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KING COUNTY
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CASE #: 24-2-00977-9 SEA

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. THE KROGER CO.; ALBERTSONS COMPANIES, INC.; ALBERTSON'S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; and KETTLE MERGER SUB, INC. Defendants.	NO. COMPLAINT

I. NATURE OF THE COMPLAINT

1. Plaintiff, the State of Washington ("State"), through its Attorney General, brings this enforcement action in its sovereign capacity against Albertsons Companies, Inc., Albertson's Companies Specialty Care LLC, Albertson's LLC, and Albertson's Stores Sub LLC (collectively, "Albertsons"); and The Kroger Co., and Kettle Merger Sub, Inc. (collectively, "Kroger"); (all collectively, "Defendants") including their agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, to protect the public interest and to enjoin their unlawful proposed merger (the "Proposed Transaction").

2. The Washington State Constitution states that "monopolies and trusts shall never be allowed in this state." Wash. Const. art. Article XII § 22. Transactions that may substantially lessen competition or tend to create a monopoly in any line of commerce are so injurious to the

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public interest that the legislature has expressly declared them unlawful in RCW 19.86.060 of the Washington Consumer Protection Act ("CPA").

3. Defendants' Proposed Transaction would combine the two largest supermarket chains operating in Washington. Albertsons, the largest supermarket chain in the State, operates as Albertsons, Haggen, and Safeway. Kroger, the second largest supermarket chain in the State, operates as Fred Meyer and QFC. Together, Albertsons and Kroger—both the products of prior multi-billion dollar mergers—account for more than 50% of supermarket sales statewide.

4. This Proposed Transaction will likely substantially lessen supermarket competition or tend to create a monopoly in many Washington communities where Defendants currently compete head-to-head. The ultimate effect of that lessening of competition would be to increase the likelihood that prices of food and other grocery products in supermarkets offered to Washington consumers will increase, and that the quantity and quality of choices available to Washington consumers will decrease.

II. INTRODUCTION

5. Supermarkets stand apart from other places where consumers may buy food. A supermarket pairs a full range of grocery offerings—fresh ingredients for meals, prepared foods, nonperishables, and more—with a full-service shopping experience.[1] This full-service "one-stop shopping" experience can save consumers time by replacing multiple trips to specialty stores.

6. Increases in the price of groceries in recent years emphasize the importance of robust competition amongst supermarkets to keep prices in check. When the COVID-19 pandemic and supply chain issues arose in 2021, for example, Kroger sought "to pass on as much inflation" to its customers as possible. The only "guardrail" to contain those price increases,

[1] While some supermarkets offer consumers the ability to purchase groceries online for in-person pick up or at-home delivery, 97% of Americans continue to regularly shop in-person for groceries. Megan Brenan, *In-Person Grocery Shopping Rebounds in U.S.; Online Also Up*, Gallup (Aug. 24, 2022), https://news.gallup.com/poll/397706/person-grocery-shopping-rebounds-online.aspx.

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explained a seasoned Kroger executive, was Kroger's need to keep its prices in line with those of its competitors, including Albertsons.

7. Currently, Albertsons and Kroger compete head-to-head in communities across Washington. They frequently check each other's prices and adjust their own pricing accordingly, but price competition is only part of the story. Albertsons and Kroger compete for shoppers through other facets of their operations, such as loyalty programs for fuel and grocery rewards programs. They also compete by striving to offer a wide variety of quality products and high levels of customer service. The Proposed Transaction would eliminate head-to-head competition across all of these dimensions.

8. Eliminating this robust competition between Defendants will harm millions of consumers in the State. The Proposed Transaction would combine the two largest—and, in some areas, the *only*—supermarkets in many communities across Washington, which is likely to lead to higher prices, lower quality, and less variety in many local markets throughout Washington.

9. The Proposed Transaction is also likely to lead to store closures. As a result of the Proposed Transaction, Kroger will own overlapping stores in many Washington communities, and will have an incentive to close some of them, further concentrating these markets and reducing choice for consumers, as well as eliminating jobs. Indeed, Kroger executives have also previously suggested strategically "closing" unionized stores "for a period of time to make them nonunion." Because unionized supermarket workers generally receive higher wages and better benefits compared to their non-unionized counterparts, union-disrupting strategies like this increase Kroger's profits at the expense of workers. If the Proposed Transaction is consummated, Kroger will no longer face competitive pressure from Albertsons to keep stores open or reopen closed stores in order to maintain its market share. Instead, because consumers will have fewer options, such closures are likely to steer displaced shoppers of the closed Kroger store to another—but less preferred—Kroger store.

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10. The harmful effects of the Proposed Transaction are likely to be particularly acute because, leading up to the merger agreement, Albertsons had been successfully growing its grocery business, taking market share from Kroger in the process. Indeed, after the parties announced the merger, an Albertsons executive boasted, "our owners are <u>not</u> selling us because we are at risk . . . we are literally crushing it consistently."

11. Defendants have always known that the removal of such a robust competitor would harm competition. When rumors of the Proposed Transaction began circulating, one Albertsons' Vice President wrote "you are basically creating a monopoly in grocery with the merger so [it] makes no sense," followed by "[i]t's like AT&T and Verizon wanting to merge." Another Albertsons' Vice President agreed: "[t]here is no way that they could buy all of us - too many competing markets."

12. Defendants' proposed remedy for this harm to competition is to divest 413 stores nationwide to C&S Wholesale Grocers, LLC ("C&S"). But their proposed divestiture is woefully inadequate to restore the competition lost through the Proposed Transaction. C&S is primarily a wholesale distributor that operated only 24 retail grocery stores nationwide as of October 3, 2023—and none at all in Washington. It has no track record of successfully running hundreds of grocery stores. And C&S is not a sufficiently established and sophisticated competitor to restore the competition that will be lost if Kroger is permitted to acquire an established, successful competitor like Albertsons.

13. Indeed, the proposed divestiture bears a striking resemblance to Albertsons' failed divestiture of stores in connection with its 2015 acquisition of Safeway. In order to address competition concerns regarding that merger, Albertsons and Safeway divested 146 stores, including 26 stores in Washington, to Haggen, a Washington-based regional supermarket chain. *In re HH Liquidation, LLC*, 590 B.R. 211, 219 (Bankr. D. Del. 2018). Haggen lacked the infrastructure to rapidly expand to a multi-state, national grocery retailer and struggled immensely to operate the divested stores. Six months after the divestiture, Haggen was forced to

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close 127 stores (14 of which were in Washington)[2] and lay off thousands of workers (more than 1,130 of whom had worked in Washington).[3]

14. Washington consumers and workers should not be forced to take a gamble on another risky supermarket divestiture. Defendants are proposing to divest stores in fifteen states. Approximately one out of every four proposed store divestitures are in Washington. Because this divestiture proposal disproportionately impacts Washington stores, the failure of this proposed divestiture would be particularly harmful here.

15. Because the effect of Kroger's merger with Albertsons "may be to substantially lessen competition" in violation of RCW 19.86.060, the State of Washington respectfully requests that this Court enjoin the Proposed Transaction.

III. JURISDICTION AND VENUE

16. The State files this complaint and institutes these proceedings under the provisions of the Consumer Protection Act, RCW 19.86.

17. Defendants are subject to the personal jurisdiction of this Court pursuant to RCW 19.86.160 and because each transacts business in, has purposeful, continuous or systemic contacts with, or has sufficient minimum contacts in Washington. Each Defendant engages in the business of operating retail supermarkets across Washington, including marketing, transporting, storing, and selling groceries at locations across Washington; employing Washington workers; and engaging in business with Washington residents and business entities. The combination of these separate entities through the challenged Proposed Transaction will have a substantial and foreseeable effect on Washington trade and commerce.

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[2] *Haggen to close 127 grocery stores; 14 in Washington*, KIRO7 (Sept. 25, 2015), https://www.kiro7.com/news/haggen-close-127-grocery-stores-14-washington/27019376/#:~:text=VIDEO%3A%20Haggen%20grocery%20chain%20closing,amid%20allegations%20of%20unfair%20competition.&text=BURIEN%2C%20Wash.,less%20option%20to%20buy%20groceries.

[3] Angel Gonzalez, *Haggen promises laid-off workers here will be paid on time*, Seattle Times (Sept. 30, 2015), 2015 WLNR 28935201, https://www.westlaw.com/Document/I608d4d50671711e5bd0de12d3891819a/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

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18. Venue is proper in King County because Defendants have extensive intentional, continuous and systematic contacts in Washington, including contacts in support of their retail supermarkets in King County; and Defendants' activities were intended to have, and will continue to have, a foreseeable effect on commerce in Washington, including in King County.

IV. THE PARTIES AND THE PROPOSED TRANSACTION

A. Plaintiff

19. Plaintiff is the State of Washington, by and through its Attorney General, in its sovereign capacity.

20. The Office of the Attorney General is charged with the constitutional mandate to ensure that companies do not create monopolies or trusts. Wash. Const. art. XII, § 22; RCW 19.86.080. Washington has a sovereign interest in the enforcement of its antitrust laws and authority to bring this action under RCW 19.86.080.

21. The State also has a sovereign interest in fostering fair and honest competition, protecting consumers from anticompetitive and unlawful practices, and supporting the general welfare of consumers and businesses in Washington and its economy.

22. Pursuant to that mandate and interest, the State, through the Office of the Attorney General, has been investigating the Proposed Transaction for the past year. The Attorney General has issued Civil Investigative Demands and conducted interviews with dozens of market participants and other relevant actors, collected millions of documents, conducted an economic analysis of the Proposed Transaction, and engaged with the parties to understand the intricacies of the industry at issue. Through this investigation, the Attorney General has concluded that the Proposed Transaction is illegal under RCW 19.86.060, and is thus requesting that this Court enjoin it.

B. Defendants

23. Defendants Albertsons and Kroger are two of the largest national supermarket companies in operation today. Together they employ over 710,000 workers and operate 4,996

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grocery stores, 66 distribution centers, 3,972 pharmacies, 52 manufacturing plants, and 2,015 fuel centers in 48 states and the District of Columbia. Their expansive reach allows them to serve 85 million households, for a combined annual revenue in excess of $210 billion.

24. In Washington, Albertsons and Kroger are the two biggest supermarket chains, both by number of stores and by footprint. Collectively, Defendants operate over 300 grocery stores in the State, including approximately 194 in the Seattle-Tacoma-Bellevue Metropolitan Statistical Area ("MSA").

1. Albertsons

25. Albertsons Companies, Inc. is a Delaware corporation that started in, and is still headquartered in Boise, Idaho, and has operated in Washington since the mid-twentieth century.

26. Albertson's Companies Specialty Care, LLC is a Delaware limited liability company and a subsidiary of Albertsons Companies, Inc., with its principal place of business in Boise, Idaho, that is engaged in retail grocery business in Washington State.

27. Albertson's LLC is a Delaware limited liability company and a subsidiary of Albertsons Companies, Inc., with its principal place of business in Boise, Idaho, that is engaged in retail grocery business in Washington State.

28. Albertson's Stores Sub LLC is a Delaware limited liability company with its principal place of business in Boise, Idaho, at the same location as Albertsons Companies, Inc., that is engaged in real estate business in Washington State.

29. In 1998, Albertsons agreed to buy Montana's Buttrey Food and Drug Store Company and its 44 stores—spread across Montana, Wyoming, and North Dakota.[4] After the Federal Trade Commission ("FTC") expressed concerns that this proposed acquisition might substantially lessen competition, Albertsons agreed to divest 15 stores in those states.[5] A mere

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[4] Don Day, *Albertsons cut a deal to sell stores to clear a merger in '98. Most of them quickly closed*, Boise Dev (Sept. 11, 2023), https://boisedev.com/news/2023/09/11/albertsons-kroger-buttrey/.

[5] *Id*.

ATTORNEY GENERAL OF WASHINGTON
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two years later, the buyer of most of those stores—which is now owned by Kroger—began closing them[6] after it struggled to win loyal customers in areas where Albertsons remained in the market.[7] Today, all but two of the 15 divested stores have closed.[8]

30. In 2006, Albertsons sold a majority interest in its stores in Idaho, Southern Nevada, Utah, Southern California, and the Northwestern U.S.—including its Washington stores—to supermarket chain SuperValu, Inc. while retaining a 35% interest.[9] By 2013, however, SuperValu sold all of its Albertsons assets back to Albertsons.[10]

31. In 2015, Albertsons significantly expanded its presence in the State when it acquired Safeway—which, at the time, owned 1,332 supermarkets.[11] As a result of this consolidation, Albertsons increased the number of stores it operated in Washington from 49 to 172.[12]

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[6] *Id.*

[7] John Stucke, *Smith's Food and Drug Store will Close this Saturday*, Missoulian (Aug. 22, 2000), https://missoulian.com/smiths-food-and-drug-store-will-close-this-saturday/article_2578d35e-8ea0-5025-ba94-cc2e4f48e70c.html.

[8] Day, *supra.*

[9] Supervalu, Inc., Current Report (Form 8-K), EX-99.2, at 29 (Jan. 23, 2006), http://pdf.secdatabase.com/397/0001193125-06-009695.pdf.

[10] Olivia Oran & Lisa Baertlein, *Supervalu selling 877 supermarkets in $3.3 billion deal*, Reuters (Jan. 10, 2013, https://www.reuters.com/article/us-supervalu-results/supervalu-selling-877-supermarkets-in-3-3-billion-deal-idUSBRE90A00320130111/.

[11] Like Albertsons, Safeway obtained its scale, in part, through acquisitions. For example, as part of its acquisition of Carrs in 1998 the Alaska Attorney General's office required Safeway to divest seven Alaska stores due to competition concerns. Associated Grocers, an experienced wholesaler, purchased six of those divested stores. Tony Hopfinger, *Safeway Sells Six Stores Associated to Start Changeover Saturday*, Alaska Dispatch News (Oct. 14, 1999), at A1, 1999 WLNR 7357656, https://www.westlaw.com/Document/I02b8e020e32011dab6a0f547ef0b9623/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0. All six of the stores divested to Associated Grocers closed within a year, "leaving local residents with fewer options for groceries." James Brooks, *Two dozen Alaska legislators join opposition to Kroger-Albertsons merger plans*, Alaska Beacon (Oct. 6, 2023), https://alaskabeacon.com/briefs/two-dozen-alaska-legislators-join-opposition-to-kroger-albertsons-merger-plans/; Paula Dobbyn, *Marketplace unable to pay creditors*, Alaska Dispatch News (Feb. 3, 2021), at D1, 2001 WLNR 11280134, https://www.westlaw.com/Document/Icaec9ef0e34e11dab59adb083e1ba21b/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

[12] Krista Brown, *Supermarket Squeeze: The Real Costs of the Kroger and Albertsons Deal*, American Economic Liberties Project (Nov., 2023), 20231109-AELP-Supermarket-Brief_v3.pdf.

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32. After reviewing the proposed Albertsons-Safeway transaction, the State and the FTC concluded it would be anticompetitive and required Albertsons to divest nearly 170 stores, including 26 stores in Washington.[13] Haggen, a regional supermarket with only 18 stores, purchased 146 of Albertsons' divested stores, including all 26 Washington stores.[14]

33. What followed has been described as "one of the swiftest, most spectacular corporate crash-and-burns in recent history."[15]

34. Haggen faced challenges almost immediately. The divested stores saw stagnating sales and widespread customer dissatisfaction with increased pricing. Less than a year later, Haggen announced that it would sell more than 100 of the stores it acquired and filed for bankruptcy. In analyzing Haggen's failure, the bankruptcy court agreed with industry commentators that Haggen "did not have the talent nor the numbers of people in merchandizing to adequately negotiate, make decisions, set up pricing, and manage a large chain."[16]

35. Albertsons reacquired 48 of the stores it had divested, in some cases paying only $1 per store at auction. Albertsons also acquired 14 of Haggen's formerly independent stores. Haggen thus became Albertsons' third banner in the State.

36. Today, Albertsons operates roughly 215 stores in Washington under its own name, as well as the Haggen and Safeway names.[17] Its Washington stores represent approximately 10% of its stores nationwide.

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[13] Decision and Order, *In the Matter of Cerberus Institutional Partners, et. al.*, Dkt. No. C-4504 (F.T.C., July 2, 2015), https://www.ftc.gov/system/files/documents/cases/150702cerberusdo.pdf. Washington only required the divestiture of Washington stores. *See* Order Entering Consent Decree, *State of Washington v. Cerberus Institutional Partners, et. al*., No. 2:15-cv-00147-JCC, Document 11 (W.D. Wash. Feb. 3, 2015).

[14] *In re HH Liquidation, LLC*, 590 B.R. at 219.

[15] Jon Talton, *Haggen a harsh lesson in expanding too quickly*, Seattle Times (Sept. 24, 2015), https://www.seattletimes.com/business/economy/haggen-a-harsh-lesson-in-expanding-too-quickly/.

[16] *In re HH Liquidation, LLC*, 590 B.R. at 238 (internal quotation omitted).

[17] Nationwide, Albertsons operates under the following names: Albertsons, Safeway, Vons, Pavilions, Randalls, Tom Thumb, Carrs, Jewel-Osco, Acme, Shaw's, Star Market, United Supermarkets, Market Street, Haggen, Kings Food Markets, and Balducci's Food Lovers Market.

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2. **Kroger**

37. Kroger was founded and is headquartered in Cincinnati, Ohio.

38. In 1997, Fred Meyer, a Portland, Oregon-based company, bought QFC, a Bellevue-based company, and Ralphs, a Southern California-based company. At that time, QFC had about "6,000 workers and 90 stores in the state."[18] Eight months after Fred Meyer acquired QFC, Kroger acquired Fred Meyer.[19] At that time, Kroger had about 1,400 grocery stores in the Midwest and South.[20] By acquiring Fred Meyer's 800 stores, Kroger's reach grew to "31 states from Georgia to Alaska."[21]

39. Today, Kroger operates 114 stores in Washington under its Fred Meyer and QFC names.[22]

3. **Kettle Merger Sub**

40. Kettle Merger Sub, Inc. is a Delaware corporation and wholly owned subsidiary of The Kroger Co., and is a party to the October 13, 2022, merger agreement among Albertsons Companies, Inc. and The Kroger Co.

C. Defendants' Proposed Transaction

41. On October 13, 2022, Defendants entered into a definitive merger agreement. Under the terms of that agreement, Kroger would acquire all of the outstanding shares of Albertsons "common and preferred stock (on an as converted basis) for an estimated total

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[18] Lee Moriwaki, *Fred Meyer To Buy QFC -- Chain With National Plans Is Sold Instead*, Seattle Times (Nov. 7, 1997), https://archive.seattletimes.com/archive/?date=19971107&slug=2570906.

[19] Michele Matassa Flores & Joe Heim, *Attention Shoppers: We've Been Sold - Again -- As Grocery Giants Take Over, Customers Fret About Choice*, Seattle Times (Oct. 20, 1998), https://archive.seattletimes.com/archive/?date=19981020&slug=2778731.

[20] Christine Dunn, *Kroger in $12 billion deal to buy Fred Meyer*, Pittsburgh Post-Gazette, (Oct. 20, 1998), at D1, https://news.google.com/newspapers?id=-tNRAAAAIBAJ&sjid=Zm8DAAAAIBAJ&pg=6052%2C9766080.

[21] *Id.*

[22] Nationwide, Kroger operates under the following names: Kroger, Ralphs, Dillons, Smith's, King Soopers, Fry's, QFC, City Market, Owen's, Jay C, Pay Less, Baker's, Gerbes, Harris Teeter, Pick 'n Save, Metro Market, Mariano's, Fred Meyer, Dillons Marketplace, Fry's Marketplace, King Soopers Marketplace, Kroger Marketplace, Smith's Marketplace, Food 4 Less, and Foods Co.

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consideration of $34.10 per share, implying a total enterprise value of approximately $24.6 billion, including the assumption of approximately $4.7 billion of Albertsons Cos. net debt."[23]

42. Since Defendants announced the Proposed Transaction, the State has received numerous complaints from concerned consumers across Washington. Consumers from Spokane to Sequim, and Bellingham to Vancouver submitted complaints on a range of topics—from concerns about lack of selection and choice, to increased prices and price-fixing, to decreased product quality and diversity, to store closures and access to resources, to decreased wages and job loss, among others.

43. For example, a Gig Harbor consumer shared their concern that the Proposed Transaction would leave them with "limited choices to fill prescription medications without traveling some distance," as pharmacies located in grocery stores were most convenient to that consumer and, after the merger, the pharmacies would negotiate the same contracts with Pharmacy Benefit Managers ("PBMs") and may not be in-network. Similarly, a Sammamish consumer said, "It is unknown whether the merged Albertsons-Kroger would choose to remain or exit my pharmacy network, but it does emphasize that it's more than just groceries involved and the result of such a merger would be reduced choice."

44. Across King County, consumers are concerned the Proposed Transaction will result in a decrease in grocery competition and access in their neighborhoods. A Kent consumer wrote: "People can live without internet/cable, but this Albertson purchase jeopardizes the ability of people to feed their families." Another consumer wrote, "I live in the south end of Seattle and have seen already a degradation of quality, variety of goods and management of our local Safeways since the 2015 acquisition; this further merger is only going to further exacerbate our limited shopping options. We risk becoming a food desert." Similarly, a Bothell consumer wrote:

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[23] Press Release, Kroger, Kroger and Albertsons Companies Announce Definitive Merger Agreement (Oct. 14, 2022), https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx.

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> These two grocery stores are the only two viable chains in the Seattle area, following the Albertsons merger with Safeway a couple of years ago. Giving Kroger a monopoly of the grocery market will severely impact lower to middle class families in our area. Those families either cannot afford to shop at Whole Foods and other one-off stores in our area, or else cannot reach them due to distant locations. Unfettered by competition, Kroger will assuredly raise prices for decades to come. Grocery purchases are an absolute necessity for every family. No company should have a monopoly in that market.

45. Even Defendants' own executives and other employees reacted to the merger announcement with concern and disbelief. In internal documents, the Fred Meyer President wrote in response to rumors that Kroger would be acquiring Albertsons, "I could see us picking up individual markets, but can't see us taking on all of [Albertsons]." Similarly, a Kroger store manager wrote, "There's no way if we by [sic] them we are keeping all these stores open." On the Albertsons side, after seeing the merger announcement, a Senior Vice President said, "I was shocked to see that hit the wire. I didn't think [Kroger] would be an option with all the overlap." In the aftermath of the announcement, an Albertsons Senior Director discussed the U.S. Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights' hearing examining the competitive impact of the Proposed Transaction, stating, "It's all about pricing and competition and we all know prices will not go down."

V. OVERVIEW OF THE SUPERMARKET INDUSTRY

A. Retail Grocery Stores

46. A range of stores sell food to consumers, from specialty food stores to small corner grocers to larger supermarkets. Supermarkets, however, stand apart in offering a full line of groceries, meat, and produce, with many also offering a staffed deli, bakery, and/or pharmacy.[24]

[24] Other retailers also sell food and grocery products. Wholesale club stores, like Costco, provide a relatively limited variety of products, in bulk, in a warehouse environment to customers that pay an annual membership fee. Dollar stores sell a combination of merchandise and mostly shelf-stable consumable items in small sizes at aggressive price points. Such stores offer a distinct assortment of products and customer experience from that offered by supermarkets.

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47. Large national supermarket companies are often comprised of multiple chains of separately branded retail stores, known as "banners." Albertsons, for example, operates three banners within Washington: Albertsons, Haggen, and Safeway. Kroger operates two banners in Washington: Fred Meyer and QFC. Supermarket companies can add new banners as the result of acquisitions: what was an independent chain of stores becomes a banner operated under a larger parent company. Each supermarket location publicly bears the name of its banner—rather than the name of the parent company.

48. Each banner has distinct branding and may also have distinct product offerings and store layouts. Different banners often employ their own pricing strategies, promotions, and loyalty programs.

49. In addition to their outward differences, retail supermarket chain banners can be operationally distinct—they usually have different Information Technology ("IT") systems, different management structures, and different arrangements with suppliers.

50. Supermarket parent companies will sometimes seek to convert a store from one banner to another—a process known as "rebannering." Rebannering is expensive and time-consuming. It requires reconciliation of the many public-facing and operational distinctions between banners, including some or all of the following changes: updating the store layout and signage; adopting a new pricing and promotional strategy; integrating a new IT system; negotiating new agreements with suppliers and vendors, and switching product manufacturers, or customizing the label for a manufacturer's product, and replacing those items on store shelves. Oftentimes, a store will need to close for a period of time to implement these changes, missing out on sales in the process. According to Albertsons, the average cost to rebanner a single store [redacted].

51. Supermarket companies also invest substantial sums in opening new stores, expanding or remodeling existing stores, and closing poorly performing stores. Albertsons and Kroger, for instance, each have a national real estate team that is responsible for selecting sites

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for new stores and building them out. For example, Albertsons' approach is to [redacted].

B. Supermarket Operations

52. Supermarkets source a wide range of products both directly from manufacturers and growers ("suppliers") as well as from wholesalers, who in turn purchase products from suppliers. To facilitate large-scale purchases from their biggest suppliers, including major consumer packaged goods companies, supermarket companies often negotiate long-term contracts that govern key terms of dealing, including product shelf-space allotments and supplier contributions towards funding promotions or advertisements. Supermarkets also procure certain products from smaller, often local suppliers. Offering an assortment of local products can provide a competitive advantage over other market participants.

53. Supermarkets also sell products from their wholly-owned brands, known as "private labels." Some private label products are completely vertically integrated, meaning the supermarket company directly manufactures and packages the product for retail sale. Other private label products are manufactured by third parties, but are packaged and sold under a brand name owned by the supermarket company. Supermarket companies actively advertise and promote their private label brands and some private labels have developed significant name-recognition and brand equity. Albertsons and Kroger, for instance, have eight private label brands with one billion dollars in sales or more each: Albertsons' Lucerne, Signature Select, Signature Café, and O Organics[25]; and Kroger's Private Selection, Simple Truth, Kroger Brand, and Home Chef.[26]

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[25] Russell Redman, *Albertsons spotlights customer-favorite own-brand products*, Supermarket News (Jan. 10, 2022), https://www.supermarketnews.com/private-label/albertsons-spotlights-customer-favorite-own-brand-products.

[26] Russell Redman, *Kroger named SN's 2022 Retailer of the Year*, Supermarket News (Sept. 6, 2022), https://www.supermarketnews.com/retail-financial/kroger-named-sns-2022-retailer-year.

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54. The vast majority of grocery transactions take place in-store.[27] Some supermarket business, however, has moved online. Supermarkets use a range of proprietary mobile and online applications, as well as third-party services, such as Instacart, to offer pickup and delivery of groceries to customers. Ultimately, this online business is necessarily tied to supermarkets' in-store operations.

55. Operating full-service supermarkets is a labor-intensive business. Albertsons alone has approximately 290,000 employees across the country.[28] In order to offer a high level of service to support an in-person shopping experience, supermarket companies must also invest heavily in training their in-store employees. Kroger, for instance, spent over a hundred million dollars in associate training and development in 2021 alone.[29]

C. Supermarket Pharmacies

56. Many supermarkets operate pharmacies within their stores. For example, Albertsons' pharmacy sales account for approximately [redacted] of total revenue. These pharmacies also drive additional business elsewhere in the store, as pharmacy customers tend to spend significantly more on their overall grocery purchases than non-pharmacy customers.

57. Running a pharmacy introduces operational complexities for supermarket operators. Pharmacies must obtain state and federal licenses to operate. Pharmacies also require specialized labor. Kroger employs 24,000 healthcare professionals in its pharmacies, and Albertsons employs over 10,000 healthcare professionals in its pharmacies. In addition, pharmacies introduce an entirely separate set of supply chain considerations, as supermarkets

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[27] Alarice Rajagopal, *Most grocery transactions still occur in stores*, Supermarket News (June 7, 2023), https://www.supermarketnews.com/issues-trends/most-grocery-transactions-still-occur-stores.

[28] Albertsons Companies, Inc., Quarterly Report (Form 10-Q), at 23, (Jan. 9, 2024), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001646972/e583cb22-92da-4916-997a-75ef15266aa7.pdf.

[29] *Examining the Competitive Impact of the Proposed Kroger-Albertsons Transaction Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 117th Cong. (2022) (written statement of Mr. Rodney McMullen, The Kroger Co.), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20McMullen%20-%202022-11-28.pdf.

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must negotiate with drug manufacturers and PBMs to secure an adequate supply of prescription drugs and to obtain them at affordable prices.

D. Supermarket Fuel Centers

58. Many supermarket locations also include fuel centers. These fuel centers not only serve tens of thousands of customers on a daily basis—they also drive grocery sales. According to Albertsons, [redacted]. Kroger, for its part, reports to investors that "[f]uel sales are an important part of our revenue, net earnings and loyalty offering."[30]

59. Like pharmacies, fuel centers require operational expertise, including hiring specialized labor and investments in fuel-specific infrastructure.

E. Supermarket Analytics

60. Across all of these business lines, modern supermarket companies rely heavily on sophisticated analytics departments to set pricing and promotions.

61. These analytics departments also drive alternative sources of revenue. At Kroger, for instance, the 84.51º analytics division uses customer data obtained from customers' use of Kroger Plus loyalty cards to generate insights about consumer preferences and to create highly targeted advertising and personalized offers for specific products.[31] Kroger then sells its consumer insights and personalized offers, through its "Best Customer Communication" platform, back to its suppliers.[32] Albertsons has also been building a "Consumer and Market [redacted].

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[30] The Kroger Co., Annual Report (Form 10-K), at 4, (Mar. 29, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000056873/107badbb-3656-4d1e-8e88-bede8ee11566.pdf.

[31] 84.51°, Consumer Packaged Goods, https://www.8451.com/industries/consumer-packaged-goods/ (last visited Jan. 14, 2024).

[32] *Id*.

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62. Operating these analytics businesses requires significant investment in data and technology.[33]

VI. RELEVANT MARKETS

63. RCW 19.86.060 prohibits mergers the effect of which "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

64. The Legislature has established that, in interpreting the CPA, courts should "be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters." RCW 19.86.920; *see also State v. LG Elecs., Inc.*, 185 Wn. App. 123, 133-34, 340 P.3d 915 (2014). One such statute is Section 7 of the Clayton Act ("Section 7"), which, like RCW 19.86.060, prohibits mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

65. When assessing whether a merger between competitors is likely to substantially lessen competition, the anticompetitive effects of a merger between two competitors are typically analyzed within the relevant market or markets in which those competitors compete. A "relevant market" is comprised of both a "relevant product market," which "identifies the product and services with which the defendants' products compete," and a "relevant geographic market," which "identifies the geographic area in which the defendant competes in marketing its products or service." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015). Proof that a merger may substantially lessen competition in *any* market—no matter its size—suffices to show that the merger violates the antitrust laws. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193, 258 (D.D.C. 2017).

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[33] *See e.g.*, *Examining the Competitive Impact of the Proposed Kroger-Albertsons Transaction Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 117th Cong. (2022) (written statement of Mr. Rodney McMullen, The Kroger Co.), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20McMullen%20-%202022-11-28.pdf ("We continue to prioritize using our data and technology to enhance the customer experience our supply chain, our business operations and productivity, and our associates experience — and doing it all in an accessible and seamless way.").

ATTORNEY GENERAL OF WASHINGTON
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A. Relevant Product Market: The Retail Sale Of Food And Other Grocery Products In Supermarkets

66. The sale of food and other grocery products through Supermarkets is the relevant product market in which to assess the effect of Kroger's proposed acquisition of Albertsons and constitutes a line of commerce under RCW 19.86.060.

67. For purposes of this Complaint, the term "Supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and distilled spirits.

68. Supermarkets like Albertsons and Kroger provide a broad array of products and services and offer consumers convenient one-stop shopping for food and grocery products. In order to accommodate the large number of products and services necessary for a one-stop shopping experience, Supermarkets must be physically larger than many other retailers. For example, Kroger's securities filings state that it believes that its primary food 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

ATTORNEY GENERAL OF WASHINGTON
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Seattle, WA 98104-3188
(206) 464-7744

produce."[34] In addition, JP Morgan reported on July 21, 2020 that Kroger' average store size was 65,000 square feet and Albertsons' average store size was 50,000 square feet.

69. Supermarkets compete primarily with other Supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets regularly base their food and grocery prices on the prices of products sold at nearby Supermarkets. To do this, Supermarkets conduct regular "price checks" of the goods offered by other local Supermarkets.

70. Albertsons has acknowledged that club stores like Costco and Sam's Club are "*structurally a different consumer proposition*" than Supermarkets, which sell a different "product configuration" to their customers and require an annual membership fee.

71. Additionally, as one industry commentator put it, club stores "think big: bigger package sizes or multipacks" to fit that store format.[35] Many dollar stores, meanwhile, "require packages that can be retailed for $1."[36]

72. As such, although retailers other than Supermarkets, such as club stores or dollar stores, may also sell food and grocery products, these types of stores do not offer a Supermarket's array of products and services.

B. Relevant Geographic Markets For Supermarkets

73. The majority of grocery shopping occurs at stores located very close to where consumers live, study, or work. As a result, competition for Supermarkets is local in nature and the relevant geographic markets consist of the areas surrounding each of Defendants' stores.

74. This localized competition is reflected in Defendants' ordinary course documents concerning competitive analysis and pricing. Albertsons' strategy documents note that "[c]ompetition is . . . determined at a neighborhood level." Similarly, Kroger uses mathematical

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[34] *See*, *e.g.*, The Kroger Co., Annual Report (Form 10-K), at 4, (Jan. 29, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000056873/107badbb-3656-4d1e-8e88-bede8ee11566.pdf.

[35] *Food and Beverage's Changing Retail Landscape*, Food Processing (Mar. 16, 2016), https://www.foodprocessing.com/business-of-food-beverage/business-strategies/article/11321951/food-and-beverages-changing-retail-landscape.

[36] *Id*.

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
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Seattle, WA 98104-3188
(206) 464-7744

models to develop "trade areas" around each of its stores. Kroger uses the trade areas to "understand[] the households that live nearby and the competition around the store that is likely to have the most impact." Kroger has also noted that its "primary food store format . . . typically draw[s] customers from a 2-2.5 mile radius."[37]

75. As the Supreme Court has noted, a plaintiff need not "delineat[e] . . . [each geographic market] by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). This is because the "Supreme Court has recognized that an element of fuzziness would seem inherent in any attempt to delineate the relevant geographic market." *Sysco Corp.*, 113 F. Supp. 3d at 48 (internal quotation omitted).

76. Here, the competitive effects of the Proposed Transaction can be evaluated within at least the following 49 city areas, each of which consists of a city, a section of a large city, or a grouping of nearby cities in Washington: (1) Auburn, (2) Battle Ground, (3) Belfair, (4) Bellevue, (5) Bellingham, (6) Bonney Lake, (7) Bothell, (8) Bremerton, (9) Burlington, (10) Edmonds, (11) Ellensburg, (12) Enumclaw, (13) Everett, (14) Federal Way, (15) Gig Harbor, (16) Issaquah, (17) Kent, (18) Kirkland, (19) Longview, (20) Lynnwood/Mountlake Terrace, (21) Marysville, (22) Monroe, (23) North Bend, (24) Olympia, (25) Port Orchard, (26) Port Townsend, (27) Puyallup, (28) Redmond, (29) Renton, (30) Sammamish, (31) NE Seattle, (32) NW Seattle, (33) S Seattle, (34) SE Seattle, (35) SW Seattle, (36) W Seattle, (37) Sequim, (38) Shelton, (39) Snohomish, (40) N Spokane, (41) S Spokane, (42) Stanwood, (43) E Tacoma, (44) W Tacoma, (45) Tri-City/Richland/Kennewick/Pasco, (46) E Vancouver, (47) W Vancouver, (48) Wenatchee/East Wenatchee, and (49) Yakima. These city areas are a conservative approximation of the area of effective competition among Defendants' stores. In some cases,

[37] *See, e.g.*, The Kroger Co., Annual Report (Form 10-K), at 4, (Jan. 29, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000056873/107badbb-3656-4d1e-8e88-bede8ee11566.pdf.

ATTORNEY GENERAL OF WASHINGTON
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depending on the location of Defendants' stores, the relevant geographic market may be smaller than a city area.

VII. ANTICOMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION

77. Federal law, and by extension, Washington law, recognizes an "expansive definition of antitrust liability," *California v. Am. Stores Co*., 495 U.S. 271, 284 (1990), because "[Congress's] concern was with probabilities, not certainties," *Brown Shoe Co. Inc. v. United States*, 370 U.S. 294, 323 (1962). Accordingly, a merger violates the law if it is "reasonably likely to cause anticompetitive effects." *United States v. H & R Block, Inc*., 833 F. Supp. 2d 36, 49 (D.D.C. 2011). The law "does not require proof that a merger or other acquisition has caused higher prices [or reduced quality] in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Id*. (internal quotation omitted). Some mergers are *presumptively* illegal because they are "so inherently likely to lessen competition substantially that [they] must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

78. A merger between Kroger and Albertsons—the two largest Supermarket operators in the State—creates an appreciable danger that there will be a substantial lessening of competition in the sale of food and grocery products by Supermarkets in city areas throughout Washington. The Proposed Transaction will eliminate head-to-head competition between Albertsons and Kroger—competition that has resulted in better service, better products, and better prices for Washington consumers. It will likely result in store closures and worsening quality of store service. It will remove Albertsons—the largest grocery retailer in Washington, and a company whose focus on local competition has resulted in better offerings and better deals for Washington customers—from the market. And it will increase the likelihood that, in the wake of this merger, the remaining retail Supermarket competitors in Washington will coordinate to raise prices or reduce store or product quality. For all these reasons, the Proposed Transaction,

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unless enjoined, will likely raise the cost of groceries for Washington consumers and reduce the quality of their grocery shopping experience.

A. Defendants' Proposed Transaction Is Presumptively Unlawful

79. The Proposed Transaction is presumptively unlawful.

80. A presumption that a merger is illegal arises when the merger would result in "a firm controlling an undue percentage share of the relevant market," including a firm that would "control[] at least 30%" of the market, and "result[] in a significant increase in the concentration of firms in that market." *Philadelphia Nat'l Bank*, 374 U.S. at 363-64.

81. To measure market concentration, courts have sometimes relied on the Herfindahl-Hirschman Index ("HHI"). The HHI of a particular relevant market is calculated by summing the squares of each individual firms' market shares. *See* U.S. Dep't of Justice & FTC, Merger Guidelines § 2.1 (2023), https://www.ftc.gov/reports/merger-guidelines-2023 ("Merger Guidelines").[38] So, for example, a market consisting of four firms with market shares of 30%, 30%, 20%, and 20%, would have an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). Courts look at the post-merger concentration levels in the relevant market, and at the increase in HHI resulting from the proposed transaction, called the "delta HHI."

82. The Proposed Transaction need only result in markets exceeding *either* the 30% market share with significant increase in concentration threshold set forth in *Philadelphia National Bank or* the HHI and delta HHI thresholds set forth in the Merger Guidelines to be presumptively unlawful. Merger Guidelines § 2.1; *see also FTC v. IQVIA Holdings Inc.*, No. 23 CIV. 06188 (ER), 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024).

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[38] Federal courts have looked to prior versions of the Merger Guidelines to assist in their interpretation of the antitrust laws. *See, e.g.*, *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 117 (D.D.C. 2016); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 53 (D.D.C. 1998); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 1991); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997).

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83. The Proposed Transaction would result in such a significant concentration of market power in the hands of the merged firm that it is presumptively anticompetitive in dozens of city areas throughout the State.[39]

84. That fact is unsurprising. As noted previously, Albertsons and Kroger are the two largest Supermarket operators in Washington. In Renton, for example, their combined share exceeds 70% and exceeds the relevant HHI thresholds, rendering the Proposed Transaction presumptively anticompetitive. Similarly, in Bonney Lake, their combined share exceeds 40% and exceeds the relevant HHI thresholds, rendering the Proposed Transaction presumptively anticompetitive.

85. Once a plaintiff establishes that a proposed merger is presumptively illegal, the burden shifts to defendants to rebut the presumption. *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014). This means that, to the extent that a defendant attempts to argue that a particular transaction will not substantially reduce competition, it is the defendant's burden to substantiate that defense.[40]

B. Defendants' Proposed Transaction Will Eliminate Head-To-Head Competition Between Albertsons And Kroger

86. Defendants' Supermarket operations and documents additionally show that the Proposed Transaction is likely to substantially reduce competition.

87. Defendants are significant competitors throughout much of the United States. That competition is particularly fierce in Washington, where they currently operate Supermarkets in many Washington communities within a few miles of each other. In fact, they currently operate Supermarkets in some Washington communities within a single mile of each other.

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[39] While club and dollar stores are not part of the relevant product market, this remains true even if they are included in calculating market shares, HHIs and delta HHIs resulting from the Proposed Transaction.

[40] If the presumption is overcome, the burden shifts back to the plaintiff. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337-38 (3d Cir. 2016).

ATTORNEY GENERAL OF WASHINGTON
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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
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88. In Washington, both Kroger banners, Fred Meyer[41] and QFC,[42] compete head-to-head with Albertsons' banners, Albertsons, and Haggen, and Safeway.

89. The Division President of QFC has stated unequivocally that "Safeway/[Albertsons]" is QFC's "#1 direct competitor" and QFC's actions match that statement. QFC reviews Safeway's ads and its "primary strategy" for certain key items is to [redacted]

90. Throughout Washington, Albertsons banners also compete head-to-head with Kroger banners. The President of Albertsons' Seattle Division, which covers the vast majority of Washington, has described Fred Meyer as Albertsons' "main competitor." [redacted].

91. The head-to-head competition between Albertsons and Kroger banners has resulted in significant benefits to consumers. For instance, [redacted]. Fred Meyer and QFC have done the same.

92. The vigorous head-to-head competition between Albertsons and Kroger banners is not limited to price. Albertsons and Kroger also improve and expand their product offerings

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[41] Fred Meyer operates 59 grocery stores across 43 cities in Washington. Fred Meyer, Grocery Stores in Washington, https://www.fredmeyer.com/stores/grocery/wa (last visited Jan. 10, 2024). It operates an additional 51 stores in Oregon, 11 stores in Idaho, and 11 stores in Alaska. Fred Meyer, Grocery Store Locations, https://www.fredmeyer.com/stores/grocery (last visited Jan. 10, 2024).

[42] QFC operates almost exclusively in Washington. It has "55 grocery stores across 30 cities in Washington." QFC, Grocery Stores in Washington, https://www.qfc.com/stores/grocery/wa (last visited Jan. 10, 2024). It operates only four additional stores outside Washington—in Portland, Oregon. QFC, Grocery Stores in Portland, Oregon, https://www.qfc.com/stores/grocery/or/portland (last visited Jan. 10, 2024).

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and services to compete with, and win customers from, each other. For example, QFC has expanded its store hours in Washington as well the products it offers in order to compete with Safeway. [redacted].

93. As an example of the vigorous head-to-head competition between Kroger and Albertsons, after the Seattle City Council mandated large grocery stores provide a $4 per hour hazard pay during COVID to their workers, Kroger closed two QFC stores—one in Seattle's Wedgwood neighborhood, which had been beloved independent grocer Matthew's Red Apple Market until QFC took it over in 1999, and one in Seattle's Capitol Hill neighborhood.[43] Both the Wedgwood and Capitol Hill stores were within one mile of competing Albertsons-owned Safeways. In 2021, [redacted] the sales would come back from Safeway and be a HUGE market share pull back."

94. Economics and common sense suggest that if this vigorous head-to-head competition between Albertsons and Kroger is lost, customers in markets throughout Washington will face increased prices and worse service.

95. So do the parties' documents. Kroger, for example, has recognized that areas with diminished competition are areas where it can pursue a "different price strategy" and raise prices.

[43] Paul Roberts, *'It's devastating': As a QFC store winds down, neighbors and politicians thank employees, criticize closure*, Seattle Times (Apr. 22, 2021), https://www.seattletimes.com/business/local-business/as-a-qfc-store-winds-down-neighbors-and-politicians-thank-employees-criticize-owner/; Paul Roberts, *QFC has no plans to reopen Wedgwood store, despite repeal of city law that prompted closure*, Seattle Times (Dec. 17, 2021), https://www.seattletimes.com/business/qfc-has-no-plans-to-reopen-wedgwood-store-despite-repeal-of-city-law-that-prompted-closure/.

ATTORNEY GENERAL OF WASHINGTON
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Seattle, WA 98104-3188
(206) 464-7744

Kroger is not alone in this regard. Albertsons also recognizes that when its stores face less competition, it can take the opportunity to raise prices and "margin up."

96. Accordingly, unless the Proposed Transaction is enjoined, the loss of head-to-head competition between Albertsons and Kroger will likely lead to substantial lessening of competition in markets throughout Washington, likely resulting in increased product prices, decreased choices, and diminished Supermarket shopping quality for Washington residents.

C. Defendants' Proposed Transaction Will Likely Result In Store Closures

97. The Proposed Transaction will also likely result in store closures in Washington, which will reduce consumer choice or force consumers to travel further to buy groceries.

1. Kroger will have an incentive to close stores in neighborhoods where its newly acquired stores overlap with its current ones

98. As a result of the Proposed Transaction, Kroger will own and operate multiple Supermarkets within a few miles of each other. In fact, many of these stores will be within a mile of another Kroger store. Having consolidated its control over these stores, Kroger will be incentivized to reduce geographic overlap by closing some overlapping stores. These store closures, in turn, will lead to lost jobs and reduced choice for consumers.

99. History is a guide. Albertsons closed a store located in the Birchwood neighborhood of Bellingham, shortly after acquiring the Haggen store a mile away in the wake of the Albertsons-Safeway merger. The Birchwood store had served the community for 38 years.

100. Two years after this store's closure, Albertsons sold the property with a use restriction that prevented subsequent owners from devoting more than a small portion of the store to grocery items. That restrictive covenant was to last for decades to come—until 2038.

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
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Seattle, WA 98104-3188
(206) 464-7744

101. Local National Public Radio station KUOW reported in May 2023 that the loss of the Birchwood Albertsons in 2016 "created a food desert in one of Bellingham's most racially and socio-economically diverse neighborhoods that continues to this day."[44]

2. Kroger will have an increased incentive to close stores to reduce union participation

102. Defendants negotiate collective bargaining agreements with local union chapters for their stores. Documents from both companies reflect the reality that when one "cave[s]" to a demand for increased wages, the other will "be[] pressured to increase wages to remain competitive." Local unions have leveraged this tension to secure higher wages, increased contributions from Kroger to union Health and Welfare funds, and additional benefits, as compared to non-union workers.

103. A 2021 labor strategy document prepared for Kroger recommends that Kroger pursue, over the long-term, a strategy to "reduc[e] the percentage of Kroger associates represented by organized labor." That strategy includes "deterr[ing] union campaigns," "opening more nonunion operations," and "shutting . . . union represented locations." So, for example, in connection with a contemplated acquisition of Food for Less stores in California in 2022, a Kroger Senior Vice President asked about the costs associated with "closing . . . [the unionized stores] for a period of time to make them nonunion."

104. At present, competition from Albertsons impedes Kroger's incentive and ability to shutter union stores to render them non-union. Specifically, Kroger must contend with the possibility that even a temporary closure of a store to render it non-union would risk shifting

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[44] Ruby de Luna, *A grocery store merger made this Bellingham neighborhood a food desert. Are others next?*, KUOW (May 9, 2023), https://www.kuow.org/stories/a-2015-grocery-merger-made-this-bellingham-neighborhood-a-food-desert-are-others-next. Areas with low access to fresh food are colloquially called "food deserts." The U.S. Department of Agriculture has recognized Birchwood as a Low-Access Census Tract because it has low access to food stores. The U.S. Department of Agriculture also recognized the area just northwest of the former Albertsons as both a Low-Access Census Tract and a Low-Income Census Tract, a designation held by only 13% of U.S. census tracts in 2019. *Food Access Research Atlas*, U.S. Dep't of Agric. Econ. Rsch. Serv., https://www.ers.usda.gov/data-products/food-access-research-atlas/.

ATTORNEY GENERAL OF WASHINGTON
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

most of that store's customer base to a nearby Albertsons location. By consolidating control over more than 300 Supermarkets in Washington in Kroger's hands, however, the Proposed Transaction would make it significantly easier for Kroger to close stores without suffering a substantial loss in sales, because any business diverted to a former Albertsons location would now count towards Kroger's sales.

105. Closing and reopening stores as non-union—in effect, undoing a unionization vote—would result in layoffs and store closures in the immediate term. Such closures would also result in fewer choices for consumers and the possibility that customers would have to travel further for groceries.

D. Defendants' Proposed Transaction Will Eliminate Aggressive Competition From Albertsons

106. Albertsons is the largest Supermarket in Washington by far—operating almost twice as many stores as Kroger. It is also an aggressive and successful competitor in Washington, which has been, according to Albertsons' internal documents, "crushing it consistently" for the past few years.

107. Albertsons' success is in large part a product of Albertsons' strong focus on local competition, which is backed by the resources and services of a national organization. Consumers have benefitted from that local focus in the form of lower prices—Albertsons' CEO, for example, has noted that Albertsons is more likely than other retailers to be a "catalyst for a price war," given Albertsons' "local decisions on [promotions]."

108. Albertsons' local focus has also resulted in an ability to offer a diverse array of local products in their stores; a focus which Albertsons employees have described as the "secret sauce of [Albertsons'] new winning model compared to Kroger." That is particularly true in Washington, where Albertsons employees have noted that whereas "QFC . . . used to be known for best in class local assortment . . . today they have been almost completely peanut buttered and centralized under Kroger." Kroger employees have also noticed this

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(206) 464-7744

distinction—complaining that Safeway can be "much more aggressive on local innovation" than QFC for certain products.

109. If the Proposed Transaction were to be consummated, Albertsons' local focus—and the unique value that Albertsons brings to its customers—would be lost, resulting in a significant diminishment of competition throughout Washington.

E. Defendants' Proposed Transaction Will Reduce Competition Between All Supermarkets And Increase The Potential For Coordinated Effects

110. "Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009) (internal quotation omitted). By removing Albertsons from the market, the Proposed Transaction will increase the likelihood that, instead of competing fiercely, the remaining Supermarkets in Washington will be incentivized to coordinate to raise prices.

111. Grocery pricing has always been transparent.[45] Historically, Supermarkets have been able to send employees to competitors' stores to see what prices their competitors charge customers so that they can respond accordingly. The advent of modern technology has exacerbated this trend. Now Albertsons and Kroger can, and do, "scrape" (i.e., use technology to extract) the prices of thousands of products across their competitors' stores in order to inform their own pricing decisions and monitor the pricing decisions of their competitors. This practice creates a situation ripe for coordination.

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[45] Courts and regulators look to certain key factors to determine whether a market is particularly susceptible to coordination. One of those factors is whether pricing in a particular market is transparent—that is, whether a company can easily determine the prices that its competitors charge customers, and vice versa. Transparent pricing is conducive to coordination in a particular market because it permits market participants to "signal" to each other that they want to raise prices by raising their own prices—confident in the knowledge their competitors will be aware of this move. That transparent pricing then also permits the "signaler" to track whether its competitors raise their own prices in response. Another factor, that customers cannot negotiate prices with supermarkets, is similarly present in this market.

ATTORNEY GENERAL OF WASHINGTON
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112. The transparency of grocery prices has created opportunities for coordinated behavior among grocery stores. Kroger, for example, has noted that its strategy is to [redacted]

113. [redacted] $2.19-$2.39."

114. Similarly, in June of 2022, Kroger decided to "update[] [its] pricing strategy" by raising the price it charged for chicken. [redacted] Kroger later reported that, as it had hoped, "many of our traditional grocery competitors mov[ed] up in markets that we have increased retails."

115. Existing competition constrains coordination, but if the Proposed Transaction were to be consummated, the elimination of Albertsons will increase the ease and likelihood of coordination amongst the remaining Supermarkets, leading to the potential for further harm to Washington consumers.

VIII. THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION WILL NOT BE MITIGATED OR OFFSET

116. To the extent Defendants seek to argue that the prospect of entry by new competitors, expansion of existing competitors or the potential efficiencies created by the Proposed Transaction mitigate or offset the threat it poses to competition, they face a heavy burden. For example, if a defendant seeks to justify a merger on the basis of efficiencies, it must come forward with "proof of extraordinary efficiencies" for mergers that will result in "high

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market concentration levels." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001). A defendant that seeks to show that entry by new firms or an expansion by existing firms will resolve the competitive harm of a merger must show the entry will be timely, likely and sufficient to counteract the anticompetitive harm of the merger. *Sysco Corp.*, 113 F. Supp. 3d at 80.

A. Entry And Expansion Are Unlikely To Prevent The Proposed Transaction's Potential Harm

117. New entry or expansion by existing Supermarkets is unlikely to address the Proposed Transaction's anticompetitive effects. There are high barriers to building a successful Supermarket business, including significant start-up costs and operating expenses, building advanced information technology systems, cultivating and maintaining competitive distribution networks, ensuring consistent supply across multiple categories of product, hiring and training staff with specialized skills, and establishing brand differentiation, including an online presence.

118. Consumers have grown accustomed to Supermarkets offering a wide range of products and services, such as bakeries, pharmacies, affordable private label products, fresh and organic produce, wine and beer selections, and a wide variety of non-perishable items. New entrants need to secure multiple licenses and registrations with varying state entities to ensure regulatory compliance, such as an enterprise DEA license to operate a pharmacy, or a liquor license to sell alcohol in their store. A new competitor must be equipped to provide these offerings or risk closing.

119. Additional barriers to entry can be created by incumbents, who may hold on to closed stores or undeveloped land for potential reopening, or add use restrictions that prevent closed properties from being developed by another company into a grocery store. A strategically placed use restriction can foreclose a market to the benefit of the incumbents, especially in more densely populated areas where suitable space is already difficult to find.

120. Overcoming these high barriers to entry is difficult and costly. Internal Albertsons documents warn that [redacted]

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[redacted]. These high barriers to entry can also be especially pronounced for companies seeking to introduce new banners to a local market, which must heavily invest in marketing to generate greater brand recognition and customer loyalty.

121. Existing grocery store operators have been unable to expand their operations in a manner that would prevent or remedy the Proposed Transaction's likely anticompetitive effects in Washington. Walmart, for example, has not opened a supercenter in Washington since 2018. It has, however, closed two of its stores in Washington over the last four years, and to date operates only 52 supercenters and four neighborhood markets in Washington, compared to Albertsons' approximately 215 stores and Kroger's approximately 114 stores. There is also no indication that any existing Supermarkets have plans to substantially expand their presence in Washington, much less in a manner that would timely replicate the intensity of the competition that the Proposed Transaction is poised to eliminate.

B. There Are No Merger-Specific Efficiencies That May Reverse The Proposed Transaction's Potential To Harm Consumers

122. Defendants have not provided any meaningful analysis of the purported synergies or efficiencies they claim will result from the Proposed Transaction. Even if the synergies they have claimed were cognizable for purposes of this Court's analysis of the Proposed Transaction, they would not be sufficient to cure the anticompetitive effects that are likely to occur in the relevant markets if the Proposed Transaction were to take place.

IX. DEFENDANTS' PROPOSED DIVESTITURE

123. All but conceding the fact that their proposed merger will substantially lessen competition, Defendants have proposed a divesture of assets to C&S in the event the Proposed Transaction is permitted to close. It is Defendants' burden to show the adequacy of this divestiture.

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124. As part of the proposed divestiture, Defendants have agreed to sell 413 stores (104 of which are in Washington), eight distribution centers [redacted], two regional offices [redacted], the QFC, Mariano's and Carrs brand names, the exclusive licensing rights to the Albertsons brand name in Arizona, California, Colorado and Wyoming, and five private label brands. Defendants are selling this divestiture package to C&S for $1.9 billion in an attempt to remedy the significant harm to competition posed by the Proposed Transaction.

125. C&S is a wholesale grocery store supply company that operated only 24 retail grocery stores as of October 3, 2023 (and none in Washington).

126. C&S has not demonstrated the ability to successfully and durably operate retail grocery stores, let alone undertake the complicated process of rebannering a number Supermarkets it will acquire via the parties' proposed divestiture.

A. History Shows That C&S Lacks The Incentive To Operate The Divested Assets In A Manner That Would Restore The Competition Lost As A Result Of The Proposed Transaction

127. C&S is not incentivized to fully replace the competitive intensity that Albertsons brought to the sale of food and grocery products in Supermarkets.

128. C&S has a history of buying grocery stores, then selling them to their customers in their wholesale distribution business. Through this practice, C&S can lock in lucrative distribution agreements with these divested stores, without having to undertake the work necessary to operate them.

129. In 2000, for example, C&S acquired 185 Grand Union Supermarkets. A year after C&S purchased the Grand Union stores, it had sold 140 of them to other Supermarket chains,

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with plans to sell another 15.[46] Many of the Supermarkets that C&S sold ultimately closed,[47] and in 2012, the Grand Union brand was effectively defunct.[48]

130. C&S has expressly stated in annual and quarterly reports from 2018, 2019, and 2020 that "[w]here possible, we seek to sell [purchased stores] to buyers who are already customers under existing contracts with our grocery wholesaling and distribution business."

131. Neither Defendants nor C&S have provided binding commitments that would ensure that C&S will continue to operate and invest in the divested stores. To the contrary, C&S' internal documents suggest that it is not committed to operating all of the stores it hopes to acquire from Defendants. When commenting on a draft press release relating to the Proposed Transaction in September of this year, C&S' former CEO commented to current CEO, "Do we have to say that we won't close stores? (the 'all' is a problem') – the trick is that they stay open as they transition but then what? Are we committed to this?"

B. C&S Lacks The Ability To Successfully Restore The Competition Lost As A Result Of The Proposed Transaction

132. C&S lacks the requisite experience and resources to successfully operate and rebanner the divested stores. As a consequence, C&S will be unable to replace the competitive intensity lost due to Albertsons' removal from the relevant market.

133. ***C&S lacks experience operating grocery stores.*** C&S' primary business is as a grocery store supplier—not a retail grocery store operator. The "About" section of C&S' website

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46 William J. Kemble, *Supermarket Will Stay in Saugerties – Under New Name*, Daily Freeman (Nov. 29, 2001, updated July 22, 2021), https://www.dailyfreeman.com/2001/11/29/supermarket-will-stay-in-saugerties-under-new-name/.

47 *Last Grand Union Grocery Store In Connecticut Will Close*, Hartford Courant (Nov. 8, 2012, updated Sept. 15, 2021), https://www.courant.com/2012/11/08/last-grand-union-grocery-store-in-connecticut-will-close-2/.

48 Jason Graziadei, *Nantucket supermarket closing doors*, Cape Code Times (Oct. 15, 2012), https://www.capecodtimes.com/story/news/2012/10/15/nantucket-supermarket-closing-its-doors/49348503007/. In 2021, C&S reopened 11 stores under the Grand Union banner after purchasing them from Tops Markets as a part of another divestiture package. Russell Redman, *C&S Wholesale Grocers readies Grand Union relaunch*, Supermarket News (Feb. 28, 2022), https://www.supermarketnews.com/retail-financial/cs-wholesale-grocers-readies-grand-union-relaunch.

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describes it as "an industry leader in supply chain solutions and wholesale grocery supply."[49] Nowhere does that page mention that C&S is at all involved in the business of operating retail grocery stores. That omission is unsurprising. C&S operated only 24 retail grocery stores in the Midwest and Northeast as of October 3, 2023—stores that are on average smaller and offer fewer complementary services than stores in the divestiture package. C&S' agreement to purchase the 413 divested grocery stores amounts to an increase of over **<u>1,700%</u>** in its grocery retail business.[50]

134. [redacted].

135. ***C&S has never opened or operated a grocery store in Washington.*** C&S has never opened or operated a grocery store in Washington. Nor does it have any distributions centers in Washington. As a result, C&S lacks the relationships with local vendors, labor unions, and suppliers necessary to successfully operate and supply the 104 divested stores in Washington. This also means that any attempt to expand its presence *beyond* the stores divested by Defendants would require C&S to break new ground, literally and figuratively.

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[49] About, C&S Wholesale Grocers, https://www.cswg.com/ (last visited Jan. 10, 2024).

[50] C&S also owns the Piggly Wiggly brand and franchises over eighty Piggly Wiggly stores. But C&S does not run those stores.

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136. The lack of relationships with local vendors and suppliers is concerning, since building relationships with local suppliers to offer local products is one means by which Albertsons attempts to differentiate from its competition.

137. ***C&S has a history of not renewing union contracts and shifting operations to non-union shops.*** C&S has a history of closing unionized facilities, a practice which could, if applied to the stores it is set to acquire, reduce consumer choice and force some customers to travel farther for their grocery needs. As early as 2004, C&S closed unionized warehouses in Maine, Massachusetts, and Rhode Island within a year of acquiring them, transferring the jobs to non-union facilities located elsewhere, where workers were paid less per hour and did not have access to union health and retirement benefits.[51] In 2015, C&S acquired two unionized Safeway warehouses in Maryland and swiftly closed them, again transferring jobs to non-union warehouses elsewhere.[52] One report observed that "[i]t has become almost commonplace for C&S to acquire control of Teamster-contracted union warehouses, transfer the shipping work to other C&S non-union subsidiaries, and then get rid of the unionized workers."[53]

138. The majority of Albertsons and Kroger employees are union members, and the overwhelming majority of Albertsons and Kroger employees in Washington are union members. As a consequence, as part of the divestiture C&S will take ownership of 358 unionized retail stores.

139. C&S has declined to comment on its willingness to renew the collective bargaining agreements it will inherit from Defendants and it has made no commitments not to close unionized stores after the divestiture is finalized.

140. ***C&S lacks the sophisticated analytics and IT systems of Albertsons and Kroger.*** Defendants maintain four different IT systems, which are required to operate everything from

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[51] *C&S Closing Three New England Warehouses*, Progressive Grocer (Mar. 5, 2004), https://progressivegrocer.com/cs-closing-three-new-england-warehouses.

[52] Bruce Vail, *Teamsters Say Union Buster C&S Wholesale Grocers Aims To Kill Jobs at Safeway*, In These Times (Oct. 16, 2016), https://inthesetimes.com/article/cs-wholesale-grocers-safeway-layoffs.

[53] *Id*.

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distribution centers to customer point-of-sale transactions, to digital loyalty programs, to the companies' human resources systems. IT systems capable of carrying out those and hundreds of other tasks needed to run a grocery retail business are necessary to C&S' success in taking over the divested stores.

141. C&S' current IT systems, however, lack the capabilities of Defendants' systems. C&S believes that advanced IT systems are necessary to "maintain the day-to-day operations of grocery stores, as well as to manage pricing, sales and promotions, inventory control, and customer analytics." Therefore, C&S believes that access to the existing IT systems in the divested stores will be critical to successfully running these stores.

142. Defendants have agreed to provide C&S with only certain raw customer data, technical support, and maintenance services for a limited amount of time following the close of the divestiture.

143. Accordingly, C&S will need to create an IT system that increases its existing capabilities to match those of the four IT systems currently operated by Defendants. C&S will therefore need to develop a brand new, advanced IT system that governs virtually every aspect of its business. As C&S explained, "For C&S to successfully operate the divested stores, having access to existing IT systems" and transitioning to a new IT system "will be critical." This process that would take any business a long time to successfully complete.

144. ***C&S does not possess a robust array of private brands to sell in the divested stores.*** Together, Defendants own 22 private labels, including the O Organics, Lucerne, Heritage Farms, and Big K brands. In 2019, for example, Albertsons alone carried over 11,000 products under its private labels.[54] Likewise, Kroger "stock[ed] over 14,000 private label items" in 2022,

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[54] Lawrence Aylward, *Albertsons Companies: A store brands success story*, StoreBrands (Jan. 28, 2019), https://storebrands.com/albertsons-companies-store-brands-success-story.

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and, as of January 28, 2023, "operated 33 food production plants."[55] Sales of private label items represent approximately one-quarter of overall grocery stores' sales.

145. C&S owns only one private label brand, called "Best Yet."[56] C&S acknowledges that it will need to "augment substantially its current range of private brand products by adding hundreds of additional products."

146. C&S will acquire only five private label brands in the divestiture, and the labels Defendants propose divesting are not equivalent to the brands they are retaining. Certainly, Kroger has not agreed to divest any of the four Albertsons private label brands with $1 billion in sales or more each—the Lucerne, Signature Select, Signature Café, or O Organics brands.[57] Instead, it has offered C&S brands such as "Waterfront Bistro," a private label brand that offers only a limited number of frozen seafood items.

147. Even if C&S expands its private label offerings, it will be unlikely to match Defendants' private label brand pricing because C&S lacks the manufacturing plants Defendants rely upon to produce private goods.

148. ***C&S Lacks the Expertise and Infrastructure Necessary to Operate the Non-Grocery Assets it Hopes to Acquire in the Divestiture.*** C&S lacks sufficient experience, infrastructure, and resources to operate a number of the non-grocery services that Defendants offer their customers in order to drive grocery store sales. Those services include Defendants' pharmacies and fuel centers, many of which are included in the divestiture package proposed by the parties. C&S will, for example, acquire about 327 pharmacies from Defendants, over 80 of which are located in Washington. But C&S today operates only a single pharmacy.

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[55] The Kroger Co., Annual Report (Form 10-K), at 5, (Mar. 29, 2022), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000056873/107badbb-3656-4d1e-8e88-bede8ee11566.pdf.

[56] C&S also has access to other private label brands through its membership in Topco Associates, LLC, a grocery group purchasing organization of which C&S is a member.

[57] Russell Redman, *Albertsons spotlights customer-favorite own-brand products*, Supermarket News (Jan. 10, 2022), https://www.supermarketnews.com/private-label/albertsons-spotlights-customer-favorite-own-brand-products.

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149. ***C&S Is Unlikely to Be Able to Successfully Rebanner the Divested Stores.*** When assuming control of the divested stores, C&S will not only have to assume control over and begin operating hundreds of stores, it will also need to undertake a complex rebannering process for the vast majority of those stores. That rebannering process will require it to convert the stores it acquires from Defendants' banners (such as Albertsons or Safeway) to new banners (such as QFC or Carrs).

150. The stakes for a successful rebannering are high. Store banners are important to consumers and, if poorly executed, store rebannering can lead to customer confusion, permanent sales declines, and store closures. Outside consultants advising C&S on rebannering have explained that C&S could lose customers and suffer substantial revenue declines if "new banners are meaningfully less attractive, not introduced to a market properly, and/or not transitioned well at the store level."

151. Rebannering can entail not just swapping out the aesthetic branding of the store, but also replacing proprietary private label brands owned by the previous banner, switching IT systems, hiring new employees, and contracting with new distribution centers and wholesalers, among other tasks. Shortly after closing the transaction, C&S will need to undertake this complex rebannering process for 336 of Defendants' divested stores, 63 of which are located in Washington. There is no indication it will be able to do so in a successful or timely fashion.

C. Even If C&S Successfully Operates And Rebanners The Divested Stores, The Divestiture Will Not Remedy The Anticompetitive Effects Of The Proposed Transaction

152. Regardless of C&S' ability to operate and rebanner the divested stores, even after the divestiture of 413 stores (104 of which are in Washington) to C&S, Defendants will not be able to remedy the anticompetitive effects of the Proposed Transaction. Indeed, post-divestiture,

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there will *still* be several city areas in Washington in which the merger is presumptively anticompetitive.[58]

X. VIOLATION OF THE CONSUMER PROTECTION ACT, RCW 19.86.060

153. Plaintiff repeats, re-alleges and incorporates by reference each and every preceding paragraph and allegation of this Complaint as if fully set forth herein.

154. Defendants' Proposed Transaction violates RCW 19.86.060.

155. The effect of the Proposed Transaction will likely substantially lessen competition for the retail sale of food and other grocery products in Supermarkets in the relevant geographic markets in Washington.

156. The Proposed Transaction affects trade and commerce as defined in RCW 19.86.010(2) because it affects Defendants' sale of food and other grocery products in Supermarkets to Washington consumers through Defendants' employees in Washington and across the nation.

157. Unless enjoined, the Proposed Transaction is likely to have the effect of substantially lessening competition for the retail sale of food and other grocery products in Supermarkets in the relevant geographic markets in Washington in the following ways, among others:

(a) by eliminating direct and substantial competition between Defendants Albertsons and Kroger;

(b) by increasing the likelihood that Defendant Kroger will unilaterally exercise market power; and

(c) by increasing the likelihood of, or facilitating, coordinated interaction between Defendant Kroger and the remaining market participants in each of the relevant geographic markets.

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[58] While club and dollar stores are not part of the relevant product market, this remains true even if they are included in calculating market shares, HHIs and delta HHIs resulting from the proposed divestiture.

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158. The ultimate effect of the Proposed Transaction would be to increase the likelihood that prices of food and other grocery products in Supermarkets offered to Washington consumers will increase, and that the quantity and quality of choices available to consumers will decrease in the relevant geographic markets in Washington.

XI. REQUEST FOR RELIEF

The State of Washington respectfully requests that this Court:

1. Adjudge and decree the Proposed Transaction to be unlawful because it violates RCW 19.86.060;

2. Enter judgment in favor of the State of Washington and against Defendants as alleged in this Complaint;

3. Permanently enjoin and restrain Defendants, their affiliates, successors, transferees, assignees and other officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf or in concert with them, from consummating the Proposed Transaction;

4. Award the State of Washington its reasonable costs and attorneys' fees, as provided by law; and

5. Award such other relief as it may deem just and proper.

DATED this 15th day of January 2024.

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DECLARATION OF SERVICE

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

DATED this 15th day of January 2024, in Seattle, Washington.

s/ Paula Pera C.
PAULA PERA C., WSBA No. 54630

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