Exhibit B

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CASE #: 24-2-00977-9 SEA

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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FINDINGS OF FACT

The following facts have been proved by a preponderance of the evidence.

I. BACKGROUND

A. Kroger and Albertsons' Proposed Merger

1. Kroger and Albertsons are the number one and number two supermarket chains in Washington, where they collectively operate 320 stores. Trial Transcript, Testimony of Rodney McMullen, 1290:19-22; Dr. Nitin Dua 1587:22-23. In Washington, Kroger runs 55 stores under the Quality Food Center ("QFC") banner and 59 under the Fred Meyer banner, Groff 539:15-25, and Albertsons operates 215 stores under the Albertsons, Safeway, and Haggen banners, Schwarz 465:9-15; State's Exhibit ("SX") 0218.

2. Kroger and Albertsons are among the largest retailers nationally, as well. Kroger operates 2,722 supermarkets nationwide and is one of the world's largest retailers by revenue, with $150 billion in revenue in 2023. Defendants' Exhibit ("DX") 1996, p.61, SX4822, p.4. Albertsons operates 2,271 supermarkets nationwide. SX0218, p.13. In 2023, Albertsons earned $79.2 billion in revenue and $1.2 billion in profit. *Id.* at 61, 70. Defendants each own the rights to some of the largest, most recognizable, and most successful "private labels" in the country. *See* DX2983, p.18 (Kroger's "Our Brands" are the "9th largest CPG in the US with four, $1B brands."); *see also* Schwarz 507:4-508:4 (Own Brands is the largest Consumer Packaged Goods in Albertsons' stores).

3. Both companies have grown their businesses by acquiring other grocery store chains, including in Washington. Albertsons acquired Safeway in 2015. Sankaran 1352:10-15. Kroger's scale is the product of decades of buying up competitors across the country, including Harris Teeter, Roundy's, and Fred Meyer. *Cf.* Aitken 1304:25-1305:3.

4. On October 13, 2022, Kroger entered an agreement to purchase Albertsons for nearly $25 billion. DX1254 at p.6; DX2552. The merger is structured as a stock-purchase agreement, in which Kroger will buy all outstanding shares of Albertsons. *Id.*

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B. Defendants' Proposed Divestiture and C&S

5. When announcing the merger, Defendants announced a plan to spin off 100-375 Albertsons stores to an Albertsons subsidiary ("SpinCo"). DX1254, p.6. Almost 11 months after announcing the merger, Defendants announced a plan to instead divest 413 stores to C&S Wholesale Grocers ("C&S"), a large grocery wholesaler. Florenz 867:1-10.

6. In April 2024, Defendants and C&S entered into an amended Asset Purchase Agreement ("APA"), in which Defendants agreed to divest 579 stores, including 124 in Washington. SX3748; Morris 2776:2-6, 2776:9-10. C&S is primarily a grocery wholesaler, Winn 1456:20-22, with limited experience in grocery retail. It currently operates just 25 retail stores under the Grand Union and Piggly Wiggly banners. McGowan 1158:3-7.

7. Under the APA, C&S will acquire 485 Albertsons and 94 Kroger stores across the country. DX2915; SX3748; Morris 2776:2-13. In Washington, C&S will acquire 50 QFC stores from Kroger, and 12 Haggen, 59 Safeway, and three Albertsons stores from Albertsons. Florenz 866:3-19; Morris 2798:23-2799:1, 2777:11-15. C&S is acquiring the QFC and Haggen banners, but will not receive rights to the Safeway banner, and will have to rebanner the 59 Safeway stores. Florenz 865:7-11; Morris 2793:8-10; 2798:25-2799:1; Morris 2827:12-20.

II. THE MERGER WILL CREATE 57 HIGHLY CONCENTRATED SUPERMARKET CITY AREA MARKETS

A. Supermarkets Are the Relevant Product Market

8. Supermarkets are the relevant market. *See* Dua 1586:25-1587:10; Finding of Fact ("FOF") ¶¶11-45. Supercenters, which include supermarkets inside them, are also in the relevant market. *See* Tucker (WinCo) 2387:15-22 (supercenters contain supermarkets); Dua 1587:5-9; 1588:15-1589:6. Other retail formats, including club stores, dollar stores, and specialty and natural grocers, and mass merchandisers, are not in the market. *See* Dua 1589:7-20; FOF ¶¶46-91.

9. Each Kroger and Albertsons store in Washington is a supermarket or

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supercenter. Dua 1588:10-24. Walmart also operates grocery stores (Walmart Neighborhood Markets) and Walmart Supercenters, which contain grocery stores. Tucker 2387:15-22; Lieberman (Walmart, Inc.) 2426:6-11 (most Walmart locations are neighborhood markets). Walmart Discount Stores are mass merchandisers and not in the market. *See* Dua 1589:7-20.

10. Other Washington supermarkets include Winco and Amazon Fresh, and local chains like Rosauers and Yoke's. Rigsbee (Rosauers) 2412:16-17; 2412:21-23; Kimball (WinCo) 2362:9-15; Oblisk (Whole Foods Market, Inc.) 2865:20-22.

1. Supermarkets offer a distinct customer experience based on product breadth and diversity

11. Supermarkets offer a "one stop shopping" experience, where customers can get substantially all of their food and household non-food needs for the week, if they so choose. *See* Rigsbee (Rosauers) 2413:6-9; Oblisk (Whole Foods) 2887:3-9; SX0928 at P13315; Lieberman (Walmart, Inc.) 2425:22-2426:23; DX3055 (Snow (Dollar General) Dep.) 93:22-94:02; Dua 1587:11-1588:9. Supermarkets and supercenters both carry a wide assortment of food and other grocery products, including produce, frozen food, meat, deli and bakery products, and household and beauty products. McMullen 1310:5-1311:1; *see also* DX2087 p.9 (Walmart); Oblisk (Whole Foods) 2887:3-9; Dua 1587:11-1588:9. Supermarkets' product offerings are also focused on variety: they offer customers choices in order to cater to a wide variety of customer preferences. *See* Albi 704:22-705:5 (QFC); Kammeyer 796:12-17 (Fred Meyer); Street 412:7-15 (Albertsons); Schwarz 511:16-52:11 (Albertsons).

12. Supermarkets offer multiple product types and brands, including within a given product category. *See* Rigsbee (Rosauers) 2422:7-17; *see also* McMullen 1310:10-15 (Kroger). For example, supermarkets might offer crunchy and creamy peanut butter, national brands like Skippy and JIF, and private label brands. Supermarkets typically stock both national and private-label brands. *E.g.*, DX3050 (Tucker (WinCo) Dep.) 2363:11-14; SX4828 (Cahan (Trader Joe's) Dep.) 99:23-100:19; DX2087 at 12 (Walmart).

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13. Supermarkets offer multiple product sizes to give consumers "a variety of options . . . to choose from." Kammeyer 797:8-17 (Fred Meyer); Street 409:16-21 (Albertsons); Albi 703:2-14, 703:15-25 (QFC); Lieberman (Walmart, Inc.) 2435:22-2436:15; Rigsbee (Rosauers) 2422:7-2423:3. Supermarkets do not generally sell products in bulk. *E.g.*, Albi 745:25-746:1; Lieberman (Walmart, Inc.) 2435:22-2436:15.

14. Supermarkets thus carry tens of thousands of stock keeping units ("SKUs"). *See, e.g.*, Rigsbee (Rosauers) 2412:18-20; SX4688 ¶ 6; SX4828 (Cahan (Trader Joe's) Dep.) 99:23-100:19. Supermarkets generally use at least 20,000 square feet of selling space. Dua 1586:25-1587:10; *see, e.g.*, Tucker 2362:11-15; Rigsbee (Rosauers) 2412:12-15; SX4828 (Cahan (Trader Joe's) Dep.) 99:23-100:19; Lieberman (Walmart, Inc.) 2425:22-2426:23.

(a) Kroger and Albertsons stores are supermarkets

15. Like other supermarkets, Kroger and Albertsons carry a wide assortment of food and non-food products. McMullen 1310:7-9. They both carry fresh produce, organic foods, health and beauty care, pre-made meals, frozen foods, and many other products. *Id.* at 1310:16-19; Albi 692:4-23 (QFC); SX0218 at p.15 (ACI 2024 10-K).

16. Kroger and Albertsons are one-stop shops. *See* Albi 692:20-23 (QFC's goal is "to provide anything a customer would need related to food"); Albi 701:11-702:21 (similar); Kammeyer 794:2-11 (at Fred Meyer, "customers can purchase substantially all of the household food and non-food requirements"); McMullen 1213:1-12 (acknowledging financial filings indicating that Kroger provides "a one-stop shopping experience"); SX0928 at P13315 (Kroger's 2022 10-K characterizing Kroger stores as satisfying customers' "desire for one-stop shopping"); DX2711 at p. 32, 34 (2024 internal Albertsons analysis describing a group of its customers as wanting "fast, easy, one-stop shopping," and noting its "future growth will rely on delivering the right value drivers" with those customers); Kammeyer 793:6-14, 795:1-8 (acknowledging his prior testimony labelling Fred Meyers as "one stop shopping locations" because they "offer a wide variety of items . . . that we feel serve a

customer's needs and wants."); SX4835 (Lanoue (Albertsons) Dep.) 47:22-48:9 (noting that "it would behoove us as . . . a large grocery retailer in the Seattle metro area, to incentivize customers to shop with us as a one-stop shop option"); Dua 1587:24-1588:9.

17. Kroger and Albertsons' product offerings prioritize customer choice and variety. *See* FOF ¶¶ 11-12, 15-16, 18. Kroger and Albertsons thus offer a range of private label and national brands, including in particular product categories. *See also* Albi 704:16-21 (QFC); Kammeyer 796:8-11 (same for Fred Meyer); Schwarz 511:16-512:11 (same for Albertsons).

18. Kroger and Albertsons also offer customers variety in product sizes. Kammeyer 797:8-17 (Fred Meyer); Street 409:16-21 (Albertsons); Albi 703:2-14 (QFC); Albi 703:15-25 (QFC). Washington shoppers can thus get individually packaged items—like a single cup of yogurt or a small size bottle of ketchup—at Albertsons and Kroger supermarkets in Washington state. *See* Street 409:14-15 (Albertsons – yogurt cup); Albi 702:19-24 (QFC – yogurt cup); Street 409:16-18 (Albertsons – ketchup); Albi 702:25-703:1 (QFC – ketchup). While Kroger and Albertsons each stock some larger format items, they generally do not carry products in bulk. *E.g.*, Street 409:12-24; Albi 763:25-764:1 (QFC very rarely sells bulk sizes).

19. Both Kroger and Albertsons carry tens of thousands of SKUs. Kroger stores carry 60,000 SKUs on average, while Safeway and Albertsons carry 40,000 SKUs on average. *See* Groff 540:22-24; *accord* McMullen 1293:15-17; Kammeyer 795:12-14; Street 408:5-12.

20. Kroger and Albertsons stores average well over 30,000 square feet. *See* Street 407:21-408:4 (Albertsons stores average 45,000 sq. ft. and very few are less than 20,000 sq. ft.); Dua 1587:11-1588:9 (Kroger and Albertsons stores in Washington average 31,000 sq. ft.)

21. Testimony and data suggesting that consumers do not use Albertsons or Kroger as a "one stop shop" are not credible. Albertsons' internal data on customer trips includes *any* trip to a wide range of retailers—including Shell gas stations, Petcos, and high-end beauty stores like Ulta—for any category of item also for sale at Albertsons. *See* Kinney 1936:23-1939:17. And Kroger executives were repeatedly forced to acknowledge prior testimony and

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financial filings referring to Kroger's offering as one-stop shopping. *See* FOF ¶ 16. Albertsons' internal data, in any case, suggests that customers shop at traditional grocers 2.1 times per week, on average, and shop far less frequently at other store formats. SX4448.

22. No Albertsons witness disputed that a customer can buy substantially all their household food and non-food needs at Kroger or Albertsons stores.

2. Kroger and Albertsons compete most closely with other supermarkets on price

23. Kroger and Albertsons compete most closely with other supermarkets (including each other) on price. *See* FOF ¶¶ 28-31, 153-162. In Washington, Kroger's QFC and Fred Meyer stores benchmark their prices primarily against other supermarkets. Groff 551:12-14.[1] QFC's pricing strategy is essentially to "match" Safeway for every item in its stores. Groff 551:17-20, 552:4-9. *See also* FOF ¶¶ 156 (describing QFC's pricing strategy). QFC does not index prices against Costco, Whole Foods, or any retailer other than Safeway. Groff 552:8-16.

24. Fred Meyer sets prices primarily against Walmart and Safeway: Fred Meyer uses Walmart's prices as a "floor" and Safeway's prices as a "ceiling." Groff 559:4-17; *see also* FOF ¶¶ 155-59 (describing in detail Fred Meyer's pricing strategy). Fred Meyer generally does not raise its prices above Safeway's. *See* FOF ¶¶ 157-59. But where Safeway's prices are comparatively high, Fred Meyer will take advantage and raise its own. SX2607; SX0600.

25. There is no evidence in the record that QFC or Fred Meyer changed even a single base (non-promotional) price in response to a retailer other than Walmart and Safeway. No Kroger witness was shown documents reflecting competition on base prices with formats other than supermarkets. *See* Groff 676:6-15; Albi 762:20-763:9; Kammeyer 849:15-23.

26. In Washington, Albertsons similarly sets its prices based primarily on other

[1]Andy Groff leads the national team responsible for setting the pricing strategy for QFC and Fred Meyer stores. Groff 540:1-8; *see also* Groff 543:2-6; Aitken, 2501:19-21.

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supermarkets and supercenters. *See* FOF ¶¶ 27, 160-62 (discussing Albertsons' pricing strategy).

27. The Seattle division's pricing "philosophy" is to "price at an index against Fred Meyer." *See* Street 360:19-22;[2] *see also* SX1165 at p.1 ("Albertsons' pricing strategy is to "generally price our goods between the traditional grocery retailers, (i.e., QFC, Rosauers, Yoke's, etc.), and our modified low price operator, Fred Meyer."); *accord* Street 374:17-375:1. Consistent with that strategy, Albertsons does not generally index its prices against any other retail format, including club stores, when setting prices in Washington. *See* FOF ¶¶ 29-32.

(b) Kroger & Albertsons' price checking

28. Kroger overwhelmingly price checks other Supermarkets. Overall, 99% of Kroger's price-checks in Washington state are of other supermarkets or supercenters. *See* Dua 1594:4-24. In Washington, Kroger price checks Safeway and Walmart in all its Rules Based Pricing ("RBP") zones. Israel 3326:8-19. Albertsons also overwhelmingly price checks other Supermarkets. Overall, 96% of Albertsons' price checks in Washington state are to other supermarkets or supercenters. *See* Dua 1594:4-25. In the Seattle Division, Safeway and Albertsons price check against Walmart and a "primary food competitor," which in the Seattle division is Kroger. *See* Street 379:19-383:15; *see also* SX1587 at pp. 8, 19. Albertsons has a "CPI" tracker that tracks its overall pricing against its competitors, which lists prices for Kroger banners (Albertsons' "primary food competitor") and for Walmart. SX1587; *see also* Street 379:17-384:3. The CPI tracker does not list prices for any non-supermarket. SX1587. Albertsons does not price check Costco for the purposes of adjusting its prices in Washington. Street 413:2-414:13; *see also* Schwarz 512:23-513:1, 514:3-21. Similarly, Albertsons does not check or react to prices from Trader Joe's. *See* Schwarz 509:7-14. Albertsons also does not set pricing against Whole Foods except for some specific seasonal items. Schwarz 511:3-15.

[2] Albertsons' Seattle division includes most of the state of Washington. Street 354:24-355:6.

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(c) Supermarkets do not generally set or adjust prices based on other store formats

29. At trial, Albertsons offered only one specific example of a price or promotional responses to non-Supermarket and Supercenter competitors' prices. That document listed a set of 5 promotions on three different bread products in 2021 "to fight Costco leakage." DX0090 at p.1; *see also* Cloward 3031:7-3032:4. Albertsons witnesses could identify only 3 items for which Costco's prices influence the base prices Albertsons sets: bulk paper, water, and Frito-Lay multipacks. *See* Street 414:9-13. Dennis Schwarz, former Senior Vice President of Marketing and Merchandising, could not recall a single time when Albertsons changed its base pricing, or offered promotions, to compete with Costco. *See* Schwarz 515:11-19, 516:12-14.

30. Other Albertsons witnesses were asked general questions about competition with other store formats, but were not shown specific documents involving any specific responsive actions. *See, e.g.*, Sankaran 1440:1-22, 1442:2-6. Brad Street testified that documents referring to Costco, Dollar Stores, Whole Foods, and others are present in his "full files." Street 431:5-18. But the only document Albertsons' counsel showed Mr. Street (and entered into evidence) was a "single text message about some chicken" at Costco. Street 463:3-7. Similarly, Dennis Schwarz testified that documents regarding Grocery Outlet, Trader Joe's Whole Foods, Amazon, and pharmacies were all "available" in his files, yet his counsel did not show him a single document discussing competition with those store formats. Schwarz 534:10-535:1. Those Albertsons witnesses also did not testify about any individual instances in which Albertsons changed its pricing or promotions to compete with stores in other formats.

31. Although witnesses from both companies testified that when stores open in their supermarkets' trade areas, they employ a strategy called "competitive blunting," this limited scope of competition confirms that Defendants do not perceive non-supermarkets to be ongoing close competitors. Albertsons witnesses could not name competitive blunting actions other than mailers for new store openings. Schwarz 536:25-537:5. Kroger's competitive

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response to new non-supermarkets is similarly limited. *See* Kammeyer 846:8-14 ("[M]ost often when a Costco does open within a market, we send mailers . . . ."). The only document Kroger introduced regarding these competitive blunting efforts listed dates on which single mailers were sent in response to Sprouts, Target, Metropolitan Market, and various supermarket locations that opened in the state. *See* DX0061 at p.2. The list suggests that mailers were not sent for multiple stores in Washington, *see* Kammeyer 848:7-849:11, and that for stores where Fred Meyer *did* send mailers, it did so only on one or two occasions. *See* DX0061 at p.2.

32. Other supermarkets in Washington also price check mainly or exclusively to supermarkets. WinCo, a Supermarket with locations in Washington, primarily price checks Walmart, Kroger, and Albertsons. SX4688 ¶ 8. Rosauer's does not comprehensively price check any retailer besides Safeway and Fred Meyer. Rigsbee (Rosauers) 2416:6-9. It does not typically price check Costco or convenience stores. *Id.* at 2423:7-10, 2417:6-14.

3. Defendants and the industry recognize supermarkets as a distinct market

33. Defendants treat supermarkets as their closest competitors. Defendants refer to one another as their "primary" competitors. *See* FOF ¶¶ 147-52. And they both describe Walmart as the most important competitor in their industry. *See* McMullen 1245:10-14; Sankaran 1375:12-1377:9. These are all supermarkets.

34. Third parties also recognize supermarkets as a distinct category, which includes Albertsons and Kroger. *See* SX4842 (Neal (Sprouts) Dep.) 105:12-107:15 ("conventional supermarket" means retailers such as HEB, Kroger, and Publix, Albertsons, Hy-Vee, and Winn Dixie, where "customers will go in and do their [] shopping for food primarily"); George (Costco) 2296:24-2297:1 (Kroger and Albertsons are "traditional supermarkets"); Conlin (Target) 2918:25-2919:10; 2918:25-2919:10 (describing Kroger and Albertsons as "grocery store[s]," and, when asked to identify other stores that sell groceries, naming Walmart); *see also* SX4828 (Cahan (Trader Joe's) Dep.) 99:23-100:19 (Trader Joe's also understands Kroger

and Albertsons to be Supermarkets, and understands the term "Supermarket" to mean a store with tens of thousands of SKUs, most of which are branded, and one that runs ads and does high-low pricing—none of which are true of Trader Joe's); DX3055 (Snow (Dollar General) Dep.) 87:14-88:05 (Albertsons and Kroger are part of the Grocery channel).

35. In a 2020 presentation to the Federal Trade Commission to secure antitrust clearance of Albertsons' acquisition of two specialty grocery chains in the mid-Atlantic area, Albertsons distinguished the traditional grocery market from other retail formats. It argued that there was "no product overlap" between its existing "traditional supermarkets" (including Safeway banner stores) and the "specialty" stores it sought to acquire, distinguishing the acquired stores based on their smaller size, specialty assortment, and high-income customers. SX0157 at p.16. Albertsons presented the traditional grocery market, in which Kroger and Albertsons operate, as distinct from "specialty" (which it defined to include PCC, Trader Joe's and Whole Foods), "price impact," (including Aldi, Grocery Outlet, and Lidl), and "club" (including Costco). SX0157, P1315. *See also* SX4840 (Morris Dep.) 140:14-143:16.

36. The industry has traditionally divided retailers into "channels." *See, e.g.*, Sankaran 1357:14-1358:2; DX3055 (Snow (Dollar General) Dep.) 80:22-81:20. One is the "supermarket channel," which is distinct from "the Club channel, the dollar channel, the convenience channel." *Id*. Retail "channels" are reflected in standard data provided by firms like Numerator—which divides retailers into subcategories including "mainstream grocery," "club," "gas and convenience," and "premium grocery." *See* Kinney 1989:15-1990:21. Albertsons' internal documents reflect those same industry-standard categories. *See* SX1526 at p.39 (2021 analysis compiled by Lisa Kinney's team dividing "traditional grocery" off as a discrete category from other retailer types, including "club," "ethnic," and "mass" retailers, and including in "traditional grocery" Safeway, QFC, Kroger, Haggen, Fred Meyer, and Walmart Neighborhood Markets); *see also* Cloward 3043:1-13.

37. The industry uses "supermarkets," "traditional grocery" and "conventional

grocery" interchangeably. George (Costco) 2304:14-19; Rigsbee (Rosauers) 2412:21-2413:1.

4. Economic analyses support supermarkets as a relevant product market

38. An antitrust product market is a collection of products that consumers consider as close substitutes. Dua 1585:2-11. It does not include all possible substitutes, or all substitutes *some* consumers may choose. Dua 1585:17-1586:2; Israel 3227:20-3228:7.

(a) Diversion analysis indicates that consumers do not consider other formats substitutes for supermarkets

39. In analyzing consumer diversion, the State's competition economist expert witness, Dr. Nitin Dua, relied upon an internal study performed by Albertsons that indicated that the vast majority of sales from closed Albertsons supermarkets in Washington state would divert to other supermarkets—not to other store formats. *See* Dua 1592:21-1594:3. Albertsons' study analyzed where sales would go if Albertsons closed stores in several Washington cities—including Yakima, Seattle, Marysville, and Kennewick. *Id.* The study found that if an Albertsons were to close, 90% of its sales would divert to other supermarkets and just 10% would go to other store formats. *Id.* Even if a Costco was located within three or five miles, diversion from a closed Albertsons store would still be less than 5%. *See* Dua 1686:11-22.

40. Dr. Dua found several real-world examples that allowed him to corroborate these analyses by measuring diversion directly between Kroger and Albertsons. *First*, in 2021, Kroger closed two QFC stores—one in Capitol Hill and one in Wedgwood. *See* Dua 1624:4-1625:13. Dr. Dua performed a regression analysis to isolate the impact of those closures on the sales of the nearest Albertsons stores. *See* Dua 1624:4-1626:11. Despite the presence of stores of different formats in close proximity to the closing QFCs, Dua Rebuttal 3473:24-3474:11, his analysis showed that between 55% and 70% of sales diverted to the closest Albertsons stores. *See* Dua 1626:3-11. A 2022 email exchange between QFC's president Brent Stewart and David Richard, a QFC employee, further corroborated these results, estimating that if the Wedgwood

QFC, one of the two stores studied by Dr. Dua, re-opened, it would draw 95% of its sales from the Safeway one block away. SX2998; *see also* SX4846 (Stewart (Kroger) Dep.) 266:15-21.

41. *Second*, in 2022, roughly half of Kroger's King Soopers were closed for about ten days due to a strike. *See* Dua 1626:12-20. Dr. Dua performed a regression analysis showing about 55 percent of sales diverted to Albertsons during the strike. *See* Dua 1626:21-1627:15. Dr. Dua also used the loyalty card data provided by the parties to calculate diversions between Kroger and Albertsons. Dua 1626:24-1627-15. In conducting this analysis, he estimated each party's shares at the granular census block group level to control for variance in consumer preferences. *Id.* He calculated diversions between Kroger and Albertsons of about 50 to 60 percent, *id.*, which is consistent with the results of the QFC Store Closure and King Soopers strike analyses. Dua 1627:16-23. This degree of substitution between *just the party stores* located near one another shows the degree of substitution to *all* supermarkets within an entire city area is more than sufficient to constitute a relevant market. Dua Rebuttal 3473:24-3474:24.

42. Studies of the effect of new grocery retail entrants also support a supermarket product market. Dr. Dua conducted a regression analysis using Kroger and Albertsons' sales data over a one-year period, showing that when a traditional supermarket enters within one mile, sales at Kroger and Albertsons decreased an average of between 15% and 20%, but when stores of other formats entered within one mile, the sales impact was significantly smaller, and in some cases statistically indistinguishable from zero. Dua 1590:23-1591:15. The effect of a club store entering within one mile was indistinguishable from zero. Dua 1780:15-1781:19.

43. Dr. Dua's entry study indicates that Kroger and Albertsons are far more likely to see their sales adversely affected by—and thus far more likely to respond to—competition from other supermarkets than competition from stores of other formats. Dua 1591:16-1592:3. The parties' own analyses are in accord. As Dr. Dua explained at trial, an Albertsons internal study found that on average, Albertsons supermarket sales dropped by roughly 10% when another supermarket entered the market; whereas other store formats, like wholesale club or

natural organic gourmet stores, had effects half or less than half that size. Dua 1592:4-14.

44. The results of Dr. Dua's entry studies and the parties' internal analyses indicate that consumers consider supermarkets close substitutes, and that other store formats, including warehouse club stores and natural organic supermarkets, are not close substitutes to supermarkets. Dua 1591:16-1592:20. This Court agrees.

45. Defendants' expert, Dr. Mark Israel did not propose any alternative markets—product or geographic. Israel 3335:8-3336:6. Dr. Israel contends that other store formats *could* be in the relevant market depending on their geographic proximity to a supermarket, but does not identify the set of close competitors that would be in the market for *even a single store.* Israel 3337:24-3339:25; *see* FOF ¶¶ 106-14 (discussing the EGK model).

5. Other store formats are not in the product market

(a) Club stores

46. Defendants and the industry both recognize Costco as a club store, not a supermarket. *See* DX0925 at PCC000075 (PCC internal document labelling Costco as a club store); Oblisk (Whole Foods) 2886:17-18 ("Costco or Sam's Club is not a supermarket"); Rigsbee (Rosauers) 2421:24-2422:1; SX1526 at p.39 (Albertsons' internal document categorizing Costco and others as "club" stores, not traditional grocers); Cloward 3043:14-17; Kinney1989:15-1990:21; Cloward 3029:2-4 ("Costco is in club."). *See also* Dua 1589:7-20.

47. Third-party supermarkets do not see club stores as direct competitors. *See Lieberman* (Walmart, Inc.) 2437:12-2438:4 (product offerings between club stores and Walmart supermarkets and supercenters are "not easily comparable"); Winco 2391:1-3 (Costco is not a close competitor, in part because Costco requires memberships).

48. The vast majority of Costco's price responses—95%— are in reaction to other club stores (BJ's and Sam's). George (Costco) 2309:9-2310:23; SX4818 ¶ 11. Non-club store retailers, including Walmart, "account for a very small fraction of Costco's pricing responses." *Id. See also id.*, George (Costco) 2308:1-19 (Costco only conducts "regular periodic price

checks of other club stores"; it does not regularly price check traditional grocery stores).

49. Entry and exit of traditional grocery stores also has no sustained effect on Costco's sales. When a traditional grocery store exits the market near a Costco warehouse, Costco experiences no sustained change in its grocery and bakery sales. *Id.* at 2306:24-2307:4. Ms. George, a Costco executive, believes that "customers of the closed store move to another store with a similar format in the area instead of switching to Costco." SPX4818 ¶ 10. When a traditional grocery store opens near a Costco warehouse, Costco observes only a small in its grocery and bakery sales, and that decline is only temporary. George (Costco) 2305:19-2306:23; SPX4818 ¶ 10 (estimating sales decline by only 2% and rebound "soon thereafter").

50. Costco's business model also differs from the business model of traditional grocery stores. Costco requires a paid membership to shop in its warehouses. George (Costco) 2314:17-25. In its grocery categories, Costco carries fewer than 2,500 SKUs per warehouse, compared to the 40,000 SKUs stocked by typical grocery stores. George 2313:1-2314:16; SPX4818 ¶ 4. Costco's strategy is to carry a limited selection of items that ensure rapid inventory turnover. George (Costco) 2298:18-2299:5. That business model makes Costco's supply chain more efficient and makes it challenging for traditional grocery stores to set comparable prices. George (Costco) 2297:9-16; 2299:6-2300:4.

51. Costco offers a different consumer experience and store facilities than traditional grocery stores. Geroge (Costco) 2315:10-13. Costco warehouses have concrete floors and very high ceilings. *Id.* at 2315:14-16. They have greater square footage than supermarkets—around 150,000 square feet—and have aisles big enough to accommodate forklifts. *Id.* at 2315:17-25. Costco warehouses stack products in pallets. *Id.* at 2316:1-3.

52. Costco's product offerings also differ. Unlike traditional grocery stores, Costco carries far fewer brand options and does not optimize for customer choice. George (Costco) 2316:12-14. And, Costco does not stock at all some products that supermarkets stock. *Id.* at 2316:15-17. A customer cannot buy fresh herbs at Costco, for example. *Id.* at 2316:18-19.

Costco generally only carries pack sizes larger than those available at traditional supermarkets. *Id.* at 2316:20-22. And most products are offered for sale in case, carton, or multi-pack quantities. *Id.* at 2316:23-25. Customers cannot buy standard consumer sizes like a single tube of toothpaste or a single cup of yogurt. *Id.* at 2317:11-13. Much of the produce Costco sells is in prepackaged sizes: Costco customers cannot buy a single banana or weigh and purchase a specific amount of potatoes. *Id.* at 2317:1-10. On average, Costco customers make less frequent trips to its warehouses. George (Costco) 2317:19-25. Costco estimates that its customers go to its warehouses less than every other week, with such trips colloquially known as "Costco runs".

53. Supermarkets do not regularly price check Costco. *See, e.g.*, DX3050 (Kimball (WinCo) Dep.) 85:13-85:23 ("WinCo rarely price checks Costco"); Rigsbee (Rosauers) 2423:4-13 (Rosauers only intermittently price checks Costco for only a limited set of items).

54. Ms. Kinney's testimony about the share of Albertsons stores "impacted in a negative way by a Costco nearby," is not credible. *See* Kinney 1865:7-10, 1865:7-1868:7. Ms. Kinney could not explain the measurement used, or whether it reflected merely geographic proximity and demographic data, instead of sales data. *See id.* at 1979:1-1980:19. Even under the model Ms. Kinney presented, 56% of Albertsons stores in the Seattle Division were not impacted by Costco. *Id.* at 1981:7-11.

(b) Natural, organic, and gourmet stores

55. The industry recognizes premium, organic, and gourmet stores as a discrete category, *see* FOF ¶ 36. Albertsons has argued to regulators that premium, organic, and gourmet stores were in a different market than conventional grocery. *See* FOF ¶ 35 (ACME deck). Albertsons' documents categorize Whole Foods, Trader Joes, and PCC as "specialty" grocers. SX1526 at p.39; Cloward 3043:22-3044:7. Supermarkets do not compete closely with natural and organic grocers, as they do with other supermarkets. *E.g.*, DX3050 (Tucker (WinCo) Dep.) 2392:12-15; 2391:24-2392:6.

56. Supermarkets do not compete closely with natural, organic, and gourmet stores on price. Supermarkets do not regularly price check premium, organic, and natural grocery stores. *E.g.*, DX3050 (Kimball (WinCo) Dep.) 85:13-85:23; 86:04-86:16; *id.* at 114:06-114:17.

57. There is no evidence of the record of any supermarket adjusting its prices in response to premium or natural stores outside of the competitive blunting context, *see* FOF ¶¶ 30-31.

58. Switching data presented by Ms. Kinney at trial regarding natural and organic stores like Whole Foods and Trader Joes was not credible. DX2221. Ms. Kinney could not explain the methodology used or whether the results were statistically significant, and the data included no comparisons to the effect of entry by traditional grocery stores. *See* Kinney 1986:19-1988:19; 1986:15-18.

(i) PCC

59. PCC does not consider itself a supermarket, because it offers a specialized assortment, Spear (PCC) 2339:15-24, "focused on natural and organic foods," and considers the social, environmental, and financial impact of its decision-making. PCC has strict quality and animal welfare standards. Spear (PCC) 2340:9-2341:25. *Id.* at 2325:10-12; 2326:15-19; 2338:14-16. 95% of the goods PCC sells are organic, *id.* at 2341:5-8, and PCC declines to stock certain products that are harmful to the environment. *Id.* at 2341:5-25. PCC bans items containing any of 500 "unacceptable" ingredients, including artificial preservatives and flavors. *Id.* at 2340:12-21. A consumer cannot find many popular national brand items like Kraft Mac & Cheese and Coca-Cola on PCC's shelves. *Id.* at 2340:22-2341:4. PCC considers natural and organic retailers to be closer competitors than other grocery retailers, and considers Whole Foods Metropolitan Markets and Town & Country Markets its key competitors. *Id.* at 2342:18-2343:3.

(ii) Whole Foods

60. Whole Foods is a specialty, natural, and organic retailer. Cloward 3029:12-13.

Whole Foods product offering and assortment is different from supermarkets'. Oblisk (Whole Foods Market, Inc.) 2881:23-2883:6. Whole Foods does not carry products containing any one of 500 banned ingredients from its shelves. *Id.* at 2881:23-2882:17. It thus carries limited national brands. *Id.* at 2886:5-9, 2887:14-2888:5. Consumers cannot buy Gatorade, or Oreos, or Lay's potato chips, or Kraft Mac & Cheese, for example, at Whole Foods. *Id.* at 2887:14-2888:5. Third-party supermarkets do not consider Whole Foods to be a direct competitor. Tucker (WinCo) 2391:19-2392:4 (Whole Foods customers are affluent and "interested in organic and natural options."); *see also* Rigsbee (Rosauers) 2420:12-2421:11.

61. Dr. Israel testified there was "substantial diversion" between Defendants and Whole Foods, Israel 3346:20-3347:7, but on cross examination admitted that his own model estimated aggregate diversion from the Defendants to Whole Foods of just 1.2 to 1.8 percent in Washington. Israel 3347:25-3348:4.

(iii) Sprouts

62. Sprouts is a specialty, natural, and organic retailer. DX0222 at p.1 (Sprouts Form 10-K). Its assortment differs from traditional supermarkets: it focuses on products that are grass fed, organic, from regenerative farms, and gluten free. SX4842 (Neal (Sprouts) Dep.) 112:11-20. Sprouts also focuses on more health-conscious and selective customer segments than conventional retailers do. *Id.* at 111:18- 112:10. Sprouts does not carry many national brands and conventional cleaning items or household supplies. *Id.* at 178:20-179:25.

63. Sprouts does not compete directly with conventional supermarkets. Whole Foods—another premium store—is the only store that has any material impact on Sprouts' sales. SX4842 (Neal (Sprouts) Dep.) 124:16-125:7; 125:19-23; 125:25-126:19. Sprouts accordingly does not adjust its pricing or otherwise take any action in response to conventional supermarkets that open nearby. *Id.* at 130:14-1313; 128:15-18. Customers generally drive past conventional supermarkets to get to Sprouts. *Id.* at 118:15-119:2. Third-party supermarkets, in turn, do not consider Sprouts a close competitor. Tucker (WinCo) 2391:14-2392:15.

64. Customers often stock-up on national brand items at conventional supermarkets and then purchase additional items at Sprouts, in what Sprouts calls "fill-in trip[s]." SX4842 (Neal (Sprouts) Dep.) 28:1-7; 110:22-111:14.

(iv) Trader Joe's

65. Supermarkets consider Trader Joes to be "specialty" grocer, *see* Cloward 3029:14-15, or a "premium" retailer, and not a direct competitor, Tucker (WinCo) 2392:18-19. Trader Joes likewise does not consider itself a supermarket like Kroger or Albertsons. SX4828 (Cahan (Trader Joe's) Dep.) 99:23-100:19.

66. Trader Joe's business model and product offering is different from a traditional grocer's. SX4828 (Cahan (Trader Joe's) Dep.) 101:13-102:10. It stocks "far fewer SKUs" than a traditional supermarket, *id.*, and its stores average about 13,000-15,000 square feet, *id.* at 17:15-18:13. Trader Joe's products are primarily private label items exclusive to Trader Joe's stores, *id.*, *id.* at 103:25-104:25 (Trader Joe's sells 80% private-label products). It would be "extremely rare" for Trader Joe's to offer national-branded products. *Id.* at 106:11-20. Like other natural and organic stores, Trader Joes bans a list of ingredients in the products it stocks. including artificial preservatives, artificial colors and flavors, and GMOs. *Id.* at 30:4-13.

67. Grocery stores that open near Trader Joe's locations do not meaningfully impact Trader Joe's sales. SX4828 (Cahan (Trader Joe's) Dep.) 68:16-69:8-15, 69:17-18. Indeed, Trader Joe's is comfortable being in the same shopping center as other grocery stores, and the presence of a supermarket would not deter Trader Joe's from opening a store nearby. *Id.* at 136:25-137-13. Trader Joe's does not price based on supermarkets' prices and does not see a difference in its sales when a nearby supermarket offers lower prices. *Id.* at 70:14-23. Trader Joe's also does not routinely check other retailers' prices and does not adjust prices based on any price checks it does conduct. SX4828 (Cahan (Trader Joe's) Dep.) 93:14-94:12; 80:12-19.

(c) Dollar & value stores

68. Dollar Stores are a distinct channel from grocery stores, *e.g.*, Oblisk (Whole

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Foods) 2886:13-14 ("I don't consider a Dollar Store, though, a grocery store"); DX3055 (Snow (Dollar General) Dep.) 99:23-100:07, 147:6-8.

69. Dollar stores price check and compete primarily against other dollar stores and mass merchandisers. SX4847 (Unkelbach (Dollar Tree) Dep.) 81:24-83:7; 158:5-159:8 (dollar stores); DX3055 (Snow (Dollar General) Dep.) 21:14-22:11 (Walmart mass merchandiser are key competitors); *Id.* at 122:11-23 ("We do not account for the presence or distance to Grocery Channel stores in our pricing structures"). Dollar stores have a distinctive pricing model. At Dollar General stores, the vast majority of items are $5 or less. *Id.* at 94:18-95:08.

70. Dollar stores are destinations for "fill-in" trips—not one-stop shops at which customers commonly handle the majority of their grocery needs. *See* DX3055 (Snow (Dollar General) Dep.) 87:14-88:05, 93:10-94:02; SX4847 (Unkelbach (Dollar Tree) Dep.) 119:22-24, 120:2-3 (Customers "[v]ery rarely" do their weekly grocery shopping at a Dollar store).

71. Dollar Stores have a smaller offering than traditional supermarkets that is more focused on convenience items; SX4847 (Unkelbach (Dollar Tree) Dep.) 126:18-127:5 (Dollar Tree focuses on "immediate consumption products"); SX4688 ¶ 10; DX3055 (Snow (Dollar General) Dep.) 82:07-82:19 (stores in the dollar channel typically have less than 15,000 SKUs); *see also* Lieberman (Walmart, Inc.) 2437:12-2438:4 (assortment between dollar stores and Walmart supermarkets and supercenters are not a close match). A typical Dollar Tree or Family Dollar store offers just 1-3 aisles of groceries, roughly 1/10th the space a typical Kroger would offer. SX4847 (Unkelbach (Dollar Tree) Dep.) 108:15-109:4. Dollar General also stocks a more limited assortment. DX3055 (Snow (Dollar General) Dep.) 45:10-18. Neither Dollar Tree nor Family Dollar stores offer fresh meat or seafood. SX4847 (Unkelbach (Dollar Tree) Dep.) 113:22-114:7; DX3055 (Snow (Family Dollar) Dep.) 122:3-14. Dollar stores offer only a limited selection of refrigerated and frozen foods. *Id.* at 131:12-135:4, and do not offer organic products. DX3055 (Snow (Dollar General) Dep.) 96:11-19. Dollar Tree stores do not reliably provide even a basic assortment of groceries. *See* SX4847 (Unkelbach (Dollar Tree) Dep.)

27:5-16; 110:20-111:9 (milk and eggs are not "not in stock very consistently"); *id.* at 111:12-18. ("you never know what you're going to get.").

72. There is no evidence of the record of any supermarket adjusting its prices in response to dollar stores, outside of the competitive blunting context, *see* FOF ¶¶ 30-31. Third-party supermarkets do not consider dollar stores to be close competitors and do not price check dollar stores. SX4688 ¶ 10.

(d) Mass merchandisers (without supermarkets)

73. Mass merchandisers, which may offer a limited selection of groceries but focus primarily on the sale of general merchandise products, are recognized by the industry as a distinct channel. Dua 1785:10-1786:18, 1788:13-17; SX1526 at p.39 (Albertsons internal analysis). Walmart discount stores (but not Walmart Supercenters or Walmart Neighborhood Grocery stores) are considered mass merchandisers. *See* Dua 1588:25-1589:6.

74. Target stores in Washington State are also mass merchandisers. *See* Dua 1786:2-18; 1785:7-14 (including as categorized by TDLinx). Some Target stores, which the company refers to as "Super Targets," are supercenters that include large grocery assortments; but no Super Targets operate in Washington State. Conlin (Target) 2922:4-7; Dua 1785:7-14; 1787:7-12. By contrast, Target's most common store format carries a "more limited range of fresh produce." Conlin (Target) 2922:16-23. Target internally identifies a "peer group" of companies that includes stores like Gap, Nordstrom, Home Depot, Lowe's, and Ross Stores, which do not carry grocery products. Conlin (Target) 2917:18-2918:13.

75. Kroger also does not identify Target or Walmart mass merchandisers as competition. As part of Kroger's Colorado "no comp" zone initiative, it raised prices at a store in Glenwood Springs, which it identified as a "no-comp zone," despite the presence of a Walmart store and a Target store, both of which were mass merchandisers. Dua 1788:13-22.

76. There is no evidence of the record of any supermarket adjusting its prices in response to Target or a Walmart mass merchandiser (not containing a supermarket), outside of

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the competitive blunting context. *See* FOF ¶¶ 30-31.

(e) Other retail formats (ethnic, limited assortment)

77. There is no evidence of the record of any supermarket adjusting its prices in response to an ethnic store or limited assortment store.

78. In its internal documents, Albertsons refers to "ethnic" retailers as a separate market category. *See* SX1526 at p.39 (Categorizing "Ethnic" groceries, including Ranch 99 Market, Fiesta Foods, and H Mart). Fiesta Foods is a niche retailer that "market[s] mainly to Hispanic consumers." Gaylord (Fiesta Foods) 767:13-16, 777:12-14, 780:2-5. It "offers a center store grocery selection that is much different than [an] average supermarket" because its offering focuses on Hispanic and Mexican food items. *Id.* at 777:15-22; 779:20-780:1. It markets "mainly to Hispanic customers," *id.* at 767:12-14; *see also id.* at 770:19-22 (noting that Fiesta does not price check Safeway and that he does not believe they share many customers although it is "down the street from our store" in Yakima). Fiesta Foods operates three stores, all east of the Cascades. *Id.* at 768:24-769:1, 769:13-14; 781:6-7. The former president of QFC testified at trial that she had never heard of Fiesta Foods. Albi 730:5-7.

(i) Aldi & Lidl

79. Aldi and Lidl are limited assortment stores that principally sell private label brands. McMullen 1252:17-1253:1; SX4688 ¶ 11. Defendants' witnesses testified that they compete with Aldi and Lidl, but neither operates stores in Washington. McMullen 1252:12-14.

(ii) Grocery Outlet

80. Grocery Outlet is a limited assortment store with a "limited . . . perishable presence" and "much . . . fewer SKUs" than a traditional supermarket. Rigsbee 2409:14-13; *accord* Schwarz (Grocery outlet has a different format and selection than Albertsons). As a third-party Supermarket CEO explained that it "do[esn't] have a real good assortment that you can count on every day." *Id.* at 2409:21-22. Dr. Israel testified that "Albertsons is . . . focused on competition with Grocery Outlet," Israel 3242:21-3243:13, and that there was "substantial

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diversion" between Defendants and Grocery Outlet, *id.* at 3346:20-3347:7, but on cross examination admitted that his own model estimated aggregate diversion from the parties to Grocery Outlet of only about 1% in Washington, despite 70 Grocery Outlet locations in the state. Israel 3347:8-24.

(iii) Amazon Go

81. Amazon Go is not a significant competitor to QFC and other supermarkets. Albi 716:8-717:2. Amazon Go is "more of a convenience store." Oblisk (Whole Foods) 2890:20-21. Amazon Go stores cater to grab-and-go customers who are looking for a meal solution and basic grocery items. SX3140; Albi 718:7-10. Its stores have more limited selection than conventional supermarkets and charge higher prices. Albi 719:13-20; Albi 719:21-720:2 (Amazon Go's retails were "shockingly high"); SX3140 at p.1 (same).

(f) E-commerce

82. Supermarkets do not generally consider e-commerce retailers to be direct competitors. *See* Lieberman (Walmart, Inc.) 2440:17-22.

83. Defendants testified generally at trial about competition from online retailers, but aside from Amazon.com, Defendants primarily identified other brick-and-mortar retailers that also sell groceries online. *See, e.g.*, Street 434:18-21; Kinney 1894:17-14 (Walmart, Target). Defendants themselves sell groceries through online channels as a supplement. *See* Aitken 1305:15-22. Third-party services like Ubert Eats, Instacart, and Doordash are not themselves online retailers, and instead provide fulfillment services for brick-and-mortar retailers. *E.g.*, Spear (PCC) 2325:19-22; Aitken 2503:10-16; Collison 2203:24-5; George (Costco) 2303:9-11.

84. The evidence at trial showed that brick and mortar retailers do not stock full offerings online, *e.g.*, George (Costco) 2315:1-6, or impose additional fees on online orders, *e.g.*, Lieberman (Walmart) 2441:6-15, George (Costco) 2315:7-9.

85. Amazon sells groceries online through three distinct storefronts: Amazon.com,

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Amazon's dedicated grocery services (Whole Foods and Amazon Fresh), and Amazon's fulfillment services for third-party merchants. Heyworth (Amazon) 3451:15-19. Amazon's dedicated grocery services (Whole Foods and Amazon Fresh) are not available everywhere in the state of Washington. *See* Heyworth (Amazon) 3454:4-3455:21. Amazon's third-party offerings make up the bulk (50 to 60%) of its online grocery business. SX4823 p.2. For those retailers, Amazon offers fulfillment services, and does not act as a retailer: Amazon's third-party partners handle prices, promotions, and assortment themselves. Heyworth (Amazon) 3455:22-3457:3. Those partners include local specialty grocers like Metropolitan Market. *Id.* The third storefront, Amazon.com, does not make perishable products, like dairy, eggs, or frozen foods, a "focal point" of its business. Heyworth (Amazon) 3465:25-3466:3, 3460:21-3461:9. Indeed, customers are unlikely to be able to order perishables through the Amazon.com storefront. *Id*. Amazon.com has no refrigerated grocery warehouses in Washington, and only one in the country—in Arizona. *Id.* at 3461:10-3462:6.[3]

86. Defendants introduced no evidence of specific price or promotional competition in response to Amazon or any other online-only retailers' grocery offerings.

6. Defendants' view of competition is unduly broad

87. Economists recognize that antitrust markets encompass only close substitutes, and do not include *all* options available to customers, or all options that some customers consider substitutes. *See* Dua 1585:12-16. As Dr. Dua explained at trial, economists would not consider motorcycles and mid-sized sedans to be in the same relevant product market, for example, even if *some* consumers would react to a price change in mid-sized sedans by switching to a motorcycle. Dua 1586:9-24.

88. The broad view of competition Defendants and third parties testified to, which holds that retailers compete with *every* retailer that sells a subset of the goods they do, is not

[3] Amazon's testimony that it competes closely with a range of brick and mortar retailers was not credible. Amazon is currently defending an FTC lawsuit, *id.* at 3463:17-3464:3, alleging that Amazon does not compete with brick and mortar grocery stores and has monopolized a market for *online* groceries and services, *id.* at 3467:21-3468:11.

relevant to substitution. *See, e.g.*, Groff 634:12-20 (anyone selling food Kroger also sells is a competitor); Sankaran 1362:17-21 (defining competition as: "Anybody who takes a dollar from our shopper for groceries. And I mean, the broad set of groceries, whether it's toothpaste or a banana."). Defendants' witnesses, using this view of competition, testified that they compete with drug stores, convenience stores, gas stations, McDonalds, and ice cream shops. Aitken 2564:10-2566:18, as well as restaurants, pharmacies, liquor stores, Sankaran 1435:25-1436:10; 1437:2-6, office supply stores and with pet stores, to the extent those retailers sell product-types (pet food and stationary) that are also available at Albertsons', Sankaran 1436:18-1437:6. No evidence in the record supports the idea that any of these retailers are close or likely substitutes for traditional grocery stores.

89. "Share of Wallet"—which measures the percentage of a consumer's total grocery dollars spent at a given retailer—likewise is "not useful [] for analyzing substitution." Dua Rebuttal 3539:21-3540:2. Dr. Israel conceded that share of wallet data itself "doesn't answer the question as to who a close substitute is." Israel 3343:15-17; *id.* 3343:18-3344:4 ("[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."). Share of wallet, moreover, includes "hundreds of retailers," Kinney 1940:3-15, that bear very little similarity to grocery stores of any type. Those retailers include 7-Elevent, Total Wine, CVS and Walgreens, Shell, Chewy.com, an online pet store, and Sephora. *Id.* at 1939:7-1940:2. *See also* Kinney 1906:11-1912:3 (convenience stores and drug stores are "generally" included in Albertsons' share of wallet analyses).

90. Multi-Outlet ("MULO") and MULO+ data also are not indicative of substitution. The data includes dollar stores, club retailers like Sam's Club and Costco, Amazon.com, and mass merchandisers like Target. Kinney 1832:1-8. Lisa Kinney, who is responsible for tracking and reporting MULO+ data within Albertsons and testified to the data at length during trial, was unable to answer whether MULO+ market share data also includes

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retailers like Bed Bath & Beyond, Five Below, and Big Lots. Kinney 1947:3-14. No evidence shows that MULO+ data influences Albertsons' pricing or promotional decisions.

91. Albertsons' testimony about the MULO+ data is also not credible. Albertsons appears to have begun relying on MULO+ data only after it began advocating for the merger. In November 2022—just after the merger was announced—Albertsons did not have market share data for Target, Walmart, or Costco. *See* Kinney 1969:14-1972:11; 1958:11-1960:1. Mr. Sankaran and Ms. Kinney's testimony that MULO+ data revealed this year that Albertsons is losing share to Costco, *see, e.g.*, Sankaran 1438:6-1439:18, is specifically not credible. Albertsons' financial filings do not reflect such a share decline and in fact contradict it. ACI's 2024 10-K, issued after the company began analyzing MULO+ data, *id.* at 1439:11-18, reports share *gains* over the prior year. *Compare* SX0218 at p.8 (2024 10-K, reporting that ACI holds "a number one or number two position by market share in 70% of the 121 metropolitan statistical areas ('MSAs') in which we operate.") *with* SX0908 at p.8 (2023 10-K reporting a number 1 or number 2 position in 69% of MSAs). DX1331—which includes statements about market share, Defendants' competition, and the merger and divestiture—is an advocacy document for the merger and is not credible. *See* 1397:4-10. The deck is a "marketing presentation" created by Solomon Brothers, which disclaims its content. 1394:8-1397:11. It was not admitted for its truth and counsel asked no questions about it at trial. *Id.*

B. <u>City Areas are a Relevant Geographic Market</u>

1. Grocery retailers draw from a small trade area

92. Grocery competition is local. Kroger's "primary food store format," "typically draw[s] customers from a 2-2.5 mile radius." SX4288 at p. 5; *see also* SX4826 (Botcher Dep.) 67:12-68:9 (one to three miles in urban areas). *See also* Lieberman (Walmart) 2442:17-2443:1 ("[I]n the … traditional grocery store channel, most customers won't drive past five different grocers to get to a fifth grocer. The grocers are usually a factor of convenience and time"); Dua 1596:3-7; Israel 3194:21-3195:1 ("It's a very localized business.").

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93. QFC recognizes the trade area—or effective area of competition—for their stores to be 2-5 miles, depending on location. *See* Albi 709:6-16 (trade area ranges between two and five miles, depending on store location); *see also* SX4846 (Stewart Dep.) 29:13-25; 30:2-4 ("One-and-a-half to two miles"); *id.* at 30:5-31:6 (in Seattle trade areas may be as small as a half or a quarter mile, while rural trade areas may be as large as 5 miles).

94. Albertsons' contrary testimony about trade areas was not credible. Ms. Kinney testified about driving distances based on Placer data, Kinney 1884:10-1885:5 (testifying she relies on Placer data for driving distance in the ordinary course); 1884:10-1885:5 (listing distances), but was shown prior testimony indicating she had never studied data showing how far shoppers generally drive to an Albertsons, and didn't "recall looking at drive distance." *Id.* at 1997:19-1998:13. Mr. Sankaran also alluded to Placer data, but was shown no documents to support his testimony. Sankaran 1452:22-1453:14.

2. Dr. Dua identified 57 supermarket city areas

95. Dr. Dua identified 57 city areas as relevant geographic markets. Dua 1596:3-7. Dr. Dua's 57 relevant geographic markets only include areas in which both parties have stores. Dua 1596:8-12. Dr. Dua relied on record evidence, including Defendants' ordinary course documents, showing that competition between supermarkets typically takes place locally, usually within a 3-to-5 mile radius. Dua 1596:13-25. He used the pre-existing, relatively narrow geographic boundaries of cities as a starting point for the markets while making some adjustments to account for stores located near the city boundaries. *Id.* Some cities are so large that they contain more than one market. For these cities, Dr. Dua identified multiple relevant city area markets, divided by zip codes and in some cases adjusted to reflect natural boundaries like rivers and highways. Dua 1596:13-1598:12.

96. Dr. Dua validated all of his city area boundaries by analyzing Albertsons and Kroger loyalty card data in the record. That loyalty card data showed where individuals within a given census block—a small area representing about 1,200 households—shopped. Dua

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1598:13-1600:3. Dr. Dua used this micro-level data to assess the percentage of individuals shopping at one of Defendants stores within each city area and determine whether the city areas reasonably captured patterns of competition. *Id.*

97. Dr. Israel proposed no geographic markets of his own. Dua 1795:8-18.

C. <u>Supermarket City Areas Pass the Hypothetical Monopolist Test</u>

1. Dr. Dua correctly performed the hypothetical monopolist test and validated the State's 57 proposed markets.

98. The State's 57 supermarket city area markets all pass the Hypothetical Monopolist Test, and thus are relevant product and geographic markets.

99. The Hypothetical Monopolist Test is a method of validating a proposed antitrust market. *See* Dua 1600:14-1601:5. The test asks whether a hypothetical monopolist of the proposed market would be able raise prices by a small but significant and non-transitory amount (a "SSNIP") without losing so many sales that the price increase would be unprofitable. *Id.* If the price increase would be profitable, it shows that many customers will not look outside the proposed product or geographic market for alternatives in light of the price increases. *Id.* But if the price increase would be unprofitable, it shows that consumers perceive products outside the proposed product and geographic market to be capable of replacing those of the hypothetical monopolist—illustrating that the market has been defined too narrowly. *Id.*

100. There are "three main inputs" to the hypothetical monopolist test: (1) diversion within the proposed market; (2) the SSNIP—or price increase; and (3) profit margins, i.e., how profitable a particular price increase would be. Dua 1602:6-20. For diversions within the market, Dr. Dua used data available from the record and industry data from TDLinx to calculate diversion proportionate to share. Dua 1603:1-5; 1698:11-1699:2. These calculations are corroborated by Dr. Dua's empirical analyses of substitution between store formats, Dua 1590:3 –1594:3, and his analyses of substitution directly between the merging parties; Dua Rebuttal 3473:24-3474:25. For the SSNIP level, Dr. Dua used a 5% price increase, which is

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common, and is higher than values used in certain prior grocery merger analyses. Dua 1603:6-24. As Dr. Dua explained, there is no "hard and fast rule," but rather the correct value depends on the industry and competitive conditions. *Id.* The higher the SSNIP, the harder it is for a proposed market to pass the HMT. Dua 1603:16-20. For margin information, Dr. Dua used gross margins, which were used by Kroger and Albertsons in the ordinary course of business, as reflected by their documents. Dua 1602:21-25.

101. With these inputs, Dr. Dua performed two different versions of the hypothetical monopolist test: a break-even test, and a profit-maximization test.[4] Dua 1604:2-10. All 57 city markets passed each variant of the Hypothetical Monopolist Test. *Id.* According to standard economic principles, those results demonstrate that each of the 57 city area supermarket markets is a valid antitrust market. Dua 1604:11-15.

102. Kroger's real-world behavior when it faces no competition from other supermarkets validates the results of Dr. Dua's hypothetical monopolist tests. *See* Dua 1604:16-1608:22. As Dr. Dua explained at trial, Kroger identified stores in the state of Colorado as located in no- or low-competition areas ("no comp" or "low comp"). *Id.* In each of these areas, Kroger stores were the only supermarket in a narrow area. *Id.* Despite the presence of other nearby store formats—including Costco and Target locations—Kroger was able to profitably increase prices. *Id.* Kroger executives themselves concluded that the price increases had been profitable, based on the business's own assessment of its gross margins. *See* FOF ¶ 182.

103. In particular, Dr. Dua analyzed no-comp zones in Eagle, Colorado. Dua 1606:1-22. In Eagle, Colorado, a Kroger City Market store was the only supermarket in a 5-mile radius. *Id.* Kroger increased prices at that store despite the presence of a Costco within that radius. *Id.* The price increases were profitable. *Id.*; *see also* Dua 1608:7-17. Kroger's

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[4] Dr. Israel contended that Dr. Dua should have used the profit-maximizing method. While Dr. Dua contends that the break-even method is equally informative, Dr. Dua performed the profit-maximizing method in connection with his reply report and showed that all of his proposed markets pass under either version of the test. Dua 1604:2-15.

ability to profitably increase prices in Eagle, Colorado, despite the presence of a Costco four miles away indicates that Costco was not able to constrain Kroger's price increases. Dua 1606:23-1607:5. That result validates a product market that excludes Costco. *Id.*

104. Kroger's ability to profitably raise prices in Glenwood Springs, Colorado, also corroborates Dr. Dua's HMT analysis. Dua 1606:23-1607:5. There were no other supermarkets near a Kroger City Market store in Glenwood Springs—although there was a Target mass merchandiser, a Walmart mass merchandiser, and multiple natural grocers within a narrow radius. Dua 1607:6-24. Kroger was able to profitably raise prices at the City Market location, according to the company's own analysis of its margins. Dua 1607:6-25-1608:17. That result corroborates Dr. Dua's HMT analysis and supports a product market that excludes mass merchandisers like Target and Walmart, and natural grocery stores. *Id.*

105. Kroger's decision to raise prices at these stores presents "a real-life version of the hypothetical monopolist test." Dua 1605:13-21. Kroger's ability to raise prices at these stores profitably thus validates Dr. Dua's finding that supermarkets are a relevant antitrust market. *Id.* Kroger's decision to label store areas as "low comp" or "no comp" zones, despite the presence of other store formats (like club stores or natural grocers) in the trade area, also suggests that Kroger looks primarily to other supermarkets as competitors. Dua 1708:13-20.

D. Dr. Israel's Modified EGK Model Is Not Reliable for Market Definition

106. Dr. Israel testified that Dr. Dua should have proposed markets on a store-by-store basis using a modified version of the EGK model, which is described in one academic article. *See* Dua (Rebuttal) 3477:10-21. For each Defendant store, Dr. Israel would have the Court use the modified EGK model to estimate diversions to each potential competitor store, then rank-order competitor stores by magnitude of diversion. Israel 3227:2-19. The stores with the highest diversions would form the relevant market. *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"). Neither the EGK model—nor Dr. Israel's modified version of it—has ever been

used in antitrust analysis before. Israel 3368:12-20. Dr. Israel has not even used it in his own academic research. *Id.* at 3368:12-20.

107. Unlike Dr. Dua's analysis, neither the EGK model nor Dr. Israel's modified version of it incorporates any actual customer-level data. Dua Rebuttal 3476:1-22. In addition, as Dr. Israel acknowledges, the model does not measure actual diversion in response to price changes or store closures. Israel 3368:23-3369:14. Nor does it use real-world data about customer-level shopping habits or even data about how consumer behavior changes following a real-world price-increase or store closure. Dua Rebuttal 3476:1-22. Such real-world information was available to Dr. Israel through discovery, but he chose not to use it to measure diversions. Dua Rebuttal 3476:23-3477:6.

108. Even the authors of the academic article on which Dr. Israel's modified EGK model is based concede the model merely provides estimates based on limited data. They agree that researchers with access to "micro-level data" would be able to "obtain more precise estimates of substitution." Dua Rebuttal 3477:10-21.

109. Dr. Israel used a modified version of the EGK model described in the academic paper setting forth the model. Israel 3368:5-11. Dr. Israel "changed the methodology" that was used in the paper. *Id.* at 3368:5-11. Dr. Israel made material changes to the EGK model when modifying it for use in this case. For example, Dr. Israel changed the radius of the "choice set" of the model from 10 to 15 miles, included data for the New York metro area, which the EGK paper excluded, added new "controls" that are not in the EGK model, and used drive time instead of linear distance. Israel 3370:10-3371:18. He also could not remember whether the original EGK excluded rural areas, which he included in his model. *Id.* at 3371:6-12.

110. Dr. Israel's changes to the model appear to be results-oriented. Dr. Israel admitted that he ran multiple variations of the EGK model in connection with this case. Israel 3371:19-3373:4. In fact, he could not rule out that he ran *more than 50* variations on the model. *Id.* at 3372:19-3373:4. When running these variations, Dr. Israel did not report results if, in his

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view, they were "wrong" based on his understanding of economics. *Id.* at 3373:9-18. Thus, in deciding whether to report a particular result from his modified EGK model, Dr. Israel's preexisting views about what made sense drove the acceptable range of outcomes—not the model itself. *Id.* at 3373:19-3374:21. Dr. Israel conceded that changing the model can change its results, and changes to the model lead to wildly varying results. Israel 3371:19-21; Dua (Rebuttal) 3482:2-3486:12.

111. Dr. Dua showed that limiting the modified EGK model's dataset to just data from Washington, Oregon, and Idaho yields radically different results. Dua Rebuttal 3606:15-23. He explained that this exercise demonstrates how modifications to the model can change the outcome in a "big way." Dua Rebuttal 3560:24-3561:19.

112. Dr. Israel did not validate his modified EGK model by comparing it to real world data. Dua Rebuttal 3479:2-10. Had he done so, he would have seen that his modified EGK model is "completely inconsistent with the evidence in this case." Dua Rebuttal 3479:11-15. For example, Dr. Israel's modified EGK model predicts that of every $100 in lost Supermarket sales following a price increase, nearly one third will go not to other nearby Supermarkets, or even Club Stores, natural/organic stores, or limited assortment stores, but to an undefined set of *other* options called "the outside good." Dua Rebuttal 3477:25-3479:1. These results are out-of-step with the substantial real-world data showing high diversions to stores located in a narrow radius. Dua Rebuttal 3479:11-3481:11. No record evidence supports that extent of substitution away from *all* formats or to stores located more than 15 miles way. The excessively large diversion to the "outside good" estimated by Dr. Israel's modified EGK model effectively and artificially deflates Dr. Israel's estimates of diversions to Supermarkets. Dua Rebuttal 3481:23-3482:1.

113. Although he claimed that diversion must be measured at the store level, Dr. Israel did not report the results of his modified EGK model on a store-by-store basis—even for a single store. Israel 3348:15-3349:23. Instead, Dr. Israel reported only the aggregate statewide

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diversions between various grocery store banners and formats.[5] *Id.* Dr. Dua did assess the modified EGK model's results on a store-level. The diversion ratios it produced bear no relation to Defendants' *own* internal diversion estimates. Dr. Israel's modified EGK model predicted that diversions from an Albertsons store in Redmond, Washington to Supermarkets within 5 miles would be, astonishingly, less than 21%. But ACI's own estimates were that 86% of sales from that same store would go to Supermarkets within just two miles. For stores in Kennewick and Marysville, Dr. Israel's model predicted that between 25-40% of sales would divert to Supermarkets within 5 miles, but ACI's estimates suggested that 88-89% of sales would go to Supermarkets within only 3-3.5 miles. Dua Rebuttal 3479:17-3480:14.

114. The store-level results from Dr. Israel's modified EGK model suggest that the model is incapable of reliably estimating real-world diversion—especially as applied to Washington. In some instances, Dr. Israel's modified EGK model produces results that are facially inconsistent with consumer behavior—or even basic common sense. During his testimony, Dr. Israel highlighted the EGK model estimates for the Safeway store in Edmonds, Washington. For that store, the modified EGK model predicted that more customers would switch to stores located *across the Puget Sound*—an hour and fifteen minutes away *by ferry*—than would switch to a QFC *down the street*. Dua Rebuttal 3489:17-3491:1. As Dr. Dua explained, this example is illustrative of a broader pattern in the model's estimates: it predicts that nearby stores would receive diversions similar to diversions to stores located very far away, suggesting that diversions will go to nearly 100 stores in total. Dua Rebuttal. 3488:11-3489:14. If grocery competition is local—as both Dr. Dua and Dr. Israel agree it is—these results do not make sense. Dua Rebuttal 3490: 8-11. Dr. Israel's modified EGK model is simply not helpful to the Court.

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[5] These aggregated results show that Kroger and Albertsons are the closest substitutes for each other and therefore tend to support the State's supermarket market. Israel 3345:18-3348:15.

1. Dr. Israel's preferred margins are not consistent with industry practice

115. To perform the HMT, Dr. Dua used the company's ordinary course gross margins, which were approximately 25-30%. Israel 3353:5-6. Dr. Israel claimed that the appropriate measure of margin was "variable margins"—i.e., margins that subtract *all* variable costs, including labor, warehousing costs, and credit card transaction fees. Israel 3355:22-25 Dr. Dua explained, however, that economic theory requires that only incremental costs—those costs that change because of a *small* increase in output—be subtracted; not *all* costs that *could be* variable given some larger change in output. Dua Rebuttal 3495:18-3496:4. Dr. Israel's margins were about 17%—or about half of the gross margins that Dr. Dua used. Israel 3353:7-9; Dua Rebuttal 3494:14-3495:6.

116. Dr. Israel's decision to use these smaller, variable margins is not supported by industry practice, Defendants' ordinary course documents, Dr. Israel's past practice, or even Dr. Israel's use of margins for other purposes *in this case*. Dr. Dua's margins were therefore correct.

117. Dr. Israel admitted that Dr. Dua used "ordinary course" gross margins. Israel 3353:5-6. In other words, Dr. Dua calculated gross margins in the same way the parties do in the ordinary course of their business. Dr. Israel also admitted that he previously used gross margins in another case and that he thought it was reasonable to do so. Israel 3354:23-25. Dr. Israel further conceded that the gross margins he used in that case did not subtract warehousing costs or labor costs, both of which he says *must* be subtracted here. Israel 3355:1-25.

118. Dr. Israel's approach is out of step with the economic literature. Leading economists focused on the grocery market recognize that retail grocery firms consider *gross* margins as the relevant margins. Dua Rebuttal 3497:7-3498:16. Dr. Israel admitted that the economic literature consistently refers to *gross* margins. Israel 3357:2-5. The EGK paper, which Dr. Israel views as reliable, uses margins of around 30%. Israel 3358:6-7; 3360:11-14.

Dr. Dua's gross margins—also around 30%—are in line with this economic literature, but Dr. Israel's margins of around 17% are at odds with it.

119. Dr. Israel concedes that the right thing to do when deciding what margin to use is to "see what margins the companies use . . when they're talking about their pricing decisions." Israel 3357:11-21. But Dr. Israel did not identify a single document in his testimony that actually showed Kroger or Albertsons setting prices or discussing the effect of pricing strategies using his variable margins. *See* Dua Rebuttal 3500:14-16.

120. By contrast, Dr. Dua showed that both ordinary course documents and witness testimony demonstrate that gross margins are routinely used in discussing pricing decisions. Dua Rebuttal 3498:17-22.

121. For example, in an email discussing whether to lower the price of eggs, Andy Groff and Stuart Aitken evaluated the impact of that decision in terms of gross margins. Dua Rebuttal 3499:1-11. Another Kroger document evaluated price rebalancing across different departments and assessed the impact of that proposed rebalancing on gross margins. Dua Rebuttal 3499:12-25. Yet another internal document showed that when deciding whether to change the price of chicken, Kroger evaluated the impact of prices going up or down in terms of gross margins. Dua Rebuttal 3500:1-9. Counsel for Defendants did not show Dr. Dua a single document showing that Kroger sets prices based on variable margins. *Id.* at 3605:1-3.

122. In deciding to use gross margins, Dr. Dua also considered corporate testimony that Kroger focuses on "selling gross"—an even more expansive measure of margin—when assessing "pricing activity." SX4845 (Springer 30(b)(6) Dep.) 25:17-26:5. "Selling gross" does not subtract transportation, warehousing, shrink, or advertising. *Id.* The gross margins used by Dr. Dua do subtract these additional costs, making Dr. Dua's margins a conservative approximation of those considered relevant for pricing activity by Kroger's corporate designee. Dua Rebuttal 3504:24-3506:10. Dr. Israel did not address this testimony from Kroger's corporate designee. Other supermarkets testified that they also use gross margins to set prices

in the ordinary course of business. *See* Winco 2373:21-2374:7.

123. Dr. Israel relied on gross margins that Kroger provided to the FTC in the context of the investigation into the merger. Israel 3361:2-8. Those margins were provided by Kroger's Capital Finance team, which does not set prices at Kroger. *Id.* at 3361:2-17.

124. Dr. Israel's only basis to believe that these margins were ordinary course was conversations his team had with Kroger's Capital Finance Team. Israel 3362:16-22. But Dr. Israel did not participate in these conversions; he did not know who from Kroger participated in the conversations; he did not see any notes from the conversation; and he did not know what, if anything, his team had done to verify that these margins were ordinary course margins. *Id.* at 3362:23-3363:18. Dr. Israel did not review any Kroger internal documents to verify that the Capital Finance Team's margins were used in the ordinary course. *Id.* at 3364:1-5. As far as Dr. Israel knows, his team simply took Kroger's word that the margins Dr. Israel obtained were ordinary course margins. *Id.* at 3363:19-25.

2. Dr. Israel's alternative approaches to the HMT are unreliable and contrary to the economic literature.

125. Dr. Israel purported to test whether Dr. Dua's markets passed the hypothetical monopolist test using two kinds of regression analyses: one that estimates the relationship between prices and number of competitors, and one that estimates the relationship between price and concentration. Dua Rebuttal 3506:13-3507:2.

126. Dr. Israel's use of a regression to estimate the relationship between price and concentration (HHI)[6] has been "formally rejected for excellent reasons by decades of academic research," including in a paper by nearly 20 economists, including various ex-chief economists of the Department of Justice and the Federal Trade Commission, which explains that "merger analysis does not benefit from regressions of price on . . . concentration," given that the variable of interest in merger analysis is the change in concentration—not the level of

[6] "HHI" refers to the Herfindahl-Hirschman Index. *See* FOF 135.

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concentration. Dua Rebuttal 3507:3-3508:25. Dr. Israel's regression estimating the relationship between price and number of competitors is likewise unreliable because he failed to sufficiently control for store-level differences and failed to identify causes for the differences in the number of competitors, as the literature requires for such an analysis to be informative. Dua Rebuttal 3511:17-3512:9; 3583:9-3584:6.

127. Although these regressions are unreliable, to the extent they are credited, they yield results consistent with Dr. Dua's approach to market definition. Dr. Israel's regressions of price on HHI show that a hypothetical monopolist of the Supermarkets market would increase prices by approximately 6-10%, well above the 5% SSNIP level. Dua 3508:4-3509:9.

3. Dr. Israel's treatment of the divestiture is incorrect and incomplete.

128. Dr. Israel's post-divestiture analyses assume the success of the divestiture and are therefore unreliable. Dr. Israel concedes that, as a matter of economics, any analysis of the merger that includes the divestiture must incorporate the "effects" of the divestiture "to have probative value," Israel 3308:10-13, but Dr. Israel's own analysis fails to incorporate key issues regarding the effects of the divestiture.

129. Dr. Israel instead relies on his modified EGK model to account for the divestiture, but his model fails to account for any changes to the divested stores as a result of the divestiture. Dr. Israel acknowledged that his modified EGK model's estimates are based on "the historical characteristics of each banner" and that it is estimating, based on "2023 data, consumer preferences for each banner." Israel 3313:5-12. Dr. Israel further admitted that the model "doesn't account in any way for changes in the characteristics of any particular banner that may occur after the transaction closes." *Id.* at 3313:13-19.

130. For example, Dr. Israel agreed that historically Kroger has offered private label products at QFC, that private labels are "among the important products that a store offers," and that the divestiture will change QFC's private label selection. Israel 3314:11-13 (KR offers private label products at QFC); *id.* 3314:19-24 (private label products important); *id.* at 3315:8-

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18 (C&S not getting private label products sold at QFC). But he acknowledged that his EGK model does not account for the change in private labels. *Id.* at 3315:23-3316:5. Similarly, the EGK model cannot account for changes to QFC's loyalty program or changes to quality of the produce stocked at QFC. *Id.* at 3316:6-16.

131. Dr. Israel incorrectly declines to even run the HMT on proposed markets in which the Defendants would not own overlapping stores after the divestiture to C&S is taken into account. Israel 3270:22-3271:10 (describing how he removed the "divested areas," such that he considered only post-divestiture "overlaps" in running the HMT). Dr. Israel's approach of assuming the divestiture's success at every turn "put[s] the cart . . . before the horse, as it fails to first properly evaluate "the extent of competition that exists today between Kroger and Albertsons." Dua Rebuttal 3470:12-3471:15.

132. As a result, Dr. Israel's analysis of divestiture not only incorporates the EGK model's many flaws, *see* FOF ¶¶ 106-14, it also assumes that those stores will retain all of their pre-divestiture characteristics—an assumption that is untethered from law, economics, or the record in this case. Dr. Israel's post-divestiture analyses are therefore unreliable.

E. <u>The Merger Would Produce 57 Highly Concentrated Supermarket City Area Markets</u>

1. The 57 markets produce high concentration by market share

133. After the merger, in the 57 supermarket city areas, Defendants' average market share in each market is roughly 75%. *See* Dua 1611:24-1613:5; SX4816.

134. In fourteen supermarket city areas, Defendants will merge to a monopoly. *Id.*

2. The 57 markets produce presumptively anticompetitive HHIs

135. Economists measure market concentration using the Herfindahl-Hirschman Index ("HHI"), which takes the market share of each company in the market, squares those shares, and adds the squared shares together. Dua 1609:6-25. Shares are calculated by taking the percentage of revenue a single firm contributes to the market (in other words, by taking the

revenue of a competitor and dividing it by the revenue of all competitors in the market). *Id.*

136. The 2010 and 2023 Merger Guidelines both use HHI to evaluate market concentration—although the guidelines set different benchmarks for what concentration constitutes a presumptively anticompetitive market. Dua 1610:10-1611:6; *see also* Conclusion of Law, *supra*, ("COL") ¶ 382 (describing thresholds under both sets of Guidelines).

137. Dr. Dua found that absent the divestiture, in all 57 city markets, the merger would result in an HHI increase of over 500, and post-merger HHI ranging from about 3,000 to 10,000. Dua 1611:7-1613:6; SX4816. The average HHI increase would be about 2,800, and the average post-merger HHI would be about 6,700. *Id.* These results indicate that the merger is presumptively anticompetitive in every market. *See* COL ¶ 383.

138. Dr. Dua also analyzed HHIs for all 57 city markets for three different scenarios that accounted for the divestiture. Dua 1613:9-1614:10; 1645:9-1647:7. That analysis indicates that the merger would result in presumptively anticompetitive HHIs in multiple markets, even assuming that the divestiture is successful. Dr. Dua calculated HHIs in the 57 markets assuming the divested stores retain 100% of their market share (and therefore perfectly replicate the competitive intensity of Albertsons). *Id.* Even in that scenario, 21 supermarket city areas would result in presumptively anticompetitive market concentrations under the 2023 Merger Guidelines. *Id.* Under the 2010 guidelines, 19 city area markets would result in presumptively anticompetitive market concentrations. Dua 1771:20-1772:21.

139. Dr. Dua then calculated HHI in the 57 markets assuming the divested stores retained just 70% of their sales—to show the effect of potential sales losses on market concentration. Dua 1645:9-1646:18. Retention of 70% of sales corresponds to the sales loss that C&S experienced following its acquisition of stores as part of the Price Chopper/Topps divestiture in 2021. Dua 1640:23-1643:8; SX4817. In that scenario, 46 and 37 city areas would be presumptively anticompetitive under the 2023 and 2010 Merger Guidelines, respectively. Dua 1646:22-1647:12 (discussing both 2010 and 2023 Guidelines).

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140. The following chart summarizes the number of presumptively anticompetitive markets in each scenario, under each set of guidelines:

Scenario	**2023 Guidelines**	**2010 Guidelines**
Before the Divestiture	57	57
Divestiture With 100% Sales Retention	21	19
Divestiture With 70% Sales Retention	46	37

141. Dr. Dua also performed an analysis of HHIs that concluded that, even if C&S were to retain 70% of the sales of the divested stores, as it did following its most recent divestiture acquisition, *and if* the market were expanded to include Costco, natural organic, and limited assortment stores (Dr. Dua's "Supermarket Plus" category, Dua 1617:4-1618:3), the merger would be presumptively anticompetitive in 48 city areas under the 2023 guidelines. Dua 1646:22-1647:12.

3. Dr. Dua's sensitivity analyses confirm that the merger is presumptively anticompetitive

142. Dr. Dua performed multiple sensitivity analyses, which confirm the conclusion that the merger is presumptively anticompetitive.

143. For example, Dr. Dua found that the merger would be presumptively anticompetitive in all 57 city areas under the 2023 Merger Guidelines if the market were expanded to include Costco. Dua 1617:4-1618:3. Dr. Dua also tested a "Supermarket Plus" product market sensitivity that included Costco, natural, organic, and limited assortment stores. Before accounting for the divestiture, the Supermarket Plus market sensitivity would still result in presumptively anticompetitive markets in all 57 city areas under the 2023 Guidelines. Dua 1617:4-1618:3. Dr. Dua performed a further market sensitivity test analyzing concentration if the product market were expanded to include mass merchandisers that do not contain supermarkets, such as Target. That analysis shows many city areas remain presumptively anticompetitive, even if Target and other mass merchandisers are included. Dua 1683:4-21.

144. Dr. Dua also performed sensitivity analyses with respect to his geographic market definition. For example, Dr. Dua assessed MSAs—metropolitan statistical areas—rather than city areas. He found that the merger would still be anticompetitive in 11 MSAs under the 2023 Merger Guidelines, regardless of whether Costco and the "Supermarket Plus" categories were also included in the market. Dua 1618:8-22.

145. Finally, Dr. Dua performed a sensitivity analysis that set relevant geographic markets at 3- and 5-mile radii around Kroger and Albertsons' stores. Dua 1618:23-1620:23. That analysis found that the merger would be presumptively anticompetitive under the 2023 guidelines—regardless of whether the market included Supermarkets and Supercenters, or was expanded to also include Costco, or Costco and Dr. Dua's "Supermarket Plus" category. *Id.*

146. Dr. Dua's sensitivity analyses demonstrate that Defendants' critiques of his methods for determining the product and geographic market—while incorrect—are also immaterial: they do not alter the conclusion that the merger is presumptively anticompetitive.

III. <u>THE MERGER IS LIKELY TO PRODUCE ANTICOMPETITIVE EFFECTS</u>

A. <u>Unilateral Effects</u>

1. Kroger and Albertsons compete head-to-head on all aspects of their business

147. Defendants are significant competitors and compete on all aspects of their business, including price, quality, and services. FOF ¶¶ 153-178; *see also* McMullen 1313:12-15 ("Albertsons is a key competitor"); *id.* (admitting that he testified that Albertsons and Kroger stores "compete in every way that you would typically compete"). The merger is likely to harm Washington consumers by eliminating this fierce head-to-head competition.

(a) Their documents identify them as primary competitors.

148. Kroger's ordinary course documents show that Albertsons is its closest competitor in Washington, and that competition between Kroger and Albertsons is focused and intense. *E.g.*, SX2790 at p.1 (November 2022 email from Todd Kammeyer, Fred Meyer's

division president, reads: "Not sure how they think we're not in direct competition with ABS/SWY. They are our biggest competitors with 300+ stores," and notes, "I don't want to give ABS/SWY an extra advantage"); *see also* Kammeyer 786:11-791:17; SX3646 (2020 email from Christine Albi, QFC president, responding to news indicating Safeway would be more aggressive in the market in going after sales with the message: "Just shoot me"); Albi 685:23-692:3; SX0209 at p.58 (Kroger investor Fact Book identifying Kroger as having top-two market share position in the Seattle-Tacoma-Bellevue MSA, and Albertsons Safeway/Seattle Division and Walmart as its two major competitors in the MSA).

149. When assessing financial performance, Kroger looks to Albertsons and retools its competitive plans in response. Just six months before Kroger approached Albertsons regarding a merger, Kroger CFO Gary Millerchip identified that Kroger was losing market share to Albertsons at the same time as it was seeing declining margin. SX2606 at p.2. Mr. Millerchip sought Mr. Aitken's help in understanding "why we are losing share," and whether Kroger has "confidence in the plan to reverse the trend." *Id*. Mr. Millerchip proposed price investments, better execution, and other initiatives to respond to Albertsons. *Id*. Mr. Aitken acknowledged that deals in the weekly circular on "basket building" items is "a promotional tactic that ACI leverages better than we do, particularly in the West," and responded with a series of actions Kroger was taking to regain market share—including identifying categories in which Kroger was losing share, "pivoting strategies on promo, display plan, and assortment," increasing promotional frequency, and improving execution on "Full, Fresh, and Friendly". SX2606 at p.1. *See also* SX2557, at p.2 (Albertsons also out-performed Kroger in identical sales—a key metric of sales growth—over the two years ending September 2021).

150. Albertsons calls Kroger its "primary competitor" in Washington in ordinary course documents. *See, e.g.,* SX1711 (pricing emails referring to Fred Meyer as Albertsons' "primary competitor" for the Portland and Seattle Divisions); SX4835 (Lanoue Dep.) 101:25-103:10) (discussing same); *see also* SX0474 at Column K (referring to Kroger as Albertsons'

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stores' "primary grocery competitor" in Washington); SX4851 at p.1 (referring to Kroger as Albertsons' "fiercest competitor," at least "[u]ntil the merge is approved").

151. Albertsons' documents indicate it also focuses intensely on competition from Kroger. In March 2022, Mr. Sankaran emailed senior Albertsons leaders to report that Kroger's identical sales grew less than Albertsons' over the same one- and two-year periods. SX1129 at p.2. He wrote: "Crushed them!!" *Id.* Susan Morris replied: "Eat our dust, Kroger." SX1129 at p.2. *See also* Sankaran 1433:4-1435:8.

152. Albertsons executives, moreover, have focused employees' performance evaluations and the company's overall strategy on "beating" Kroger. Dennis Schwarz, a former executive in Albertsons' Seattle Division, told sales managers they would be evaluated on their improvement in pricing relative to Fred Meyer. Schwarz 493:11-495:19; SPX1064 at p.2 (Sept. 2021 email noting that "Each sales manager will be score carded on their improvement on CPI index to Fred Meyer compared to Q, QE"). Vivek Sankaran directed Albertsons executives to focus on catching up to Kroger's performance—not Walmart or Costco or any other retailer. *See* Sankaran 1431:6-1432:12 ("I picked Kroger so that - - to motivate our teams to catch up in performance."). A January 2021 email from Mr. Sankaran to Albertsons executives reads: "As I have mentioned to you on previous occasions, I am confident that we will beat Kroger on a sustained basis. But that outcome is not a given. We will need to fight for it." SX1396 at p.2; Sankaran 1431:6-1432:1. That guidance email does not mention any competitor besides Kroger. *See id.*; Sankaran 1432:13-21. *See also* SX3813 (2020 email to Vivek Sankaran that reads: "Seems like we don't necessarily need to beat Walmart, Amazon, etc., to but rather Kroger and other local players. . . Locally Great, Nationally Strong right on point.").

(b) Defendants compete head-to-head on price

153. Defendants compete head-to-head on pricing. McMullen 1312:17-21.

(i) Kroger

154. Kroger uses different pricing strategies for its QFC and Fred Meyer banners—

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but both banners index their prices against Safeway. *See* FOF ¶¶ 155-59.

155. For pricing purposes, Kroger divides products into three categories. The first category—"Everyday essentials"—are items that Kroger's data scientists have concluded have the biggest impact on customers' perception of prices (and therefore where they choose to shop). *See* Groff 548:6-549:2. Everyday essentials includes just five items that customers buy frequently: milk, eggs, sugar, bananas, and head lettuce. *Id*.; Groff 547:21-548:5. The second category—"program items"—comprise a few thousand SKUs that Kroger has determined have an outsized effect on consumer price perception and behavior. *Id.* at 549:3-9. Kroger monitors the pricing of program items "particularly carefully." Groff 549:10-12. The final category—"non-program items"—describes Kroger's remaining SKUs. Groff 549:13-16.

156. Albertsons is the primary constraint on QFC's pricing. QFC's strategy is to set prices at, or slightly better than, Safeway's. Groff 551:17-20, 552:4-10; 555:10-557:9; *see also* SX2661 at p.2 ("QFC Strategy is Safeway Match."); SX0846 (with attachment at SX0717); Albi 725:9-19; SPX3634; Albi 728:8-14; SPX2657. QFC does not index prices against Costco, Whole Foods, or any retailer other than Safeway. Groff 552:8-16.

157. Albertsons also acts as a key constraint on Fred Meyer's pricing. For everyday essentials and program items, Fred Meyer's pricing strategy is to use Walmart as a "floor" and Safeway as a "ceiling." Groff 559:4-17. Kroger uses Walmart as a "floor" by setting its prices to be a certain spread above Walmart. *See, e.g.,* DX0359; SX4814 (15% target spread for certain products). Where no Walmart exists in a trade area, Fred Meyer's price strategy for everyday essentials items is simply to follow Safeway. *See* SPX3400; Kammeyer 805:7-11.

158. Kroger's strategy of using Safeway as a "ceiling" for Fred Meyer prices is internally referred to as the "HPR" or "high-priced retailer" rule. Groff 565:2-9. The HPR rule governs Fred Meyer's prices for program items—the few thousand items Kroger has determined are most important to customer price perception—"in most cases." Groff 564:14-565:1; 566:10. Under that rule, no program item should be priced higher than the price the

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HPR is charging for the same item. Groff 564:14-566:19. Safeway is the designated "HPR" for Kroger's Fred Meyer division. *Id*.

159. Applying the HPR rule, Kroger lowers (or declines to raise) Fred Meyer's prices in response to Safeway's. *See* DX0359; SX4814; *see also* SPX3420; Kammeyer 825:7-826:8 (walking through instances in which "Fred Meyer lowered the price" of produce and floral items to "get below Safeway."); Groff 566:4-19 (explaining that "if Safeway lowers the price of Cheerios in Washington . . . below the price that Fred Meyer is currently charging," Fred Meyer would lower the price of Cheerios to match Safeway.).

(ii) Albertsons

160. In Washington State, Kroger is the primary constraint on Albertsons' prices. Albertsons' stores are assigned a "primary food competitor" that Albertsons benchmarks pricing against. For every Albertsons store in Washington, the primary food competitor is either QFC or Fred Meyer. *See* SX0474 ("primary grocery competitor"); *see also* Street 360:19-22 (Albertsons' price "philosophy" in its Seattle Division's is to "price at an index against Fred Meyer.").

161. To set prices, Albertsons' divisions use an internal tool, called Price Advisor, that issues recommended pricing for the individual items in Albertsons' stores. SX4844 (Silva Dep.) 21:13-15, 106:11-13, 106:15-25. Price Advisor's recommendations are based solely on the prices of a given's store's "primary food competitor." *Id*. While Walmart prices are visible to users of the Price Advisor, Price Advisor does not use Walmart's prices when recommending prices to Albertsons employees. SX4844 (Silva Dep.) at 106:21-25). Kroger's prices are therefore the primary constraint on Albertsons' current prices.

162. Evidence at trial showed active price competition between Albertsons and Fred Meyer. *E.g.*, SX1055 at p.1 (2020 exchange on beef prices reads: "We will not go above Fred Meyer on any items. We are losing share already in meat and cannot afford to lose more.").

(c) Promotions

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163. Defendants also compete head-to-head on promotional pricing. Both Kroger and Albertsons are promotional or "high/low" retailers. McMullen, 1308:6-13. Their strategy is to set higher base prices and offer promotions to attract customers to their stores. *Id.*; *see also* Schwarz 466:9-15. Walmart, by contrast, is an "Every Day Low Price" retailer, and does not rely heavily on promotions. Groff 545:15-546:4.

164. Kroger and Albertsons stores in Washington each publish a "Weekly Ad" that showcases their promotions for the coming week. *See* Kammeyer 811:1-3; SX4839 (Meyer Dep.) 93:4-9 (Kroger issues circulars weekly). Both companies monitor and respond to the other's weekly ads. *See* FOF 163-73. The winner of the weekly ad battle sees increased sales and traffic to its stores. Schwarz 480:9-19.

165. If Kroger and Albertsons merge, this vigorous head-to-head competition would stop entirely. Kroger describes Albertsons as "the only other competitor" that publishes weekly ads. Kammeyer 790:8-791:17. Walmart does not run similar promotions. SX4839 (Meyer Dep.) 152:8-19. Thus, in October 2022, Kroger's pricing team recommended that Kroger stop Weekly Ad distribution in markets *except* where Kroger was "in competition w/ Albertsons/Safeway." SX2986 at 7; *see also* SX2983; SX4839 (Meyer Dep.) 111:6-112:23, 113:1-2, 114:22-115:7. Kroger largely adopted that approach. *Id.* at 117:1-5.

(i) *Kroger*

166. Kroger executives see the weekly ads as an opportunity to win market share from Albertsons. *See* SX4846 (Stewart Dep.) 190:24-191:3.

167. Kroger thus actively monitors competition between Kroger and Albertsons on weekly ads. Kroger executives receive weekly emails comparing Kroger's and Albertsons' ads and assessing who "beat" who that week. *See, e.g.*, SX3611, SX3620, SX3623, SX2992, SX2993; SX3327, SX3431; SX3458 and SX3459; Aitken, 2543:3-6 (ad comparison reports are weekly).

168. Kroger aggressively responds to Albertsons' promotions. For the 2023

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Superbowl, Albertsons offered a promotion on Coors Light that sold the brand below cost. SX3431. Fred Meyer changed its prices to match, even though Fred Meyer's executives believed the promotion was "crazy," SPX3431 at p.1, and a "shockingly low price," Kammeyer 812:17-816:17. Fred Meyer met Safeway's below-cost price because it "wanted to be the place that customers would choose to come to." Kammeyer 815:3-5 (promotion was $10 under cost), 816:4-15. "We need to ensure we don't get beat on this key item for us," Todd Kammeyer wrote. SX3431 at p. 1.

169. Customers benefit from this competition on ads. In particular, Kroger's decision to match Safeway's "crazy" price on beer was a great win for customers. Kammeyer 816:4-17. ("Q. This was a great win for customers, right? A. Yes.").

(ii) *Albertsons*

170. Albertsons executives similarly see weekly ads as an opportunity to win market share from Kroger. *See* Schwarz 498:3-13; SX1120 at p.1 (2020 email to Susan Morris, regarding Fred Meyer's promotions on meats, notes: "We had a good track record of winning but FM is heating things up in PDX. We will not lose the lead FC lead again. We just got our market share gain positive . . . and don't intend to lose our momentum.").

171. Competition on weekly ads is intense. Albertsons' executives have referred to the competition between Kroger and Albertsons as a "dog fight" in their ordinary-course emails. SX0245. Ads are circulated to the top executives in the company—with commentary on whether Albertsons is "winning" or "losing." SX1171, for example, is a 2021 email exchange that asks Albertsons employees to let Susan Morris know "how you matched up," on 4th of July ads. SX1171 at p.2. "We need to keep winning!," the email reads. *Id*. *See also* SX1582 at p.1 (2020 email sent to Susan Morris attaching Fred Meyer's ads with the comment: "We feel we have still won the overall ad but will continue to monitor that as well and adjust."). Albertsons executives monitor Kroger's promotions and compare them to Albertsons' each week. *See* SX1135; SX0244; SX1522; SX0245; Street 397:14-398:25.

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172. Weekly ad competition is especially important to Albertsons' pricing strategy, because, as a "high-low" retailer, Albertsons maintains slightly higher base prices than Fred Meyer, but aims to offer steeper discounts on more important items to win customers. *See* Groff 678:23-679:4; *see* SX2606 at p.1; FOF ¶ 149 (discussing SX2606). Even with higher base prices, Albertsons executives testified that if Albertsons "won the ad on a weekly basis" against Fred Meyer it would "gain market share against Fred Meyer." Schwarz 498:3-13.

173. Albertsons executives therefore use aggressive promotions to specifically "target" Fred Meyer in an attempt to win market share. *See, e.g.*, SX1717 at p.1 (Chris Lanoue noting that release of a "downright irresponsible" Memorial Day ad is "targeting a 300bp increase in market share versus Fred Meyer (Kroger) next week!!"); *see also* SX4835 (Lanoue Dep.) 149:11-18; SX1571; SX1572; SX0543; SX1124 at p.1 ("We need to continue to be as nimble as products and promotions change with the intention of never losing share to FM or the remaining market."). An internal Albertsons email from 2020 attached a Fred Meyer weekly ad and reported that "Produce is one area we are continuing to win in share, so they are fighting back. Ad meeting it today, so we will get hotter." SX1057 at p.1. An Albertsons executive wrote back: "Punch FM in the throat today in the ad meeting." *Id.* Another exchange, from 2021, responds to a report of net sales increases for Albertsons' Portland division: "And the competition (FM) is crying today with the ad grocery put on the street." SX1104 at p.1. Yet another exchange promises that "[n]ext week there will be tears in the FM merch office." SX1148 at p.1. A 2020 exchange summarizes Fred Meyer's 10/7 Ad with the note: "This one is painful. They are Hot, and are in attack mode." SX1590 at p.2. Susan Morris writes back: "Fight hard – responsibly but hard . . . . We must win on weekly ads." *Id.* at p.1.

(d) Quality, Services, and Assortment

174. Price is not the only dimension on which Albertsons and Kroger compete—and is not the only dimension customers care about. *See* Dua 1757:12-1758:1. Millions of consumers each year pick higher priced supermarkets for a number of reasons, including

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quality, assortment, and service. *See* Groff 678:9-680:18.

175. Kroger and Albertsons compete on assortment and quality. Albertsons sees its assortment as a "competitive advantage" over Kroger. SX1553 at p.1 (March, 2022 Albertsons email calling Albertsons's "local flare with assortment" its "secret sauce . . . compared to Kroger"); Schwarz 486:10-489:15; SX 1714 at p.14 (former ACI Portland Division executive Chris Lanoue noting that "[W]e kick the shit out of Fred Meyer in terms of quality and assortment. [I]t can be a differentiator."); SX1590 at p.1 (2020 email from Susan Morris, emphasizing her team should "Fight hard – responsibly but hard," in response to Fred Meyer. "Are we leading the markets we operate in on fresh quality? Really leading?").

176. Kroger and Albertsons compete on customer service. *See* Albi 710:11-14; SX1590 at p.1 (2020 email from Susan Morris, emphasizing that Albertsons "must win on safety and cleanliness, as well as on customer service excellence."). In 2020, for example, QFC abandoned guidance to remove the seafood counter from a QFC location. Albi 715:7-9. Executives were concerned that removing the counter would make the store less competitive given "the Safeway across the street ha[d] service counters." SX3619 at p.3; Albi 714:24-715:6. Kroger also competes with Albertsons on the quality and performance of its e-commerce services, including the pick-up time for online orders. McMullen 1305:23-1306:1.

177. Kroger and Albertsons compete on overall shopping experience. That includes the layout of their stores. Aitken, 2552:6-7. For example, Kroger altered remodeling plans to expand displays of ready-to-eat meal options to compete against a local Albertsons banner. *See* SX2578. Kroger and Albertsons also compete on in-stock levels, because being out of stock in key items reduces the likelihood that customers will come to a store. SX4846 (Stewart Dep.) 106:19-107:2. During the COVID-19, QFC compared in-stock levels at QFC, Safeway, and Walmart by physically going to stores and photographing shelves. SX3115; SX3118. In-stock levels are so important that these reports were shared with the President of QFC. SX3115; *see also* SX4846 (Stewart Dep.) 102:1-107:12.

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178. Kroger and Albertsons also compete on store hours. SX4846 (Stewart Dep.) 214:14-215:9 (QFC increased its store-open hours after the pandemic to more closely match Safeway's opening and closing hours; it did not consider any other retailer's hours).

1. The evidence suggests that Kroger will raise prices absent competition from Albertsons

179. The evidence shows that Kroger systematically tracks where its stores do not face competition. Kroger has raised prices and reduced offerings where competition is low or lacking. It is thus likely that Kroger will raise prices at store locations in Washington where the competitive pressure of Albertsons or another supermarket is not present.

180. Kroger's past practice is to raise prices in local markets where it faces little to no competition. *See* Groff 618:13-17 (conceding that "there have been instances where that has occurred."**).** Kroger has raised prices in the past in stores that do not face competition from Walmart and Albertsons, even if other retailers are nearby. In 2022, Kroger systematically identified stores in Colorado with "no" competition, so that Kroger could raise prices to offset its costs. Groff 618:18-619:1; 619:7-14; *see also* Groff 619:2-6 (finding 9 stores on the western slope of Colorado). Kroger labeled stores as having "no competition," if they had no Safeway or Walmart nearby. *See* SX2698 p.1. Kroger's "no competition" zones included areas that *did* contain stores of other formats, including Costco, Target, and natural/organic grocers. Dua 1606:1-1607:24. In those no-competition stores, Kroger raised prices and did not lose sales volume. Groff 622:9-11; *see also* Groff 619:23-620:1. Gross margin in the "no competition" stores increased by twice as much as other stores in the same region. SX3394 at 2; Groff 624:2-17. Kroger considered the initiative a success. Groff 622:7-8. A Kroger executive summarized this, in a 2023 email, as a "big win." SX3394 p.1.

181. In Washington, Kroger already charges higher prices for essential items where there is no nearby Albertsons store. SX717, an excel file listing prices for Everyday Essentials items, including milk, at QFC stores in Washington, shows that Kroger prices milk at $3.79 in

Seattle and $3.19 in Renton. SX717; *see also* Groff 629:6-8. A collection of stores—in Stanwood, Maple Valley, and Mercer Island—are labeled as facing "no competition." SX717; Groff 629:21-24 (confirming that the stores were each in "non-competition zone[s]"). Each of the no-competition stores priced milk at $3.99—higher than Seattle and higher than any other price for milk at any other QFC store in Washington. *Id. See also* Groff 631:11-14 (Kroger charged more on these items in Washington when it didn't face competition in the market—just like Kroger did on Colorado's Western Slope).

182. The evidence suggested that Kroger will look for similar opportunities to raise prices in the future. Mr. Groff responded to the 2023 email reporting Kroger's success in raising prices in Colorado's Western Slope: "the next obvious question is . . . where else in the Enterprise do we potentially have the same opportunity?" SPX3394; *see also* Groff 625:8-14.

183. It is also likely that if Kroger loses competitive pressure from Albertsons, it will reduce investment in price, promotions, quality, assortment, service, and hours. In recent years, executives at Kroger have been rolling out a program called "Stores as an Asset" that systematically tailors the degree of investment in store services based on the degree of competition the store faces. SX3671; SX3672. Under the Stores as an Asset effort, stores are divided into four categories based primarily on the income of the stores' shoppers and the degree of competition the store faces. SX3672 at p.4. Kroger recommends that its "Competitive" stores, which face the most intense competition, "[c]ompete with great quality & price, need for high efficiency." Kroger categorizes 300-500 stores with "low" competition as "Advantaged." It describes these stores as "good profit drivers for the company" and recommends "leverag[ing] structural advantage to not over-invest and maximize efficiency and profitability." *Id.*; *id.* at p.5 (emphasis added). *See also* SX3572. When proposed within Kroger, the program was met with enthusiasm by senior leadership. For example, Stuart Aitken called the idea "exactly what we need." SX2550 at p.1.

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2. Economic analysis shows the merger will create an incentive for Kroger to raise prices

184. When two independent competitors compete, that competition creates an incentive not to raise prices. Dua 1628:21-1629:20. That is because if one company raised prices too much, its customers would switch to its competitor—and vice versa. *Id.* When those two firms merge, whatever incentive not to increase prices that that former competitor imposed falls away. *Id.*

185. Economists quantify the potential harm to consumers from this loss of competition by calculating "upward pricing pressure." Dua 1628:21-1629:1. This is a well-accepted tool among economists and has been endorsed by the Merger Guidelines. Dua 1629:2-5. The analysis uses three main inputs: One is the diversion ratio *between the merging parties* (not the broader market, as when performing the HMT). Dua 1629:21-1630:5. The higher the diversion ratio—i.e., the more consumers would leave one former competitor for the other—the greater the upward pricing pressure is likely to be. *See* Dua 1629:6-1630:5. Dr. Dua used the results from his loyalty card-based diversion analysis, which uses real-world consumer choice data and is corroborated by natural experiments, for this input. Dua 1630:13-16; *see supra* ¶ 41. A second input to this analysis is profit margin, which translates sales volumes into profits. Dua 1629:21-1630:5 Dr. Dua again used the parties' ordinary course gross margins, as he did when he conducted the HMT. *See supra* ¶ 100. The final input is the ratio of merging parties' average prices, Dua 1629:21-1630:5, which Dr. Dua had from the record in this case, Dua 1630:6-9.

186. When performing an upward pricing pressure analysis, economists typically use a 50% "pass through" rate. Dua 1630:20-1631:9. The pass through rate is simply the rate at which the firm's incentive to raise prices translates to actual price increases. *Id.* Dr. Dua used a 50% pass through rate here. *Id.*

187. Dr. Dua's upward pricing pressure analysis showed that both Kroger and

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Albertsons stores will experience upward pricing pressure. *Id.* Applying a 50% pass-through rate, Dr. Dua's upward pricing pressure estimates translate to prices increases of about 5% on average for Albertsons stores and 8% on average for Kroger stores. Dua 1631:4-9. Overall harm to Washington consumers would be around $800 million each year in the form of higher grocery price increases. *Id.*

188. There is no recognized "safe harbor" level for harm to consumers. Defendants critiqued Dr. Dua's upward pricing pressure analysis by suggesting that in some markets, the upward pricing pressure would be less than 5% and therefore would be unlikely to result in actual price increases. To make this point, they asked Dr. Dua about a 2010 speech by Dr. Carl Shapiro that suggested that upward pricing pressure of less than 5% does not tend to be indicative of higher prices. They also asked Dr. Dua about other reports and articles that parroted Dr. Shapiro's speech. The so-called 5% "safe harbor" has never been endorsed by the merger guidelines. Dua 1748:8-18. A properly conducted assessment of anti-competitive effects must account for nature of competition in a specific industry, including the margins in that industry, so there is no basis for adopting a single "safe harbor" number and applying it in mergers across all industries. *Id.* Indeed, Dr. Israel testified under oath in the *Sysco* case that "there is no basis that the harm has to be a 5 or 10 percent number for there to be a problem, it just has to be harmful or worse, bigger than the benefits." Israel 3375:10-3377:10.

189. Neither Dr. Israel nor Defendants' counsel identified any upward pricing pressure analyses in this case showing that prices would *drop* or that there would not be any upward pricing pressure. And, of course, the evidence shows that in the real world, where Kroger does not face competition from Albertsons, it has raised prices. *See* FOF ¶¶ 180-82 (discussing "no comp zones").

190. Dr. Israel's regression that purportedly tests whether the presence of Albertsons affects Kroger's prices is not informative. When run on all Washington stores, the regression did not show any statistically significant results for the presence of any competitors of any kind

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on Kroger's prices. Israel 3329:15-3333:19. When excluding stores to be divested, the regression paradoxically showed that the presence of an Albertsons resulted in statistically significant and *higher* Kroger prices. Dr. Israel did not offer any explanation for this incongruous result. Israel 3333:20-3335:2.

191. Dr. Israel also revives his critiques of Dr. Dua's margins—to the same effect. *See* FOF ¶¶ 115-24 Dr. Dua correctly calculated the margins when calculating the HMT and does so again for use in his upward pricing pressure analysis. *See id.*

192. Dr. Israel's critiques of Dr. Dua's diversions are likewise unpersuasive. Dr. Israel writes off Dr. Dua's multiple, reinforcing analyses based on real-world consumer choice data as "one-off[s]," Israel 3279:14-25, and offers a number of generic critiques about Dr. Dua's econometric controls and choice of event studies. *See* Israel 3278:4-3280:10. Dr. Israel's ultimate conclusion is that these analyses are simply "a lesser version of EGK," which he describes as "a published way to measure substitution." Israel 3272:23-3273:19. But Dr. Israel's modified EGK lacks the real-world data leveraged by Dr. Dua's analyses, and as a result, does not, in fact "measure substitution," and instead only "tr[ies] to *estimate*" substitution using store revenue, on the one hand, and average demographic information on consumers, on the other. Dua 3476:1-22. And unlike Dr. Dua's loyalty-card based diversion analysis, Dr. Israel's modified EGK model has no grounding in the real world. *See supra* ¶¶ 106-114.

(b) Competition from Walmart does not preclude these likely unilateral effects

193. Defendants' contention that the merger will not harm competition because Kroger will remain "laser focused" on Walmart is not supported by the evidence. Kroger's aggressive promotional strategy is *entirely* directed at Safeway, given that Walmart does not engage in comparable promotions. *See* FOF ¶¶ 163, 165.

194. The Court heard significant evidence about how Kroger and Albertsons serve as

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a check on each other's pricing, notwithstanding Walmart's presence in the market. *See* FOF ¶¶ 153-62. The HPR rule, in particular, regulates Fred Meyer's pricing when its target spread with Walmart would otherwise put it above Safeway's price. *See* FOF ¶¶ 158-59. When Walmart's prices are higher than Kroger's on program items, *only* Safeway (under the HPR rule) keeps Kroger's prices down. *See id.* The evidence at trial showed that when Walmart raised the price of infant formula during a period of significant inflation, Kroger did not immediately follow. *See* Groff 573:10-579:17 (discussing SX4815); SX4815. Instead, Andy Groff asked his colleagues to find out "whether we can raise [the] price" by checking against the HPR rule. *Id.* In other words, Groff directed employees to check whether Safeway's prices would allow Kroger's to follow Walmart's prices higher. The merger would eliminate that constraint.

195. Consumers will be harmed, moreover, despite Walmart's presence in the market. Today in Washington, Kroger, Albertsons, and Walmart each deploy different strategies for their pricing, promotions, assortment, quality, and services. Groff 678:9-680:6. Millions of customers choose to shop at each of those stores. Groff 680:7-16. That choice is good for consumers, Groff 680:17-18, and eliminating it will harm them. Dr. Israel's contention that Walmart's presence as a lower-priced retailer will prevent consumer harm unjustifiably ignores all facets of competition other than price. Dua 3513:20-3514:21. Economic analysis indicated that the merger *will* harm consumers and competition despite Walmart's presence in the market. Each of Dr. Dua's analyses—his concentration analyses and his upward pricing pressure analyses—accounts for the competitive pressure from Walmart. *See* Dua 3513:7-19. Even accounting for Walmart, Dr. Dua's analysis showed that there would be substantial upward pricing pressure. Dua 1630:20-1631:9.

196. Dr. Israel's analysis and critiques do not demonstrate that the merger will not result in anticompetitive effects because of the continued presence of Walmart. Dr. Israel relied on the number of price zones in which Kroger price checked Walmart as evidence of Kroger's

focus on Walmart prices, but he admitted on cross-examination that, in Washington, Kroger price checks Albertsons as much as or more than it price checks Walmart. Israel 3325:9-3327:1; Israel 3327:2-15. Dr. Israel specifically admitted that Fred Meyer and QFC price check Albertsons in as many of Kroger's Rules Based Pricing Zones as they check Walmart. Israel 3325:9-3327:1. Dr. Israel also admitted that Kroger price checks Albertsons in more Everyday Essentials Pricing Zones in Washington than it price checks Walmart. Israel 3327:2-15. Dr. Israel's regressions that purported to show the correlation between Kroger prices and Walmart and Albertsons prices are not informative because he presented only national data and did not perform a Washington-specific regression. Israel 3328:9-3329:14. Given that, in Washington, QFC is focused entirely on Safeway's prices, Israel 3319:24-3320:3, the national numbers are not representative of Washington.

197. Dr. Israel agreed that a standard assumption in economics is that firms seek to maximize profits and that, as a result, we should assume that, after the merger, Kroger will be "implementing strategies to seek to maximize profits." Israel 3317:21-3318:3. Dr. Israel also agreed that, today in Washington, Kroger has found that pursuing two different strategies is best for its profits. Israel 3322:20-24; 3318:10-13. Thus, Dr. Israel admitted that QFC does not follow the same strategy as Fred Meyer and "definitely pays more attention to Albertsons stores." Israel 3319:5-15. He conceded that, despite his testimony about Kroger's supposed "laser focus" on Walmart, QFC's pricing strategy today is "definitely is more focused" on Safeway. Israel 3319:24-3320:3.

198. Dr. Israel tried to dismiss the fact that QFC prices only against Safeway—not against Walmart—by pointing out that most QFC stores and the QFC banner will be sold to C&S, but he admitted that he does not actually know what pricing strategy Kroger will follow for the 141 *Albertsons* stores it will acquire in Washington. Israel 3324:1-6. He conceded that if Kroger continued to find it profit-maximizing to follow a non-Walmart strategy in some of its Washington stores, it would do so. Israel 3322:11-19. Dr. Israel also conceded that Kroger

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has also applied non-Walmart pricing strategies elsewhere, including at stores it acquired through its recent mergers with Roundy's and Harris Teeter. Israel 3321:10-3322:6.

199. The evidence shows that Kroger has not yet decided which pricing rules or strategies will apply to the Albertsons stores it is seeking to acquire. *See* McMullen 1217:23-1218:6 (Kroger had not decided on a "pricing model" for the acquired Albertsons stores, and will "do tests to see what connects best with the Albertsons customer."); Aitken 2556:25-2557:17 (conceding that he testified in his deposition that with respect to pricing strategies, "nothing has been agreed at this point," except that there will be "a pilot of 70 categories that would be coordinated as a test.").

200. There are also significant portions of the state—including Seattle—in which there simply is no Walmart for the merged entity to compete with. Mr. McMullen acknowledged that there were no Walmarts in Seattle and estimated the nearest location to be 8 miles outside the city, in Bellevue, and up to an hour drive in traffic. McMullen 1291:11-21; 1313:16-21.[7] As a result, low-income residents in Seattle and other areas without a nearby Walmart will be especially vulnerable to the loss of competition between Defendants. Mr. McMullen suggested that low-income residents receiving SNAP could "get delivery" from Walmart as a solution. McMullen 1292:14-17. Walmart, however, imposes additional fees on online orders. *See* Lieberman (Walmart) 2441:6-15.

B. <u>Coordinated Effects</u>

201. Coordinated effects describe when market participants are incentivized to take actions that would not be individually profitable, but *would* be profitable if other participants followed suit. Dua 1631:10-1634:22. Markets are more likely to exhibit coordinated effects when participants can easily monitor, and respond to, price increases by other market participants, as they can in this market. Dua 1633:22-1634:11. Concentrated markets are also

[7] The Court is aware (and takes judicial notice) that a Walmart supercenter is located in Renton, Washington and that location might be closer to Seattle than the Bellevue location. The exact proximity of the Renton Walmart to the southern city limits of Seattle are unknown to the Court. Those are currently the only two Walmart locations in the Seattle/King County metropolitan area.

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more likely to exhibit coordinated effects. Dua 1634:12-22. Coordinated effects are likely to occur as a result of the merger, therefore, given that all 57 supermarket city areas would be highly concentrated. Dua 1634:12-22.

1. Kroger and Albertsons already engage in tacit coordination

202. Coordinated effects are especially likely because Defendants already engage in coordinated pricing behavior—monitoring and responding to each other's prices. *See* Dua 1633:22-1634:22. Dr. Dua explained that the sort of "systematic[]" price probes he observed the parties carrying out in the ordinary course demonstrated the ease of engaging in the sort of coordinated behavior he explained would lead to higher prices. *Id.*

203. Kroger "raises the price on a particular item and then watches to see how competitors react." Groff 607:12-15. SX2607 at p.2; *see also* Groff 611:5-15; SX3020 at p.2; Kammeyer 804:11-805:3; SX3400. Kroger calls these experimental price-increases "price probes." Groff 607:9-15. If competitors raise their prices in response to the probe, Kroger stays at the higher price. Groff 607:16-24. If competitors do not follow Kroger's price up, Kroger drops its price back down. Groff 607:25-608:3. The probe thus is an experiment to see whether competitors would be willing to raise prices and Kroger's pricing is contingent on the answer. Kroger uses price probes to target both Albertsons and Walmart. FOF ¶¶ 153-62. When price probes succeed in influencing competitors to adopt a higher price, Kroger executives say that they have successfully "le[d] markets up." SX2607 at p.2.

204. The evidence at trial showed multiple instances in which Kroger's probes succeeded in "lead[ing] the markets up." For example, Kroger employees responded to price increases by instituting a price probe on bananas. SX2607 at p.2. A Kroger employee wrote to Andy Groff and others that "Our probe helped lead markets up." *Id.*; Groff 610:5-8 (testifying that Kroger, in this instance, "went first and . . . waited to see if others followed"). In May 2022, a Kroger pricing analyst reported to Mr. Groff that "QFC-Safeway responded to probe and moved up from $1.99 to $2.19 - $2.39." SX3020 at p.2. In other words—"QFC sent out a

price probe to raise the price of eggs and Safeway responded by also raising its prices." Groff 611:5-15. Also in 2022, Fred Meyer reported used a price probe on eggs to "see how Walmart may react." Kammeyer 804:11-805:3; SX3400. An internal email, referring to Fred Meyer's price on eggs, and Walmart, reported: "WM moved up .20 we probed." SX3400; Kammeyer 804:11-805:3.

205. Albertsons also uses price probes. Albertsons refers to this strategy as "lead up, follow down." SX1516 at 14; Schwarz 480:5-8. Albertsons executes the "lead up" strategy by raising prices in response to cost increases, and then monitoring to see if competitors follow suit. *See* Street 393:21-395:7; Schwarz 478:3-480:8; SX1165 at p.2 (May 2022 email noting that "We are moving up with cost increases"; "We are pushing hard to . . . send the message to Fred Meyer"; and "We then monitor closely on how they react."); SX1103 at p.1-2 (2020 email discussing a cost increase in bananas reported that "Fred Meyer today is at 59¢ pound 10¢ below us currently," and said "We can try to lead up to 79¢ (effective Dec 28th) and see if they follow, but if they don't follow quickly I am not comfortable being 20¢ lb higher than them."). Albertsons employees describe this process at times as "send[ing] a message" to competitors about pricing. SX1165 at p.2.

2. Divestiture to C&S will not cure anticompetitive effects

206. The divestiture to C&S will not eliminate the likelihood of coordinated effects. *First*, C&S is unlikely to be the same level of competitor as Albertsons and Kroger are today with each other. *See* FOF ¶¶ 147-78. *Second*, C&S will be "dependent on . . . one of its competitors," and thus unable to fully "constrain or not follow price increases . . . by Kroger." Dua 3514:22-3515:18. *Third*, C&S will face significant costs and challenges not currently faced by Albertsons—the highest priced of the three major supermarket competitors currently in Washington. It is therefore unlikely that C&S will be able to keep its costs (and therefore its prices) below either Kroger or Walmart with any frequency.

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

207. If their merger closes, Kroger and Albertsons will sell 579 stores, including 124 in Washington, and other assets and capabilities that are currently owned by both Kroger and Albertsons to C&S Wholesale Grocers, Inc. Morris 2776:2-6; *see also* SX3748.

208. Defendants acknowledge that this divestiture may be necessary to address potential antitrust concerns regarding their proposed merger. McMullen 1269:17-19; McMullen 1295:15-18; Sankaran 1409:2-6; Cosset 2661:5-18.

A. Kroger Picked an Inexperienced and Ill-Equipped Divestiture Buyer

1. C&S is a wholesaler with different skills than a retailer

209. C&S is primarily a grocery wholesaler. *See* Winn 1456:23-25; Florenz 979:21-980:3. Over 99% of its sales come from its wholesale business. Winn 1456:23-25. Even after the divestiture, C&S is "committed to being a much larger wholesaler than retailer." SX2299 at p.1.

210. Being a successful grocery retailer requires a different set of skills than being a successful grocery wholesaler. Winn 1457:1-6; Ailawadi 2021:23-2022:9. This is in part because retailers and wholesalers have very different customers: while wholesalers' customers are other businesses (specifically, retailers), retailers' customers are individual consumers. Ailawadi 2023:8-2024:6; *see also* Winn 1504:6-13.

211. Pricing and promotions are a critical part of grocery retail, but are not a core part of grocery wholesalers' business. Successful retailers like Kroger and Albertsons must manage prices and promotions, and intelligently "decide the prices" they will charge in their stores, what promotions to run "on which items, at which time," and how to target customers—complex decisions that are critical to retail operations, but not a part of wholesalers' business. Ailawadi 2024:1-11; *see also supra* ¶¶ 154-173 (Defendants' pricing and promotions strategies).

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212. Successful retailers like Kroger and Albertsons rely on troves of data to inform which items' base prices are most important to consumers' decisions regarding where to shop, and what promotions to offer, when and to whom. *Supra* ¶ 155; *see also* Aitken 2496:24-2497:7. C&S does not currently have these pricing and promotions capabilities. *See infra* ¶ 276. In fact, C&S's retail pricing, promotions, and data analytics capabilities are limited and rudimentary compared to those of Kroger and Albertsons. McGowan 1159:23-25; McGowan 1159:19-22; SX4832 (Greene Dep.) 49:2-18, 50:5-6, 8-20; SX4832 (Greene Dep.) at 59:20-60:14; SX0321; SX4832 (Greene Dep.) 50:22-51:6, 54:2-3, 5-6; SX4832 (Greene Dep.) at 89:9-17, 19; SX2391; SX4832 (Greene Dep.) 9:20-22, 10:7-13, 17-18, 11:15-16, 11:21-12:5; *see also* Ailawadi 2026:12-2028:15 (describing C&S's current pricing capabilities and agreeing with C&S employees' characterization of them as stuck "in the 20th century").

213. The services C&S offers independents and franchisees do not indicate that C&S can successfully run the divestiture stores. Winn 1568:7-10, 1568:11-1569:5 (conceding important differences between owning a store and franchising one). They are the same services that C&S currently uses to unsuccessfully run its retail stores. Winn 1569:8-17; *see also* Ailawadi 2028:16-18 (given C&S's "own retail stores are in bad shape[,] I don't know how you can provide those services to other retailers"). Any advantage in buying power C&S's wholesale business might give it, C&S has today, Morris 2855:14-2856:2, and that has not resulted C&S's retail stores being successful. To the contrary, C&S's current retail operations are small and unsuccessful.

2. C&S's current retail operations are small and unsuccessful

214. C&S has never operated as many stores as it now seeks to acquire in the divestiture. Florenz 1032:6-10; Winn 1457:10-1469:22. Rather than operate a large chain of retail grocery stores, C&S's practice has been to "buy and then sell or close retail stores." Winn 1457:10-13. From 2001 to 2006, C&S bought over 300 grocery retail stores in a series of transactions. *See* Winn 1457:10-1469:22. Of the 221 stores that C&S bought between 2001 and

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2003, C&S operated just 29 by 2005. Winn 1460:2-1467:6. And of the more than 300 total stores that C&S bought between 2001 and 2006, C&S operated just 3 by the end of 2012. Winn 1464:8-9. C&S does not know how many of the stores it sold off between 2001 and 2012 are still in operation as grocery stores today. Winn 1460:2-1467:6. From 2015 to 2020, C&S operated *fewer than four grocery stores at any one time*. Winn 1467:4-6.

215. C&S often immediately sold the stores it acquired, typically to its wholesale customers, so that C&S could continue to profit off of the wholesale supply contract. *Id.*; Winn 1458:16-18, 1468:13-1469:7. This is part of a strategy in which C&S "acquire[s] retail store locations in connection with strategic transactions to maintain or expand [its] grocery wholesaling and distribution business." SX2257 at 33; Winn 1468:13-20. C&S maintains that strategy today. SX0803; Winn 9/24 54:3-13; *see infra* ¶¶ 308-312 (discussing C&S's openness to selling stores to its wholesale customers). After selling stores to customers, C&S would then close unprofitable stores, including stores that began losing money under C&S's ownership. *Id.* so that C&S could continue to profit off of the wholesale supply contract. Winn 1458:16-18, 1468:13-1469:7. In a March 2021 quarterly report, C&S candidly stated its intentions regarding its retail grocery stores: "We do not intend to grow our grocery retailing operations or to operate the retail grocery stores long term." SX 2257 at 33-34.

216. Today, C&S currently operates 23 retail grocery stores, Winn 1457:7-9, none of which are in Washington, McGowan 1158:8-10. These stores bear the Grand Union and Piggly Wiggly banners. McGowan 1171:1-10; McGowan 1175:10-15.

217. In 2021, C&S acquired 12 stores from Tops Markets in a divestiture related to Tops' merger with Price Chopper. McGowan 1171:1-21. In connection with that acquisition, C&S gave the FTC financial projections showing that C&S could profitably run the divested stores and that those stores were preferable to Price Chopper stores more closely resembling the divested stores. SX2357 p.10; McGowan 1170:7-23. After C&S acquired these 12 Tops Stores, it rebannered 11 of them to Grand Union and the other to Piggly Wiggly. McGowan

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1171:1-10. Sales declined and e-commerce sales dropped 80% to 90%. McGowan 1172:17. The Grand Union Stores lost money in fiscal years 2022 and 2023, and they have failed to meet the projections that C&S gave the FTC at the time of the divestiture. McGowan 1171:17-1173:1. C&S's Grand Union stores currently lose almost $3 million per year. McGowan 1172:5-7. In 2021, C&S also acquired 12 Piggly Wiggly stores. McGowan 1175:10-15. Those stores are underperforming, and C&S closed one of those stores because it was unprofitable. McGowan 1175:23-1176:9.

3. Kroger picked a weak buyer

218. Kroger ultimately narrowed the potential buyers down to four companies, only two of which, including C&S's bid, submitted a bid for the full package of stores. Cosset 2649:22-24; DX0813.

219. Kroger was well aware of C&S's limited retail capabilities when it selected C&S as the divestiture buyer. *See* SX3509; SX0844; SX3680. Early in the diligence process, C&S requested a call with Kroger executives "to discuss what it takes to operate a grocery store." SX3509. Kroger senior executives did not think C&S was the strongest divestiture buyer. SX3680 at p.3 (Cosset texts with Aitken calling it a "no brainer" to pick a different buyer); Cosset 2650:11-2654:19. These executives were concerned that other decisionmakers were underestimating the degree of logistical support that C&S would need. SX3680 at p.3-4; Cosset 2651:5-2653:18.

220. C&S also was not the highest bidder. SpartanNash—which one Kroger executive described as the "no brainer" buyer—offered to buy the entire package of stores, without any private labels, for almost $200 million more than C&S's bid. DX0813 at p.4.

221. Kroger's CEO Rodney McMullen, then-CFO Gary Millerchip, and Kroger's outside counsel and advisors made the final selection of C&S as the divestiture buyer over the other bidders. Cosset 2659:8-19. Though Mr. Cosset testified at trial that Kroger picked the strongest buyer, he conceded that the selection committee considered criteria and information

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about the bidders that he was not privy to, and that he did not personally assess C&S's retail track record. Cosset 2659:14-2661:3. Mr. Cosset also admitted at trial that he texted another Kroger executive during the final presentation of divestiture candidates to the Board that a different potential buyer was the best candidate. Cosset 2654:10-16.

222. Mr. McMullen took C&S Chairman Rick Cohen's word that C&S would be able to successfully operate the stores when selecting C&S as the divestiture buyer. SX4838 (McMullen Dep.) 239:20–240:11. Rick Cohen, Chairman of C&S, told Mr. McMullen that C&S "would be able to use a lot of the capabilities that they already have to be able to do a fantastic job on operating the stores on a go-forward basis." *Id.* at 239:20– 240:11. Mr. McMullen did not ask anyone on his team to look into whether what Mr. Cohen told him was true and does not know if anyone at Kroger did so. *Id.* at. 240:12-17; *see also id*. 186:5-187:10. Based only on those assurances, Mr. McMullen—along with Mr. Millerchip and Kroger's outside advisors—selected C&S as the divestiture buyer over a buyer that other senior executives thought more capable and that was offering more money. *See* FOF ¶¶ 219-20.

B. <u>The Divestiture Package Puts C&S at a Competitive Disadvantage</u>

223. On September 8, 2023, C&S and Defendants signed an initial APA in which C&S would acquire 413 stores, including 106 stores in Washington, and four banners, from a mix of Kroger and Albertsons. Winn 1530:22-1531:2; SX4483; SX3748 pp.34, 59. Included in the package were the QFC banner and exclusive rights to five of Albertsons' smallest private label brands. Florenz 859:4-10. The agreement included a Transition Services Agreement ("TSA") under which Defendants would provide C&S a number of essential services in the months immediately after the divestiture closed. Winn 1538:21-1539:15.

224. On October 31, 2023, C&S sent a letter to the California Attorney General's Office ("California AGO") that assessed the "execution risk associated with" the September 2023 divestiture package. SX0158 at p.1. C&S told the California AGO that Kroger's "mix-and-match" approach to the divestiture package "will complicate the transition and C&S's

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ultimate operation of those assets," and said that "the closer the divestiture package comes to being a freestanding business, the lower C&S's execution risk will be." SX0158 at p.1-2. C&S also identified the need to rebanner "336 out of 413" stores as a factor that "increase[d] execution risk," and explained that acquiring "only stores . . . that are owned by Albertsons" and "exclusive rights on a nationwide basis to certain banners owned by Albertsons, including Safeway" would "substantially reduce execution risk," in part because it would reduce C&S's rebannering obligations. *Id.* at p.2-3. And C&S identified that it would not be receiving a "full range of private brand products or private brands that are well-known to consumers" as a factor that increased C&S's "execution risk," and said that it would "substantially reduce execution risk" if C&S acquired Albertsons' "Signature and O Organics private brands owned by Albertsons," because C&S "would not need to develop its own full range of private brand products." *Id.* at pp. 2-3. According to C&S, this would enable C&S to "compete more effectively against Kroger/Albertsons, which will have access to Kroger's full range of private label brands and does not need two." *Id.* C&S's statements to the California AGO regarding the importance of private label brands were consistent with its statements to the FTC in connection with the Tops divestiture discussed above. SX2357 p.10. At that time, C&S told the FTC that it's "inability to fully replicate [Price Chopper's] private label offering risks driving [Price Chopper] customers away." SX2357 p.10.

225. On November 30, 2023, C&S's counsel emailed the Washington Attorney General's Office about the initial divestiture package. In that email, C&S's counsel told the Washington Attorney General's Office that "many of the items reflected in the materials we provided to California would be of particular importance to consumers in Washington." SX4483 at p.2. C&S reiterated that an "all Albertsons" approach would reduce risk, especially in Washington where C&S was receiving "a large number of stores from both Kroger (42 stores) and Albertsons (64 stores)." *Id.* This split of stores, C&S explained, meant that the challenges of the mix-and-match approach would be "heightened" in Washington. *Id.* In this

letter, C&S also reiterated that acquiring the Safeway banner and Signature and O Organics customers would reduce the risks of the divestiture in Washington. *Id.*

226. On April 22, 2024, C&S and Defendants signed an amended APA. SX3748; SX3750. Under the April 2024 APA, C&S would acquire 579 stores total, including 485 from Albertsons and 94 from Kroger. Morris 2776:2-6. In Washington, C&S would acquire 124 total stores, including 50 QFC stores from Kroger and 59 Safeway, 3 Albertsons, and 12 Haggen stores from Albertsons. Morris 2798:14-2799:16; SX3750 (divestiture store list). In addition to the Mariano's, Carrs, and QFC banners, C&S would also receive the Haggen banner. SX3748 at p.34. C&S still will not acquire the Signature or O Organics brands and will instead receive only the five niche brands included in the prior APA. SX3748 p.37.

227. The April 2024 package also includes a TSA. *See* SX3748. For up to twelve months, Defendants will provide operations support to C&S for divested stores, including IT, pricing and promotions, supply chain, and loyalty programs. Ailawadi 2030:20-2031:2 (data, pricing, and promotion support); Florenz 922:17-925 (IT support). *See also* SX3748. During the TSA, C&S will depend on Defendants to perform essential functions. Ailawadi 2031:6-17 (dependent on Kroger for pricing functions). Much of this support will end after 12 months, but C&S will still rely on Defendants for private label products for up to four years, at increasing mark-ups. Ailawadi 2060:3-7.

228. C&S's assessment of the execution risks posed by the original divestiture applies equally to the April 22, 2024 divestiture package, which is not materially different in those aspects, particularly in Washington. Under the new divestiture package, C&S continues to receive a mix of Kroger and Albertsons stores, and will be required to rebanner just two fewer stores than under the original package. Winn 1483:7-1484:2. It will also receive the same private labels that it earlier identified as execution risks. Winn 1475:8-18, 1479:5-19.

229. Kroger's decision to sell C&S a mix-and-match package, rather than the "all-Albertsons package" that C&S requested, increases the risks C&S faces while decreasing the

risks faced by Kroger. SX0158; SX4483; Winn 1487:9-1489:7; SX4848 (Van der Veen Dep.) 90:14-91:2 (Bain warned C&S that package structure it will need "to have one central org take on a lot of decentralized brands, geos, operations that were historically managed more decentralized than not—that's a *hard transition*") (emphasis added); SX3927 at p.3.

230. If C&S later determines that it does not have the assets, capabilities, or support it needs to successfully operate, there is no mechanism for C&S to get those additional assets from Kroger. SX4838 (McMullen Dep.) 112:5-9; Cosset 2661:5-2662:10.

1. Stores

231. Kroger, not C&S, selected the stores included in the divestiture package. *See* Winn 1472:1-8 (C&S was "not really the author of the journey" on store selection).

232. In selecting those stores, Kroger kept the best performing assets for itself. *See* SX4838 (McMullen Dep.) 267:21-24, 268:2-3 (conceding that "if I could" I would "cherry-pick" stores in C&S's position). Kroger is retaining the UVillage QFC store in Seattle because Kroger CEO Rodney McMullen personally requested that it not be divested due to its significant real estate value. McMullen 1220:7-1221:5, 1221:10-12; 1223:14-1224:3. Kroger assessed the real estate value of that QFC store at between $50 million and $150 million. SX3531 at p.1-2. Kroger also considered the financial performance and value of the Albertsons stores it elected to divest. For example, Kroger planned to divest ACI stores that would require significant price investment. SX3303 at p.1 (Las Vegas). But Kroger planned to keep specific Albertsons stores that outperformed their Kroger counterparts. *Id.* (Gillette, Wyoming and Las Vegas, Nevada). Where it could, Kroger followed a simple rule: if a store was a "good EBITDA producer, . . . we wouldn't want to divest." *Id.* (discussing Nampa, Idaho ACI).

233. Kroger is retaining Kroger's 25 highest performing stores in Washington. SX4837 (Maharoof Dep.) 361:2-23 (based on 2021 store-level EBITDA). At the same time, Kroger is divesting a substantial share of its lowest performing stores in Washington. More than half of Kroger's 29 stores with negative EBITDA in Washington were QFC stores.

SX4837 (Maharoof Dep.) 362:3-363:25 (based on 2021 store-level EBITDA); SX3750. Kroger is divesting all but 5 QFC stores in Washington; Kroger is not divesting the UVillage QFC discussed above. SX4837 (Maharoof Dep.) 365:10-15.

2. Banners

234. Banners—or store names—are "important to consumers." Winn 1474:4-9; SX0158 at p.1; Morris 2794:1-3. They "reflect certain commitments, promises, programs that that store represents." SX4833 (Keptner Dep.) 22:2-3, 22:5-6. Banners, and their consumer perception, also drive important strategic decisions for a retailer related to pricing, promotions, assortment, and private label products. Ailawadi 2066:8-2067:6.

235. During negotiations, C&S sought to reduce its rebannering requirements by keeping down the number of stores that it acquired without the accompanying banner. *See* SX2345; SX0158; SX4483. C&S specifically sought to reduce the number of Safeways in the package, but recognized that the Pacific Northwest "will always be [the] biggest issue." Florenz 868:13-872:22; SX2345 at p.2. For that reason, the lowest risk outcome for C&S was a divestiture package that "includes at least partial ownership of the Safeway brand" in the Pacific Northwest. SX0443; Florenz 895:15-897:20; *see also* SX0158; SX4483.

236. Of the banners Defendants currently use in Washington, C&S is acquiring only the Haggen and QFC banners. SX3748 at p. 34. Although C&S is acquiring the rights to use the Safeway banner in Colorado and Arizona, C&S is not acquiring rights to the Safeway banner in Washington. Morris 2800:23-2801:8; Winn 1477:10-11; Florenz 869:24-870:2. As a result, C&S will need to rebanner 286 stores in 18 states within three years. Florenz 864:4-9. In Washington, C&S will have to rebanner 62 stores (59 Safeways and 3 Albertsons) to either QFC or Haggen. Morris 2798:14-2799:19, 2793:2-18, 2798:19-2799:5.

237. Safeway is a strong banner. Deloitte determined the value of the Safeway banner in Arizona, Washington, and Oregon is $514 million. SX4821 p.3. Acquiring the banner—nationwide or in Washington—would reduce the execution risks of the divestiture.

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See SX0158; SX4483; Winn 1484:12-1489:7. The banner is so strong that it would, as C&S's CEO put it, be "crazy" not to want the Safeway banner. Winn 1477:4-9. After the Albertsons-Safeway merger, Albertsons' rebannered stores to the Safeway brand because Albertsons determined that in the Seattle area the Safeway brand has more equity with Albertsons customers. Morris 2830:21-2831:2; *see also id.* at 2831:16-21. C&S wanted to acquire the Safeway banner. *See* Winn 1477:4-9; SX0158; SX4483. But Kroger was not willing to sell the rights to the Safeway banner to C&S outright or for use in Washington. *See* SX3748 at p.34; Morris 2800:23-2801:8; Winn 1477:10-11; Florenz 869:24-870:2; Florenz 863:14-25.

238. The Kroger banner that C&S will receive in Washington, QFC, is a weak and poor performing banner. *E.g.*, SX4030 at, p. 36-38 (Bastion presentation).[8] QFC is a small banner and its market share generally declined from 2019 to early 2022. Albi 715:14-16, 18-20; *see also* Albi 684:5-7. During the same period, QFC consistently performed poorly on customer price perception. Albi 715:21-23. Bastion, one of the consulting firms C&S hired, warned C&S that QFC was a weak banner, SX4030 at, p. 36-38; Florenz 1022:17-1023:12, and weaker than competing banners in Washington—including Safeway and Albertsons; *id.*, Florenz 1023:1-12. As Ms. Florenz put it to a colleague, Kroger is giving us its "worse chains," including QFC. SX4398 at p.2. QFC's weakness as a banner translated to poor financial performance. *See* SX2685 (2022 internal Kroger analysis putting "Seattle, WA (QFC)" on Kroger's list of "under-performing MSAs"); SX4824 (Adcock Dep.) 220:20-221:13, 223:13-224:2, 224:6-226:2, 237:22-239:4 (Kroger designated over 10 QFC stores in Seattle as underperforming); *see also* SX4837 (Maharoof Dep.) 305:11-306:13, 306:24-309:22, 310:17-312:3, 314:15-17, 314:20-23; SX2682; SX2683; SX0713; SX0714.

239. Kroger divested its QFC banner and stores instead of its Fred Meyer banner and stores because Fred Meyer's banner and stores are more valuable. *See*, e.g., SX3303 at 1, P46874 (indicating Kroger considered financial performance when deciding what assets to

[8] This exhibit was introduced by Defendants and admitted for the truth of the matter asserted.

divest). Fred Meyer generates nearly twice the rate of return as QFC stores. SX4837 (Maharoof Dep.) 314:15-17, 314:20-23; SX0713, SX0714; *see also* FOF ¶ 232 (Kroger considered financial performance when picking assets to divest).

240. The Albertsons banner that C&S will acquire in Washington, Haggen, is a small and relatively weak banner from a branding perspective. There are currently just 15 Haggen stores in Washington. Ailawadi 2099:10-15 *see also* SX4030 at p.37. Even shoppers familiar with the Haggen banner are less likely to shop at Haggen than shoppers familiar with banners like Fred Meyer and Safeway are to shop at those stores. SX4030 at 62. Deloitte, retained by Kroger to estimate the value of various banners, valued the Haggen banner at just $16 to $30 million. SX4821 at p.3.

241. C&S has not analyzed the effect of rebannering-related sales losses on the profitability of particular stores that C&S is acquiring in Washington and its deal model is not capable of doing so. Winn 1490:2-7; Galante 2745:9-2746:19. Rebannering is complicated and risks a significant sales loss from disruption and alienating customers. Welsh 1079:12-1081:5, 1085:20-1086:15; McMullen 1224:23-1225:2.

242. Although Jackman, another consulting firm, prepared a presentation in which it said QFC had “strong” brand equity and operating efficiency, Florenz 1006:8-18, that presentation was a pitch deck made to win C&S’s business, Florenz 1025:4-17, and is therefore entitled to less weight. No presentations presenting similar findings from Jackman after it was hired have been introduced into evidence.

243. The Haggen and the QFC banners require more investments in their brand and brand equity than banners like Safeway and Fred Meyer, because Haggen and QFC are weaker and less well-known banners than Safeway and Fred Meyer. Florenz 1022:3-1023:8; SX4030 at 36-37, 62; Ailawadi 2099:21-2100:4. C&S does not have concrete plans to improve these banners or stores. While C&S CEO Eric Winn testified that C&S planned to invest $150 million in the divested stores prices, Winn 1551:24-1553:17, Winn did not explain why he

believed C&S would be able to offer lower prices than Albertsons, *see id.*, which does not currently bear any of the transition costs that C&S will incur to stand up the divested stores. And while Mr. Winn also stated generally that C&S intended to "[g]row the business" and "make some improvements to some of the banners," including QFC, and to some of the Albertsons stores, he did not elaborate on what those plans were. Winn 1564:7-20.

244. The relative weakness of the QFC and Haggen banners as compared to the Safeway banner is substantially likely to increase the sales losses that C&S will experience in the stores that are rebannered in Washington. C&S was advised by one of its consultants, Bain, that sales losses (or detriments) from rebannering generally can range from 5-10% to over 20%. *See* SX0441 at p.3[9]; Welsh 1143:17-1144:5 (agreeing with Bain's assessment); *see also* Florenz 884:25-888:16; 1021:6-14. Bain provided C&S with base case and worst case estimates for permanent sales losses due to rebannering the divested stores in each region in which C&S was acquiring stores. SX0512; Florenz 876:17-877:6; SX4848 (Van der Veen Dep.) 47:17-48:8. Bain's "base case" rebannering sales detriment for rebannering in the Pacific Northwest was 6.3%. SX0512.[10] Bain's "worst case" rebannering sales detriment for rebannering in the Pacific Northwest was 21.2%. SX0512. Bain projected similar sales losses for rebannering stores with the Albertsons banner in the Pacific Northwest. *Id.*

245. C&S's rebannering sales losses are likely to result in sales losses that are closer to the worst-case scenario estimates of 20% or more. Joe Welsh, the State's rebannering expert, testified that this estimate/advice from Bain was consistent with his decades of experience in the grocery retail industry, including his experience rebannering over 100

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[9] Although this document was not offered for its truth and the Court does not rely upon it for its truth, Mr. Welsh opined that these sales loss ranges were consistent with his decades of experience in the grocery retail industry. Welsh 1143:17-1144:5.

[10] At trial, the Court admitted State's Exhibit 512 with the limitation that the Court would not rely upon SX 512 for the truth or accuracy of any sales detriment numbers. That is the case here. The Court makes no finding as to the accuracy of "6.3%" or "21.2%" or any other detriment number. As explained in Findings of Fact 246 and 247 below, the Court (partially) relies upon SX 512 in finding that C&S reduced its own advisor's base case estimate, without any basis in data or financial analysis, and thus significantly and artificially discounted the financial risk associated with rebannering.

grocery stores. Welsh 1143:17-24. Mr. Welsh explained that, here, rebannering "in the wrong direction"—from a stronger banner to a weaker banner—increases the likely sales losses. Welsh 1055:5-19, 1085:10-19. The Court found Mr. Welsh's testimony credible on this point. A rebannering sales detriment of 20% translates to sales losses of between $5 million and $10 million per store, per year. SX2249 (Total Detail Working Tab, Column BT multiplied by 3.17); Florenz 964:6-18.

246. C&S's financial models and business plans do not account for the possibility that it will lose 20% or more of rebannered stores' sales as a result of rebannering. Florenz 1018:14-19 (this detriment is not included in C&S's "very conservative" deal model). Instead, C&S took Bain's base case rebannering detriment (6% for rebannering Safeways to QFCs) and reduced it by a third. Florenz 994:17-21; SX2249 (Input Tab); Florenz 880:24-881:3. C&S's smaller rebannering detriment was not substantiated by any data or analysis and was unreasonable to adopt. This "management judgement" was made by C&S's finance team—not anyone in its retail division. Florenz 880:24-881:3. The one-third reduction was based, in part, on C&S's ability to use transition banners like "Safeway by QFC." Florenz 882:13-884:4. Bain never validated the one-third haircut C&S applied, SX4848 (Van der Veen Dep.) 62:16-63:16, 63:24-64:2, 64:4, and transition banners are likely to increase, rather than reduce, rebannering related risks. *See* Welsh 1087:14-1088:2 (calling transition banners a "terrible idea"); Welsh 1087:24-25; 1088:9-16; SX4848 (Van der Veen Dep.) 108:25-110:6; *see also* SX4833 (Keptner Dep.) 18:25-19:6, 20:4-21:4, 26:21-27:10. Using Bain's worst case rebannering detriment—rather than a base-case detriment that had been further reduced by one-third—would have had a significant effect on C&S's projections. Florenz 904:23-905:1; *see also* Galante 2696:10-21 ("small changes" to the deal model "could have larger changes in terms of the numbers"); *see generally* McMullen 1244:1-11 (if a store loses 30-35% of its volume it "go[es] out of business.").

247. There is no way to know whether C&S's investors and lenders would have

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provided C&S financing and investment for the divestiture had they been aware of these rebannering-related risks. Investors and lenders did not see any financial projections from C&S that reflected the advice C&S received from Bain regarding the risk of 20%+ sales losses because C&S did not include them in their deal model and C&S provided potential lenders with an even more optimistic deal model than its "very conservative" deal model. Florenz 862:13-863:2; Winn 1570:3-7. Nor is there any evidence in the record that those investors and lenders were otherwise informed of the possibility of permanent sales losses exceeding 20%. Even Defendants' diligence expert had not seen the advice from Bain warning of the likelihood of 20%+ rebannering sales detriments. *See* Galante 2741:1-11.

248. The risk of significant rebannering sales losses is compounded here because C&S will need to introduce the QFC banner east of the Cascades, where there are currently no QFCs. Florenz 895:7-9. C&S had previously expressed concern about introducing the QFC brand in new locations. *See* SX0443; Florenz 893:22-895:3.

249. The scale and speed of C&S's rebannering obligations also increases the risk of sales losses from C&S's rebannering. C&S's obligation to rebanner 286 stores within three years (including 62 in Washington) is without precedent. *See* Florenz 864:10-13. There is no evidence in the record of any prior grocery retail rebannerings of this scale and speed.

250. In addition to the number of stores that will need to be rebannered, C&S's timeline for rebannering is likely to reduce C&S's effectiveness as a competitor. C&S will need to develop and implement a retail strategy *before it rebanners*, which is a reversal of the normal strategy where brand identity informs retail strategy. Ailawadi 2066:22-2067:19. That "strange" result, Ailawadi 2066:22, will "negatively affect C&S's ability to compete with the merged Kroger stores." Ailawadi 2067:14-19.

251. In Washington (as in some other markets), C&S and Kroger will operate stores bearing the same banner for up to three years, risking customer confusion and sales losses. SX4848 (Van der Veen Dep.) 104:24-105:16, SX3928; s*ee also* SX4833 *(*Keptner Dep.)

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136:15-139:14, 146:16-151:20; SX0598 at P8198, SX4406. This also reduces incentives to differentiate by offering distinct promotions, assortment, or experiences, as customers will not associate any advantage with a particular store owner. *Id.*

252. Hiring Susan Morris and other experienced retail executives does not mitigate the significant risks associated with the unprecedented rebannering required of C&S. Ms. Morris's experience at Albertsons only highlights how difficult C&S's task is. Albertsons' acquisition of Safeway led to the rebannering of over 70 stores (out of thousands)—far less than the 286 out of 579 that C&S will need to rebanner. Morris 2827:8-14. Albertsons undertook that rebannering voluntarily, because it acquired the stronger Safeway banner in the acquisition; Albertsons was not required to rebanner any stores and not obligated to rebanner within a certain timeframe. Street 416:10-20; Morris 2825:20-2827:11. Because Albertsons could take its time, it did: though the companies merged in 2015, rebannerings continue today—almost 10 years later. Morris 2773:15-22, 2826:24-2827:7.

253. Kroger's refusal to sell C&S the rights to the Safeway banner in Washington shifted these rebannering-related execution risks from Kroger to its newest competitor. Had Kroger provided C&S with the rights to Safeway in Washington—as it did in other states—*Kroger* would bear the burden of rebannering the Safeways that it would own in Washington to a different banner. Winn 1477:4-1478:1. Kroger instead must rebanner only 5 QFC stores in Washington. McMullen 1224:13-1225:11.

3. Private label

(a) The benefits to retailers of successful private label products

254. Private label brands are brands that a company manufactures or sources from third-party suppliers and sells under the company's own brand in their own stores, often at a lower price than corresponding national brand products such as JIF peanut butter or Lay's potato chips. Ailawadi 2054:8-19; SX4827 (Brown Dep.) 15:19-23; Ailawadi 2055:1-3; Schwarz 504:11-505:4, *see also* SX1521 (same); Schwarz 508:16-20; Maharoof 2964:7-1;

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Albi 704:4-9, 704:16-21. They are sometimes called store brand, Own Brands, or Our Brands. SX4827 (Brown Dep.) 16:4-7 (Own Brands); Aitken 2511:24-2512:12 (Our Brands).

255. Successful private label products are "vital" to the success of a successful grocery retail operation and can account for 25% or more of a retailer's sales volume. SX0158; *see also, e.g.*, Street 415:8-10; Schwarz 507:19-21; Albi 705:6-15; *see also* Ailawadi 2054:20-2055:22 (describing the benefits of private label products). Private label products are especially popular in Washington. SX4835 (Lanoue Dep.) 57:8-14 (Seattle Division has highest share of private label sales at ACI); Schwarz 503:16-19. And because they have lower costs, private label products allow retailers to earn better margins at a lower price than national brand products. Ailawadi 2055:1-3. Schwarz 504:11-505:4, *see also* SX1521 (same); Schwarz 508:16-20; Maharoof 2964:7-17. Generating higher margins on private label products enables retailers to offer lower prices and more aggressive promotions on other products, conferring a competitive advantage in the market. DX1058 at 53; Schwarz 504:21-505:4, 508:16-20. A strong private label program also enables retailers to negotiate for better vendor funding to support promotions on national-brand products. Ailawadi 2055:4-12.

256. Private label products are typically exclusive—i.e., sold only by one retailer—which means that a successful and attractive retailer will "attract consumers to the stores" and generate customer loyalty to the retailer's private brand products and store banner. Ailawadi 2055:13-22; *see also* Street 415:17-22, 416:3-9; Schwarz 507:19-508:20 (agreeing that successful private label products are a way to "capture [a] customer for life"); SX4827 (Brown Dep.) 43:14-18 (similar); SX4831 (Gilliand Dep.) 16:7-12 (similar). For that reason, retailers make every effort to ensure that their private label products are well-recognized by consumers. SX0158; Albi 706:1-13.

(b) Kroger, Albertsons, and C&S's current private label offerings

257. Kroger and Albertsons have strong private label programs that enable them to take advantage of the many important benefits of private label brands.

258. Kroger has a strong and fully developed private label program. Kroger has 17 different private label brands spread across "just under 13,000 SKUs across those brands," which generate $31 billion in sales annually. Ailawadi 2056:12-15; SX4820. Their national brand equivalent private label is Kroger, which generates $13 billion in sales a year, followed by Private Selection and Simple Truth, each of which sees more than $1.5 billion in sales annually. Ailawadi 2056:12-25; SX4820; SX4825 (Aitken Dep.) 322:22-323:6; Albi 705:16-22. Simple Truth is Kroger's organic private label offering, which is particularly important in Washington because consumers in the state "generally over index[] on natural and organic products." Ailawadi 2056:19-25; SX4831 (Gilliand Dep.) 171:9-15. Kroger's varied private label programs help drive traffic to its stores because different customers are loyal to different products. SX4838 (McMullen Dep.) 7:5-7, 29:23-25.

259. Albertsons also has a strong and fully developed private label program. *See* Schwarz 505:16-17; 507:9-18; *see also* Schwarz 504:11-20 (discussing margins); SX1521 (same); SX4827 (Brown Dep.) 171:17-22, 24-25 (discussing percentage of sales). Albertsons sells more than 14,000 unique SKUs across approximately 10 different private label brands, which collectively generate $16.5 billion in sales a year. Ailawadi 2057:4-9; SX4820; SX4827 (Brown Dep.) 16:11-17:7, 28:20-22. Albertsons offers a wide portfolio of brands to "meet different consumer needs" and because it's "important for each brand to have distinct segment it's targeting and a distinct brand personality." SX4827 (Brown Dep.) 34:25-35:6, 35:8-35:10.

260. Albertsons' three largest and most important private label brands are Signature Select, a national brand equivalent, O Organics, an organic brand, and Lucerne, a dairy brand. SX4827 (Brown Dep.) 173:15-19, 21-24; Street 415:2-13; Morris 2848:12-2849:8. Signature Select has 8,000 SKUs and generates $8.5 billion in sales per year. O Organics and Lucerne both generate more than $1 billion in sales—the only other Albertsons private label brands to do so. Ailawadi 2057:4-9; SX4820; SX4827 (Brown Dep.) 54:23-25, 182:10-22, 183:7-8, 11; SX4831 (Gilliand Dep.) 108:24-109:1, 109:16; SX4827 (Brown Dep.) 173:15-19, 21-24;

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Street 415:11-13; Morris 2848:12-2849:8.

261. Albertsons acquired the Signature, O Organics, and Lucerne brands in its acquisition of Safeway. Morris 2484:12-20. Despite devoting significant resources to private label products, Albertsons has never been able to build a $1 billion+ private label brand from scratch. Morris 2849:5-8. Kroger recognizes that if it sold Signature Select and O Organics to C&S it would make the Albertsons stores it is acquiring less valuable. McMullen 1226:2-7; SX4838 (McMullen Dep.) 124:19-125:9, 125:23-126:11.

262. C&S's current private label portfolio is smaller and weaker than Kroger or Albertsons' private label programs. C&S owns three private label brands that cover 2,000 SKUs in total. Ailawadi 2057:23-2058:3; SX4820; SX4831 (Gilliand Dep.) 19:21-20:5. These brands generate just $30 million in retail sales and $250 million in wholesale sales a year. Ailawadi 2058:4-7; SX4820; *see also* Ailawadi 2104:16-19. C&S does not own an organic private label brand. SX4831 (Gilliand Dep.) 145:22-24. Best Yet is C&S's national-brand equivalent private label brand. SX4831 (Gilliand Dep.) 48:19-22. Best Yet is C&S's largest private label brand, and it covers just 1,300 SKUs, 99% of which are non-perishable. Ailawadi 2057:23-2058:3; SX4820; SX4831 (Gilliand Dep.) 19:21-20:5, 21:7-14; McGowan 1161:3-5. Best Yet does not have strong brand recognition among consumers, has dated packaging, does not signal quality and overall is not "a product line that customers would want to purchase." SPX2086 p. 5; SPX4414; SX4831 (Gilliand Dep.) 50:8-19, 52:5-12, 56:13-15. Because C&S sells its private label products, including Best Yet, to its independent retail customers, Best Yet "doesn't have a specific store association" or a "brand halo" that generates loyalty. SPX2086 at 5, 7. And C&S receives from its private labels no exclusivity benefit, which drives loyalty. Ailawadi 2058:4-17; Winn 1482:10-21.

263. C&S has very limited in-house private label expertise. C&S has just two employees that develop the company's private brand strategy and only 14 full-time employees on its private label team. SX4831 (Gilliand Dep.) 26:15-27:1. Albertsons' Own Brands team

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has 190 employees and budget of $40M. SX4827 (Brown Dep.) 115:21-25, 136:13-20.

(c) C&S is not acquiring a full private label portfolio and will face significant challenges building one in time

264. After the merger, Kroger will control both Kroger and Albertsons' full multibillion-dollar private label portfolios and it does not need both. SX0158 at 3.

265. C&S is not acquiring the permanent rights to Kroger's private label products. DX1058 at 53. C&S is also not acquiring the permanent rights to Albertsons' Signature Select, O Organics, or Lucerne private label products. McMullen 1225:12-22; *see* Florenz 909:8-14; DX1058 at 53. Instead, C&S is getting ownership rights to Five Albertsons private label brands: Open Nature, Waterfront Bistro, Debi Lilly, Primo Taglio, and ReadyMeals. Florenz 909:8-14; DX1058 at 53. These are "much smaller private label brands," than Signature or O Organics or Lucerne, "and they tend to be more focused, narrowed niche kind of categories." Ailawadi 2059:12-16; *see also* Winn 1479:5-1482:9 (brands pertain to "very specific niches"); SX4827 (Brown Dep.) 40:2-5, 40:10-13, 40:14-17, 41:10-19 (describing these brands).

266. Under the TSA, C&S will receive a license to sell Signature, O Organics and other Albertson private label products only for up to four years. Florenz 911:18-912:1; Ailawadi 2059:17-2060:7. Initially, C&S will be able to acquire these products at cost, but, starting in year three, C&S will pay a markup that will reach 10% above cost by year four. SX3748 at P49304-10 (TSA § 2.9). C&S can also sell Kroger private label products in former Kroger stores for up to four years, with markups starting after two years. Ailawadi 2060:8-2061:21; SX3748 at P49304-10 (TSA § 2.9); Florenz 914:15-20.

267. Because C&S is not acquiring permanent rights to Kroger or Albertsons' national brand equivalent private labels, C&S will face four interrelated challenges.

268. *First,* C&S plans to offer <u>Defendants'</u> private label products in its stores in Washington for 3-4 years, which means C&S will lose out on some of the key benefits of private label products during this period. During this time, C&S will be offering its biggest

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competitor's private label brands, which makes C&S dependent on Kroger for a critical part of its business. And because those private label products will also be sold in Defendants' stores, private label cannot be a differentiator for C&S. SX4831 (Gilliand Dep.) 185:4-15; *see also id.* at 126:7-19. During this time, C&S will not be able to make any changes to the offerings, recipes, or packaging of Defendants' private label products. Florenz 914:10-13.

269. *Second*, the markups that C&S will need to pay in years three and four of the TSA are likely to "substantially eat into any margin advantage that [C&S] would have." Ailawadi 2060:8-16. In those years, C&S will be less able to take advantage of the higher margins that private label products typically offer, *infra* ¶ 255, making C&S less competitive.

270. *Third*, the TSA does not give C&S sufficient time to build its own private label brand to replace the Kroger and Albertsons private label products in the divested stores. This will require adding more than 10,000 SKUs, improving quality and packaging, and adding entire private label product lines, such as for organic products. *E.g.*, Ailawadi 1064:7-10; 2064:23-2065:8. C&S is highly unlikely to be able to replace Albertsons' and Kroger's current private label offerings within four years—i.e., before its access to Signature and O Organics expires. Ailawadi 2061:9-21 (expressing "concerns" about the four year timeline); Ailawadi 2061:14-25 (just getting products on the shelf will be difficult). Much smaller projects can take years. 2063:20-25, 2118:13-24; Ailawadi 2064:1-6; Gilliand Dep. 120:2-14; *see also* Brown Dep. 106:4-5, 118:23-119:10, 129:12-130:1 (Albertsons takes "40 to 50 weeks" to launch a single product). And C&S is expecting to take about two years to refresh their much smaller Best Yet portfolio as well. Private label brands typically either "mature[] over many, many years," Morris 2849:5-8, or are acquired in an acquisition, *id.* 2848:18-20. While C&S plans to hire Susan Morris and other experienced corporate employees, it is very unlikely that such hiring will enable C&S to stand up a complete private label brand portfolio essentially from scratch—something Albertsons has never done—in just four years. Ailawadi 2106:11-15; 2849:5-2050:24.

271. Timing aside, C&S's expanded private label program, like its current offerings, will not be exclusive to the divested stores because C&S's wholesale customers will also sell them. Ailawadi 2065:12-25. This lack of exclusivity significantly diminishes the benefits of private label products. *Id.*; *see also* SX4831 (Gilliand Dep.) 85:23-86:4; Ailawadi 2111:14-25.

272. *Fourth*, C&S will need to change the private label products offered in its stores at least once—twice for QFC stores in Washington—which by itself risks sales losses. Florenz 915:14-917:22; SX0512 (advising C&S that this risks sales loss)[11]; Florenz 918:4-919:9; SX4831 (Gilliand Dep.) 186:5-7, 9-12. Customers develop loyalty to certain private label brands, which drives where they shop. *Supra* ¶ 259. In the Albertsons stores C&S acquires in Washington, C&S will transition from the Signature and O Organics private labels to C&S's own private label within four years, meaning that customers who prefer Signature and O Organics products will have to go to Kroger stores to buy them. In the QFC stores C&S acquires, customers will first be switched from Kroger private label products to Albertsons private label products and then from Albertsons private label products to C&S's private label products. Florenz 916:25-917:9; Florenz 915:14-916:7.

273. C&S's deal model does not include a sales detriment due to changes in private label products. Florenz 919:5-18; Florenz 1018:5-7. And C&S has not analyzed the effect of sales losses on individual stores in Washington due to private label product transition. Winn 1490:2-7. As with the rebannering detriment, there is no evidence that C&S's lenders or investors were aware of this significant execution risk.

4. Pricing, promotions, loyalty, and data analysis

274. Pricing, promotions, and data analytics are "crucial" to a successful grocery retail operation. Ailawadi 2025:16-18; Ailawadi 2025:16-19; Ailawadi 2028:24-2029:4;

[11] At trial, the Court admitted State's Exhibit 512 with the limitation that the Court would not rely upon SX 512 for the truth of the matters contained in the document. That is the case here. The Court makes no finding as to the truth of Bain's advice to C&S that changes to private label products at stores would risk sales losses. As explained in Finding of Fact 273, the Court (partially) relies upon SX 512 in finding that, despite being advised of the possibility of such sales losses, C&S's deal model did not analyze or account for the potential effects of sales losses on individual stores in Washington caused by the private label transitions.

Ailawadi 2025:19-2026:3. Data analytics are essential to a grocery retailer's ability to intelligently and thoughtfully set its prices and promotions. Ailawadi 2026:4-6, 2029:9-13; *see also* SX4832 (Greene Dep.) 94:11-95:6, 95:8-96:6.

275. Kroger and Albertsons each have their own loyalty programs. Florenz 925:11-12. Sophisticated retailers like Kroger and Albertsons depend on the data their loyalty programs generate to develop complex pricing and promotional strategies—analyzing individual customer preferences to personalize promotional offers. SX4825 (Aitken Dep.) 111:4-112:4, 112:10, 112:12-113:4. Building and maintaining such a program takes significant resources. Maharoof 2962:19-2963:14; SX4825 (Aitken Dep.) 367:17-368:9; Cosset 2646:14-20 (84.51 has more than 1,000 full-time employees). Kroger and Albertsons developed these capabilities over decades. Ailawadi 2029:25-2030:6.

276. C&S is not acquiring data analytics, pricing, promotions, or loyalty capabilities in the divestiture. Winn 1548:1-5; Collison 2137:17-2138:3; Galante 2751:14-19; Ailawadi 2033:18-2034:1. Instead, C&S would receive only twelve months of pricing, promotions, and loyalty support *from its competitor* Kroger. C&S's current data analytics, pricing, promotions, and loyalty capabilities are limited and rudimentary by comparison. Ailawadi 2026:12-17, 2027:3-22, Ailawadi 2027:25-2028:7; SX4832 (Greene Dep.) 18:23-24:18; SX2317; McGowan 1159:23-25. As a result, C&S will need to build up these capabilities "from scratch" in twelve months. Ailawadi 2028:19-2029:4. As Professor Ailawadi testified, C&S is unlikely to be able to do so. Ailawadi 2031:21-2032:2; Ailawadi 2029:25-2030:6 (Defendants' programs took decades).

277. If C&S lacks the pricing, promotions, and data analytics capabilities it needs to intelligently set prices, it will be at a major competitive disadvantage to Kroger. Kroger and Albertsons' sophisticated pricing and promotional capabilities enable them to fiercely compete over customers—with small variations in prices driving sales and price perceptions. *See supra* ¶¶ 153-173 (head to head competition on pricing and promotions).

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278. Because C&S would acquire 59 Safeway stores that have historically served as Kroger's HPR in Washington, it is possible that C&S would become Kroger's new HPR in Washington post-merger. Groff 649:3-7. If that were to occur, and if C&S's rudimentary pricing capabilities resulted in it setting prices too high, then Kroger would be freer to raise its own prices. *See supra* ¶¶ 158-59 (describing the HPR rule).

279. C&S's current rudimentary pricing, promotions, and data analytics capabilities mean that C&S will not meaningfully be an independent competitor during the 12-month pricing, promotions, and loyalty TSA. Under the TSA, C&S is entitled to have Kroger propose prices and promotions for C&S stores via a "clean room". Ailawadi 2030:20-2031:2; Florenz 922:17-925:5; SX3748 at P49455-56. While C&S will have the authority to make adjustments to these recommended prices, C&S will not have the capabilities to do so in an informed or strategic manner. Ailawadi 2031:6-17; *see* ¶ 212 (C&S's rudimentary pricing, promotions, and data analytics capabilities). And though Susan Morris testified that a loyalty card system could be set up in months, at her deposition she testified that "there's a lot of pieces and parts to that, and I won't profess to be the expert end to end." SX4840 (Morris Dep.) 285:12-286:6.

280. C&S also will not be able to set up its own loyalty program comparable to the loyalty programs of Kroger and Albertsons within one year. Ailawadi 2034:2-5. As Professor Ailawadi explained, other major retailers like CVS and Target took anywhere between 1.5 to 2 years just to *test* their loyalty programs before launching them across all retail locations. Ailawadi 2034:7-24. While Yael Cosset testified that C&S could stand up a loyalty program in one year, he provided no examples of any loyalty program in any industry that had been set up in such a short amount of time. Cosset 2632:18-2634:6. Moreover, Kroger relies on thousands of employees to perform its critical data analytics and loyalty-program related work. Cosset 2646:14-20.

281. Transitioning loyalty programs will inconvenience consumers and could, on its own, lead to sales losses. Ailawadi 2035:2-2037:3; SX4833 (Keptner Dep.) 149:5-150:2.

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282. If C&S does not have a loyalty program set up before the TSA ends, it will be at a substantial competitive disadvantage to Kroger, which spends significant resources each year on loyalty rewards to entice consumers to use its program and shop at its stores. *See, e.g.*, SX4825 (Aitken Dep.) 367:17-368:9 (Kroger budgets $750M for fuel rewards alone).

283. The terms of the TSA allow Kroger to use its loyalty program advantage to draw customers from C&S. While C&S will acquire the sales and customer data for customers that exclusively shop at the divested stores, Florenz 921:15-20, Kroger will retain the demographic data for customers who cross-shop at divested and retained stores, Winn 1570:8-18; Ailawadi 2036:18-2037:3. Kroger therefore can target those customers with its extremely sophisticated and well-funded promotions capabilities at the same time that C&S's many transitions are likely to cause customers to experience friction and disruption at C&S stores. Winn 1570:8-18; Ailawadi 2036:18-2037:3, 2036:3-11, 2035:23-2036:3.

284. Notwithstanding this, C&S's deal model does not account for *any* sales loss due to the change in loyalty programs. Florenz 926:21-24. C&S also has not analyzed the effect of sales losses in individual stores due to loyalty program transition. Winn 1490:12-15.

285. C&S's ability to offer competitive promotions will also be jeopardized by its inability to negotiate vendor funding on favorable terms. Ailawadi 2049:16-25, 2052:22-2054:4; *see also* SX4819 (Bain's assessment of this risk); Ailawadi 2051:3-2052:4 (agreeing with Bain's assessment). Despite its experience as a wholesaler, C&S is likely to struggle with negotiating vendor funding because it "does not have much experience with retail." Ailawadi 2052:6-16. Kroger and Albertsons' combined size and experience will make vendors even less likely to allocate funds to C&S. Ailawadi 2053:1-12. C&S's weak private label portfolio will also hamstring its negotiations for vendor funds. Ailawadi 2064:11-22. Losing out on vendor funds will either hurt C&S's revenue or profitability or both. Ailawadi 2053:16-2054:4. Without adequate vendor funding, C&S will be unable to offer competitive promotions unless it foots part or all of the bill for the price drop. Ailawadi 2053:16-25.

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5. Information technology

286. IT is critical to grocery retail operations. Florenz 919:21-920:7; Collison 2131:2-17, 2133:14-2134:15. IT errors can cause problems with basic functions like ringing up correct prices or reordering inventory. Collison 2131:2-17, 2136:15-20.

287. C&S will need to transition the divested business onto a new IT system. Florenz 919:21-921:6. In the divestiture, C&S will receive a "clone" of Albertsons' Tech Stack. Florenz 919:21-920:10; 922:7-11. That "clone" will include nearly all of the IT systems that Albertsons currently uses to run its grocery retail operations, Winn 1539:16-1540:1, but will not include any proprietary algorithms or optimizations. Florenz 921:21-922:6. Albertsons and a third-party vendor will build that clone in the first year after close. Florenz 922:7-20; SX3748 at P49310 (TSA § 2.10(b)). C&S will also receive a "clone" of Kroger's human resources related IT systems for use in the divested business. Collison 2137:5-16.

288. Once the clone is ready, C&S will have three months to convert the divested stores from their current Tech Stacks to C&S's new Tech Stack. Winn 1570:23-1571:4; Florenz 920:11-14; SX3748 at P49298 (TSA § 1.1(vv) (providing for a non-extendable "Post-Tech Stack Readiness Conversion Support Period" of three months). While Eric Winn testified that Kroger, not C&S, will handle these store conversions, Winn 1534:7-12, the TSA itself provides only that Kroger will provide C&S "reasonable" support for those conversions, SX3748, P49312 (TSA § 2.10(d)(iv)). And C&S must entirely replace the Tech Stack clone it acquires from Albertsons within four years. Collison 2184:7-10.

289. Converting the 579 stores from their current Tech Stacks to C&S's Tech Stack is likely to take longer than the three months provided by the TSA. The pace at which C&S must convert stores is substantially faster than prior store conversions in the industry—including conversions involving the Albertsons Tech Stack. *See* Collison 2175:21-2176:1, 2193:13-14 (Albertsons converted 900 stores onto the Safeway Tech Stack in four years); SX4840 (Morris Dep.) 178:11-13 (same); Collison 2193:19-22 (Albertsons converted 7 A&P

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stores onto the Albertsons Tech Stack in three months); Collison 2194:15-18 (Haggen converted 146 stores from the Albertsons Tech Stack to the Haggen Tech Stack in six months); Collison 2176:2-2177:7 (C&S plans to convert stores at six-times the speed of prior conversions); Collison 2172:12-2173:1 (describing the complexities of store conversion in general); Collison 9/27 AM 2173:18-2174:10 (describing what would be required to convert Kroger and Albertsons's stores and the differences in that process).

290. C&S has asked Kroger for additional time to complete these conversions, Winn 1570:19-1571:8, which indicates that C&S has already determined that it is likely to need more than the three months allotted in the TSA. There is no evidence in the record that Kroger plans to give C&S that additional time. If C&S cannot complete store conversions within three months, there is a significant risk of disruptions to C&S's store operations. Until a store is converted, C&S cannot directly control the operations of a store's IT system. Collison 2203:4-2204:7, 2135:5-12, 2135:5-12; *see also* Collison 2131:22-2132:3.

291. And while C&S will initially receive TSA support from Kroger, most of that support expires before the end of the three-month period for store conversions—i.e., fifteen months after close. *See* SX3748 at P49351-441 (TSA Schedule 2.1(a) – Services from Albertsons); *id.* P49442-516 (TSA Schedule 2.1(a) – Services from Kroger). While the IT-specific TSA includes a limited-scope, additional three-month extension that would extend it to 18 months post-close, the other TSA provisions to not contain such an extension. *See* SX3748, P49351-441 (TSA Schedule 2.1(a) – Services from Albertsons); *id.* P49442-516 (TSA Schedule 2.1(a) – Services from Kroger).

292. If C&S rushes its store conversions, that creates a risk of errors in the IT systems, which can cause customers to experience problems when checking out, issues with restocking inventory, and other problems that lead to sales losses. Collison 2132:24–2135:4.

293. C&S's deal model does not include any sales detriment due to the potential disruption from IT conversions. SX2249 (Inputs and Assumptions Tab).

6. Personnel

294. Hiring experienced retail employees does not change the fact that C&S faces significant execution risks. Ailawadi 2120:1-6.

295. While Defendants have suggested that C&S hiring Susan Morris substantially reduces these execution risks, Ms. Morris has not—in her nearly 40-year career—overseen a comparable transition to even one of the several enormous transitions that C&S must now undertake. The same would be true of other experienced retail executives; after all, these transitions are unprecedented. Ms. Morris has not overseen a rebannering effort comparable to the rebannering of 286 retail grocery stores in 18 states in just three years. Albertsons' rebannering during her tenure involved a smaller number of stores over a longer timeline. *See supra* ¶ 252. Ms. Morris has not overseen the development of a complete line of private label products—let alone in under four years. Albertsons bought—rather than developed—its most successful private label products. *See supra* ¶ 261. Ms. Morris has not overseen the development of a loyalty program from scratch—let alone in just one year. *See* Morris 2814:3-16 (Albertsons' loyalty program was "born a long time ago"). Ms. Morris has not overseen the development of a full suite of pricing, promotions, and data analytics capabilities from scratch in just one year. Albertsons built these capabilities over decades. Ailawadi 2029:14-2032:2. Ms. Morris has not overseen the conversion of 579 stores to a new IT system in just three months. Albertsons' prior store conversions moved at a far slower pace. Collison 2178:3 – 2180:16. The fact that Ms. Morris, in her lengthy career at one of the nation's largest and most established grocery retailers, has not overseen a transition that is comparable to even one of the multiple risky transitions that C&S must undertake as part of the divestiture demonstrates that the divestiture puts anomalous and unprecedented risks on C&S.

296. Washington consumers bear the risk of failure. Even if C&S cannot operate the stores it acquires—even if C&S went bankrupt—Kroger will not agree to unwind the transaction with Albertsons to restore competition. Moreover, in every market in which C&S

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acquires a store, one of its major competitors will be Kroger. SX4838 (McMullen Dep.) 271:4-7. Kroger will compete hard against C&S on day one after the divestiture. *Id.* at 139:3-14. And Kroger will try to win customers from C&S from day one. *Id.* at 139:17-23. The evidence convincingly shows that C&S, with its limited retail experience and infrastructure, will not compete effectively against the grocery colossus of a merged Kroger and Albertsons.

C. <u>C&S Has Strong Incentives and a Well-Trod Playbook to Exit Retail Markets if it Encounters Difficulties in Running the Divestiture</u>

1. C&S remains open to selling off the divested stores

297. As discussed above, C&S has a lengthy history of buying retail stores to sell them to its wholesale customers to expand C&S's wholesale business. *See* ¶¶ 214-17. Critically, C&S projects it will profit from supplying divested stores as a wholesaler—a revenue stream it would retain even if it sold off the stores to its wholesale customers. SX2249.

298. C&S employees testified at trial that C&S is committed to operating the divested stores and is not considering selling off those stores to its wholesale customers. However, the internal communications of C&S's employees show that they know they cannot mention the possibility of selling off divested stores while the merger review is ongoing. On May 1, 2023, while reviewing the original divestiture package, one of C&S's consultants texted Ms. Florenz, C&S's "quarterback" for the divestiture process, about the possibility of selling off divested stores to wholesale customers. SX2407; Florenz 965:12-966:7, 968:2-969:8. Ms. Florenz replied, "Yes just careful with FTC . . . we want to say we can run them." SX2407. Ms. Florenz testified at trial that this message was an instruction to the consultant to focus on running the stores, but she later admitted that this interpretation is contrary to the plain text of the message. Florenz 965:1-969:8.

299. Notwithstanding Ms. Florenz's admonition to be "careful with FTC," C&S's internal documents show that C&S told its wholesale customers that it is open to selling them divested stores. While Mr. Winn testified at trial that he told C&S customers that C&S planned

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to operate the stores, that is not what C&S's internal documents say. Mr. Winn's talking points for conversations with wholesale customers regarding the divestiture included notes on how to respond to specific customers who had previously asked about the "process and/or ability to buy stores" in the divestiture. Winn 1495:19-22; SX2299. Those talking points did not tell customers that C&S planned to operate those stores. *See id.* Instead, the talking points say that C&S planned to tell its wholesale customers: "If asked if we would sell…at this point that isn't something we can discuss, but we have always viewed you as a potential partner in that regard and we definitely want to support your growth." SX2299; Winn 1494:20-1497:2. In other words, to ensure that the proposed merger would survive regulatory/antitrust scrutiny, C&S publicly insists that it will operate the divested retail stores, while privately signaling that it will be open to eventually selling off those stores to customers of C&S's essential and indispensable wholesale business.

300. C&S's internal documents likewise show that, behind the scenes, C&S is keeping its options open when it comes to closing divested stores. In September 2023, then-COO Eric Winn and then-CEO Bob Palmer revised a draft press release to omit a commitment to running "all" the divested stores. Winn 1491:8-16, 1493:12-15. According to Mr. Winn's notes, Mr. Palmer told Mr. Winn "the trick is that they stay open as they transition, but then what?" Winn 1492:15-17. According to Mr. Winn's notes, the conversation included suggestions to "just say that it would ensure the stores remain open through the divestiture process." Winn 1492:18-1493:11. At trial, Mr. Winn claimed that he could not confirm these statements by Mr. Palmer, even though the statements appear in his contemporaneous notes of the conversation.

301. The Asset Purchase Agreement does not contain any provision that prohibits C&S from selling off or closing stores it acquires in the divestiture. Winn 1572:6-13. C&S has no "contractual obligation" to keep any divested stores at all. Florenz 977:21-24. C&S retains the business option to close or sell stores, because circumstances can change and a prudent

business manager has to be able to react to those circumstances. Florenz 977:17-978:11; McGowan 1177:4-10 (agreeing).

V. DEFENDANTS HAVE NOT DEMONSTRATED ENTRY

302. There is no evidence in the record that any potential entrant intends to enter any specific market in which Kroger and Albertsons currently operate. Nor is there any evidence in the record that any entry or expansion in Washington will involve a number even approaching the number of stores that either Kroger or Albertsons operates today. Grocery retail growth is generally slow, difficult, and capital intensive. SX4688 p.3 (attesting that WinCo grows at a modest pace, develops stores over a five to fifteen year timeframe, and considers whether an existing building could be used and whether a store could be served by their existing distribution network); SX4828 (Cahan Dep.) 128:1-17 (once a neighborhood is identified for a new store, it can take "many years" to find a desirable location).

303. There is no evidence that retailers in the market intend to accelerate their offerings in Washington. Winco "does not expect to accelerate growth plans in response to the merger [of Kroger and Albertsons], even if the merged company were to increase prices." SX4688 ¶ 14. While Walmart plans to open new stores, there is no evidence in the record that it intends to expand in Washington, or that it would enter markets it does not currently compete in, such as Seattle, if Kroger increased their prices. Lieberman 2440:12-16. Similarly, Amazon has no plans to open new Amazon Fresh stores in Washington. DX3046 (Oblisk (Whole Foods Market, Inc.) Dep.) 2865:20-22; 2891:14-2892:8; 2892:24-2893:2. Where Amazon Fresh has opened stores, moreover, nearby Krogers have reported "little to no impact" on their sales. SX4477, SX4644. Kroger's documents thus indicate that it does not consider Amazon Fresh a significant competitive threat, *see* Albi 722:8-14; *see also* SX3131 (Amazon Fresh "never really took much business from us"); Albi 721:5-13.

304. The record does not show a credible threat of entry from other store formats, either. Target has no specific plans to concentrate growth in Washington. DX3052 (Conlin

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(Target) Dep.) 2916:24-2917:3. Dollar Tree is actively *closing* stores. *See* SX4847 (Unkelbach (Dollar Tree) Dep.) 138:3-8 (closing 970 Dollar Tree locations). Dollar General operates no stores in the grocery channel and has no plans to open stores with footprints larger than 20,000 square feet. DX3055 (Snow (Dollar General) Dep.) 100:14-101:17. Fiesta Foods has opened no new stores since 2009 and does not have plans to open new stores. Gaylord (Fiesta Foods) 780:6-10. Trader Joe's similarly testified that it did not expect Trader's would locate a store in an area if supermarkets were to increase their product prices. SX4828 (Cahan (Trader Joe's) Dep.) 137:24-138:3.

305. Amazon Go and Amazon Fresh likewise are not likely to accelerate their activity in Washington. AmazonGo has only about 10 stores in the United States, Oblisk (Whole Foods Market, Inc.) 2865:23-25, and Amazon closed Amazon Go stores in 2023 because "they weren't meeting specific customer needs." Oblisk (Whole Foods) 2890:9-18. Amazon has announced plans to stop developing Amazon Fresh stores, which are not profitable, *id.* at 2891:14-2892:6, and has no immediate plans to open Amazon Fresh Stores in Washington, *id.* at 2892:24-2893:2. There is no specific evidence in the record that Amazon.com intends to expand its grocery-related capabilities in Washington in the near term. *Cf.* Heyworth (Amazon) 3450:4-18 (offering no specific expansion plans or plans in Washington). Defendants' suggestion that Amazon's entry was a competitive threat is speculation: executives conceded that they are unaware of any analysis of entry by Amazon, *see* Street, 407:4-6 ("Q. Albertsons has not done any analysis of Amazon's entry or expansion in the State of Washington, right? A. I don't know."). Nor was any such analysis presented to the Court.

306. Any entry that does occur is likely to arise years after any merger harm has been felt. Supermarket growth is slow and opening new stores is time consuming. WinCo, for example, "grow[s] organically, typically by purchasing parcels of land and developing them over a five-to-fifteen year time frame." SX4688, ¶ 13. Trader Joe's testified that opening a

new store can take "many years." SX4828 (Cahan (Trader Joe's) Dep.) 128:1-17.

VI. DEFENDANTS CANNOT PROVE AN EFFICIENCIES DEFENSE

A. Defendants' Estimate of Cognizable Efficiencies Is $1.1 to $1.5 billion

307. The maximum amount of efficiencies that Defendants purport to have verified is $1.5 billion. Defendants' own efficiencies expert, Mr. Gokhale, asserted that he could only verify between $1.1 and $1.5 billion achieved over a four-year period. Gokhale 3052:16-3053:24, 3055:2-6. While Kroger's internal estimate of efficiencies produced a higher figure, that figure is not the product of any assessment of the verifiability or cognizability of the efficiencies under the Merger Guidelines. Maharoof 2990:6-16, 2991:8-18.

308. $1.6 billion in efficiencies over four years are not extraordinary efficiencies in this industry. Both Kroger and Albertsons each routinely achieve comparable efficiencies as independent companies. Sankaran 1342:6-1343:2 (over $1 billion in efficiencies from 2019 to 2021); Sankaran 1343:3-13 (Albertsons is "well on its way to achieving" $750 million savings target); SX4840 (Morris Dep.) 38:22–39:7; SX4484 (progress update presentation); SX0535 (more than 400 cost savings initiatives above $1 million in value); Aitken 2499:14-2500:7, 2508:10-18. *See also* SX1952 at R1129 (Sankaran assessing "line of sight to an additional $1.5B of cost to take out over the next 2 years."); Sankaran 1346:12-17 (Albertsons could pursue those investments as a standalone company).

309. There is no evidence in the record regarding which of these cost savings and revenue increases, if any, would occur in the State of Washington. Mr. Gokhale did not analyze that question. Gokhale 3125:9–3126:10 ("I did not include any specific analysis specific to Washington . . . .").

B. Evidence Does Not Show Efficiencies Estimates Are Reliable

310. There is not adequate evidence in the record to show that Bain, BCG, and AT Kearny's methods in estimating efficiencies are reliable. Bain, BCG, and AT Kearney analyzed clean room data, not accessible by any employee of Kroger or Albertsons, and

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reached conclusions regarding the cost savings and revenue increases that would be achieved by the merger. Maharoof 2993:6–2994:4 (testifying that Kroger executives do not have access to competitively sensitive Albertsons information, and that that analysis was performed by consultants). But the record does not contain testimony from any employee of BCG, Bain, or AT Kearney. And Mr. Gokhale, who did have restricted clean room access, did not cite to a single contract between Kroger or Albertsons and a supplier, and relied instead on financial information compiled by Bain. Gokhale 3109:10-17.

311. Mr. Gokhale did not independently analyze or calculate Kroger's claimed efficiencies. Mr. Gokhale's analysis consisted principally of understanding the methodology used by Kroger or its consultants, BCG, Bain, and AT Kearney, and determining whether that methodology was reasonable and consistent with the Merger Guidelines. Gokhale 3126:11–3127:22; 3128:21–3129:14 ("So it's not just repeating what Bain did. It's being able to understand what Bain did. I found the methodology reasonable independently . . . .") *See also id.* at 3091:22–3092:7 (accepting the entirety of efficiencies estimated by Kroger's consultants regarding fuel costs to be cognizable despite conceding that the lack of a 10% divestiture adjustment was a "departure" from the treatment of sourcing savings in other categories and that therefore "one might take [the total] and reduce it by 10 percent."); 3081:10–3082:6 (finding all of Bain's estimated Goods for Resale cost savings to be merger specific despite Defendants' efforts to achieve similar savings as independent companies).

C. <u>A Large Portion of Defendants' Claimed Efficiencies Are Speculative</u>

312. A large portion of Defendants' claimed efficiencies are speculative. For example, Kroger's projecting sourcing cost savings, which make up more than 50% of Kroger's claimed efficiencies, Gokhale 3108:2-5, are each based on the same "best-of-both" methodology, Gokhale 3011:24–3012:14. The best-of-both methodology relies on the premises that: (1) there is a genuine gap between the prices Kroger and Albertsons receive after taking account of all economically relevant terms; and (2) that knowledge of that gap alone will allow

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the merged parties to close some or all of that gap. Gokhale 3108:6-11. There is inadequate evidence in the record to support either premise.

313. Defendants have not shown that there is a genuine gap in price. Kroger and Albertsons' contracts with suppliers contain numerous terms that affect the economics of the deal and may explain any price difference. Gokhale 3109:18–3110:4 (contracts may contain different payment terms or quality requirements, or the duration of the contracts may be different). Bain's comparison of prices comes from the point of sales data, tracking what each company is paying, Gokhale 3109:2-9, and was "supported by *some* examination of the contracts," only. Gokhale 3109:2-9 (emphasis added). In validating Bain's analysis, Mr. Gokhale relied only on Bain's summary of the point of sale data, not the underlying contracts. Gokhale 3108:17–3109:17. *See also* Gokhale 3108:24–3109:1, 3110:18-21 (has seen only a handful of contracts). And Kroger executives, including Mr. Maharoof, cannot review Albertsons' contracts with suppliers. Maharoof 2994:5-8.

314. More importantly, Defendants also have not shown that the parties' knowledge of such a gap, if it exists, will enable them to close it. To achieve sourcing cost savings, Kroger will have to negotiate with suppliers for lower prices. Gokhale 3111:14-20. These suppliers, many of which are large companies like Proctor & Gamble, Coca-Cola, Kraft, Nestle, and Tyson's, will push back and want Kroger to pay the higher price. Gokhale 3111:21-3112:14; 3114:7-3115:4. It is possible, for example, the suppliers will say their costs have gone up and so the lower price is no longer possible. Gokhale 3112:15 – 3113:10.

D. <u>A Large Portion of Defendants' Claimed Efficiencies Are Not Incremental</u>

315. Mr. Gokhale's analysis does not adequately distinguish between efficiencies that are and are not incremental to what Defendants could achieve independently.

316. Kroger's sourcing cost savings are not incremental. Defendants have achieved sourcing savings independently. Maharoof 2974:11-14, 3081:10-15. Mr. Gokhale's analysis does not show how the merged company could negotiate its expected ordinary reductions in

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sourcing costs on top of best-of-both pricing. Additionally, Most Favored Nations terms in vendor contracts could close price gaps without the need for a merger. Gokhale 3138:25–3140:1.

317. Kroger's projected Own More Transportation cost savings are not incremental. Kroger and Albertsons had a very similar portion of owned transportation just a few years ago, Gokhale 3088:10-12, and Albertsons can increase its share of owned transportation to 50% as an independent company, Maharoof 2996:2-5.

318. Kroger's Alternative Profits revenue increases are also not fully incremental. Albertsons currently operates a retail media business, Sankaran 1346:18-1348:2, 1349:2-4, which it believes will be "a contributor to our growth and a profit driver," SX0218 at P3896; SX1952 at P31368; *see also* Sankaran 1349:14-1350:8. Albertsons would likely be able to achieve some, if not all, of the projected growth independently.

E. Defendants Have Not Shown the Merger Will Create Efficiencies that Will Result in a New, Lower, Profit-Maximizing Price.

1. Unrebutted econometric analysis shows an increase in prices.

319. The merger will create an economic incentive to raise prices. Dr. Dua's Compensating Marginal Cost Reduction ("CMCR") analysis concluded that Albertsons and Kroger must reduce marginal costs by 16% to 49% to offset the incentive to increase prices. Dua 1635:10–1637:4. Even taking all of Mr. Gokhale's efficiencies—many of which are not marginal cost reductions—the merger efficiencies are just a 1% cost reduction. Dua 1637:5-17. And even accounting for the divestiture, the efficiencies claimed by Mr. Gokhale would be insufficient to counteract the merger's upward pricing pressure. Dua 1637:18-20. Neither Dr. Israel nor Mr. Gokhale calculated a CMCR, or otherwise showed that the merged company's profit maximizing price would be lower after the merger. Gokhale 3138:4-10.

2. Defendants do not show incentive to pass-through efficiencies.

320. Defendants have not calculated the amount of efficiencies that they will have an

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economic incentive to pass through to consumers. Kroger will not have an economic incentive to pass-through its efficiencies that are not marginal cost reductions (i.e., fixed cost savings and revenue increases). Dua Rebuttal 3512:13-3513:6 ("when you're looking at efficiencies, you're looking at merger-specific marginal cost savings, not fixed cost savings," because "the underlying economics shows that . . . changes in marginal cost are what inform pricing."). *See also* Gokhale 3141:17-25 (in econometric modeling "you're trying to understand whether and how much marginal cost is reduced."); DX2559, p.7 (in a presentation to the FTC Kroger touted "~$1 billion in annual cost synergies," without mention of increased revenue). Defendants' estimated efficiencies contain fixed cost savings and revenue increases. *See* Maharoof 2967:7-9 (administrative labor is fixed); Gokhale 3091:19-21 (same); Cosset 2645:21-2646:13 (alternative profits are revenue). Defendants do not calculate an estimated reduction in marginal costs. Nor do they calculate the portion of marginal cost efficiencies they would be incentivized to pass through to consumers. Gokhale 3137:6-3138:2.; *see also* Gokhale 3142:4-8 ("Q. Now, you did not come up with the $1 billion amount, correct? A. That's what Kroger has announced. Q. Right. Kroger came up with that number, right? A. Yes.").

3. Defendants offer no economic analysis of how much its alternative profits business will lower the profit-maximizing price.

321. Albertsons sets its prices at its profit maximizing level today. There is no evidence in the record that Albertsons has failed to set prices at a profit-maximizing level.

322. Defendants have not shown how much, if at all, Kroger's alternative profits business lowers that profit maximizing price. There is no economic analysis in the record quantifying how much, if at all, Kroger's alternative profits business would lower the profit-maximizing price from Albertsons' current levels. *See* Gokhale 3138:4-10 (no economic analysis). And Kroger has told investors that it uses its "flywheel" model to drive shareholder

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return, not to lower prices. SX0184, p. 4[12]; *see also* Gokhale 3146:10-3150:9 (did not trace Kroger's use of alternative profits).

4. Kroger's price investment plan is an unenforceable promise.

323. Kroger's "price investment" is merely an unenforceable promise. It is not evidence of the amount of efficiencies Kroger will be incentivized to pass through to consumers.

324. Kroger's "price investment" shows no *consistent* pass-through rate of efficiencies. DX1727, p. 6 ($500M price investment implying a pass-through rate of 28%, followed by $1 billion price investment implying an incremental pass-through rate of 50%).

325. The total amount of Kroger's commitments – lower prices, higher wages, investments in stores – is $3.3 billion per year, more than the total efficiencies Mr. Gokhale finds to be cognizable, calling into question whether that sum total really consists of the passed-through efficiencies. Aitken 2519:16-25; Gokhale 3143:8-19, 3144:14-24.

326. There is not reliable evidence in the record that Kroger passed through efficiencies during prior mergers. Evidence in the record does not establish whether Kroger actually achieved efficiencies in those prior mergers. And there is evidence in the record that whatever price investments were made were not the pass-through of efficiencies. *See* Aitken 2558:9-25 (testifying that Kroger made price investments though it did not achieve efficiencies). The evidence also calls into question the amount of price investments that were actually made. *Compare* McMullen 1226:17–1227:3, SX0913 (testifying to $110 million investment at Roundy's), *with* Groff 599:25–600:8; SX2656 (Kroger records show an investment of $12 million). *See also* SX4845 (Springer Dep.) 73:5-23 (Harris Teeter price investment was half of what was modeled); SX2427, P39989 (Harris Teeter performance is

[12] "This flywheel creates an incredible value for shareholders. It gives us confidence and to consistently grow earnings of 3% to 5% per year and increase operating cash flow that enables us to fund capital projects, to grow the business, increase the dividend over time and return excess cash to our shareholders through share repurchases, which we've done a lot of, as you know." SX184, p. 4. In this March 4, 2022 quote by Kroger CEO Rodney McMullen during an investor call, the Court finds nothing there about using the Flywheel to lower prices for consumers.

"counter to the expectations" of "significant price investment"); SX4845 (Springer Dep.) 29:17–30:70 (testifying that selling gross margins could be explained by factors other than a price reduction such as increased transportation costs to distribution centers, costs of manufacturing own brands, energy costs at a factory, or cost of goods sold).

327. There is also significant evidence in the record that Kroger's price investment is not a promise lower prices *relative to if the merger did not occur*. *See* Aitken 2523:11-22 (plan calls for lowering prices on less than 700 SKUs); DX2237, p.7 (only the "initial 3 investment waves have been defined."); DX2237, p. 9 ($17.6 million in the Seattle Division in first three waves); SX4846 (Stewart Dep.) 64:21-65:8 (Kroger raised prices on some SKUs to fund price investment in others); SX4838 (McMullen Dep.) 252:6-18. Kroger has not yet decided what strategy to use to price the remaining 99% of SKUs. McMullen 1217:7-12; 1217:23–1218:6 (Kroger will look at what connects with customer). And of the three banners Kroger has acquired in the last decade—Harris Teeter, Pick n' Save, and Mariano's—Kroger has not moved two to its pricing model. McMullen 1217:13-22 (Kroger did not apply its pricing model to Harris Teeter); Aitken 2555:11-15 (same, regarding Mariano's); SX4645, p. 1 ("not necessary to 'Krogerize' all merger partners . . . allowing the companies to maintain autonomy/identity . . . has proved to be beneficial.").

5. Albertsons & Kroger are not failing firms and do not constitute a failing market.

328. Kroger is in excellent financial condition now, as it was at the time it began pursuing a merger with Albertsons, in March 2022. McMullen 1204:3-21. *See also* SX0184, pp. 3-4, 15, 20, 28; McMullen 1204:22–1205:15. Kroger has forecasted growth to investors even if the merger is blocked. SX4838 (McMullen Dep.) 135:24–137:1.

329. Albertsons is in excellent financial condition today. *See* Sankaran 1327:4-5. Albertsons was also in excellent financial condition in November 2022, around the time the merger was announced. *See* Sankaran 1327:6-8, 1328:9-1330:20, 1330:18-20. In Washington,

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Albertsons' stores are thriving. *See* Street 406:4-8.

330. Albertsons' performance was strong enough that the company announced a $4 billion special dividend in 2022. That November, its CFO Sharon McCollam submitted a sworn declaration defending the dividend, which emphasized: "we are confident in the financial future of the company *and its continued ability to compete in its ferociously competitive industry*. . . ." (emphasis added). SX4447, p. 4; *see also* Sankaran 1336:16-23 (agreeing). Albertsons represented that "Albertsons does not expect to be a 'failing firm' and will not make any such argument during the merger review process." SX4447, p. 17.

331. The merger is not necessary to enable Kroger and Albertsons to compete with Walmart and non-traditional retailers. Non-traditional retailers are not in the market. *Supra* ¶¶ 46-86. And in any event, they are not new. Amazon "got in the grocery business in 2007 or '8," and "made the decision to . . . buy Whole Foods in 2017." Sankaran 1377:20-1378:6. Costco has generated a significant share of its revenues from groceries for <u>decades</u>. *See* DX3042 p.2 (food constituted 31% of Costco sales in 1994). During the same period, Defendants' businesses have thrived. *E.g.*, McMullen 1207:3-7 (Kroger's stock price has increased by approximately 2,000 percent in the last 30 years); McMullen 1205:20-24; 1206:17-1207:2; 1205:25-1206:7.

332. At trial, Defendants' counsel suggested that Kroger and Albertsons need to merge in order to compete effectively with Costco's scale, *cf.* 2322:7-14, but Kroger's grocery revenues are larger than Costco's. *Compare* DX3041, p. 14 (Costco's 2023 10-K, reporting $96.175 billion in Food & Sundries sales revenue, and $31.977 billion in Fresh Foods revenue for 2023, for a total grocery revenue of over $128 billion, worldwide), with DX1996, p. 27 (Kroger's 2023 10-K, reporting over $150 billion in sales in 2023).

<u>CONCLUSIONS OF LAW</u>

VII. <u>THE LEGAL STANDARD AND BURDEN SHIFTING FRAMEWORK</u>

333. Washington's 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 RCW 19.86.60, courts are "guided by" federal court decisions interpreting analogous federal statutes. RCW 19.86.920.

A. **The *Baker-Hughes* Burden Shifting Framework**

334. RCW 19.86.060, like Section 7 of the federal Clayton Act on which it was modeled, bars any merger that "may" substantially lessen competition. RCW 19.86.060; 15 U.S.C. § 18 (Clayton Act). The use of the word "may" means the focus is "necessarily . . . 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) (citation omitted). 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 (citation omitted).

335. Courts use a "burden-shifting framework" to assess the legality of proposed mergers. *St. Alphonsus*, 778 F.3d at 783 (citation omitted).

336. 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," (i.e., the "prima facie case"). *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, it has "establishe[d] a 'presumption' that the transaction will substantially lessen competition." *Id.*

337. 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). Court assesses entry, efficiencies, and divestiture arguments at this stage. *See, e.g., United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017). "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.

338. 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.

VIII. THE MERGER IS PRESUMPTIVELY ANTICOMPETITIVE

339. The State has met its prima facie burden of 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

340. This inquiry "starts with defining the relevant market," which includes both a "relevant product market" and a "relevant geographic market." *FTC v. Sysco*, 113 F. Supp. 3d 1, 24 (D.D.C. (2015). *See also* RCW 19.86.060 (the State must identify a "line of commerce" in which the merger "may substantially lessen competition or tend to create a monopoly.")

341. "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). Within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* 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 (quoting *FTC v. Arch Coal*, 329 F.Supp.2d 109, 120 (D.D.C.2004)).

342. "[T]he 'product' that comprises the market need not be a discrete good for sale." *Sysco*, 113 F. Supp. 3d at 26. "Thus, what is relevant for consideration here is not any particular [] item sold . . . by Defendants, but the full panoply of products and services offered by them that customers recognize as" supermarkets. *Sysco*, 113 F. Supp. 3d at 26.

343. "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. Courts have determined relevant antitrust markets using only the *Brown Shoe* factors, or a combination of the *Brown*

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Shoe factors and economic evidence. *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*).

344. Defendants' ordinary course documents offer highly relevant evidence when defining a market. *United States v. H & R Block, Inc.,* 833 F. Supp. 2d 36, 52 (D.D.C. 2011). Such documents can be more persuasive than contrary trial testimony. *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 385 (S.D.N.Y. 2024). Here, ordinary course documents and trial testimony show that supermarkets are the relevant product market.

345. Under *Brown Shoe*, courts define the relevant market by assessing: "industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325.

346. Here, both types of evidence confirm that supermarkets (including supercenters like Walmart that include supermarkets) are the relevant product market.

1. The *Brown Shoe* factors indicate that supermarkets are a relevant product market.

347. Supermarkets, including Kroger and Albertsons' stores in Washington, have peculiar characteristics and uses. *Brown Shoe*, 370 U.S. at 325. Supermarkets uniquely provide consumers a single store in which to buy a wide selection of grocery and other household items in the most common brands and sizes. *See* FOF ¶ 11. Supermarkets' "unique combination of size, selection, depth, and breadth of inventory" distinguishes them from other grocery stores, even if some other retailers offer overlapping products and services. *Sysco*, 113 F. Supp. 3d at 31; *see also infra,* COL ¶¶ 351-60.

348. Supermarkets have distinctive facilities and offer a distinct shopping experience. FOF ¶¶ 11-14. No one entering a supermarket would mistake it for a dollar store or a club store like Costco. *See Sysco*, 113 F. Supp. 3d at 28 (distinctive facilities are relevant

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under *Brown Shoe*); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1079 (D.D.C. 1997) ("No one entering a Wal-Mart would mistake it for an office superstore . . . You certainly know an office superstore when you see one.").

349. Supermarkets' narrow focus on the prices and promotions of only other supermarkets and supercenters (*see supra* ¶¶ 153-173) also demonstrates that they are a distinct product market. *See Sysco*, 113 F Supp. 3d at 30; *Brown Shoe*, 370 U.S. at 325 ("distinct prices" and "sensitivity to price changes" in the market are indicate a relevant market).

350. Industry recognition is strong evidence of a distinct market because "economic actors usually have accurate perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986); *Sysco*, 113 F. Supp. 3d at 65 (discussing industry participants' testimony). The evidence at trial demonstrated that industry participants recognize supermarkets as a submarket (or "channel") within grocery retail. *See* FOF ¶¶ 33-37. This shows a distinct market. *Sysco, 113 F. Supp. 3d at 40-42.*

2. Economic analyses support a supermarket product market

351. Economic analyses based on real-world evidence performed by Defendants in the ordinary course of their business and by the State's expert Dr. Dua show much higher rates of diversion between supermarkets than between supermarkets and other store formats. FOF ¶¶ 39-45 (discussing Albertsons' entry and exit analyses and Dr. Dua's diversion analyses). Because a higher diversion ratio indicates closer competition, *United States v. Bertelsmann SE & Co. KGaA,*, 646 F. Supp. 3d 1, 39 (D.D.C. 2022) (citing 2010 Merger Guidelines § 6.1), these studies support a supermarket product market.

3. Other grocery retailers are not in the market

352. Antitrust law focuses on the merging parties' closest competitors. *See Staples*, 970 F. Supp. at 1074-75; *FTC v. Whole Foods*, 548 F.3d 1028, 1039-41 (D.C. Cir. 2008) (Brown, J.); *Sysco*, 113 F. Supp. 3d at 24-25. The fact that Defendants "compete" with a retailer *in some sense* does not necessarily mean that that retailer is in the relevant antitrust

market. *See, e.g.*, *Staples*, 97 F. Supp. at 1075, 1079 (office supply superstores are a discrete antitrust market, despite other retailers like club stores, mass merchandisers, and mail-order retailers that also sold office supplies); *see also Whole Foods*, 548 F.3d at 1039-41 (Brown, J.); *H&R Block*, 833 F. Supp. 2d at 54-60.

353. The fact that a retailer may draw some customers away from another also does not indicate that the retailers are in the same relevant market. *See H&R Block*, 833 F. Supp. 2d at 55; *Whole Foods*, 548 F.3d at 1039-41 (Brown, J.); *accord id.* at 1042-43 (Tatel, J., concurring); *Sysco*, 113 F. Supp. 3d at 26.

354. Other retail formats—including club, natural and specialty stores, mass merchandisers, dollar stores, limited assortment, and online—are outside the market because they do not offer customers a wide array of the most common groceries in the most common sizes, as supermarkets do. *See Whole Foods*, 548 F.3d at 1038-39 (Brown, J.) (referring to the "whole package" a store format provides).

355. Evidence at trial showing industry recognition that other formats are distinct subcategories within grocery retail, FOF ¶¶ 46-54 (club), FOF ¶¶ 68-72 (dollar stores), FOF ¶¶ 73-76 (mass merchandisers), FOF ¶¶ 55-67 (natural and specialty stores), FOF ¶¶ 79-80 (value and limited selection), FOF ¶¶ 82-86 (online), supports the conclusion that each of these formats are outside the market. *See Rothery Storage*, 792 F.2d at 218 n.4; *Sysco*, 113 F. Supp. 3d at 65 (discussing industry participants' testimony).

356. Evidence at trial showing that other formats do not check, set, or adjust prices and promotions primarily to other supermarkets, FOF ¶ 53 (club), FOF ¶ 72 (dollar stores), FOF ¶ 76 (mass merchandisers), FOF ¶¶ 56-57 (natural and specialty stores), FOF ¶ 79-80 (value and limited selection), FOF ¶ 86 (online), likewise indicates that each of those formats are not in the market. *See H & R Block*, 833 F. Supp. 2d at 55 (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).

357. Kroger's practice of labelling store zones "no competition zones," even where they include other formats—specifically natural, organic, and gourmet stores, mass retailers like Target, and dollar stores, FOF ¶ 75, persuasively indicates that those formats are not in the market. *Staples*, 970 F. Supp. at 1079 (identifying a "non-competitive" zone in which certain store formats operate is highly persuasive evidence of a product market).

358. Club stores' different overall shopping experience, FOF ¶ 51, supports the conclusion that they are outside the market. *See Staples*, 970 F. Supp. at 1079. Club stores' different business model and pricing structure supports their exclusion from the market. *See H & R Block*, 833 F.Supp.2d at 55 (significant price disparities probative to market definition).

359. Natural, organic, and gourmet stores' focus on natural and organic products, and the fact that they ban hundreds of ingredients including some of the most recognizable national brand products, is a "peculiar characteristic" that distinguishes them from supermarkets. *Whole Foods*, 548 F.3d at 1045 (Tatel, J. concurring).

360. Economic analysis showing low diversion from supermarkets similarly indicates that other format stores are not considered by customers to be reasonable substitutes and thus fall outside the market.

361. In any event, sensitivities (or "variations" as Dr. Israel called them in *Sysco*) demonstrate that Dr. Dua's analysis is robust and confirm the soundness of his overall conclusion that the merger would produce highly concentrated markets—even *if* other format stores were included. *See 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 competition in many areas"); *see* FOF ¶¶ 142-46.

4. 57 city areas are the relevant geographic markets

362. The evidence at trial established that the relevant geographic market is the 57

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city areas in the State of Washington.

363. The relevant geographic market is the "area of effective competition where buyers can turn for alternate sources of supply." *St. Alphonsus*, 778 F.3d at 784. (citation omitted). In the grocery context, this is the area where grocers meaningfully compete with one another for shoppers' business. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("[A] market is the group of sellers" with "the 'actual or potential ability to deprive each other of significant levels of business.'" (citation omitted)).

364. City areas are the relevant geographic market for supermarkets. Economic analysis and the Defendants' own documents emphasize that grocery shopping is highly localized. *See* FOF ¶¶ 92-93. 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. *See* 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. This approach to identifying where the "vast bulk" of defendants' business draws from is consistent with the law. *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963) (relevant market was the "four-county area in which [the Bank's] offices are located," based on the fact that the "vast bulk" of its business came from that area."); *Sysco*, 113 F. Supp. 3d at 50 (adopting Dr. Israel's preferred method of drawing a circle around defendants' competing distribution centers that reflected 75% of the centers' local sales and then defining the overlap as relevant geographic markets.)

365. Defendants here do not propose an alternative geographic market and instead rely on criticisms of the State's proposed market.

366. Defendants' critiques of Dr. Dua's geographic markets demand a level of precision not required by the law. Defendants' primary objections are that the markets omit stores just beyond the perimeter of his city areas and do not account for the shopping patterns

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of consumers who might live near the perimeter. But the U.S. Supreme Court in *Philadelphia National Bank* specifically rejected a nearly-identical argument based on consumer behavior at the perimeter of a geographic market. 374 U.S. 359-60 & n.37. The Court recognized that competitors might be located just beyond the market's edge and that consumers might be located just within it, but made clear that neither undermined the market. *Id.,* n.37 (acknowledging the inherent "artificiality" and "fuzziness" in defining *any* geographic market). There is nothing unacceptably "arbitrary" about excluding outliers, *Sysco*, 113 F. Supp. 3d at 50, or about focusing on where the "vast bulk" of business comes from when defining relevant markets, *Phila. Nat'l Bank*, 374 U.S. at 359-60.

367. Defendants, moreover, have offered no evidence rebutting Dr. Dua's testimony that he performed a sensitivities analysis to assess whether the boundary definitions of the geographic markets affected market concentration results, and confirmed they did not. 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

B. <u>Supermarkets in City Areas Satisfy the HMT</u>

368. The State's proposed markets satisfy the Hypothetical Monopolist Test ("HMT"), which confirms that supermarkets in the State's city areas are relevant product and geographic markets. *See Aetna*, 240 F. Supp. 3d at 20-21.

369. The HMT is routinely applied by courts to define a relevant market. *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; 2023 Merger Guidelines § 4.3. The test asks whether a hypothetical monopolist of all products in the proposed market could *profitably* impose a "small but significant nontransitory increase in price" ("SSNIP"). *St. Alphonsus*, 778 F.3d at 784. If it could not—because consumers can respond to the SSNIP by shopping for substitute products from outside the proposed product or geographic market—then "the proposed market definition is too narrow." *Id.*; *see also Sysco*, 113 F. Supp. 3d at 33. A market that passes the

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hypothetical monopolist test constitutes a valid antitrust market. *Aetna*, 240 F. Supp. 3d at 20-21.

370. Dr. Dua performed two different, generally accepted versions of the HMT—both of which validated all 57 of his proposed markets, *see* FOF ¶¶ 98-101, and thus confirmed that they are relevant markets for antitrust purposes.

371. Kroger's creation of "no-comp" zones further validates Dr. Dua's analysis and acts, effectively, as a real-life version of the hypothetical monopolist test. In two such zones, in Eagle, Colorado and Glenwood Springs, Colorado, Kroger was able to profitably raise prices even though there were stores of other formats within a 3-5 mile radius. *See* FOF ¶ 103, *see* FOF ¶ 104. Those results affirm that a hypothetical supermarket monopolist could profitably raise prices according to the State's product and geographical markets.

372. Dr. Israel's criticisms of Dr. Dua's hypothetical monopolist test are misguided or beside the point, and thus do not undermine the state's prima facie case.

373. Dr. Israel's criticism that Dr. Dua's use of a 5% SSNIP fails, for three reasons. *First*, Dr. Dua also ran Dr. Israel's preferred "price maximizing" version of the HMT with a 5% SSNIP (which, as Dr. Israel explained, is equivalent to the 10% break-even level), and found that all 57 markets passed the HMT under either version. *Second*, both versions of the test are approved 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). *Third*, neither the Guidelines, nor economic logic demand a specific SSNIP level, *see* 2023 Guidelines § 4.3.C and n. 83, 2010 Guidelines § 4.1.2 (noting SSNIPs lower than 5% may be appropriate depending on the industry); *accord FTC v. Rag-Stiftung*, 436 F.Supp.3d 278, 293 n. 2 (D.D.C. 2020) (noting SSNIP levels lower than 5% may be appropriate depending on the industry). SSNIPs of 5% are common, *see, e.g., Staples*, 970 F. Supp. 3d at 1076, n. 8, and lower levels have been used in economic testimony relied on in prior grocery retail cases, *see* Dua 1603:6-24 (referring to analysis in *Whole Foods*).

374. Dr. Israel's criticism regarding Dr. Dua's use of gross margins also does not undermine the results of Dr. Dua's hypothetical monopolist analysis.

1. The market should not be drawn by Dr. Israel's modified EGK model on a store-by-store basis

375. Dr. Israel's approach to market definition is inconsistent with antitrust caselaw.

376. 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. Courts have rejected similar proposals that would draw a market based solely on diversion ratios. *See Aetna*, 240 F. Supp. 3d at 39 (rejecting an approach to market definition that would "calculate individual diversion ratios for all the products potentially in the market, rank them from highest to lowest, and, at some point, draw a line between those products that fall within the market and those products that fall outside.").

377. Dr. Israel's method also ignores decades of cases, including in grocery retail, in which courts identify the relevant product market before turning to the geographic market. *See, 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); *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1087 (N.D. Cal. 2023) (video games); *H & R Block*, 833 F. Supp. 2d at 58-60 (tax preparation); *Aetna*, 240 F. Supp. 3d at 45 (health insurance plans).

378. Viewed in light of the evidence as a whole, Dr. Dua's market definition is more credible than Dr. Israel's. Courts faced with conflicting economic expert testimony rely on ordinary course documents to determine which economic account more persuasively describes the relevant market. *See, e.g., U.S. v. Anthem, Inc.*, 236 F. Supp. 3d 171, 219-20 (D.D.C. 2017) (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); *Sysco*, 113 F. Supp. 3d at 37 (crediting expert testimony that was "more consistent with the business realities of the … market," when "evaluated against the record as a

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whole"). Dr. Dua's analysis is more plausible than Dr. Israel's in light of the fact evidence clearly indicating that supermarkets are the relevant product market and that competition is local.

2. The merger is presumptively anticompetitive

379. The State has proven its prima facie case showing that, by any plausible measure, the proposed merger will so increase market concentration in Washington's markets that the merger is presumptively anticompetitive.

380. The Supreme Court has held that a market share of more than "30% presents" an unacceptable threat of anticompetitive effects. *Phila. Nat'l Bank*, 374 U.S. at 364. The State demonstrated that the merger is anticompetitive under that standard. *See* FOF ¶¶ 133-34.

381. Dr. Dua's economic analysis of the relevant product and geographic markets also shows that the proposed acquisition will increase market concentration to a presumptively unlawful level under the standards in the Merger Guidelines. *St. Alphonsus*, 778 F.3d at 785.

382. Dr. Dua used the Herfindahl-Hirschman Index ("HHI") set forth in the Guidelines. *See Anthem*, 855 F.3d at 349. That method sums the squares of each market participant's market share. *Id.* Under the 2023 Guidelines, a market is highly concentrated if it has an HHI above 1,800 and the merger increases HHI by more than 100 points. 2023 Guidelines § 2.1. The 2010 Guidelines set a slightly higher threshold of 2,500 with an increase of 200 points. DOJ & FTC, Horizontal Guidelines (2010) ("2010 Merger Guidelines") § 5.3.

383. Dr. Dua's analysis shows that the proposed merger is presumptively anticompetitive in all 57 markets under the standards of both Guidelines (2010 and 2023). It will increase the HHI in each market by at least 500 points, and about 2,800 on average. *See* FOF ¶ 137. Post-merger HHIs will range from about 3,000 to 10,000, and average at 6,700.

384. Dr. Dua's analysis showed that the proposed merger is presumptively anticompetitive *even assuming* that C&S retains 100% of the divested stores' sales. In that case, the merger would still produce 21 anticompetitive markets in Washington under the 2023

Merger Guidelines and 19 anticompetitive markets under the 2010 Merger Guidelines. The proposed acquisition will thus increase market concentration to a presumptively unlawful level in multiple relevant markets—even assuming a perfectly successful divestiture. *St. Alphonsus*, 778 F.3d at 785.

385. Because the state has demonstrated that supermarkets in 57 city areas are the relevant market, and has proven presumptively unlawful market concentration in those markets, it has "establishe[d] a 'presumption' that the [merger] will substantially lessen competition." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990).

3. Defendants challenge to the state's prima facie case failed

386. Defendants' challenge to the State's prima facie case failed to rebut the state's substantial evidence, based upon Defendants' internal documents, third party and party trial testimony, and confirming economic analysis.

387. At trial, Defendants did not offer any alternative market definition. They instead attacked unpersuasively the State's market definition in several respects. They argued that other store formats, like club stores, should be included in the market – that a Costco warehouse, a dollar store, or a Whole Foods market, for example, are substitutes for a neighborhood QFC or Safeway supermarket. They also argued that Dr. Dua's geographic markets were arbitrary. And they argued that the State's proposed markets did not satisfy the hypothetical monopolist test. These attacks are not supported by the evidence.

IX. THE MERGER IS LIKELY TO CAUSE ANTICOMPETITIVE EFFECTS

388. Because the merger is presumptively anticompetitive (under any applicable test), the state does not need to show actual anticompetitive effects. *See Phila. Nat'l Bank*, 374 U.S. at 363. Nonetheless, the state has demonstrated that merger is likely to cause anticompetitive effects in Washington, in the form of both higher prices or lower quality.

389. The merger will likely cause unilateral anticompetitive effects because it will eliminate extensive head-to-head competition between Kroger and Albertsons. *Anthem*, 236 F.

Supp. 3d at 216 ("Relevant evidence of a merger's potential unilateral effects include[s] . . . the history of head-to-head competition between the two merging parties."); *Staples*, 190 F. Supp. 3d at 131 (acquisitions "that eliminate head-to-head competition between close competitors often result in a lessening of competition."). Ordinary course documents and testimony in this case demonstrate fierce head-to-head competition between the parties regarding price, quality, and service. FOF ¶¶ 147-178. This is consistent with the diversion analysis performed by Dr. Dua showing a high degree of substitution between the parties. FOF ¶ 185.

390. Courts recognize that eliminating such head-to-head competition can alone cause a substantial lessening in competition. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 81 (D.D.C. 2011) ("The elimination of competition between two firms that results from their merger *may alone* constitute a substantial lessening of competition."); *see also Bertelsmann SE & Co.*, 646 F. Supp. 3d at 41 (holding that a merger with far lower diversion rates cause an "inarguable loss of competition").

391. The merger also creates a risk of coordinated anticompetitive effects, because it is likely to result in markets across the state with few competitors. FOF ¶ 201. *Anthem*, 236 F. Supp. 3d at 215-16 (coordinated effects 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 (citation omitted)).

392. Defendants have failed to rebut these likely anticompetitive effects.

393. Kroger's proposed price investment plan at to-be-acquired Albertsons stores also is not the type of "guarantee" that can "rebut a likelihood of anticompetitive effects," *H & R Block*, 833 F. Supp. 2d at 82, and the Court gives it no weight. *Bertelsmann SE & Co.*, 646 F. Supp. 3d at 50. Defendants have not shown that the promised price investment is the result of incentives created by merger efficiencies. FOF ¶¶ 320-25. Rather, it is an unenforceable promise to refrain from anticompetitive harm, FOF ¶ 323, which is entitled to no weight.

394. Kroger's competition with Walmart also does not rebut the State's showing of

anticompetitive effects. Courts routinely find that mergers are anticompetitive even when other, stronger competitors remain in the market. *See, e.g.*, *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017) (enjoining merger between second and third largest medical health insurance providers); *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001) (enjoining merger between second and third largest baby food producers); *United States v. H&R Block*, 833 F. Supp. 2d 36 (D.D.C. 2011) (enjoining merger between second and third most popular tax prep software providers); *Aetna,* 240 F. Supp. 3d at 43 (merger eliminating head to head competition can have anticompetitive effects "even where the merging parties are not the only, or the two largest, competitors in the market").

395. Defendants also have not offered evidence to rebut the State's showing of coordinated effects and thus have not met their burden, given the State's prima facie case, "to produce evidence of 'structural market barriers to collusion' specific to this industry that would defeat the 'ordinary presumption of collusion' that attaches to a merger in a highly concentrated market." *H & R Block*, 833 F.Supp.2d at 77 (quoting *Heinz*, 246 F.3d at 725).

X. DIVESTITURE IS UNLIKELY TO RESTORE LOST COMPETITION

396. To rebut the State's prima facie case, Defendants bear the burden to produce evidence that the proposed divestiture is likely to "restore competition" and "replac[e] the competitive intensity lost as a result of the merger." *Sysco*, 113 F. Supp. 3d at 72*; accord Aetna*, 240 F. Supp. 3d at 60. The State bears the ultimate burden of persuasion. *Id.*

397. Courts carefully scrutinize the divestiture buyer's likelihood of success in "replac[ing] competition lost." *See, e.g., Aetna*, 240 F. Supp. 3d at 60, 64-74; *Sysco*, 113 F. Supp. 3d at 73. As both *Aetna* and *Sysco* show, courts do not simply defer to the buyer's business decision to buy the divestiture assets. Instead, courts carefully scrutinize the record in its entirety to assess whether the divestiture will restore lost competition. This includes, but is not limited to, interrogating the buyer's experience and capabilities, the adequacy of the assets divested, "the riskiness of the transaction," and the buyer's incentives to competitively run the

divested assets. *Aetna*, 240 F. Supp. 3d at 70-72; *Sysco*, 113 F. Supp. 3d at 73-78.

398. Defendants must also show that a substantial measure of the prior competition will be restored in a timely manner. *See Sysco*, 113 F. Supp. 3d at 73-74 (rejecting divestiture projected to be uncompetitive for five years).

399. The evidence shows that the divestiture is not likely to restore competition.

A. <u>The Divestiture Will Not Restore Competition or Supermarkets</u>

1. C&S is an unsophisticated and inexperienced buyer

400. Divestiture buyers like C&S, that either have no experience or unsuccessful experience in the market raise concern about their ability to successfully compete following the divestiture. *Aetna*, 240 F. Supp. 3d at 72-73; *see also United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 135 (D.D.C. 2022). The evidence showed that C&S's experience in grocery retail is limited and unsuccessful overall. FOF ¶¶ 214-17. Over its history, C&S has primarily bought retail grocery stores only to sell them to its wholesale customers, thereby expanding its own wholesale business. *Id.*

401. Defendants are wrong that C&S's wholesale business, including its provision of retail and other services to its franchisees and independents, indicates that C&S can run the divested stores. The evidence shows C&S has been unable to translate whatever capabilities it may have as a wholesaler into success in the retail stores it already operates. *See Aetna*, 240 F. Supp. 3d at 64 (buyer's past failures to expand into Medicare Advantage plans undermined claims that its Medicaid experience would transfer to running Medicare Advantage plans).

402. Kroger's selection of C&S does not validate its strength as a buyer. Merging parties have no incentive to create a strong competitor. *See, e.g., Aetna*, 240 F. Supp. 3d at 71; *Sysco*, 113 F. Supp. 3d at 77. Kroger picked C&S over stronger alternatives. FOF ¶¶ 219-22. In any case, Courts reject divestitures even where the ill-equipped buyer was the best of bad options. *See Aetna*, 240 F. Supp. 3d at 62.

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

403. C&S is receiving stores, banners, and other assets and capabilities from both Kroger and Albertsons. FOF ¶ 7. It is not receiving an "existing business entity." *Aetna*, 240 F. Supp. 3d at 60. This makes the divestiture less likely to "effectively preserve the competition that would have been lost through the merger." *Id.* at 60.

404. Defendants contend that C&S is getting the functional equivalent of a standalone business. That concedes that C&S will not get an existing business entity.

405. Divestiture of a "lesser set of assets *might* be appropriate" only where "the purchaser already has, or could easily attain, the . . . capabilities needed to compete effectively." *Aetna*, 240 F. Supp. 3d at 60. (emphasis added); *see also Sysco*, 113 F. Supp. 3d at 74 (rejecting divestiture where buyer was not receiving competitively necessary assets). C&S does not currently have the capabilities to compete, as evidenced by its short and unsuccessful retail track record. FOF ¶ 218.

406. The divestiture package does not give C&S the capabilities it needs to compete. C&S is getting a number of Kroger's poorer performing stores and banners, and is not getting critical capabilities, including private label products, pricing, promotions, data analytics, and loyalty programs—other than a small set of "niche" private label brands. FOF ¶¶ 265. C&S and party witnesses testified that C&S will be able to compete with the assets it is acquiring, but contemporaneous documents from C&S and Defendants are more credible (and revealing) as to whether it is receiving what it needs, and confirm that C&S is not. *Sysco*, 113 F. Supp. 3d at 73-78.

407. Because C&S does not have the capabilities to compete and is not receiving them in the divestiture, its ability to compete depends on its ability to build or acquire them, *Aetna*, 240 F. Supp. 3d at 60, which the evidence showed C&S is unlikely to be able to do. C&S will need to successfully pull off a series of expensive, time-consuming transitions that risk significant sales losses. FOF ¶ 295. These include rebannering 286 stores in 18 states, plus

developing and transitioning to: (1) a new or dramatically expanded private label program, (2) a new loyalty program, (3) new pricing, promotions, and data analytics strategies, and (4) new IT systems for 579 grocery stores. FOF ¶¶ 236, 270, 276, 287-88. The evidence showed that C&S is unlikely to succeed in all of these transitions and will thus face significant sales losses. FOF ¶¶ 236-53, 267-73, 279-85, 289-93. Together, they all but guarantee that the divestiture will not restore competition. *Aetna*, 240 F. Supp. 3d at 60.

408. That Defendants and C&S entered into the TSA does not alter this result. Like the TSA in *Aetna*, the TSA here merely gives C&S "time to build its own capacity" while "do[ing] nothing to provide [C&S] with the resources it would need to do so." 240 F. Supp. 3d at 71. The TSA also imposes additional markups on private label products. Courts have rejected divestitures like this one where the buyer is reliant on the seller for private label products. *See Sysco*, 113 F. Supp. 3d at 70.

409. C&S's plans to hire experienced corporate employees does not show the divestiture is likely to restore competition. Hiring qualified personnel does not fix depriving an inexperienced buyer of the assets it needs to compete. *Aetna*, 240 F. Supp. 3d at 69 (hiring 1,500 to 2,000 qualified employees, including senior executives, did not override divestiture's other risks). *Aetna* is consistent with both the record and common sense: Integrating thousands of new personnel to a new company is itself a transition that takes time and creates risks.

3. C&S lacks incentives to run the divestiture as a competitor

410. Courts recognize that a divestiture will not preserve competition if a buyer lacks the incentive to compete with the seller. *See Aetna*, 240 F. Supp. 3d at 72. This is a market-by-market analysis; a divestiture is inadequate if there is a risk that the buyer will only compete in some markets. *Id.* Here, the evidence at trial showed that, at least in states like Washington, where it faces an uphill battle, C&S has a backup plan: it can sell off underperforming stores to its wholesale customers, as it has in the past. FOF ¶¶ 215-17, 297-301.

B. <u>C&S Will Depend on Defendants for Too Long to Restore Competition</u>

411. Courts routinely reject divestitures that leave buyers dependent on the seller, as this one will. "[D]ivestitures must be made to . . . a willing, *independent* competitor capable of effective production." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 59 (D.D.C. 2009). *Sysco*, for example, rejected a divestiture that would leave the buyer dependent on the seller for private label products supply and customer databases for three to five years. *See Sysco*, 113 F. Supp. 3d at 77. The package here raises the same concerns and threatens greater entanglement than what the court held impermissible in *Sysco*. For the first year, C&S will depend on Defendants to run nearly every aspect of its business, FOF ¶ 227, including its prices and promotions, FOF ¶ 276. For the first three years post-close, Defendants and C&S will run overlapping banners in overlapping geographies, FOF ¶ 251. And for as long as four years post-close, C&S may depend on Defendants for private label products, FOF ¶¶ 268-69. During part of this time, Kroger will simultaneously be setting C&S's pricing and using C&S as its "HPR" (i.e., ceiling) for its Fred Meyer pricing. FOF ¶ 278.

C. <u>Even a Successful Divestiture Would Not Restore Competition in All Areas</u>

412. Even if C&S runs these stores as successfully as Albertsons runs them, the merger would still result in multiple presumptively anticompetitive markets and would therefore be unlawful. *See infra* ¶ 140. Dr. Dua's sensitivity analyses show that this result is the same even when he includes club stores, natural and organic stores, and limited assortment store formats. FOF ¶ 141.

413. If, as is more likely, C&S instead loses sales relative to the divested stores' current performance, the number of presumptively anticompetitive markets increases. If C&S suffers sales losses of the same magnitude as the sales drops its Grand Union stores experienced when it acquired and rebannered those stores (30%), 46 out of 57 supermarket city areas will be presumptively anticompetitive. FOF ¶ 141.

414. Both results assume that C&S does not close or sell divested stores.

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415. Regardless of whether a rebuttable presumption is warranted based upon the framework recognized in federal courts, Defendants have failed to satisfy their burden of proof on each affirmative defense asserted in their Answers, including, but not limited to, that divestitures will eliminate any potential anticompetitive effects of the proposed merger. *Grp. Health Co-op. of Puget Sound v. King Cnty. Med. Soc.,* 39 Wn.2d 586, 662, 237 P.2d 737, 778 (1951) (enjoining restraint of competition and holding that a defendant who asserts an affirmative defense bears the burden of proof on it).

XI. DEFENDANTS CANNOT PROVE AN EFFICIENCIES DEFENSE

A. Efficiencies Are Not Extraordinary and Would Not Benefit Competition

416. Courts have left open only a very narrow defense based "proof of extraordinary efficiencies"—i.e., efficiencies so significant that the seemingly anticompetitive merger will in fact *promote* competition. *Sysco*, 113 F. Supp. 3d at 81, 86; *see also* 2023 Merger Guidelines at 33; 2010 Merger Guidelines at 30-31. But even if the Court were to credit all efficiencies that Defendants' own expert claims—approximately 1% of the firm's costs—they are not "proof of extraordinary efficiencies" sufficient to render the merger pro-competitive. *Sysco*, 113 F.Supp.3d at 85-86 (efficiencies of approximately 1% of the firms' costs "are unlikely to outweigh the competitive harm"); FOF ¶ 319 (unrebutted CMCR analysis shows efficiencies do not outweigh harm).

417. Defendants have not shown "that their claimed efficiencies would benefit customers"—and not just themselves. *Sysco Corp*., 113 F. Supp. 3d at 82, 98 (D.D.C. 2017); *Aetna Inc*., 240 F. Supp. 3d at 98. Defendants have not shown that merger efficiencies will create the economic incentive to lower prices by $1 billion, as Defendants promise, or any other amount. FOF ¶¶ 320-24.

418. Defendants' price investment plan is an unenforceable promise, not entitled to any weight. *H&R Block*, 833 F. Supp. 2d at 82. Testimony of Kroger executives shows that the price investment plan is disconnected from an economic incentive to pass through a particular

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portion of merger efficiencies achieved. FOF ¶ 320-25. And the parties' changing efficiencies and price investment estimates over time reveal inconsistent pass-through rates. FOF ¶ 324-25.

B. <u>Defendants Have Not Demonstrated Cognizable Efficiencies</u>

419. Defendants' claimed revenue increases and fixed cost savings are not cognizable because they have not proven that fixed cost savings and revenue increases, and not just marginal cost savings, would benefit customers and enhance competition. *Sysco*, 113 F. Supp. 3d at 81; *Aetna*, 240 F. Supp. 3d at 98; *St. Alphonsus*, 778 F.3d at 790. *See* FOF ¶ 320 (only an economic incentive to pass through marginal cost savings); 2010 Merger Guidelines at 29 ("[I]ncremental cost reductions may reduce . . . firm's incentive to elevate price."); *Sysco*, 113 F. Supp. 3d at 83 (merging parties' efficiencies expert considered only variable cost savings).

420. Defendants have not met their burden of production to show that their efficiencies estimates were calculated by a "reliable methodology" and are not "speculative." 2010 Merger Guidelines at 30; 2023 Merger Guidelines at 33. There is no testimony in the record from the consultants who performed the efficiencies analysis and who alone had access to the relevant competitively sensitive information. FOF ¶ 313. The State has raised substantial doubts regarding their methodology, including as to sourcing savings, whether there is a price gap after considering all economically relevant terms, and whether Kroger is likely to be able to use price discovery to negotiate better prices. FOF ¶¶ 313-14.

421. Defendants also have not met their burden of production to show that their estimates represent *only* efficiencies that the firms could not achieve independently. 2010 Merger Guidelines at 30; 2023 Merger Guidelines at 32. For example, both Kroger and Albertsons routinely achieve sourcing cost savings, but Mr. Gokhale's analysis does not show that the combined company could negotiate those ordinary cost savings on top of the savings he finds to be cognizable from price discovery, including through a most favored nations clause. FOF ¶ 316-18.

XII. DEFENDANTS HAVE NOT DEMONSTRATED ENTRY

422. Defendants must demonstrate ease of entry, *see Anthem*, 236 F. Supp. 3d 171 (defendant has burden of production on entry), and that entry will be timely enough to offset harm to competition, *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019). Here, Defendants' gestures at competitive threats from Aldi, Amazon.com, Costco, and others—all retailers outside the market—are speculative and do not suggest likely, easy, or timely entry.

* * *

423. For all the above reasons, the State has demonstrated that the effects of the Proposed Transaction "may be to substantially lessen competition" in 57 supermarket city area markets in Washington, in violation of RCW 19.86.060.

424. The State is the prevailing party in this action and is entitled to its costs, including attorneys' fees, under RCW 19.86.080(1).

XIII. WASHINGTON IS ENTITLED TO A PERMANENT INJUNCTION

A. The State's Case on the Merits Will Prove the Injunction Elements

425. The State is entitled to an injunction barring Defendants from consummating this unlawful merger. The CPA authorizes suits "to restrain and prevent" anticompetitive mergers, RCW 19.86.080(1), and an injunction is warranted under CR 65. The State has proven (1) "a clear legal or equitable right"; (2) "a well-grounded fear of immediate invasion of that right"; (3) "actual and substantial injury" to it; (4) the absence of an adequate "legal remedy." *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209-10 (2000). The State has shown a well-grounded fear of the immediate invasion of its rights under RCW 19.86.060, and an injury of unlawful harm to competition in Washington. An anticompetitive merger causes irreparable injury. *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016).

B. The Equities, Including the Public Interest, Favor the Injunction

426. The equities favor issuing the injunction. RCW 19.86.060's prohibition on anticompetitive mergers and RCW 19.86.080's authorization to enjoin such acts constitute

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statements by Washington's legislature that enjoining anticompetitive mergers is in the public interest. *See, e.g, Lightfoot v. MacDonald*, 86 Wn.2d 331, 333 (1976) (en banc); *Swedish Match*, 131 F. Supp. 2d at 173. The evidence on the merits shows that the merger harms the public interest by creating anticompetitive effects likely to result in higher prices and reduced quality. FOF ¶¶ 147-206.

C. <u>The Proposed Injunction is Carefully Calibrated to Remedy the Harm</u>

427. An injunction prohibiting Defendants from closing the Proposed Transaction is carefully calibrated to remedy the harm. The injunction remedy is expressly provided for by the CPA, and injunctions prohibiting consummation of unlawful mergers are routinely issued. *See, e.g.*, *Anthem*, 236 F. Supp. 3d at 259; *Bertelsmann SE & Co.*, 646 F. Supp. 3d at 56; *H&R Block*, 833 F. Supp. 2d at 92. Here, Defendants have failed to show that a divestiture to C&S will restore lost competition, not because it divests too few stores, but because C&S is unlikely to be able to run them in a way that restores competition. Simply expanding the scope of that inadequate divestiture will not accord complete relief from the anticompetitive transaction. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

428. An injunction blocking the merger in Washington is not a "nationwide injunction." The injunction restrains the conduct only of Defendants, who do significant business in Washington, and only as to this specific merger, which has anticompetitive effects in Washington. An injunction against the transaction does not reach any party that is not before this Court. Nor does it restrain Defendants' conduct with respect to non-parties. It is thus unlike the "nationwide injunctions" against federal action that have been criticized by some courts. *See, e.g., City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1243 (9th Cir. 2018).

429. The fact that enjoining the transaction will have effects beyond Washington also does not alter the propriety of an injunction. *See State v. Reader's Digest Ass'n*, 81 Wn.2d 259 (1972) (en banc) (CPA's reach not limited to conduct occurring exclusively within the State's borders). Enjoining Defendants' transaction will have effects outside Washington only because

Defendants structured the transaction as an all-or-nothing stock purchase deal. Because of that structure, providing complete relief to Washington consumers necessarily requires an injunction that blocks the deal as a whole. Enjoining the transaction would not bar Defendants from negotiating a merger without anticompetitive impacts in Washington.

D. <u>Washington's Proposed Injunction Is Constitutional</u>

430. The dormant commerce clause does not prohibit this Court from enjoining Defendants' transaction under the CPA. The CPA is a non-discriminatory statute. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (dormant commerce clause's "core" protection is against state "[]discrimination" and "economic protectionism." (citation omitted)). Defendants have not shown 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).

431. The Full Faith and Credit Clause does not prohibit this Court from enjoining the transaction. Defendants do not and cannot identify any "judicial Proceedings" or "public Act[]" of any state that would not be afforded Full Faith and Credit by the issuance of the injunction. U.S. Const. art. IV § 1. No state law requires Kroger and Albertsons to merge.

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JUDGE MARSHALL FERGUSON
KING COUNTY SUPERIOR COURT
516 3RD AVENUE, COURTROOM E-713
SEATTLE, WASHINGTON 98104

CONCLUSION

For the forgoing reasons, the evidence has shown that the proposed merger is unlawful and the following relief is necessary, appropriate and constitutional: (1) a declaration that the Proposed Transaction violates RCW 19.86.060; (2) entry of judgment in favor of the State of Washington and against Defendants; (3) an order permanently enjoining and restraining 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) an award to the State of Washington its reasonable costs and attorneys' fees, as provided by law; and (5) any such other relief as the Court may deem just and proper.

DATED this 10th day of December, 2024.

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Judge Marshall Ferguson
King County Superior Court

King County Superior Court
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