" version of the HMT with a 5% SSNIP and found that all 57 markets passed the HMT under either version. FOF ¶ 101. Both versions of the test are discussed by the merger guidelines. *See* 2010 Horizontal Merger Guidelines § 4.1.3 (discussing the "breakeven analysis and the "profit maximizing" analysis); 2023 Merger Guidelines § 4.3.C (same). In any event, as Dr. Dua explained, neither the merger guidelines nor economic logic demand a specific SSNIP level—although 5% is common (and was used by Dr. Dua), lower levels have been used by economists, including in a prior grocery retail case. FOF ¶ 100.[16]

Margins. Dr. Israel's criticism of Dr. Dua's use of gross margins, rather than variable margins, fares no better. As Dr. Dua explained, the economic literature, industry practice, deposition testimony, and Defendants' ordinary course documents all confirm that gross margins are the relevant margins because those are the margins that supermarkets consider when setting prices. *See* FOF ¶¶ 118, 120-122. These are also the margins that are relevant to a supermarket when it sells a *small amount* of additional product, which is the relevant question

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[16] Dr. Israel also criticizes other technical aspects of Dr. Dua's HMT analysis, including the fact that it determined that a city area market passes the HMT if one store in the city area passes, but Dr. Dua's setup and approach directly follow economic logic and the merger guidelines. *See* 2010 Horizontal Merger Guidelines § 4.1.1 (HMT is passed if hypothetical monopolist "likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") *on at least one product in the market, including at least one product sold by one of the merging firms*." (emphasis added)); 2023 Merger Guidelines § 4.3.A (same).

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according to economic theory. FOF ¶ 115.

By contrast, Dr. Israel's "capital finance" margins were based solely on margins provided by the parties during the investigation into the merger. Dr. Israel did not rely on any ordinary course documents for these margins, and he conceded that he did nothing to verify that these margins were, in fact, appropriate ordinary course margins, other than to rely on his staff's conversations with members of Kroger's capital finance team. *See* FOF ¶¶ 123-124. And Dr. Israel's reliance on these capital finance margins was especially misplaced given that he admitted that the right margins to use are ones that the companies use when they are "talking about their pricing decisions." FOF ¶ 119. The capital finance team has no role in setting Kroger's prices. *See* FOF ¶ 123.

Dr. Israel's insistence that the relevant margins must subtract *all* variable costs, such as labor and warehousing, is also directly undercut by his admission that in *Sysco* he used the companies' gross margins—which did not subtract *either* of those costs—and believed it was reasonable to do so. FOF ¶ 117. And Dr. Israel's choice of margin is further undermined by the fact that the EGK paper on which he relies for the central piece of his economic analysis uses a well-accepted measure of margin almost *identical* to Dr. Dua's, and nearly twice as large as the margins used by Dr. Israel here. *See* FOF ¶ 118.

Diversions. Finally, Dr. Israel's criticism of Dr. Dua for using diversion proportionate to share, rather than diversion calculated by his modified EGK model, is similarly misguided. Dr. Dua validated his share-based approach by looking to his entry study, as well as the diversion analyses conducted by the parties themselves in the ordinary course. *See* FOF ¶ 100. Dr. Israel, by contrast, insists on the use of margins from his modified EGK model. As discussed below, the Court should not rely on Dr. Israel's modified EGK model in this case, including the highly unreliable diversions it estimates.

D. The Market Should Not be Drawn by Dr. Israel's Modified EGK Model on a Store-by-Store Basis

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Dr. Israel's approach to market definition is inconsistent with the caselaw. Rather than offer an alternative product and geographic market, Dr. Israel proposes a store-by-store approach to market definition based purely on the results of an unverified econometric model. Under that approach, the Court must define a separate market for each of Defendants' stores using Dr. Israel's modified EGK model. For each Defendant store, the Court would use the modified EGK model to estimate diversions to each potential competitor store. FOF ¶ 106. Then, the Court would rank order competitor stores by magnitude of diversion and include the competitor stores with the highest diversions in the relevant market for that particular Defendant store. *See id.* (asking the Court to "do the exercise the way we like to as economists, which is let the data from this model tell you what's the market"). Dr. Israel did not actually perform this analysis for *any* single store. FOF ¶ 113.

The caselaw has rejected an approach to market definition that would require "calculat[ing] individual diversion ratios for all the products potentially in the market, rank[ing] them from highest to lowest, and, at some point, draw[ing] a line between those products that fall within the market and those products that fall outside." *Aetna,* 240 F. Supp. 3d at 39. Such a "purely econometric approach" is inconsistent with decades of precedent, which looks to ordinary course documents and the *Brown Shoe* factors when defining the relevant market. *Id.* Yet that is precisely what Dr. Israel calls for here; Dr. Israel's analysis asks the Court to disregard both in favor of econometric analysis alone.

Dr. Israel's modified EGK model underscores the problem with an econometrics-only theory of the relevant product market: It produces outcomes that are not consistent with actual consumer behavior. Among its many flaws, *see* FOF ¶¶ 106-114, the model assumes that a significant percentage of diversions go to the so-called "outside good"—i.e., retailers and stores not even included the model, such as gas stations, restaurants, or convenience stores. FOF ¶ 112. That conflicts with the parties' ordinary course documents and testimony, which overwhelmingly suggest that no such diversion happens. *See* FOF ¶¶ 88-89, 114. This

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overinflated "outside good" in turn effectively *deflates* estimated diversions between Supermarkets, understating the significance of competition between stores of the same format. Dr. Israel's modified EGK model is also highly sensitive to changes in inputs or datasets—in particular with respect to its estimate of the "outside good," yet Dr. Israel threw out many of the alternatives he tested that could have provided more insight into its stability. FOF ¶¶ 109-111.

Dr. Israel's model does not use any data about where customers actually shop, nor did Dr. Israel attempt to validate the results of his model against real world activity. *See* FOF ¶¶ 107, 112. As a result, the model offers predictions about customer diversion that defy common sense. In his trial testimony, Dr. Israel discussed only two specific examples of store-level analysis by the EGK model, and for those two examples he did not actually show the model's estimated store-by-store diversions. In the State's rebuttal case, Dr. Dua testified that, for one of those specific examples, the EGK model predicts that in the event of a price increase at the Edmonds Safeway, greater numbers of shoppers would switch to stores *across the Puget Sound* than to the QFC down the street. *See* FOF ¶ 114. More generally, Dr. Dua testified, the model predicted diversions from the Edmonds Safeway of small and similar sizes to both nearby stores and very distant stores—and nearly 100 different stores in total—a result that makes little sense in light of both expert economists' acknowledgement that grocery retail competition is highly localized. *See* FOF ¶ 114.

A model that produces such obviously faulty results—and that has not been validated against actual consumer behavior or ordinary-course evidence in any way—is entitled to no weight at all. By contrast, Dr. Dua's empirical conclusions are validated by real-world evidence and confirm the results suggested by the *Brown Shoe* factors. FOF ¶¶ 39-44.

Dr. Dua's approach is also consistent with decades of blackletter law. In that case law, covering many industries *including grocery retail*—courts first identify the relevant product market before turning to the geographic markets in which the merging parties compete. *See,*

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e.g., *Whole Foods*, 548 F.3d at 1040 (grocery retail); *Staples*, 970 F. Supp. at 1078 (office supply retail); *Sysco*, 113 F. Supp. 3d at 24 (wholesale food distribution); *Microsoft Corp.*, 681 F. Supp. 3d at 1087 (video games); *H&R Block*, 833 F. Supp. 2d at 58-60 (tax preparation); *Aetna*, 240 F. Supp. 3d at 45 (health insurance plans).

E. The Merger Is Presumptively Anticompetitive

Dr. Dua's economic analysis of the relevant product and geographic markets as defined above shows that the proposed acquisition will increase market concentration to a presumptively unlawful level in all relevant markets. *St. Alphonsus*, 778 F.3d at 785. Dr. Dua performed that analysis using the Herfindahl-Hirschman Index ("HHI") as set forth in the Merger Guidelines. *See Anthem*, 855 F.3d at 349. That method sums the squares of each market participant's market share. *Id.* Under the 2023 Merger Guidelines, a market is highly concentrated if it has an HHI above 1800 and the merger increases HHI by more than 100 points. 2023 Merger Guidelines § 2.1. The 2010 Merger Guidelines set a slightly higher threshold of 2500 with an increase of 200 points. DOJ & FTC, Horizontal Merger Guidelines (2010) ("2010 Merger Guidelines") § 5.3.

As Dr. Dua testified, the proposed merger is anticompetitive in all 57 markets under either standard. It will increase the HHI in each market by at least 500 points, and by approximately 2,800 on average. *See* FOF ¶ 137 Post-merger HHIs will range from about 3,000 to 10,000, and average at 6,700. *Id.* Even accounting for a divestiture in which C&S retained 100% of sales, the merger would produce 21 anticompetitive markets under the 2023 Merger Guidelines and 19 anticompetitive markets under the 2010 Merger Guidelines. *See* FOF ¶ 138 If C&S retains only 70% of the divested stores' sales [REDACTED] [REDACTED] FOF ¶ 139), that number rises to 46 presumptively anticompetitive markets.[17] *See* FOF ¶¶ 139-140

Dr. Dua testified that the merger is also presumptively anticompetitive under the 30%

[17] If the Dr. Dua's sensitivities analyses show that if grocery retail stores over 9,000 square feet are included, two *additional* market are anticompetitive. *See* FOF ¶ 141.

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market share standard adopted by the Supreme Court. *Phila. Nat'l Bank*, 374 U.S. at 364.

III. THE PROPOSED MERGER WILL LEAD TO ANTICOMPETITIVE EFFECTS

A. The Merger is Likely to Cause Unilateral Anticompetitive Effects

The State showed that the merger will lead to anticompetitive effects—higher prices and lower quality—by eliminating the substantial head-to-head competition between Kroger and Albertsons in communities across the State. "The elimination of competition between two firms that results from their merger *may alone* constitute a substantial lessening of competition." *H&R Block*, 833 F. Supp. 2d at 81 (emphasis added); *see Staples*, 190 F. Supp. 3d at 131 (collecting cases).

A merger "is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H&R Block*, 833 F. Supp. 2d at 81. "Relevant evidence of a merger's potential unilateral effects include[s] the merging companies' ordinary course of business documents, testimony of industry participants, and the history of head-to-head competition between the two merging parties." *Anthem*, 236 F. Supp. 3d at 216.

The evidence at trial showed that the competition between Defendants is immediate and intense. Internal documents from both companies refer to the other as their "primary" or "biggest" competitor in Washington. *See* FOF ¶¶ 148-50. This sentiment is consistent with the diversion analyses performed by Dr. Dua and by the parties themselves. *See* FOF ¶¶ 39-44 (describing diversion analyses). Even mergers between firms with far lower diversion rates than those observed here cause an "inarguable loss of competition." *See United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 41 (D.D.C. 2022).

Defendants Compete Head-to-Head on Price. Kroger's pricing strategy is based on Albertsons' prices and vice versa. QFC's entire pricing strategy is to "match" or beat Safeway. *See* FOF ¶ 156. For Fred Meyer stores, Safeway acts as a "ceiling" on Fred Meyer's prices. *See* FOF ¶¶ 157-158. In Washington, Albertsons benchmarks its prices to Fred Meyer's. *See* FOF

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¶¶ 160-162. This head-to-head price competition would disappear with the merger.

Defendants Compete Head-to-Head on Promotions. Kroger and Albertsons' head-to-head competition is fierce over promotions as well. Both Kroger and Albertsons use a "promotional" grocery strategy. Under this strategy, for most items Kroger and Albertsons set white label (or base) prices slightly higher than those of Everyday Low Price retailers, and then offer deep discounts or promotions on selected products to bring customers into their stores. *See* FOF ¶¶ 163-165. Albertsons is a "high-low" retailer, which means it deploys a particularly extreme version of this strategy: offering higher white label prices than Kroger, but steeper discounts on promotional items to win shoppers. FOF ¶¶ 170-173. As a result, though Fred Meyer's white label prices are consistently lower than Safeway's, every week, they obsessively check each other's ads and try to beat each other's promotional offerings. *See* FOF ¶¶ 163-173.

In contemporaneous emails admitted at trial, executives from both companies described this promotional pricing competition in very strong terms. FOF ¶¶ 163-173. One Albertsons executive called the competition "a dog fight." FOF ¶ 171. This head-to-head competition on promotional pricing also would disappear with the merger.

Defendants Compete Head-to-Head on Quality and Services. Defendants' competition goes beyond price. The facts at trial showed that they compete on services, FOF ¶ 176, assortment, FOF ¶ 175, and store hours, FOF ¶ 178, and the quality of the in-store experience, including stock levels, FOF ¶ 177. The facts at trial also showed that where Kroger faces less competition, it reduces investment in services, assortment, and quality. FOF ¶¶ 179-183.

Eliminating Defendants' Head-to-Head Competition Will Enable Kroger to Raise Prices and Reduce Quality. The evidence at trial showed that the elimination of this head-to-head competition would lead to anticompetitive effects. Safeway stores would no longer serve as a "ceiling" on Kroger's Fred Meyer prices or as a "match" for QFC's prices. Likewise, Safeway stores would no longer need to hew to Fred Meyer's prices. And Defendants would not need to continue their fierce competition via weekly promotions or in-store services.

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Kroger's past practice of raising prices and reducing quality where it faces little-to-no competition confirms the likelihood of anticompetitive effects if the merger closes. Kroger already elevates prices in so-called "no comp zones," where its stores face no nearby supermarket competition, in Washington. FOF ¶¶ 179-183. After Kroger successfully raised prices in no-comp zones in Colorado, executives wrote that the effort was a "big win." FOF ¶ 180. Mr. Groff, who runs Kroger's pricing team, told colleagues: "The next obvious question is where else in the enterprise do we potentially have the same opportunity." FOF ¶ 182. If the merger is successful, Kroger will have more such opportunities in the state of Washington.

Economic analysis also suggests that Kroger is likely to raise prices if this head-to-head competition is eliminated. *See* FOF ¶¶ 184-192. To quantify the harm to consumers from the merger, Dr. Dua performed a well-accepted "upward pricing pressure" analysis. To run the analysis, Dr. Dua first calculated diversions between the parties by estimating each party's shares at the granular census block group level. Dr. Dua validated these diversions by analyzing consumer choice during two real-world diversion events: the closure of two QFC stores in Seattle and a strike at Kroger stores in Colorado. *See* FOF ¶¶ 39-45.[18] Using those diversions, along with the same ordinary course gross margins used in the HMT, Dr. Dua calculated that Kroger would face upward pricing pressure that would lead to 5% and 8% price increases in Albertsons and Kroger stores, respectively. *See* FOF ¶ 187. That translates to around $800 million *each year* in increased grocery bills for Washington consumers. *See id.*

Dr. Israel's competitive effects analysis, which relies on his unverified modified EGK model and unsupported choice of margins, cannot be credited. In addition to using erroneous inputs, Dr. Israel's analysis impermissibly assumes the success of the divestiture at every stage, and produces results completely out-of-step with the evidence at trial and with common sense.

Courts faced with conflicting economic expert testimony frequently rely on ordinary course documents to determine which economic account more persuasively describes the

[18] His regression analyses of these event studies yielded results consistent with his loyalty card-based approach. *See* FOF ¶ 41.

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relevant market. *See, e.g.*, *Anthem*, 236 F. Supp. 3d at 219-20 (relying on "internal communications" that told a "consistent story" about direct and aggressive competition between the merging parties to determine which economic analysis was more credible); *accord Sysco*, 113 F. Supp. 3d at 37 (finding conflicting expert testimony persuasive because it was "more consistent with the business realities of the [] market," when "evaluated against the record as a whole"). Here, that analysis is clear: Dr. Dua's analysis aligns with the strong head-to-head competition reflected in parties' ordinary course documents and the testimony at trial; Dr. Israel's analysis blinks reality.

Defendants Counterargument is Irrelevant. Defendants have claimed that the merger will not harm competition because Kroger is "laser focused" on Walmart, which is a lower-priced retailer. FOF ¶¶ 193-201. That theory ignores the facts: that Kroger and Albertsons are the #1 and #2 competitors for grocery retail in Washington; that there are no Walmarts in many parts of the state, including the city of Seattle; and that today, despite this supposed "laser focus" on Walmart, half of the Kroger stores in Washington price only against Albertsons—not Walmart—and the other half uses Safeway as a price "ceiling." FOF ¶¶ 154-159. It also makes no economic sense, as it ignores all facets of competition other than price. FOF ¶ 195.

Defendants' argument is also inconsistent with the case law—which routinely enjoins mergers despite the existence of other, *stronger* market participants. Acquisitions "that eliminate head-to-head competition between close competitors often result in a lessening of competition." *Staples*, 190 F. Supp. 3d at 131. *United States v. JetBlue Airways Corp.*, for example, held that a merger between Spirit and JetBlue would have unilateral anticompetitive effects because they compete head-to-head—even though the parties compete with other airlines and do not compete on all of their routes. 2024 WL 162876, at *17, *27-28 (D. Mass. Jan. 16, 2024). Similarly, in *Anthem*, the court held that the merger between Anthem and Cigna eliminated head-to-head competition based on documents and economic evidence showing that consumers in fact chose between those two companies for health insurance and that the two

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firms adjusted their prices in response to one another. 236 F. Supp. 3d at 216-20. That was true *even though* Anthem "insist[ed]" at trial that "United, not Cigna, [was] its 'closest' competitor" because "[t]he acquired firm need not be the other's closest competitor to have an anticompetitive effect." *Id.* at 216.[19] Defendants' argument proves too much: parties need not merge to a monopoly to generate anticompetitive effects. 2010 Merger Guidelines § 6.

B. The Merger Raises the Likelihood of Coordinated Anticompetitive Effects

Combining the two largest supermarket retail chains in the already-concentrated Washington markets will increase the likelihood of coordination. Coordinated effects occur "when market participants mutually decrease competition in the relevant market." *Bertelsmann SE & Co.*, 646 F. Supp. 3d at 44. They occur in "markets with few competitors, in which firms may 'coordinate their behavior, either by overt collusion or implicit understanding in order to'" engage in anticompetitive conduct. *Anthem*, 236 F. Supp. 3d at 215-16. The fewer the competitors, the more likely such effects will occur. *See Heinz*, 246 F.3d at 716.

The Supermarkets markets in Washington will be susceptible to tacit coordination following the merger, for three reasons. *First*, the merger would produce highly concentrated markets in all 57 city areas. Even accounting for a perfectly successful divestiture, the merger will result in presumptively anticompetitive market concentration in 21 city areas. *See* 2010 Merger Guidelines § 7.2 (citing "few significant competitors" as evidence of vulnerability to coordinated conduct). *Second*, this market is further susceptible to this sort of tacit coordination because pricing is transparent. 2010 Merger Guidelines § 7.2. Here, competitors "price check" one another on a regular basis and so would easily be able to see if their competitor has followed their lead on price increases. FOF ¶¶ 203-206.

Third, price coordination is especially likely to occur because defendants *already tacitly coordinate price*. FOF § III.B.1 Prior actual or attempted coordination is "highly

[19] Other courts have reached the same result where other competitors—including the market leader—that remain in the market. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 (D.C. Cir. 2001) (enjoining merger between second and third largest baby food producers); *H&R Block*, 833 F. Supp. 2d 36 (D.D.C. 2011) (enjoining merger between second and third most popular tax preparation software providers).

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1 probative of likely harm from a merger." *Bertelsmann SE & Co.*, 646 F. Supp. 3d at 45; *see*
2 *also* 2010 Merger Guidelines § 7.2. Both Kroger and Albertsons raise prices, then look for
3 responses from the other or from Walmart, before deciding whether to stay at the higher price
4 or drop back down. FOF ¶¶ 153-62. The companies refer to these changes as "price probes,"
5 and report, when successful, that their probes "le[d] the markets up." FOF ¶¶ 203-06. This is
6 precisely the type of price coordination that economists recognize as one way that consolidated
7 markets harm competition. *See* FOF ¶¶ 202-203. Dr. Dua explained that these three factors all
8 indicate the merger will likely increase coordinated anticompetitive effects in Washington. *Id.*
9 Given the State's prima facie case, "the burden is on the defendants to produce
10 evidence of structural market barriers to collusion specific to this industry that would defeat the
11 ordinary presumption of collusion that attaches to a merger in a highly concentrated market.
12 *H&R Block*, 833 F. Supp. 2d at 77. Defendants have not done so.

13 **IV. DEFENDANTS CANNOT PROVE THAT THEIR DIVESTITURE PROPOSAL**
14 **WILL REPLACE ALBERTSONS' COMPETITIVE INTENSITY**

15 Defendants propose divesting 579 stores to C&S—a wholesaler with a limited and
16 unsuccessful track record in grocery retail. To rebut the presumption established by the prima
17 facie case, Defendants must introduce evidence that the proposed divestiture would "restore
18 [the] competition" lost by the merger and thus "counteract[] the anticompetitive effects of the
19 merger. *Aetna*, 240 F. Supp. 3d at 60; *see also Sysco*, 113 F. Supp. 3d at 72 (assessing whether
20 the divestiture will "replac[e] the *competitive intensity* lost as a result of the merger" (emphasis
21 added). Courts therefore carefully scrutinize the divestiture business's ability to compete.
22 In *Aetna*, for example, the court considered a wide array of factors assessing Molina's
23 ability to replace lost competition in the market for Medicare Advantage plans, including (1)
24 Molina's limited and unsuccessful track record running Medicare Advantage plans; (2)
25 whether Molina had the requisite experience and capabilities to successfully operate the
26 divested plans; (3) whether Molina was receiving the assets and capabilities necessary to do so;

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1 and (4) Molina's past disinterest in expanding into Medicare Advantage plans. *Id.* at 60-74.
2 The court gave little weight to the parties' transition services agreement, because it merely
3 gave Molina *time* to stand up competitive capabilities—not the capabilities themselves. *Id.* at
4 71. In addition, the low purchase price for the transaction made the deal "low-risk and high-
5 reward," even if Molina "was not well positioned to be an effective competitor." *Id.*

6 In *Sysco*, the court rejected a proposed divestiture that would not be able to exert
7 sufficient "[c]ompetitive [p]ressure" on the merging parties. *Sysco*, 113 F. Supp. 3d at 73. In
8 particular, the court gave significant weight to the fact that the merger did not give the buyer a
9 sufficient number of distribution centers to "compete effectively." *Id.* at 74-75. In reaching that
10 result, the court relied on internal documents describing these concerns over contrary in-court
11 testimony that the buyer had what it needed. *See id.* at 75-76. And the court also found the
12 buyer's inability to offer the same array of private label products as the merging parties put it
13 at a "competitive disadvantage." *Id.* at 76. The buyer's prior lack of success with key customer
14 segments meant the buyer further disadvantaged it. *Id.* at 77. And finally, the court noted that
15 the buyer would be dependent on the sellers for private label products and other key services
16 for years, undermining its independence as a competitor. *Id.* at 77-78.

17 As both *Aetna* and *Sysco* show, courts do not simply defer to the buyer's business
18 decision to buy the divestiture assets.[20] Instead, courts perform a record-intensive assessment
19 of whether divestiture will restore lost competition. This includes, but is not limited to,
20 interrogating the buyer's experience and capabilities, the adequacy of the divestiture assets,
21 "the riskiness of the transaction," and the buyer's incentives to competitively run the divested
22 assets. *Aetna*, 240 F. Supp. 3d at 70-72. Defendants must also show that independent
23 competition will be restored in a timely manner. *See Sysco*, 113 F. Supp. 3d at 73-74.

24 **A. The Divestiture Will Not Restore Competition for Supermarkets**

25 The divestiture likely will not restore the competition lost by the merger for three

26

[20] Despite Defendants' repeated gesturing at the business judgment rule from corporate law, Defendants cite no case that adopts such an approach in the context of antitrust divestitures. *See* Defs.' PTB at 2.

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mutually-reinforcing reasons. First, C&S lacks the experience and expertise necessary to competitively run the divested assets. Second, the divestiture package cobbles together a hodgepodge of disfavored assets from across both companies and multiple banners, which creates substantial—even existential—execution risks. Third, C&S lacks the incentives to stay in the grocery retail business and run the divested stores competitively with Kroger—especially if these execution risks start to cause the stores to lose sales.

1. C&S is an unsophisticated and inexperienced buyer

Divestiture buyers like C&S, that either have no experience or unsuccessful experience in the market they seek to enter, "raise[] concern[] about [their] ability to successfully compete following the divestiture." *Aetna*, 240 F. Supp. 3d at 72-73. C&S's retail track record is alarming in both its brevity and poor performance. From 2012 to 2021, C&S operated no more than four stores at once.[21] FOF ¶ 215. C&S currently operates 23 Piggly Wiggly and Grand Union stores—nearly all of which it bought in the last four years. FOF ¶ 217. C&S's Piggly Wiggly stores are underperforming; one has already closed. FOF ¶ 218.

The situation at C&S's Grand Union stores is even more dire. These 12 Grand Union stores now collectively lose roughly $3 million a year. *Id.* That failure is especially alarming because C&S specifically told the FTC when acquiring those stores that it was more likely to succeed in running those Tops stores than a set of Price Chopper stores that more closely resemble the current divestiture stores. *Id*. C&S's inability to successfully run even a handful of retail stores fatally undermines Defendants' claim that it will be able to restore competition lost from the merger. *Aetna*, 240 F. Supp. 3d at 72-73.

The evidence shows that, in picking C&S, even Kroger did not pick a buyer it thought most likely to successfully run the divested stores as a strong competitor. C&S did not hide its inexperience from Kroger: Early on, C&S requested an early diligence call with Kroger "to

[21] C&S has a lengthy track record of buying packages of retail stores in order to sell most of them to their wholesale customers and then closing the rest once they start losing money under C&S management. FOF ¶¶ 215-16. This, combined with C&S's openness to doing the same thing here for at least some stores, *see infra* p. 39-41, further undermines the case for C&S as a capable and competitive buyer. *Aetna*, 240 F. Supp. 3d at 64-65.

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1 discuss what it takes to operate a grocery store." FOF ¶ 220. The Court heard no testimony
2 from anyone at Kroger who actually vetted C&S's retail operations capabilities before
3 selecting them as the buyer. FOF ¶ 222. Nor did any of the Kroger executives responsible for
4 selecting C&S—Rodney McMullen and Gary Millerchip—testify about how or why they
5 chose C&S as the buyer. Instead, texts between Yael Cosset and Stuart Aitken reveal that they
6 both thought it was a "no brainer" to pick a different finalist and both expressed concerns about
7 the amount of support C&S would require. FOF ¶ 220. This and other contemporaneous
8 documentation shows that a different buyer was less risky, required less support from Kroger,
9 was preferred by executives, and was offering a *higher* purchase price.[22] FOF ¶¶ 219-23.

10 **2. The divestiture package hamstrings C&S's ability to compete**

11 The divestiture package itself deprives C&S of critical competitive capabilities and
12 assets and saddles it with difficult and expensive transition risks. Kroger, like other sellers, had
13 no incentive to make their buyer an effective competitor. *See Aetna*, 240 F. Supp. 3d at 60. To
14 that end, Kroger held on to its favored banners, private labels, and stores and offloading risks
15 to *C&S*—its fledgling new competitor. This mix-and-match package that includes assets from
16 both Albertsons and Kroger but leaves out essential capabilities will, as C&S told regulators,
17 increase C&S's execution risks and limit its ability to compete. SX0158; SX4483. Divestitures,
18 like this one, of something less than an existing business entity are unlikely to restore
19 competition. *Aetna*, 240 F. Supp. 3d at 60. That is especially true when the buyer, like this one,
20 does not already have—and cannot easily acquire—the necessary assets and capabilities to
21 compete. *Id.* The evidence shows that, across a number of different dimensions of the deal,
22 Kroger protected its interests at the expense of C&S and, ultimately, consumers.

23 ***Stores.*** Kroger, not C&S, picked the stores in the divestiture package. *See* FOF ¶ 232.
24 Ordinary course documents reveal that Kroger employees assessed stores' financial
25 performance and value when deciding which ones to divest and tried to keep the higher

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[22] And even if C&S were the best of the remaining options (it was not), courts have rejected divestitures where the ill-equipped buyer was simply the best of bad options. See Aetna, 240 F. Supp. 3d at 62.

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performers.[23] *See* FOF ¶¶ 233-34. Kroger CEO Rodney McMullen even personally requested that Kroger employees ensure that the UVillage QFC was not divested because of its real estate value [REDACTED]—even as Kroger divested 50 of 55 QFCs in Washington. *Id.* This strategy paid dividends: [REDACTED]

[REDACTED]

[REDACTED] *Id.* This was not the store package that C&S wanted. During the negotiations, C&S told the California and Washington Attorneys General that it would substantially reduce execution if C&S received an "all-Albertsons" package of stores. FOF ¶¶ 225-26. But Kroger refused.

Banners. Kroger also retained the most valuable banners. In Washington, C&S is getting the QFC and Haggen banners. FOF ¶ 237. QFC has been a consistently underperforming banner and division within Kroger. *See* FOF ¶ 239. QFC is a weak banner that is less well-known than Safeway and has poorer consumer perception. *Id.* As C&S SVP Alona Florenz told a colleague, "Kroger is giving us its worse chains." *See id.*

Once again, this is not what C&S wanted. During the divestiture negotiations, C&S told regulators that C&S's execution risks would be significantly reduced if C&S received the Safeway banner—particularly here in Washington. SX0158; SX4483. That banner is so valuable that C&S CEO Eric Winn called it "crazy" not to want it.[24] FOF ¶ 238. Kroger gave C&S the rights to the Safeway banner in other states, but not in Washington. FOF ¶¶ 237-38. As a result, C&S must rebanner 286 stores in 18 states plus the District of Columbia, including 59 Safeways and 3 Albertsons in Washington, in just three years. *See* FOF ¶ 237.

Rebannering is complex and risks significant sales losses because it is inherently disruptive and involves changes that tend to alienate customers. *See* FOF ¶ 242. C&S's advisors warned of these risks: Bain, one of C&S's consulting firms, warned that C&S should

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[24] Indeed, Albertsons COO Susan Morris testified that when Albertsons acquired Safeway, Albertsons chose to rebanner some of its existing stores to Safeway because the Safeway banner had strong equity with Washington consumers. FOF ¶ 238

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assume that rebannering came with a 5-10% sales risk that "could rise to ~20%+ if new banners are meaningfully less attractive, not introduced to a market properly, and/or no transitioned well at the store-level." *See* FOF ¶¶ 245-46..[25]

C&S's rebannering will cause sales losses that are likely to be in line with Bain's 20% worst-case scenario numbers. FOF ¶¶ 245-46. The size and speed of the required rebannering is unprecedented.[26] FOF ¶ 250 . Making matters worse, C&S's own limited experience with rebannering has been a disaster: When it rebannered just 12 Tops Market stores, the then-profitable stores suffered significant sales declines and now lose $3 million per year. *See* FOF ¶ 218. Yet C&S used that botched rebannering as the basis for its rebannering budgets here—suggesting that it had not learned anything from that failure. *See* FOF ¶ 253. As it turns out, those budgets are woefully inadequate, further increasing the risks here. *Id*. C&S's rebannering task in Washington is especially difficult because C&S will be rebannering 59 stores from Safeway (a very strong banner, *see* FOF ¶¶ 238) to QFC (a particularly weak banner, *see, e.g.,* FOF ¶ 239). As Mr. Welsh explained—and Bain warned C&S—rebannering from a strong banner to a weak one increases the risk of permanent sales losses.[27] FOF ¶ 245-46.

C&S has not financially prepared for these potential sale losses. Despite Bain's warnings about potential sales losses of 20% or more, C&S used Bain's ████ or "base case" rebannering detriment in its "conservative" deal model and then further reduced it by one third on the assumption that using transition banners like "Safeway by QFC" would reduce sales losses. FOF ¶ 247. But these assumptions by C&S's finance team are neither "conservative" nor based in reality: The overwhelming record evidence shows that rebannering in the wrong direction is extremely risky and that transition banners were likely to be a confusing mess that

[25] Though this exhibit was introduced not for the truth of the matter, the State's expert, Joe Welsh, later testified that this advice was consistent with his decades of industry experience. FOF ¶¶ 245.

[26] In addition, the rebannering timeline is not coordinated with C&S's other various transitions that will be important to establishing (and improving) its brand, including loyalty program changes, pricing and merchandising transitions, and private label product changeover. As Dr. Ailawadi explained C&S's ability to establish itself will be undermined by his disjointed rollout of its brand. See FOF ¶ 251.

[27] Introducing a new banner is an even more significant risk. FOF ¶ 249. Yet that is precisely what C&S will need to do east of the Cascades. *Id*.

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1 would *increase* (not decrease) the risk of sales losses. FOF ¶¶ 245-47.

2 ***Private Labels.*** Successful private label products are critical to successfully competing
3 as a supermarket. FOF ¶ 257. This is especially true in Washington, where private label
4 products are especially popular. FOF ¶ 258. Having a weaker or smaller private label product
5 line than the merging parties puts a divestiture buyer at a "competitive disadvantage." *Sysco*
6 *Corp.*, 113 F. Supp. 3d at 76. By every conceivable measure, C&S does not currently have and
7 will not acquire in the divestiture a private label product portfolio that is comparable to even
8 one of the two complete portfolios that Defendants will have after the merger. FOF ¶¶ 260-68.
9 C&S knew this make it difficult to compete with Defendants and warned regulators that
10 acquiring Albertsons' two largest private label brands, Signature and O Organics, would enable
11 C&S to "compete more effectively against Kroger/Albertsons." FOF ¶¶ 225-26; SX0158.
12 Kroger refused, leaving C&S without a "vital" component of the business that accounts for
13 roughly 25% Defendants' (and thus of the divested stores') sales. *See* FOF ¶ 257-68.

14 The fact that C&S is receiving a four-year [REDACTED] to the Signature and O
15 Organics brands, does not alter this result. Like the TSA in *Aetna*, the TSA here merely gives
16 C&S "*time* to build its own capacity" while "do[ing] nothing to provide [C&S] with the
17 resources it would need to do so." 240 F. Supp. 3d at 71. Just the opposite: The TSA imposes
18 significant markups well before C&S could plausibly stand up a replacement private label line.
19 FOF ¶ 269. This will cut into C&S's margins and reduce its ability to capitalize on the lower
20 costs that private label products typically offer. FOF ¶¶ 258, 272.

21 The time the TSA provides for C&S to build a replacement private label portfolio is far
22 too short. This is a massive undertaking. FOF ¶ 273. Among other components, C&S will need
23 to both quintuple Best Yet's offerings, while also revamping its "dated" and unappealing
24 packaging and advertising, while introducing and expanding other brands in the portfolio. *Id.*
25 C&S will not be able to do this in two years (before it starts paying markups) and is highly
26

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unlikely to be able to do so before the TSA expires in four years.[28] *Id*. If C&S cannot replace Defendants' private label products in time, it will lose the ability to sell some of its stores' most profitable and popular products. FOF ¶ 257-60, 273. Even if C&S succeeds in developing a private label portfolio in time, the changeover itself risks sales losses. FOF ¶ 275. That is magnified in Washington, where QFC stores are slated to have three different private label lines (Kroger, then Albertsons, then C&S) in four years. *Id.* C&S did not account for any of these risks in its deal model or analyze their effect on individual stores. FOF ¶ 276.

Pricing, Promotions, Loyalty & Data.[29] Pricing, promotion, loyalty and data are crucial to success as a grocery retailer. FOF ¶ 277. Defendants know this: They devote enormous resources to strategically set prices and promotions in the hopes that even small variations in pricing and promotions will win them customers. *See supra* Part II.A; FOF ¶¶ 147-73. Defendants' loyalty programs collect the data necessary to do so. FOF ¶ 278. Again, C&S is not receiving these essential capabilities. *Aetna*, 240 F. Supp. 3d at 60; *see* FOF ¶ 279.

As with private label products, C&S cannot "easily acquire" these essential capabilities because C&S must build them essentially from scratch. *Aetna*, 240 F. Supp. 3d at 60; *see supra* FOF ¶ 279. Here, again, the TSA gives C&S time, but not capacity. *Aetna*, 240 F. Supp. 3d at 71. C&S's prices are set currently set using "20th century" practices. *Id.* And C&S is unlikely to be able to build competitive pricing capabilities or a successful new loyalty program in just a year. FOF ¶¶ 279, 283. Even established retailers take longer than 12 months to test and launch

[28] Hiring experienced Albertsons employees does not change this: Albertsons' COO Ms. Morris confirmed that building a successful private label brand takes time, and she admitted that Albertsons has not developed a single billion dollar private label brand in her tenure with the company. FOF ¶ 273.

[29] C&S's ability to offer competitive promotions depends on it being able to negotiate sufficient vendor "funding" to support in-store promotions. As Professor Ailawadi explained, C&S's lack of retail track record puts it at a significant disadvantage when negotiating scarce vendor-funding dollars. FOF ¶ 288. C&S knows this. *Id*. And C&S will also be competing with itself: [redacted] *Id.* C&S has not accounted for any decrease in vendor funds in its deal model or analyzed the impact of any resulting sales losses on the profitability or competitiveness of individual stores. *Id.*

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loyalty programs.[30] *Id.* And, as C&S's own employees warned and Professor Ailawadi confirmed, transitioning loyalty programs will inconvenience consumers and, on its own, could lead to sales losses. FOF ¶ 284.

IT. The store IT conversion timeline sets C&S up to fail.[31] After relying on Defendants' IT systems for up to a year, C&S will have just three months to convert the stores that it is receiving onto C&S's new IT systems. FOF ¶¶ 290-91. Three months is not enough time to complete this task. FOF ¶ 292. C&S CEO Eric Winn conceded as much when he testified that C&S had already approached Kroger about extending that period. FOF ¶ 293. There is no evidence that Kroger will agree to that extension. *Id.* And it has no incentive to do so.

Missing the deadline could be disastrous for C&S. After three months, if the conversion is incomplete, C&S will be left with some stores whose IT—and thus operations—it does not and cannot control without Defendants' help. FOF ¶¶ 293-95. At this same time many critical provisions of the TSA will have expired or will be expiring, leaving C&S without a legal entitlement to support from Kroger for those functions. FOF ¶ 294.

Personnel. Defendants' primary response to each of these challenges that C&S will face is to point to the large number of employees going over to C&S from Kroger and Albertsons—and in particular on Susan Morris's planned role as CEO of C&S's retail operations. Courts recognize that hiring qualified personnel does not overcome depriving an inexperienced buyer of the assets it needs to compete.[32] *Aetna*, 240 F. Supp. 3d at 69 (hiring 1,500 to 2,000 qualified employees, including senior executives, did not override divestiture's

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[30] Though Yael Cosset suggested that all C&S would need was data to establish his program, he identified no examples of any programs established in such a short time. FOF ¶ 283. And his claim is belied by Kroger's own reliance on thousands of employees for data and loyalty-related work. *Id.*

[31] The IT aspects of the divestiture are deficient in other ways: C&S will be receiving just a fraction of the employees needed to run the IT infrastructure it is acquiring, FOF ¶ 296.

[32] None of the State's experts' assessment of these risks is changed by C&S hiring significant numbers of experienced employees from Defendants. Professor Ailawadi made clear that her assessment assumed that C&S would hire experienced retail executives. *See* FOF ¶ 299. Similarly, Rick Collison and Joe Welsh both testified that even experienced grocery retailers can struggle with complex and risky tasks like rebannering grocery stores and converting the IT.

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other risks). That makes sense. The transitions C&S must undertake are each unprecedented, which means even experienced grocery retailers—including Albertsons during Susan Morris' nearly 40-year career—have not previously stood up the capabilities that C&S must in the time allotted—let alone all at once. FOF ¶ 299-30.

3. C&S has an out.

Courts recognize that if a divestiture buyer lacks the incentives to run the divestiture in a way that competes with the seller, the divestiture will not preserve competition. *See Aetna*, 240 F. Supp. 3d at 72. This is a market-by-market analysis; a divestiture is inadequate if there is a significant risk that the buyer will only compete in some markets. *Id.* Here, C&S has a backup plan if running the stores proves too difficult. It can sell off underperforming stores to its wholesale customers, as it has in the past. C&S has a 25-year history[33] of buying up stores, then either closing them or quickly selling them off to their wholesale customers with profitable wholesale supply contracts in place. *See* FOF ¶¶ 215-16.

At trial, C&S executives disclaimed any intention to sell the divested stores. But C&S's internal documents tell a different story: C&S is at least open to selling the stores, but knows it cannot mention selling stores while the merger review process is pending. For example, Ms. Florenz responded to a suggestion from Bain that C&S consider selling off underperforming stores to wholesale customers with the instruction "Yes just careful with FTC . . . we want to say we can run them." FOF ¶ 309. C&S's customers have already asked about buying the divested stores. FOF ¶ 310. Rather than tell them "no," C&S instructed its executives to explain that while that was not "something we can discuss, . . . we have always viewed you as a potential partner in that regard and we definitely want to support your growth." *Id.*; *see also* FOF ¶ 31 (C&S executives revised its day-of press release to omit a commitment to operate "all" the divested stores) To be clear: C&S may not end up selling stores (and the State need not show that it will), but internal documents containing "statements by [C&S] executives

[33] Even in recent years, C&S has disclaimed any "inten[tion] to grow our grocery retailing operations or operate . . . retail grocery stores." FOF ¶ 216.

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indicat[ing] that [C&S] might decide to withdraw from several of the divestiture [markets] in short order, and instead only compete in some" creates a significant concerns about the likelihood of restoring competition. *Aetna*, 240 F. Supp. 3d at 72.

C&S's existing wholesale business will also exert pressure on C&S to reduce its retail operations. Because C&S is a wholesaler that supplies grocery retailers, the divestiture puts C&S in the difficult position of simultaneously supplying and *competing against* some of its wholesale customers. FOF ¶ 313 As Professor Ailawadi explained, this creates a major conflict and distorts C&S's incentives. *Id*. Among other challenges, C&S's wholesale and retail arms are likely to compete for critical vendor funding. *Id.* Even after acquiring 579 retail stores, reassured its wholesale customers that it was "committed to being a much larger wholesaler than retailer." FOF ¶ 310.

The low price makes this pivot easier. A "'fire sale' price" is a red flag because the buyer could still profit off of the acquisition without developing into a "significant competitor," *Aetna*, 240 F. Supp. 3d at 72, such as by repurposing the acquired assets. It also compensates for "the riskiness of the transaction." *Id.* A too-low price is a real concern here. C&S is paying $2.8 billion.[34] FOF ¶ 314. That includes $1.9 billion in owned real estate, plus 579 stores, four store banners, five private label products, distribution centers, and manufacturing plants. *Id.* And critically, C&S has a profitable wholesale business—a revenue stream it would retain even if it sold stores to its wholesale customers.

The low price here, as in *Aetna*, essentially preserves C&S's exit options—thus capping its downside risk—while offering the unique opportunity to expand into retail. *Aetna*, 240 F. Supp. 3d at 72 (explaining that a low purchase price "supports the conclusion that [the buyer] has serious doubts about its own ability to manage all the divestiture plans but is willing to try given the low risk to the company reflected in the bargain price"); *id.* (expressing concern that the low price enables the buyer to withdraw from some markets and only compete in some).

[34] To be sure, C&S plans to invest additional funds into standing up the business. FOF ¶ 314. But many of those expenses come in later years and therefore would not be incurred if C&S pivoted before then. FOF ¶ 314.

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1 But the low price, coupled with C&S's well-trod playbook of closing and selling sores, creates
2 a real risk that C&S will move to recoup potential losses by exiting markets if sales.

3 **4. C&S's Diligence Process Does Not Validate its Ability to Compete**

4 Throughout trial, Defendants' primary defense of the divestiture was that C&S did its
5 homework by hiring consultants and building deal models. Defendants appear to be trying to
6 import corporate law principles—specifically the business judgment rule—into the assessment
7 of antitrust divestitures. *See* Defs.' PTB at 28. But that approach is entirely inconsistent with
8 both the outcome and reasoning antitrust cases assessing divestitures. *See, e.g., Aetna*, 240 F.
9 Supp. 3d at 73-74; *Sysco*, 113 F. Supp. 3d at 72. Defendants cite no case that remotely supports
10 their view. *See id.* Nor do they explain why the diligence a divestiture buyer might perform has
11 any bearing on the post-divestiture competitive landscape.

12 Defendant's expert's testimony illustrates why this legal standard makes no sense.[35] As
13 an accountant, Daniel Galante had no actual expertise in any aspect of grocery retail
14 operations, FOF ¶ 302. Even so, Mr. Galante agreed he "would never second guess
15 management's business judgment." *Id.* He therefore could not assess what capabilities were
16 necessary to compete, whether C&S's plans were actually feasible (only that they drew up
17 plans), or whether C&S might lose sale in the process (only that they built a deal model).

18 **B. C&S Will Depend on Defendants for Too Long to Restore Competition**

19 Divestitures, like this one, that leave the buyer dependent on the seller for years post-
20 closing are routinely rejected by courts. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 59
21 (D.D.C. 2009) ("divestitures must be made to . . . *independent* competitor" (cleaned up)). In
22 *Sysco*, for example, the court rejected the divestiture in part because the buyer would be
23 dependent on the seller for private label products supply and customer databases for three to
24 five years. *Sysco*, 113 F. Supp. 3d at 77. C&S and Defendants will be more entangled than the
25

26 [35] Mr. Galante' testimony is irrelevant for several unrelated reason, including the fact that he had very limited visibility into the dilience or negotiations he was supposedly assessing and C&S did not actually provide investors with the same conservative projections they used themselves. FOF ¶ 303-07.

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1 parties in *Sysco*. For the first year, Kroger will functionally set C&S's prices. While C&S can
2 make changes, it lacks the capability to do so intelligently. FOF ¶¶ 279-82. During this time
3 C&S will also be the new ceiling for Fred Meyer pricing. *Id.* That is not real competition. For
4 three years, Defendants and C&S will run overlapping banners in overlapping geographies.
5 FOF ¶ 237. For up to four years post-close, C&S may be dependent on Defendants for private
6 label products. FOF ¶ 269. This is more entanglement than in *Sysco*, 113 F. Supp. 3d at 77. Not
7 only will C&S rely on Defendants for private label products, they will *share brands* for three
8 years. Three years is too long to permit the largest market players to be so entangled. *See id.*

9 **C. Even a Successful Divestiture Does Not Restore Competition in All 57 Markets**

10 Even if C&S somehow managed to succeed in this risky divestiture, it would still be
11 inadequate. If C&S succeeds in maintaining 100% of its sales—therefore entirely replacing
12 Albertsons' competitive intensity—21 markets remain impermissibly concentrated under the
13 2023 Merger Guidelines (19 under the 2010 Merger Guidelines). FOF ¶ 138. Thus, even in the
14 event C&S restores competition where it competes, the merger would still result in multiple
15 presumptively anticompetitive markets and would therefore be unlawful.

16 If, as seems likely, C&S's sales drop, the number of highly concentrated markets
17 increases. The more they drop, the more markets are unremediated. As Dr. Dua explained at
18 trial, if C&S retains 70% of its sales in every store, the merger, accounting for the divestiture,
19 results in 46 highly concentrated markets. FOF ¶ 139. And Dr. Dua's sensitivity analyses show
20 that this result is the same even when HHIs include club stores, natural, organic and gourmet
21 stores, and limited assortment store formats. *Id.* [redacted]
22 [redacted]. *Id.*
23 Put simply, C&S need not sell off stores or be "another Haggen" for the divestiture to fail to
24 restore competition where it competes; it just needs to lose some sales.[36]
25
26
[36] Defendants contended in their pretrial brief that the State would be bound by the results of the preliminary injunction hearing in the District of Oregon in the case brought by the FTC. Defendants of course have no such favorable judgment in hand, nor are they likely to. But in any event, that is wrong as a matter of law. Among other

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V. DEFENDANTS HAVE NOT SHOWN NEW ENTRANTS TO THE MARKET WILL OFFSET THE LOSS OF COMPETITION

Defendants have speculated about various potential new entrants to the market. *See*, e.g., Defs.' PTB at 43-44. That is insufficient to rebut the presumption. *Anthem*, 236 F. Supp. 3d 171, 222 (D.D.C.). Entry or expansion "must be 'timely, likely, and sufficient in its magnitude, character, and scope' to counteract a merger's anticompetitive effects." *Id.* Defendants "bear the burden of demonstrating ease of entry into the relevant market." *Id.*

They have failed to carry that burden. The minimal evidence in the record showed that grocery retail growth generally is slow, difficult and expensive. FOF ¶¶ 315-19. The evidence regarding the difficulties C&S has and will face in standing up supermarkets demonstrates how difficult it is to start or expand a supermarket operation. *See supra* § IV; FOF ¶¶ 315-19. While Defendants presented some generalized evidence that some grocery retailers plan to expand their operations, Defendants did not show where or when that expansion would happen—if at all. FOF ¶¶ 315-19. And Defendants have produced no evidence that any competitor actually plans to enter or expand in Washington—let alone in the particular markets in which the merger will reduce competition. FOF ¶¶ 315-19. Nor did Defendants offer any statistical or other analysis showing that any entrant—including C&S—would counteract the merger's anticompetitive effect in any market. *Anthem*, 236 F. Supp. 3d at 222-29.

VI. DEFENDANTS CANNOT PROVE AN EFFICIENCIES DEFENSE

Defendants have not shown that the efficiencies generated by this transaction, if any, are "extraordinary"—*i.e.*, of a character and magnitude that override the anticompetitive effects of the merger. *Sysco*, 113 F. Supp. 3d at 81. That is a very high bar. Courts must

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requirements, collateral estoppel applies only where there is a "final judgment on the merits" and party against whom [it] is asserted must have been a party to or in privity with a party to the prior adjudication." *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600, 602 (2001). Neither is true here. The sole support Defendants cite for their argument is a selective quotation from *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008), concerning the ability of *a class representative* in a certified class action to bind class members. That is entirely irrelevant here. In the unlikely event that Defendants do receive a favorable decision in that case that Defendants seek to enforce via collateral estoppel, the State would request the opportunity to submit supplemental briefing on this issue.

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1 "undertake a rigorous analysis of the kinds of efficiencies" to ensure they "represent more than
2 mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. Not only
3 must those efficiencies show "that the proposed merger enhances rather than hinders
4 competition," they must also be "merger-specific" and "verifiable, not merely speculative." *St.*
5 *Alphonsus*, 778 F.3d at 790. Defendants must demonstrate "that their claimed efficiencies
6 would benefit customers"—not just themselves. *Sysco*, 113 F. Supp. 3d at 82.

7 Defendants have not met their burden. Defendants' own efficiencies expert only
8 claimed to verify [redacted] in efficiencies. FOF ¶ 320. These efficiencies, achieved over four
9 years, amount to less than 1% of Defendants' costs—none of which has been allocated to
10 Washington.[37] FOF ¶¶ 320, 333. Courts have specifically rejected efficiencies of this
11 magnitude as insufficient. *See Sysco*, 113 F. Supp. 3d at 85-86 (rejecting efficiencies of less
12 than one percent of firm's *revenue*). The Court should do the same.

13 Defendants have not presented any economic analysis assessing whether and to what
14 extent efficiencies of this magnitude would translate into price reductions for consumers. FOF
15 ¶¶ 334-36. *See, e.g., Aetna*, 240 F. Supp. 3d at 95-96 (considering expert economist testimony
16 regarding likely pass-through rates). But Dr. Dua did. He found the efficiencies would need to
17 reduce Defendants costs by 16% *or more* to create an economic incentive to lower prices—
18 many times more than Defendants' claimed efficiencies. FOF ¶ 333. Even accounting for the
19 divestiture, Dr. Dua calculated that the efficiencies claimed by Mr. Gokhale would be
20 insufficient to counteract the merger's upward pricing pressure. FOF ¶ 333.

21 And many of Defendants' claimed efficiencies are either legally irrelevant, speculative,
22 or not merger-specific. *First,* merger-specific marginal cost savings are the only kinds of
23 efficiencies that can overcome the effects of lost competition. *See* 2010 Horizontal Merger
24 Guidelines at 31 n.13. Defendants' efficiencies based on increased revenue (e.g., Alternative
25 Profits), and fixed cost savings (e.g., Administrative Labor), FOF ¶ 334, are therefore not
26

[37] For scale, these savings are of the same magnitude that Kroger and Albertsons have each achieved independently during recent three-to-four year periods, FOF ¶ 321.

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cognizable efficiencies.[38]

Second, Defendants asserted sourcing efficiencies—their largest category—are not supported by the record. These efficiencies assume that Kroger and Albertsons will, for every product they sell, simply pay whatever the lowest price one of them was paying before the merger.[39] FOF ¶ 326. There is no evidence of anyone ever reviewing Kroger and Albertsons' contracts to assess how often Kroger and Albertsons are truly paying different prices.[40] FOF ¶ 327. And, even if Kroger and Albertsons are paying different prices, that alone is insufficient. *Aetna*, 240 F. Supp. 3d at 97. Kroger has not shown that suppliers actually will agree to lower their prices. FOF ¶ 328. Even if Bain accounted for this via an arbitrary haircut off of the total price differential, though Mr. Gokhale's description of their methodology does not support this, *supra* n.38, *Aetna* precludes such an approach. 240 F. Supp. 3d at 97.

Third, Mr. Gokhale's analysis adequately distinguishes merger-specific efficiencies from those that could be achieved by the firms independently. *See Sysco*, 113 F. Supp. 3d at 83 (rejecting reliance on management consultants for merger-specificity analysis). For example, both Kroger and Albertsons achieve sourcing cost savings year after year, but Mr. Gokhale's analysis does not show the combined company could negotiate those ordinary reductions on top of best-of-both pricing. FOF ¶ 330.[41] This falls well short of showing merger-specificity.

VII. THE COURT CAN AND SHOULD ENJOIN THE MERGER

Because the State has shown that Defendants' merger is anticompetitive and would harm Washington consumers, the Court can and should enjoin this merger. As discussed in the State's pretrial brief (at 45-50), the CPA authorizes this relief and the State's showing on the

[38] Defendants point to discussion of revenue increases and fixed cost savings as benefits to businesses. But antitrust law is concerned only with "the effects on consumers, not on profits of firms." *Aetna*, 240 F. Supp. 3d at 95 (quoting the merging parties' efficiencies expert).

[39] The lowest price reflects Bain's adjustment for: (1) differences in shelf space accorded to the product, and (2) promotional frequency, only two of many factors that could explain a price difference. Gokhale 3065:3-3066:7.

[40] According to Mr. Gokhale, Kroger's consultants, Bain, only looked at point-of-sale data, which would shed no light on, for example, whether Kroger and Albertsons had different costs for good reason: such as different payment terms, quality requirements, or contract lengths. FOF ¶ 327.

[41] For other examples, see FOF ¶ 331 (discussing transportation routes); FOF ¶ 332 (alternative profits).

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1 merits in turn satisfies both the CPA and the CR 65 injunction standard.[42]

2 **A. The Proposed Injunction is Calibrated to Remedy the Anticompetitive Harm**

3 If the Court agrees with the State and concludes that Defendants' transaction may
4 substantially lessen competition in Washington—and that Defendants have not proven that the
5 divestiture to C&S will restore competition—then the proper remedy is to enjoin Defendants'
6 merger. That is the remedy expressly provided for by the CPA. RCW 19.86.080(1). That is the
7 remedy routinely ordered in merger cases. *See, e.g.*, *Anthem*, 236 F. Supp. 3d at 259;
8 *Bertelsmann SE & Co.*, 646 F. Supp. 3d at 56; *H&R Block*, 833 F. Supp. 2d at 92. And that is
9 the remedy necessary here to accord complete relief from an anticompetitive transaction. *See*
10 *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) ("the key to the
11 whole question" of remedy is whether the relief "restore[s] competition").

12 Defendants' insistence that divestiture is the only appropriate remedy misunderstands
13 the law and makes no sense in light of the facts here. "[D]ivestiture is an inadequate and
14 unsatisfactory remedy in a merger case." *H.J. Heinz Co.*, 246 F.3d at 726. Only where the
15 partis have *already merged* is divestiture the preferred remedy.[43] And of course because
16 Defendants have not shown that C&S is capable of running the stores so as to restore
17 competition, then selling *more stores* to C&S is hardly a *remedy* for the competition problem.
18 *See E.I. du Pont*, 366 U.S. at 326; *see also, e.g.*, *Aetna*, 240 F. Supp. 3d at 74-75 (enjoining a
19 merger after concluding the divestiture buyer was unlikely to restore competition).

20 Defendants' contention that this would be a "nationwide injunction" is untrue. The
21 injunction restrains the conduct only of Defendants—two companies doing significant business
22 in Washington—and only as to the specific transaction that creates the anticompetitive effects
23 in Washington. An injunction against the transaction does not reach any party that is not before
24 this Court. Nor does it restrain Defendants' conduct with respect to non-parties. It is therefore

25

26 [42] As explained in the State's pretrial brief, the state does not believe it needs to satisfy the CR 65 standard, but in the interest of the appellate record would ask the court to make findings under that standard here.

[43] All of the cases Defendants cited in their pretrial brief involved divestitures in already consummated mergers.

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entirely unlike the "nationwide injunctions" against federal-government action that have recently been criticized by some courts. *See, e.g., City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1243 (9th Cir. 2018) (permanently barring immigration officials from enforcing executive immigration policy in any state). Enjoining the Proposed Transaction here would not bar Defendants from negotiating a merger that does not cause unlawful anticompetitive effects in Washington.

To be sure, enjoining Defendants from closing on this proposed transaction will have effects beyond Washington's borders. But that fact does not alter the propriety of enjoining the transaction. The Washington Supreme Court has long recognized that affording complete relief under the CPA may have effects beyond the borders of this state.[44] *See State v. Reader's Digest Ass'n*, 81 Wn.2d 259 (1972) (CPA's reach not limited to conduct occurring exclusively within the State's borders); *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 803 (2015) (same). Nor does it create constitutional issues here. *See infra* p. 48-50.

Moreover, enjoining Defendants' transaction will have effects outside Washington only because Defendants elected to structure the transaction as a unitary, all-or-nothing deal. The proposed merger is a stock-purchase agreement in which Kroger will purchase all of Albertsons' stock and thus acquire control over the company and all of its assets. Because of that structure, providing complete relief to Washington consumers necessarily requires an injunction that blocks this all-or-nothing transaction. Defendants have not proposed, and the Court need not consider, the legality of some other hypothetical transaction that does not cause harmful effects in Washington. In fact, Defendants made clear to this Court that they would not present an alternative remedy to their proposed divestiture at trial. Furthermore, Defendants represented to this Court that if they proposed an alternative remedy, it would be as a way to resolve this matter outside of court. MIL Hr'g at 65:21-25. Even under the proposed inunction

[44] Indeed, in reliance on the CPA's scope, the State has brought many successful enforcement actions to enjoin conduct occurring beyond state borders that produces in-state harm. *See, e.g., State v. LG Electronics*, 186 Wn. 2d 169, 375 P.3d 1035 (2016); *State v. AU Optronics Corp.*, 180 Wn. App. 903, 328 P.3d 919 (2014).

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Defendants would remain free to craft a transaction that does not cause unlawful anticompetitive effects in Washington—i.e., an injunction the CPA would not reach.

If the CPA could not reach transactions that harm solely because they have some extraterritorial component, as Defendants urge, then parties could circumvent Washington antitrust laws by adding an out-of-state component to a merger. This approach would defeat the very purpose of state antitrust laws (protecting the state's citizens from anticompetitive harm) and contravenes both the text of the CPA and longstanding precedent. *See Reader's Digest*, 81 Wn.2d at 277-78; RCW 19.86.920 (requiring the CPA be liberally construed).

B. Washington's Proposed Injunction Is Constitutional

Enjoining the proposed merger is constitutional.[45] As the state previously explained in detail in its pretrial brief (a discussion the State incorporates in full here), the injunction complies with the dormant commerce clause. That clause's "core" protection is from state "[]discrimination" and "economic protectionism." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023). Courts have long upheld non-discriminatory statutes like the CPA against dormant commerce clause challenges. *Id.*[46] To prevail on their challenge, Defendants must show that the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). But because the CPA is non-discriminatory on its face and in effect, Defendants' challenge "falls well outside *Pike*'s heartland" and is heavily disfavored.[47] *Nat'l Pork Producers*, 598 U.S. at 380. As explained in the State's pretrial brief, Defendants cannot prevail on *Pike*.

Defendants do not address the *Pike* balancing test in their pretrial brief. They instead

[45] In their pretrial brief, Defendants, in a single sentence, invoked notions of comity and federalism. Defs' PTB at 49. But those doctrines only prevent states legislating beyond their borders when the conduct they are regulating has "no relation to anything done or to be done" within the state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (citation omitted); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996) (invalidating an Alabama punitive damages award because it would deter conduct that was "lawful where it occurred and that *had no impact on Alabama or its residents*.").

[46] *See also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Standard Oil Co. of Kentucky v. Tennessee*, 217 U.S. 413 (1910)

[47] *See also Washington Bankers Ass'n v. State*, 198 Wn. 2d 418, 451 (2021).

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1 rely entirely on the fact that the injunction will have some extraterritorial effect. But *National*
2 *Pork Producers* specifically rejected this exact argument. 598 U.S. at 371 (rejecting a per se
3 rule against extraterritorial effects). And the primary case on which Defendants rely, *Allergan,*
4 *Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013), both predates *National*
5 *Pork Producers* and is inapposite. In *Allergan*, the injunction applied California law to entities
6 outside of California "regardless of whether the[ir] conduct in other states causes harm to
7 California." *Id.* at 1358. The State does not seek such an injunction: The State has proven the
8 transaction it seeks to enjoin will cause harm to Washington, *E.g.*, FOF ¶¶ 147, 187, and has
9 made clear that Defendants are free to enter into a transaction that will not cause such harm to
10 Washington—even if it may cause anticompetitive harm elsewhere.

11 Defendants also argue in their pretrial brief that the Full Faith and Credit clause is
12 implicated by an injunction here. That argument is without merit. Defendants do not identify
13 any "judicial Proceeding[]t" or "public Act[]" of any state that they contend has not been
14 afforded Full Faith and Credit. U.S. Const. art. IV § 1. Nor could they: No state's law *requires*
15 Kroger and Albertsons to merge.[48] And as explained, Defendants remain free to enter into a
16 transaction that does not have anticompetitive effects in Washington. *See supra* p. 45-47.

17 The Full Faith and Credit clause does not require the State to decline to enforce its laws
18 to protect its own citizens in the absence of a conflict with another state's laws. *See Franchise*
19 *Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003). Even where there is such a conflict, the
20 clause "does not compel 'a state to substitute the statutes of other states for its own statutes'
21 dealing with a subject matter concerning which it is competent to legislate." *Id.* Where a state
22 is "competent to legislate" on the subject, applying the state's substantive law is
23 "constitutionally permissible" so long as the state has "a significant contact or significant
24 aggregation of contacts," that applying its law "is neither arbitrary nor fundamentally unfair."
25
26

[48] Each case Defendants cite involve state laws that conflicted by *requiring* opposite results and the unconstitutional law specifically displaced another state's laws without regard for any impact in the legislating state. *See Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504–05 (1939); *Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1135 (W.D. Wash. 2011).

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Id. at 494-95. Defendants do not attempt to satisfy these standards. Nor can they: Applying Washington antitrust law against the State's two largest grocery retailers—who earn billions in sales in Washington—to protect Washington consumers from higher prices is squarely constitutional. *See Hyatt*, 538 U.S. at 494-95 (states are competent to legislate and had sufficient contacts when the challenge law protects state citizens from injury within the state).

* * *

As discussed, the Court can and should enjoin the Proposed Transaction in its entirety because that is the transaction actually proposed by Defendants and because that transaction will harm competition in Washington. Enjoining the parties from closing the Proposed Transaction is a remedy that is narrowly drawn to provide the State complete relief.

CONCLUSION

For the forgoing reasons, the State respectfully submits that the merger is unlawful and should be enjoined, and respectfully requests that this Court: (1) Adjudge and decree the Proposed Transaction to be unlawful in violation of RCW 19.86.060; (2) Enter judgment in favor of the State of Washington and against Defendants; (3) Permanently enjoin and restrain Defendants, their affiliates, successors, transferees, assignees and other officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf or in concert with them, from consummating the Proposed Transaction; (4) Award the State of Washington its reasonable costs and attorneys' fees, as provided by law; and (5) Award such other relief as it may deem just and proper.

DATED this 18th day of October 2024.

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DECLARATION OF SERVICE

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

DATED this 16th day of December 2024 in Seattle, Washington.

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