UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya
In the Matter of The Kroger Company and Albertsons Companies, Inc.
Commission File No. D9428

January 2, 2025

Kroger's proposed $24.6 billion acquisition of Albertsons would have been the largest supermarket merger in U.S. history. The Commission's complaint alleged that the deal would have eliminated competition between two of the largest grocery chains in communities across the United States, leading to higher prices for groceries and other essentials for millions of Americans.[1] In a first for an FTC litigated enforcement action, the complaint also alleged that the proposed deal would have illegally harmed competition in labor markets, worsening wages and benefits for hundreds of thousands of grocery workers across the country.[2]

On December 11, Kroger and Albertsons announced an abandonment of their proposed merger.[3] The announcement followed a ruling by the U.S. District Court for the District of Oregon granting the Federal Trade Commission's request for a preliminary injunction halting the transaction.[4] In light of the abandonment, I joined my colleagues in granting the parties' motion to dismiss the administrative proceeding in this matter. I write separately to highlight several aspects of the district court's opinion, which advances antitrust analysis and vindicates the FTC's rigorous and reinvigorated approach to merger enforcement.

Throughout the opinion, the district court relied on the 2023 Merger Guidelines, adding to a line of cases where courts have treated the revised guidelines as persuasive authority.[5] When

[1] Complaint, *In re Kroger Co. & Albertsons Companies, Inc.*, Docket No. D-9428 (Feb. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/d9428_2310004krogeralbertsonsp3complaintpublic.pdf.
[2] Compl. ¶¶ 57-62.
[3] P3Press Release, Albertsons, Albertsons Files Lawsuit Against Kroger for Breach of Merger Agreement (Dec. 11, 2024), https://albertsonscompanies.com/newsroom/press-r

eleases/news-details/2024/Albertsons-Files-Lawsuit-Against-Kroger-for-Breach-of-Merger-Agreement/default.aspx ("Kroger willfully breached the Merger Agreement in several key ways, including by repeatedly refusing to divest assets necessary for antitrust approval, ignoring regulators' feedback, rejecting stronger divestiture buyers and failing to cooperate with Albertsons.").
[4] The FTC was joined in its request for a preliminary injunction by the States of Arizona, California, Illinois, Maryland, Nevada, New Mexico, Oregon, Wyoming, and the District of Columbia. *FTC v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *3 (D. Or. Dec. 10, 2024) [hereinafter Kroger Op.]
[5] *See Teradata Corp. v. SAP SE*, No. 23-16065, 2024 WL 5163082, at *4 (9th Cir. Dec. 19, 2024); *FTC v. Tapestry*, Inc., 2024 WL 4647809, at *7 n.3 (S.D.N.Y. 2024); *FTC v. Cmty. Health Sys., Inc.*, 2024 WL 2854690, at *20, *22

permitting an otherwise unlawful merger in order to permit firms to compete with an industry giant."[15]

The court again drew on the 2023 Merger Guidelines, acknowledging that "[c]ognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly."[16] The court methodically scrutinized the precise source of the various efficiencies the parties were touting, ultimately finding that "a significant portion" of the claimed efficiencies were neither merger-specific nor verifiable.[17]

Notably, the court accorded little weight to defendants' promise that they would make a $1 billion "price investment" in the form of price reductions on key grocery items, given that "promise[s] can be broken at will."[18] Even if parties intend to follow through on their promises, "the business realities on the ground after the merger may change what defendants are able to invest or what is in their best interest to invest."[19]

Defendants' primary rebuttal concerned their proposed divestiture of 579 stores to C&S Wholesale Grocers, LLC ("C&S").[20] The court carefully reviewed the proposal, noting that a divestiture can only cure the illegality of a transaction if it "replace[s] the competitive intensity lost as a result of the merger."[21] Plaintiffs' economic analysis showed that—even assuming a perfectly successful divestiture with no sales lost or stores closed—the merger would still be presumptively illegal in more than 1,000 supermarket markets and over 500 large format stores markets around the country. Even defendants' economic expert found that there were markets that were not remedied by the divestiture. The court concluded that the economic evidence, alone, was "sufficient to find that the divestiture will not mitigate the merger's anticompetitive effect such that it is no longer likely to substantially lessen competition."[22]

Notably, the court continued its analysis—penning one of the more rigorous assessments of a proposed divestiture in recent antitrust history. The court looked at the scope of the divestiture, noting C&S would receive a hodgepodge of assets rather than a "standalone, fully functioning company."[23] It noted, in particular, the risk associated with "rebannering" stores—which just under half of the 579 divested stores would need to undergo.[24] The court noted that C&S would have limited access for a few years to some of Kroger's and Albertsons' private labels—an important source of margin for grocery retailers

them all.[25] The court also noted that C&S would have temporary rights to customers' preexisting loyalty programs for up to a year—and then C&S customers would have to enroll in a new program.[26] The court noted the divestiture would not give C&S support for various other aspects of grocery retail, such as retail media capabilities, which C&S estimated would take it three years to fully develop.[27] "The structure of the divestiture package," the court wrote, "creates many risks for C&S that could make it difficult to compete."[28]

The court continued, reviewing whether C&S had a track record of successfully running grocery stores. While C&S is an established player in wholesale, it lacks experience running a large portfolio of retail grocery businesses. It presently operates just 25 retail grocery stores, the court noted, and while it acquired 334 retailer grocery stores between 2001 and 2012, by 2012 it had shut down or sold off all but three of those stores. What stores do remain, the court noted, seemed to be "performing below expectations."[29]

The court noted that C&S would remain dependent on Kroger/Albertsons for many years after purchasing the divested stores. Kroger would provide sales forecasting data and a base pricing plan to C&S for a period of time—and, strikingly, C&S would need to go through Kroger in order to adjust its own prices. This degree of entanglements between the divestiture buyer and the merging parties, the court noted, "poses a significant issue for the success of the divestiture" as it is not set up to create a truly independent competitor right away. Lastly, the court noted that C&S had agreed to buy the divested assets for $2.9 billion—a low price that the FTC argued suggested C&S's long-term plans were to sell the stores and retain the assets that could be repurposed to support its wholesale business.[30]

Ultimately the court found "ample evidence" that "the divestiture is not sufficient in scale to adequately compete with the merged firm and is structured in a way that will significantly disadvantage C&S as a competitor."[31] The court continued:

> C&S' history of unsuccessful grocery store ventures and its continuing dependence on defendants throughout the TSA [transition services agreement] period also suggest that the divestiture will not adequately restore competition. The deficiencies in the divestiture scope and structure create a risk that some or all of the divested stores will lose sales or close, as has happened in past C&S acquisitions. While many markets remain presumptively anticompetitive assuming the divestiture functions perfectly, a relatively small loss of sales or closure of stores short of a failure would still significantly increase the number of presumptively unlawful markets. It is unlikely that the proposed divestiture would sufficiently mitigate the anticompetitive effects of the merger.[32]

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[25] *Id*.
[26] *Id.*
[27] *Id*.
[28] *Id*.
[29] *Id.* at 51.
[30] *Id*. at 54.
[31] *Id*.
[32] *Id.* at 54.

The court's conclusion that the proposed divestiture raised enough red flags so as to be too risky is extraordinarily significant—and vindicates the FTC's unwillingness to accept the divestiture as a "fix" that could cure the illegality of the Kroger/Albertsons merger. Informed by failed remedies over the past decade,[33] the Commission in recent years has adopted a more stringent approach to reviewing proposals from merging parties. While the Commission has continued to review carefully any proposed divestiture put before us,[34] it has rejected remedies that either failed to resolve the underlying competition harms or posed too high a risk of failure.[35] This approach has meant that the Commission has chosen to litigate to challenge deals in lieu of accepting inadequate remedies—resulting in a record number of merger litigations over the last year.[36]

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The red flags posed by the proposed divestiture in this matter should continue to guide both the Commission's and courts' assessment of proposed divestitures in merger challenges. These include:

- Composition of the divested assets: whether the divestiture involves a hodgepodge of assets rather than a full, standalone business;
- Completeness of the divestiture: whether the divestiture resolves competition harms

Commission's successful experience in this matter—and being willing to reject risky divestitures, even when it means litigating—will help ensure the public is not unfairly bearing the risk of failed remedies.

Finally, the court broke new ground in its assessment of the FTC's labor markets theory. The Commission's complaint alleged that the merger would substantially lessen competition for union grocery store labor. Defendants argued that the theory was not cognizable under the Clayton Act because Section 6 states that "[t]he labor of human being is not a commodity or article of commerce." The court rightly rejected this novel argument, noting that Section 6 protects labor organizing from antitrust prosecution and does not create a safe harbor for mergers that unlawfully lessen competition for workers.[39] While the 2023 Merger Guidelines are the first to expressly discuss labor markets, "the concept of antitrust protections that extend to workers, not just consumers is not [new]."[40]

The court reviewed the FTC's qualitative and quantitative evidence that the market for unionized grocery jobs is distinct from the labor market as a whole. Union grocery workers testified that they receive wages and benefits that non-union grocery workers do not, primarily because unionized workers enjoy the protections secured by their collective bargaining agreement. They detailed the many ways that unionized contracts can differ, including, for example, by guaranteeing better pensions, representation during termination proceedings, the accrual of seniority preference for scheduling, and the ability to maintain seniority when switching between employers.[41] While defendants argued that the difference between unionized and non-unionized grocery work was insignificant, workers who took the stand disagreed.[42]

The court also noted that union grocery workers are not interchangeable with workers in non-grocery retail jobs.[43] Evidence shows that unionized grocery workers are more likely to receive training to serve in specialized roles such as meat cutters, cake decorators, bakery heads, or deli department clerks.[44] Defendants' expert argued that workers employed in union grocery positions have "general skills" that are also valued in other retail settings, and hence that these workers can be expected to move freely between unionized and non-unionized jobs.[45] But the

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townhall-on-kroger-merger/article_d9cbdcb2-7907-11ee-b72b-0b8855531dda.html; Casey Harrison, *FTC Chairwoman To Attend Las Vegas Meetings On Proposed Grocery Store Merger*, LAS VEGAS SUN (Sept. 12, 2023), https://lasvegassun.com/news/2023/sep/12/ftc-chairwoman-to-attend-las-vegas-meetings-on-pro/; *see also* Leah Nylen & Christopher Cannon, *supra* note 33.

[39] Kroger Op. at 56.

[40] *Id.* at 55; *see also* at Dissenting Statement of Commissioner Andrew N. Ferguson, *In the Matter of Guardian Service Industries, Inc.* (Dec 4, 2024) at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/guardian-ferguson-dissenting-statement-final.pdf ("The Commission is wise to focus its resources on protecting competition in labor markets. After all, the antitrust laws protect employees from unlawful restraints of the labor markets as much as they protect any output market.").

[41] Kroger Op. at 58.

[42] *Id.* at 59 (*See, e.g.*, Tr. 648:19-649:1 (McPherson) (Kroger executive testifying that "the driving discussion at the bargaining table is wages."); *c.f.* 677:11-17 (Clay) (President of UFCW Local 555 testifying that at bargaining he is "very concerned about health and welfare coverage and pension coverage; and then, you know, protections in the workplace for our members as well.").

[43] *Id.*

[44] *Id.*

[45] *Id.* at 60.

court found that some movement between union grocery and other jobs could be explained by a range of factors, including the fact that "there may not always be sufficient, consistent employment opportunities for all workers who prefer union grocery work."[46] Ultimately the court recognized the FTC's proposed union grocery labor market as "a plausible, relevant market for antitrust purposes"—even as it observed that the economic tools and methods available to gauge relevant labor markets are relatively under-developed.[47]

The court also found "plausible" the FTC's explanation of how eliminating competition between Kroger and Albertsons would harm union grocery workers by reducing their bargaining leverage during negotiations. Delving into the mechanics of how unions negotiate and strike, the court recognized that having more than one grocery store employer gives unions the ability to use an agreement with one employer to extract similar concessions from the other. It recognized, too, the way that unions can more credibly threaten a strike when they can divert customers to an alternative union grocery, given that a strike would impair normal operations. The court noted:

> Plaintiffs' argument that increased market concentration and loss of head-to-head competition would result in decreased bargaining power, leading to worse CBA negotiation outcomes for workers, including reduced compensation, is plausible. Defendants seek an advantageous bargaining position…to mitigate the harm that unions can cause with strikes and to resist union demands, including for increased compensation. With only one union employer in many markets, defendants would be in a relatively stronger, and union grocery workers in a relatively weaker, bargaining position. That argument is certainly more plausible than defendants' assertion that an increased concentration in union grocery employers and the loss of direct competition between Kroger and Albertsons would not change the balance of power at the bargaining table and, on the contrary, would be beneficial for union grocery workers.[48]

Here, too, the court noted the relative dearth of economic modeling and both sides' reliance on "primarily anecdotal testimony"—concluding that the lack of economic guidance meant that the court could not rule that the FTC's labor market theory was an independent basis for granting the preliminary injunction.[49]

I commend the district court for analyzing the labor market theory even after finding for the FTC on the product market claim. Importantly, the court confirmed that a substantial lessening of competition in labor markets can be an independent basis for liability. And by identifying areas where courts may need further guidance, the court set out a roadmap for enforcers to pursue. These areas include: (a) how to measure employee diversion resulting from a hypothetical monopolist employer imposing a small but significant decrease in wages and

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[46] *Id.*

[47] *Id.* at 62 ("Given that this is a relatively unusual market definition, it lacks supporting economic analysis that would generally be undertaken to verify whether a market is appropriately bounded. However, the Court is not aware of any standard economic analysis used to measure employee diversion resulting from, for example, a hypothetical monopolist employer imposing a small but significant decrease in wages and benefits. The Court

benefits;[50] (b) how to assess when a merger would lead to presumptively unlawful concentration in a particular labor market, and how the presumptive thresholds in the 2023 Merger Guidelines should apply;[51] and (c) how to conduct economic modeling of how wages, benefits, and other compensation might change as a result of changes in workers' bargaining power.[52] Additional work on these areas by labor market experts and others could help bolster both enforcers' and courts' analysis of whether a merger illegally threatens competition in labor markets.[53]

I commend the parties for their thorough briefing in this matter and the district court for issuing a careful opinion that advances merger analysis and ultimately protects communities around America from higher grocery prices and worse jobs.[54]

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[50] *Id.* at 62.
[51] *Id.* at 64.
[52] *Id.* at 68.
[53] Economists have already conducted some of this analysis, including in the context of this transaction. *See* Marshall Steinbaum, *Evaluating the Competitive Effect of the Proposed Kroger-Albertsons Merger in Labor Markets* (Nov. 11, 2023),