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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202</td><td rowspan="2">

▲COURT USE ONLY▲</td></tr>
<tr><td>STATE OF COLORADO, ex rel. PHILIP J. WEISER, ATTORNEY GENERAL,

Plaintiff,

v.

THE KROGER CO.; ALBERTSONS COMPANIES, INC.; and C&S WHOLESALE GROCERS, LLC,

Defendants.</td></tr>
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Plaintiff, the State of Colorado, by and through its Attorney General, Philip J. Weiser ("Plaintiff" or "Attorney General"), brings this action against Defendants The Kroger Co. ("Kroger"), Albertsons Companies, Inc. ("ACI"), and C&S Wholesale Grocers, LLC ("C&S") (collectively, "Defendants") pursuant to C.R.S. § 6-4-104 and C.R.S. § 6-4-107 and alleges as follows:

Few issues impact Colorado citizens, especially families, more than food. What to eat, where to buy, and the cost of groceries are constant sources of anxiety for Colorado families. Rising grocery prices lead to food insecurity and hunger, strain the resources of local governments and non-profits, and harm every Coloradan.

Now, in an already concentrated Supermarket industry, two of the largest Supermarket companies in Colorado—and in the U.S.—seek to merge. Kroger, which operates King Soopers and City Market, intends to buy its chief competitor, ACI, which operates Safeway and Albertsons.

Few would feel the impact of this Proposed Merger as profoundly as Coloradans. Kroger is the biggest Supermarket operator in the state, and ACI is third. Combined, they would control more than half of the Supermarket industry in Colorado. And in many local areas, the resulting impact would be even greater.

ACI employees immediately recognized the potential impact of the Proposed Merger, reacting with shock and disbelief. One employee exclaimed, "you are basically creating a monopoly in grocery with the merger . . . It's like AT&T and Verizon wanting to merge." Another echoed that the merger could not possibly be approved because it would create a "monopoly." Even the ACI COO acknowledged, "We are being bought by our enemy."

Indeed, Kroger and ACI are fierce head-to-head competitors in Colorado, and across the country. They constantly monitor each other's prices and they compete in all aspects of grocery operations including on price, customer service, store quality, shopping experience, product depth and variety, availability of local supply, private label brands, customer loyalty and rewards programs, and data analytics. Consumers benefit greatly from this competition in the form of lower prices, friendly service, well-maintained and stocked stores, fresh products, diverse offerings, good rewards programs, and the ability to support local farmers and suppliers in their communities and the state.

Others benefit too. For instance, the companies seek to hire the best employees for their stores, which improves wages and benefits. And because the companies compete for local products, Colorado farmers and suppliers get fair prices for their goods.

Kroger and ACI have decided that collusion is more profitable than competition. Of course, the elimination of competition between these two industry giants will also eliminate the many benefits to Coloradans that accompany that competition, and will lead to higher prices and diminished quality of the shopping experience. The combination proposed by Kroger and ACI, and the harm that it will inflict on consumers, is precisely the kind of activity that the Colorado antitrust laws were drafted to address. The Proposed Merger violates the Colorado Antitrust Act of 2023.

Conscious of the substantial harm to competition to be caused by the merger, Kroger has proposed to divest some of the ACI stores that it would acquire in Colorado to defendant C&S—stores which almost uniformly underperform the nearby Kroger stores—along with some other assets. This proposed "fix" does not fix anything. The assets included in the proposed divestiture are woefully insufficient to restore the competition eliminated by the Proposed Merger, and, even if the divestiture package were more robust, C&S is not well situated to be a viable competitor because of its complete lack of experience as a national-scale retailer, lack of any experience in Colorado, and its lack of the infrastructure needed to replace the competition lost from ACI—infrastructure that Kroger plans to keep for itself.

Investigation of the Proposed Merger unveiled other unlawful activity demonstrating the risk of additional concentration in the grocery industry. Despite being competitors, Kroger and ACI have already colluded to suppress the wages and benefits of their workers. In January 2022, unionized employees at 78 King Soopers stores in Colorado went on strike. Fearful that striking workers might flee to ACI, and that concerned customers would too, Kroger reached out to ACI to make a nefarious bargain. The companies agreed that for the duration of the strike, ACI would not hire King Soopers employees, and that ACI would not solicit King Soopers pharmacy customers. Executives at the very highest levels of both companies knew of this unlawful arrangement and allowed it to go forward. Such "no-poach" and "non-solicitation" agreements are unconscionable and *per se* unlawful.

The Proposed Merger should be enjoined and the no-poach and non-solicitation agreements should be enjoined and penalized.

TABLE OF CONTENTS

I. THE PARTIES AND RELEVANT NON-PARTIES

1. Philip J. Weiser is the duly elected Attorney General of the State of Colorado and is authorized under the Colorado Antitrust Act of 2023 (the "Antitrust Act") to bring actions to enjoin violations of the Antitrust Act, to seek civil penalties, and to recover costs and attorneys' fees. See C.R.S. §§ 6-4-111 and 112.

2. Defendant Kroger is a public company incorporated in the State of Ohio, with a principal place of business in the State of Ohio.

3. Defendant ACI is a public company incorporated in the State of Delaware, with a principal place of business in the State of Idaho.

4. Defendant C&S is a limited liability company organized under the laws of the State of Delaware.

5. Non-Party Kettle Merger Sub, Inc. ("Kettle") is a Delaware corporation and a wholly-owned subsidiary of Kroger created for the purpose of effectuating the merger of Kroger and ACI.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to C.R.S. § 6-4-110(1).

7. Venue is proper in this district pursuant to C.R.S. § 6-4-110(2) because Kroger and ACI propose to merge stores, operations, and other assets in this district and consumers who reside in this district will be harmed.

8. This Court has personal jurisdiction over the Defendants because Defendants transact substantial business in the State of Colorado and have entered into transactions which have a substantial locus in the State of Colorado and this judicial district.

9. Plaintiff has standing to bring this action because the proposed merger would cause antitrust injury in relevant markets in the State of Colorado.

III. THE PARTIES AND THE PROPOSED MERGER

A. The Kroger Co.

10. Kroger operates 2,719 stores across the United States. Kroger's annual revenue for the year 2022 was over $148 billion, with operating profit over $4.1 billion.[1] Kroger has

[1] The Kroger Co., Annual Report (Form 10-K) at 30, 32 (March 28, 2023), *available at* https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/56873/000155837023004767/kr-20230128x10k.htm.

approximately 6,000 employees at its Cincinnati, Ohio corporate headquarters to support its national operations.

11. Kroger operates 148 stores in Colorado under the King Soopers and City Market banners.

12. Kroger acquired the King Soopers banner in 1983 through its acquisition of Dillon Companies, Inc. in a deal valued at up to $750 million.[2] There are 116 King Soopers in Colorado today. The King Soopers stores are typically located in urban and suburban areas. They have an average of REDACTED square feet and sell approximately REDACTED Stock Keeping Units ("SKUs").[3]

13. Kroger's acquisition of Dillon also brought with it the City Market banner. There are 32 City Markets in Colorado today. The City Market stores are typically located in mountain towns and rural areas. They have an average of REDACTED square feet and sell approximately REDACTED SKUs.

14. Kroger utilizes three distribution centers in Colorado and one fulfillment center. Kroger also has two manufacturing facilities in Colorado: the King Soopers Bakery and Mountain View Foods (a plant for dairy and other aseptic products such as broth). Nationwide, Kroger has 44 distribution centers and 33 manufacturing facilities, including 14 dairies and 5 bakeries.[4]

15. To provide added convenience and one-stop shopping opportunities for its customers, many Kroger stores have in-store pharmacies and adjacent fuel stations, so that customers can fill their grocery baskets, prescriptions, and fuel tanks in the same trip.

16. Kroger offers many private label products in its stores, which Kroger refers to as "Our Brands."[5] Some of Kroger's more popular private label brands include Kroger, Simple Truth, Private Selection, and Murray's. These private label products are trusted and highly valued by consumers.

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[2] Associated Press, *Kroger to Acquire Dillon, a Retailer*, N.Y. Times (Nov. 16, 1982), *available at:* https://www.nytimes.com/1982/11/16/business/kroger-to-acquire-dillon-a-retailer.html; "The History of Kroger," Kroger, available at: https://www.thekrogerco.com/about-kroger/history/#:~:text=In%201983%2C%20100%20years%20after,Gerbes%20into%20the%20Kroger%20family.

[3] "SKU" stands for Stock Keeping Unit and is a unique code assigned to a product, typically in the form of an alpha-numeric code and accompanied by a scannable bar code.

[4] The Kroger Co., 2023 Fact Book (2023), at 2, 6, *available at:* https://ir.kroger.com/files/doc_downloads/factbook/2023-pdf-fact-book.pdf.

[5] Private label products are products sold under a brand that is owned by a particular company and exclusively sold in that company's stores. For example, "Kroger" brand products can only be found in Kroger stores. Private label products are sometimes manufactured by the company that owns the brand, but may be manufactured by a third party. Private label products are often lower-priced than national brand products and more profitable to the store than national brand products.

Kroger boasts that three of its private label brands are multi-billion dollar brands, which "generate three times the sales . . . of the top five CPGs [national brand consumer packaged goods] combined." With more than $30 billion in sales in 2022, Kroger's private labels comprised over 20% of Kroger's total sales. Kroger manufactures 30% of its private label products in-house.[6] If Kroger's Our Brands were a standalone business, it would be the ninth-largest consumer packaged goods company in the U.S.

17. Kroger invests significant resources developing its private label products and the massive national infrastructure that supports their manufacture and distribution. Kroger employs thousands of employees at its corporate and manufacturing facilities, including research and development personnel, quality assurance personnel, consumer researchers, marketing and promotions personnel, financial analysts, designers, sourcing and supply chain personnel, manufacturing personnel, and executive staff.

18. Kroger also has a very popular and robust loyalty program, backed by a highly sophisticated and proprietary data analytics business, called 84.51. Kroger customers can earn rewards through shopping at Kroger stores, including fuel discounts. Through its data analytics platform at 84.51, Kroger can offer customized product offerings and discounts to its customers in the form of targeted coupons, mailings, and advertisements. This not only provides a customized shopping experience for customers, but also an alternative revenue stream for Kroger, because it can sell customer insights and targeted advertising to suppliers.

19. Kroger claims that its loyalty program is at the core of its business. Its loyalty program captures 90% of Kroger's sales, and covers 60 million households. Kroger's "advanced data science capabilities . . . sets us apart from the competition." Kroger's data scientists and loyalty program personnel analyze 10 petabytes of customer data to come up with two trillion personalized customer recommendations annually, and to tailor its pricing strategy, sales planning, category management, and assortment. The effect of its loyalty program is to "nearly doubl[e] the likelihood of a customer adding an item to their cart."[7]

20. Many of the employees in Kroger stores are unionized. In Colorado, there are 123 Kroger stores at which there is at least some union representation, including 117 King Soopers stores and six City Market stores. Most Kroger grocery store workers are represented by the United Food and Commercial Workers Local 7 (the "UFCW"). Other grocery store workers are represented by the Bakery Confectionary Tobacco Workers and Grain Millers Local 26 (the "BCTGM") and United Steel Workers Local 290 ("USW").

21. Many of the employees in Kroger's distribution centers and manufacturing facilities are also unionized. Workers in the distribution facilities are represented by the International

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[6] The Kroger Co., 2023 Fact Book (2023), at 18, *available at:* https://ir.kroger.com/files/doc_downloads/factbook/2023-pdf-fact-book.pdf.

[7] The Kroger Co., 2023 Fact Book (2023), at 17, *available at:* https://ir.kroger.com/files/doc_downloads/factbook/2023-pdf-fact-book.pdf.

Brotherhood of Teamsters Local 455 ("Teamsters").

B. ACI.

22. ACI owns and operates 2,271 stores across the United States. ACI's annual revenue for the year 2022 was $77.6 billion, with operating income of $2.3 billion.[8] To support its national operations, ACI is headquartered in a 250,000 square foot facility in Boise, Idaho, and it also has corporate offices in Pleasanton, California; Phoenix, Arizona; and Plano, Texas.

23. ACI operates 105 stores in the State of Colorado under the "Safeway" and "Albertsons" banners.

24. ACI acquired the Safeway banner in 2015 for about $9.4 billion. There are 103 Safeways in Colorado today, located across the state. They have an average of REDACTED square feet and sell approximately REDACTED SKUs.

25. There are only two Albertsons banner stores in Colorado today; one in Pueblo and one in Durango. They have an average of REDACTED square feet and sell approximately REDACTED SKUs.

26. ACI operates two manufacturing facilities in Colorado: the Denver Beverage Plant and the Denver Milk Plant. ACI operates one distribution center in Colorado, referred to as the "Denver DC." The Denver DC also includes a bakery on its campus. Nationwide, ACI has 19 manufacturing facilities and 22 distribution centers.

27. In competition with Kroger, many ACI stores also offer in-store pharmacies and adjacent fuel stations to provide convenience for their customers.

28. ACI offers many private label products in its stores, which ACI refers to as "Own Brands." ACI boasts having four billion-dollar-plus private label brands. Some of ACI's more popular private label brands include Signature and O Organics. ACI's Own Brands are highly profitable, making up REDACTED. ACI considers its own brands—and in particular its Signature and O Organics labels—to be REDACTED

29. ACI has spent significant resources developing its private label products, which require massive national infrastructure. ACI employs scores, if not hundreds, of employees at its corporate, regional, and manufacturing facilities to support its private label operations, including research and development personnel, quality assurance personnel, consumer researchers, marketing and promotions personnel, financial analysts, designers, sourcing and supply chain

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[8] Albertsons Companies, Inc., Annual Report (Form 10-K) at 42 (April 25, 2023), *available at* https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/1646972/000164697223000045/aci-20230225.htm.

personnel, manufacturing personnel, and executive staff.

30. ACI also has a popular loyalty program through which customers can earn rewards, including discounts on fuel. ACI uses a data analytics platform to offer a customized shopping experience and as a source of additional revenue by selling customer insights and targeted ads to suppliers.

31. ACI's loyalty program is a huge driver of its revenues and profits. REDACTED [redacted] ACI's loyalty program produces REDACTED [redacted]

32. Many of the employees in ACI stores are unionized. In Colorado, there are 93 ACI stores at which there is at least some union representation, including 92 Safeway stores and one Albertsons store. As with Kroger, the grocery store workers are represented by the UFCW.

33. Many of the employees in ACI's distribution centers and manufacturing facilities are also unionized. As with Kroger, these workers are represented by Teamsters.

a. The ACI/Safeway Merger.

34. ACI is majority-owned by four private equity firms: Cerberus Albertsons Incentive LLC and Cerberus Iceberg LLC (together, "Cerberus"), Klaff Realty, L.P., Lubert-Adler Partners, L.P., and Kimco Realty Corporation.

35. In 2015, ACI purchased Safeway for approximately $9.4 Billion.

36. In reviewing the transaction, the Federal Trade Commission concluded the merger would have anticompetitive effects and ordered ACI to divest 168 stores. Almost all of those stores—146 in total—were divested to Haggen, Inc. ("Haggen"). That divestiture utterly failed to ameliorate the anticompetitive effects of the ACI acquisition of Safeway. Haggen went bankrupt within months of the divestiture sale, ACI bought back many of the stores, and many other stores soon shuttered.

37. Haggen was a small regional grocer that operated 18 stores in Washington and Oregon. The divestiture led to the eight-fold expansion of Haggen across five states, including three states where Haggen had no prior market presence: California, Arizona, and Nevada.

38. Haggen was aware of the execution risks of buying the divested stores, including risks associated with entering new markets. Nevertheless, Haggen believed the transaction was a deal "too juicy" to pass up because it believed that the value of the real estate of the divested stores far exceeded the purchase price of the divestiture.

39. Haggen was majority-owned by a private equity firm at the time. The private equity

owner knew that it could realize much of that real estate value through a "sale/leaseback" strategy, whereby it would sell the real estate and then lease the stores back from the subsequent buyer. The sale proceeds could be diverted back to the private equity owner while the operating entity of the stores would be saddled with the lease payments.

40. Haggen took control of the stores on a rolling basis starting in February 2015.

41. Shortly after acquiring the divested stores, Haggen filed a lawsuit accusing ACI of anticompetitive conduct and alleged violations of the FTC's divestiture order, attempted monopolization, breach of the purchase agreement between ACI and Haggen, fraud, and unfair competition, among other claims.

42. Haggen claimed that ACI made false representations about the divested stores to induce Haggen to acquire the stores under an expedited timeframe; misused Haggen's confidential information to implement strategies to draw customers away from Haggen; provided inaccurate inventory data to disrupt the transition of the stores to Haggen; provided inaccurate and misleading pricing information to cause Haggen to overprice its goods; sabotaged inventory at the divested stores by, inter alia, overstocking the stores with perishable meat and produce; improperly removed store fixtures and inventory; disrupted Haggen advertising for the new stores; and failed to perform routine maintenance prior to transfer of the stores.

43. On September 8, 2015, Haggen filed for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code. A series of asset sales followed through the bankruptcy court. In 2015, just months after the divestiture sale, ACI re-acquired 35 stores from Haggen. Then, in 2016, ACI bought another 29 stores from Haggen, 15 of which had been part of the divestiture. ACI also acquired certain trade names and other intellectual property from Haggen, allowing ACI to operate stores under the Haggen banner. Indeed, Haggen is still one of ACI's banners today.

44. Although some of the other Haggen stores were sold to third parties, many closed.

45. Although there were no Haggen stores in Colorado, our state suffered from the ACI/Safeway merger in other ways. In the two years after the merger, ACI closed 20 stores in Colorado as it sought to consolidate its operations and eliminate so-called redundancies. The result was diminished competition, lost jobs, emptied shopping centers, and reduced consumer choice. The competition promised by the Haggen divestiture proved to be a sham.

46. Haggen's owner, however, did not experience nearly the downside that consumers and workers did. On information and belief, Haggen paid $309 million for the divested assets it purchased from ACI. Quickly thereafter, Haggen entered into real estate sale/leaseback transactions for 59 of the divested stores, for a reported $300 million.[9] ACI then paid over $100

[9] Angel Gonzalez, *Haggen's Risky Expansion Largely Bankrolled Itself*, Seattle Times (Oct. 29, 2015), *available at:* https://www.seattletimes.com/business/retail/haggens-risky-expansion-largely-bankrolled-itself/.

million to buy stores back from Haggen.[10]

C. C&S.

47. C&S is a privately held company. Upon information and belief, it is owned by Rick Cohen and a Cohen family trust. Rick Cohen is currently Executive Chairman of C&S.

48. C&S is one of the largest distributors in the grocery industry in the U.S. It does not have any operations or customers in Colorado.

49. C&S currently owns and operates 23 retail grocery stores in New York, Vermont, Pennsylvania, and Wisconsin under the Grand Union and Piggly Wiggly banners. C&S also franchises the Piggly Wiggly banner to various operators in the Midwest and Southeast.

50. C&S has at various times in its history owned and operated other retail grocery stores as well, but sold or closed the large majority of stores roughly a decade ago.

51. C&S currently sells only a handful of private label brands in its own stores, most of which it outsources from a third party. C&S has only about [redacted] private label SKUs and it does not own any manufacturing facilities.

52. C&S does not have a data analytics platform or a modern loyalty program like Kroger and ACI. C&S also only operates one retail pharmacy.

D. The Proposed Merger.

53. Kroger and ACI entered into an Agreement and Plan of Merger on October 13, 2022 (the "Merger Agreement"), and publicly announced the Proposed Merger the following day. Kroger agreed to pay $24.6 billion to acquire all of the outstanding stock of ACI, amounting to $34.10 per share to ACI shareholders. Soon after announcing the Proposed Merger, ACI paid a special dividend to its shareholders of $6.85 per share, totaling $4 billion. The purchase price to be paid by Kroger to ACI shareholders was reduced on a per share basis by an equivalent amount pursuant to the Merger Agreement, resulting in a purchase price of $27.25 per share. ACI has asserted that it remains in strong financial condition notwithstanding that it incurred debt to pay the dividend (the majority of which was paid to its private equity shareholders) and that it would not assert a failing firm defense in any merger challenge.[11]

54. The Proposed Merger would result in Kroger owning all of ACI's stores in Colorado,

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[10] Jim Davis, *Haggen reaches $106 million deal to sell remaining stores to Albertsons*, HeraldNet (Mar. 11, 2016), *available at:* https://www.heraldnet.com/business/haggen-reaches-106-million-deal-to-sell-remaining-stores-to-albertsons/.

[11] ACI Mem. Of Law in Opp. To Plaintiff State of Washington's Motion for a TRO (Dkt. No. 40).

including ownership of the Safeway and Albertsons banners. Kroger would also take ownership of ACI's private label brands, including its popular Signature and O Organics brands.

55. Kroger would also own ACI's Denver DC, its dairy plant, its bakery, and all of ACI's other physical assets in Colorado.

IV. THE GROCERY INDUSTRY

56. The grocery industry in Colorado comprises various types of stores. Different types of stores provide different shopping experiences and fulfill different needs. Although some consumers shop across store types, the relevant market for purposes of reviewing the Proposed Merger under the Antitrust Act is comprised of Supermarkets (as described below) and not the entire grocery industry. The following section provides an overview of certain types of stores.

A. Supermarkets.

57. Perhaps the most recognizable category of grocery stores is the Supermarket. The Federal Trade Commission ("FTC"), which has authority to review mergers in the grocery industry at the federal level, has in the past defined a "Supermarket" as "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/or distilled spirits."

58. The FTC further describes a Supermarket as any store that carries more than 10,000 SKUs, typically with a deep inventory of those items, and that has more than 10,000 square feet of selling space.

59. In short, Supermarkets offer the convenience of one-stop shopping and a wide variety of products. Supermarkets primarily compete with other Supermarkets that provide one-stop shopping opportunities.

60. Examples of Supermarkets in Colorado are King Soopers, City Market, Safeway, Albertsons, and Walmart Neighborhood Market.

61. Some stores combine a Supermarket with a general merchandise store to create a hypermarket. The Supermarket component of these hypermarkets also compete with Supermarkets. Examples in Colorado include Walmart Supercenter (which essentially combines a typical Walmart with a Walmart Neighborhood Market) and Super Target.

62. Walmart stores that are not a Neighborhood Market or a Supercenter are not Supermarkets. Such "Walmart" stores may carry a limited number of food SKUs, but do not have the full assortment found in a Supermarket, and in particular may lack fresh produce, fresh meat, fresh seafood, eggs, and milk.

B. Club Stores.

63. Club Stores are also an option for consumers to fulfill certain grocery needs. However, Club Stores typically sell products in large bulk quantities, frequently rotate product assortment, and offer less variety than Supermarkets. Club Stores also typically require a membership with an annual fee.

64. Club Stores carry far fewer SKUs in each category of item than Supermarkets. Club Stores do not offer the same one-stop shopping convenience of Supermarkets.

65. The typical Club Store customer is more affluent and higher educated than the typical Supermarket customer. Because items must be bought in bulk, a trip to a Club Store can be more expensive in total than a trip to a Supermarket, even though the per ounce price or per item price might be lower at a Club Store. Many Club Store members visit Club Stores once or twice per month, or even less frequently.

66. Club Stores are likely to compete more closely with other Club Stores.

67. Examples of Club Stores in Colorado are Costco and Sam's Club.

C. Dollar Stores.

68. There are a variety of stores that offer a limited number of products in small quantities, often at a discount, commonly referred to as "Dollar Stores."

69. Dollar Stores typically do not carry perishable products like fresh produce, meat, seafood, or baked goods. Some may offer a limited assortment of produce that does not require refrigeration, like bananas or apples. Dollar Stores may also offer frozen meat and chicken.

70. Most of the items in Dollar Stores are packaged goods like cereal, cookies, breakfast bars, soup, canned goods, and baking items.

71. The typical Dollar Store customer is lower-income and older than a typical Supermarket customer.[12]

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[12] Dominick Reuter, *Meet the typical Dollar General customer*, Business Insider (Mar. 16, 2023), *available at:* https://www.businessinsider.com/typical-dollar-general-shopper-demographic-older-worker-earning-lower-income-2021-8.

72. The typical Dollar Store customer also spends less money per trip to a Dollar Store than a typical Supermarket customer does at a Supermarket.

73. Dollar Stores are typically smaller than Supermarkets and offer fewer SKUs.

74. Examples of Dollar Stores in Colorado include Family Dollar and Dollar General.

D. E-commerce.

75. Consumers also have the option to buy groceries Online. Almost all of the grocery stores discussed in the prior sections offer at least some of their products online, and many offer their entire inventory online. Customers can use online ordering for in-store or curbside pick-up or for home delivery. Some stores have their own fulfillment services for delivery, some use a third-party delivery service,[13] and some offer both.

76. Third-party delivery services do not compete with Supermarkets; rather, they partner with Supermarkets to provide another avenue for consumers to buy products from Supermarkets.

77. Online ordering is typically more expensive than in-person shopping at a physical location. Stores that have their own fulfillment services typically charge a delivery fee for deliveries or a service fee for pick-up. Some stores may charge an annual or monthly fee for a membership and provide free or discounted delivery to members. Third-party delivery services similarly either charge a fee or charge a mark-up on the products.

V. THE RELEVANT MARKETS

78. The Proposed Merger would have anticompetitive effects in local markets for the retail sale of food and other grocery products in Supermarkets. Each of these markets constitutes a line of commerce, as that term is used in C.R.S. § 6-4-107, and each is a relevant product market in which the potential competitive effects of the Proposed Merger can be assessed.

A. Retail Grocery.

a. Product Market.

79. The relevant product market is food and other grocery products available for retail sale in Supermarkets.

80. The term "Supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their 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;

[13] Examples of third-party delivery services are Uber Eats, DoorDash, and InstaCart.

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/or distilled spirits.

81. Supermarkets provide a broad array of products and services and offer consumers the convenience of one-stop shopping for food and grocery products. Kroger touts that its Supermarkets are "successful because the stores are large enough to offer the specialty departments that customers desire for one-stop shopping, including natural food and organic sections, pharmacies, general merchandise, pet centers and high-quality perishables such as fresh seafood and organic produce."[14]

82. Demonstrative of actual competition, Supermarkets primarily check prices at other Supermarkets, and base their pricing on prices at other Supermarkets. REDACTED REDACTED

83. Similarly, ACI REDACTED

84. Many consumers shopping for certain staples like fresh milk or eggs will regularly compare prices at Supermarkets against one another before deciding where to shop.

85. Although other categories of retail grocery stores also sell food and grocery products, they do not offer the broad set of products and services offered at Supermarkets.

86. Club Stores may offer some food and grocery products, but do not offer the same depth of SKUs as Supermarkets and mostly offer their products in bulk, which many Supermarket consumers do not want or need.

87. Club Stores are not in the relevant market.

88. Dollar Stores are not in the relevant market either. In Colorado, Dollar Stores do not carry fresh produce or meat. Dollar Stores have a limited assortment of SKUs. Customers cannot satisfy all their food and grocery needs at a Dollar Store.

89. A standard method that economists use to test the reliability of a product market definition is to employ the Hypothetical Monopolist Test. This test asks whether a hypothetical

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[14] *See* The Kroger Co., Annual Report *supra* note 1 at 4.

monopolist in the proposed market could profitably impose a "small but significant and non-transitory increase in price" (referred to as a "SSNIP") on at least one product in the proposed market. The test assumes that prices for all products that are excluded from the market definition remain the same.

90. A SSNIP for this purpose is typically set at 5%. Meaning, the question is whether a hypothetical monopolist in the proposed market could profitably raise at least some prices by at least 5%. To profitably raise prices means that even though the hypothetical monopolist may lose some customers if it were to raise prices by 5%, that loss of customers would be outweighed by increased profit on sales to customers who continue to purchase its product, such that the hypothetical monopolist would make more money after the price increase than before.

91. If the hypothetical monopolist cannot profitably impose a SSNIP, that means the proposed market is too narrow, because too many customers have found substitutes outside the defined market.

92. If the hypothetical monopolist can profitably impose a SSNIP, that means the proposed market contains a sufficient number of substitutes, because other potential products are not close enough substitutes for the hypothetical monopolist's customers. Put differently, it means that other products excluded from the market do not constrain the hypothetical monopolist's ability to raise prices and reduce quality.

93. The vast majority of Supermarket consumers are not likely to start shopping at other types of stores, or significantly increase grocery purchases at other types of stores, in response to a SSNIP by a hypothetical Supermarket monopolist. Other stores are therefore not reasonable substitutes for most Supermarket customers.

b. Geographic Market.

94. Supermarket competition is highly localized because consumers demand convenience and do not want to travel unnecessarily far distances to do their grocery shopping. The overwhelming majority of Supermarket consumers do their grocery shopping at stores close to where they live.

95. The particular bounds of each geographic market will vary based on the area and depend on factors such as population density, traffic patterns, and unique characteristics of each location.

96. In public filings made before the merger was announced, Kroger regularly disclosed that its Supermarkets "typically draw customers from a 2-2.5 mile radius."[15]

97. A very conservative articulation of relevant geographic markets here are localized

[15] *See, e.g.*, Kroger 10-K for Fiscal Year Ended January 29, 2022.

areas, within the following city areas:[16] Southeast Denver, Southwest Denver, West Denver, North Denver, Downtown Denver, East Denver, Colorado Springs, Aurora, Fort Collins, East Littleton, Arvada, Longmont, Grand Junction, Broomfield, Pueblo, West Littleton, Boulder, Greeley, Loveland, North Englewood, Parker, Castle Rock, East Brighton, Durango, Montrose, Louisville, Steamboat Springs, Golden, Vail-Avon, Cañon City, Cortez, Alamosa, Lafayette, Evergreen, Woodland Park, Conifer, Windsor, Delta, and Gunnison.

98. These city areas contain clusters of Supermarkets that are typically located close to each other and generally removed from other clusters of Supermarkets. Most of the city areas listed here contain a set of stores within the borders of the city, but some include stores just outside city borders that are close in proximity to stores within the border, with no geographic impediment in between, like a mountain or major highway. Some cities are divided into smaller city areas.

VI. ANTICOMPETITIVE EFFECTS OF THE PROPOSED MERGER

99. The Proposed Merger would eliminate head-to-head competition between Kroger and ACI and significantly consolidate already highly-concentrated markets. The Proposed Merger would lead to higher prices, worse service, lower quality, and reduced choice for consumers. It would also harm suppliers and workers in Colorado and weaken the state's supply chain resiliency. The Proposed Merger would also increase the likelihood of anticompetitive collusion.

A. The Proposed Merger Is Presumptively Unlawful.

100. The more that a proposed transaction would increase market concentration, the more likely it is to substantially lessen competition, as prohibited by C.R.S. § 6-4-107. Mergers that significantly increase concentration in already concentrated markets are presumptively unlawful. The United States Supreme Court has held that any transaction that results in "a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963). A resulting market share of 30% by the post-merged firm crosses the presumptive threshold, as may shares less than that. *See id.* at 364 & n.41.

101. The Herfindahl-Hirschman Index ("HHI") is a well-established and widely accepted measure of market concentration used to evaluate the likely competitive effect of a proposed transaction. HHI scores are calculated by summing the squares of each individual firm's market share. Accordingly, HHI scores range from 0 in markets with no concentration to a high

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[16] City areas are generally small, localized areas, and contain clusters of stores that consumers could plausibly choose between.

of 10,000 in markets where one firm has a 100% market share.[17] Sufficiently large HHI scores establish a prima facie case that a merger is anticompetitive and therefore unlawful.

102. The DOJ and FTC recently published updated "Merger Guidelines" on December 18, 2023 (the "2023 Merger Guidelines"). The 2023 Merger Guidelines provide guidance on how to interpret HHI scores, and courts historically rely on DOJ and FTC guidance when considering merger challenges. Under the 2023 Merger Guidelines, if the post-merger HHI score would be more than 1,800, and the merger would increase the HHI score by more than 100 points, then the proposed merger is presumptively unlawful. Such a merger would result in a highly concentrated market, and is presumed likely to enhance market power and substantially lessen competition.

103. Before issuance of the 2023 Merger Guidelines, the effective guidance from the DOJ and the FTC was contained in The Horizontal Merger Guidelines, issued August 19, 2010 (the "2010 Merger Guidelines"). According to the 2010 Merger Guidelines, a transaction was considered presumptively unlawful if the relevant market would have a post-merger HHI score of 2,500 or more and if the merger would increase the HHI score by 200 points or more.

104. As described below, the Proposed Merger is presumptively unlawful under both the 2023 Merger Guidelines and 2010 Merger Guidelines.

105. The HHI scores here establish that the Proposed Merger is presumptively unlawful because it would significantly increase concentration in the 39 relevant geographic markets in Colorado for food and other grocery products available for retail sale in Supermarkets.

106. Across the 39 city areas, the post-merger HHI scores range from about 2,600 to 10,000, with an average post-merger HHI score of around 4,600. The change in HHI scores from pre-merger to post-merger range from around 400 to 4,300, with an average change of around 1,400. Therefore, the Proposed Merger is presumptively unlawful under both the 2023 Merger Guidelines and 2010 Merger Guidelines.

107. The Proposed Merger is also presumptively unlawful even if one were to (incorrectly) include Club Stores and Dollar Stores in the calculations. If one were to include Club Stores and Dollar Stores in the calculations, the Proposed Merger would still be presumptively unlawful in all 39 city areas.[18]

108. The Proposed Merger is also presumptively unlawful if one were to apply a more narrow geographic market of a 3-mile radius around each of Kroger's and ACI's stores. In that scenario, there would be 253 geographic markets in Colorado (one for each of the parties' stores). Out of those, the Proposed Merger would be presumptively unlawful in 190 markets. A transaction does not need to exceed the HHI thresholds in every relevant market to be presumptively unlawful

[17] For example, a market with two participants who each have 50% market share would have an HHI of 5,000 ($50^2 + 50^2 = 5{,}000$. A market with three participants who have shares of 40%, 40%, and 20% would have an HHI of 3,600 ($40^2 + 40^2 + 20^2 = 3{,}600$).

[18] To be clear, Club Stores and Dollar Stores are not in the relevant market.

as a whole.

B. The Proposed Merger Would Eliminate Head-To-Head Competition Between Kroger and ACI.

109. Kroger and ACI are direct competitors for the retail sale of food and other grocery items.

110. Kroger and ACI vigorously compete against each other for consumers on the basis of price, quality, service, and product selection, including selection of local Colorado products.

111. Indeed, before the Proposed Merger was announced, REDACTED

112. The Proposed Merger would eliminate the competition between Kroger and ACI. *See United States v. First Nat. Bank & Trust Co. of Lexington et al.*, 376 U.S. 665, 669-70 (1964) ("[I]t [is] clear that the elimination of significant competition between [merging parties] constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act. . . . It [can be] enough that the two . . . compete[], that their competition [is] not insubstantial and that the combination [would] put an end to it."); *ProMedica Health System, Inc. v. F.T.C.*, 749 F.3d 559, 568-70 (6th Cir. 2014); 2023 Merger Guidelines § 2.2 at 7 n.18.

a. Kroger and ACI Compete on Price.

113. Kroger and ACI watch each other closely on price and change their prices based on what the other one is doing.

114. For example, in December 2020, the price of bananas spiked because of hurricanes in banana-growing regions causing banana shortages. This caused retailers like Kroger and ACI to pay higher prices to their banana suppliers. REDACTED

115. REDACTED

116. Kroger considers ACI to be a strategic focus, and Kroger competes on price with ACI REDACTED

117. ACI takes a similar approach. In Denver, for example, ACI's REDACTED

118. ACI considers Kroger to be REDACTED [redacted]

b. Kroger and ACI Compete on Customer Service.

119. Kroger and ACI compete for customers in part by trying to offer strong customer service and a quality shopping experience. To do so, they must hire and retain strong employees both in their stores as well as at higher levels to oversee the stores. Because of the unique features of Supermarkets—namely, full service, one-stop shopping—Kroger and ACI greatly value the experience of each other's employees when making hiring decisions.

120. As a result, Kroger and ACI actively compete against each other for grocery labor, particularly experienced and skilled labor such as district managers, store managers, department managers and supervisors, meat cutters, cake decorators, and pharmacists. The Proposed Merger would eliminate that competition, hurting both consumers and workers.

121. In 2020, for example, Kroger REDACTED [redacted] CI believed that REDACTED [redacted]

122. Kroger has referred to Safeway as REDACTED [redacted]

123. This kind of head-to-head competition benefits consumers because Kroger and ACI seek to hire the best employees so that they can provide high-quality customer service and a positive shopping experience. It is also good for workers because it leads to improved wages and better working conditions.

124. Kroger and ACI also regularly REDACTED [redacted]

125. This type of competition ensures that customers have quality stores and a good shopping experience.

126. Many consumers similarly shop at both Kroger and ACI and compare not only prices, but also the availability and quality of products, as well as whether the stores are inviting and provide a positive shopping experience. Kroger and ACI each recognize this and compete to attract customers based upon these factors.

c. The 2022 UFCW Strike Against King Soopers.

127. In January 2022, the UFCW went on strike against 78 King Soopers stores in Colorado. The strike provides a real-world example of the level of head-to-head competition between Kroger and ACI. In advance of the strike, Safeway anticipated that REDACTED and Safeway would REDACTED he Safeway Denver Division reported that REDACTED

128. Internal updates at ACI about the strike confirmed the impact of the Kroger strike on Safeway sales. On January 14, 2022, Zbigniew Fusiarz, Financial Analyst, Denver Division at ACI, REDACTED Mr. Fusiarz noted that there were REDACTED Those Safeway stores REDACTED He also noted that REDACTED

129. Mr. Fusiarz further noted that REDACTED

130. Todd Broderick, the President of ACI's Denver Division, REDACTED

131. When unable or unwilling to shop at King Soopers stores, customers diverted their shopping to Safeway stores.

d. Kroger and ACI Compete Head-to-Head for Local Colorado Supply.

132. Kroger and ACI both strive to have strong offerings of local products in their stores. Having availability of local products is important to Colorado consumers. Kroger and ACI therefore compete with each other to offer the best and most fresh local products to draw customers into their stores.

133. Palisade peaches are one example of this dynamic. Palisade peaches are iconic in

Colorado. The Palisade growing region has the ideal climate and soil for peach-growing. Typically picked when tree-ripe, Palisade peaches are superior in flavor to other peaches and are a strong draw for Colorado customers.

134. Retail stores, including Kroger and ACI, compete against each other by often selling Palisade peaches on promotion to generate store traffic and REDACTED [redacted] benefitting consumers.

135. Kroger and ACI strongly compete for Palisade peach supply. This benefits Palisade peach farmers because they can be assured of a fair price and avenues through which to sell their crops. It benefits consumers because they have access to great local product at low prices and a more robust supply chain.

136. The same dynamic plays out for other local Colorado products, ranging from produce and other fresh products like dairy or baked goods to center-store packaged products.

137. As noted, Kroger and ACI compete with each other to purchase inputs and goods that they resell to consumers, including labor and local products. The Antitrust Act protects these types of competition. "A merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the remaining buyers. It can likewise lead to undue concentration among buyers or entrench or extend the position of a dominant buyer. Competition among buyers can have a variety of beneficial effects analogous to competition among sellers. For example, buyers may compete by raising the payments offered to suppliers, by expanding supply networks, through transparent and predictable contracting, procurement, and payment practices, or by investing in technology that reduces frictions for suppliers. In contrast, a reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume, which in turn reduces incentives for suppliers to invest in capacity or innovation." 2023 Merger Guidelines § 2.10 at 26; *see*, *e.g.*, *Mandeville Island Farms*, *Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

C. The Proposed Merger Would Harm Consumers By Reducing Consumer Choice, Raising Grocery Prices, Reducing Quality, and Weakening Supply Chain Resiliency.

138. Many consumers check prices—including promotions and available coupons—at their nearest Kroger and ACI stores before deciding where to shop. Kroger and Albertsons provide convenient shopping alternatives not provided by other grocery outlets. For many of these consumers, other types of stores are not viable substitutes. These consumers would lose their ability to choose between Kroger and ACI if the Proposed Merger were consummated.

139. Knowing this dynamic, a post-merger Kroger would have the ability to raise its

prices.

140. In urban areas, consumers tend to shop within a limited geography of a mile or two. Consolidation of Kroger and ACI creates significant market power to raise prices and reduce quality and services.

141. Consumers in many other geographic markets would feel the effect of the Proposed Merger even more profoundly. For instance, in Gunnison, the only Supermarkets are City Market and Safeway.[19] The merger would result in a monopoly for Kroger in this market. To reach a non-Kroger Supermarket, a Gunnison resident would have to drive about 65 miles to Salida or Montrose.

142. Grand County is another example of a community that will suffer. There is a Safeway in Fraser, and a City Market in Granby—those are the only two Supermarkets in the county. People there already suffer from higher "resort" prices at these stores, and the Proposed Merger would make that even worse.

143. Many geographic markets would face a Kroger/Walmart duopoly post-merger. This is also a bleak outcome for consumers. In addition to the market power that these two firms could wield against consumers to raise prices, the loss of consumer choice would be dramatic. Walmart Neighborhood Markets and Walmart Supercenters stock their shelves heavily with national brands and produce from outside of Colorado. Kroger and ACI place a much higher emphasis on local products. The loss of ACI stores would reduce consumer choice for local products because Kroger would have incentives to consolidate suppliers, thus eliminating some local suppliers from its shelves. Examples of local markets where this would happen include Delta, Cortez, Durango, Alamosa, Canon City, Woodland Park, and Monument.

144. The Proposed Merger could also harm consumers by weakening supply chain resiliency. Today, if Kroger has a supply chain problem resulting in a shortage in its stores—e.g., a shipment is delayed due to weather or a supplier is experiencing a shortage—a consumer can go to their nearest ACI store to look for the product, and vice versa. However, a post-merger Kroger would likely seek to consolidate its supply chain in the state and eliminate redundancies in the name of efficiency. That means any Kroger supply chain problem could have a much harsher effect on consumers.

D. The Proposed Merger Would Increase the Likelihood of Anticompetitive Collusion.

145. The potential for coordinated effects are high in a concentrated market. The relevant markets are highly concentrated in Colorado.

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[19] There is a Walmart in town, but it is not a Neighborhood Market or Supercenter. Accordingly, it does not offer fresh produce, meat, seafood, eggs, etc.

146. Barriers to collusion between Supermarkets are low because of transparency in grocery prices. Supermarkets can regularly check each other's prices and walk through each other's stores.

147. Post-merger, there will be even fewer Supermarket competitors, and an increase in the ease and likelihood of coordination among them. This has the potential to further harm Colorado consumers.

148. When reviewing mergers, courts consider "a history of collusion or attempted collusion" in the relevant market to be "highly probative of likely harm from a merger" because the merger may lead to so-called "coordinated effects." *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 45 (D.D.C. 2022) (citing *Hosp. Corp. of Am. v. F.T.C.*, 807 F.2d 1381, 1388 (7th Cir. 1986); *F.T.C. v. Elders Grain*, *Inc.*, 868 F.2d 901, 906 (7th Cir. 1989)).

149. Here, there is a history of collusion between Kroger and ACI in the form of unlawful no-poach and non-solicitation agreements.

150. In January 2022, certain collective bargaining agreements ("CBAs") concerning UFCW employees at King Soopers stores and Safeway stores in Colorado were set to expire.

151. The UFCW and ACI reached an agreement on an extension of the soon-to-be expired CBAs to provide additional time to negotiate a renewal. Kroger, however, did not agree to an extension, and so the King Soopers CBAs expired. The UFCW therefore went on strike against King Soopers, which lasted for ten days.

152. Concerned about losing employees and customers, Kroger and ACI agreed that ACI would not hire any King Soopers workers during the strike, and that ACI would not solicit any King Soopers pharmacy customers to transfer their prescriptions to Safeway pharmacies.

153. The agreement was expressly spelled out in an email between Kroger and ACI employees responsible for labor relations. On January 9, 2022, Daniel Dosenbach, the Senior Vice President of Labor Relations at ACI, wrote to his counterpart at Kroger, Jon McPherson, the Vice President for Labor & Associate Relations at Kroger, as follows:

From: Daniel Dosenbach REDACTED
Sent: Sunday, January 9, 2022 7:50 AM
To: McPherson, Jon K REDACTED
Cc: Brent Bohn REDACTED
Subject: RE: EXTERNAL EMAIL: Union Communications

Jon,

1. We don't intend to hire any King Soupers employees and we have already advised the Safeway division of our position and the division agrees.
2. With regards to Rx, we don't intend to solicit or publicly communicate that King Soupers employees should transfer their scripts to us. However, when a customer brings in a new or transferred script, we don't inquire as to why the customer is transferring or where they work, nor do we make it a practice to turn away customers.

Both Brent and I will be available to discuss the negotiations this week.

Dan

154. This agreement was then communicated internally within the Denver Division of ACI, which is the division responsible for most of Colorado, including the Front Range.

155. Brent Bohn, ACI's Group Vice President, Labor Relations, forwarded the agreement email to other executives at ACI with the instruction "let's make sure the Denver team understands the below two things"—the no-poach agreement and the non-solicit agreement—along with the caution "Please don't forward the email."

156. Todd Broderick, the President of ACI's Denver Division, confirmed the existence of the agreement to not hire King Soopers employees during testimony provided to the FTC.

157. The purpose of the agreement was ACI's "need [for] Kroger to hold the line" in its negotiations with the UFCW, and "stay strong." By "agree[ing] not to hire their employees," ACI and Kroger restrained the ability of Kroger's striking union employees to find alternative employment and leave Kroger, which strengthened Kroger's ability to resist union demands at the negotiating table.

158. Mr. Broderick also told Andy Lukes, the ACI Director of Labor Relations for ACI's Denver and Southwest Divisions, that he wanted the no-poach agreement to go even farther. As relayed by Mr. Lukes to Mr. Dosenbach: Broderick "wishes we would have gotten an agreement from Kings that they would not poach our employees either. The background is that about a year ago, Kings poached several good store directors by offering them $10k above their salaries. They also periodically come in and poach key employees such as cake decorators and Starbucks employees."

159. In relaying news about the spike in sales from the strike, Mr. Dorcheus also noted that "we agreed to not hire any existing employees" from King Soopers and "to not target King's Pharmacy Customers."

160. Mr. Broderick then relayed the existence of the agreement further up the chain to ACI's Chief Operating Officer, Susan Morris, telling her that "we have agreed to not hire [King Soopers'] employees and not actively solicit their pharmacy customers."

161. The existence of the agreement also was relayed to the very highest levels at Kroger. Mr. McPherson relayed the existence and terms of the unlawful agreement directly to Rodney McMullen, the Kroger CEO; Gary Millerchip, the Kroger CFO; Christine Wheatley, the Kroger General Counsel; Mary Ellen Adcock, Kroger SVP of Operations; Timothy Massa, Kroger Chief People Officer; and Joe Kelley, President of the King Soopers & City Market Division.

162. Apparently, this was not the first instance of collusion between Kroger and ACI. In an email between Mr. Dosenbach and Mr. Bohn on January 7, 2022, Mr. Dosenbach alluded to a similar agreement in Portland, Oregon: "Like with Portland we would not hire any employees from King Soupers [*sic*]."

163. This prior history of collusion demonstrates the likelihood of anticompetitive effects from the Proposed Merger.

VII. ABSENCE OF COUNTERVAILING FACTORS

164. New entry or expansion by existing competitors in response to an exercise of market power by a post-merger Kroger would not be likely, timely, or sufficient in its magnitude, scope, or character to deter or fully offset the Proposed Merger's likely anticompetitive effects.

165. Barriers to entry or expansion are high for Supermarkets. First, it is difficult to find real estate large enough and in a desirable area to open new Supermarkets.

166. Even where such space is apparently available, there may be use restrictions in the form of (i) restrictive covenants that run with the land in shopping centers or (ii) restrictions in lease agreements that tail lease expiration or store closure, which prevent retail grocery stores of any kind from opening a location in the shopping center or taking over an empty space where a prior grocery store closed.

167. Grocery stores located in multi-tenant shopping centers typically benefit from use restrictions that prohibit any business from opening in the shopping center that sells any product sold by the grocery store. Thus, any business selling food or grocery items cannot open in the same shopping center. Such restrictive covenants even survive after a grocery store closes.[20]

168. An examination of the store locations that were closed in the wake of the ACI/Safeway merger illustrate the difficulties of replacing closed stores. Of the 20 stores that

[20] This is partly why many shopping centers have large vacant spaces where grocery stores once operated. These large spaces have few potential uses other than for retail grocery; some alternate permissible uses include retail clothing, fitness centers, and indoor pickleball courts.

were closed in the two years after that merger, none are currently a Supermarket. Instead, nine are fitness centers, five are still vacant, three are retail stores of various stripes, one is a Target (with limited grocery options), one is a 7/11, and one is a community health center.

169. Second, new entry or expansion requires a distribution chain that can support new or expanded locations. This means finding warehouse space, purchasing trucks to move goods, and hiring labor. This challenge is highly pronounced in markets in mountain towns where warehouse space is more limited and transportation issues complicate distribution.

170. Third, any new entrant will incur high marketing costs to attract new customers, which can include advertising and providing discounts and promotions to lure customers away from existing stores.

171. Additionally, the Proposed Merger will not generate any efficiencies that outweigh the anticompetitive effects.

VIII. THE PROPOSED DIVESTITURE FAILS TO REMEDY THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED MERGER

172. Recognizing the anticompetitive nature of the Proposed Merger, the Defendants have proposed a divestiture. However, the parties' proposal echoes many of the problems that have plagued failed grocery divestitures in the past, and is insufficient to save this Proposed Merger.[21]

A. The Divestiture Package.

173. Kroger and ACI propose to divest retail stores, distribution centers, certain private label brands, and other assets to C&S, the sole divestiture buyer, pursuant to an Asset Purchase Agreement by and among The Kroger Co., and Albertsons Companies, Inc., as the Sellers, and C&S Wholesale Grocers, LLC, as Buyer, Dated as of September 8, 2023 (the "Divestiture Agreement"). This proposed divestiture was announced after the Attorney General had already been investigating the Proposed Merger since its announcement for nearly a year, and was not included in Kroger and ACI's pre-merger notification filings with the FTC.

174. Since announcing the Divestiture Agreement, Kroger and ACI have proposed modifications to the assets in the divestiture package, but to date none of those modifications have been agreed to by C&S. The divestiture announced on September 8, 2023, is therefore the only divestiture that can potentially be considered.

175. On a national level, C&S will pay $1.9 billion to acquire 413 stores, eight distribution centers, five private label brands, three banners (QFC, Mariano's, and Carrs, none of

[21] Any divestiture proposal is only a potential remedy for an otherwise anticompetitive merger, not a defense.

which have stores in Colorado), and an exclusive license to use the Albertsons banner in Colorado, Wyoming, Arizona, and California. The number of stores can be increased to as many as 650, with an agreed-upon per-store price to be added to the total purchase price in the event more stores are added.

176. In Colorado, the divestiture specifics are as follows. C&S will acquire 52 stores, all from the ACI side. That includes 50 Safeway stores and both Albertsons banner stores. A total of 53 ACI stores are not proposed to be divested and will transfer to Kroger, bringing its Colorado store count to 201.

177. C&S will not be purchasing the Safeway banner, as Kroger will keep the Safeway banner post-merger. Instead, C&S will be given an exclusive license to use the Albertsons banner in Colorado. This will require C&S to re-banner the 50 Safeway stores it is acquiring into Albertsons stores.

178. C&S will acquire the following five private label brands: Open Nature (a natural products brand), Waterfront Bistro (seafood), Primo Taglio (premium meats and cheeses), ReadyMeals (ready-to-eat foods), and Debi Lilly Designs (floral). Kroger will keep ACI's largest and national brand-equivalent private label brands, Signature and O Organics, for itself.

179. C&S will acquire ACI's Denver DC. C&S will also acquire ACI's Salt Lake City distribution center, which services ACI stores along the Western Slope. However, Kroger will keep the ACI dairy plant and bakery (located on the same campus as the Denver DC) for itself.

180. REDACTED [redacted]

181. The Divestiture Agreement also contains a Transition Services Agreement ("TSA") between Kroger and C&S that outlines certain support and other services to be provided by Kroger to C&S, thereby intertwining Kroger and C&S operations for up to two years. The length of the support varies depending on the particular service or function.

182. Pursuant to the TSA, REDACTED [redacted]

183. With respect to pricing, REDACTED [redacted]

184. Similarly, for up to a year post-divestiture, C&S would be reliant on Kroger REDAC C&S would also be reliant on Kroger to REDACTED

185. As for store operations, C&S would be reliant on Kroger to REDACTED The same is true for distribution, as REDACTED C&S would also be reliant on Kroger to REDACTED

B. The Divestiture Buyer.

186. C&S needs a TSA of substantial duration not just to provide for a transition of business, but to provide support to C&S because C&S lacks experience operating a Supermarket chain of any meaningful size.

187. Recently, C&S has been losing its largest distribution customers, including Ahold Delhaize, Target, and Southeast Grocers, as large grocery chains have moved to self-distribution.

C. The Failings of the Divestiture.

188. The divestiture package fails to alleviate the anticompetitive effects of the Proposed Merger. The number and quality of the stores and other assets to be divested are inadequate; the execution risks of the divestiture are too high and present a danger that the divestiture will fail; and C&S is an inadequate buyer that is unlikely to effectively compete against a strengthened post-merger Kroger.

a. The Number and Quality of Divested Stores Fails to Address the Anticompetitive Effects of the Merger.

189. The divestiture package does not include enough stores in Colorado to (i) give C&S adequate scale to effectively compete in a post-merger marketplace and (ii) address the anticompetitive effects of the Proposed Merger. C&S will acquire 52 stores in Colorado, compared with the 105 stores that ACI presently operates in the state. That would give C&S less than half of ACI's present scale in the state, and will be dwarfed by the 201 stores that Kroger would have. C&S will not have sufficient scale to attract customers, spread its costs, and effectively compete with Kroger on price.

190. The number of stores also fails to address all local markets that would suffer anticompetitive effects.

191. The quality of the divested stores is also a problem. The divested stores in Colorado all come from the ACI side, and, except for one store, REDACTED

[redacted]

192. Additionally, the ACI stores on the divestiture list tend to [redacted]

193. The revenue disparities are especially stunning. [redacted]

194. A divestiture of simply the worst performing and least desirable stores demonstrates that Kroger does not want to face a strong competitor post-merger.

b. The Divestiture Proposal Has High Execution Risk That Makes It Likely to Fail.

195. The proposed divestiture is rife with execution risks that would lead to store closures and threaten the viability of C&S as a competitor. The divestiture is therefore unlikely to succeed.

196. **First, there is significant re-bannering risk**. Overall, C&S will be required to re-banner over 80% of divested stores across the country. In Colorado, all but two of the divested stores will have to be re-bannered from Safeway (a well-known brand in Colorado with high customer affinity) to Albertsons (a largely unknown brand in Colorado with low customer affinity, mostly associated with failure).

197. Consumers tend to like the familiar. A significant risk of re-bannering a store is that people who regularly shop there will go elsewhere after re-bannering. In Colorado, this risk is particularly high because Kroger will maintain the Safeway banner and can lure customers from the divested stores—which will then be Albertsons stores—to either the next closest Safeway, King Soopers, or City Market. Loyal Safeway customers therefore may be diverted away from C&S stores to Safeway stores that will be owned by Kroger. And consumers who presently cross-shop at Safeway and King Soopers or City Market may just choose to divert all their shopping to King Soopers or City Market rather than shop at an unfamiliar banner.

198. Re-bannering in Colorado and elsewhere also injects higher costs for C&S, which also puts the competitiveness and viability of those stores at risk. C&S will incur the cost of physically changing the banner, plus marketing to keep and attract customers. C&S will also have to close each store for [redacted] while it re-banners, which means lost sales for those days as well as the carry-on effects of closure. C&S optimistically estimates that re-bannering will cost approximately [redacted] per store and will result in a [redacted] decline in sales. C&S estimates that re-bannering for the whole divestiture package will cost about [redacted]

199. C&S is likely underestimating the direct and indirect costs of re-bannering. For example, in 2018, ACI re-bannered a store in Fort Collins from Albertsons to Safeway. That re-bannering cost ACI [redacted] [redacted]

C&S will no doubt also have to remodel or renovate some of the re-bannered stores as well.

200. Kroger and ACI are well aware of the value of the Safeway banner in Colorado. Kroger's CEO believes that if Kroger were to divest the Safeway banner to C&S, that would significantly increase the risk of the transaction to Kroger and weaken Kroger's connection to the Safeway customers. For its part, Kroger wants to minimize the number of stores that Kroger will have to re-banner post-merger.

201. Similarly, after ACI merged with Safeway in 2015, ACI recognized the strength of the Safeway banner and chose to re-banner many of the Albertsons stores to the Safeway banner, and shuttered several Albertsons stores all together. Indeed, after the ACI/Safeway merger, in Colorado alone ACI re-bannered 15 Albertsons stores to Safeways, and eventually closed four other Albertsons stores.

202. Further complicating the re-bannering risk is the fact that REDACTED

203. **Second, there is significant risk to C&S lacking a strong private label offering**. Private label brands are very important to a store's success because they are more profitable for the store while being lower-priced to the customer than other competing brands. Private label brands account for a substantial portion of a store's sales volume.

204. Here, the divestiture does not include any national-brand equivalent "center store" private label products. "Center store" items are typically packaged goods that are located in the aisles in the middle of the store, rather than around the periphery of a store.

205. C&S will only acquire certain niche private label brands: Open Nature (a natural products brand), Waterfront Bistro (seafood), Primo Taglio (premium meats and cheeses), ReadyMeals (ready-to-eat foods), and Debi Lilly Designs (floral). These brands are REDACTED

206. C&S will not acquire ACI's most popular private label brands: "Signature" and "O Organics." Those brands have a wide variety of offerings that can be found in the center store as well as in the fresh sections, e.g., packaged salad greens. The Signature brand offers ACI's REDACTED he separate "Signature Cafe" brand REDACTED The O Organics brand REDACTED

207. Private label brands are essential to ACI stores' profitability, as REDACTED

208. C&S currently has only a handful of private label brands in its own stores, most of which it outsources from a third party. C&S's private label offerings are significantly underdeveloped compared to private brands at large retailers like Kroger and ACI. REDACTED Further, C&S's "Best Yet" brand has no brand recognition or affinity for Colorado consumers.

209. To compete with national brands, Kroger and ACI have invested in massive nationwide private label development and manufacturing infrastructures, and employ hundreds to support their private label operations, including research & development personnel, quality assurance personnel, consumer researchers, marketing and promotions personnel, financial analysts, designers, sourcing and supply chain personnel, manufacturing personnel, and executive staff.

210. C&S will be significantly disadvantaged in competing with a post-merger Kroger without a divestiture of national brand equivalent private label brands like Signature and O Organics and the supporting nationwide infrastructure. C&S will also be disadvantaged REDACTED Kroger and ACI currently REDACTED Moreover, ACI sells REDACTED C&S will not have this ability and will not be able to compete with Kroger on milk price.

211. Post-merger, Kroger estimates that it will have a $43 billion private label portfolio, which will make the post-merged firm "One of the Largest [Consumer Packaged Goods] Companies in the U.S."[22]

212. **Third, there is significant integration risk because C&S is not acquiring a standalone business line**. On a national basis, rather than divest from just one side of the acquisition, i.e., entirely from ACI, the parties have taken a mix-and-match approach, which will require C&S to stitch together different stores, banners, IT systems, and employees from both Kroger and ACI. C&S faces significant risk that it will not be able to timely integrate all these different pieces into a cohesive whole. This risk is particularly amplified because of C&S's lack of experience running a Supermarket chain.

213. Kroger and ACI are REDACTED

[22] Kroger-Albertsons Merger: Investor Presentation, *available at* https://assets-global.website-files.com/6313a39c3c13ed1541dc24e1/63497445b7be8f45282920d4_Kroger-Albertsons-Companies-Merger-Investor-Presentation.pdf.

214. From an IT perspective, the national set of divested stores will come from both Kroger and ACI, and those stores REDACTED

215. C&S will also be trying to hire roughly [redacted] employees from Kroger and ACI at the division-level or higher, as well as hiring another [redacted] employees from elsewhere. Assembling a work force of that size—which does not even include the store-level employees at the divested stores—into a cohesive whole that can smoothly operate the business on day one is a monumental challenge.

216. This is a highly unusual approach to a divestiture. Typically, divestitures involve standalone business lines to minimize integration risk and maximize the likelihood of a successful operation post-divestiture. The mix-and-match approach here is a hallmark of failed divestitures.

217. **Fourth, C&S does not have enough employees to run the business**. C&S currently only operates 23 stores, and its workforce in the retail side of its business reflects that small number. To scale up to run the 413 stores it seeks to acquire, REDACTED However, there is no guarantee that the Kroger and ACI employees will want to work for C&S. Additionally, REDACTED roger may decide to keep all the best employees and only make available to C&S the lowest-performing employees.

218. The uncertainty around whether C&S will have enough employees, and the right employees with requisite knowledge of the retail industry and the particular assets that C&S is acquiring, is a major risk that threatens the viability of C&S as an operator of the divested assets.

219. **Fifth, C&S is not getting sufficient distribution assets across the country to support the retail stores**. REDACTED

220. REDACTED

221. If C&S's operations fail in other areas of the country, it could lead to a strain on, if not collapse of, its entire retail operation, including in Colorado.

222. **Sixth, C&S faces significant risk on loyalty card data,** REDACTED

223. As for what C&S is receiving, REDACTED

REDACTED

224. Just as important is what Kroger will retain post-merger. REDACTED Indeed, this is what happened to Haggen, and it simply was not able to get those customers back. That is a serious risk for C&S as well.

c. C&S Is an Inexperienced Retailer with a Troubling Track Record And Lacks Independence from Kroger.

225. C&S lacks experience in retail and is ill-equipped to take on a divestiture of this size. It also has a troubling track record of selling and franchising stores that casts a shadow on its commitment to successfully operating the divested stores long-term. And due to its inexperience, it will require a lengthy transition period that will make it dependent on Kroger for far too long, which will diminish competition between C&S and Kroger.

226. Much like Haggen, C&S is trying to dramatically grow its retail footprint all at once through this divestiture. Haggen only owned 18 stores before buying 146 stores from ACI/Safeway, an eight-fold increase. Now C&S, which only owns 23 retail stores, wants to buy 413 stores, a nearly twentyfold increase.

227. The difficulty of this task is reflected in the lengthy transition period in the TSA, which could last as long as two years REDACTED

228. Under the TSA, C&S will be reliant on Kroger for key competitive functions in the divested stores, including REDACTED This will diminish competition between Kroger and C&S because Kroger will have no incentive to ensure that the divested stores vigorously compete with its own. C&S's extensive reliance on Kroger will hamper its ability to build a strong competitor to Kroger and good alternative for consumers.

229. The length of the transition and extent of C&S's dependence on Kroger shows that C&S is not a strong and independent buyer. Indeed, C&S's inexperience is evident not only in the limited number of stores it currently operates, but in what it presently lacks. REDACTED It currently only operates one single pharmacy. [redacted]

REDACTED

230. It has taken established retailers like Kroger and ACI years to develop these kinds of programs. The idea that C&S can simply stand up a large retail operation with all the complex programs of leading retailers in a short period of time and compete with Kroger in the way that ACI does today is completely unrealistic.

231. C&S's history of operating retail stores does not inspire confidence. C&S has previously bought retail stores only to eventually sell them off. REDACTED

REDACTED

232. For example, C&S acquired the Grand Union banner and certain stores through the Grand Union bankruptcy in 2001. REDACTED

233. Similarly, C&S's Southern Family Markets banner acquired 111 BI-LO stores in 2005 that were operating under different banners. REDACTED

234. C&S largely exited retail by 2012 and remained so until 2021, when it bought some stores under the Piggly Wiggly banner and a dozen stores in New York and Vermont from a divestiture in the Topps/Price Chopper merger.

235. In connection with its acquisition of Piggly Wiggly Midwest, C&S operates only 11 of the stores involved and entered into service agreements with the remaining stores.[23]

236. C&S's history of dealing with labor unions is also troubling and portends poorly for workers. For example, in 2004, C&S closed three unionized facilities that it acquired from Supervalu in New England and shifted the work to its non-union facilities in the region. All told,

[23] *C&S Wholesale Grocers Enters into Definitive Purchase Agreement With Piggly Wiggly Midwest*, C&S Wholesale Grocers (Jul. 15, 2021), *available at*: https://www.cswg.com/news/cs-wholesale-grocers-enters-into-a-definitive-purchase-agreement-with-piggly-wiggly-midwest/.

over 600 union jobs were lost.[24]

237. Similarly, C&S had a large warehousing operation in Woodbridge, NJ, from which it served facilities across the Tri-State Area (New Jersey, New York, and Connecticut). In 2011, despite the prime location, C&S shut down the union facilities and shifted the work to non-union facilities in Pennsylvania. This resulted in over 1,000 lost union jobs.[25]

238. In 2014, C&S acquired certain White Rose warehouses out of bankruptcy. C&S shifted the work to non-union facilities, resulting in over 400 union jobs lost.[26]

239. As part of the divestiture here, C&S [redacted] REDACTED [redacted]

240. The UFCW and the Teamsters both publicly oppose the divestiture to C&S, fearing it will result in the loss of good-paying union jobs.

241. C&S's track record as a grocery retailer and its inexperience cast a dark cloud over its worthiness as a divestiture buyer here. If C&S fails, the results will be devastating for local communities.

242. It will mean closed stores resulting in vacant lots in shopping centers due to the restrictive covenants that prevent new grocery stores from operating in those closed locations. That in turn will mean fewer grocery options for consumers, lost jobs for grocery workers, and shuttered local businesses that operate in shopping centers and rely on anchor tenant grocery stores to drive traffic to their stores.

243. C&S's failure would all redound to Kroger's benefit, which may end up buying back some failed stores (following the ACI playbook with Haggen), or at the least gaining customers from the failed stores and having eliminated one of its closest competitors.

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

[25] *Town Responds to C&S Plan to Close N.J. Warehouse*, Progressive Grocer (Feb. 2, 2011), *available at:* https://progressivegrocer.com/town-responds-cs-plan-close-nj-warehouse.

[26] Jon Springer, *C&S to close White Rose facilities,* Supermarket News (May 13, 2015), *available at:* https://www.supermarketnews.com/retail-financial/cs-close-white-rose-facilities.

d. The Low Purchase Price Reflects the High Risk and Weakness of the Divestiture.

244. C&S is paying a discount price for the assets it is acquiring.

245. The low price that C&S will pay reflects the high execution risk of this deal and its weaknesses. If C&S flounders, it will be able to sell the assets and recoup most of its investment through the sheer value of the real estate and other assets. This is another eerie parallel with the Haggen deal; Haggen's owners at the time believed the deal was too good to pass up because of the value of the real estate. Indeed, Haggen's owners reportedly were able to immediately recoup their purchase price through sale-leasebacks of the acquired stores. This shows that a divestiture can work out fine for the buyers and sellers, at the cost of consumers, workers, and communities.

246. The low purchase price also likely reflects C&S's REDACTED [redacted]

IX. FIRST CAUSE OF ACTION

Violation of C.R.S. § 6-4-107 (Against All Defendants)

247. Plaintiff hereby incorporates and re-alleges the allegations of Paragraphs 1 through 246 above as if set forth fully herein.

248. The Proposed Merger may substantially lessen competition in the relevant markets alleged above.

249. Among other things, the Proposed Merger would

a. reduce consumer choice and raise grocery prices for food and other grocery products available for retail sale in in Supermarkets;
b. reduce the quality of customer service in the relevant markets;
c. eliminate head-to-head competition between Kroger and ACI in the relevant markets;
d. reduce competition generally in the relevant markets;
e. weaken supply chain resiliency;
f. increase the likelihood of anticompetitive collusion in the relevant markets;

250. The proposed divestiture does not alleviate the anticompetitive effects of the Proposed Merger. The Proposed Merger, even with the proposed divestiture, is likely to substantially lessen competition in the relevant markets alleged above.

X. SECOND CAUSE OF ACTION

Violation of C.R.S. § 6-4-104 (Against Defendants Kroger and ACI)

251. Plaintiff hereby incorporates the allegations of Paragraphs 1 through 250 above as if set forth fully herein.

252. Kroger and ACI are direct, horizontal competitors for customers, including pharmacy customers.

253. Kroger and ACI are direct, horizontal competitors for labor, including grocery store workers. They compete to provide high quality customer service, which requires that they recruit and retain the best employees. Kroger and ACI often recruit and hire each other's employees. Indeed, Mr. Broderick testified that King Soopers had recruited Albertsons' store directors on multiple occasions. Mr. Dosenbach similarly testified that ACI and Kroger compete for talent.

254. Kroger and ACI agreed that ACI would not solicit Kroger's pharmacy customers during a strike against King Soopers (the "Non-Solicitation Agreement").

255. Kroger and ACI agreed that ACI would not hire any King Soopers employees during a strike against King Soopers (the "No-Poach Agreement").

256. Rather than vigorously compete with its rival on all fronts, ACI entered into an unlawful agreement to not hire King Soopers employees and to not solicit its pharmacy customers.

257. The unlawful No-Poach Agreement diminished competition in the labor market and harmed employees who were deprived of access to job opportunities during the strike against King Soopers.

258. ACI's executive-management was aware of the unlawful agreement. Mr. Broderick, President of ACI's Denver Division, relayed the existence of the unlawful agreement to Susan Morris, ACI's Chief Operating Officer, telling her that "we have agreed to not hire their employees and not actively solicit their pharmacy customers."

259. Kroger's executive management was also aware of the unlawful agreement. Mr. McPherson relayed the existence and terms of the unlawful agreement directly to Rodney McMullen, the Kroger CEO; Gary Millerchip, the Kroger CFO; Christine Wheatley, the Kroger General Counsel; Mary Ellen Adcock, Kroger SVP of Operations; Timothy Massa, Kroger Chief People Officer; and Joe Kelley, President of the King Soopers & City Market Division.

260. The Non-Solicitation Agreement is an unlawful contract, combination, or conspiracy in restraint of trade.

261. The No-Poach Agreement is an unlawful contract, combination, or conspiracy in

restraint of trade.

262. Kroger and ACI's Non-Solicitation Agreement is a naked restraint of trade and is per se unlawful. It is not reasonably necessary to any competitive purpose.

263. Kroger and ACI's No-Poach Agreement is a naked restraint of trade and is per se unlawful. It is not reasonably necessary to any competitive purpose.

264. By agreeing that ACI would not solicit Kroger's pharmacy customers or its employees during the strike, Kroger and ACI agreed to allocate those customers and employees—a per se unlawful, and thus unreasonable, restraint of trade. The No-Poach and Non-Solicitation Agreements were not reasonably necessary to any separate, legitimate business transaction or collaboration between the companies.

XI. REQUEST FOR RELIEF

Plaintiff respectfully requests that this Court:

a. Enter an Order that the Proposed Merger is unlawful and violates C.R.S. § 6-4-107;
b. Enjoin and restrain Defendants and all persons acting on their behalf from consummating the Proposed Merger or from entering into or carrying out any other transaction, contract, agreement, plan, or understanding that would combine Kroger with ACI;
c. Enjoin and restrain Defendants Kroger and ACI from enforcing or entering into any agreement to not hire each other's employees;
d. Enjoin and restrain Defendants Kroger and ACI from enforcing or entering into any agreement to not solicit each other's customers;
e. Order that Kroger pay a civil penalty of $1,000,000 for its violation of C.R.S.§ 6-4-104;
f. Order that ACI pay a civil penalty of $1,000,000 for its violation of C.R.S. § 6-4-104;
g. Award Plaintiff attorneys' fees, costs, and expenses incurred during the investigation and litigation of this action; and
h. Award such other relief as the Court deems just and proper.

Dated this 14th day of February, 2024.

PHILIP J. WEISER
Attorney General

<u>/s/ Arthur Biller</u>
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