



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALBERTSONS COMPANIES, INC.,	)	
	)	
Plaintiff/	)	
	)	
Counterclaim Defendant,	)	
	)	
v.	)	C.A. No. 2024-1276-LWW
	)	REDACTED PUBLIC VERSION
THE KROGER CO.,	)	FILED: October 12, 2026
	)	
Defendant/	)	
	)	
Counterclaim Plaintiff.	)	

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PRELIMINARY STATEMENT

The \$25 billion Merger between The Kroger Co. (“Kroger”) and Albertsons Companies, Inc. (“Albertsons”) would have created a company with the scale and resources to drive down prices for consumers, invest in products and technology, and protect labor and union jobs. Both Kroger and Albertsons knew antitrust regulators would approve a deal between the two largest traditional grocers in the country only if Kroger, as the acquiror, took steps to preserve competition in markets where the parties’ stores overlapped, chiefly by “divesting” (*i.e.*, selling) a robust package of stores and other key assets to one or more viable competitors.

Albertsons, mindful of the risks of being locked-up during an extended regulatory-review process, would not have done this deal absent Kroger’s ironclad commitment to do whatever it took to secure approval. Kroger gave that commitment, agreeing to “use best efforts, to take ... any and all actions,” and, upon even a “threat” of investigation or litigation, “to take any and all actions,” full-stop, to remove any antitrust impediment to the Merger—with *no limit* except that Kroger did not have to divest more than 650 stores. Otherwise, as Kroger’s CEO testified, Kroger had to do “*everything it could*” to get approval, even if contrary to its own financial interests.

Kroger willfully breached these maximalist contractual commitments. Kroger wanted the Merger but only on its own terms, conditioned by the high internal rate of return (“IRR”) and EBITDA targets its management had promised its Board. To hit those targets, Kroger had to minimize the value of divested assets, adopting a just-enough strategy in place of the contract’s edict of “any and all actions.” Kroger’s CEO thus worked to create a \$400 million executive bonus pool based on *post-merger* profits that incentivized its senior management to take a highly aggressive and incrementalist strategy with regulators. Following its internal plan, Kroger’s M&A team modeled hundreds of deal scenarios throughout 2022 and 2023 that constrained its divestiture proposals—and materially delayed submissions to regulators—but preserved a post-merger IRR of at least 8%. When deal headwinds arose in the form of regulatory pushback, declining grocery performance, and a late-discovered \$500 million error in its financial modeling, Kroger inflexibly held to its pre-Merger targets—even refusing to divest assets specifically identified by the regulators as key to the success of its chosen divestiture buyer. Despite clear feedback from regulators, clear advice from its own counsel and economists, and repeated pleas from Albertsons and the divestiture buyer, C&S Wholesale Grocers (“C&S”), Kroger stuck to its failing lowball strategy right through the litigation that ended the deal.

Egregiously, Kroger worked to protect its bottom line by cherry-picking the more valuable banners and stores for itself—nearly *60% of stores in overlapping areas*—which it ruled “ineligible” for divestiture. These management-imposed “banner rules” were directly contrary to well-settled FTC guidance, which warns against divestiture of lower-performing stores in grocery mergers. Kroger’s own antitrust advisors and economists warned Kroger not to take such actions, which severely limited any ability to construct viable divestiture packages. Kroger’s senior executives understood counsel’s warnings: when the FTC asked them under oath about the process, Kroger’s CEO and CFO, among others, concealed and outright misrepresented the facts. Albertsons only discovered the truth after ten months of massive battles to ensure that Kroger and its agents produced all relevant documents without improper designations of privilege.

Kroger’s strategy inevitably led to failure. Its first package of 238 stores was assembled by outside counsel using an *ad hoc* approach constrained by the banner rules, in sharp contrast to the standard practice of using a principled economic methodology. That package was so obviously lacking that Albertsons’ counsel called it “insult[ing],” and the FTC agreed. But Kroger repackaged the 238 into its next iteration of 413 stores, assembled just the same way, and presented nearly *one year* after the Merger Agreement. Kroger knew this package was not built on the

FTC’s requested customer “diversion analysis” and in fact was economically indefensible, both as to the construction of store-sets and as to non-store assets, as the FTC confirmed.

Kroger’s later packages continued to prioritize Kroger’s financial targets over FTC guidance and direct feedback, in disregard of Albertsons’ continuous efforts to seek meaningful improvements. Kroger’s 510-store set, presented on November 16, 2023, recycled the discredited 413-store package and added just 97 stores. After the FTC swiftly rejected the package, again with detailed feedback on how actually to solve the competitive concerns, Kroger’s counsel commented that “there seem[ed] to be a number under 650 that should work,” but “*Kroger [was]n’t so sure about wanting to increase the number.*” Faced with having to make divestitures beyond the EBITDA of the “worst case” divestiture scenario presented to Kroger’s Board pre-signing, Kroger set an arbitrary 550-store ceiling and held to its management-imposed “banner rules.” One month later, the FTC sued to block the Merger.

Even then, in an act of outright hubris, Kroger refused to put its best foot forward. Panicked that a robust 650-store package would not allow it to hit its internal profit targets, Kroger’s final 579-store package was largely dictated by the same ineligible-stores list from 2022—and it continued to fall far short of FTC demands for better non-store assets, which Kroger regarded as a “Christmas list.”

Solvable competitive concerns were left unaddressed. When Albertsons offered in September 2024 to go far beyond its own obligations and reduce the merger price by over \$800 million to fund an improved divestiture package, Kroger's CEO did not even present that proposal to Kroger's Board.

Kroger's willful breaches extended to disregard and even contempt for the state attorneys general ("state AGs"), despite repeated pleas by Albertsons' General Counsel. Kroger's own outside counsel called its non-engagement with the states "inane," and its own state AG expert in this very case labeled Kroger the "perfect example" for what goes wrong when the feedback from state AGs is ignored. Unusually, but unsurprisingly given Kroger's conduct, the states of Washington and Colorado filed their own lawsuits to block the Merger, and eight other states and the District of Columbia joined the FTC's case. On December 10, 2024, a federal preliminary injunction issued and a Washington *permanent* injunction followed—making any further merger progress impossible; Albertsons exercised its right to terminate the deal the same day.

Kroger's knowing material breaches caused the Merger to fail. Under *Anthem-Cigna*, once Albertsons shows that Kroger's breaches "contributed materially" to the Merger's failure by making closing "less likely," the burden shifts to Kroger to prove the deal would not have cleared regardless of its conduct—and Kroger cannot

carry that burden. As Albertsons’ experts will show, this is a merger that likely would have earned regulatory approval; if Kroger had only abandoned the cherry-picking in its management-imposed banner rules, it would have been able to construct myriad packages using standard economic methodologies to solve the FTC’s requirements. Kroger’s willful prioritization of its internal targets instead cost Albertsons’ stockholders between \$5.43 and \$6.88 billion in lost merger premium (depending upon the date of first breach), inclusive of interest through June 30, 2026. To make Albertsons’ stockholders whole also now requires \$1.4 to \$1.7 billion in a tax gross-up, given that the payments no longer run directly to stockholders.

Finally, Albertsons is squarely entitled to the \$600 million break-fee for failure to close within the Outside Date (as extended), plus prejudgment interest of at least \$75 million as well as fees and costs. In one of its more brazen breaches, Kroger declined to pay the break fee and asserted baseless counterclaims that Albertsons itself supposedly breached the contract. Now, on the eve of trial, Kroger’s counterclaims have been so thoroughly disproven in discovery that it has abandoned them—yet Kroger still has not paid the break-fee.

The travesty here is that, but for Kroger’s hyper-aggressive and less-than-candid strategy with federal and state regulators—in its relentless pursuit of maximizing its own profits rather than taking “any and all actions” to secure

approval—this Merger would have closed to the benefit of consumers, unions, both companies’ stockholders, and the greater economy. Instead, Kroger has caused Albertsons over \$8 billion in harm and left it to pick up the pieces.

BACKGROUND

I. The Parties Negotiated the Merger Agreement While Kroger Privately Planned to Offer Regulators as Little as Possible

In spring 2022, Kroger and Albertsons began negotiating a merger that would have benefitted consumers and delivered value to the companies’ respective stockholders.

A. Kroger Understood a Significant Divestiture Would Be Necessary to Obtain Regulatory Approval

As the country’s two largest traditional grocery retailers, Albertsons and Kroger understood the Merger would receive intense antitrust scrutiny and require significant divestitures in overlap geographies. Dkt. 23, Counterclaims (“Counterclaims”) ¶62. Before approaching Albertsons, Kroger engaged Arnold & Portner (“A&P”) and Compass Lexecon (“Compass”), ostensibly to prepare divestiture proposals based on regulators’ “typical” approach to ensuring “adequate competition to the post-transaction Kroger.” JX-0557 at -448. Kroger knew “the number of stores divested” should “turn on economic analyses regarding the competitive effects of the transaction,” Counterclaims ¶67, and its early estimates

ranged from 232 to over 700 stores, JX-0571 at -947. A&P advised Kroger that—particularly if it sought to offer fewer divestitures—it would take “a significant amount of time and effort to attempt to convince the FTC (and State AGs) ... including submitting economic analyses and other advocacy submissions.” JX-0571 at -940. A&P also advised that “getting FTC sign-off quickly” would depend on the “attractiveness of the initial divestiture package.” JX-0731.

Kroger understood the FTC needed confidence the buyer could effectively operate the divested assets, which would “turn on factors including the location of the stores and other assets being sold with the stores such as distribution centers, warehouses, private label brands, and particular store ‘banners.’” Counterclaims ¶67. Longstanding FTC guidance, JX-0097 (“Merger Remedies Guidelines”), advised merging parties to divest as much as possible from one party, so the buyer could take over a pre-existing business. JX-0097 at 5-6. A “mix and match” of both parties’ assets would “slow the negotiations down, requiring a more fact-specific, detailed” assessment. *id.* at 7. The FTC also warned that parties “divesting lower performing, higher operating cost, older, [and] less conveniently located supermarkets” will “have difficulty persuading the [FTC] staff to accept such a

package.” *Id.* at 6-7.¹ As such, A&P advised: “the FTC may ultimately determine that a mix-and-match within an MSA is not appropriate,” JX-0749 at -120, and “even if we could convince [the FTC] to allow [mix and match] in certain geographies,” “it would add significant time ... and risks them digging in for more divestitures,” JX-0898 at -397; *see also* Wheatley Tr. 937:21-939:2; Bernstein Tr. 102:8-103:1.²

Kroger knew these best practices constitute a “playbook” parties routinely follow to maximize the likelihood of approval. *See, e.g.,* McMullen Tr. 67:11-70:03; Dailey Tr. 387:14-388:1; Cook Tr. 45:16-47:20. As Albertsons’ general counsel, Thomas Moriarty, and experts will testify, this “playbook” includes early, consistent, and transparent engagement with regulators, engagement with relevant interest groups, and proactive, economics-based divestiture submissions.

B. Albertsons Focused on Achieving Deal Certainty

When Kroger approached Albertsons in April 2022, Albertsons was “excited” but stressed the need to “move at speed.” JX-0592. Because closing “was always

¹ Kroger also knew there would be heightened scrutiny because of the failed divestiture to Haggen for the 2015 Safeway-Albertsons merger. McMullen Tr. 177:2-179:3; Counterclaims ¶54. Haggen declared bankruptcy shortly after that divestiture. JX-3747 at -179-80. Kroger appreciated “the importance of selecting a strong divestiture buyer to persuade regulators that a similar outcome would not result” here. McMullen Tr. 177:20-178:4.

² An MSA is a Metropolitan/Micropolitan Statistical Area, or geographic region.

harder on the seller than the buyer,” JX-0607 at -138, “deal certainty was a huge area of focus for” Albertsons. Roe Tr. 94:9-96:3; *accord* Wheatley Tr. 939:3-14. On May 19, 2022, Albertsons’ then-CEO Vivek Sankaran told Kroger’s then-CEO Rodney McMullen that Kroger needed a defined plan for regulatory clearance with divestitures. JX-1887 at 23. On May 21, 2022, Albertsons’ lead banker told Kroger’s then-CFO Gary Millerchip that Albertsons would proceed only at “the right price and with the right protections.” JX-0607 at 137-138.

Albertsons expected “a high standard to act, and a high penalty if [Kroger] fail[ed],” *id.* at -138, with its counsel and bankers demanding “hell-or-high-water” efforts obligations, “a higher number of stores” and a higher break fee as “evidence of [Kroger’s] commitment to get this [deal] done.” JX-0589; JX-0780 at -109, JX-0824 at -304-305.

A. Kroger Focused on Retaining the Most Valuable Stores and Devised “Banner Rules” to Adversely Select Its Lowest-Performing Stores for Divestiture

Fully aware of how the FTC would scrutinize the divestiture package, Wheatley Tr. 937:21-938:8, and while assuring Albertsons that it was “commit[ted] to make a number of store divestitures that should be sufficient to obtain the necessary antitrust approvals” within 12 months, JX-0735 at 695, Kroger spent

spring and summer 2022 assembling a package that lacked credibility, prioritizing ways to minimize the economic impact of divestitures.

In April 2022, A&P's Matthew Shultz prepared a "preliminary analysis of potential divestitures for an acquisition of Albertsons" resulting in a "best-case" of 232 stores, a "likely case" of 460 stores, and a "worst-case" of 713 stores. JX-0571 at -940-947. Shultz did not use regulators' traditional economic analysis, *infra* § Bkg.III; instead, he reviewed maps of overlap areas and predicted where divestitures might be necessary based on rough proximity, demographics, some sales data, and geographic boundaries. JX-0545; JX-0586; Shultz Tr. 108:9-109:8. Shultz assumed all divestitures would be Albertsons stores, JX-0571 at -941, avoiding mix-and-match.

Although A&P warned its preliminary analysis did not account for key information and should be "treated as directional rather than an exact figure," Kroger treated it as the foundation for all its divestiture proposals. JX-0571 at -940.³

Kroger assessed how to minimize the financial impact of divestitures, including by divesting lower-performing Kroger "banners" (brands like "Harris

³ These preliminary best-, likely- and worst-case scenarios were revised over the summer of 2022 to include Kroger stores, though the approximate number of stores in each scenario remained the same. JX-0749 at -120, -122.

Teeter” and “Mariano’s”) in MSAs where Albertsons stores were more profitable, *see, e.g.*, JX-0661; JX-1017, and by “mixing and matching” stores from different banners within MSAs, to retain valuable stores. JX-0641. After Compass modeled various scenarios and their EBITDA impact, JX-0661; JX-0641; JX-0655, Kroger gave A&P its preferences for which stores to retain using indicia of value like EBITDA, banner “equity,” and whether a store was owned or leased.⁴ Aitken July 29, 2026 Tr. 40:12-42:4. A&P memorialized Kroger’s choices as “banner rules,” creating a list of stores ineligible for divestiture, which Kroger then used to create every pre-litigation divestiture package. *See* Shultz Tr. 360:12-362:3; Wheatley Tr. 1058:13-1059:13.

By deeming higher-performing stores ineligible, and leaving a mix-and-match of lower performing stores for divestiture, Kroger’s banner rules increased its expected deal return and ensured that returns would remain above Kroger’s minimal 8.0% “benchmark” or “threshold” IRR.⁵ JX-6377 ¶48-49; JX-6427 ¶28; JX-6383

⁴ Divesting a leased store is more complex. *See* Albertsons 30(b)(6) Tr. 97:25-100:20. Yet Kroger sought to divest banners with a greater percentage of leased stores. *See* JX-1002.

⁵ Kroger does not dispute it adopted a lower-bound IRR “hurdle rate” of approximately 8.0%, and that it only had an economic incentive to close the Merger if returns exceeded that threshold. Gompers Tr. 38:14-41:4; 138:2-139:9; JX-5923 at -164 (September 2024 board materials noting Kroger’s “internal commitment” to maintain IRR above 8.3%).

¶¶97, 112, 125, 144, 153. For example, in the Pacific Northwest, they required divesting as many Kroger QFC stores as possible, supplementing with Albertsons-owned stores, and retaining Kroger’s high-performing Fred Meyer stores. *See* JX-0845 at -974 (A&P noting Kroger “wanted to get rid of QFC because it isn’t great and divest ACI stores next in order to keep Fred Meyer”). Kroger took the same approach elsewhere. In Chicago, it retained Albertsons’ Jewel Osco stores rather than Kroger’s low-performing Mariano’s and Food4Less stores. JX-0760; *see also* JX-0661 at -675-676; JX-6383 ¶97. In Southern California, it dictated that “Ralph’s (not [Albertsons]) would be the banner stores [it] would divest” because Albertsons’ “profitability is much higher” and Kroger would “have to divest more stores if [Kroger] chose [Albertsons] instead of Ralph’s.” JX-1001. And in D.C., Kroger retained Albertsons stores after it realized it would do “materially better” divesting Kroger’s Harris Teeter stores. JX-0661. As Albertsons’ expert Dr. Lawrence Wu will testify, Kroger’s banner rules rendered approximately 57% of the parties’ stores (nearly 1,600 stores) in overlapping areas ineligible for divestiture.

B. Kroger Used Its Banner Rules to Create a Package It Knew Was Inadequate

On June 23, 2022, Kroger presented its Board with divestiture assumptions including divestiture of the entire low-performing QFC division in the Pacific

Northwest and a “mix of [Kroger] and [Albertsons] stores” in other areas, “based on the lowest EBITDA in each MSA.” JX-0726 at -571. Kroger estimated needing to divest between 249 and 633 stores. *Id.*

In early July 2022, Shultz used the banner rules to construct an initial 351-store proposal from his preliminary scenarios. JX-0782.⁶ Shultz explained that his proposal only included stores Kroger had no “credible argument to keep,” JX-0772, described the package as “aggressive,” and acknowledged the “FTC will ask for and [Kroger] will have to divest more,” JX-0786.

Upon seeing Shultz’s proposal, Kroger’s lead antitrust lawyer Michael Bernstein responded: “[y]ikes.” JX-0783. As A&P previewed the proposal with Kroger, JX-0784; JX-0785, Bernstein pushed Shultz to shrink the package to “appease Rodney [McMullen],” JX-0802, asking whether Shultz could “get this number a bit lower -- maybe around 315-325 and still be credible,” but to make sure “it doesn’t look like we just picked a round number when we go to the FTC,” JX-0786, at -069. Shultz replied: “There might be some room to cut some stores, but not 25-30 if we want to be credible.” *Id.* at -068. Bernstein nonetheless directed more cuts, and despite Shultz’s skepticism, JX-0802, he removed 37 stores, JX-0832.

⁶ The proposal contained 351 stores, not 350 as Shultz initially wrote. JX-0786 at -068.

A&P shared the resulting 327-store package with Kroger on July 21, 2022. JX-0827, at -711_004. Kroger removed another 17 stores. JX-0820 at -445; JX-0832. A&P shared the resulting package with Kroger on August 1, 2022, JX-0856, advising that 309 stores, *see* Dkt. 325 ¶¶270, 273, JX-0835, was the “lowest credible” package to get FTC approval within a year. JX-0858 at -497.

But Kroger demanded more cuts. Disregarding Bernstein’s advice against cherry-picking, Bernstein Tr. 493:5-494:11, Millerchip sent A&P a list of “stores/small markets” to “take an even closer look at, to determine whether we have to include.” JX-0882. Although A&P’s Sonia Pfaffenroth told Shultz and Bernstein that “taking any of these out is challenging,” JX-0865, A&P removed another store at Millerchip’s request, JX-0873. Kroger also removed 73 QFC, Mariano’s, and Food4Less stores (but not the entire banners) to preserve EBITDA, notwithstanding A&P’s advice that divesting complete banners was more “practical/realistic” with the FTC. JX-0931; JX-0885; JX-0679; *see also* Shultz Tr. 79:5-21.

Kroger executives continued to intervene for financial reasons. On September 3, 2022, Mary Ellen Adcock, Kroger’s then-Senior Vice President of Retail Operations, asked Bernstein to remove four Ralphs stores in Southern California because they were “[t]he highest sales and profit of the division,” although she acknowledged “cherry pick[ing]” was not permitted. JX-1017. A&P removed two

of the four despite advising it was “likely” a divestiture would be required for one and there “is not really a credible argument we could make to keep” the other “off the initial list.” *Id.* In place of one Ralphs store, A&P added an Albertsons Vons store, creating a mix and match in Southern California.⁷ JX-1017. And on September 14, 2022, McMullen directed A&P to remove QFC #807 in Seattle because it was a “crown jewel” store. JX-1065. Despite telling Kroger that removing it would “complicate[]” the divestiture, A&P complied. *Id.*

These changes left Kroger’s initial package at 238 stores, a third less than the 351-store package A&P considered an “aggressive” opening offer and far below the “lowest credible” number A&P identified. JX-2504; JX-0858. The package was finalized in mid-September. When Albertsons’ antitrust counsel, George Paul at White & Case, reviewed it, he told Kroger it was “so small as to insult FTC staff.” Paul Tr. 78:9-15.

⁷ Regulators immediately noticed the single Vons store in Southern California and asked why it was included. JX-2446. As Albertsons’ regulatory expert opines, “it is difficult to imagine more of a red flag for potential ‘cherry picking’ concerns.” JX-6420 ¶¶177; *see also* JX-6124 ¶232 (criticizing Kroger’s decision to retain a QFC store in Seattle because “McMullen personally requested that it not be divested due to its significant real estate value”).

C. Albertsons Negotiated for Stringent Regulatory Obligations

On August 12, 2022, Albertsons provided the first draft Merger Agreement. JX-0904 at -829. It included stringent regulatory covenants, including the “hell-or-high-water” provision Albertsons highlighted in early negotiations, *id.*; *supra* § Bkg.I.B; JX-1032 (Kroger’s counsel confirming Merger Agreement included “hell-or-high-water” clause). Kroger accepted those terms without edits. JX-1224 § 6.3; Aiello Tr. 63:3-13, 69:10-70:2.

Remaining negotiations centered on the number of stores Kroger could be required to divest. *See, e.g.*, Aiello Tr. 209:3-9 (store cap was heavily negotiated, “important point in the deal”); JX-0850 (store cap was “critical in the decision for both parties”). Although both parties believed they could address regulators’ concerns by divesting fewer than 650 stores, Albertsons rejected a lower store cap and accepted a “well-below industry break fee” in exchange for the 650-store commitment and maximalist regulatory covenants. JX-1118; McCollam Tr. 149:20-152:5, 156:15-157:6; *see also* Roe Tr. 128:18-130:1. At the same time, Kroger concluded that divesting 650 stores would “tak[e] [Kroger] below [its] cost of capital,” JX-1118 at -879, but believed it could offset that risk with the banner rules. *Id.* at -881; JX-1130 at -504-505. Kroger thus agreed to the 650-store cap knowing of the strain on its model the closer it came to 650 stores.

D. Kroger Created an Executive Compensation Plan That Incentivized Minimizing Divestitures

Simultaneously, Kroger developed a \$400 million executive incentive plan, designed by and for management, tied to achieving post-merger synergies to meet IRR thresholds. JX-0707 at -647 (June 2022 board materials describing need for an “incentive to achieve synergy goals”); JX-0965 at -947; JX-5918. Kroger’s senior executives—including McMullen, Stuart Aitken (Kroger’s then-Chief Merchandising Officer), Adcock, Yael Cosset (Kroger’s then-Senior Vice President and Chief Information Officer), Christine Wheatley (Kroger’s then-General Counsel), and Mafaz Maharoo (Kroger’s then-Vice President of Strategic Finance, Mergers & Acquisitions, and Long Range Planning)—could receive bonuses of up to six times their base salaries if Kroger achieved “upside” or “goal” synergies in full, but no bonuses if Kroger’s synergies fell more than \$200 million below its “base” synergies target, which was associated with minimally viable deal returns. *See* JX-2192; JX-5918 at -404; JX-6040; JX-6050 at -585. The plan thus disincentivized divestitures, because fewer retained assets undermined Kroger’s ability to use those assets to achieve synergies. Dresdow Tr. 90:9-92:23. Certain beneficiaries—McMullen, Millerchip, Wheatley, and Maharoo—were responsible for designing the plan’s targets, monitoring Kroger’s deal model performance, and

adjusting Kroger's divestiture proposals based on that information, knowing they would be personally rewarded for maximizing synergies. JX-2192; JX-3100; JX-3231; JX-5829; JX-7034 at -844; JX-7035; JX-7036. McMullen Tr. 505:1-507:1, 510:2-511:1; Massa Tr. 28:20-29:8, 308:8-312:2, 324:8-329:10.

II. The Merger Agreement Obligated Kroger to Seek Deal Closure and Preserved Albertsons' Right to Recover Damages If Kroger Did Not

The Merger Agreement, executed October 13, 2022, JX-1224, committed Kroger to do anything necessary to obtain regulatory approval, up to and including a "hell-or-high-water" obligation to take "any and all actions" to remove antitrust impediments. Section 6.3 provides for differentiated efforts levels. While both parties agreed to "reasonable best efforts" to close the Merger "as promptly as reasonably practicable," *id.* § 6.3(a), Kroger alone agreed to "use best efforts, to take ... any and all actions necessary to avoid, eliminate, and resolve any and all impediments under any Antitrust Law ... so as to enable the Closing to occur as promptly as practicable." *Id.* § 6.3(d). And upon the triggering of "any Proceeding," defined as any "claim, suit, action, investigation or proceeding of any nature," *id.* § 4.14, "instituted (or threatened) challenging the Merger as violating any Antitrust Law," Kroger committed to "any and all actions" to "eliminate each and every

impediment under any Antitrust Law to close the Transactions prior to the Outside Date.” *Id.* § 6.3(e).

The only limit on Kroger’s obligations under Sections 6.3(d) and 6.3(e) was the 650-store divestiture cap; otherwise, there were no limits on banners, distribution centers, manufacturing plants, or other non-store assets Kroger had to divest. There were no carveouts for “crown jewel” stores; valuable banners, store brands, other assets; or financial limitations. And, unlike other agreements, no provision allowed Kroger to refuse divestitures that would result in a material adverse effect on its business. JX-6379 ¶¶62; Aiello Tr. 78:4-10.

While Kroger had “principal responsibility for devising and implementing the [divestiture] strategy,” the parties had to “jointly develop” the strategy and “consult and reasonably cooperate with one another, and consider in good faith the views of one another.” JX-1224 at § 6.3(b). Both parties also agreed to cooperate “in connection with any filing to or submission with any Governmental Entity ... and in connection with any Proceeding by or before any Governmental Entity....” *Id.*

The Merger Agreement allowed either party to terminate “if the Closing does not occur on or before ... the Outside Date.” JX-1224 § 8.1(e). Albertsons negotiated a \$600 million termination fee plus reasonable costs and expenses (the “Termination Fee”), payable if the Merger was terminated under Section 8.1(e). *Id.* §§ 8.4(b)-(c),

(d)-(f). In the event of Kroger’s Willful Breach, *id.* §§ 8.3, 9.5, Albertsons can recover the lost premium its stockholders otherwise would have received.⁸ *Id.* § 9.5.

III. Kroger Understood Its Obligations at the Time of Signing

Kroger understood at signing it had to do anything necessary to clear antitrust impediments as quickly as possible. McMullen testified, “Kroger needed to do everything that it could, including litigation, to get approval for the merger,” McMullen Tr. 45:3-10, and that “Kroger had to make best efforts specifically to enable the closing to occur as promptly as practicable.” *Id.* at 53:5-10. He understood Kroger “had to make sure that the divestiture buyer received all the assets that it needed,” including banners and exclusive product lines (“private labels”). *Id.* at 68:15-69:3. Maharroof’s “understanding was Kroger was under the duty to do

⁸ The \$34.10 consideration represented a 32.8% premium over Albertsons’ unaffected price on October 12, 2022. JX-1258 at -532. Alongside the Merger, Albertsons announced a \$4 billion special dividend. *Id.* Kroger was aware of the planned dividend since May 2022 and agreed to it. JX-1887 at 23. The dividend reduced the anticipated consideration by \$6.85/share. JX-1258 at -532. Kroger and its advisors determined Albertsons would maintain adequate liquidity after the dividend. JX-6381 ¶¶26 n.44, 61; Millerchip Tr. 709:16-710:23; JX-1706 at -634-639. Though the Washington AG attempted to enjoin the dividend, Kroger and Albertsons successfully prevailed against that challenge, JX-1609; JX-6384 ¶ 73, and the Washington AG did not reference the dividend in its later complaint to enjoin the Merger, JX-4592. The FTC requested limited information about the dividend in October 2022, JX-1491, and similarly did not reference it in its later complaint, JX-5130. Albertsons’ expert Lawrence Frankel will testify there is no evidence the dividend had a material impact on the FTC’s decision to oppose the Merger. JX-6421 ¶11 n.23.

whatever it took to get FTC approval.” Maharroof Tr. 637:6-12. Lead deal counsel Michael Aiello agreed Kroger “had to take any and all actions to get the deal done as soon as practicable”—meaning “[a]s quickly as you can get it done under the circumstances”—and acknowledged Kroger’s obligations under Sections 6.3(d) and 6.3(e) were not qualified by “reasonableness.” Aiello Tr. 425:23-426:2, 66:5-24, 76:11-24.

Senior leaders also understood the store cap was the only limit on Kroger’s efforts. Millerchip acknowledged Kroger “committed to 650 stores ... if that was required by the FTC.” Millerchip Tr. 194:19-195:6. Cosset, who led the deal after Millerchip’s departure, agreed there was no limit on non-store assets Kroger had to divest. Cosset Tr. 251:13-23. Kroger’s Board shared that understanding. *See* Aufreiter Tr. 267:16-268:9; Vemuri Tr. 158:6-159:24; Sutton Tr. 127:21-128:5. Kroger knew its obligations “extended even to actions that would potentially harm Kroger’s financial interest.” McMullen Tr. 59:8-21; *see also id.* at 57:23-58:2; Aiello Tr. 81:13-18.

Kroger was also aware regulators would analyze the Merger’s effect on prices through a “diversion analysis.” JX-1164 at -313; JX-1545 at -245; JX-0079 at 21 (FTC relies primarily on “the value of diverted sales” to analyze mergers “in markets with differentiated products,” like supermarkets). Diversion analysis rests on the

principle that if “Store A” raises prices, it loses some sales to a competing “Store B”—but if the owners of both stores merge, the combined company may be more willing to raise prices at Store A because the company now “recaptures” customers who switch to Store B. JX-6383 ¶43. Economists combine diversion ratios (the “fraction of unit sales lost by the first [store] due to an increase in its price that would be diverted to the second [store],” JX-0079 at 21) with profit-margin data to calculate the “Gross Upward Pricing Pressure Index” (“GUPPI”), which quantifies, as a percentage, the merged firm’s incentive to raise prices. JX-6383 ¶44.⁹ Kroger knew that, other things equal, lower diversion ratios and GUPPIs indicate less competitive risk. Weiskopf Tr. 255:9-16, 228:15-229:4.

Kroger’s economists understood the FTC historically focused on the “Hosken-Tenn” method for calculating diversion ratios in grocery mergers. JX-1191 at -189-90; JX-6385 ¶69 n.115; JX-0402 at -626 & n.1. Hosken-Tenn uses loyalty-card data to analyze local grocery-shopping patterns, allowing inferences about diversions. JX-0233 at 271-272. Kroger assured Albertsons in October 2022 it would

⁹ Another diversion-based metric is the compensating marginal cost reduction (“CMCR”), measuring how much a merger would need to reduce the firm’s costs to counteract its incentive to raise prices. *Id.* ¶79 n.188.

take the lead on implementing this “[l]oyalty card approach to estimating diversions (and GUPPIs).” JX-1545 at -245.

Kroger knew the FTC would also perform a “structural” analysis: defining an antitrust “market” in which each store competes and calculating concentration measures based on market shares. *Id.* at -243-44; JX-6383 ¶36; JX-6384 ¶132. Structural analyses are central to merger litigation because courts use them to assess whether mergers are presumptively anticompetitive. JX-6421 ¶81; JX-6420 ¶¶27-29. A&P advised Kroger that, for structural analyses in comparable mergers, the FTC defined the market to include only “full-line retail grocery stores” where “customers can purchase all of their weekly groceries.” JX-0731.

IV. Kroger Began the Regulatory Process with a Flawed Divestiture Proposal and Refused to Address Feedback on Improving the Package

On November 7, 2022, the FTC informed Kroger it had opened a “non-public investigation to determine whether the proposed merger ... may substantially lessen competition and thereby violate” antitrust laws. JX-1689 at -556. On December 1, 2022, the parties met with the FTC for the first time and Kroger gave a brief “overview” of its 238-store proposal. JX-1881; JX-1885. Although the FTC warns against making proposals without supporting backup materials, JX-6337, Kroger provided no backup data, no methodology detail, and no criteria explaining its store

selection. *See* JX-6337. Nor did Kroger’s presentation address non-store assets. JX-1882; Shultz Tr. 289:5-290:21.

Four days later, the parties received a “Second Request” from the FTC demanding documents and data. Second Requests are rare, and Kroger understood it signaled higher likelihood of FTC litigation. Pfaffenroth Tr. 38:21-39:6; Shultz Tr. 35:13-21; *see also* JX-6420 ¶50 & n.13, 14; Dick Tr. 46:15-47:5. Nevertheless, when the parties next met with the FTC on March 17, 2023, Kroger presented the same deficient 238-store package, again without backup materials. Bernstein Tr. 616:7-18; JX-2440. Kroger falsely represented it had performed a “traditional[]” structural analysis by analyzing “store-by-store supermarket competition.” JX-2420 at -586. A “traditional” structural analysis requires defining a relevant market, “look[ing] at who the players in the market are, what their market shares are, [] mak[ing] some effort to understand, after the merger, what the levels of concentration are in [the] relevant market, and how those levels of concentration changed as a result of the merger,” Vote Tr. 315:19-316:7 (Kroger expert), and then considering whether resulting concentration measures “raise a presumption” of anti-competitiveness under the Horizontal Merger Guidelines. JX-6385 ¶32.

Kroger had not done a “traditional” structural analysis. Instead, Kroger took A&P’s preliminary scenarios and whittled them down based on executive

preferences. *See supra* § Bkg.I.D. Kroger’s “structural analysis” also assumed a competitor set broader than the FTC’s, counting “alternative format” retailers like Trader Joe’s and Costco. JX-2420 at -586. Kroger did not provide sufficient information for the FTC to evaluate these departures from historical practice. *See, e.g.*, JX-2812 at -142 (FTC questioning why Kroger included Trader Joe’s).

Kroger’s obfuscation and misrepresentations prompted predictable questions from the FTC at the March 2023 meeting, including whether Kroger had used any measure of market concentration; which competitors Kroger considered; and the “decision tree” Kroger used to select stores. JX-2450. Kroger did not disclose that its banner rules systematically selected lower-performing stores for divestiture or disclose it had withheld a “crown jewel” property in Washington based on its CEO’s preference. *Id.* And when regulators asked about one cherry-picked store in Southern California, Kroger dissembled, claiming a Kroger executive “liked” the store while omitting that the store was retained because of its stand-out financial performance. JX-2451.

After the meeting, the FTC reiterated it “need[ed] the backup data and analysis that went into Kroger’s presentation,” specifically “the methodology employed, including assumptions made, to select the stores you propose to divest, the stores you propose to retain, and any underlying data or analyses supporting those

decisions.” JX-2440. Kroger had no defensible methodology, so A&P asked Compass to reverse-engineer one. JX-2223 at -386. But, after several attempts, Compass could not create a methodology that explained Kroger’s choices. JX-2515 at -975-976.

V. Kroger Constructed the Little-Improved 413-Store Package

Recognizing the 238-store proposal was inadequate, Kroger asked A&P in March 2023 to assemble a list of 400 stores—an arbitrary limit dictated by Kroger to minimize divestitures. *See* JX-2505 (Bernstein telling Shultz the “client really wants only 400”). Shultz was tasked with creating a divestiture package, “largely without [Compass’s] input.” JX-5742. Shultz started with one of A&P’s preliminary scenarios and created a package that even he did not believe would obtain FTC approval.¹⁰ JX-2500; Shultz Tr. 342:9-343:9. The 413-store package was built using the same banner rules as the 238-store package, JX-6383 ¶¶108-112; JX-3889 at -775-76, and omitted the same cherry-picked stores Kroger executives previously removed. JX-6383 ¶109.

¹⁰ Shultz originally constructed a proposal of 401 stores, intended to include the 238-store package. JX-2500. Shultz later identified 12 stores from the 238-store package inadvertently omitted and one that had closed and should come out of the package. JX-2726 at -783. Later, A&P identified one additional store to include, *id.*, JX-2682, bringing the total to 413.

Between March 2023, when the 400-store package was developed, and September 2023, when Kroger presented it to regulators, JX-3527, Kroger had limited engagement with the FTC. Kroger finally submitted a “white paper” in May 2023 offering some information on how Kroger evaluated competition in the DC-Maryland-Virginia region, but the paper offered little objective economic analysis and, in any case, addressed less than 3% of the 238-store proposal. JX-6421 ¶29 & n.52.¹¹ The FTC observed during a May 22, 2023 call that the white paper lacked “sufficient economic analysis.” JX-2801. During that call, the FTC reiterated its expectation that Kroger would use a loyalty-data-based diversion analysis, JX-2808 at -218, as Kroger had anticipated since at least October 2022. *Supra* § Bkg.III. Compass advised A&P to inform Kroger that the Hosken-Tenn approach was “reasonable” and advantageous because, unlike a structural analysis, it would not require winning “arguments on whether some competitors are in the market or not.” JX-3819 at -669. Despite that clear FTC feedback, Kroger did not revise its 413-store package.

¹¹ Kroger did not submit other regional white papers until September 2023, and its white papers never covered certain overlap areas, including Arizona, Texas, and Alaska. JX-6420 ¶161 n.109.

Instead, throughout summer 2023, Kroger rejected feedback that would have raised the number of divested stores because that would jeopardize its profitability targets. Albertsons, Albertsons' counsel, and Kroger's economists warned of deficiencies in the 413-store package. Sankaran urged McMullen to expand the package and engage with Albertsons' analysis showing it was insufficient, JX-3140 at -043-044, and Albertsons' counsel proposed 181 additional stores for inclusion. JX-3170. As Sankaran will testify, however, McMullen ignored his input and became increasingly unreachable. Despite acknowledging additional divestitures were necessary, Kroger never seriously considered adding any of the stores Albertsons identified. JX-3775; Shultz Tr. 340:10-341:14; Pfaffenroth Tr. 543:11-544:2. Kroger's outside counsel told Albertsons that they had "a client issue" and "pressure to keep [the number] as low as possible." JX-7029.

A&P privately advised Kroger the 413-store package had "holes the FTC could try to exploit in litigation," JX-3383, and that A&P would want a larger package if the FTC sued, JX-3824 at -343. In July 2023, A&P asked Compass for a "litigation-defensible" package, JX-3062 at -038, and Compass identified 146 additional stores needed to address presumptively anticompetitive markets, JX-3264. A&P shared this 559-store proposal with Kroger, JX-3383, which refused to add any stores.

VI. Kroger Ran a Flawed Divestiture Buyer Selection Process With Inadequate Store Lists

Consistent with its overall approach, and despite its irrelevance to the FTC’s assessment of buyer viability, Kroger’s desire to maximize value shaped its search for a divestiture buyer. JX-0098 at 10-12. Kroger ran the selection process as an auction, which would “maximize sale proceeds” and “[o]ptimize transaction returns” by pitting “buyers against each[]other,” JX-1679 at -090; JX-2355 at -306, notwithstanding that an auction process could “[e]xtend[] time period to close” and contradicted FTC guidelines cautioning against auctions “because of the additional time involved” and because there is “no guarantee that the Commission will approve the winning bidder.” JX-1679 at -090; JX-0098 at 10. Kroger structured its auction in four phases, frustrating buyers but helping Kroger avoid “giving up too much too quickly.” JX-2457 at -509. Kroger kept Albertsons in the dark throughout the process despite Albertsons’ requests for information and offers to help, including from Sankaran to McMullen. JX-3140 at -043-044; JX-7028.

A&P told Kroger in summer 2022 the attractiveness of the initial package would affect its ability to “attract[] good divestiture buyers.” JX-0731 at -381. Kroger nonetheless marketed its deficient 238-store package in January 2023. JX-3725. The results were predictably negative, as potential buyers identified

obvious and significant weaknesses “right away.” Levin Tr. 100:6-101:3; *see also* JX-6378 at 30. Only 28 of 57 potential buyers that signed confidentiality agreements submitted indications of interest, JX-3726, meaning half lost interest once they saw what Kroger was selling. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Many remaining candidates expressed frustration with the package. *See* JX-2370 at -083; JX-2394 at -204, -211; JX-2461; JX-2570 at -577.

Kroger knew it had to offer more stores and that buyers needed time to conduct diligence and obtain financing. Yet Kroger intentionally slow-rolled an expanded store list to avoid “tipping [] off” the FTC that additional divestitures were necessary. *See* JX-2456; JX-2458. If Kroger scaled up to the “mid-case package” of approximately 450 stores, “FTC [would] know stores for mid-case,” and “[i]f we share more detail, then [we] risk FTC” requesting more stores. JX-2457 at -509; JX-2504 at -282 (Bernstein predicting the “FTC will say why aren’t you including those stores?”).

Kroger also knew its desire for the “best deal” was in “[d]irect tension” with the need to “pivot” for antitrust reasons to “a deal that is reasonable for FTC.” *Id.* Kroger’s delay slowed buyers’ ability to secure financing, JX-2395 at -233; JX-2459 at -264, and complicated diligence, as Kroger would be asking buyers to re-start diligence on a new set of stores, JX-2504; *see also* Smith Tr. 87:2-7. Kroger’s bankers observed Kroger’s delay was “slowing us down meaningfully” and “risk[ed] ... losing interested buyers.” JX-2472. Kroger did not share a larger store list with potential buyers until May 2023. JX-3725.

Kroger similarly marketed the 238-store package without indicating which non-store assets, if any, it would include. *See* JX-2167 at -777; *see also* JX-2840 at -597; JX-2392 at -937; Bhardwaj Tr. 266:15-267:15. This created a “chicken and egg” problem because buyers did not know the full scope of what Kroger would divest or what non-store assets Kroger used to operate its stores. *See* JX-2392 at -936; *see also* JX-2459 at -265 (“let buyers push” for banners rather than offering in the first instance). The lack of information confused buyers and made precise bids difficult. *See, e.g.*, JX-2323 at -506-07, -510-11.

Of the 28 parties that submitted initial interest in the 238-store package, Kroger received 10 offers on the 413-store package and narrowed to four bidders—including C&S and SpartanNash. JX-3222 at -981. Kroger’s bankers pressured

bidders to bid higher, telling them “to put [their] best foot forward here on price.” JX-3253 at -302_0002, 0004. Kroger executives recognized SpartanNash was the “no brainer” choice, JX-3234 at -948, having scored it higher than C&S on its readiness to operate stores after closing—a key attribute for antitrust approval, JX-3226 at -078—and knowing SpartanNash’s business plan was one “that could be presented to the FTC in short order,” JX-3229. But, though it was the stronger operator, SpartanNash offered less money, so Kroger sabotaged SpartanNash’s ability to obtain financing, then relied on its lack of financing to select C&S’s riskier, but more lucrative, offer. Kroger only allowed SpartanNash to engage with three financing partners and delayed NDAs with financiers until mid-July. Sarsam Tr. 144:7-145:8, 147:12-24. SpartanNash’s financing partners needed at least two months for diligence, leaving minimal time before Kroger’s self-imposed September 8, 2023, deadline to announce a buyer, selected to sync with Kroger’s quarterly earnings call. Sarsam Tr. 147:20-148:11; JX-3242 at -884. Millerchip confirmed “there was no regulatory reason for that date,” Sarsam Tr. 202:5-9, but when SpartanNash asked for additional time, Kroger refused, JX-3320; Sarsam Tr. 154:7-155:17, selecting C&S. A disappointed SpartanNash director predicted Kroger “may regret putting price above FTC credibility.” JX-3417.

VII. Kroger Presented the 413-Store Package to Regulators and Received a Predictably Negative Response

Kroger announced C&S as the divestiture buyer and presented the deficient 413-store package on September 8, 2023. JX-3527. Once again, Kroger provided no economic backup, prompting the FTC to ask whether Kroger selected the stores using diversion analysis per its May 2023 instructions. JX-3588 at -943-44. A&P conceded it had not but represented that “a diversion analysis would have led us to offering a similar set of stores.” *Id.* at -944. That was false: Kroger was already “working on” its next package, the first to add stores based on diversions, Gowrisankaran Tr. 522:14-523:3, and based on that initial analysis Kroger knew the 413-store package failed to address 184 problematic stores. JX-3448 at -005. Meanwhile, Albertsons asked Kroger to supplement the package, including with stores Albertsons identified in July 2023, as “time [was] of the essence.” JX-3536.

The FTC requested a “detailed explanation for why this particular buyer and package were chosen.” JX-3607 at -059. At an October 6, 2023, meeting, the FTC again requested information about “how the package was constructed,” raised doubts about its sufficiency, and sought detail on Kroger’s market definition. JX-3737; *see also* JX-3738. On October 26, 2023, the FTC “renew[ed]” its request for “information and advocacy,” specifically seeking an update (again) on the diversion

analysis. JX-3867 at -134. During an October 31, 2023 call, Wheatley admitted Kroger’s delays were due to “a lot of back and forth between [Kroger’s] bankers, [Millerchip], and others internally”—*i.e.*, Kroger’s extensive financial analysis. JX-7031; Dresdow Tr. 143:21-144:18 (Kroger ran “hundreds of different” deal model scenarios). Only after Sankaran wrote directly to McMullen, imploring Kroger to reply, did Kroger respond regarding its divestiture-buyer selection. JX-3867 at -133; JX-3963. But Kroger did not present any diversion analysis until weeks later, on November 16, 2023. JX-4129 at -019.

Ultimately, the FTC told Kroger the 413-store proposal left “dozens if not hundreds” of markets above the structural presumption, even “using [Kroger’s] own recommended methodologies”—just as Compass told Kroger the previous summer. JX-4079; *supra* § Bkg.V. The FTC reiterated that “[f]or reasons we have discussed on several occasions since our May 22 discussion ... we do not endorse the methodologies” that produced the 413-store package. JX-4079; *see also* JX-4137 (November 2023 email from Albertsons’ counsel stating the FTC had “repeatedly expressed for ... months” that Kroger’s “lack of any explanation as to how the list of 413 was generated” was unacceptable). Regulators also signaled the package was still inexplicably small, asking when Kroger would identify the other 237 stores to hit the 650-store cap. JX-3489; JX-3598.

While the 413-store package included certain proposed non-store assets for C&S, JX-3497 at -148, -151, there were obvious problems. The private labels Kroger agreed to divest accounted for less than 15% of Albertsons' private label sales. JX-5861 at -462. While Kroger also agreed to divest the rights to a small set of banner names (such that C&S could use those banners on the divested stores), those banner rights did not align with the existing banners on the divested stores, meaning that C&S would have to "re-banner" over 80% of the 413 stores to a new name—a costly, risky process. JX-6420 ¶205. For example, despite including 62 Ralph's stores in Southern California for divestiture (because they were lower performers, *see supra* § Bkg.I.C), Kroger refused to give C&S the Ralph's banner (because it had high customer recognition, JX-2396)—meaning that C&S would be forced to re-banner all 62 to the Albertsons banner. JX-3527 at -436; JX-5882. State AGs immediately questioned the banners Kroger selected for divestiture. JX-3738.

VIII. Kroger Presented a 510-Store Package that Failed to Address Regulator Concerns

After the FTC criticized Kroger for not following its earlier guidance to use diversion analysis, Kroger belatedly constructed a revised package based partly on diversion, which it presented to the FTC on November 16, 2023. JX-4039. That

package added 97 stores to the 413-store package, resulting in 510 stores. *Id.* at -223. Kroger knew it remained deficient.

Kroger built the 510-store package on top of the already-rejected 413-store package instead of starting fresh with diversion analysis, as the FTC had requested four months earlier. JX-3907. While keeping the 413 stores was convenient for Kroger (to avoid renegotiating its contract with C&S), it guaranteed the package would be methodologically unsound, adversely selected, and mixed-and-matched—all contrary to FTC guidance.

In implementing the diversion analysis, Kroger again used any available means to limit divestitures and maximize profitability. Kroger demanded that Compass “push[] the limits to what is defensible” to minimize added stores. JX-3853 at -351. A lower diversion-ratio threshold would trigger more divestitures and reduce antitrust risk. JX-3819 at -669; JX-3907 at -601. But Kroger instructed Compass to propose the “highest” diversion ratio threshold it could possibly defend. JX-3323. Compass advised that 25% was “on the edge” of problematic, JX-3856 at -344-346; *see also* JX-3853; JX-4288 at -233-34, whereas “switching to a 20% diversion ratio cutoff ... would still land us somewhere comfortably below 650 (including the 413)”—but A&P instructed Compass not to share that with Albertsons’ advisors.

JX-3910 at -243. Albertsons also advocated a 20% ratio. Paul Apr. 28, 2026 Tr. 301:22-303:8; *see also* JX-4137 at -245. Kroger chose 25% anyway.

Kroger also applied the same banner rules, JX-6422 ¶86, imposing significant limitations. As Compass acknowledged, “relaxing the MSA-banner rules” resulted in “a much lower number of stores with diversion ratios above the critical threshold.” JX-4068 at -686; *see also* JX-3871 (Compass noting Kroger could divest 3-5 Kroger Fry’s stores in Phoenix, instead of 52 Albertsons Safeway stores, but would not because “it violates the banner rules”). It was not until the presentation of this package that Kroger disclosed it had made thousands

of stores “ineligible” for divestiture. JX-4039 at -206. Even then, Kroger did not disclose the purpose of the banner rules was to maximize retained value.

C&S’s antitrust counsel observed the 510-store package did not reduce re-bannering, did not include sufficient non-store assets, and did not address regulators’ concerns in key geographies. JX-3966 at -076-77.¹² Similarly, Albertsons explained the package was “too little, too late” and “strongly encourag[ed]” Kroger “to offer

¹² Before and after Kroger presented the 510-store package, C&S repeatedly told Kroger that the package’s mix and match of stores in the Pacific Northwest was drawing pushback from regulators. JX-3894 at -348; JX-4603; *see also* JX-4419

something very close to the full 650-store package now.” JX-3972 at -554. Kroger refused.

Predictably, the FTC rejected the 510-store package on November 22, 2023, noting it “still incorporate[d] the old methodologies by assuming that the initial set of 413 stores would be divested.” JX-4079. The FTC told Kroger to start “from scratch.” JX-4711 at -528. The FTC questioned Kroger’s 25% diversion ratio and directed Kroger to use “a store-level ‘harm’ threshold,” like a GUPPI threshold. JX-4069.

IX. Regulators Continued to Provide Detailed Feedback, but Kroger Failed to Address It

Consistent with its pre-Merger guidance and feedback in May 2023, *supra* §§ Bkg.I.D, V, in December 2023, the FTC reiterated it wanted Kroger to base its GUPPI calculations on Hosken-Tenn diversions, JX-7037, at -511. The FTC provided further detailed feedback on the GUPPI analysis, highlighting data sources, methodology for key inputs, and concerns about the appropriate threshold. JX-7037 at -511.

On December 6, 2023, the FTC provided a list of approximately 2,200 stores with “significant local competitive interaction.” JX-4237 at -358. The FTC told the parties this list was “over inclusive,” represented the “outer bound of stores that

compete,” JX-4193, and was not a divestiture list. JX-4237 at -358. Kroger understood that, in many cases, divesting one store could eliminate multiple competitive interactions. *See* JX-4237. A&P welcomed the list as good news. *Id.* at -356. Bernstein told Wheatley that Kroger could address all competitive interactions identified by the FTC’s list and remain under the 650-store cap, noting “these figures are not far from our range of offered divestitures.” *Id.* Bernstein told colleagues “there seem[ed] to be a number under 650 that should work with the FTC if we can just discuss parameters,” but “Kroger isn’t so sure about wanting to increase the number.” JX-4254.

In December 2023, the FTC also flagged concerns about C&S’s ability to run the stores in Kroger’s 510-store proposal, including because C&S (i) would have to re-banner the vast majority of divested stores; (ii) was receiving insufficient distribution and manufacturing assets; (iii) would not receive a national private-label brand; and (iv) would not receive adequate data assets, including loyalty and e-commerce data. JX-4399 at -507-08. The FTC identified additional non-store assets that Kroger should divest to solve these concerns. JX-4466 at -231-32; JX-4419 at -066. The FTC also flagged that “mixing & matching of KR and ACI assets” would make the package “more difficult [for C&S] to integrate.” JX-4419 at -066.

State AGs echoed the FTC’s concerns. *Id.* at -066-67; *see also* JX-3870 -796-99; JX-4166; Winn Tr. 35:10-37:22.

This feedback was a gift to Kroger: the FTC was telling Kroger precisely what assets to divest to get approval. Albertsons emphasized that the “FTC and states have outlined a path to an approvable settlement” but that “time [was] of the essence”—Kroger needed to propose a revised package by early January. JX-4448 at -136. Yet Kroger never took this feedback seriously; Bernstein dismissed it as the FTC’s “Christmas list.” JX-4423.

X. Senior Kroger Executives Concealed Information in Their Investigational Hearings

In December 2023, the FTC deposed Kroger’s leaders—including the CEO, CFO, and others—in investigational hearings to understand how Kroger had constructed its plainly insupportable divestiture packages. Each witness misrepresented their involvement in banner and store selection and falsely suggested financial considerations were not a factor.¹³

¹³ Similarly, much of Kroger’s conduct during the regulatory-review process was concealed from Albertsons in this litigation through Kroger’s specious invocation of privilege. Ultimately, after six months of discovery battles, Kroger was forced to de-designate many thousands of documents it improperly withheld. Dkt. 281.

McMullen testified that he did not “weigh in on the inclusion of any assets involved in the divestiture proposal.” JX-4004 at 240:10-241:21. In fact, McMullen insisted Kroger retain QFC #807, even though Kroger was otherwise proposing to divest QFC stores in the Pacific Northwest. JX-1065; JX-3527 at -436 (excluding QFC #807); JX-5579 at -479 (same). And, contrary to his testimony that he did not want to be informed about specific divested assets, lest he “influence the conversation,” JX-4004 at 240:22-241:5, McMullen cast the decisive vote to divest Kroger stores in Southern California and retain higher-performing Albertsons’ stores, JX-1002. Bernstein admitted McMullen did “provide[] general views” about what stores should be divested and “specific views on some stores.” Bernstein Tr. 508:9-19.

Millerchip falsely testified Kroger did not cherry-pick stores or banners based on profitability and claimed Kroger’s management relied on A&P to pick stores. JX-4191 at 38:3-42:18. Millerchip later admitted his testimony “omi[tted]” that management’s preferences—based on value and profitability—determined divestitures. Millerchip Tr. 524:2-12; *see also id.* at 328:19-329:14, 329:8-11, 547:19-548:8, 557:3-558:16. In addition, despite C&S’s repeated communications to Kroger regarding its concerns with the 510-store package, Millerchip falsely

testified C&S had not “[n]ot specifically” “provided any feedback to Kroger” on the 97 additional stores. JX-4191 at 118:21-119:14.

And Adcock falsely told regulators she played no role in analyzing or determining the assets in divestiture packages. JX-3890 at 165:22-167:2; JX-7004 at 64:10-13. In fact, she instructed A&P to remove specific Southern California stores from the package due to their profitability, JX-1017, and later admitted she participated in conversations establishing the banner rules, Adcock Tr. 45:22-46:3.

XI. Kroger Squandered Its Last Chance to Avoid FTC Litigation

A. Kroger Failed to Provide Information that Would Facilitate Settlement Based on Diversion Analysis

As the FTC provided Kroger with feedback about the 510-store package, Kroger withheld information that the FTC requested for its diversion and GUPPI analyses. For instance, Kroger failed to provide information on profit margins, a key GUPPI input. *See* JX-4557; JX-6383 ¶162. The FTC believed profit-margin data should account for variable costs, but needed Kroger to explain which specific costs were variable and why. JX-4015; JX-4371; JX-4557. Had Kroger provided that information, regulators likely would have calculated lower GUPPIs, identifying fewer stores as concerning. JX-6383 ¶173.

Kroger also failed to answer FTC questions about merger-specific efficiencies, about which the FTC had asked since December 2022. JX-1881. The

FTC explained it was considering GUPPI thresholds of 1-5% to identify competitive concerns and that higher substantiated efficiencies could permit higher GUPPIs. JX-4424 at -918; JX-6009 at -814; JX-6383 ¶¶57. Despite internally validating over \$3 billion in efficiencies, Maharoo Tr. 708:16-709:20; Dresdow Tr. 334:2-336:16, Kroger never produced sufficient detail to verify them, as its litigation expert later admitted, JX-6383 ¶¶58, 183.

Kroger also could have given regulators greater assurance regarding efficiencies by agreeing to make binding its public commitment to invest \$1 billion of those savings annually in lowering prices. It did not. JX-5126 at -659 (FTC Commissioner Slaughter noting “no enforceability” of price commitment); JX-6383 ¶191.¹⁴

B. Kroger Submitted a Deficient 541-Store Package

By January 12, 2024, the FTC had provided extensive feedback on the 510-store package, had thoroughly investigated the Merger, and was almost out of time

¹⁴ Albertsons continued expressing significant concerns about these issues: As Albertsons notes, by mid-December 2023, “Kroger ha[d] yet to explain adequately the methodology for selecting the 413 (or now 510) store package,” despite its obligation to propose a package “based on a sound methodology.” JX-4358.

to decide on settlement.¹⁵ The FTC told Kroger to submit any further divestiture proposal within a week. JX-4587 at -475. Concerned that this was the final settlement opportunity and that Kroger would again refuse to construct the best possible package, Albertsons asked Kroger to meaningfully involve Albertsons. JX-4682. Instead, on January 18, 2024, Kroger unilaterally submitted a revised (but still deficient) 541-store proposal. JX-5022.

While Kroger told the FTC it “start[ed] from scratch” in building the 541-store package, JX-5022; *see also* JX-5102, that was false. Kroger continued to apply its banner rules, Weiskopf Tr. 262:15-263:17, rendering thousands of stores “ineligible” for divestiture for business, not antitrust, reasons. *See* JX-4821. Albertsons told Kroger that adjusting the banner rules even slightly would allow a lower-GUPPI package under 650 stores, but Compass said that recommendation was “not worth [their] time” because “[Kroger] will not go for this so this is a non-starter.” JX-4631.

¹⁵ The FTC was under time pressure because Kroger delayed submitting diversion analysis until the parties’ timing agreement with the FTC was near expiring. *See* JX-3389 at -151; JX-4308 at -413. As Albertsons’ counsel will testify, the FTC needed an enforcement recommendation by February 2024.

To maximize its internal rate of return, Kroger continued to ignore regulator feedback, telling A&P it “[n]eed[ed] to have # of stores as low as possible” and that 541 stores was “pushing it.” JX-4589. Kroger instructed Compass to apply a 550-store cap, around which Compass reverse-engineered its GUPPI analysis to produce the 541-store list. *See* JX-4569 (Compass email discussing how to “keep [the package] comfortably within the 550 at 3.5% [GUPPI] target counsel set”); *see also* JX-5082 (A&P acknowledging 602-store package was “non-starter” for Kroger); JX-4558. Kroger similarly ignored A&P’s advice to strengthen the package by adding stores based on a structural analysis. JX-4288.

Kroger also refused to construct a package using a 3% GUPPI threshold—which Compass estimated the FTC was using, JX-4403—because doing so would mean divesting more stores. Weiskopf Tr. 281:7-282:9; *see also* JX-4713 (Wheatley stating lowering GUPPI to 3% would cause McMullen to “lose his squash”). Instead, Kroger falsely claimed it could not construct a package under 650 stores that would satisfy a GUPPI threshold below 3.5%, JX-4526 at -313, even when Albertsons showed Kroger multiple 3% GUPPI packages under 650 stores, *e.g.*, JX-4563 at -833-834, and Compass told A&P such packages were possible, JX-4733. Compass confirmed in internal emails that “it is critical that we keep the 3% [GUPPI package] ABOVE 650,” noting that “the politics here are confusing.” JX-4634.

Kroger’s 541-store package also included insufficient non-store assets. On January 16, 2024, C&S gave Kroger a detailed “Path Forward” memo explaining which non-store assets it needed to address regulators’ concerns, including feedback it had received from state AGs. JX-4627 at -338. Kroger ignored that roadmap and the detailed feedback it received from regulators in December 2023, *supra* § Bkg.IX, adding just one distribution center in Arizona and a Colorado-specific Safeway banner license. JX-5022 at -957; JX-6420 ¶246. Kroger did not add distribution capacity in Alaska, California, Illinois, or Idaho; manufacturing assets; private label brands; data assets; or additional banners in Arizona, the Pacific Northwest, Washington, or California. *Id.*

C. Kroger Failed to Accept a Final Olive Branch from the FTC

The FTC quickly rejected Kroger’s 541-store proposal and indicated that further staff-level discussions would not be productive. On January 31, 2024, the FTC told Kroger it “remain[ed] unconvinced that the package conveys sufficient assets to position [C&S] for success.” JX-4874.

The FTC invited Kroger and Albertsons to meet with agency leadership, including the three sitting commissioners, for “last rites” meetings, JX-4874, widely understood as the final opportunity to avoid litigation, JX-6420 ¶249. The commissioners criticized Kroger for failing to address competitive concerns in

various markets, for submitting packages containing a “mix of KR and ACI” assets, and for not giving C&S adequate support, scale, and non-store assets to compete. JX-5126; JX-5052; JX-5075; JX-5079. But Commissioner Rebecca Kelly Slaughter expressed that she always preferred settlement over litigation, JX-5126, and Bernstein believed settlement remained possible. Bernstein Tr. 904:19-905:9, 1026:19-1027:5. Despite Albertsons’ entreaties, Kroger did not revise its divestiture proposal to seize this opportunity. JX-5063; JX-5103 (Wheatley stating she “[d]oesn’t care what ACI says”). The FTC sued to block the merger on February 26, 2024. JX-5130.

XII. Kroger’s Paltry Engagement with State AGs Caused Colorado and Washington to Sue to Block the Merger

Given the localized competitive issues raised by this Merger, Kroger knew it had to engage state regulators directly. JX-3157. Doing so would help Kroger address state-specific issues, like concerns of local labor groups, enhancing settlement prospects with both state AGs and the FTC and reducing litigation risk. *See* JX-7032. But Kroger did almost nothing to plan for that engagement before signing. The results were unsurprisingly negative: As Kroger’s state attorney general engagement expert admitted, “Kroger/Albertson[s] is a perfect example of you ignore the states at your peril.” JX-5986.

During pre-Merger planning, Kroger’s “Government Relations Outreach Plan” barely mentioned engaging state AGs and did not identify customized messaging or outreach goals. JX-1357 at -777. Kelli McGannon, the non-lawyer employee overseeing state AG outreach, had no prior merger-related experience, no national-level strategy coordination experience, JX-6380 at 21; McGannon Tr. 101:10-12, and did not learn of the Merger until the morning it was announced, *id.* at 77:18-78:5.

The day the Merger was announced, Colorado AG Phil Weiser—widely recognized as a leader on antitrust issues among state AGs—announced his office would “closely monitor and review” the Merger. JX-1365. Consultants advised Kroger that the Washington and California AGs would likely “follow suit.” JX-6380 at 24. But Kroger did not conduct any outreach to state AGs through at least January 2023, when McGannon attended a meeting with the Colorado AG and thirty of his staff. *Id.* at 23-27. McGannon was unprepared to answer “antitrust or legal questions,” instead telling Weiser and his staff to “direct those to our legal counsel,” who were not present. McGannon Tr. 223:2-4; 250:7-14.

Kroger waited until January 2023 to engage Orrick, Herrington, & Sutcliffe (“Orrick”) to advise on “AG Outreach.” JX-2040. From the outset, Orrick advised Kroger that state AGs would have a “major role” in the Merger, that “engaging with

them directly is crucial,” and that, while state AGs may choose to join federal regulators in merger investigations, “they just as routinely conduct their own investigations and bring their own lawsuits to challenge mergers.” JX-2123 at -141.

Kroger instructed Orrick and McGannon not to engage in substantive discussions with state AGs for seven months after the Merger was announced, Cook Tr. 115:3-118:14—a strategy Orrick’s Andy Cook told Kroger was “inane,” JX-3134. Until May 2023, Kroger’s only interactions with state AGs’ offices outside of the coordinated FTC-state process were “more informal” conversations at conferences. JX-6380 at 26-29. Kroger’s neglect of state AGs prompted Colorado’s AG to ask Orrick repeatedly why Kroger was not “engaging with him and having more dialogue during the merger process,” JX-3157. Orrick could not schedule meetings even when requested by the state AGs. Cook Tr. 119:8-25; JX-3988 (reflecting, as of November 2023, Kroger’s affirmative strategy not to meet with state AGs). Kroger senior management also spurned the state AGs—Wheatley never directly engaged and McMullen had just one meeting with the Colorado AG in September 2023. McGannon Dep. 440:1-15.

On the handful of occasions when McGannon and Orrick met directly with state AGs, Kroger forbade them from discussing any substantive details of the regulatory process—including markets where divestitures might be required, the

stores and non-store assets Kroger would divest, or behavioral remedies. Cook Tr. 117:4-22. And when state AGs raised specific concerns about the Merger, Kroger failed to respond. In May 2023, McGannon and Orrick met with Arizona’s AG, who asked whether Kroger would make a binding commitment to keep stores in Arizona open for a period after closing. JX-2761 at -573. Kroger never followed up, prompting the Arizona AG to state publicly in September 2023 that she had asked that question “a few months back” and “didn’t get an answer.” JX-3631. In an August 2023 meeting, Nevada’s AG referenced the state-specific settlement he had reached in T-Mobile/Sprint (where the parties made a binding commitment to preserve Nevada jobs and offer free and low-price internet options in the state, JX-7003) and said he would consider a similar path here. JX-3384. Kroger never followed up, nor offered any binding behavioral remedies to a single state. Colorado’s AG repeatedly emphasized that C&S would not receive ownership of strong private label brands and told Kroger the number of Colorado stores was insufficient. JX-4817 at -452, -452_001; JX-4399; JX-4419. The Arizona AG’s office expressed doubts that re-bannering divested stores from Safeway to Albertsons would work because Safeway was the “dominant banner” in Arizona. JX-4261 at -041. Kroger never addressed these issues.

Ultimately, on January 15, 2024, Washington sued to block the merger. JX-4597. On February 14, 2024, Colorado followed. JX-4987. Eight states (including Arizona and Nevada) and the District of Columbia joined the FTC's suit on February 26, 2024. JX-5130. The day after Colorado filed suit, AG Weiser noted that "parties/lawyers who think they don't need to talk to state AGs do so at their own peril. Failing to do so will likely lead to an enforcement action." JX-5008. AG Weiser then privately told Kroger's counsel that comment was for "Kroger's benefit." *Id.*

XIII. Kroger Presented an Inadequate Final Package of 579 Stores

Even after being sued thrice-over, Kroger failed to do all it could to facilitate settlement or enhance the Merger's defensibility in litigation. After the FTC sued, Kroger offered C&S a modestly larger package of 564 stores. JX-5185. But that package suffered from the same flaws, including using a 3.5% (not 3%) GUPPI threshold and a "structural" component based on *ad hoc* A&P analysis, with little input from Kroger's economists. JX-5295.

C&S and Albertsons tried to convince Kroger to improve the 564-store list. C&S shared a 650-store term sheet, which Albertsons converted into a specific store list. JX-5394 at -653; JX-5284. C&S's term sheet proposed permanent divestiture of Signature and O Organics private label brands, licenses to additional banners that

would reduce re-bannering, supplemental distribution facilities, and additional IT assets. JX-5394 at -654-55. Despite being told by Kroger to “poke holes” in the proposal, JX-5283, Compass concluded the 650-store package was superior to Kroger’s proposals. JX-5284. Kroger, however, had already decided divesting 650 stores was “off the table.” JX-5560.

Kroger rejected C&S’s 650-store proposal for financial reasons. JX-5237. If C&S declined to either accept the flawed 564-store package or pay an additional \$4 billion for its proposed 650-store package, Kroger told C&S the “only” other option would be for Kroger to deliver a put notice, requiring C&S to accept a 613-store package built on the already-rejected 413 stores. *Id.* Kroger claimed its fiduciary obligations to stockholders meant it could not give C&S additional assets without additional consideration, Maharoof Tr. 223:10-224:16, 614:22-615:5, even though Kroger knew the Merger Agreement contained nothing limiting Kroger’s obligations based on financial or fiduciary considerations. *Supra* § Bkg.III.

In truth, Kroger’s deal returns were already under strain. While Kroger had initially expected to divest \$1.0 billion of four-wall EBITDA with an illustrative 500-store package, the 541-store package alone comprised \$1.5 billion of four-wall EBITDA, equivalent to the “downside” case Kroger modeled at announcement. *See* JX-5680 at -229. Merger returns faced other challenges: Albertsons’ and Kroger’s

performance had declined, merger costs had increased, and Kroger discovered a \$400-500 million tax liability in January 2024—an additional headwind that further constrained the company and decreased IRR by a full percentage point. JX-4180 at -997, -001, -007; JX-5597 at -140; JX-7001; JX-7002; JX-4542; JX-7027. Critically, Kroger’s projected returns risked dipping below its 8.0% “hurdle rate.” *Supra* § Bkg.I.C. During this negative spiral, just three weeks after Kroger discovered its \$500 million deal error, Kroger’s CFO Millerchip abruptly announced he was leaving the company. Millerchip Tr. 614:13-616:17. McMullen alerted A&P that it would need to “address with the Board why we were so wrong on [the] initial analysis.” JX-4624. To preserve deal economics and realize the upside of Kroger’s incentive plan, Kroger would need to do everything it could to limit divestitures. *Supra* § Bkg.I.F.

Ultimately, in April 2024, Kroger added 15 stores, including 13 from its low-performing QFC banner, producing a list of 579 stores with minimal improvements to non-store assets. This package resulted in an internal rate of return just above 8.0%, keeping Kroger’s financial returns barely viable, JX-5680 at -229-230, but the divestitures remained deficient. Among other issues, Kroger applied its old banner rules with just one significant modification, JX-5293 at -687, mixed and matched assets in numerous MSAs, JX-6124 ¶228, and kept the store count 71 stores below

the contractual cap, losing the chance to use those stores to reduce GUPPIs, address structural presumptions, or provide C&S with additional scale. Addressing any of these issues would have made closing more likely, but Kroger refused.

The non-store assets in the 579-store package also did not address regulators' concerns.¹⁶ Despite concluding that C&S's request for ownership of the Signature and O Organic private labels was "similar to" what the FTC and state AGs requested, Kroger declined because C&S "was aware of [the] private label situation when [it] signed the agreement." JX-4817 at -452_0002. C&S requested the Safeway banner in the Pacific Northwest and Arizona, the Haggen banner in Washington, and the Ralphs banner in California to reduce the burden of re-bannering—another regulator concern. *Id.* Kroger agreed to divest Haggen, but only divested Safeway in Arizona and Colorado and refused to divest Ralphs. JX-5554 at -653; JX-5562. The final package still required C&S to re-banner almost half the stores. JX-6420 ¶281. C&S

¹⁶ The 579-store package included the same private labels, manufacturing assets, banners, and IT and data assets as the 413-store package, plus: (1) a 24-month license to sell Albertsons' Signature and O Organics products with an option to extend the license 24 additional months at cost; (2) a manufacturing plant in Colorado; (3) the Haggen banner and a license to use the Safeway banner in Arizona and Colorado; and (4) additional IT and data assets. JX-5554. The package also included two distribution centers in Arizona, two in Colorado, one in Utah, and one in Washington. Distribution centers in Arizona and California from the 413-store package were removed. *Id.*

and regulators expressed concern about C&S's distribution capacity in Alaska, California, and Illinois, JX-4817, but Kroger refused to divest an Alaskan or Midwestern distribution center, and removed the Compton, California distribution center. JX-5554.

XIV. Kroger Refused to Improve Its Divestiture Package, Despite Regulators and Its Own Expert Identifying Weaknesses, and Despite Albertsons Offering Over \$800 Million for Kroger to Divest More Assets

The 579-store package was quickly shown to be indefensible in litigation. Kroger's own expert conceded deficiencies, including that 26 stores had a GUPPI over the 3.5% threshold Kroger purported to use. JX-5728 at -453. Albertsons asked Kroger to divest additional stores to fix the problem, *id.*, but Kroger refused. Similarly, the state AGs' expert found Kroger's package failed to address all presumptively anticompetitive markets in Colorado and Washington. The issues were eminently fixable: the expert identified between 12-21 presumptively anticompetitive markets in Washington, along with only 1-2 such markets in Colorado. JX-5790 ¶199; JX-5823 ¶407. Kroger could have added stores to solve these issues and remained well under the 650-store cap—which Albertsons urged Kroger to do. Kroger again refused.

Remarkably, in September 2024, mid-trial, Albertsons' then-CEO and co-chairman called McMullen and offered to lower the Merger consideration by \$1-2

per share so Kroger could enhance its divestiture package. JX-5898; McMullen Tr. 450:7-14. Kroger's senior management never presented the offer to Kroger's full Board or substantively responded to Albertsons. McMullen Tr. 456:11-14.

XV. The Merger Was Enjoined

On December 10, 2024, the federal court in Oregon granted the FTC's and states' motion for a preliminary injunction. JX-6119 at 1. The same day, the Washington Superior Court issued a permanent injunction. JX-6124 ¶425. Both courts reiterated problems with the 579-store package that regulators, C&S, and Albertsons had identified and Kroger had refused to address. Each found the package of stores insufficient and that C&S was receiving a mix of stores, not a standalone business. JX-6119 at 46-48; JX-6124 ¶¶403-04. The Washington decision noted Kroger was divesting "a number of Kroger's poorer performing stores," while retaining the most profitable stores for itself. JX-6124 ¶¶238, 406.

Both courts also determined that the 579-store package included insufficient non-store assets. They criticized the strength of the banners and the need for significant re-bannering, JX-6119 at 48-50; JX-6124 ¶¶234-253; Kroger's decision to retain stronger private-label brands like Signature and O Organics, JX-6119 at 48-49; JX-6124 ¶¶254-273; and deficiencies in divested customer data and data-analytics capabilities, JX-6119 at 50; JX-6124 ¶¶274-285. The Oregon court also

noted “C&S would need to supplement its distribution centers to effectively meet the needs of divested stores,” including building warehouses in Alaska, Southern California, and Illinois. JX-6119 at 50. Regulators previously highlighted all these concerns. *See supra* §§ Bkg.VII-IX. Both courts further highlighted the unenforceability of Kroger’s promises to lower prices, JX-6119 at 44; JX-6124 ¶¶323, echoing concerns raised by regulators. *See* JX-5126 at -659.

This outcome was not inevitable. Albertsons and C&S made specific, contemporaneous proposals to Kroger to improve its packages and, in some cases, provided Kroger with complete packages that better addressed regulators’ concerns. *See supra* § Bkg.XIII, XI.B; JX-6420 § VIII. As Dr. Wu will testify, there were numerous additional viable paths to settlement if Kroger had engaged more deeply with the FTC’s feedback and shifted its focus away from maximizing retained value. JX-6383 § V. Had Kroger timely provided the FTC with backup, responded to requests, and implemented feedback, the FTC would have been better able to work with the parties toward settlement. JX-6421 § II.

XVI. Albertsons Terminated the Merger Agreement, But Kroger Refused to Pay the Termination Fee

Albertsons terminated the Merger Agreement on December 10, 2024. JX-6136. Kroger was obligated to pay the Termination Fee within two business days.

JX-1224 § 8.4(c). Instead, on December 11, 2024, Kroger claimed Albertsons' termination notice was ineffective, refused to pay the Termination Fee, and falsely asserted that Albertsons had breached its obligations under the Merger Agreement. JX-6156. Kroger has not paid the Termination Fee.

ARGUMENT

Kroger agreed to exacting efforts obligations to obtain regulatory approval, *infra* § Arg.A, which it knowingly disregarded to maximize expected returns, willfully breaching the Merger Agreement, *infra* § Arg.I.B. Under this Court's burden-shifting framework, Albertsons will show Kroger's breaches substantially reduced the likelihood of closing, *infra* § Arg.I.C.1, shifting to Kroger the burden of proving the Merger could not have closed under any circumstances—which Kroger cannot prove, *infra* § Arg.I.C.2. Finally, Kroger's willful breaches entitle Albertsons to the lost premium its stockholders would have received. *Infra* § Arg.I.D.

I. Kroger Is Liable for Willfully Breaching the Merger Agreement

Breach of contract requires “(1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) resulting damage to the plaintiff.” *Fortis Advisors LLC v. Johnson & Johnson*, 2024 WL 4048060, at *21 (Del. Ch. Sept. 4, 2024).

A. Kroger's Stringent Efforts Obligations

Delaware courts “interpret clear and unambiguous terms according to their ordinary meaning.” *Cox Comm'cns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022). Here, Albertsons insisted Kroger agree to stringent obligations to close the deal. *Supra* § Bkg.I.B.

1. Section 6.3(e) Required Kroger to Take “Any and All Actions” to Close the Deal as of November 2022

Once triggered by a Proceeding or threatened Proceeding, Section 6.3(e) required Kroger to “take any and all actions ... to eliminate each and every impediment under any Antitrust Law to close the Transactions,” subject only to the 650-store cap. JX-1224 § 6.3(d)-(e). Section 6.3's obligation to “take any and all actions” is a “hell-or-high-water” provision, JX-6379 ¶59, the “most extreme” efforts provision and “the strongest possible commitment a party can make in a merger agreement.” *Desktop Metal, Inc. v. Nano Dimension, Ltd.*, 2025 WL 904521, at *24 (Del. Ch. Mar. 24, 2025) (cleaned up); *see also In re Anthem-Cigna*, 2020 WL 5106556, at *93 (Del. Ch. Aug. 31, 2020) (“The obligation to take any and all actions does not admit exclusions.”) (cleaned up).¹⁷

¹⁷ Kroger's argument that 6.3(e) concerns only litigation, JX-6419 ¶40, ignores that it (1) is triggered by any actual or threatened “Proceeding,” defined to include an “investigation”; and (2) includes an express obligation in 6.3(e)(ii) requiring Kroger to “eliminate each and

a. Section 6.3(e) was Triggered as Early as November 2022

Section 6.3(e) was triggered as of November 7, 2022,¹⁸ when the FTC sent its Voluntary Access Letter announcing (1) an “investigation,” (2) being “conduct[ed],” (3) concerning the Antitrust Laws, (4) by a “Governmental Entity.” JX-1685; JX-1224 at 10, § 4.5(b). Alternatively, Section 6.3(e) was triggered no later than December 5, 2022, when the FTC issued a Second Request to Kroger “with respect to the proposed acquisition of Albertsons ... to investigate a possible violation” of federal antitrust law. JX-1920 at -428. Multiple Kroger witnesses understood the Second Request as an “investigation.” Bernstein Tr. 33:21-34:2, 613:2-9; Pfaffenroth 36:19-22; Aiello Tr. 341:11-19. Kroger’s experts admit the same. JX-6384 ¶24; JX-6423 ¶26. Kroger also knew the Second Request signaled an increased risk of litigation. Bernstein Tr. 613:2-21; Pfaffenroth Tr. 38:4-39:6; McMullen Tr. 61:4-7.

every impediment under Antitrust Law,” which applies beyond litigation and would duplicate 6.3(e)(i) if limited to litigation.

¹⁸ Kroger’s expert, Steven Solomon, asserts that the FTC’s investigation could not have triggered 6.3(e) because it did not “challenge” the Merger under antitrust law. Solomon Tr. 145:17-146:14. But Solomon was unable to explain what type of investigation would trigger 6.3(e) under his definition of “challenge,” *id.* at 151:5-153:22, and his definition thus reads “investigation” out of the definition of “Proceeding.”

2. Section 6.3(d) Required Kroger to Make “Best Efforts ... to Take Any and All Actions” To Close the Deal as Promptly as Practicable, Including by Making Divestitures and Agreeing to Behavioral Remedies

Kroger was always required to use “best efforts, to take, or to cause to be taken, any and all actions necessary to avoid, eliminate, and resolve any and all impediments under Antitrust Law with respect to the Transactions, in each case, so as to enable the Closing to occur as promptly as practicable,” including by (1) committing to a “divestiture” of the parties’ assets, (2) entering into “other arrangements” to avoid injunctions, (3) modifying “any course of conduct” regarding the merged company’s “future operations,” and (4) committing to future behavioral restraints. JX-1224 § 6.3(d); *see also* Aiello Tr. 46:23-47:25, 48:7-49:3 (admitting that Section 6.3(d)’s non-exhaustive list was “meant to cover just about everything subject to the provisos”). Section 6.3(d)’s “best efforts ... to take any and all actions” obligation required Kroger to “take extreme measures” if necessary. *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 276 n.45 (Del. 2017) (Strine, C.J., dissenting); *see also* *Twin Willows, LLC v. Pritzkur*, 2022 WL 3039775, at *9 n.126 (Del. Ch. Aug. 2, 2022) (“[T]he best efforts standard requires a party to do essentially everything in its power to fulfill its obligation.”) (citation modified). Kroger’s obligations were qualified only by the 650-store cap. *See id.*

Kroger argues that “best efforts” provisions contain an implied reasonableness limiter. *E.g.* Dkt. 324. But the only Delaware case that applies a reasonableness limiter to a best-efforts provision, *HControl Holdings LLC v. Antin Infrastructure Partners S.A.S.*, 2023 WL 3698535 (Del. Ch. May 29, 2023), did not address the impact of a provision, like the one here, that lists specific required actions and defines specific limits. Section 6.3(d) enumerates actions “includ[ed]” in “best efforts ... to take any and all actions”—including divestitures and behavioral commitments—and states precisely what that obligation does not include (divesting over 650 stores). JX-1224 § 6.3(d); *see also In re Anthem-Cigna*, 2020 WL 5106556, at *93 (parties modified “reasonable best efforts” obligation by specifying that it included obligation to “tak[e] any and all actions” to avoid antitrust impediments). The contract thus answers the question of what efforts are and are not required. Reading in an implied “reasonableness” limiter would contradict the express terms, allowing Kroger to argue that it complied even if it divested less than 650 stores because it unilaterally determined a smaller divestiture was “reasonable.” That was plainly not the parties’ intent. *Supra* § Bkg.III.

Unlike the efforts standards in Sections 6.3(a) and 6.3(b), Section 6.3(d)’s “best efforts” standard contains no “reasonableness” language, as Kroger’s lead deal counsel admitted. *See Aiello Tr.* 66:5-24, 76:11-24, 425:23-426:2. The parties

intentionally omitted any reasonableness qualifier from Section 6.3(d), giving “best efforts” a distinct and more demanding meaning. *Cf. AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC*, 268 A.3d 198, 212-13 (Del. 2021) (finding a covenant “absolute” because “[t]he parties included commercially reasonable efforts qualifiers elsewhere in the contract, even in the same sentence—making the absence in the relevant part of the covenant all the more conspicuous”).

3. Section 6.3(a) Required Kroger to Make “Reasonable Best Efforts” to Close the Merger as Promptly as Reasonably Practicable

Section 6.3(a) required each party to use “reasonable best efforts” to “take or cause to be taken all actions, and do or cause to be done all things, necessary, proper or advisable” to close the transaction “as promptly as reasonably practicable,” including “taking actions necessary to avoid, eliminate, and resolve any and all impediments under any Antitrust Law.” JX-1224 § 6.3(a). A “reasonable best efforts” standard imposes an obligation “to take all reasonable steps to solve problems and consummate the transaction.” *Williams*, 159 A.3d at 272.

B. Kroger Willfully Breached Section 6.3

Kroger is liable for Albertsons’ damages if Albertsons proves a “Willful Breach,” JX-1224 § 8.3, meaning “a material breach of th[e] Agreement that is the consequence of an act or omission by the breaching party with the actual knowledge

that the taking of such act (or, in the case of an omission, failure to take such act) would cause or constitute such material breach, regardless of whether breaching was the object of the act or failure to act.” *Id.* § 1.1. A material breach “go[es] to the root or essence of the agreement between the parties, or ... touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.” *Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, 2016 WL 4401038, at *24 (Del. Ch. Aug. 18, 2016) (citation modified).

“Actual knowledge” is “clear and direct knowledge.” *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 342 A.3d 324, 356 (Del. 2025). For example, in *XRI Inv. Holdings LLC v. Holifield*, the defendant had actual knowledge his conduct breached an agreement when (1) he knew the agreement prohibited the transfer of interests for consideration and (2) he knew he was transferring his interests for consideration. 2024 WL 3517630, at *23, *26 (Del. Ch. July 24, 2024). Circumstantial evidence can “establish the defendant’s knowledge of the underlying breach.” *In re Columbia Pipeline Grp.*, 342 A.3d at 356-57.

“Knowledge of an officer or director of a corporation will be imputed to the corporation.” *Teachers’ Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 n.23 (Del. Ch. 2006). Similarly, knowledge of an advisor—including outside counsel—“is generally imputed to his principal.” *See MetCap Secs. LLC v. Pearl Senior Care*,

Inc., 2007 WL 1498989, at *10 (Del. Ch. May 16, 2007). Albertsons thus need only prove that Kroger’s officers, directors, or advisors (1) knew the Merger Agreement required Kroger to do what was necessary, including divesting up to 650 stores; (2) knew Kroger was not doing everything it could to close; and (3) knew its breaches were material.

Kroger knew it had to do everything it could, short of divesting 651 stores, to close the Merger as promptly as practicable.¹⁹ *Supra* § Bkg.III. It knew that promise was a key commitment that induced Albertsons to agree to the Merger. *Supra* § Bkg.I.B. Indeed, Kroger’s knowledge that Section 6.3 was a critical provision, without which Albertsons would not have agreed to merge, is sufficient to establish Kroger’s knowledge that its breaches of Section 6.3 were material. *Medicalgorithmics*, 2016 WL 4401038, at *24 (finding breach was material because plaintiff agreed to the contract in part because of the relevant provision and breach of that provision “exposed [the plaintiff] to the[] very risks” it was intended to protect against). Albertsons will also establish at trial that Kroger knew that each of

¹⁹ In any event, knowledge of contractual obligations is charged to Kroger. *XRI Inv. Holdings LLC*, 2024 WL 3517630, at *23.

its breaches created additional antitrust risk, further proving its knowledge of materiality.

Kroger also knew, and disregarded, what regulators expected in a divestiture package. *Supra* § Bkg.I.A. Instead of trying to give regulators an acceptable package as promptly as practicable, Kroger made successive lowball offers it knew risked rejection. And no matter what regulators demanded, Kroger was *never* willing to divest near 650 stores, abandon its banner rules, or heed regulators’ requests to equip C&S with valuable non-store assets. By deliberately rolling the dice on a “just enough” strategy rather than taking “any and all actions” to secure regulatory approval “as promptly as practicable,” Kroger chose to own the risk of deal failure.

Now that the risk has materialized, Kroger cannot feign ignorance about how it should have performed. From the outset, Kroger’s advisors told it what the FTC would expect based on longstanding guidance and warned that deviating from those practices would cause delay and jeopardize approval. *Supra* § Bkg.I.A. The FTC then told Kroger precisely what economic analyses to run and how to improve its divestiture packages—down to specific MSAs and non-store assets. *Supra* §§

Bkg.IV, VII. There was no mystery about what taking “any and all actions” required—Kroger was simply unwilling to take those actions.²⁰

1. Kroger Willfully Breached by Submitting and Re-Submitting the 238-Store Package Without Its Methodology

Kroger knew approval required a strong divestiture package. *Supra* § Bkg.I.A. Kroger knew it had to support its proposal with economic analyses. *Id.* And it knew that, to maximize its chances, it should divest as much as it could from one party or the other, avoiding mixing-and-matching, and not offload poor-performing stores. *Id.* Yet Kroger’s opening proposal violated all this guidance.

The 238-store proposal had three obvious defects, each caused by Kroger prioritizing its potential financial returns. *First*, it used banner rules, rendering well over half the parties’ stores in overlap areas ineligible for divestiture, not for antitrust reasons, but to ensure Kroger always kept the most valuable stores and divested the

²⁰ Tellingly, while Kroger has shielded its counsel’s advice regarding compliance with the Merger Agreement, Dkt. 286, the record shows that counsel never advised Kroger it had met its obligations. Aiello Tr. 239:20-240:8 (A&P was responsible for ensuring Kroger was “operating under the standard of the merger agreement”); Bernstein Tr. 99:13-100:1 (admitting “nobody at Arnold & Porter provided advice on whether or not Kroger’s actions in connection with this merger complied with their obligations under the merger agreement”).

worst.²¹ *Supra* § Bkg.I.D. Kroger never instructed A&P to modify or remove the banner rules, Wheatley Tr. 1058:13-1059:13, even if they created antitrust problems. *Second*, it was based on A&P’s *ad hoc* preliminary analysis, whittled down to “appease” Kroger’s executives, JX-0802 at -945, resulting in a package with no articulable, principled basis. *Supra* § Bkg.I.D. The absence of detailed backup foreseeably limited the engagement and feedback the FTC could provide in the critical early months. JX-6420 ¶161; JX-6421 ¶¶23-24. *Third*, it was tainted by Kroger executives removing specific stores, despite A&P warning against “cherry-picking.” *Supra* § Bkg.I.D.

Kroger’s submission and re-submission of the 238-store package were willful breaches because Kroger knew the package did not represent its “best efforts to take ... any and all actions” to achieve antitrust approval as “promptly as practicable” and did not satisfy its obligation to take “any and all actions” to obtain approval. *Supra* § Bkg.III. Kroger also knew that its actions would delay or impede approval, because they violated FTC guidance. *Supra* § Bkg.III. Further, Kroger’s failure to

²¹ Kroger claims the banner rules were developed to minimize mix-and-match, but the record shows they were created to protect Kroger’s financial interests and created mix-and-match issues. Kroger could have created more coherent packages without imposing ex ante constraints limiting divestitures. JX-6383 ¶193.

provide backup for the package or answer the FTC’s questions about its construction was another independent willful breach because it predictably delayed the regulatory process. *See* JX-6420 ¶¶176-179. Finally, Kroger separately willfully breached the Merger Agreement by failing to consider Albertsons’ feedback in good faith. *See supra* § Bkg. I.D.

2. Kroger Willfully Breached by Delaying and Ultimately Submitting the 413-Store Package and Failing to Provide Forthcoming Responses to the FTC’s Questions

Kroger waited until September 8, 2023 to present a revised 413-store package to the FTC. This delay alone willfully breached Section 6.3: Kroger knew its original package was deficient, knew it had to achieve approval as “promptly as practicable,” and yet did nothing for months because increasing the package might cause it to forgo the “best deal” for itself. JX-2504 at -282; *see supra* §§ Bkg.IV, V.

Kroger’s submission of the 413-store package was also a willful breach because it, like the 238-store package, eschewed well-accepted methods for assessing competitive effects. Kroger imposed a 400-store cap for business, not antitrust reasons, *see supra* § Bkg.V, used the same improper banner rules and removed the same stores executives had cherry-picked, *id.*, and failed to provide the FTC with the requested backup material or diversion analyses, *see supra* § Bkg.VII. As Dr. Wu will explain, Kroger could have constructed a diversion-based package

to submit instead, without delaying the submission, and knew—because Albertsons, Compass, and A&P warned it—the 413-store package did not address all markets identified by the traditional structural analysis it claimed to have performed.²² *Supra* § Bkg.V. When the FTC conducted Investigational Hearings to understand how the 413-store package was constructed, Kroger’s executives gave false testimony and obfuscated Kroger’s process and their own roles. *Supra* § Bkg.X.

Finally, Kroger separately breached Section 6.3(a) by failing to consider Albertsons’ feedback in good faith. *Supra* § Bkg.V.

3. Kroger Willfully Breached by Submitting the 510-Store Package

Although Kroger incorporated a partial diversion analysis into its 510-store package—approximately six months after the FTC’s explicit request and over a year after its economists anticipated it—Kroger knew the package remained aggressive and unlikely to obtain FTC approval. Rather than run a diversion analysis based on sound economic methodology, Kroger identified 97 incremental stores using

²² Kroger’s counsel’s assertion that Kroger did not increase the 413-store package in response to these criticisms because divestiture buyers had already bid on it was a problem of Kroger’s own making. Shultz Tr. 340:4-341:14; *see also* JX-6384 ¶153. Kroger knew when it created the 413-store package that it was unlikely to satisfy the FTC. *Supra* § Bkg.V.

diversions and tacked them onto the already-discredited 413-store package. *Supra* § Bkg.VIII. Kroger knew its diversion analysis carried avoidable risk because it pressured Compass to “push[] the limit to what is defensible” to “t[ake] the number [of stores] down.” JX-3853 at -351. Kroger applied its same profit-driven banner rules, constraining potential stores for selection and ensuring C&S would receive the worst-performing stores. *See supra* § Bkg.V.III. Both Albertsons and C&S told Kroger that the package had problems. *See id.* Kroger then falsely told the FTC that C&S had “[n]ot specifically” “provided any feedback to Kroger” on the 97 additional stores. *See supra* § Bkg.X. Kroger willfully breached by proceeding with a package it knew was flawed and by disregarding Albertsons’ feedback.

4. Kroger Willfully Breached by Submitting the 541-Store Package as Its Final Pre-Litigation Offer

Kroger willfully breached Section 6.3 by imposing improper restraints on its final pre-litigation 541-store package. Kroger knew that 3% GUPPI packages under 650 stores were achievable. *Supra* § Bkg.XI.B. But because using a lower GUPPI threshold meant increasing the package, Kroger minimized divestitures by insisting on a 3.5% GUPPI threshold—despite Compass’s estimate that the FTC itself was using 3%. *Id.* Kroger then concocted bad-faith arguments to Albertsons that 3% was impossible. *Id.*

Although Kroger told the FTC it had “start[ed] from scratch” in constructing the 541-store package, Kroger also continued using its banner rules. *Supra* § Bkg.XI.B. Compass acknowledged ways in which “relaxing the MSA-banner rules” produced more efficient divestiture solutions, resulting in a “much lower number of stores with diversion ratios above the critical threshold,” JX-4068 at -686, but deviating from the banner rules was a “non-starter” for Kroger. JX-4683.

A&P also advised Kroger to strengthen its package by adding stores based on a structural analysis. JX-4288 at -234. Dr. Wu’s analysis shows that, had Kroger followed this advice, it could have eliminated all markets that would raise FTC concerns based on structural presumptions. *Infra* § Arg.C.2. Kroger did not.

Kroger’s choices were designed to limit the number and value of stores Kroger would have to divest. *See* JX-4589; JX-4624. By prioritizing its bottom line over its contractual obligations, Kroger willfully breached Section 6.3. Kroger separately willfully breached Section 6.3(a) by failing to consider Albertsons’ feedback in good faith, including by making knowingly false statements about its ability to implement that feedback. *Supra* § Bkg.XI.B.

5. Kroger Willfully Breached By Submitting and Refusing to Improve the 579-Store Package

Kroger’s final proposal—two months after the FTC sued to block the Merger—remained deficient. It stopped 71 stores short of the 650-store cap, although Kroger knew adding more stores could help address FTC feedback. *See supra* §§ Bkg.XI.C. Kroger also continued applying the same banner rules with only one material adjustment. *Id.* The 579-store package therefore continued to provide C&S with underperforming, mixed-and-matched stores. JX-6421 ¶68.

Kroger knew the 579-store package was not the best it could offer.²³ Bernstein admitted he could not recall ever telling Kroger “in words or substance, that the 579-store pa[ckage] was likely to achieve regulatory approval from the FTC and the State AGs.” Bernstein Tr. 1053:7-11. And despite Kroger’s instruction to its economists to “poke holes” in C&S’s proposed 650-store package, JX-5283, Compass

²³ Kroger’s experts defend its performance in the regulatory process, but none opine that Kroger offered the best possible remedies, as required by the Merger Agreement. *See* Vote Tr. 57:12-58:14 (testifying that he assessed only whether Kroger’s efforts were “within [the] range” of “standard practices”); Aronson Tr. 83:2-16, 87:23-88:5 (disclaiming whether Kroger offered “the best possible divestiture package to secure regulatory approval”); Gowrisankaran Tr. 554:20-555:22, 559:14-560:19, 561:24-563:23 (opining that each Kroger store list responded to certain feedback from the FTC, but disclaiming whether any list “would address a loss of competition” or whether any list was better than any other); *see also id.* 35:14-20 (disclaiming opinion on soundness of non-store assets in packages).

concluded it was superior. *Supra* § Bkg.XIII. Yet Kroger refused to consider it. *Id.* Even after litigation highlighted clear deficiencies with the package, Kroger refused to address them, including, remarkably, a small number of specific store deficiencies identified by the state expert in each of the Washington and Colorado actions, which could have been achieved while staying below the 650-store cap. *Supra* § Bkg.XIV. Kroger’s failure to fix these state issues and consider Albertsons’ feedback in good faith, constitute separate willful and material breaches.

6. Kroger Willfully Breached by Selecting C&S Based Primarily on Deal Value, Not Antitrust Considerations

Kroger knew selecting a qualified divestiture buyer was critical to prompt approval. JX-0731 at -380-381. It should have prioritized marketing an attractive package to a high-quality buyer. Instead, Kroger prioritized maximizing value to itself—willfully breaching by knowingly increasing antitrust risk.

Kroger chose to run its buyer-selection process as a four-phase auction process because that would “maximize sale proceeds” at the cost of “[e]xtend[ing] [the] time period to close” and deterring strong buyers. *See supra* § Bkg.VI. It began its auction with a facially defective set of 238 stores and withheld information about other stores and non-store assets it might sell. Strong buyers were deterred, *see id.*, and buyers that did submit bids complained about “the quantity and quality” of the

package. *Id.* While Kroger knew buyers were interested in additional stores, it withheld information to avoid “tipping [] off” the FTC to additional divestitures. *Id.*

Additionally, Kroger picked C&S to maximize sale value, not likelihood of approval. *See supra* § Bkg.VI. C&S offered the highest price but had serious shortcomings as a retailer, requiring more support from Kroger and increasing risk with the FTC. JX-3461 at -650, -658; Finkelstein Tr. 238:8-239:3; Smith Tr. 290:11-291:5, 292:9-292:21.

Separately, despite its obligation to cooperate with Albertsons, JX-1224 § 6.3, Kroger intentionally failed to keep Albertsons informed on the divestiture-buyer selection, knowingly breaching its cooperation obligations under Section 6.3(a). JX-3049 at -985-987; Counterclaims ¶¶97; Bhardwaj Tr. 422:4-423:5; Finkelstein Tr. 256:16-257:11; Levin Tr. 172:11-173:1; Smith Tr. 62:25-63:13.

7. Kroger Willfully Breached by Failing to Provide C&S Necessary Non-Store Assets

The Merger Agreement imposed no limit on non-store assets Kroger had to divest, and Kroger understood its obligations extended to ensuring the buyer received all assets needed to compete. McMullen Tr. 68:15-25. Regulators told Kroger the non-store assets in its packages were insufficient. *See supra* §§ Bkg.IX, XI.C. Regulators said C&S needed additional distribution capacity in multiple states,

stronger banners requiring less re-bannering, stronger private labels, dairy manufacturing, and additional data analytics and loyalty data. *Id.* Kroger ignored nearly all the feedback. *See supra* §§ Bkg.IX, XIII. Kroger thus willfully breached by failing to provide the non-store assets regulators demanded, knowing its refusal would increase the likelihood the deal failed.

8. Kroger Willfully Breached by Failing to Engage with Other Critical Stakeholders

Kroger willfully breached by failing to adequately engage with and respond to feedback from state AGs and unions, despite knowing such engagement was necessary to prevent their opposition and by failing to cooperate with Albertsons on the same.

State AGs. Despite A&P's advice, JX-0571 at -940, Kroger had no plan to engage state regulators before the Merger. § Bkg.XII. After announcement, Kroger developed a list of key states to meet with, JX-3600, but did not follow through, and ignored Albertsons' pleas for deeper engagement, JX-3349; JX-2942. At points, Kroger adopted a policy of not meeting with state AGs individually, JX-3988, despite counsel advising that early conversations with senior management were "vitally important." JX-3157 at -457. After Colorado sued, its AG commented that "[p]arties/lawyers who think they don't need to talk to state AGs do so at their own

peril.” JX-5007 at -905. AG Weiser privately told Kroger’s counsel his comment was for “Kroger’s benefit.” *Id.* at -903.

Unions. Kroger understood early that diplomacy with the FTC would be more effective with labor union support. McPherson Tr. 65:15-66:13, 97:18-98:16. Kroger failed to offer meaningful concessions to the unions, guaranteeing their opposition. Kroger could have negotiated to obtain the UFCW International’s support for the Merger. But Kroger’s leadership rejected the recommendations of Kroger’s labor team to offer concessions to UFCW International in exchange for its support of—including on key issues like agreeing to remain neutral toward unionizing efforts at non-union stores, which Kroger declared a “non-starter.” JX-1958; *see also* McPherson Tr. 121:14-122:1, 129:5-10; Massa Tr. 207:17-210:22. In November 2022, Kroger made one watered-down offer to the UFCW. JX-1793. The UFCW rejected that offer, telling Kroger it needed more information about the Merger before it could decide whether to publicly support it. JX-1997. Kroger never provided the information, even after the UFCW warned that Kroger’s failure would force it to take a public negative position. JX-2378; Dosenbach Tr. 134:15-21, 168:21-169:22. After learning the UFCW was focused on learning the identity of the divestiture buyer, McMullen Tr. 521:19-22; McPherson Tr. 302:14-22, McMullen told the UFCW that Kroger would keep it informed throughout the process. JX-2627.

McMullen broke that promise, deciding Kroger would instead only engage the UFCW after selecting the buyer, JX-2910 at -248; McMullen Tr. 538:6-14. Shortly after, the UFCW publicly opposed the Merger, citing Kroger's "lack of transparency." JX-2704.

Kroger also alienated the Teamsters, who had offered to support the Merger in exchange for certain concessions, including that Kroger agree to union-neutrality. JX-2698 at -434. Kroger rejected that offer as a "non-starter." JX-2600; *see also* Massa Tr. 129:5-10; McPherson Tr. 213:9-11. The Teamsters publicly opposed the Merger in June 2023. JX-2900. Kroger never made another offer to the Teamsters. Massa Tr. 222:21-223:8, 224:6-225:7.

C. Kroger's Breaches Caused the Merger to Fail

A two-step framework governs causation. *First*, Albertsons must prove "that the breach contributed materially to the failure" by making closing "less likely." *In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556, at *90-91 (Del. Ch. Aug. 31, 2020); *see also id.* at *111-114 (Cigna's opposition to a divestiture contributed materially to the merger's failure). *Second*, the burden shifts to Kroger to prove "that its breach could not have contributed materially to the non-occurrence of [closing] because the [Merger] would have failed regardless." *Id.* at *91; *accord Williams*, 159 A.3d at 273. Albertsons need not prove the Merger would have closed but for

Kroger's breaches; once Albertsons shows Kroger's breaches made closing less likely, Albertsons is entitled to judgment unless Kroger proves nothing it could have done (short of divesting more than 650 stores) would have secured approval.

1. Kroger's Breaches Made Closing Less Likely

Each of Kroger's breaches made approval materially less likely.

Deficient Store Lists. Kroger's store divestiture lists were deficient in at least six respects.

First, Kroger insisted that each package contain well under 650 stores, weakening its ability to resolve antitrust concerns. *Supra* § Arg.I.B.1-5. Regulators told Kroger before litigation that the insufficient scale of the divestiture was a barrier to approval, *e.g.*, JX-4419, at -066-067; JX-5126, at -658-659, and cited that in their lawsuits, JX-5130 ¶108; JX-5097, at -071 ¶189. The federal court credited that concern. JX-6119, at 47-50. Divesting closer to 650 stores would have ameliorated C&S's scale concerns and reduced potential anticompetitive effects as measured by GUPPI, diversion ratio, CMCR, and structural presumptions. *See* Gowrisankaran Tr. 222:23-226:20; JX-6438. It also would have given regulators—who knew about the 650-store threshold—greater incentive to settle. Frankel Report ¶¶150-51. Regulators expected Kroger to offer 650 stores. JX-3489; JX-3595 at -138. Kroger's failure to do so contributed materially to the Merger's failure.

Second, Kroger chose not to construct store lists to minimize key economic measures of competitive harm, although doing so would have addressed regulators' and courts' concerns.

- **GUPPI:** Kroger recognized that, “at least for settlement purposes,” the FTC “might be willing to accept the GUPPI analysis as a complete fix.” JX-5742 at -669. To maximize that possibility, Kroger had to minimize the GUPPI threshold of its package. *See* Weiskopf Tr. 228:15-229:4. Kroger could have used a 3% GUPPI threshold to make the package more responsive to the FTC. *E.g.*, JX-4733; JX-6383 Exs. 25-26, 31-32, 51. Kroger instead insisted on a higher 3.5% threshold. *Supra* § Bkg.IX.B.
- **Structural Presumptions:** Kroger's packages all left over 1,000 presumptively anticompetitive markets, using the traditional market definition. JX-6385 Ex. 15. Kroger could have greatly reduced the total number of presumptive markets, JX-6438, and eliminated *all* presumptions in markets with five or fewer post-merger competitors (where the FTC has historically focused virtually all its supermarket enforcement). JX-6383 Exs. 5, 26, 28, 30, 34, 36, 44, 46.²⁴ The high number of presumptions under Kroger's packages factored into the FTC's recommendation to sue, JX-4874; emboldened regulators to reject Kroger's unsatisfactory settlement offers by strengthening their expected litigation hand, *see* JX-6420 ¶65; JX-6383 ¶200; and ultimately helped regulators prevail in litigation, JX-6119 at 47; JX-6124 ¶383.

²⁴ Wu's packages need not eliminate *all* presumptions to significantly reduce the odds of regulators blocking the Merger. *Contra* Gowrisankaran Tr.328:14-329:10. In arguing otherwise, Kroger ignores that presumptions are rebuttable. Under Wu's packages, the relatively few residual presumptions would be far easier to rebut. *See infra* § Arg.C.2.b.

Third, Kroger’s banner rules and cherry-picking made its packages biased toward divesting underperforming stores. *Supra* § Bkg.I.C-D; JX-6383 Exs. 8, 10, 13, 16, 19; *see also* JX-6438. FTC guidance made clear this adverse selection would harm settlement prospects. JX-0098 at 6-7. It also hurt the parties’ litigation defense. *See* JX-6124 ¶¶232-33.

Fourth, Kroger’s choice to mix-and-match, including within MSAs, hindered settlement. *Supra* § Bkg.VIII. Courts similarly found that “Kroger’s decision to sell C&S a mix-and-match package ... increase[d] the risks” of competitive harm. JX-6124 ¶229 (Washington court); *accord* JX-6119 at 47-48 (federal court). Kroger could have eliminated or greatly reduced mix-and-match, improving settlement and litigation odds. JX-6383 ¶¶64-65, 193.

Fifth, Kroger’s pre-litigation proposals required C&S to re-banner most stores, and the 579-store package only modestly reduced re-bannering. JX-6438. High re-bannering rates contributed to regulators’ decision to sue. JX-4419 at -067; JX-4166; JX-5348 ¶¶149-51. The same issue contributed to Kroger’s litigation loss. JX-6119 at 47-48.

Sixth, Kroger’s delays in proposing divestitures independently contributed to its failure to settle. Kroger submitted its final package during litigation, making settlement based on that package less likely. JX-6420 ¶¶79-80. Previously, Kroger

waited over a year after the Merger announcement to propose the 510-store package, the first based partly on diversion analysis. *Supra* § Bkg.VIII. By then, the FTC was short on time to negotiate. *Id.* The FTC provided valuable feedback on the 510-store package. *Id.* But when Kroger submitted its following 541-store offer, there was no time for further feedback. JX-5075; JX-5487 at -906-07. Had Kroger submitted a diversion-based package by August 2023 (more than a month after receiving all necessary data, JX-6384 ¶140), it would have increased opportunities for regulator feedback.

Non-Store Assets. Kroger's refusal to divest the non-store assets identified by regulators and C&S, *supra* §§ Bkg.VII-IX, VI.C, contributed to the regulators' decisions to sue. JX-5130 ¶¶108-09; JX-4983 ¶¶195-224; JX-4597 ¶¶140-151. Courts agreed with those concerns in blocking the Merger. JX-6119 at 48-50; JX-6124 ¶¶234-96.

Divestiture Buyer Issues. If Kroger was unwilling to equip its divestiture buyer with extensive non-store assets, its only potentially viable alternative was to select buyer(s) who had successful retail operations, thus needing fewer assets to solve regulatory concerns. But Kroger instead prioritized C&S's high bid. *Supra* § Arg.I.B.6. Regulators and courts said their rejection of the Merger was driven

partly by C&S's lack of past retail success, combined with Kroger's refusal to equip C&S with sufficient non-store assets. *Supra* §§ Bkg.XI.B, XV, Arg.I.B.6-7.

Failure to Engage with State AGs. Kroger's own expert admits that this Merger "is a perfect example of [why] you ignore the states at your peril." JX-5986 at 15; *see also* JX-5007. Had Kroger engaged actively with state AGs, it would have significantly increased its prospects of avoiding litigation in Colorado and Washington. JX-6380 at 60-62.

Failing to Offer Concessions to Unions. Throughout the regulatory process, Kroger executives knew that union support would make regulatory approval more likely. McMullen Tr. 511:12-16; McPherson Tr. 97:24-98:5. But Kroger refused to make the necessary concessions to obtain union support. *Supra* § Arg.I.B.8.

2. Kroger Cannot Show the Merger Would Have Failed Regardless of Its Breaches

Kroger takes the made-for-litigation position that the Merger was doomed regardless of its conduct. That argument is facially suspect: Why would Kroger, advised by sophisticated antitrust counsel, agree to take "any and all actions" to consummate a \$25 billion merger that could never close? Kroger knew better. Kroger told investors it was "confident" it had "a clear path to achieve regulatory approval with divestitures." JX-3092, at -863 (Millerchip's remarks). Kroger also

internally “[e]xpect[ed] to be able to complete [the] acquisition with divestitures” if the FTC and states followed their “historical approach”—which they did. JX-0972 at -685. Had Kroger performed, the parties likely would have (1) negotiated a settlement with the FTC and states or (2) won in litigation. Kroger cannot show otherwise.

a. Pre-Litigation Settlement Was Achievable

Evidence at trial will debunk Kroger’s contention that settling with regulators was impossible.

First, there were divestiture packages under 650 stores that would have satisfied regulators’ competitive concerns. Dr. Wu, a former FTC economist who has worked on over 100 mergers in private practice, will testify that after removing Kroger’s banner rules, he constructed eleven illustrative packages of stores and banners that would likely satisfy the FTC’s competitive concerns—including, for example, a 649-store, 3% GUPPI package incorporating economic inputs that the FTC indicated it would likely accept if Kroger provided supporting data. JX-6438; JX-6383 Exs. 25-38, 43-46. Wu will testify Kroger could have proposed one of his illustrative packages no later than late summer or early fall 2023, then adjusted based on regulator feedback. This approach likely would have resolved the FTC’s concerns.

Wu’s analysis is effectively un rebutted. Kroger’s antitrust economist, Gowrisankaran, disclaimed any opinion on “what FTC staff would do or what they would recommend ... to the commissioners” if presented with alternative divestiture proposals. Gowrisankaran Tr. 90:9-18. While Gowrisankaran asserts Wu’s packages are not “economically more sound” than Kroger’s 579-store package, he incorrectly assumes Wu’s packages would be proposed at the *end* of the regulatory process, Gowrisankaran Tr. 715:3-717:3, 733:22-734:20, and evaluated under the methodology advocated by the FTC’s expert at trial, *id.* at 643:2-645:24. But as Gowrisankaran does not dispute, the FTC would not necessarily use a litigation analysis in evaluating settlement offers. *Id.* at 760:15-761:9.

Second, regulators would have settled if Kroger had performed its contractual obligations. Lawrence Frankel, a veteran federal antitrust enforcer, will testify that the Merger “likely would have been allowed to proceed had Kroger taken the appropriate steps throughout the regulatory process.” JX-6420 ¶15. As Frankel will explain, the FTC’s engagement with the parties indicated strong interest in settling. *Id.* ¶¶174, 214, 219, 228, 229, 241-43, 257, 262, 267.²⁵ The FTC gave detailed feedback on Kroger’s divestiture proposals, *supra* §§ Bkg.VII-IX, and

²⁵ Kroger’s expert did not disagree that settlement was possible. Vote Tr. 59:18-60:3.

communicated, both explicitly and implicitly, that settlement was possible, *supra* §§ IX, XI.

The FTC’s interest in settlement is consistent with past practice in supermarket mergers. The Merger was the first combination of traditional supermarkets challenged by the FTC in a quarter-century. The modern FTC has settled numerous supermarket and other retail mergers. JX-6385 Ex. 3. Chair Lina Khan continued settling horizontal mergers where possible, including supermarket mergers. JX-6420 ¶¶129-34.

Nor can Kroger speculate that state AGs would have rejected any settlement under 650 stores. State enforcers share the FTC’s mandate to block mergers that would “substantially lessen competition”²⁶ and would not likely spend “limited resources,” JX-6380 at 8, challenging a merger with divestitures that made anticompetitive effects unlikely, as Wu’s packages would here. JX-6380.

Third, Kroger had many available routes to satisfy regulatory concerns about the competitive viability of divested stores. Christopher McGarry—a seasoned executive of multiple successful grocery chains—confirms that Wu’s illustrative packages would form viable businesses; would be marketable to capable divestiture

²⁶ E.g., Colo. Rev. Stat. § 6-4-107(1); Wash. Rev. Code § 19.86.060.

buyers; and would impose less risk on the divestiture buyer(s) than Kroger's proposed packages. JX-6378 at 37-38.

b. Kroger Cannot Establish that Litigation was Unwinnable

Had Kroger performed, it would have significantly enhanced its litigation defense. Kroger cannot show this would not have changed the outcome.²⁷ In litigation, courts identify presumptively anticompetitive markets, then consider whether evidence rebuts the presumption by showing competitive harm is unlikely. JX-6119 at 3-4; JX-6124 ¶¶335-38.

Wu's analysis illustrates how Kroger could have prevailed under that framework. His packages significantly reduce the number of presumptive markets compared to Kroger's 579-store package, JX-6438, and include packages in which (a) all retained stores have sufficiently low GUPPIs that Kroger could have demonstrated price increases were unlikely; (b) prices would likely *decrease* overall

²⁷ In *Anthem-Cigna*, Cigna disproved causation by showing that its breaches made no difference to the regulator's decision to sue or the court's decision to enjoin the merger. 2020 WL 5106556, at *123-125. For example, Cigna breached by "opposing a divestiture," *id.* at *110, but "divestitures would not have addressed ... concentration in the market for national accounts," an independent basis on which the merger failed, *id.* at *5. Here, by contrast, the regulators' complaints and the courts' decisions blocking the Merger cite the same (resolvable) deficiencies resulting from Kroger's willful breaches. *See supra* §§ Bkg.XV, Arg.C.1.

due to efficiencies; (c) all remaining presumptive markets would have six or more post-merger competitors, ensuring healthy competition; and (d) all retained stores pass the CMCR test the FTC’s trial expert used, assuming Kroger substantiated its variable costs. JX-6383 Exs. 25-38, 43-46; JX-6422 ¶18. Those features would support strong arguments that no markets had unrebutted presumptions of harm. JX-6383. Kroger offers no expert opinion that courts would have rejected packages like Wu’s. Gowrisankaran Tr. 733:22-734:20 (disclaiming such opinions). Such packages would have armed Kroger with litigation arguments it could not make with its 579-store package. JX-6383.

Moreover, both courts found that divested stores risked losing sales under C&S. JX-6119 at 54; JX-6124 ¶¶223-96. Kroger could have prevented those findings by selecting different buyer(s) or equipping C&S with better assets. *See supra* § Arg.I.B.6-7. Wu’s packages would mitigate buyer-related concerns by divesting financially strong stores, minimizing mix-and-match and rebannerings, and providing greater scale. *Id.*

D. Albertsons Is Entitled to Lost Premium Damages

Because Kroger willfully breached, *see supra* § Arg.I.B, Albertsons may recover “damages incurred or suffered by the holders of Company Common Stock in the event such holders of Company Common Stock would not receive the benefit

of the bargain negotiated by the Company on their behalf.” JX-1224 § 9.5. Albertsons seeks “the standard remedy for breach of contract,” which “is based upon the reasonable expectations of the parties *ex ante*.” *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). “[E]xpectation damages [] require the breaching promisor to compensate the promisee for the promisee’s reasonable expectation of the value of the breached contract, and, hence, what the promisee lost.” *Id.*

Albertsons will prove both the fact and amount of damages. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 948513, at *20 (Del. Ch. Feb. 27, 2020). Dr. Anne Gron will calculate the compensation stockholders would have received but for Kroger’s breach—“the difference between the per share value shareholders would receive at the closing of the merger ... and the price per share in the absence of the merger ... multiplied by the number of shares outstanding.” JX-6377 ¶77 (the “Lost Premium Damages”).²⁸ Depending on the date of breach, Gron estimates Lost Premium Damages between \$4.3 and \$5.1 billion. JX-6377 Ex. 16. Gron also calculates prejudgment interest, available to Albertsons

²⁸ Kroger’s damages expert does not offer an alternative measure of damages. Fischel Tr. 140:13-141:22.

“as a matter of right.” *Wilmington Tr., Nat’l Assoc. v. Sun Life Assurance Co. of Can.*, 294 A.3d 1062, 1078 (Del. 2023).²⁹

A tax gross-up is also necessary to offset incremental taxes Albertsons will pay on Lost Premium Damages, which would not have been imposed had the Merger closed. Absent breach, the merger consideration would have been paid directly to stockholders; here, a damages award will be paid to Albertsons, interposing an additional corporate-level tax. JX-6394 ¶36. To make the award equal to “the benefit of the bargain” owed to stockholders under Section 9.5, the award must be grossed up for the tax consequences of Kroger’s breach. Professor David LaRue calculates the gross-up at \$1.4 to \$1.7 billion, depending on the date of breach. JX-6394 Table 2.

Finally, Albertsons’ decision to terminate after the Merger’s Outside Date and after two injunctions blocking the deal poses no barrier to its recovery (*contra* Counterclaims ¶¶176-85): any applicable duty to mitigate does not require the

²⁹ Gron calculates prejudgment interest using Delaware’s default legal rate, *see Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 620 (Del. Ch. 2010) (citing 6 Del. C. § 2301(a)), and follows “the modern Delaware approach ... apply[ing] compounding interest ... at quarterly intervals, and floating interest rates.” *Walker v. FRP Invs. GP, LLC*, 336 A.3d 542, 574 (Del. Ch. 2025); JX-6377 ¶94. Kroger’s damages expert advocates a novel approach that departs from Delaware precedent and undercompensates Albertsons. JX-6418 ¶¶36-42.

injured party to “give up ... clear contractual rights,” including the right to terminate at a specific date. *Standard Gen. L.P. v. Charney*, 2017 WL 6498063, at *22 n.187 (Del. Ch. Dec. 19, 2017); *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*, 2019 WL 1223026, at *21-22 (Del. Ch. Mar. 14, 2019) (permitting termination on outside date). Nor was Albertsons required to take “unreasonably speculative” mitigative steps by continuing to appeal after Kroger’s defective divestiture package and poorly supported buyer were rejected at the trial court. *NASDI Holdings, LLC v. N. Am. Leasing, Inc.*, 2019 WL 1515153, at *7 (Del. Ch. Apr. 8, 2019).

II. Kroger Must Pay the Termination Fee

After Albertsons terminated the Merger, Kroger was obligated to pay the Termination Fee within two business days. JX-1224 §§ 8.4(c). Kroger’s only basis for its failure to do so (itself a willful breach) is its baseless assertion that *Albertsons* materially breached §§ 6.3(a) and (b). Kroger claims (i) Albertsons secretly coordinated with C&S to convince regulators that C&S needed additional assets; and (ii) Albertsons focused on manufacturing a litigation record instead of defending the Merger. Both theories have been unequivocally disproven in discovery, and Kroger withdrew its counterclaims on the eve of trial. Dkt. 325 ¶458.

Kroger baselessly claims Albertsons conspired to have C&S submit letters to state regulators lobbying for additional divestitures, Counterclaims ¶¶120-24, but

C&S's witnesses uniformly denied that Albertsons prepared, contributed to, or influenced C&S's submissions. Winn Tr. 33:19-35:6, 93:15-94:8, 97:6-8; Florenz Tr. 102:2-11, 106:12-23, 196:22-25,; Hesse Tr. 69:17-70:18, 245:13-246:5.

Kroger also wrongly asserts that Susan Morris, Albertsons' then-COO, surreptitiously communicated with C&S to coordinate the alleged conspiracy. Counterclaims ¶¶131-34. But discovery showed that Morris communicated with C&S about the latter's effort to recruit her as CEO of its retail division post-Merger, not about Kroger's theorized conspiracy. Winn Tr. 47:20-48:3, 61:4-11, 62:14-19. There is zero evidence Morris shared any sensitive information C&S did not already have, or that C&S did anything with the information Morris shared. *Id.* at 47:10-17.

Kroger's final claim, that Albertsons prioritized a "Plan B" to file this litigation, instead of cooperating with Kroger, is baseless. Albertsons offered Kroger extensive support and cooperation in an effort to close the Merger. Sankaran Tr. 264:19-265:7; McCollam Tr. 403:2-404:17; Morris Tr. 222:11-14; Moriarty Tr. 35:10-14, 45:11-22. Far from building a "faux" litigation record, Albertsons expressed concerns because it was alarmed by Kroger's conduct and genuinely wanted to close the deal. The correspondence Kroger characterizes as record-building was Albertsons exercising its contractual right under § 6.3(b) to provide

input. This lawsuit was not “Plan B” but Albertsons’ only recourse for Kroger’s willful breaches.

CONCLUSION

For these reasons, and those to be shown at trial, judgment should be entered for Albertsons.

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