

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

DOCKET NO. 9428

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INTRODUCTION

Supermarkets are a central pillar of American communities. Every day, millions of people across the country depend on supermarkets to provide fresh, healthy, and affordable groceries. But over the last four years, grocery prices have skyrocketed 25%, making it ever harder for Americans to afford the food on their tables.¹ Against this backdrop, The Kroger Company (“Kroger”)—the largest traditional supermarket chain in the country—seeks to acquire one of its top competitors, Albertsons Companies, Inc. (“Albertsons”). The proposed deal is by far the largest supermarket merger in U.S. history and would eliminate fierce head-to-head competition between these two grocery giants. If allowed to proceed, the merger would result in higher grocery prices for millions of Americans and lower wages and benefits for hundreds of thousands of grocery workers.

Respondents’ own documents underscore the risk to competition if this acquisition is allowed to proceed. Shortly after the deal was announced, one Albertsons executive explained,

{ [REDACTED]

[REDACTED] }² Kroger’s Chief Merchant and Marketing Officer { [REDACTED]

[REDACTED] }³ Similarly, on the day the deal was announced, Albertsons’ COO emailed the company’s division leaders that { [REDACTED]

[REDACTED]

[REDACTED] }⁴ Today, the vigorous

¹ Abha Bhattarai & Jeff Stein, *Inflation Has Fallen: Why are Americans paying so much for food*, WASHINGTON POST, (Feb. 2, 2024), available at <https://www.washingtonpost.com/business/2024/02/02/grocery-price-inflation-biden/>.

² PX2505 (Albertsons) at 001.

³ PX1502 (Kroger) at 006.

⁴ PX2616 (Albertsons) at 001.

competition between Kroger and Albertsons (“Respondents”) benefits Americans through higher quality, more choices, lower prices, and an overall better grocery shopping experience.

Respondents’ proposed acquisition would eliminate that competition, to the benefit of Respondents’ companies and the detriment of shoppers.

The proposed acquisition is also a threat to hundreds of thousands of grocery store workers. Today, Kroger and Albertsons are two of the largest union employers in the country. Each negotiates separately with the unions that represent its workers, and the unions have a long history of leveraging Respondents against each other to obtain higher wages and better benefits for workers. Unions will lose that leverage if Respondents are permitted to merge and, as a combined company, gain the power to successfully negotiate smaller wage increases, reduce benefits, or degrade working conditions. Hard-working union grocery workers will undoubtedly be harmed by the proposed acquisition; it is no surprise that many local unions have serious concerns about its impact. The proposed acquisition will, of course, also eliminate Respondents’ existing head-to-head competition to attract and retain grocery workers generally, regardless of whether those workers belong to unions.

It is therefore no surprise that Respondents concede that the proposed acquisition violates antitrust laws. In a filing before this Court, Respondents agreed that there is no dispute Kroger and Albertsons { [REDACTED]

[REDACTED] }⁵ Nonetheless, Respondents allege that the loss of competition would be alleviated because their lawyers hand-picked a list of stores that they now propose to divest to C&S Wholesale Grocers, LLC (“C&S”), a wholesale supplier to grocery stores. C&S operated only 23 retail supermarkets as of fiscal year 2023 and has spent the last

⁵ Albertsons’ May 17, 2024 Opp. to Complaint Counsel’s Mot. to Compel at 6.

decade trying to avoid being a supermarket operator. As recently as 2021, C&S stated in its financial reports that { [REDACTED]

[REDACTED] }⁶ Respondents nevertheless propose to entrust C&S with the ongoing operations of 579 stores scattered around the nation, and they assert that C&S is well-positioned to operate them competitively in the future.

Respondents' crafted-for-litigation divestiture falls short because it does not divest stores in communities throughout the country impacted by this acquisition. That alone is sufficient reason to reject it. But it also fails for other reasons. Importantly, the proposal is a cobbled-together amalgamation of stores and other assets that will be, at best, insufficient to mitigate the harm to competition and, at worst, a non-functioning disaster. It will leave C&S—a low-margin grocery wholesaler that is ill-equipped to run the divested grocery stores—dependent on Respondents for years to come. Until then, C&S's CEO concedes that { [REDACTED] } depriving shoppers of the benefits of Respondents' fierce competition today.⁷ American shoppers and frontline workers should not be asked to bear the risk that this divestiture will not prevent the substantial lessening of competition that { [REDACTED] } will result from their proposed mega-deal.

Complaint Counsel will meet its *prima facie* burden to show that the proposed acquisition poses a reasonable probability of substantially lessening competition in over a thousand relevant markets across the country both through extensive evidence of head-to-head competition as well as through a showing of increased market concentration. Respondents are unable to meet their burden to either provide evidence of cognizable efficiencies or to show that their proposed

⁶ PX3127 (C&S) at 013.

⁷ PX4030 (Winn (C&S) IH 136:18-137:8).

divestiture would avoid a substantial lessening of competition. Complaint Counsel respectfully asks this Court to issue a permanent injunction to block this acquisition.

BACKGROUND

In the fall of 2022, Kroger proposed to pay \$25 billion to acquire Albertsons.⁸ This deal—by far the largest supermarket acquisition in U.S. history—would combine the two largest traditional supermarket chains in the country. Together, Kroger and Albertsons collectively operate approximately 5,000 stores, 4,000 pharmacies, 2,000 fuel centers, as well as 66 distribution centers and 52 manufacturing plants that provide critical infrastructure supporting their stores.⁹ Together, the combined company would operate across 48 states and the District of Columbia and control over \$190 billion of annual commerce.¹⁰ If the acquisition is allowed to go through, over 710,000 workers would depend on Kroger for employment.¹¹

In an attempt to stave off antitrust concerns, Respondents entered into an agreement to sell 579 Kroger and Albertsons stores to C&S for \$2.9 billion.¹² C&S is a grocery wholesaler and, as recently as 2021, operated only two retail supermarkets. Today, C&S operates 23 supermarkets and a single retail pharmacy, mostly in New York and Wisconsin. Because C&S is not acquiring a standalone grocery store business, Respondents are required to provide a variety of “transition services” to their purported future “competitor” C&S (some of which extend for up to four years) in a large number of areas, including { [REDACTED]

[REDACTED]

[REDACTED]

⁸ PX6084 (Kroger) at 002.

⁹ PX6084 (Kroger) at 002.

¹⁰ PX6084 (Kroger) at 002; PX7005 (Hill Rpt.) at 009-010, Figs. 1 and 2.

¹¹ PX7005 (Hill Rpt.) ¶ 160; PX6084 (Kroger) at 002.

¹² PX6253 (Kroger).

██████████ }¹³ C&S’s capabilities and assets, however, will pale in comparison to the combined supermarket behemoth Kroger will become.

Kroger. Founded in 1883, Kroger is the largest traditional supermarket chain in the country as well as the single largest employer of union grocery workers.¹⁴ When it agreed to acquire Albertsons in late 2022, Kroger owned approximately 2,700 supermarkets, of which approximately 2,250 had pharmacies and 1,600 had fuel centers. That year, Kroger had an operating profit of \$4.1 billion.¹⁵

Kroger’s massive scale is the product of over four decades of continuous expansion and consolidation of other supermarket chains across the country.¹⁶ As a result, Kroger’s supermarkets operate under a wide variety of local trade names, or “banners,” across 35 states and the District of Columbia. Kroger’s banners include Ralphs, Dillons, Smith’s, King Soopers, Fry’s, Quality Food Center (“QFC”), City Market, Owen’s, Jay C, Pay Less, Baker’s, Gerbes, Harris Teeter, Pick ‘n’ Save, Mariano’s, Metro Market, Fred Meyer, Ruler Foods, Food 4 Less, and Foods Co.¹⁷ Kroger’s primary store format “is successful because the stores are large enough to offer the specialty departments that customers desire for one-stop shopping, including natural food and organic sections, pharmacies, general merchandise, pet centers, and high-quality perishables such as fresh seafood and organic produce.”¹⁸

Kroger likewise focuses on a “value creation model” built on four strategic assets: stores, digital ecosystems, Our Brands (i.e., private label products), and data.¹⁹ This value creation

¹³ PX7009 (Fox Rebuttal Rpt.) ¶ 45; PX7003 (Fox Rpt.) at 012, Fig. 3.

¹⁴ PX4015 (McPherson (Kroger) IH 114:8-11); PX4059 (Sankaran (Albertsons) Dep. 109:14-16); PX6009 (Kroger) at 113.

¹⁵ PX6009 (Kroger) at 133.

¹⁶ PX6030 (Kroger) at 007.

¹⁷ PX1890 (Kroger) at 055-056; PX6009 (Kroger) at 113.

¹⁸ PX6009 (Kroger) at 113; PX1890 (Kroger) at 053; *see also* PX6030 (Kroger) at 002.

¹⁹ PX6009 (Kroger) at 132.

model allows it to “continue to grow its business through [its] competitive moats,” which Kroger has “spent many, many years cultivating.”²⁰

- Stores: The first pillar of Kroger’s business is grounded in its { [REDACTED]

{ [REDACTED] }²¹ Within that footprint, Kroger is { [REDACTED]

{ [REDACTED] }²²

- Digital Ecosystems: The second pillar of Kroger’s business aims { [REDACTED]

[REDACTED]

{ [REDACTED] }²³ To help accomplish these objectives,

Kroger { [REDACTED]

[REDACTED]

{ [REDACTED] }²⁴ Kroger also continues to { [REDACTED]

[REDACTED]

{ [REDACTED] }²⁵ Kroger reported

recently that its digital business had over \$12 billion of sales.²⁶

- Private Label: Kroger’s Our Brands portfolio { [REDACTED]

[REDACTED]

{ [REDACTED] }²⁷ As Gary Millerchip—

Kroger’s former Chief Financial Officer and Senior Vice President—explained to investors, Our

Brands margins are typically 6% to 8% higher than national brands, and are a key driver of

²⁰ PX6009 (Kroger) at 132; PX1255 (Kroger) at 020; PX1505 (Kroger) at 005; PX6016 (Kroger) at 006.

²¹ PX1392 (Kroger) at 019.

²² PX1392 (Kroger) at 019.

²³ PX1505 (Kroger) at 016.

²⁴ PX1505 (Kroger) at 018, 024-026.

²⁵ PX1505 (Kroger) at 016, 018, 042.

²⁶ PX6675 (Kroger) at 008.

²⁷ PX11177 (Kroger) at 021.

customer volume for Kroger.²⁸ Kroger self-manufactures more than { } of its grocery private label products and is thereby able to ensure supply and quality, control costs, and create unique brands exclusive for Kroger shoppers.²⁹

- Data: Kroger’s ability to provide a seamless and personalized customer experience depends on its trove of consumer data. Kroger’s 84.51° division—home of Kroger’s data analytics department—{ }.³⁰ Kroger retains over { }

{ }³¹ Kroger leverages these data and data science assets { }

{ }³²

Albertsons. Founded in 1939, Albertsons is—behind Kroger—the second-largest traditional supermarket chain in the United States and the second-largest employer of union grocery workers in the country.³³ Like Kroger, Albertsons has grown by a series of acquisitions, and now operates 2,269 supermarkets across 34 states and the District of Columbia under 24 banners, including Albertsons, Safeway, Vons, Pavilions, Randalls, Tom Thumb, Carrs, Jewel-Osco (“Jewel”), Acme, Shaw’s, Star Market, United Supermarkets, Market Street, Haggen, Kings Food Markets, and Balducci’s Food Lovers Market.³⁴ Albertsons also operates 1,725 pharmacies, 402 adjacent fuel centers, 22 distribution centers, 19 manufacturing facilities, and

²⁸ PX2313 (Albertsons) at 017.

²⁹ PX11177 (Kroger) at 023; PX6352 (Morningstar) at 002; PX6009 (Kroger) at 114.

³⁰ PX4021 (Aitken (Kroger) Dep. 53:21-23).

³¹ PX1890 (Kroger) at 017.

³² PX1505 (Kroger) at 051, 052-054.

³³ PX4059 (Sankaran (Albertsons) Dep. 108:16-21); PX7005 (Hill Rpt.) ¶ 247; PX2315 (Albertsons) at 011.

³⁴ PX2315 (Albertsons); PX6153 (Albertsons) at 008.

various digital platforms.³⁵ In fiscal year 2023, Albertsons generated almost \$1.3 billion in net income.³⁶ Since its latest initial public offering in 2020, Albertsons’ total cumulative stockholder return has exceeded the S&P 500 and S&P 500 Retail Composite.³⁷ Shortly after announcing the proposed acquisition, Albertsons also announced a \$4 billion dividend, which it paid to its shareholders in January 2023.³⁸ Albertsons employs 285,000 employees, approximately 200,000 of whom are covered by collective bargaining agreements with unions.³⁹

Albertsons competes and fights for market share using similar methods as Kroger. Among other familiar strategies, Albertsons focuses on its stores, digital ecosystem, “Own Brands” (i.e., private label products), and data.

- Stores: Like Kroger, Albertsons’ “portfolio of well-located, full-service stores provides the foundation of [Albertsons’] omnichannel platform.”⁴⁰ Albertsons holds a “#1 or #2 position by market share in 70% of the 121 metropolitan statistical areas (“MSAs”)” in which [they] operate.”⁴¹ Albertsons stores on average have roughly { [REDACTED] } square feet of space, carry { [REDACTED] } items, and have many departments, such as produce, grocery, meat, seafood, bakery, deli, dairy, frozen, general merchandise, health and beauty, alcoholic beverage, and floral, and in some cases, pharmacies, fuel centers, and in-store coffee shops.⁴²

- Digital Ecosystem: Albertsons, like Kroger, { [REDACTED] }

[REDACTED]

³⁵ PX6153 (Albertsons) at 008.

³⁶ PX6153 (Albertsons) at 039.

³⁷ PX6153 (Albertsons) at 035.

³⁸ PX4059 (Sankaran (Albertsons) Dep. 22:2-13).

³⁹ PX6153 (Albertsons) at 095.

⁴⁰ PX2315 (Albertsons) at 008.

⁴¹ PX6153 (Albertsons) at 008.

⁴² PX12616 (Albertsons) at tab “Data;” PX4022 (Sankaran (Albertsons) IH 180:3-5); PX4039 (Kinney (Albertsons) Dep. 80:20-81:14); PX4097 (Morris) (Albertsons) Dep., Vol. 1, 199:24-200:14); PX4117 (Cloward (Albertsons) Dep. Vol. 1, 111:18-113:9).

[REDACTED]

[REDACTED]

[REDACTED]⁴³ Albertsons also [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁴ As Kroger observed when contemplating the merger, Albertsons [REDACTED]

[REDACTED]

[REDACTED]⁴⁵

- Private Label: Albertsons has a robust private label program called Own Brands, which is a top competitor to Kroger’s Our Brands. Albertsons’ Own Brands program offers more than [REDACTED] items to its shoppers and generated more than [REDACTED] of sales in 2022.⁴⁶ Albertsons focuses on its Own Brands [REDACTED]

[REDACTED]

[REDACTED]⁴⁷ Albertsons relies on its manufacturing facilities to

manufacture over [REDACTED]

[REDACTED]⁴⁸

- Data: Albertsons has over 39.8 million loyalty program members, and its loyalty program provides [REDACTED] to Albertsons each week.⁴⁹

Like Kroger, Albertsons leverages its “rich and proprietary data” both to power its internal tools and infrastructure, as well as to drive additional revenue through a separate digital media arm,

⁴³ PX12453C (Albertsons) at 009, 012, 016.

⁴⁴ PX6153 (Albertsons) at 009-010; PX12453C (Albertsons) at 012, 016.

⁴⁵ PX0049 (Kroger) at 001-002.

⁴⁶ PX2315 (Albertsons) at 009.

⁴⁷ PX2918 (Albertsons) at 036-048.

⁴⁸ PX2315 (Albertsons) at 009.

⁴⁹ PX6153 (Albertsons) at 010; PX0078 (Kroger) at 010.

Albertsons Media Collective.⁵⁰ Similar to Kroger Precision Marketing, Albertsons Media Collective enables Albertsons to commercialize its data and data science assets and generate higher margin growth to support its grocery business.⁵¹ Albertsons invests approximately { [REDACTED]

[REDACTED]

[REDACTED] }⁵²

C&S. In contrast to Kroger and Albertsons, C&S is a wholesaler that supplies retail operators with grocery products. C&S is controlled by Richard “Rick” Cohen, who, together with his family, { [REDACTED] }⁵³ As a wholesaler, C&S { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }⁵⁴ As a result, C&S forecasts an approximately { [REDACTED] }⁵⁵

C&S has a checkered track record of owning, operating, and closing grocery stores— since 2000, { [REDACTED]

[REDACTED] }⁵⁶ { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }⁵⁷ C&S operated only 23 retail grocery stores as of fiscal year 2023, mostly in

⁵⁰ PX2315 (Albertsons) at 010.

⁵¹ PX12453C (Albertsons) at 012, 017.

⁵² PX4121 (Dhanda (Albertsons) Dep. 85:6-10); PX12453C (Albertsons) at 017.

⁵³ PX4115 (Cohen (C&S) Dep. 18:22-25, 19:13-23).

⁵⁴ PX3948 (C&S) at 008.

⁵⁵ PX4030 (Winn (C&S) IH 263:2-264:25, 271:11-20); PX3948 at 078-079.

⁵⁶ PX4061 (Winn (C&S) Dep. 379:20-25); PX7003 (Fox Rpt.) ¶¶ 12-22.

⁵⁷ PX3948 (C&S) at 011.

upstate New York and Wisconsin.⁵⁸ { [REDACTED] }
 { [REDACTED] }⁵⁹ { [REDACTED] }
 { [REDACTED] }
 { [REDACTED] }⁶⁰ To wit, one competitor to C&S and bidder on the divestiture
 assets characterized C&S's store operations as { [REDACTED] }⁶¹

ANALYSIS

Complaint Counsel brings an action to enjoin this acquisition under Section 7 of the Clayton Act and Section 5 of the FTC Act. Complaint, p. 1; *see also* 15 U.S.C. § 18, § 45. Section 7 of the Clayton Act prohibits mergers, “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. “Congress used the words ‘may be substantially to lessen competition,’ (emphasis supplied), to indicate that its concern was with probabilities, not certainties.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). A merger violates Section 7 if it “create[s] an appreciable danger of [anticompetitive consequences] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for.” *FTC v. Heinz*, 246 F.3d 708, 719 (D.D.C. 2001).

Courts analyze Section 7 cases using a burden-shifting framework. *St. Alphonsus Med.Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015); *In the Matter of Polypore, Int'l, Inc.*, 149 F.T.C. 486, 800 (Mar. 1, 2010). Under the Section 7 framework, Complaint Counsel bears the initial burden to “establish a *prima facie* case that an

⁵⁸ PX7003 (Fox Rpt.) ¶ 11.

⁵⁹ PX4060 (Winn (C&S) Dep. 31:6-9); PX4050 (McGowan (C&S) Dep. 35:7-36:2).

⁶⁰ Compare PX4030 (Winn (C&S) IH 337:10-20) with PX3112 (C&S) at -003.

⁶¹ PX4028 (Sarsam (SpartanNash) IH 101:24-103:12).

acquisition is unlawful.” *Polypore*, 149 F.T.C. at 800. The government can meet its *prima facie* burden by either showing that the acquisition (1) will eliminate head-to-head competition between Respondents or (2) “will lead to undue concentration in the market for a particular product in a particular geographic area.” *Polypore*, 149 F.T.C. at 850; *In the Matter of Polypore Int’l, Inc.*, FTC Docket No. 9327, 2010 FTC LEXIS 97, at *25 (Dec. 13, 2010).

Once Complaint Counsel has established a *prima facie* case of probable harm, the burden of production shifts to Respondents to “produce evidence showing that the plaintiff’s evidence paints an inaccurate picture of the merger’s likely competitive effects.” *In the Matter of Polypore Int’l, Inc.*, FTC Docket No. 9327, 2010 WL 9549988, *9 (Nov. 5, 2010). If the Respondents meet their burden, the burden of production shifts back to the plaintiff to produce additional evidence of competitive harm and merges with the ultimate burden of persuasion, which remains with the plaintiff. *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1048 (5th Cir. 2023). The stronger the plaintiff’s *prima facie* case, “the greater Respondent[’s] burden of production on rebuttal.” *In the Matter of OSF Healthcare Sys.*, 2012 FTC LEXIS 76, *46 (Apr. 4, 2012); *see also Heinz*, 246 F.3d at 725.

Here, Complaint Counsel meets its *prima facie* burden both by showing that this acquisition eliminates substantial head-to-head competition and by showing an undue increase in concentration in a multitude of markets as a result of the transaction. Respondents cannot produce evidence to rebut Complaint Counsel’s strong showing of harm.

I. THE PROPOSED ACQUISITION IS UNLAWFUL BECAUSE IT WILL ELIMINATE SUBSTANTIAL HEAD-TO-HEAD COMPETITION

Kroger and Albertsons compete closely in many hundreds of communities across the country. “The merger substantially lessens competition and restrains trade by the permanent elimination of significant competition formerly existing between major competitors, and that in

‘itself constitutes a violation of § 1 of the Sherman Act,’ and, a fortiori, of the Clayton Act.” *United States v. Manufacturers Hanover Trust Company*, 240 F. Supp. 867, 950 (S.D.N.Y. 1965) (citing *United States v. First Nat. ’l Bank & Tr. Co. of Lexington*, 376 U.S. 665, 671 (1964)); see also, U.S. Dep’t of Justice & Fed. Trade Com’n, *Merger Guidelines* § 2.2 (2023) (“Merger Guidelines”). The elimination of this significant head-to-head competition is “an important consideration when analyzing possible anti-competitive effects.” *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997) (“*Staples P*”); see also *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1345 (4th Cir. 1976); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 61 (D.D.C. 2015) (collecting cases holding that “a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition”). When conducting this analysis, “[c]ourts frequently rely on ordinary course documents and witness testimony illustrating that two merging parties view each other as strong competitors.” *FTC v. IQVIA Holdings Inc.*, No. 23-cv-06188-ER, 2024 WL 81232, at *37 (S.D.N.Y. Jan. 8, 2024); *Sysco*, 113 F. Supp. 3d at 62 (relying on “empirical data . . . , Defendants’ ordinary course documents, and testimonial evidence from other market actors”).

Kroger and Albertsons each strives to attract shoppers to their stores by competing on { [REDACTED] }⁶² This head-to-head competition benefits shoppers by lowering price, improving quality, and increasing convenience. As Albertsons’ CEO explained, Albertsons tries { [REDACTED] }⁶³ Likewise, as talking

⁶² PX4069 Humayun (Albertsons) Dep. 27:11-28:25, 51:25-52:9); PX2315 at 010; PX4044 (Jabbar (Kroger) Dep. 150:12-152:23-9); PX4035 (Davidson (Albertsons) Dep. 57:7-58:25); PX4063 (Adcock (Kroger) Dep. 171:22-172:6); PX4026 (Broderick (Albertsons) IH 25:5-37:13, 127:25-130:4); PX4084 (Huntington (Albertsons) Dep. 17:20-21:9); PX4043 (Kammeyer (Kroger) Dep. 43:13-44:21).

⁶³ PX2322 (Albertsons) at 001.

points for its 2020 initial public offering stated, Albertsons focuses { [REDACTED] }
[REDACTED]
[REDACTED] }⁶⁴ For Kroger’s part, its QFC
banner { [REDACTED] }, its Fred Meyer banner
{ [REDACTED] }, and its Ralphs banner { [REDACTED] }
[REDACTED] }.⁶⁵ If this acquisition is consummated, this vigorous
competition will be eliminated in thousands of communities. And shoppers will be left to bear
the risk of worsening quality and higher grocery prices.

A. Kroger and Albertsons Constrain Each Other’s Prices

Today, Kroger and Albertsons closely monitor and fiercely compete on both regular
 (“base”) and promotional pricing, thereby constraining each other’s pricing.

Base Pricing: Kroger is { [REDACTED] }
[REDACTED] } { [REDACTED] }
[REDACTED]
[REDACTED] }⁶⁶ Specifically, Albertsons’ goal is to have
{ [REDACTED] }⁶⁷ Albertsons overwhelmingly
uses { [REDACTED] }⁶⁸
Critically, Albertsons’ { [REDACTED] }

⁶⁴ PX12392 (Albertsons) at 010.
⁶⁵ PX1308 (Kroger) at 001; PX1420 (Kroger) at 001; PX4044 (Jabbar (Kroger) Dep. 193:5-194:16).
⁶⁶ See PX4017 (Silva (Albertsons) IH 91:10-23, 193:12-19); PX4018 (Cowgill (Albertsons) IH 46:19-48:18, 100:5-101:6, 149:17-150:11, 156:17-157:11, 176:2-7); PX4056 (Silva (Albertsons) Dep 106:11-25).
⁶⁷ PX4018 (Cowgill (Albertsons) IH 149:17-151:9).
⁶⁸ Albertsons uses Kroger as its primary food competitor for all Albertsons pricing areas in its Southwest, Intermountain, Portland, and Seattle divisions; nearly all price areas in the Denver and Jewel divisions; and a majority of pricing areas in the Southern and Southern California divisions. PX2419 (Albertsons) at 008-012; see also PX7005 (Hill Rpt. ¶ 170, Fig. 36; see also PX4018, Cowgill (Albertsons) IH at 150:12-151:6; PX2419 (Albertsons) at 012.

[REDACTED]

[REDACTED] }⁶⁹

Albertsons' pricing is likewise an important constraint on Kroger. For Kroger's QFC and Mariano's divisions, [REDACTED]

[REDACTED] }⁷⁰ For most of its other divisions, Kroger seeks to set prices [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } [REDACTED]

[REDACTED]

[REDACTED] }⁷² Kroger considers [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }⁷³

[REDACTED]

[REDACTED]

[REDACTED] }⁷⁵ One executive described [REDACTED]

[REDACTED] }⁷⁶ [REDACTED]

⁶⁹ PX4018 (Cowgill (Albertsons) IH 156:17-157:11); PX4056, (Silva (Albertsons) Dep. 105:19-106:25); PX7005 (Hill Rpt.) ¶ 170, Fig. 36.

⁷⁰ PX4054 (Groff (Kroger) Dep. 192:12-194:13).

⁷¹ [REDACTED] } PX1130 (Kroger) 007-018.

⁷² PX1109 (Kroger) at 007; *see also* PX1110 (Kroger) at 001-002; PX4016 (Groff (Kroger) IH 163:14-179:6); PX4054 (Groff (Kroger) Dep. 78:16-79:1).

⁷³ PX1109 (Kroger) at 007; *see also* PX1110 (Kroger) at 001-002; PX4016 (Groff (Kroger) IH 163:14-179:6); PX4054 (Groff (Kroger) Dep. 78:16-79:1).

⁷⁴ PX4016 (Groff (Kroger) IH 120:12-121:17).

⁷⁵ PX1109 (Kroger) at 007; PX4054 (Groff (Kroger) Dep. 79:2-82:13); PX4016 (Groff (Kroger) IH at 183:1-184:25); PX1115 (Kroger) at 003-006.

⁷⁶ PX1125 (Kroger) at 003.

[REDACTED]
[REDACTED]
[REDACTED] }⁷⁷ This pricing competition with Albertsons would be lost if this acquisition

is allowed to go through.

Kroger invests to compete with Albertsons’ pricing in other ways too. For instance, Kroger observed that the [REDACTED] }⁷⁸ In response, Kroger [REDACTED]

[REDACTED] }⁸⁰ Similarly, in the summer of 2021, Kroger [REDACTED]

[REDACTED]
[REDACTED] }⁸¹ Kroger’s Senior Director of Pricing Strategy and Execution observed that during this time, [REDACTED]

[REDACTED]
[REDACTED] }⁸²

Promotional Pricing. Kroger and Albertsons also compete aggressively on promotional pricing by [REDACTED] }

Kroger regularly [REDACTED]
[REDACTED]

[REDACTED] }⁸³ Around major holidays and events,

⁷⁷ PX1109 (Kroger) at 007.

⁷⁸ PX4016 (Groff (Kroger) IH 187:1-8); PX1109 (Kroger) at 009; PX1123 (Kroger) at 001; PX1125 (Kroger) at 002-003.

⁷⁹ PX1109 (Kroger) at 009; PX1125 (Kroger) at 003; PX4016 (Groff (Kroger) IH 190:5-191:10).

⁸⁰ PX1125 (Kroger) at 003.

⁸¹ PX1109 (Kroger) at 004.

⁸² PX1125 (Kroger) at 002.

⁸³ See, e.g., PX1249 (Kroger) at 001-012; PX1292 (Kroger) at 011-020; PX1368 (Kroger) at 004-017; PX1281 (Kroger) at 003-013.

Kroger { [REDACTED] }
[REDACTED] }⁸⁴ Kroger also has sought { [REDACTED] }
[REDACTED] } For example, in Las Vegas, a Kroger employee { [REDACTED] }
[REDACTED] }
[REDACTED] }⁸⁵ In another example, before one Super Bowl, Kroger employees wanted
[REDACTED] }
[REDACTED] }⁸⁶ Similarly, for
Thanksgiving advertisements, Kroger lamented that { [REDACTED] }
[REDACTED] }
[REDACTED] }
[REDACTED] }
[REDACTED] }⁸⁷

Albertsons likewise { [REDACTED] }
[REDACTED] } Leading up to Independence Day 2022, for instance, Albertsons
[REDACTED] }
[REDACTED] }
[REDACTED] }
[REDACTED] }⁸⁸ In December 2020, after Kroger's
Fred Meyer banner { [REDACTED] }
[REDACTED] }
[REDACTED] }⁸⁹ For Easter 2021, Albertsons { [REDACTED] }
[REDACTED] }
[REDACTED] }
[REDACTED] }⁹⁰ In 2021, Albertsons { [REDACTED] }

⁸⁴ See, e.g., PX1552 (Kroger) at 001; PX1553 (Kroger) at 001; PX1567 (Kroger) at 001; PX1568 (Kroger) at 001.
⁸⁵ PX1372 (Kroger) at 001; see also PX1303 (Kroger) at 001.
⁸⁶ PX1573 (Kroger) at 001.
⁸⁷ PX11252 (Kroger) at 001.
⁸⁸ PX12029 (Albertsons) at 001.
⁸⁹ PX2783 (Albertsons) at 001; PX4034 (Whitney (Albertsons) Dep. 163:10-164:4).
⁹⁰ PX2478 (Albertsons) at 001.

[REDACTED]

[REDACTED]⁹¹ A similar [REDACTED]

[REDACTED]⁹²

Illinois provides another prime example of the intense local price competition between Kroger and Albertsons. Here, Kroger’s Mariano’s banner [REDACTED]

[REDACTED]

[REDACTED]⁹⁴ In April 2023, Kroger circulated [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁵ Similarly, when Mariano’s saw that its

prices [REDACTED]⁹⁶

Notably, Kroger’s weekly [REDACTED]

[REDACTED]⁹⁷ Likewise, Jewel [REDACTED]

[REDACTED]

[REDACTED]⁹⁸ Jewel routinely [REDACTED]

[REDACTED] In November 2020, Jewel [REDACTED]

[REDACTED]

[REDACTED]⁹⁹ In March 2022, Jewel employees reported

that [REDACTED]

⁹¹ PX2464 (Albertsons) at 001.

⁹² PX2484 (Albertsons) at 001.

⁹³ PX4054 (Groff (Kroger) Dep. 193:14-194:13).

⁹⁴ See, e.g., PX1830 (Kroger) at 001; PX1800 (Kroger) at 001.

⁹⁵ PX1825 (Kroger) at 001; see also PX1808 (Kroger) at 001-002.

⁹⁶ PX1820 (Kroger) at 001.

⁹⁷ See, e.g., PX1778 (Kroger) at 002, 004, 008; PX1779 (Kroger) at 002, 004, 007.

⁹⁸ See PX2419 (Albertsons) at 011-012.

⁹⁹ PX2673 (Albertsons) at 001; see also PX2679 (Albertsons) at 001-002.

{ } and urged { }¹⁰⁰ When Albertsons' CEO asked

{ }

{ }

{ }” and described how Jewel { }¹⁰¹

The fierce competition between Respondents across the country serves as an important constraint on both Kroger's and Albertsons' pricing—be it base or promotional—leading to lower prices for shoppers at both Kroger and Albertsons supermarkets. The merger would eliminate this head-to-head competition, which in turn would raise prices for food and essential household items for millions of shoppers.

B. Kroger and Albertsons Compete Closely on Nonprice Factors Like Product Quality and Assortment, Better Service, and Convenience

Kroger and Albertsons also compete against each other across a variety of non-price dimensions. *See, e.g., IQVIA, 2024 WL 81232, at *38-39, *53* (preliminarily enjoining merger that eliminated substantial competition on price and non-price dimensions). Respondents seek to lure shoppers away from each other by offering higher quality, fresher products, more low-priced private label goods, and a broader assortment of products and services. Respondents also compete to offer better customer service, longer store hours, new amenities, and updated and remodeled stores to attract and win shoppers from each other. The proposed acquisition will eliminate this critical competition.

Product Quality and Assortment. Kroger and Albertsons constantly { }

{ } As Kroger's CEO

testified, { }

¹⁰⁰ PX2482 (Albertsons) at 001 (emphasis in original).

¹⁰¹ PX12087 (Albertsons) at 001.

{ }¹⁰² and Kroger’s internal analyses show that { }

{ }¹⁰³ To that end, Albertsons { }

{ }¹⁰⁴ For example, Albertsons’ Portland Division in 2022 identified { }

{ }¹⁰⁵

Kroger and Albertsons also compete directly with one another by expanding and improving their private label offerings, which are typically high-quality and low-cost products.

Indeed, Kroger recognizes { }

{ }

{ }¹⁰⁶ { }

{ }

{ }¹⁰⁷

Customer Service. Kroger and Albertsons also compete intensely in communities nationwide to offer better customer service that benefits consumers. In Seattle, for instance,

Albertsons’ 2021 annual operating plan noted its { }

{ }

{ }¹⁰⁸

Similarly, in California, Albertsons specifically noted { }

{ }¹⁰⁹ QFC (Kroger) in

¹⁰² PX4024, (McMullen (Kroger) IH 146:13-147:3).

¹⁰³ PX1240 (Kroger) at 003; PX4021 (Aitken (Kroger) IH 70:14-73:1).

¹⁰⁴ PX2412 (Albertsons) at 035, 089.

¹⁰⁵ PX2545 (Albertsons) at 001.

¹⁰⁶ PX4021 (Aitken (Kroger) IH at 106:2-8).

¹⁰⁷ PX1244 (Kroger) at 001-002; PX1247 (Kroger) at 002; PX4021 (Aitken (Kroger) IH at 104:6-109:2).

¹⁰⁸ PX2492 (Albertsons) at 007.

¹⁰⁹ PX2490 (Albertsons) at 001.

Washington discussed { [REDACTED] }
[REDACTED]
[REDACTED] }¹¹⁰ Conversely, when Albertsons’
COO got wind of { [REDACTED] }
[REDACTED]
[REDACTED] }¹¹¹

Customer Convenience. Kroger and Albertsons also compete vigorously to improve customer convenience and in-store shopping experiences with updated remodeled stores and new amenities. For pick-up services, Kroger closely tracked { [REDACTED] }
[REDACTED]
[REDACTED] }¹¹² In response, Kroger { [REDACTED] }
[REDACTED] }¹¹³

At the start of 2020, Albertsons, likewise, tracked Kroger’s improvements in pickup: { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }¹¹⁴ Kroger has increased { [REDACTED] }
[REDACTED] }¹¹⁵ Kroger has likewise { [REDACTED] }

¹¹⁰ PX11276 (Kroger) at 002-003.
¹¹¹ PX2480 (Albertsons) at 001.
¹¹² PX1358 (Kroger) at 001.
¹¹³ PX1232 (Kroger) at 001; PX1361 (Kroger) at 002.
¹¹⁴ PX2438 (Albertsons) at 001.
¹¹⁵ PX1308 (Kroger) 001; PX1310 (Kroger) at 003; PX11295 (Kroger) at 001.

[REDACTED]

[REDACTED] }¹¹⁶ Similarly, Albertsons has made significant investments { [REDACTED]

[REDACTED] }¹¹⁷

Across all these dimensions, competition between Kroger and Albertsons has led to significant improvements for shoppers wherever these two entities compete—competition that this acquisition will eliminate.

C. Expert Economic Analysis Confirms that Kroger and Albertsons Are Close Competitors and that the Proposed Acquisition Would Eliminate this Substantial Competition

Complaint Counsel’s expert, Dr. Nicholas Hill, PhD,¹¹⁸ evaluated whether the proposed acquisition is likely to substantially reduce competition using an economic method called “compensating marginal cost reduction” or “CMCR.”¹¹⁹ CMCR analysis calculates a percentage value that represents the reduction in marginal costs that would be necessary to offset the merged firm’s incentives to raise prices.¹²⁰ If the CMCR value is greater than the marginal cost reductions predicted to result from the merger, then the merged firm is likely to increase prices due to the merger.¹²¹ One important input to CMCR analysis is estimating diversions, that is, the sales lost by one firm to another as a result of a price increase.¹²² Diversions are a probative

¹¹⁶ PX1310 (Kroger) at 012.

¹¹⁷ PX2441 (Albertsons) at 001; PX2434 (Albertsons) at 001.

¹¹⁸ Dr. Hill is a partner at Bates White Economic Consulting who specializes in antitrust analysis. He has testified eight times about mergers and conduct in a wide variety of industries, including book publishing, chemicals, airlines, telecommunications, and banking. Dr. Hill has also served as Assistant Section Chief of the Economic Analysis Group at the DOJ Antitrust Division and as a staff economist at both DOJ and FTC.

¹¹⁹ PX7005 (Hill Rpt.) ¶ 188.

¹²⁰ PX7005 (Hill Rpt.) ¶ 188. For example, a CMCR of 5 percent means that a merger would have to reduce the merged firm’s marginal cost by 5 percent or more, relative to the stand-alone firms’ marginal costs, or the merger will result in a price increase. *Id.*

¹²¹ PX7005 (Hill Rpt.) ¶ 188-198.

¹²² PX7005 (Hill Rpt.) ¶ 190.

measure of competition between two companies—the higher the diversions between the merging parties, the closer the competition. *See, e.g., FTC v. Sanford Health, Sanford Bismarck*, No. 1:17-cv-133, 2017 WL 10810016, at *12 (D.N.D. Dec. 5, 2017), *aff'd sub nom. FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019).

Dr. Hill’s CMCR analysis assumed that CMCR values greater than five percent indicate a likelihood that competition will be substantially reduced. Dr. Hill found that 1,472 local markets have a CMCR value greater than five percent.¹²³ This means that for those stores, the acquisition is likely to result in a price increase unless it were to reduce the firm’s marginal costs by more than five percent.¹²⁴ Here, while Respondents claim the merger will reduce their marginal costs, the *total* cost reductions they estimate—that is, regardless of whether such estimates are verified or merger-specific—are less than one percent of Respondents’ combined total operating costs.¹²⁵ Dr. Hill’s CMCR analysis thus not only confirms that substantial competition will be eliminated; in using a five-percent threshold to reach that conclusion, it is also abundantly conservative.¹²⁶

D. Competition Between Kroger and Albertsons Drives Better Wages and Benefits for Union Grocery Workers

In addition to eliminating fierce competition between Kroger and Albertsons for supermarket shoppers, the acquisition also removes unions’ primary source of leverage in collective bargaining negotiations: the ability to credibly threaten a strike, boycott, or other action against an employer.¹²⁷ Strikes are { [REDACTED] }¹²⁸ because even a boycott or informational picketing can generate negative publicity about the strike target and drive

¹²³ PX7005 (Hill Reply Rpt.) Fig. 46.

¹²⁴ PX7005 (Hill Rpt.) ¶ 93. Dr. Hill’s CMCR results are qualitatively the same for the supermarket product market he analyzes and also for his more conservative “large format store” product market. *Id.*

¹²⁵ PX7007 (Hill Rebuttal Rpt.) ¶¶ 180-182, n. 200; PX7012 (Yeater Rebuttal Rpt.) ¶ 11.

¹²⁶ PX7007 (Hill Rebuttal Rpt.) ¶ 182.

¹²⁷ PX4014 (Dosenbach (Albertsons) IH 186:12-17); PX4015 (McPherson (Kroger) IH 164:19-165:2, 165:24-166:17).

¹²⁸ PX4015 (McPherson (Kroger) IH 163:18-25, 168:4-8).

shoppers elsewhere.¹²⁹ When workers strike, impacted stores cannot operate normally or may have to close.¹³⁰ Struck supermarkets are at risk of lasting damage to their reputation and permanently losing shoppers to competing stores.¹³¹

The strike target is also at risk of losing workers.¹³² Workers may choose to pick up shifts at other union grocery employers that remain open during the strike in order to continue getting paid.¹³³ Strikes can also create tension between an employer and its workers, who may decide to take jobs elsewhere.¹³⁴ Because strikes damage an employer’s sales, reputation, and employee relationships, unions can use strikes—or even the credible threat of a strike—to pressure an employer to offer better wages, benefits, and working conditions.¹³⁵

Unions employ a negotiating tactic called a “whipsaw strike,” during which workers threaten to strike to force one competing union employer to agree to certain terms.¹³⁶ Once an agreement is reached, the workers shift their strike threat to the second competing union employer—this is the “whipsaw”—to get that company to match or improve upon the agreement with the first.¹³⁷ This strategy is effective because Kroger and Albertsons do not want to lose sales or shoppers to each other and (naturally) each would prefer that the unions target the other with a strike instead.¹³⁸ Unions leverage their ability to direct Kroger’s shoppers to Albertsons,

¹²⁹ PX5014 (UFCW Local 3000 Decl.) ¶ 13; PX5011 (UFCW Local 7 Decl.) ¶ 11; PX5010 (UFCW Local 324 Decl.) ¶¶ 12, 15; PX4014 (Dosenbach (Albertsons) IH 187:1–12); PX4015 (McPherson (Kroger) IH 173:11–18).

¹³⁰ PX4015 (McPherson (Kroger) IH 285:3–286:6).

¹³¹ See PX4014 (Dosenbach (Albertsons) IH at 187:13–188:10, 208:3–10, 219:24–220:8); PX5014 (UFCW Local 3000 Decl.) ¶ 9; PX5011 (UFCW Local 7 Decl.) ¶ 11).

¹³² PX5014 (UFCW Local 3000 Decl.) ¶ 9; PX5011 (UFCW Local 7 Decl.) ¶ 11.

¹³³ PX5014 (UFCW Local 3000 Decl.) ¶ 9; PX5011 (UFCW Local 7 Decl.) ¶ 11.

¹³⁴ PX5014 (UFCW Local 3000 Decl.) ¶ 9; PX5011 (UFCW Local 7 Decl.) ¶ 11.

¹³⁵ PX5014 (UFCW Local 3000 Decl.) ¶ 9; PX5011 (UFCW Local 7 Decl.) ¶ 11; PX5010 (UFCW Local 324 Decl.) ¶¶ 12, 16.

¹³⁶ PX4015 (McPherson (Kroger) IH 274:3–12); PX4095 (Massa (Kroger) Dep. 169:11-18).

¹³⁷ PX4042 (Dosenbach (Albertsons) Dep. 150:14-151:1); PX4015 (McPherson (Kroger) IH 274:3–12); PX4095 (Massa (Kroger) Dep. 169:11-18) .

¹³⁸ PX5010 (UFCW Local 324 Decl.) ¶ 14; PX5014 (UFCW Local 3000) Decl.) ¶ 12; PX5011 (UFCW Local 7 Decl.) ¶ 11.

or vice versa, to reach more favorable agreements with these employers.¹³⁹ Unions in Oregon, Washington, Colorado, Southern California, and elsewhere have been able to use whipsaw-strike leverage to increase wages and hours, improve benefits, make workplaces safer, add more full-time positions, and improve vacation and sick leave policies.¹⁴⁰

In December 2021, for example, UFCW Local 555 leveraged competition between Kroger and Albertsons with a whipsaw strike in Portland, Oregon. Following a one-day strike against its stores, Kroger agreed to [REDACTED]

[REDACTED]¹⁴¹ [REDACTED]¹⁴² As

Albertsons' Senior Vice President of Labor Relations, Dan Dosenbach, stated, [REDACTED]
[REDACTED]¹⁴³

Respondents are well aware of the unions' strategy and [REDACTED]
[REDACTED] } For example, Mr. Dosenbach explained: [REDACTED]

[REDACTED]
[REDACTED]¹⁴⁴ Similarly, Kroger's Vice President of Labor Relations, Jon McPherson, updated Kroger's CEO and other senior leaders about an April 2022 negotiation in Seattle, explaining:

[REDACTED]
[REDACTED]¹⁴⁵

¹³⁹ PX5014 (UFCW Local 3000 Decl.) ¶¶ 13–15; PX5011 (UFCW Local 7 Decl.) ¶¶ 12–18; PX5010 (UFCW Local 324 Decl.) ¶¶ 14–15.

¹⁴⁰ PX5014 (UFCW Local 3000 Decl.) ¶¶ 13–15; PX5011 (UFCW Local 7 Decl.) ¶¶ 12–18; PX5010 (UFCW Local 324 Decl.) ¶ 15.

¹⁴¹ PX4138 (Clay (UFCW Local 555) Dep. 118:20-120:11); PX4014 (Dosenbach (Albertsons) IH 226:19–229:19); PX4015 (McPherson (Kroger) IH 277:13–278:21).

¹⁴² PX4014 (Dosenbach (Albertsons) IH 228:24-230:12).

¹⁴³ PX2151 (Albertsons) at 001; *see also* PX4014 (Dosenbach (Albertsons) IH 226:25-228:15).

¹⁴⁴ PX4042 (Dosenbach (Albertsons) Dep. 152:14-153:1).

¹⁴⁵ PX1154 (Kroger) at 001.

To counter the unions' strategy of playing them off one another, Kroger and Albertsons have attempted to align on their union negotiations¹⁴⁶ but their coordination is costly, imperfect, and often unsuccessful. For example, Kroger believes { [REDACTED] }
{ [REDACTED] }
{ [REDACTED] },¹⁴⁷ while Albertsons views Kroger's negotiating posture as { [REDACTED] }
{ [REDACTED] }¹⁴⁸
As a result, Albertsons { [REDACTED] }
{ [REDACTED] }¹⁴⁹ Respondents' frequent failure to reach alignment in bargaining, despite their best efforts, gives unions even greater negotiating leverage.

This misalignment is most evident in { [REDACTED] }
{ [REDACTED] } { [REDACTED] }
{ [REDACTED] }
{ [REDACTED] }
{ [REDACTED] }
{ [REDACTED] }¹⁵⁰ In effect, { [REDACTED] }
{ [REDACTED] }
Facing strike threats in contentious negotiations, { [REDACTED] }
{ [REDACTED] } { [REDACTED] } { [REDACTED] }¹⁵³
{ [REDACTED] }

¹⁴⁶ PX5010 (UFCW Local 324 Decl.) ¶ 14; PX5011 (UFCW Local 7 Decl.) ¶ 9.
¹⁴⁷ PX4015 (McPherson (Kroger) IH 222:9–21, 250:6–251:4); PX4113 (McPherson (Kroger) Dep. 146:20-147:23).
¹⁴⁸ PX4014 (Dosenbach (Albertsons) IH 197:25–198:2, 201:7–23).
¹⁴⁹ PX4014 (Dosenbach (Albertsons) IH 234:12–235:12).
¹⁵⁰ PX4014 (Dosenbach (Albertsons) IH 207:14–208:10); PX4015 (McPherson (Kroger) IH 173:19–176:3).
¹⁵¹ PX1040 (Kroger) at 002.
¹⁵² PX4015 (McPherson (Kroger) IH 275:3–14); *see also* PX2148 (Albertsons) at 001.
¹⁵³ PX4015 (McPherson (Kroger) IH 264:17–265:3).

[REDACTED]

[REDACTED] }¹⁵⁴

Negotiations in Southern California in Spring 2022 illustrate how misalignment between Kroger and Albertsons improved collective bargaining agreement (“CBA”) outcomes for union grocery workers. On the heels of whipsaw strike tactics in Portland and Denver, [REDACTED]

[REDACTED] }¹⁵⁵ At

first, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }¹⁵⁶ Ultimately, however,

[REDACTED]

[REDACTED] }¹⁵⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }¹⁵⁹

The acquisition provides Kroger and Albertsons with a perfect—and permanent—[REDACTED]

[REDACTED] }¹⁶⁰ being played off each other in labor negotiations. It will finally allow Kroger and

¹⁵⁴ PX4015 (McPherson (Kroger) IH 176:4–10); *see also* PX4113 (McPherson (Kroger) Dep. 149:5-149:14).

¹⁵⁵ PX4113 (McPherson (Kroger) Dep. 179:16-190:9); PX4015 (McPherson (Kroger) Dep. 263:22-265:3); PX4042 (Dosenbach (Albertsons) Dep. 159:13-162:17).

¹⁵⁶ PX1278 (Kroger) at 001.

¹⁵⁷ PX1282 (Kroger) at 003.

¹⁵⁸ PX1282 (Kroger) at 003-004.

¹⁵⁹ PX1282 (Kroger) at 003-004.

¹⁶⁰ PX1282 (Kroger) at 004.

Albertsons to achieve total alignment in all future labor negotiations, preventing unions from using whipsaw strike tactics in negotiations with the merged firm. Post-acquisition, Respondents will conduct union negotiations with fewer (or, in some geographies, no) union grocery competitors, and unions will have fewer (or no) union grocery employers in many geographic areas to leverage off one another during negotiations. There will be no need for Respondents to [REDACTED] because one would effectively already exist. With more leverage, the combined entity will be better able to successfully negotiate smaller wage increases, reduce benefits, or degrade working conditions to the detriment of hundreds of thousands of union grocery employees.¹⁶¹

Complaint Counsel meets its *prima facie* case by showing that this acquisition will eliminate head-to-head competition for shoppers and union grocery workers in markets across the country. *See* 15 U.S.C. § 18 (an acquisition is illegal where its “effect . . . may be substantially to lessen competition”); *Manufacturers Hanover*, 240 F. Supp. at 950; *see also infra* Section II (identifying Complaint Counsel’s relevant markets).

II. THE PROPOSED ACQUISITION IS PRESUMPTIVELY UNLAWFUL IN MULTIPLE HIGHLY CONCENTRATED MARKETS

Apart from showing a merger will eliminate head-to-head competition, the government also can meet its *prima facie* burden by showing that an acquisition will lead to undue concentration in a relevant market. *Polypore*, 149 F.T.C. at 850 (citing *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990)). Under Supreme Court precedent, “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to

¹⁶¹ *See generally* PX7013 (Ashenfelter Rpt.) ¶¶ 51-58.

lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363 (1963).

Courts typically use market shares and the Herfindahl-Hirschman Index (“HHI”) to determine whether a merger is presumptively illegal. A merger is presumptively anticompetitive if it increases a market’s HHI by more than 100 points and results in either (a) a post-merger market share greater than 30% or (b) a post-merger HHI exceeding 1,800. Merger Guidelines § 2.1; *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008) (HHIs).¹⁶²

The first step in assessing concentration is to define a relevant product and geographic market; specifically, to determine the “line of commerce” and “section of the country” where the relevant competition occurs. 15 U.S.C. § 18; *St. Alphonsus*, 778 F.3d at 783-84. Congress prescribed “a pragmatic, factual approach” to market definition because “the market, as most concepts in law or economics cannot be measured in metes and bounds.” *United States v. Anthem*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017) (cleaned up). In particular, the commercial realities reflecting competition between the merging parties can inform market definition. *See FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 124 (D.D.C. 2016); Merger Guidelines at § 4.3 (“Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.”).

¹⁶² The Supreme Court has also held that mergers are presumptively unlawful if they result in a single entity controlling a 30% market share. *See United States v. Phila Nat’l Bank*, 374 U.S. 321, 364 (1963); *see also IQVIA*, 2024 WL 81232, at *33.

A. This Acquisition Increases Concentration in Local Areas Near Supermarkets Across the Country

Today, Respondents currently compete in a product market for supermarkets in hundreds of local geographic areas around the country. The proposed merger would significantly increase concentration for supermarkets in these local areas, far exceeding the Supreme Court’s threshold for a presumption of illegality.

i. Supermarkets are a relevant product market

“The outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] 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). “[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.” *Sysco*, 113 F. Supp. 3d at 26 (cleaned up). As the Supreme Court has explained, within a broad market, “well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes.” *Brown Shoe*, 370 U.S. at 325.

There are two main methods to define a relevant product market. First, courts often evaluate “*Brown Shoe* factors,” which are “such practical indicia as industry or public recognition of the [relevant 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. Second, courts consider economic analysis regarding a product’s “reasonable interchangeability of use or the cross-elasticity of demand.” *Regeneron Pharms., Inc. v. Novartis Pharma AG*, 96 F.4th 327, 339 (2d Cir. 2024); *see also Sysco*, 113 F. Supp. 3d at 33-37.

Both the *Brown Shoe* factors and economic analysis show that supermarkets are a relevant product market. Supermarkets, including supercenters such as Walmart,¹⁶³ are retail stores that sell a wide variety and depth of goods ranging from food items like fresh produce, meat, seafood, dairy products, frozen foods, shelf-stable foods, and beverages, to household goods such as laundry detergent, medications, cleaning supplies, pet foods, and health and beauty care products.¹⁶⁴ The broad and deep assortment at supermarkets means that shoppers can purchase most of their household needs at supermarkets, with many size and brand options.¹⁶⁵ Kroger and Albertsons stores are supermarkets that offer this “unique combination of size, selection, depth and breadth of inventory” and services¹⁶⁶ which distinguishes them from other retailers such as natural and gourmet food stores, club stores, limited assortment stores, superettes, dollar stores, drug and convenience stores, and e-commerce stores. *See Staples I*, 970 F. Supp. at 1079.

Supermarkets satisfy the *Brown Shoe* factors even though individual goods available in supermarkets can be purchased at other retail stores. As the court explained in *California v. American Stores Co.*, 697 F. Supp. 1125, 1129 (C.D. Cal. 1988), simply because other outlets also sell groceries does not mean that “grocery shoppers seriously consider, for example, gasoline service stations or department stores as competing sources with supermarkets for their grocery needs.” *See also, e.g., Whole Foods*, 548 F.3d at 1040 (“The fact that a customer might

¹⁶³ Supercenters, like traditional supermarkets, “sell a full line of groceries, meat and produce, . . . as well as additional non-food, mass merchandise product not typically offered at a traditional supermarket.” PX7005 (Hill Rpt.) ¶ 37. As such, Supercenters like Target and Walmart are appropriately considered as a subset of the Supermarket product market. PX7005 (Hill Rpt.) ¶ 67, n.84.

¹⁶⁴ PX7005 (Hill Rpt.) ¶¶ 33, 35. *See, e.g.,* PX4081 (McMullen (Kroger) Dep. 24:4-11); PX4022 (Sankaran (Albertsons) IH 100:24-101:25); PX4022 (Sankaran (Albertsons) IH 123:18-124:17); *see also* DX0952 (C&S) at 243.

¹⁶⁵ PX4081 (McMullen (Kroger) Dep. 25:25-26:24).

¹⁶⁶ *See, e.g.,* PX2670 (Albertsons) at 017; PX4089 (Shores (Albertsons) Dep. 104:24-105:2); PX12380 (Albertsons) at 001; PX4059 (Sankaran (Albertsons) Dep. 108:12-109:16); PX6009 (Kroger) at 113; PX4011 (Lindholz (Kroger) IH 52:10-53:9).

buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market.”); *Sysco*, 113 F. Supp. 3d at 26 (“[F]ruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one’s groceries from a fruit stand is a reasonable substitute for buying from a grocery store.”). Here, supermarkets—as recognized by industry participants—have peculiar uses and characteristics, unique production facilities, and distinct customers and prices that other store formats do not offer.

For example, supermarkets uniquely provide customers with a broad one-stop shopping experience, a concept Kroger boasts of innovating and inspiring “Today’s Shopping Experience.”¹⁶⁷ An Albertsons executive explained that a one-stop shop is a { [REDACTED]

{ [REDACTED] }¹⁶⁸ The CEO of Albertsons, for instance, explained { [REDACTED]

{ [REDACTED] }¹⁶⁹ An executive at Raley’s—a regional supermarket in California—testified that its shoppers are looking for a { [REDACTED]

{ [REDACTED] }¹⁷⁰ He went on to explain that { [REDACTED]

{ [REDACTED] }¹⁷¹

Respondents’ executives concede that many shoppers { [REDACTED]

¹⁶⁷ PX6030 (Kroger) at 002.

¹⁶⁸ PX4039 (Kinney (Albertsons) Dep. 82:12-83:3).

¹⁶⁹ PX4022 (Sankaran (Albertsons) IH 110:6-111:4); *see also*, PX4022 (Sankaran (Albertsons) IH 123:6, 125:15).

¹⁷⁰ PX4083 (Knopf (Raley’s) Dep. 41:10-22).

¹⁷¹ PX4083 (Knopf (Raley’s) Dep. 103:22-104:16).

██████████¹⁷² For instance, an Albertsons executive asked her team: ██████████

██████████¹⁷³ Supermarkets fulfill their customers’ “one-stop shop” demand by offering both a *broad* range of product types and a *deep* selection within each product type, stocking private label products, national brands, organic products, and multiple package sizes, flavors, and options to suit any customer need.¹⁷⁴ Likewise, supermarkets often have a range of other services such as pharmacies, florists, fuel centers, butchers, and deli and seafood counters; many supermarkets also sell both their own private label brands as well as national brands like Coca-Cola.¹⁷⁵

Other store formats such as natural and gourmet food stores, club stores, limited assortment stores, dollar stores, drug and convenience stores, and e-commerce stores do not offer the same shopping experience.¹⁷⁶ *Staples I*, 970 F. Supp. at 1078 (finding “that office superstores are, in fact, very different in appearance, physical size, format, the number and variety of SKU’s offered, and the type of customers targeted and served than other sellers of office supplies”); *Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, 881 F. Supp. 860, 873 (W.D.N.Y. 1994) (“Department stores are distinguishable from other categories of vendors based on the types of products they sell, their prices, staffing policies . . .”).

¹⁷² PX4039 (Kinney (Albertsons) Dep. 81:24-82:10); PX1164 (Kroger) at 010; PX4063 (Adcock (Kroger) Dep. 286:9-16) ; PX4058 (Garnes (Kroger) Dep. 105:15-1); PX4043 (Kammeyer (Kroger) Dep. 43:13-21); PX4088 (Stewart (Kroger) Dep. 34:21-35:2); PX4071 (Yates (Ahold) Dep. 21:25-22:5); PX4031 (Van Helden (Stater Bros.) Dep. 39:11-23, 40:4-9).

¹⁷³ PX2932 (Albertsons) at 001.

¹⁷⁴ PX4063 (Adcock (Kroger) Dep. 286:9-24); PX4114 (Broderick (Albertsons) Dep. 178:23-179:5, 45:17-46:22); PX4075 (Kimball (Kroger) Dep. 50:23-51:5); PX4088 (Stewart (Kroger) Dep. 35:17-25, 40:11-41:8); PX4097 (Morris (Albertsons) Dep. 233:8-13); PX4031 (Van Helden (Stater Bros.) Dep. 14:17-24); PX4071 (Yates (Ahold) Dep. 58:1-18, 62:19-21, 69:21-25).

¹⁷⁵ PX4022 (Sankaran (Albertsons) IH 115:2-116:5); PX4081 (McMullen (Kroger) Dep. 35:15-41:1); PX4031 (Van Helden (Stater Bros.) IH 20:7-13); PX6030 (Kroger) at 001-002; PX4063 (Adcock (Kroger) Dep. 288:1-280:19); PX4097 (Morris (Albertsons) Dep. 123:4-124:6).

¹⁷⁶ PX7005 (Hill Rpt.) ¶¶ 38-52.

Club Stores. Club stores, such as Costco, allow customers to purchase grocery and other products in bulk.¹⁷⁷ But according to a senior executive at Costco, { [REDACTED] }¹⁷⁸

Club stores offer significantly fewer grocery SKUs than supermarkets, and mostly in large, club-sized packages rather than the variety of product packaging sizes that a supermarket carries.¹⁷⁹ Moreover, club stores offer a markedly different shopping experience than supermarkets, including in their enormous store sizes, membership fees requirements, large carts and no hand basket options, lack of comparable service counters, and shorter operating hours.¹⁸⁰ Club stores also have many fewer locations than supermarkets,¹⁸¹ meaning customers generally must travel longer distances to shop at one.¹⁸² For these reasons, shoppers typically visit club stores less often and may not do their standard grocery shopping there, but rather go for bulk { [REDACTED] }¹⁸³

Natural and Organic Stores. Premium natural and organic stores (*e.g.*, Whole Foods Market and Sprouts Farmers Market) focus on a different core customer from supermarkets. They also do not offer many of the familiar national branded products (*e.g.*, Tide, Coca-Cola, or Oreos) found in supermarkets.¹⁸⁴ Instead, Sprouts, for instance, focuses its strategy on marketing

¹⁷⁷ PX7005 (Hill Rpt.) ¶ 39.

¹⁷⁸ PX4096 (George (Costco) Dep. 34:24-35:7, 36:17-37:3); *see also* PX4135 (Grisham (Sam's Club) Dep. 14:17-15:1); PX5009 (Sam's Club Decl.) ¶¶ 4, 8; PX4062 (Leary (BJ's Wholesale Club) Dep. 195:23-196:9).

¹⁷⁹ PX5006 (Costco Decl.) ¶¶ 3, 5; PX5009 (Sam's Club Decl.) ¶¶ 8, 9; PX4135 (Grisham (Sam's Club) Dep. 71:20-72:11); PX4081 (McMullen (Kroger) Dep. 42:1-47:3); PX4031 (Van Helden (Stater Bros.) IH 18:12-19:6).

¹⁸⁰ PX4096 (George (Costco) Dep. 106:14-108:18); PX5006 (Costco Decl.) ¶¶ 3, 7; PX5009 (Sam's Club Decl.) ¶¶ 3, 5, 6, 11; PX4135 (Grisham (Sam's Club) Dep. 14:17-15:1); PX4062 (Leary (BJ's Wholesale) Dep. 41:23-42:10, 112:18-113:1, 128:22-131:5).

¹⁸¹ *See* Costco, *Warehouses by State*, <https://www.costco.com/WarehouseListByStateDisplayView> (last visited July 20, 2024); PX5006 (Costco Decl.) ¶ 2; PX5009 (Sam's Club Decl.) ¶ 2.

¹⁸² *See, e.g.*, PX5009 (Sam's Club Decl.) ¶ 10; *see also* PX4135 (Grisham (Sam's Club) Dep. 63:14-64:8).

¹⁸³ PX4096 (George (Costco) Dep. 105:6-15); *see also* PX4031 (Van Helden (Stater Bros.) IH 18:12-19:6); PX4110 (Van Helden (Stater Bros.) Dep. 193:13-195:18); PX12385 (Albertsons) at 005; PX4059 (Sankaran (Albertsons) Dep. 143:7-144:10); PX12392 (Albertsons) at 003.

¹⁸⁴ PX4120 (Neal (Sprouts) Dep. 110:13-112:10).

items that are { [REDACTED] } to cater to its core customers, who are

{ [REDACTED] }¹⁸⁵ Whole Foods upholds [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸⁶

Other natural and gourmet stores similarly offer a limited or targeted selection of products, making them poor substitutes for supermarkets.¹⁸⁷

Other Smaller Retailers. Supermarkets are also distinct from limited assortment stores (discount retailers like Aldi and Lidl that carry a limited selection of brands and products),¹⁸⁸ dollar stores (deep-discounters that primarily sell non-grocery items),¹⁸⁹ convenience stores (such as 7-Eleven),¹⁹⁰ and drug stores (such as Walgreens).¹⁹¹ Those retailers do not offer anywhere close to the depth or breadth of food and grocery products that supermarkets offer,¹⁹² nor do they offer staffed grocery services such as a butcher, seafood counter, in-store bakery, or

¹⁸⁵ PX4120 (Neal (Sprouts) Dep. 111:18-112:10); *see also* PX5003 (Sprouts Decl.) ¶ 5.

¹⁸⁶ PX4133 (Oblisk (Whole Foods) Dep. 94:12-96:10, 100:18-101:22).

¹⁸⁷ PX4091 (Cahan (Trader Joe's) Dep. 26:4-14, 101:13-102:10); PX4059 (Sankaran (Albertsons) Dep. 227:21-228:3); PX4143 (Huber (Natural Grocers) Dep. 114:1-14).

¹⁸⁸ PX4081 (McMullen (Kroger) Dep. 49:1-53:24); PX4059 (Sankaran (Albertsons) Dep. 227:21-228:3); PX4071 (Yates (Ahold) Dep. 122:20-123:14); PX12392 (Albertsons) at 003.

¹⁸⁹ PX3048 (Dollar Tree) at 014; PX7005 (Hill Rpt.) ¶ 44; PX4010 (Unkelbach (Dollar Tree) IH 28:4-18, 48:5-50:18); PX4027 (Snow (Dollar General) IH 40:23-44:5); PX4081 (McMullen (Kroger) Dep. 57:4-58:4); PX4071 (Yates (Ahold) Dep. 137:21-138:6).

¹⁹⁰ PX4071 (Yates (Ahold) Dep. 120:18-20); PX4055 (Larson (Albertsons) Dep. 65:16-25); PX4044 (Jabbar (Kroger) Dep. 63:19-22); PX4035 (Davidson (Albertsons) Dep. 129:5-13); PX4109 (Curry (Albertsons) Dep. 110:14-23); PX4043 (Kammeyer (Kroger) Dep. 129:4-11, 133:6-134:3).

¹⁹¹ PX4071 (Yates (Ahold) Dep. 120:15-22); PX4043 (Kammeyer (Kroger) Dep. 50:2-24, 136:20-22, 137:25-138:3); PX4104 (Kelley (Kroger) Dep. 59:6-60:2).

¹⁹² PX7005 (Hill Rpt.) ¶¶ 41-44.

floral department.¹⁹³ Because of their limited offerings, these stores do not offer the same one-stop shopping experience that supermarkets provide.¹⁹⁴

eCommerce. Finally, websites like Amazon.com that only sell groceries online without physical stores (the shipment format of “grocery e-commerce”)¹⁹⁵ provide a fundamentally different shopping experience than supermarkets. First, shoppers are unable to browse, view, or select specific items from a grocery e-commerce store in the same way they could select a particular cut of meat from a supermarket’s butcher counter or inspect a fresh peach for ripeness before purchasing it.¹⁹⁶ Second, when using grocery e-commerce, shoppers must wait anywhere from hours to weeks to receive their groceries, unlike the immediate convenience of walking into a supermarket and walking out with the products they need.¹⁹⁷ Third, grocery e-commerce stores typically have a more limited selection due to shipping limitations.¹⁹⁸ For example, it is difficult to ship fresh meat and produce long distances.¹⁹⁹ Finally, grocery e-commerce retailers often

¹⁹³ See, e.g., PX4081 (McMullen (Kroger) Dep. 48:23-25, 51:3-5, 51:16-25, 52:17-53:2); PX4090 (Unkelbach (Dollar Tree) Dep. 97:4-23); PX4055 (Larson (Albertsons) Dep. 58:4-12, 58:23-59:25, 66:2-10); PX4044 (Jabbar (Kroger) Dep. 65:17-66-3); PX4035 (Davidson (Albertsons) Dep. 129:15-23, 129:25-131:1); PX4043 (Kammeyer (Kroger) Dep. 132:10-134:3, 137:10-138:8); PX4109 (Curry (Albertsons) Dep. 111:11-25); PX4104 (Kelley (Kroger) Dep. 59:6-60:2); PX4137 (Sitter (Aldi) Dep. 31:6-16, 113:17-116:8); PX4063 (Adcock (Kroger) Dep. 162:4-7); PX7005 (Hill Report) ¶¶ 41-44, 50-52.

¹⁹⁴ PX4090 (Unkelbach (Dollar Tree) Dep. 118:15-20); PX4144 (Kerr (Lidl) Dep. 100:4-13); PX4031 (Van Helden (Stater Bros.) IH 39:11-42:10); PX4136 (Sitter (Aldi) Dep. 44:1-11, 85:14-89:2, 108:12-116:8, 126:10-130:4); PX4040 (Withers (Albertsons) Dep. 66-69, 74); PX4043, (Kammeyer (Kroger) Dep. 50:25-51:16).

¹⁹⁵ The grocery industry has three primary e-commerce formats: pickup (where shoppers can place orders and pick up at the bricks and mortar location), delivery (where shoppers order online and deliver—through either a grocery store’s own service or a third-party delivery service such as Instacart), and shipment (where shoppers order online groceries from a website without a brick and mortar business). PX7005 (Hill Rpt.) ¶¶ 46-49.

¹⁹⁶ PX4126 (Heyworth (Amazon) Dep. 116:17-20); PX4088 (Stewart (Kroger) Dep. 34:10-15); PX4031 (Van Helden (Stater Bros.) IH, 27:11-28:4); PX12392 (Albertsons) at 005.

¹⁹⁷ PX4126 (Heyworth (Amazon) Dep. 70:22-72:1); PX4141 (Lieberman (Walmart) Dep. 118:15-120:3).

¹⁹⁸ PX4126 (Heyworth (Amazon) Dep. 18:14-25, 102:17-103:5).

¹⁹⁹ PX4141 (Lieberman (Walmart) Dep. 26:19-27:3); PX4126 (Heyworth (Amazon) Dep. 18:14-26; 75:9-22).

charge additional service and delivery fees that increase the total cost of grocery orders to the consumer.²⁰⁰ As a result, grocery e-commerce retailers are a poor substitute for supermarkets.²⁰¹

Respondents' own executives and ordinary course documents discuss supermarkets separately from other store formats. For example, Albertsons routinely { [REDACTED] }²⁰² In a 2021 Annual Operating Plan, Albertsons categorized retailers into { [REDACTED] }²⁰³ See also *supra* Section I.A-B. Other industry participants or observers also view supermarkets as distinct grocery retailers. For example, market analysts such as Nielsen—a global leader in audience insights, data, and analytics—consider traditional supermarkets to be a separate trade channel.²⁰⁴ Similarly, an executive of Ahold's Food Lion supermarket banner acknowledged that { [REDACTED] }
 { [REDACTED] }
 { [REDACTED] }
 { [REDACTED] }²⁰⁵ Mark McGowan, former President of Ahold's Stop & Shop, also testified that { [REDACTED] }
 { [REDACTED] }
 { [REDACTED] }²⁰⁶ Likewise,

²⁰⁰ PX4016 (Groff (Kroger) IH at 69:24-70:21); PX4111 (Pollnow (DoorDash) Dep. 24:18-25:10); PX5012 (Instacart Decl.) ¶¶ 14-15; PX4031 (Van Helden (Stater Bros) IH 26:20-27:10).

²⁰¹ PX4031 (Van Helden (Stater Bros.) IH 27:6-28:4); PX4071 (Yates (Ahold) Dep. 251:10-253:4); PX4024 (McMullen (Kroger) IH 71:17-72:8); PX2272 (Albertsons) at 005; PX0008 (Albertsons) at 080; PX1227 (Kroger) at 031; PX4120 (Neal (Sprouts) Dep. 106:9-107:3, 177:2-9); PX4141 Lieberman (Walmart) Dep. 109:12-111: 14, 113:11-21, 115:19-116:5).

²⁰² See, e.g., PX12450 (Albertsons) at 001.

²⁰³ PX2003 (Albertsons) at 081.

²⁰⁴ PX6166 at 001; PX12002 (Albertsons) at 114, 120.

²⁰⁵ PX4071 (Yates (Ahold) Dep. 109:25-110:20); see also PX4031 (Van Helden (Stater Bros.) Dep. 13:13-20); PX4081 (Knopf (Raley's) Dep. 25:3-26:15, 179:6-180:2).

²⁰⁶ PX4050 (McGowan (C&S) Dep. 45:21-46:5, 158:20-22); PX4071 (Yates (Ahold) Dep. 14:22-25).

other store formats distinguish supermarkets. For example, BJ’s Wholesale Club { [REDACTED] }
 [REDACTED]
 [REDACTED]
 [REDACTED] }²⁰⁷

Compared to other types of food retailers, supermarkets also offer a unique store layout— for instance, supermarkets require a large footprint to shelve the number of SKUs that they offer as well as the various staffed departments such as deli, seafood, or bakery. Ahold’s Food Lion supermarket banner offers an average floor space of approximately { [REDACTED] };²⁰⁸ the typical Albertsons store is between { [REDACTED] } for smaller stores and { [REDACTED] } for larger stores;²⁰⁹ similarly, Kroger’s QFC stores are { [REDACTED] }, and its Fred Meyer stores devote { [REDACTED] } to grocery.²¹⁰ Other store formats such as convenience stores, dollar stores, limited assortment stores, and natural and gourmet stores typically have smaller physical footprints,²¹¹ while club stores have a *much* larger footprint to accommodate their bulk pack sizes and assortment of nonfood items like appliances, furniture, and apparel.²¹²

Apart from store footprint, supermarkets also differ from other food retail formats in customer experience.²¹³ For example, Costco displays many products on pallets, has large carts to accommodate bulk pack sizes, and its stores have a more “warehouse” look and feel compared

²⁰⁷ PX4062 (Leary (BJ’s Wholesale Club) Dep. 73:25-74:13); *see also* PX4120 (Neal (Sprouts) Dep. 124:16-125:7).

²⁰⁸ PX4071 (Yates (Ahold) Dep. 21:10-13).

²⁰⁹ PX4065 (Colgrove (Albertsons) 247:20-24); PX4097 (Morris (Albertsons) 137:8-138:13).

²¹⁰ PX4063 (Adcock (Kroger) Dep. 260:13-261:6).

²¹¹ PX7005 (Hill Rpt.) ¶ 30, Fig. 3.

²¹² PX4081 (McMullen (Kroger) Dep. 42:1-47:3); PX4062 (Leary (BJ’s Wholesale) Dep. 129:22-131:4); PX7005 (Hill Rpt.)

²¹³ *See, e.g.*, PX4055 (Larson (Albertsons) Dep. 81:24-82:1; 121:8; 122:2-3).

to supermarkets.²¹⁴ Convenience stores, dollar stores, and drug stores have fewer (or no) staffed checkout lanes and devote a smaller proportion of their footprint to fresh produce compared to supermarkets.²¹⁵ And, of course, pure e-commerce operators have no physical location at all.²¹⁶ *See Staples I*, 970 F. Supp. at 1075-80 (noting that when applying *Brown Shoe* factors courts analyze the physical appearance of retail stores, for example, “the location of checkout counters, the manner in which goods are displayed, and so on”).

Finally, supermarkets price differently than other formats. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }²¹⁷ Consumers looking for coupons, sales, and other promotional activities can find that shopping experience at supermarkets but not other formats.²¹⁸

Supermarkets also price check each other and strive to match or beat one another’s promotions.

For instance, { [REDACTED]

[REDACTED] }²¹⁹

See also supra Section I.A.

Other retail formats have distinct price points and strategies, and do not systematically target price parity with supermarkets. Club stores’ prices, on a per-unit basis, are often

²¹⁴ PX4071 (Yates (Ahold) Dep. 126:18-127:9); PX4096 (George (Costco) Dep. 107:24-108:10); PX4062 (Leary (BJ’s Wholesale) Dep. 129:22-131:4); PX5006 (Costco Decl.) ¶ 3.

²¹⁵ PX4116 (Snow (Dollar General) Dep. 98:4-10); PX4010 (Unkelback (Dollar Tree) IH 94:25-95:2); PX4027 (Snow (Dollar General) IH 25:3-6); PX4090 (Unkelback (Dollar Tree) Dep. 98:12-21); PX4055 (Larson (Albertsons) Dep. 58:4-12); PX4035 (Davidson (Albertsons) Dep. 110:13-21, 129:15-23); PX4063 (Adcock (Kroger) Dep. 162:4-7).

²¹⁶ PX4126 (Heyworth (Amazon) Dep. 95:3-5).

²¹⁷ *Compare, e.g.*, PX4136 (Sitter (Aldi) Dep. 119:18-121:1); PX4144 (Kerr (Lidl) Dep. 133:12-18; 145:16-146:16); PX4091 (Cahan (Trader Joe’s) Dep. 99:23-100:19); PX4090 (Unkelbach (Dollar Tree) Dep. 82:25-83:9) *with* PX4083 (Knopf (Raley’s) Dep. 179:6-180:2); PX4088 (Stewart (Albertsons) Dep. 77:17-78:22); PX4068 (DeBoer (Albertsons) Dep. 125:15-126:12, 166:15-22).

²¹⁸ *See, e.g.*, PX4080 (Albi (Kroger) Dep. 189:23-190:14); PX4045 (Marx (Kroger) Dep. 119:15-120:5). *Compare, e.g.*, PX4083 (Knopf (Raley’s) Dep. 180:3-182:13) *with* PX4120 (Neal (Sprouts) Dep. 123:4-125:7).

²¹⁹ PX4071 (Yates (Ahold) Dep. 143:5-145:7, 146:14-24, 147:8-148:20).

significantly lower than traditional supermarkets' pricing.²²⁰ As a result, { [REDACTED]

[REDACTED]

[REDACTED] }²²¹

By contrast, retailers in the premium and natural channel, such as Whole Foods, are often priced higher than supermarkets.²²² Kroger { [REDACTED]

[REDACTED]

[REDACTED] }²²³ Dollar stores, as their name suggests, have

consistently low price points throughout the store, and offer much smaller pack sizes that can be sold at such ultra-low prices.²²⁴ Finally, limited assortment retailers often target a lower price point than do supermarkets, which is possible because of their no-frills shopping experience (for instance, Aldi has no staffed service counters and requires customers to return their own shopping carts to recoup a refundable cart deposit) and because private label products predominate in limited assortment stores.²²⁵

Taken together, an analysis of the *Brown Shoe* factors shows key differences between supermarkets and other store formats and indicates shoppers do not view other store formats as reasonably interchangeable with supermarkets. As in previous cases, witness testimony, ordinary course documents, and quantitative analysis—as shown in Dr. Hill's analysis discussed below—all support that the “line of commerce” to assess the competitive effects of this

²²⁰ PX4135 (Grisham (Sam's Club) Dep. 46:7-16).

²²¹ PX4135 (Grisham (Sam's Club) Dep. 46:7-16); PX5006 (Costco Decl.) ¶ 11.

²²² PX4058 (Garnes (Kroger) Dep. 92:24-93:8); *see also* PX4046 (Meyer (Kroger) Dep. 150:20-151:8); PX4026 (Broderick (Albertsons) IH 122:9-12).

²²³ PX4046 (Meyer (Kroger) Dep. 150:20-151:8); PX4026 (Broderick (Albertsons) IH 121:20-112:12).

²²⁴ PX4116 (Snow (Dollar General) Dep. 94:18-95:1); PX4010 (Unkelbach (Dollar Tree) IH 23:6-13, 83:13-22).

²²⁵ PX4136 (Sitter (Aldi) Dep. 37:13-38:8); *see also* PX4091 (Cahan (Trader Joe's) Dep. 54:5-17); PX4140 (Perkins (Albertsons) Dep. 107:25-108:3, 109:9-25); PX12392 at 003.

acquisition is supermarkets. *See California v. American Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) (assessing the impact of predatory price actions in the “supermarket” product market); *Tops Mkt. v. Quality Mkts.*, 142 F.3d 90 (2d Cir. 1998) (stipulating to relevant product market “consist[ing] of the retail sale by ‘supermarkets’ of predominantly food items together with general household merchandise.”).

ii. Local areas around respondents’ stores are relevant geographic markets

The next step in defining an antitrust market is to determine the geographic market. “The relevant geographic market is the area of effective competition where buyers can turn for alternative sources of supply.” *St. Alphonsus*, 778 F.3d at 784 (cleaned up). According to Respondents’ own antitrust economic consultants, the distance customers must “physically” travel is important in defining a relevant market.²²⁶ Kroger’s CEO and Chairman testified that its customers shop { [REDACTED]

[REDACTED] }²²⁷ Albertsons’ CEO similarly testified that different

[REDACTED] }²²⁸ Another Albertsons executive testified that { [REDACTED]

²²⁶ PX10007 (Compass Lexecon) at 004; *see also id.* at 003; Israel Rpt. ¶ 62.

²²⁷ PX4024 (McMullen (Kroger) IH 12:2-13).

²²⁸ PX4022 (Sankaran (Albertsons) IH 137:11-16, 68:10-14); *see also* PX4017, (Silva (Albertsons) IH 77:14-20, 169:4-6); PX4069 (Humayun (Albertsons) Dep. 182:10-183:3); PX4031 (Van Helden (Stater Bros.) IH 40:25-41:3).

iii. *Economic analysis confirms that supermarkets in local areas are antitrust markets*

Courts have endorsed the Hypothetical Monopolist Test (“HMT”) as one tool plaintiffs can use to define an antitrust market. *See FTC v. Advocate Health Care Network*, 841 F.3d 460, 468-69 (7th Cir. 2016); *see also Sysco*, 113 F. Supp. 3d at 33; Merger Guidelines at § 4.3. The HMT is a method that economists often use to determine which products and geographies are close enough substitutes to be included in a market.²³⁵ Put simply, the HMT asks whether a “monopolist of the specified products in the specified geography would raise prices, lower quality, or take other actions to make consumers worse off compared to current conditions.”²³⁶ If, for example, a hypothetical monopolist of all supermarkets in the local area around one of Respondents’ stores could impose a small but significant price increase without losing enough sales to make the price increase unprofitable, then that product and geographic market “passes” the HMT, meaning it is a properly defined antitrust market that does not exclude important competitive substitutes.

Supermarkets in local areas easily satisfy the HMT. To conduct the HMT in this case, the FTC’s expert Dr. Hill first identified “candidate markets” consisting of a party store and the surrounding area. Dr. Hill then implemented the HMT by conducting a critical loss analysis, a common tool in market definition. Critical loss analysis asks whether a hypothetical monopolist that raised prices would lose so many customers to stores outside the candidate market (either product or geographic) that the price increase would become unprofitable. If customer substitution outside of the candidate market is small enough that the price increase would be profitable for the hypothetical monopolist, then the candidate market “passes” the HMT,

²³⁵ Merger Guidelines § 4.3.

²³⁶ PX7005 (Hill Rpt.) ¶ 65; *see also* Merger Guidelines at § 4.3.

meaning it is a properly defined antitrust market. Relying on (i) sales data provided by Albertsons, Kroger, and third parties, (ii) party loyalty data, and (iii) Census data, Dr. Hill found that 2,062 supermarket candidate markets pass the HMT, and thus are properly defined antitrust markets.²³⁷

iv. The acquisition presumptively increases concentration in the relevant supermarket local areas

Having defined a relevant product and geographic market, the next step is to determine whether the proposed acquisition would increase market concentration to a presumptively unlawful level. *St. Alphonsus*, 778 F.3d at 785. A *prima facie* case can be established by showing that the combined firm will have a high market share. *Id.* Courts typically look at the HHIs when calculating market concentration. *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014). The HHI for a market is calculated by taking “the sum of the squares of the market shares.” Merger Guidelines at § 2.1. The HHI is small when there are many small firms in the market and grows larger the more concentrated the market becomes. Merger Guidelines at § 2.1. Markets with an HHI greater than 1,800 are considered “highly concentrated.” Merger Guidelines at § 2.1.

The Merger Guidelines explain that an acquisition is presumptively unlawful when the increase in HHI from the merger is greater than 100 and results in either (a) a post-merger market share greater than 30% or (b) a post-merger HHI exceeding 1,800. Merger Guidelines at § 2.1; *Phila. Nat’l Bank*, 374 U.S. at 364. These presumption thresholds, which mirror those in the 1992 Merger Guidelines, have previously been adopted and endorsed by numerous courts. *See, e.g., Heinz*, 246 F.3d at 716; *Chi. Bridge & Iron*, 534 F.3d at 431 (“Where the post-merger HHI exceeds 1,800, and the merger produces an increase in the HHI of more than 100 points, the

²³⁷ PX7005 (Hill Rpt.) ¶ 141 and Fig. 29.

merger guidelines create a presumption of adverse competitive consequences.”); *IQVIA*, 2024 WL 81232, at *33 (discussing market share presumption).

Here, Dr. Hill found that 1,928 supermarket markets meet the presumption under the Merger Guidelines.²³⁸ Importantly, the presumptively illegal nature of Respondents’ proposed acquisition is not sensitive to the supermarket product market. Dr. Hill also defined and calculated market shares for a second broader, and more conservative, product market—“large format stores”—which includes the sale of food and groceries in traditional supermarkets and supercenters *as well as* in club stores, natural and gourmet food stores, and limited assortment stores.²³⁹ The large format store market is conservative in Respondents’ favor because it includes a much broader range of store formats that—as discussed *supra*—may not be reasonable substitutes for supermarkets. Yet even using this more conservative assumption, Dr. Hill found that the acquisition is presumptively unlawful in 1,785 large format store markets under the Merger Guidelines thresholds.²⁴⁰ In other words, *even* if Respondents are right that the appropriate product market here must include all large format stores, Dr. Hill’s analysis shows the merger is still presumptively illegal in many hundreds, if not thousands, of markets. Notably, a finding of harm in any one of these markets would be sufficient for Complaint Counsel to meet its *prima facie* burden. *Anthem*, 236 F. Supp. 3d at 254 (“The Court concludes that the merger is likely to lessen competition substantially in Richmond, Virginia at least, and it does not reach any of the other markets.”).

²³⁸ PX7005 (Hill Rpt.) ¶ 351 and Fig. 78. Under the prior 2010 Horizontal Merger Guidelines, a merger was presumed to be anticompetitive if it increased HHI by 200 and resulted in a post-merger HHI above 2,500. U.S. Dep’t of Justice & Fed. Trade Com’n, 2010 Horizontal Merger Guidelines at §5.3 (2010). Dr. Hill also assessed market concentration under the 2010 Horizontal Merger Guidelines and found that 1,574 supermarket markets satisfy the structural presumption under that standard. PX7007 (Hill Reply Rpt.) at Fig. 43.

²³⁹ The large format store market includes the sale of food and groceries in traditional supermarkets, supercenters, club stores, natural and gourmet food stores, and limited assortment stores. PX7005 (Hill Rpt.) at ¶ 67.

²⁴⁰ PX7007 (Hill Reply Rpt.) at Fig. 10. Dr. Hill also found that the proposed acquisition is presumptively unlawful in 911 large format store markets under the 2010 Merger Guidelines thresholds. *Id.*

B. This Acquisition Increases Concentration in the Market for Union Grocery Labor in CBA Areas

The unions explain the real-world impact that competition between Kroger and Albertsons has on their ability to secure wage increases, favorable working conditions, and better benefits for their members. *See supra* Section I.D. The elimination of this competition will hurt unions’ ability to bargain for union grocery workers, illustrating that “union grocery workers” is a line of commerce impacted by this merger. A market need not be defined with the “precision of a NASA scientist.” *Sysco*, 113 F. Supp. 3d at 54. Instead, the defined market must be consistent with “business realities.” *FTC v. Tronox, Ltd.*, 332 F. Supp. 3d 187, 212 (D.D.C. 2018). An analysis of the *Brown Shoe* factors and the market realities support a finding that union grocery labor in CBA areas is a relevant antitrust market.

i. Union grocery labor is a relevant labor market

Union grocery labor is a relevant labor market, because—from the perspective of union grocery workers and their unions—union grocery employers are not reasonably interchangeable with non-union or non-grocery employers. *See Brown Shoe*, 370 U.S. at 325; *FTC v. Warner Comm’ns Inc.*, 742 F.2d 1156, 1163 (9th Cir. 1984) (a relevant market “is determined by examining the reasonable interchangeability” of it “and substitutes”). Specifically, an analysis of the *Brown Shoe* practical indicia shows that union grocery labor has “peculiar uses,” “industry recognition,” and “distinct pricing.” *Brown Shoe*, 370 U.S. at 325. For union grocery workers, grocery work at union employers has unique benefits that cannot be found elsewhere. Many union grocery workers—particularly those for whom benefits have accrued—would not switch to a non-union employer, because they would lose the valuable union benefits and job protections that have been negotiated in their CBA.²⁴¹ Union grocery workers value the

²⁴¹ *See* PX4014 (Dosenbach (Albertsons) IH 135:1-20); PX4015 (McPherson (Kroger) IH 139:8-140:16).

healthcare and pension benefits and other job protections provided by the CBAs, including paid vacation time and sick leave, overtime pay, safer working conditions, more prescribed schedules, guaranteed hours, and better protections against discriminatory practices.²⁴² For this reason, turnover for union grocery workers decreases significantly after workers accrue these benefits.²⁴³ When a union grocery worker leaves their union job for a non-union employer, they lose all these bargained-for advantages.²⁴⁴ Respondents recognize the distinctions between union and non-union grocery jobs, as shown through { [REDACTED] }²⁴⁵

Union jobs in other industries are also poor substitutes for union grocery jobs. First, union grocery workers tend to be more highly compensated than union jobs outside the grocery industry. Other unionized industries, such as the retail, healthcare, or restaurant sectors, do not offer comparable wages or benefits, so from a worker's perspective, they are unlikely to be close substitutes for grocery jobs.²⁴⁶ Second, many roles in a grocery store require different skills and experiences than other jobs outside the grocery industry. For example, meatcutters employed in a Kroger or Albertsons store require a multi-year apprenticeship with training programs covering topics such as knife and equipment skills, food safety and handling, customer service, and preparing specialty cuts of meat.²⁴⁷ By contrast, working at a meatpacking plant, for instance, is a very different work environment, requires different skills, and often pays less.²⁴⁸ As a result,

²⁴² PX5010 (UFCW Local 324 Decl.) ¶¶ 2-3; PX5014 (UFCW Local 3000 Decl.) ¶¶ 2-3.

²⁴³ PX4014 (Dosenbach (Albertsons) IH 82:3-22, 83:2-21); PX4015 (McPherson (Kroger) IH 67:14-24); PX5010 (UFCW Local 324 Decl.) ¶ 3; PX5014 (UFCW Local 3000 Decl.) ¶ 3; PX5011 (UFCW Local 7 Decl.) ¶ 5.

²⁴⁴ PX4015 (McPherson (Kroger) IH 93:24-95:8); PX5010 (UFCW Local 324 Decl.) ¶ 3; PX5014 (UFCW Local 3000 Decl.) ¶ 3; PX5011 (UFCW Local 7 Decl.) ¶ 5.

²⁴⁵ PX4015 (McPherson (Kroger) IH 87:17-23, 89:24-90:21); PX4014 (Dosenbach (Albertsons) IH 43:1-17).

²⁴⁶ PX5014 (UFCW Local 3000 Decl.) ¶¶ 3, 6.

²⁴⁷ PX5010 (UFCW Local 324 Decl.) ¶ 5; PX5014 (UFCW Local 3000 Decl.) ¶ 6; PX5011 (UFCW Local 7 Decl.) ¶ 8; PX4014 (Dosenbach (Albertsons) IH 60:5-15, 61:2-62:17); PX4015 (McPherson (Kroger) IH 46:18-47:4).

²⁴⁸ PX5010 (UFCW Local 324 Decl.) ¶ 5; PX5014 (UFCW Local 3000 Decl.) ¶ 6; PX5011 (UFCW Local 7 Decl.) ¶ 8.

many grocery workers would not be able to easily substitute to another job outside of a grocery store without a different skillset and experience in another industry. That employment in alternative industries may be acceptable to some workers in some circumstances does not render the importance of union grocery worker preferences irrelevant. *See Todd v. Exxon Corp.*, 275 F.3d 191, 204 (2d Cir. 2001) (finding a plausible antitrust labor market for certain employees in the oil and petrochemical industry notwithstanding the possibility of constraints imposed by available employment in alternative industries). This is particularly true in the context of the harm alleged here—a reduced ability to negotiate as a collective bargaining unit. In the event of a strike, it is not just one or two workers who will need to find another job or more hours—it is the entire unionized workforce.

ii. CBA areas are relevant geographic markets

Each CBA covers a defined geographic area.²⁴⁹ The negotiated wages, benefits, and working conditions cover all the union grocery workers at stores within the defined area of the CBA. Any changes in wages or benefits during negotiations will impact all union workers at stores covered by the CBA.²⁵⁰ Respondents recognize that {

{

{

}²⁵² Thus, the geographic areas covered by each CBA are relevant geographic markets illuminating the

²⁴⁹ *See, e.g.*, PX4074 (Zinder (UFCW Local 324) Dep. 186:19-21); PX4134 (Frazier (UFCW Local 1564) Dep. 15:23-16:6); PX1381 (Kroger); PX2252 (Albertsons) at 084-085 (describing geographic scope of CBA around Southern California); PX2257 (Albertsons) at 006 (describing geographic scope of CBA around Spokane, Washington).

²⁵⁰ PX4112 (Cordova (UFCW Local 7) Dep. 189:2-191:9); *see also* PX4074 (Zinder (UFCW Local 324) Dep. 185:25-186:21).

²⁵¹ PX2148 (Albertsons) at 004; PX12686 (Albertsons) at 003.

²⁵² PX2148 (Albertsons) at 004; PX12686 (Albertsons) at 003.

competitive effects of this proposed acquisition. *See* Merger Guidelines § 4.3.D.8 (“geographic market definition may involve assessing whether workers may be targeted for less favorable wages or other terms of employment according to factors such as . . . work locations”).

iii. This acquisition is presumptively unlawful because it significantly increases concentration for union grocery labor in many CBA areas

The acquisition would create a dominant employer of union grocery workers in many geographic areas where Respondents compete for workers and negotiate with unions. Dr. Hill calculated market shares in four states where Respondents have overlapping CBA areas: Oregon, Washington, California, and Colorado. These calculations show that Respondents’ combined market shares, market concentration, and increases in concentration easily surpass the levels that create a presumption of illegality. In overlapping Colorado CBA areas, there are no other union grocery employers at all, making the acquisition a merger-to-monopoly.²⁵³ In Southern California, Dr. Hill calculates a combined worker share of nearly 75%.²⁵⁴ In the overlapping CBA areas of UFCW Local 555, covering parts of Oregon and Washington, Dr. Hill shows that the merged firm would employ over 70% of union grocery workers.²⁵⁵ And in each of the overlapping CBA areas of UFCW Local 3000 in Washington, Dr. Hill finds that the acquisition would give Respondents a combined worker share of more than 75%.²⁵⁶ No court has allowed an acquisition to proceed with market shares of this magnitude.

Complaint Counsel carries its *prima facie* burden both by showing the acquisition will eliminate significant head-to-head competition between Kroger and Albertsons (*see supra*

²⁵³ PX7005 (Hill Rpt.) at Fig. 59.

²⁵⁴ PX7005 (Hill Rpt.) at Fig. 60.

²⁵⁵ PX7005 (Hill Rpt.) at Fig. 61.

²⁵⁶ PX7005 (Hill Rpt.) at Fig. 62.

Section I) and by meeting the structural presumption under both the 2010 Horizontal Merger Guidelines and the 2023 Horizontal Merger Guidelines.

III. DIVESTITURE WILL NOT PREVENT A SUBSTANTIAL LESSENING OF COMPETITION

Recognizing that the proposed acquisition would be unlawful, Respondents propose a “fix” via a \$2.9 billion divestiture of 579 stores to C&S. As recently as 2021, C&S—a grocery wholesaler—had virtually no retail grocery business and stated in its financial reports that { [REDACTED]

[REDACTED] }²⁵⁷ Through the proposed divestiture, C&S would grow its retail footprint nearly 18-fold overnight.

Divesting individual assets to a grocery wholesaler with limited experience operating retail supermarkets fails to mitigate the anticompetitive effects of the proposed acquisition. A respondent attempting to rebut the FTC’s *prima facie* case by proposing a divestiture bears the burden of establishing that the divestiture would “sufficiently *mitigate* the merger’s effect such that it [i]s no longer likely to *substantially* lessen competition.” *Illumina*, 88 F.4th at 1059 (emphasis in original); *see also Sysco*, 113 F. Supp. 3d at 72 (holding divestiture must “restore competition” and “replac[e] the *competitive intensity* lost as a result of the merger”) (internal quotation marks omitted). To satisfy that burden, a respondent must show that the effect of the proposed divestiture will occur reasonably promptly. *See id.* at 73-74 (rejecting proposed divestiture projected to be uncompetitive for at least five years).

Respondents cannot satisfy their burden. Their proposed divestiture does not even attempt to remedy the loss to competition in *hundreds* of markets that serve millions of

²⁵⁷ PX3077 (C&S) at 036-037; *see also* PX3948 (C&S) at 011 (C&S’s 2023 Annual Report states that “[f]rom time to time, we may acquire retail store locations in connection with strategic transactions to maintain or expand our grocery wholesaling and distribution business.”).

consumers, which is sufficient alone to doom Respondents' divestiture defense. In other markets, C&S will be acquiring a Frankenstein's monster of former Kroger and Albertsons stores that will be dependent on Respondents for critical products and services for years and will require C&S to invest { [REDACTED] }—on top of the purchase price—to succeed. Indeed, C&S's own financial model projects { [REDACTED] }²⁵⁸ In short, there are major execution risks associated with Respondents' proposed divestiture, and the American public would bear the costs of any failure.

A. The Divestiture Fails to Mitigate a Substantial Lessening of Competition for Retail Supermarkets

The proposed divestiture will be unable to mitigate the anticompetitive effects of the acquisition for four fundamental reasons. First, it fails to address hundreds of markets where the acquisition will harm consumers and workers. Second, C&S is a wholesaler with limited (and unsuccessful) retail grocery experience and will face multiple significant obstacles to becoming a successful competitor. Third, both the size of this expansion as well as C&S's past failures in other acquisitions show success here is unlikely. Finally, C&S is not receiving from Respondents the assets it needs to restore the lost competition.

i. The Divestiture Leaves Hundreds of Local Markets Unremedied

The proposed divestiture fails at the outset because it ignores hundreds of affected markets that serve millions of consumers. Even assuming a *perfectly* successful divestiture,²⁵⁹ Dr. Hill identifies more than 1,000 supermarket markets (totaling \$37 billion in sales) in which

²⁵⁸ PX 3602 (C&S) at tab "Model;" PX4072 (Florenz (C&S) Dep. 28:19-24, 41:19-25, 49:12-20).

²⁵⁹ That is, assuming that each and every store divested to C&S not only remains open, but also (contrary to C&S's projections) maintains its pre-divestiture sales levels.

the acquisition is presumptively unlawful.²⁶⁰ *See* Merger Guidelines § 2.1; *see also Phila. Nat'l Bank*, 374 U.S. at 364. By failing to address more than a thousand markets affected by the acquisition, Respondents cannot satisfy their burden of showing that the remedy “sufficiently *mitigate[s]* the merger’s effect such that it [i]s no longer likely to *substantially* lessen competition.” *Illumina*, 88 F.4th at 1059.

Moreover, even if Respondents’ flawed arguments about the supermarket market definition are correct—and the relevant product market includes traditional supermarkets, supercenters, club stores, natural and gourmet food stores, and limited assortment stores—the proposed acquisition is still presumptively illegal in 550 large format store markets (totaling \$23 billion in sales).²⁶¹ A finding of anticompetitive harm in just one market “provides an independent basis for the injunction, even absent a finding of anticompetitive harm in [another relevant] market.” *United States v. Anthem, Inc.*, 855 F.3d at 345, 368 (D.C. Cir. 2017); *see also Illumina*, 88 F.4th at 1059; *Sysco*, 113 F. Supp. 3d at 72; *Whole Foods*, 548 F.3d at 1041 (FTC showed a likelihood of success in 18 markets). Because the divestiture, even if successful, fails to mitigate competitive harm in many hundreds of markets throughout the country—much less just one—it fails at this critical first step, and must be rejected on this basis alone.

ii. C&S Cannot Match the Divested Assets’ Current Performance

The divestiture proposal is also rife with execution risks. Unlike a divestiture of an entire existing business—which would be more likely to preserve competition because the purchaser will have everything it needs to compete, *see United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017)—the proposed divestiture to C&S is a random assortment of stores that lack

²⁶⁰ PX7007 (Hill Rebuttal Rpt.) at Appendix E, Figs. 43-44.

²⁶¹ PX7007 (Hill Rebuttal Rpt.) at Figs. 10-11. Moreover, in 334 supermarket markets and 234 large format store markets, Dr. Hill found that the acquisition not only is presumptively unlawful, but also is likely to substantially reduce competition based on CMCR analysis. *Id.* at Figs. 13 and 46.

substantial components of a successful retail grocery business. To operate these disparate assets, C&S must obtain the resources and support it needs at significant expense over several years,²⁶² and therefore is more likely to fail to result in an effective competitor. *See id.* (“[D]ivestiture of some lesser set of assets might be appropriate when the purchaser already has, or could *easily* attain, the other capabilities needed to compete effectively.”) (citation omitted) (emphasis added).

As this Court has already recognized, the composition of the divestiture was determined by antitrust lawyers as a matter of litigation strategy.²⁶³ The 413 stores included in the initial divestiture agreement executed on September 8, 2023, were selected { [REDACTED] }²⁶⁴ The composition of the current proposed divestiture was similarly steered by counsel based on litigation, not business, considerations.²⁶⁵

Critically, the proposed divestiture does not include any entire existing divisions of either Kroger or Albertsons, nor all the corporate shared services and distribution centers currently supporting the included stores.²⁶⁶ Instead, the stores come from multiple divisions of both Kroger and Albertsons,²⁶⁷ currently bear 16 different banners (with different store formats and product assortments),²⁶⁸ and are not all { [REDACTED] }²⁶⁹ In addition, C&S does not have, and will not receive, assets sufficient to operate a successful modern grocery chain, including:

²⁶² PX7003 (Fox Rpt.) ¶¶ 25-32.

²⁶³ Order Denying Renewed Mot. to Compel (June 11, 2024).

²⁶⁴ PX4030 (Winn (C&S) IH 278:4-6); PX4029 (Millerchip (Kroger) IH at 38:3-39:6, 41:18-42:7).

²⁶⁵ Respondent’s Opp. to Renewed Mot. to Compel (June 5, 2024) at 2; Order Denying Renewed Mot. to Compel (June 11, 2024) at 4-5; PX4060 (Winn (C&S) Dep. 215:25-216:14).

²⁶⁶ PX4060 (Winn (C&S) Dep. 165:24-167:5, 168:15-168:24); PX4050 (McGowan (C&S) Dep. 84:9-17, 105:5-108:4).

²⁶⁷ PX7005 (Hill Rpt.) ¶¶ 221-223; PX1641 (Kroger).

²⁶⁸ PX1641 (Kroger); PX7005 (Hill Rpt.) ¶¶ 221-23.

²⁶⁹ PX7003 (Fox Rpt.) Fig. 35.

- [REDACTED] }²⁷⁰
- [REDACTED] }²⁷¹
- [REDACTED] } (other than one dairy plant);
- [REDACTED] }²⁷³
- [REDACTED] }²⁷⁴
- [REDACTED] }²⁷⁵ and
- [REDACTED] }²⁷⁶

Respondents' own expert, Mr. Galante, opines that [REDACTED]

[REDACTED]

[REDACTED] }²⁷⁷

That opinion all but concedes that the proposed divestiture is not a standalone business at all, but rather requires significant transition support from Respondents and a [REDACTED] build-out of retail infrastructure by C&S. Indeed, C&S's CEO admits that C&S is not [REDACTED]

[REDACTED] }²⁷⁸

Two aspects of this deal are particularly problematic: the need to rebanner a significant portion of the divested stores and the limited private label assets included in the deal. Banners

²⁷⁰ PX7003 (Fox Rpt.) ¶ 63, Fig. 14.

²⁷¹ PX7003 (Fox Rpt.) ¶¶ 75-120.

²⁷² PX7003 (Fox Rpt.) ¶¶ 80-82, 84-88.

²⁷³ PX7003 (Fox Rpt.) ¶¶ 121-29, 141-50.

²⁷⁴ PX7003 (Fox Rpt.) ¶¶ 130-31, 151-53.

²⁷⁵ PX7003 (Fox Rpt.) ¶¶ 167-80.

²⁷⁶ PX7003 (Fox Rpt.) ¶¶ 159-168, 175, 181-184.

²⁷⁷ DX2495 (Galante Rpt.) ¶ 12.

²⁷⁸ PX4060 (Winn (C&S) Dep. 168:15-24).

with strong brand equity and popular private label brands are essential elements of a successful retail grocery operation.²⁷⁹ The stores in the divestiture package use 16 different banners,²⁸⁰ but almost half will have to be rebannered to one of six acquired or licensed brands, most of which are { [REDACTED] }²⁸¹ For example, C&S is acquiring the rights to the QFC banner in Oregon, where there are currently only four QFCs.²⁸² In total, C&S is acquiring 129 stores that will have to change { [REDACTED] }²⁸³ Not only will rebannered require { [REDACTED] }²⁸⁴ but { [REDACTED] }²⁸⁵

The patchwork of private label assets is another barrier to success for the proposed divestiture. In *Sysco*, the court rejected a proposed divestiture remedy in part because the buyer had one-third as many private label products as the target company, which the court recognized as “a competitive disadvantage.” *Sysco*, 113 F. Supp. 3d at 76. Similarly, Albertsons’ and Kroger’s banners derive brand equity from their respective private label offerings, including { [REDACTED] }²⁸⁶ Even though C&S { [REDACTED] }²⁸⁷ the divestiture package only includes { [REDACTED] }

²⁷⁹ PX7003 (Fox Rpt.) ¶¶ 75-76, 79; DX2497 (Kleinberger Rpt.) ¶¶ 65-66, Fig. 14.

²⁸⁰ PX1641 (Kroger); PX7005 (Hill Rpt.) ¶¶ 221-23.

²⁸¹ PX4072 (Florenz (C&S) Dep. 233:10-234:6, 243:14-244:2, 245:22-246:22); PX7003 (Fox Rpt.) Fig. 14; PX4060 (Winn (C&S) Dep. 91:16-94:11).

²⁸² PX4072 (Florenz (C&S) Dep. 227:1-15).

²⁸³ PX7003 (Fox Rpt.) ¶ 63, Fig. 14.

²⁸⁴ PX7003 (Fox Rpt.) ¶¶ 51-54.

²⁸⁵ PX3381 at tab “Total Detail Working Tab,” columns BS-BU; PX3636 (Bain) at tab “Survey response summary;” PX4093 (van der Veen (Bain) Dep. 64:17-24; 70:10-15).

²⁸⁶ PX7003 (Fox Rpt.) ¶¶ 76-77, 83, 85, 100-01, Figs. 17-18, 20; PX4081 (McMullen (Kroger) Dep. 124:6-126:3).

²⁸⁷ PX3068 (C&S) at 003.

[REDACTED]²⁸⁸ C&S will struggle to compete with Respondents with a far more limited private label offering. Moreover, C&S’s own private label line { [REDACTED]

[REDACTED]²⁸⁹ C&S acknowledges that { [REDACTED] } but its deal model { [REDACTED] }²⁹⁰

This assumption is contradicted by { [REDACTED] }²⁹¹ Moreover, C&S’s deal model { [REDACTED] } another sign of reduced competitiveness.²⁹²

Finally, C&S’s own deal model shows { [REDACTED] }²⁹³ As discussed in detail in the expert reports of Drs. Hill, Fox, and Yeater, C&S’s deal model is { [REDACTED]

[REDACTED]²⁹⁴ But C&S does project { [REDACTED]

[REDACTED]²⁹⁵ A number of these costs—

²⁸⁸ PX7003 (Fox Rpt.) Fig. 23; PX3106 (C&S) at 007; PX4030 (Winn (C&S) IH 37:15-38:25).
²⁸⁹ PX4050 (McGowan (C&S) Dep. 58:25-60:4, 120:8-19, 129:3-131:20); PX6262 (C&S); PX3449 (C&S) at 003; PX3069 (C&S) at 054; PX4060 (Winn (C&S) Dep. 294:23-296:9); PX3310 (C&S) at 001; PX7003 (Fox Rpt.) at 072, Fig. 22.
²⁹⁰ PX3602 (C&S) at tab “PL”; PX7009 (Fox Rebuttal Rpt.) ¶ 55; PX4030 (Winn (C&S) IH 39:15-22).
²⁹¹ PX7009 (Fox Rebuttal Rpt.) ¶ 55; PX7003 (Fox Rpt.) ¶ 57; PX4072 (Florenz (C&S) Dep. 125:15-126:9); PX3259 (C&S) at tab “Survey response summary.”
²⁹² PX3553 (C&S) at 019.
²⁹³ PX3602 (C&S) at tab “Assumptions and CF Impacts”; PX4072 (Florenz (C&S) Dep. 89:2-8).
²⁹⁴ PX7003 (Fox Rpt.) ¶¶ 51-57; PX7005 (Hill Rpt.); PX7012 (Yeater Rebuttal Rpt.) ¶ 152; PX7007 (Hill Rebuttal Rpt.) ¶ 141; PX7009 (Fox Rebuttal Rpt.) ¶¶ 22-25.
²⁹⁵ PX3553 (C&S) at 019-020.

{ [REDACTED] }²⁹⁶ This increase in costs compared to Kroger’s and Albertsons’ pre-acquisition costs “would, in the end, potentially have the same anti-competitive effect that the initial merger agreement would have had on the market.” *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 55 (D.D.C. 2002). C&S will not be able to replace this loss of substantial competitive intensity due to the acquisition for many years, if at all—another basis to reject the divestiture.

iii. C&S faces significant execution risks because it lacks the experience necessary to operate the divested stores

C&S—a wholesaler with limited supermarket operating experience—is a poor choice for a divestiture buyer, increasing the likelihood that the divested stores will flounder or fail. C&S operated only 23 Piggly-Wiggly and Grand Union retail supermarkets and only one retail pharmacy as of fiscal year 2023, most of which C&S acquired in 2021 and 2022.²⁹⁷ As recently as 2021, C&S expressly stated in its financial reports, { [REDACTED] }

{ [REDACTED] }²⁹⁸

The proposed divestiture would exponentially expand C&S’s retail footprint as well as add complicated business lines that it has no experience operating. Acquiring the divested stores would increase C&S’s owned retail stores by approximately 2,500% and its retail employees by { [REDACTED] }²⁹⁹ all in states where C&S does not currently have retail stores.³⁰⁰ As Mr. Winn testified, C&S’s retail stores today { [REDACTED] }

²⁹⁶ PX3602 (C&S) at “Assumptions and CF Impacts” tab.

²⁹⁷ PX7003 (Fox Rept.) ¶ 11.

²⁹⁸ PX3077 (C&S) at 036-037.

²⁹⁹ PX1641 (Kroger); PX11326 (Kroger); PX11327 (Kroger); PX12692 (Albertsons) at tab “Sheet1”; PX3338 (C&S) at 002.

³⁰⁰ PX1641 (Kroger).

[REDACTED]³⁰¹ Expansion of this magnitude carries an inherent risk of failure as the company will need to learn how to scale up quickly across a wide range of unfamiliar geographies in a customer-facing business. C&S's lack of experience is doubtlessly why C&S requested [REDACTED]
[REDACTED]³⁰²

C&S's lack of retail grocery experience is only half the story. C&S would also receive 147 fuel centers and 492 pharmacies, neither of which it has experience operating at scale.³⁰³ To make matters worse, C&S is [REDACTED] for these complicated and highly-regulated operations.³⁰⁴ C&S's deal model [REDACTED]
[REDACTED]
[REDACTED]³⁰⁵ Given [REDACTED]
[REDACTED] these assumptions are unfounded.³⁰⁶

C&S previously tried and failed to operate other supermarkets successfully, at a much smaller scale than this vast and complex transaction. The reasons for C&S's past failures include [REDACTED]
[REDACTED]³⁰⁷ Each of those concerns are present, if not compounded, here. Specifically, C&S acquired over 370 retail grocery stores between 2001 and 2012.³⁰⁸ By November 2012, it was operating only three retail

³⁰¹ PX4030 (Winn (C&S) IH 48:9-49:13); *see also* PX3338 (C&S) at 030, 033-034, 036.

³⁰² PX1272 (Kroger).

³⁰³ PX7003 (Fox Rpt.) ¶ 195; PX4030 (Winn (C&S) IH 186:8-12).

³⁰⁴ PX1654 (Kroger) at 308-309; PX3069 (C&S) at 062, 073.

³⁰⁵ PX3602 (C&S) at tab "Model," rows 5-6.

³⁰⁶ PX4030 (Winn (C&S) IH 186:8-12); PX4059 (Sankaran (Albertsons) Dep. 67:17-68:10).

³⁰⁷ DX2304 (C&S) at 9.

³⁰⁸ *See generally* PX7003 (Fox Rpt.) ¶¶ 13-18, Figs. 4 & 5; PX3128 (C&S).

stores,³⁰⁹ [REDACTED]³¹⁰ C&S explained that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³¹¹ C&S also acknowledged that it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³¹² Each of these risks is present in the proposed divestiture at a vastly greater scale.

Respondents point to C&S's recent experience as a divestiture buyer, but Respondent Albertsons' past representations about likelihood of divestiture success have been proven wrong. In 2015, Albertsons acquired Safeway and proposed divestitures of stores to several buyers.³¹³

Regarding the largest, a divestiture of 146 stores to Haggen, Albertsons claimed it would

[REDACTED]

[REDACTED]³¹⁴ But post-acquisition, Haggen [REDACTED]
[REDACTED] and a bankruptcy filing within months, in which Haggen closed or sold all of its stores.³¹⁵ Albertsons re-acquired 54 Haggen

supermarkets, along with its tradename, and today Haggen is a wholly-owned subsidiary of the merged Albertsons/Safeway.³¹⁶ Other Albertsons/Safeway divestiture buyers fared no better,

³⁰⁹ PX4061 (Winn (C&S) Dep. 376:20-377:7).

³¹⁰ DX2304 (C&S) at 8-9.

³¹¹ DX2304 (C&S) at 9.

³¹² DX2304 (C&S) at 9.

³¹³ PX6001 (FTC).

³¹⁴ PX2615 (Albertsons) at 020.

³¹⁵ PX4025 (Clougher (Albertsons) IH 28:22-29:13, 39:7-40:2, 80:9-80:19, 82:18-84:5, 89:11-91:8, 152:19-153:21, 155:3-156:18, 181:12-184:2).

³¹⁶ PX2777 (Albertsons); PX2446 (Albertsons) at 005, 008; PX2446 (Hill Rpt.) at 115-116; Haggen, *About Us*, <https://www.haggen.com/about-us.html> (last visited Jan. 4, 2024).

and Albertsons reacquired stores from those buyers.³¹⁷

In 2021, C&S purchased 12 Tops stores divested in connection with the Price Chopper / Tops merger evaluated by the FTC.³¹⁸ The stores are all located in rural parts of the Northeast, where {

{³¹⁹ C&S rebannered them {

{³²⁰ But due to its inexperience and lack of capability as a retailer, C&S {

{³²¹ The future of these 12 stores divested to C&S looks bleak. C&S's Mark McGowan, a former President of Stop & Shop hired to lead C&S's retail operations,³²² testified that {

{³²³ As of March 2024, total year-to-date sales at the 12 divested stores were {

{³²⁴

C&S's past operation of supermarkets has shown that its "experience" as a grocery wholesaler "will not transfer so as to enable it to be a successful competitor" in supermarket operations. *Aetna*, 240 F. Supp. 3d at 73. If C&S cannot maintain the performance of twelve stores from a single regional chain, it has no business undertaking the vastly more complex

³¹⁷ PX5016 (Smith (AWG) Decl.) ¶¶ 3-4, 7-20; PX2777 (Albertsons); PX6010 (FTC); PX2446 (Albertsons) at 005; PX6004, *Albertsons' United Div. Acquires 7 Lawrence Bros. Stores*, Progressive Grocer (Mar. 13, 2016); PX6002, *Closing Wichita Falls grocery store has warrant filed for owed taxes*, Times Record News (Jan. 7, 2019).

³¹⁸ PX3069 (C&S) at 009.

³¹⁹ DX2304 (C&S) at 5, 8, 10-12.

³²⁰ DX2304 (C&S) at 011; PX6347, *C&S Wholesale paves the way for Grand Union redux*, Supermarket News (Nov. 9, 2021).

³²¹ PX7005 (Hill Rpt.) ¶ 225, Fig. 56.

³²² DX2304 (C&S) at 014.

³²³ PX4050 (McGowan (C&S) Dep. 3435:7:25-36:2, 66:25-67:5-7, 751875:22-25).

³²⁴ PX3421 (C&S) at tab "GU Retail P&L v Plan (Stores)."

proposed divestiture of 579 stores scattered around the country.

iv. C&S's Low Purchase Price Does Not Incentivize Competitive Operation

The divestiture purchase price is indisputably extremely low compared to the revenues and profit Kroger and Albertsons currently earn from these assets.³²⁵ As a result, C&S will generate significant profits even if it cannot operate the 579 divested stores as well as its (overly optimistic) model projects. The fact that C&S will generate a profit *even if it were to fail* underscores why the proposed divestiture will not mitigate the anticompetitive effects of the acquisition.

The numbers tell a clear story. SoftBank, which will invest in C&S to fund part of the divestiture purchase price, modeled { [REDACTED] } even if C&S generated { [REDACTED] }

[REDACTED]

{ [REDACTED] }³²⁶ Moreover, Kroger's own model shows that { [REDACTED] }

[REDACTED] }³²⁷ And Mr. Galante,

Respondents' expert, opines that { [REDACTED] }

[REDACTED]

[REDACTED]

{ [REDACTED] }³²⁸ Collectively, all of the financial projections show that { [REDACTED] }

[REDACTED]

{ [REDACTED] }³²⁹ As a result, C&S will not have the same incentive to

³²⁵ See PX3775 (SoftBank) at 002; PX4101 (Davison (SoftBank) Dep. 50:17-21).

³²⁶ PX3776 (SoftBank) at 018; PX4101 (Davison (SoftBank) Dep. 61:18-62:2).

³²⁷ PX4029 (Millerchip (Kroger) IH 065-066, 069).

³²⁸ DX2495 (Galante Rpt.) at 031-032.

³²⁹ See PX3776 (SoftBank) at 018; PX4101 (Davison (SoftBank) Dep. 61:18-62:2).

compete as a buyer whose investment hinged on the success of its retail operation. As one court explained:

The low purchase price thus further supports the conclusion that [the buyer] has serious doubts about its own ability to manage all the divestiture [assets] but is willing to try given the low risk to the company reflected in the bargain price. That does not give the Court confidence in [the buyer]’s ability to effectively replace the competition lost by the merger.

Aetna, 240 F. Supp. 3d at 72; *cf. In re Chi. Bridge & Iron Co.*, 138 F.T.C. 1024, 1071 (2005).

B. The Divestiture Fails to Mitigate a Substantial Lessening of Competition in the Labor Markets

The proposed divestiture should be rejected for yet another reason: it fails to mitigate the loss of competition in the market for union grocery labor.

First, even if the divestiture to C&S were successful, C&S would be too small for unions to credibly leverage against a combined Kroger and Albertsons. To date, { [REDACTED]

[REDACTED]

[REDACTED] }³³⁰ Even if they do, C&S will not have the same role in labor negotiations as Albertsons. Unions { [REDACTED]

[REDACTED]

[REDACTED] }³³¹ In

Washington, Oregon, and Southern California, post-divestiture C&S will be significantly smaller than either Kroger or Albertsons is today.³³² In those areas, rather than being a credible

competing union employer whose actions could constrain Kroger, { [REDACTED]

[REDACTED] }³³³

³³⁰ PX4060 (Winn (C&S) Dep. 128:5-25).

³³¹ PX5019 (UFCW Local 400 Decl.) ¶ 7; PX5010 (UFCW Local 324 Decl.) ¶ 11.

³³² PX7005 (Hill Rpt.) ¶ 276, Fig. 65.

³³³ See PX5014 (UFCW Local 3000 Decl.) ¶¶ 17-20.

Second, entanglements will short-circuit the ability for unions to leverage C&S against Respondents. Today, Kroger and Albertsons { [REDACTED] }³³⁴ See *supra* Section I.D. For the first year after the divestiture, however, Kroger will have substantial influence over C&S’s labor strategy because { [REDACTED] }³³⁵ Even after { [REDACTED] } end, C&S’s dependency on Kroger { [REDACTED] } will make it susceptible to pressure from Kroger to coordinate negotiating strategy—pressure that an independent Albertsons does not face today.

C. The Proposed Divestiture Will Not Timely Replicate Competitive Intensity

To meet their burden, Respondents must show that their proposed divestiture will mitigate the loss of competition in a reasonably timely manner. *Sysco*, 113 F. Supp. 3d at 73-74 (rejecting proposed divestiture projected to be ineffective for at least five years post-merger). Here, even assuming that this divestiture is capable of recreating the competitive intensity of Kroger and Albertsons (which it is not), it certainly will not do so in a timely manner due to the uncertainty surrounding the divestiture and C&S’s years-long entanglements with Kroger.

- i. The proposed divestiture is uncertain to occur at all and, even if does, may result an even further reduction in competitive intensity*

The proposed divestiture is subject to post-closing contingencies that threaten C&S’s success. *First*, { [REDACTED] }

{ [REDACTED] }³³⁶ While Respondents

³³⁴ PX5010 (UFCW Local 324 Decl.) ¶ 14; PX5011 (UFCW Local 7 Decl.) ¶ 9; PX4042 (Dosenbach (Albertsons) Dep. 139:15-21); PX4015 (McPherson (Kroger) IH 231:19–232:1).

³³⁵ PX1654B (Kroger) at 071-074, 199-201.

³³⁶ PX11257 (Kroger) at 129.

are { [REDACTED] }, they cannot force landlords to consent to 1918 Winter Street Partners LLC, the special-purpose vehicle C&S has created for the acquisition, taking over the leases.³³⁷ If consent is not obtained, Respondents are required { [REDACTED] }³³⁸

Second, C&S may close or sell many of the divested stores in the near term due to their poor financial performance. Mr. Galante, Respondents' expert, calculates that { [REDACTED] }³³⁹ and C&S predicts { [REDACTED] }³⁴⁰ By definition, any stores that C&S closes or sells will fail to mitigate the anticompetitive effects of the merger in their markets.

Although Respondents tout C&S's purported commitment not to close stores or lay off frontline staff,³⁴¹ this commitment is { [REDACTED] }³⁴² Tellingly, C&S's then-CEO, Bob Palmer asked, { [REDACTED] }³⁴³

As C&S's financial reports state, { [REDACTED] }

{ [REDACTED] }³⁴⁴ This strategy { [REDACTED] }

³³⁷ PX1654 (Kroger) at 054-055; PX4115 (Cohen (C&S) Dep. 58:5-9).

³³⁸ PX1654 (Kroger) at 054-055.

³³⁹ DX2495 (Galante Rpt.) ¶ 80, Fig. 11.

³⁴⁰ PX4072 (Florenz (C&S) Dep. 35:5-36:1).

³⁴¹ PX6287 (Kroger) at 002.

³⁴² PX4030 (Winn (C&S) IH at 279:5-280:3, 281:17-282:23); PX4072 (Florenz (C&S) Dep. 259:9-19, 265:19-266:9).

³⁴³ PX3115 (C&S) at 001.

³⁴⁴ PX3128 (C&S); PX4061 (Winn (C&S) Dep. 357:2-379:25).

[REDACTED] }³⁵⁴ C&S's
 current President of Retail and integration planning leader, Mark McGowan, testified that
[REDACTED] }³⁵⁵ As a
 result, C&S's new supermarkets are likely to be staffed with less experienced and less skilled
 workers than the stores **belonging to the merged companies.**³⁵⁶

ii. C&S will depend on Kroger for pricing, plans, data, marketing, ads, and other customer-facing programs for at least a year

Courts discredit divestiture remedies that, like the proposed divestiture here, leave the
 buyer dependent on the merged parties for years post-closing. “[C]urative divestitures must be
 made to . . . a willing, *independent* competitor capable of effective production.” *FTC v. CCC*
Holdings, 605 F. Supp. 2d 26, 59 (D.D.C. 2009) (cleaned up); *see also, e.g., Sysco*, 113 F. Supp.
 3d at 77 (holding buyer reliant on merged entity for private label products supply and customer
 database for three to five years would not be “a truly independent competitor”). The proposed
 divestiture to C&S lacks substantial components of a successful retail grocery business because
 it was assembled by antitrust lawyers as a litigation strategy.³⁵⁷ And, while Respondents’ expert
 Mr. Galante concedes that [REDACTED]

[REDACTED] }³⁵⁸ Respondents and C&S
 agreed to [REDACTED]

[REDACTED] }³⁵⁹

Worse, C&S [REDACTED] }³⁶⁰

³⁵⁴ *See, e.g.,* PX2252 (Albertsons) at 067.

³⁵⁵ PX4050 (McGowan (C&S) Dep. 152:21-153:17).

³⁵⁶ PX4050 (McGowan (C&S) Dep. 153:12-17); *see also* PX2153 (Albertsons) at 001.

³⁵⁷ Order Denying Renewed Mot. to Compel (June 11, 2024) at 4-5.

³⁵⁸ DX2495 (Galante Rpt.) ¶ 64.

³⁵⁹ PX4060 (Winn (C&S) Dep. 237:25-238:25); DX2495 (Galante Rpt.) ¶¶ 65, 129.

³⁶⁰ PX3956 (C&S) at 045.

Instead, C&S { [REDACTED]

[REDACTED] } and Kroger { [REDACTED]

[REDACTED] }³⁶¹ Under the transition services agreement, Kroger will be [REDACTED]

[REDACTED] }³⁶² These transition services are designed [REDACTED]

[REDACTED]

[REDACTED] }³⁶³ But while C&S depends on Kroger for [REDACTED] }

it is not competing, let alone replacing competition between Kroger and Albertsons.

The entanglements between C&S and Respondents could last for years. While C&S could, in theory, [REDACTED] } it

[REDACTED] }³⁶⁴ Instead, C&S { [REDACTED]

[REDACTED] }³⁶⁵ and

[REDACTED] }³⁶⁶ For as long as this is the

case, C&S will not compete with Respondents in any market.

This situation could persist even longer if Kroger is not able to meet its ambitious goal of

[REDACTED]

[REDACTED] }³⁶⁷ [REDACTED]

[REDACTED]

³⁶¹ PX3956 (C&S) at 045; PX4107 (Keptner (C&S) Dep. 189:9-195:11).

³⁶² PX4107 (Keptner (C&S) Dep. 189:9-195:11); PX4072 (Florenz (C&S) Dep. 148:6-17).

³⁶³ PX4107 (Keptner (C&S) Dep. 144:1-147:21, 153:23-154:12, 155:3-162:24, 191:19-192:10); PX3837 (C&S) at 004-006.

³⁶⁴ PX3317 (C&S) at 002; PX4107 (Keptner (C&S) Dep. 150:4-152:17); PX4072, Florenz (C&S) Dep. 129:8-130:6, 234:9-20).

³⁶⁵ Compare PX1654 (Kroger) at 013 with PX1274 at 012; see also, PX4072 (Florenz (C&S) Dep. 129:8-130:6).

³⁶⁶ PX3956 (C&S) at 045; PX4107 (Keptner (C&S) Dep. 189:9-195:11).

³⁶⁷ PX4094 (Cosset (Kroger) Dep. 82:15-83:4).

[REDACTED]³⁶⁸ C&S's current business plan [REDACTED]

[REDACTED]

[REDACTED]³⁶⁹

In light of these extensive entanglements between purported "competitors," C&S's CEO conceded, [REDACTED]³⁷⁰

The divestiture cannot "fully restore competition" when transfer of such competitively sensitive information occurs, *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986), and C&S is [REDACTED] with a purported competitor.³⁷¹

iii. Kroger Can Disadvantage C&S for at Least Four Years

Pursuant to the terms of the transition services agreement, C&S will rely on the merged company to provide [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁷² Thus, the

effectiveness of Respondents' proposed divestiture remedy will depend in substantial part on Kroger's performance of its contractual obligations to its new competitor over an extended period. Courts rightly discount the likelihood of a divestiture buyer restoring competitive intensity to a market while it is reliant on the seller's services. *See Aetna*, 240 F. Supp. 3d at 71 ("The Court will not rely too heavily on the ASA, because Aetna and Humana have no incentive to provide any assistance beyond the bare minimum during this period, lest they create too

³⁶⁸ PX4072 (Florenz (C&S) Dep. 149:18-150:1312-151:16).

³⁶⁹ PX3956 (C&S) at 045.

³⁷⁰ PX4030 (Winn (C&S) IH 136:18-137:8).

³⁷¹ C&S will also not be competing through [REDACTED]

[REDACTED] PX1654B (Kroger) § 2.9(f).

³⁷² PX7003 (Fox Rpt.) Fig. 3; PX1654B (Kroger) at Schedule 2.1(a).

powerful a competitor.”).

Here, Kroger will have the ability to inhibit C&S’s competitiveness throughout the transition services agreement period due to C&S’s dependence on Kroger for [REDACTED]

[REDACTED] }³⁷³ C&S executives recognize that [REDACTED]
 [REDACTED] }³⁷⁴ so C&S will be vulnerable to Kroger underperformance or non-performance unless C&S is willing to take aggressive action against its partner. Even without breaching its contractual commitments, Kroger will be able to [REDACTED]

[REDACTED] }³⁷⁵ at critical periods [REDACTED]

[REDACTED] }³⁷⁶

Respondents fall far short of meeting their burden to show that their made-for-litigation “fix” mitigates the substantial anticompetitive effects of this acquisition. It fails out of the gate by leaving unremedied hundreds of markets where the acquisition is presumptively illegal. But even for the markets it does reach, Respondents’ lawyer-designed divestiture is fundamentally flawed due to C&S’s lack of experience and mixed incentives, the nature of the divested assets, and the duration of dependence on Respondents. In past transactions involving divestitures, Respondents shifted the risk of a failed divestiture onto shoppers and workers. In each of those cases, it was those shoppers and workers that suffered when that risk was realized. Here, this

³⁷³ PX1654B (Kroger) at Schedule 2.1(a).

³⁷⁴ PX4060 (Winn (C&S) Dep. 329:15-18).

³⁷⁵ PX4072 (Florenz (C&S) Dep. 162:10-165:2).

³⁷⁶ See, e.g., PX5016 (Smith (AWG) Decl.) ¶ 16).

Court should reject Respondents' request to once again ask American shoppers and workers to assume the risks of their bad deal.

IV. ENTRY OR EXPANSION IS UNLIKELY TO BE TIMELY OR SUFFICIENT TO PRESERVE COMPETITION

Respondents cannot rebut the FTC's *prima facie* case because they cannot show that entry or expansion would be timely, likely, and sufficient to counteract or deter the acquisition's likely anticompetitive effects. Merger Guidelines § 3.2 (entry must be sufficient in "magnitude, character, and scope" to offset the loss of the independent competitor); *Sanford Health*, 926 F. 3d at 965. To be timely, entry must occur before the acquisition causes anticompetitive effects, and to be sufficient, it must maintain competition over the long time. *Aetna*, 240 F. Supp. 3d at 52–53. Respondents bear the burden of providing evidence that "ease of entry" rebuts Complaint Counsel's *prima facie* case. *In re Otto Bock Healthcare North America, Inc.*, FTC Docket No. 9378, 2019 WL 5957363, at *12 (citing *Heinz*, 246 F.3d at 715 n.7).

Here, entry or expansion will not be timely, likely, or sufficient to replace lost competition. Testimony from industry participants, including Respondents, indicates that building a single new supermarket takes more than two years and can cost anywhere from { [REDACTED] }³⁷⁷ Accordingly, rates of new entry by supermarkets and other large format stores are low, at less than 3% increases per year.³⁷⁸ In some regions, net entry is negative due to store closures.³⁷⁹ Respondents have neither pointed to any evidence showing that entry or expansion is likely or planned in the thousands of communities where supermarket competition

³⁷⁷ See, e.g., PX4059 (Sankaran (Albertsons) Dep. 204:10-205:16); PX4071 (Yates (Ahold) Dep. 165:8-166:3); PX4031 (Van Helden (Stater Bros) IH 61:23-64:14).

³⁷⁸ PX7005 (Hill Rpt.) ¶ 196.

³⁷⁹ PX7005 (Hill Rpt.) ¶ 196.

will be lost nor has their economic expert opined as such. As such, entry or expansion cannot save Respondents' anticompetitive acquisition.

V. RESPONDENTS DO NOT SHOW EFFICIENCIES OUTWEIGH LIKELY COMPETITIVE HARM

Courts apply strict standards in their review of claims that efficiencies may prevent a substantial lessening of competition from a proposed merger. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011); *Heinz*, 246 F.3d at 720-21. Efficiencies must be cognizable and “of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market.” Merger Guidelines § 3.3. Respondents “carry the[] burden to demonstrate the verifiability of their claimed efficiencies.” *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 73 (D.D.C. 2018). As the Supreme Court explained, “where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof.” *See Smith v. United States*, 568 U.S. 106, 112 (2013).

To meet their burden, Respondents must demonstrate that their efficiencies are (1) verifiable, (2) merger specific, and (3) accrue to the benefit of competition and not simply to the merging parties. *See H & R Block*, 833 F. Supp. 2d at 89; *St. Alphonsus*, 778 F.3d at 792; *Staples I*, 970 F. Supp. at 1089- 90; *FTC v. Staples*, 190 F. Supp. 3d 100, 137-38 n.15 (D.D.C. 2016) (“*Staples II*”). To be verifiable, Respondents must show that efficiencies were “verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents.” Merger Guidelines § 3.3; *see also H & R Block*, 833 F. Supp. 2d at 89. To be merger-specific, Respondents' efficiencies must be “a type of cost saving that could not be achieved without the merger[.]” *Wilhelmsen*, 341 F. Supp. 3d at 72; *see also* Merger Guidelines § 3.3. “The more compelling the prima facie case—including other evidence

presented by Complaint Counsel that reinforces the structural presumption—the more evidence defendant must present to rebut it successfully.” *ProMedica Health Sys. Inc.*, FTC Docket No. 9346, 2012 WL 1155392, *25 (Mar. 28, 2012) (cleaned up); *accord Chi. Bridge & Iron*, 534 F.3d at 426; *Staples II*, 190 F. Supp. 3d at 115.

Respondents’ claimed efficiencies cannot meet this standard, for two reasons: first, as set forth below, the vast majority of the claimed efficiencies do not meet the requirements for a legally cognizable efficiency; second, even if the full amount of Respondents’ claimed efficiencies were credited, that amount would be insufficient to prevent the competitive harm.

Respondents—through their expert, Mr. Gokhale—claim two primary categories of efficiencies: (1) incremental revenue and profits; and (2) cost savings.³⁸⁰ Both claims suffer from similar infirmities. The claimed efficiencies are simply identified, without a demonstration of how they will be achieved (i.e., they are not verifiable); an explanation of why this merger is necessary to achieve them (i.e., they are not merger specific); and do not ultimately prevent the substantial lessening of competition from the proposed acquisition.

First, Respondents’ claims related to incremental revenue and profits³⁸¹ should be excluded. To credit efficiencies, Respondents “must demonstrate that their claimed efficiencies would benefit customers. . . and, more particularly, the customers in the challenged markets.” *Aetna*, 240 F. Supp. 3d at 94. Respondents make no such showing. For instance, Respondents argue that post-acquisition, the merged firm will receive revenues and profits from alternative profit or retail media streams by { [REDACTED]

³⁸⁰ Mr. Gokhale points to { [REDACTED] }. DX2493 (Gokhale Rpt.) ¶ 43. As Mr. Yeater explains, Kroger’s nonbinding claims that it will make price investments have no bearing on the efficiencies analysis in this case—if the merged firm fails to achieve the projected efficiencies, they can abandon the price investment strategy. PX7012 (Yeater Rebuttal Rpt.) ¶¶ 132-133; PX4076 (Aitken (Kroger) Dep. 239:1-11).
³⁸¹ Incremental revenue and profits relate to improvements and increasing revenue in certain business areas that Respondents allege will result from combining their businesses. DX2493 (Gokhale Rpt.) ¶ 215.

_____ }³⁸² These incremental revenues are driven primarily by the consolidation of Respondents' _____ } As Complaint Counsel's expert Mr. Yeater explains, this increase in revenue would arise not from an increase in efficiency but rather from: _____

_____ }³⁸³ Additionally, these retail media services are not within the relevant markets defined by either side's expert in this case—Dr. Hill or Dr. Israel—and therefore do not address the harm to competition in those markets.³⁸⁴ *See Phila. Nat'l Bank*, 374 U.S. at 370 (“[A]nticompetitive effects in one market” cannot be justified by “procompetitive consequences in another.”); *Aetna*, 240 F. Supp. 3d at 94.

Respondents are unable to show that the vast majority of the second category of claimed benefits—cost savings—are verifiable or merger specific. Respondents' expert—Mr. Gokhale—groups the cost savings into five main categories: _____

_____. In a futile attempt to demonstrate these cost savings are cognizable efficiencies, Respondents primarily rest on a panoply of unsupported assumptions by their paid-for consultants and party executives.

For the sourcing and indirect sourcing cost savings categories, Respondents engaged consultants from Bain to _____ } As Mr. Yeater explained, however, Mr. Gokhale did not _____ }³⁸⁵ Specifically, neither Bain nor Mr. Gokhale have _____

³⁸² DX2493 (Gokhale Rpt.) ¶ 233.

³⁸³ PX7012 (Yeater Rebuttal Rpt.) ¶ 28.

³⁸⁴ PX7012 (Yeater Rebuttal Rpt.) ¶ 28.

³⁸⁵ PX7012 (Yeater Rebuttal Rpt.) ¶¶ 44, 46, 49, 51.

[REDACTED]

[REDACTED] }.³⁸⁶ For example, Mr. Gokhale deems many of the cost savings as merger-specific solely because of a [REDACTED]

[REDACTED]

[REDACTED] } Mr. Gokhale, however, does not further analyze how the merger allows the combined entity to realize this assumption, beyond citing the fact that the merged firm will be [REDACTED].³⁸⁷

And there is good reason not to accept that untested assumption: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }³⁸⁸ “[B]ecause the bases for the assumptions [Defendant’s expert] identified and their role in the efficiencies analysis is unclear, the reasonableness of those assumptions, along with the ultimate determinations of likelihood and magnitude, cannot be verified with any degree of rigor.” *Wilhelmsen*, 341 F. Supp. 3d at 73 (internal citation omitted).

For all these reasons, Complaint Counsel’s expert concludes that only \$41 million of Respondents’ expert’s claimed efficiencies of \$1,149 to \$1,546 million are even *potentially* cognizable.³⁸⁹ And, even if all of Respondents’ claimed cost efficiencies were credited as cognizable, the total amount would be less than one percent of their combined total costs, and as such, would not offset the predicted anticompetitive harm to consumers from the acquisition.³⁹⁰

³⁸⁶ PX7012 (Yeater Rebuttal Report) ¶¶ 9(a), 49.

³⁸⁷ PX7012 (Yeater Rebuttal Rpt.) ¶¶ 50-51.

³⁸⁸ *See, e.g.*, PX4073 (Crane (Smucker) Dep. 49:17-50:19).

³⁸⁹ PX7012 (Yeater Rebuttal Rpt.) ¶¶ 8, 10.

³⁹⁰ PX7012 (Yeater Rebuttal Rpt.) ¶ 127; PX7007 (Hill Rebuttal Rpt.) ¶¶ 180-182, n.200.

CONCLUSION

For the reasons stated above, Complaint Counsel respectfully requests that this Court to permanently enjoin Kroger from acquiring Albertsons.

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Respectfully submitted,

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