IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL TRADE COMMISSION,	§	Civil Action No.: 3-00CV1196-R
V.	§	
THE KROGER CO., *ET AL.*	§	**Public Version**

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

The proposed $ million acquisition of Winn-Dixie Texas, Inc. by The Kroger Company ("Kroger") threatens a substantial lessening of competition among supermarkets in metropolitan Fort Worth and a number of outlying cities and towns. Winn-Dixie Texas ("Winn-Dixie") is the 74-store Texas-Oklahoma subsidiary of Winn-Dixie Stores, Inc. Kroger and Winn-Dixie today are the second- and third-largest supermarket chains in the metropolitan Fort Worth area. Through this acquisition, Kroger will eliminate Winn-Dixie as a major competitor, absorb its stores (except for those it will close) into the Kroger chain, and catapult itself into the market-leading position with 30-35% or more of supermarket sales in the area. Markets that are already highly concentrated will become substantially more so, and consumers are likely to face higher prices and reduced services. Given that the supermarkets in the affected markets have combined annual sales of over $2 billion, even a one percent price increase at these stores would cost consumers an extra $20 million per year in their grocery bills.

Unless enjoined, Kroger and Winn-Dixie will be free to consummate their merger at the conclusion of this proceeding.[1] Accordingly, the Federal Trade Commission ("Commission" or "FTC") asks this Court to enjoin preliminarily the proposed transaction pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b).[2] Injunctive relief is necessary to preserve the status quo pending a full trial on the merits in an administrative proceeding before the Commission. Without preliminary relief, consumers will likely suffer

[1]Kroger and Winn-Dixie have agreed to delay consummation of the proposed merger until 48 hours after this Court rules on the Commission motion for preliminary injunction.

[2]Section 13(b) of the FTC Act authorizes the Commission to seek, and empowers this Court to grant, preliminary relief pending the completion of administrative proceedings challenging the proposed acquisition. The Commission is empowered to bring an administrative complaint under Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21, and under Section 5 of the FTC Act, 15 U.S.C. § 45.

serious harm until the administrative trial is resolved, and adequate relief will be next to impossible if the acquisition is ultimately found to be unlawful.

The FTC is entitled to injunctive relief because the transaction will substantially increase market concentration and create a firm so large in various local markets that it warrants a presumption that the merger would create or enhance market power or facilitate its exercise. While the market share data are sufficient to establish the Commission's *prima facie* right to injunctive relief, the Commission has compelling evidence that the acquisition likely will reduce competition substantially. There is a substantial head-to-head competition between Kroger and Winn-Dixie supermarket stores: Where there is a Kroger, there is almost always a Winn-Dixie close by. Consumers who currently can choose between these two competitors will lose that choice if the acquisition occurs. The parties themselves recognize their competitive significance to one another. Both firms regard the other as a close competitor, they regularly ,
and they both engage in double and triple coupon promotions to attract shoppers. The acquisition would eliminate that head-to-head competition. Consumers will be injured by reduced promotions, price increases, store closures, and slower pace of new store construction.

The Commission is prepared to demonstrate that the proposed acquisition is unlawful and threatens significant harm to consumers. The public's interest in maintaining robust competition, both during the administrative trial and ultimately if the transaction is found to be illegal, mandates that a preliminary injunction be entered.

ARGUMENT

I. KROGER'S ACQUISITION OF WINN-DIXIE TEXAS VIOLATES SECTION 7 OF THE CLAYTON ACT BECAUSE IT THREATENS SUBSTANTIALLY TO LESSEN SUPERMARKET COMPETITION IN METROPOLITAN FORT WORTH AND SEVERAL OUTLYING CITIES AND TOWNS

The FTC is entitled to a preliminary injunction "upon a proper showing that, weighing the equities and considering the FTC's likelihood of ultimate success, such action would be in the public interest." FTC Act § 13(b), 15 U.S.C. § 53. In enacting Section 13(b), Congress adopted the "public interest" standard in place of the traditional four-part test applicable to private parties seeking a preliminary injunction.[3] Under this "public interest" standard, this Court "must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities."[4] The FTC satisfies its burden if it "'raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'"[5]

A court's role in evaluating the Commission's likelihood of success on the merits "is not to make a final determination on whether the proposed merger violates Section 7 of the Clayton Act, but rather to make a preliminary assessment of the merger's impact on competition." *Warner Communications,* 742 F.2d at 1162. As one court has stated:

> [T]he central issue . . . is not whether respondents have violated, or are about to violate, the antitrust laws, for adjudication of those issues is vested in the FTC in

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[3]*See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1081-82 (D.C. Cir. 1981); *FTC v. Lancaster Colony Corp., Inc.*, 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977).

[4]*FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991); *FTC v. Warner Communications, Inc.,* 742 F.2d 1156, 1160 (9th Cir. 1984); *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1071 (D.D.C. 1997).

[5]*Warner Communications,* 742 F.2d at 1162 (quoting *FTC v. National Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979)).

> the first instance . . . . Rather, the question . . . is whether the FTC has shown *prima facie* that the public interest requires that a preliminary injunction issue to preserve the status quo until the FTC can perform its adjudicatory function.

FTC v. Lancaster Colony, 434 F. Supp. at 1090 (citations omitted).

Section 7 of the Clayton Act prohibits any merger or acquisition "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 is intended to arrest anticompetitive mergers "in their incipiency" and, accordingly, requires a prediction of the merger's likely impact on future competition. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963). Because the statute requires a forward-looking assessment, certainty is not required.

The analysis of a merger under Section 7 begins with the identification of the relevant markets – the "line of commerce," or product market, and the "section of the country," or geographic market – that may be affected by the merger, taking into account the economic and commercial realities facing consumers. *See FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998). Kroger's proposed acquisition of Winn-Dixie is likely to harm competition in the retail sale of food and grocery items through supermarkets in the metropolitan Fort Worth area and certain outlying cities and towns.

A. The Relevant Product Market Is the Retail Sale of Food and Grocery Items Through Supermarkets.

Supermarkets offer an array of products and services unlike those offered anywhere else. Although some individual items sold at supermarkets may be available at other retail establishments, such as convenience stores or specialty food stores, those stores cannot provide

the variety and depth of products offered by supermarkets. Nor can mass retailers such as Wal-Mart or Target provide the same variety and service, except by building their own supermarkets. Consumers have no practical alternative to the variety and convenience of one-stop shopping offered by supermarkets. Supermarkets themselves acknowledge their unique position, looking only to other supermarkets in setting their prices and identifying other supermarkets as their primary competitors. Supermarkets therefore constitute the relevant product market or line of commerce in which to analyze the likely competitive effects of the proposed acquisition.

The criteria for defining markets are well known. "Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 (D.C. Cir. 1986). Product markets are determined by the reasonable interchangeability between a product and substitutes for it,[6] and two products are in the same market if consumers would switch from one product to the other in response to a "small but significant" and nontransitory price change.[7]

Courts look to "practical indicia" of a market (such as industry or public recognition of the market, the product's peculiar characteristics and uses, unique production facilities, distinct

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[6]*Hornsby Oil Co. v. Champion Spark Plug Co.,* 714 F.2d 1384, 1393 (5th Cir. 1983) ("[t]he relevant product market is composed of products that have reasonable interchangeability for the purposes for which they were produced – price, use and qualities considered"), quoting *Dougherty v. Continental Oil Co*., 579 F.2d 954 (5th Cir. 1978), *judgment vacated by stipulation,* 591 F.2d 1206 (5th Cir. 1979); *see also HTI Health Services, Inc. v. Quorum Health Group, Inc.,* 960 F. Supp. 1104, 1115 (S.D. Miss. 1997).

[7]*See Staples*, 970 F. Supp. at 1076 n.8; *Merger Guidelines* § 1.11, at 5-6. While the *Guidelines* are not binding on the courts, courts have considered them in determining a proposed acquisition's impact on competition. *See, e.g., Olin Corp. v. FTC*, 986 F.2d 1295, 1299 (9th Cir. 1993); *University Health,* 938 F.2d at 1211 n.12; *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir.1986); *Staples*, 970 F. Supp. at 1076, 1082.

customers, distinct prices, sensitivity to price changes, and specialized vendors) as evidentiary proxies for direct proof of substitutability.[8] *See, e.g., Rothery Storage,* 792 F.2d at 218, citing *Brown Shoe*, 370 U.S. at 325. Several indicia point to supermarkets as the relevant product market, including a unique retailing format, independent pricing, and industry recognition of supermarkets as filling a distinct need.

Supermarkets are a unique retailing format for food and groceries because they carry a full line and wide variety of food and non-food products and provide a one-stop shopping environment for consumers. *See California v. American Stores Co.,* 697 F. Supp. 1125, 1129 (C.D. Calif. 1988) ("only supermarkets compete for the consumers' weekly or periodic grocery shopping needs"), *aff'd in part and rev'd as to remedy,* 872 F.2d 837 (9th Cir. 1989), *rev'd,* 495 U.S. 271 (1990); PX at 218-9; PX 95 at 1316. A supermarket is characterized by large floor space, typically more than 10,000 square feet, generally carries approximately 30,000 non-pharmacy items (designated as stock-keeping units or "SKUs"), and has a sales volume of $2 million or more annually.[9] The one-stop shopping offered by supermarkets is qualitatively

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[8]Not all factors need be present, or need be present to the same degree, to establish a relevant market. *See, e.g., C.E. Services, Inc. v. Control Data Corp.,* 759 F.2d 1241, 1246 (5th Cir. 1985); *General Foods Corp. v. FTC,* 386 F.2d 936, 941 (3d Cir. 1967).

[9]*See*, *e.g.*, *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 94 (2d Cir. 1998) (defining supermarket as "retail store with at least 7,500 square feet of retail space that sells a full range of perishable and non-perishable food items and general household merchandise"); *American Stores,* 697 F. Supp. at 1129 (full line grocery stores with more than 10,000 square feet). *See also* PX ¶ 2; PX ¶ 4; PX ¶ 2.

different from the offering of a retail store that carries only a small percentage of the items available at a supermarket.[10]

Other retail stores that sell food, such as club stores, mass merchants, specialty food stores, "mom & pop" stores, convenience stores, and "limited assortment" stores, do not effectively constrain prices at supermarkets because they operate significantly different retail formats. They typically have limited floor space for food products, do not carry a full line, and do not offer one-stop shopping for food and groceries. For example, club stores such as Sam's typically only carry about 2,000 SKUs of the items sold in supermarkets, and the majority of those items are available only in "institutional size" or bulk packaging. PX 94 at 1267. Sam's views itself as competing with "warehouse clubs, as well as with discount retailers, wholesale grocers and general merchandise wholesalers and distributors," but not supermarkets. PX 94 at 1268.

Traditional mass merchandise stores such as Wal-Mart, Kmart and Target typically allocate about 1,000 square feet of selling space to a limited selection of impulse-driven food and beverage products such as snack foods and soda.[11] PX ¶¶ 4, 5. Mass merchandise stores as being able to constrain pricing at supermarkets. PX ¶ 11.

[10]Supermarkets therefore have the equivalent of *Brown Shoe*'s "unique production facilities." *Cf. Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 874 (W.D.N.Y. 1994) (finding that department stores are a proper product market in part because their delivery mechanisms are unique).

[11]Consumers do not view mass merchandise stores as a destination for weekly shopping, because they do not have the selection of food needed for one-stop shopping. PX ¶ 7. Some mass merchants such Wal-Mart have opened new "supercenters" that combine a mass merchandise store and a supermarket under one roof. The FTC includes the supermarket portion of these supercenters in the supermarket category.

Alternative format food stores such as convenience stores and limited assortment stores do not carry the selection or variety of products to provide one-stop shopping.[12] These operators view other convenience and limited assortment stores as their primary competitors and

as being able to constrain pricing at conventional supermarkets. PX

¶ 6; PX ¶¶ 7, 8; PX

¶¶ 6, 7.

Specialty food stores that concentrate on ethnic foods or particular product groups (*e.g.*, organic/natural foods, produce, seafood, or meat) similarly do not offer one-stop shopping. Where their product lines overlap with those of supermarkets, specialty food stores generally price

% higher than conventional supermarkets on similar items and are unlikely to constrain supermarket pricing.[13] PX ¶ 8.

Industry perceptions such as these provide compelling evidence that supermarkets constitute a product market. As the Court of Appeals for the D.C. Circuit explained: "[I]ndustry or public recognition of the [market] as a separate economic unit matters because we assume that

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[12]These retailers stock only a limited variety of food items. Some of these operators do not even carry a consistent offering of products, but buy from wholesalers as products become available. PX ¶ 3; PX ¶ 4; PX ¶ 2.

[13]In many cases their product lines are not comparable to that of conventional supermarkets. PX ¶¶ 5, 9; PX ¶¶ 4, 5. Neighborhood "mom & pop" stores and convenience stores also carry a limited selection of SKUs and typically charge higher prices for most of the same or similar items carried in supermarkets. PX ¶¶ 4, 5. They are unlikely to constrain the pricing of supermarkets. *See American Stores,* 697 F. Supp. at 1129 ("Even if convenience stores competitively price a few food items, such as bread and milk, in direct competition with supermarkets, such is not sufficient to justify inclusion of all retail grocery sales from whatever outlet in the relevant product market").

economic actors usually have accurate perceptions of economic realities."[14] The marketplace behavior of Kroger and Winn-Dixie confirms that they view other full-line supermarkets as their primary competitors. Kroger and Winn-Dixie

,[15] (PX at 139-40; PX at 370-1; PX ; PX ; PX ; PX) and rarely

. PX 18 at 500-2; PX at 618; PX ; PX ; PX . They do not view (PX

at 198-9) and consider because

. *See, e.g.*, PX

at 225. None of the alternative format retailers mounted a competitive response when supermarkets initiated double coupon, triple coupon, or super triple coupon programs. PX at 392-4.

In sum, both consumers and the food and grocery retailing industry recognize supermarkets as distinct and unique providers of food shopping services.

B. The Relevant Geographic Markets Include Metropolitan Fort Worth and Several Outlying Cities and Towns

The relevant geographic market encompasses "the area of effective competition" for a

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[14]*Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d at 218 n.4. *See also American Stores,* 697 F. Supp. at 1129 (noting that "defendants' own marketing documents focus on supermarket shoppers and competition from other supermarkets and do not evaluate convenience stores, gasoline service stations, etc. as competitors"); *Merger Guidelines* § 1.11, at 5-6.

[15]In *Bon-Ton Stores, Inc. v. The May Department Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994), a product market consisting of traditional department stores was supported in part by evidence that department stores price checked and monitored other department stores but not specialty stores. *See id.* at 874.

particular product or service or its reasonably interchangeable substitutes.[16] As with product market definition, a relevant geographic market is defined by asking to what geographic area a consumer can practicably turn in response to a small but significant and nontransitory increase in price. *See Merger Guidelines* § 1.2, at 6-8. In determining the geographic market, "such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered."[17]

1. Metropolitan Fort Worth Is a Relevant Geographic Market

While the Dallas/Fort Worth area is sometimes referred to as a "metroplex" (*See, e.g.,* PX 51), metropolitan Fort Worth (which consists of the city of Fort Worth and adjacent communities to the northeast and southeast)[18] is in fact separated from metropolitan Dallas by considerable distance and other economically significant factors.

There is little or no cross-market grocery shopping between the Fort Worth and Dallas metropolitan areas. Consumers generally do not travel more than two to three miles to do their grocery shopping. *See* PX at 301 - 302; PX at 412 - 414; PX ¶ 3. The driving distance from city center Fort Worth to city center Dallas is over thirty miles, and the driving time is approximately 45

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[16]*Hornsby Oil Co. v. Champion Spark Plug Co.,* 714 F.2d 1384, 1383 (5th Cir. 1983).

[17]*Hornsby Oil Co.,* 714 F.2d at 1394. The exact boundaries of the geographic market need not be laid out "by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966).

[18]The northeast communities include North Richland Hills, Euless, Hurst, Grapevine, Keller, Watauga, Richland Hills, Haltom City, South Lake, and Bedford. The southeast communities include Arlington, Grand Prairie, and Mansfield.

minutes.[19] The border area between metropolitan Fort Worth and metropolitan Dallas consists of substantial natural and manmade barriers which include Grapevine Lake, Dallas-Fort Worth International Airport, Dallas Naval Air Station, Mountain Creek Lake, and Joe Pool Lake. This several-mile wide band of manmade and natural barriers, coupled with extremely low population density within the band, form a natural barrier between metropolitan Fort Worth and metropolitan Dallas for grocery shopping purposes.

The parties' business documents further establish that metropolitan Fort Worth is a separate geographic market distinct from Dallas. For example, Kroger

for metropolitan Fort Worth and metropolitan Dallas. *See, e.g.,* PX ; PX ; PX ; PX . Kroger for metropolitan Fort Worth (PX ; PX ; PX), as does Winn-Dixie. PX . Kroger also prepares

. These

. PX

. The evidence shows that, under the case law and the *Merger Guidelines,* metropolitan Fort Worth is a relevant geographic market.[20]

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[19]*See United States v. Waste Management, Inc.*, 743 F.2d 976, 980 (2d Cir. 1984). In upholding the district court's finding that Dallas is a separate geographic market from Fort Worth for refuse hauling, the Second Circuit noted that "the area between the two cities is not heavily urbanized and . . . the travel times between the more heavily populated areas is 45 to 50 minutes." *See also Brown Shoe Co. v. United States*, 370 U.S. 399 (1962) (upholding finding that Fort Worth is a separate geographic market for the retail sale of women's shoes and children's shoes); PX at 275-6.

[20]Kroger

(continued...)

2. Three Outlying Cities and Towns Are Relevant Geographic Markets[21]

Three outlying cities and towns – Granbury, Weatherford, and Brownwood, Texas – are distinct geographic markets, separated from other markets by distance and areas of low population density.[22] Kroger . PX

at 482-4; PX .

C. The Acquisition is Likely to Lessen Competition Substantially in the Sale of Food and Grocery Products in Supermarkets in Metropolitan Fort Worth and Outlying Cities and Towns

A number of factors – large increases in already high market concentration levels, the nature of competition between Kroger and Winn-Dixie, the proximity of many Kroger and Winn-Dixie stores, and the insufficiency of timely new entry – all point to a substantial likelihood of

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[20](...continued)

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[21]Although the Commission believes the transaction will violate Section 7 in four additional outlying areas, the Commission need not allege all potential violations to obtain a preliminary injunction pending plenary administrative adjudication.

[22]Granbury is located in Hood County, about 20-25 miles southwest of metropolitan Fort Worth. There are no supermarkets in the county outside Granbury. Post-acquisition, Kroger/Winn-Dixie will have 55% of the market, and the second largest competitor will have 28%. PX 62 at 1169. Weatherford is located in Parker County, about 15 miles west of metropolitan Fort Worth. Surrounding areas are sparsely populated, and the nearest supermarket outside of Weatherford is 15 miles away. Post-acquisition, Kroger/Winn-Dixie will have 46% of the market, and the second largest competitor will have 28%. PX 62 at 1171. Brownwood is located in Brown County, approximately 130 miles southwest of the Fort Worth area. The surrounding area is sparsely populated, and the nearest supermarket outside Brownwood is 15 miles away. Post-acquisition, Kroger/Winn-Dixie will have 52% of the market, and the second largest competitor will have 37%. PX 62 at 1172.

lessened competition as a result of the proposed acquisition.[23]

1. Substantially Increased Market Concentration in Each of the Geographic Markets Points to a Likelihood of Lessened Competition

Market concentration is "one of the most important factors to be considered" when determining the likely effects of a merger.[24] Each of the relevant markets affected by this transaction is already highly concentrated, and will become substantially more so as a result of this transaction. In metropolitan Fort Worth, Kroger and Winn-Dixie would have a combined 32.1% market share based on 1999 year end data, and the top four firms would control nearly 90% of the market. PX 62 at 1167. The Herfindahl-Hirschman market concentration index ("HHI") would increase 514 points to a post-merger level of 2249 – well into the "highly concentrated" range.[25] PX 62 at 1167. Kroger's post-merger market share and concentration levels would be even higher in the outlying cities and towns: Granbury (post-merger share of 55%; 3985 HHI), Weatherford

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[23]Because Section 7 addresses the probable future effects of an acquisition, it necessarily requires predictions and inherently "deals in probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). To establish a violation, the government need only show a reasonable probability, not a certainty, that the proscribed anticompetitive activity may occur. "All that is necessary is that the merger create an appreciable danger of [anticompetitive] consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Staples*, 970 F. Supp. at 1072.

[24]*Brown Shoe*, 370 U.S. at 343; *see also FTC v. Lancaster Colony*, 434 F. Supp. at 1094 ("statistics reflecting market share remain the primary index of market power").

[25]The HHI is calculated by squaring the market share of each competing firm and summing the results. The *Merger Guidelines* define a market with an HHI between 1000 and 1800 as moderately concentrated and one with an HHI of more than 1800 as highly concentrated. Mergers that produce an increase in the HHI of more than 100 in a moderately concentrated market or more than 50 points in a highly concentrated market potentially raise significant competitive concerns. Mergers that produce an increase in the HHI of more than 100 points in a highly concentrated market (1800 or greater) are presumed likely to create or enhance market power or facilitate its exercise. *Merger Guidelines,* Section 1.51.

(post-merger share of 46%; 3576 HHI), and Brownwood (post-merger share of 52%; 4212 HHI). PX 62 at 1169, 1171-1172. These market data by themselves show that the Commission can carry its burden of demonstrating that the effect of the acquisition will be "substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18. Similar market shares and concentration levels have led numerous courts to find likely violations of Section 7 of the Clayton Act.[26]

A very high level of concentration creates a rebuttable presumption of illegality. As the Supreme Court stated:

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence showing that the merger is not likely to have such anticompetitive effects.

Philadelphia Nat'l Bank, 374 U.S. at 363 (merger created bank controlling 30% commercial banking in Philadelphia metropolitan area; combined share of two largest firms increased from 44 % to 59 %).[27] The 30-35% market shares and concentration levels resulting from this transaction exceed the threshold the Supreme Court established as raising a presumption of illegality under Section 7: "Without attempting to specify the smallest market share which would still be

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[26] *See, e.g., FTC v. Elders Grain, Inc.*, 868 F.2d 901, 902 (7th Cir. 1989) (market share of largest firm increased from 23% to 32%); *Hospital Corp. of Am.*, 807 F.2d at 1384 (market share of second largest firm increased from 14% to 26%); *Warner Communications*, 742 F.2d at 1163 (four-firm concentration ratio of 75%); *FTC v. Bass Bros. Enters. Inc.*, 1984-1 Trade Cas. ¶ 66,041 at 68,609-10 (N.D. Ohio 1984) (market share of second largest firm increased from 20.9% to 28.5%).

[27] *See also American Stores,* 872 F.2d 837, 841 (9th Cir. 1989) (acquiring firm's average post-merger market share would increase to 24%, with a range from 15% to 38% in individual areas; two-firm concentration would increase from a pre-merger average of 51% to a post-merger average of 56%, and four-firm concentration would increase from an average of 73% to 79%) (quoting *Philadelphia National Bank*).

considered to threaten undue concentration, we are clear that 30% presents that threat." *Philadelphia Nat'l Bank*, 374 U.S. at 364.

2. The Acquisition Will Eliminate Intensive Head-to-Head Competition Between Kroger and Winn-Dixie

The proposed acquisition would terminate 22 years of intense, head-to-head competition between these two supermarket chains in the Fort Worth metropolitan area. Kroger, currently the second largest firm in the market, has sought to become the market leader through price wars, aggressive promotions, double and triple couponing, new store openings, expansion of existing stores, improved customer services, and other forms of head-to-head competition that have benefitted Fort Worth customers. Winn-Dixie has followed a similar strategy and .[28] PX at 145, 154.

The similar pricing and promotional strategies of Kroger and Winn-Dixie have resulted in substantial overlap in their customer bases. . PX at 528, 1284; PX 20 at 628, 633. Double and triple coupons lure customers to Kroger and Winn-Dixie. The availability of double coupons influences the store choice of over % of Kroger primary shoppers. PX at 615. Similarly, % of primary Winn-Dixie shoppers are influenced by the availability of double coupons when choosing a supermarket. PX at 615.

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[28]The other top chains are substantially differentiated. Albertson's with weekly specials but no double or triple coupons. PX at 392. Tom Thumb . PX at 148. A large portion of Minyard's sales are accounted for by its warehouse-style format (Sack N Save) and its Carnival stores, which .

The similar customer appeal of Kroger and Winn-Dixie is reinforced by the proximity of many of their stores. Six Winn-Dixie stores in metropolitan Fort Worth are located less than a mile from a Kroger store, and virtually all Winn-Dixie stores in metropolitan Fort Worth are within three miles of a Kroger store. *See* PX 73. The proximity of Kroger and Winn-Dixie stores is highly significant, because a store's "trade area" is generally no more than 2 to 3 miles. PX at 301-302; PX at 412-414. Consequently, Kroger's acquisition of these Winn-Dixie stores will eliminate direct head-to-head competition from a close competitor.

The acquisition also will put a brake on Winn-Dixie's expansion and modernization. Prior to the announcement of the acquisition, Winn-Dixie . *See* PX at 1031. After the acquisition was announced, . There are Winn-Dixie stores planned for construction with projected opening dates.

Winn-Dixie's plans to also will come to an end. Winn-Dixie . PX ; PX ; PX . Moreover, Winn-Dixie's PX at 984. The competitive stimulus and consumer benefit from these programs will be lost as a result of the acquisition.

3. The Acquisition Will Substantially Increase the Likelihood of a Unilateral Price Increase or Reduction in Services

The acquisition will enable Kroger to unilaterally exercise market power and harm consumers because the merged firm will account for a significant portion of the market share and

because a significant percentage of consumers view Kroger and Winn-Dixie as the closest substitutes. Unilateral competitive effects can arise in a variety of ways.

(1) Store Closures. One of the most direct ways to harm competition is to close down stores that are particularly close to one another. The presence of competing Kroger and Winn-Dixie stores in physical proximity to one another has benefitted competition and consumers.

.[29] With , Kroger will not be forced to compete as aggressively for customer sales dollars at its remaining supermarkets.

(2) Reduced Coupon Promotions. By eliminating its most direct rival in double and triple coupon promotions, Kroger would be able unilaterally to reduce or eliminate coupon promotions at some or all of its stores. Albertson's does not regularly offer double and triple coupons, and Tom Thumb, which does employ a couponing strategy,

. Consequently, Kroger will be able to reduce its use of double and triple coupons after the acquisition without worry of losing customers to its primary coupon competitor - Winn-Dixie. Fewer coupons obviously mean less discounting and higher effective prices for consumers.

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[29]

. PX at 1201.

. PX at 1209.

(3) Price Increases Through Price Zone Changes. Price zones are groups of stores that have the same prices for the same products. Kroger will be able to increase prices by simply moving some or all of its stores into higher-priced zones to reflect the less competitive post-merger conditions.[30] Price zones can have as few as one store for one product category. PX 58. Stores can be added to or taken out of a price zone, depending on competitive conditions. *See* PX at 196-7.

(4) Reduction of Store-Specific Promotions. Both firms run store-specific promotions . PX at 270-2; PX 46. Post-acquisition, there will be less competitive pressure to offer such promotions, effectively resulting in a price increase for consumers.

4. The Acquisition Will Substantially Increase the Likelihood of Coordinated Interaction

The substantially higher levels of market concentration resulting from this acquisition will better enable the few remaining large chains to reduce the amount of price competition. Indeed, there is evidence of recent non-competitive behavior among firms in the market. In 1999,

. PX at 149-52. This is a clear example of how consumers can be harmed by tacit coordination among firms in a concentrated market. Firms in such markets

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[30]Both parties currently charge different shelf prices on a limited number of items at compared to stores in . The parties are able to charge different prices by placing stores in different price zones. *See* PX at 187-90. For example, . PX . . PX ; PX . Changing store price zones is relatively easy and can be accomplished in a week through pricing software. PX at 184.

recognize that each can be better off by going along with others in raising prices rather than engaging in price competition.[31]

Another competitor agrees that Kroger would again be able to increase prices after the acquisition:

. PX

¶ 15.

Similarly, customers fear that prices will increase. PX at 1220; PX at 1222.

The likelihood of anticompetitive behavior is supported here by numerous market characteristics that facilitate coordinated interaction: (1) the relatively small number of firms necessary to reach and enforce coordinated behavior; (2) relatively inelastic demand (few consumers increase or decrease their food consumption in response to small price changes); (3) relatively stable market conditions and relatively constant demand; (4) the ready availability of price information through mutual price-checking, which enables firms to signal price changes[32] and detect cheaters; (5) recognition of mutual interdependence, as illustrated by the

, and followed by [ ]; (6) the ability to detect cheating since prices are publicly available; and (7) the ability to "punish" cheaters through episodic price

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[31]*See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 433 (9th Cir. 1990); 6 Philip E. Areeda, Antitrust Law 1429 (1986).

[32]The use of price signaling to end a price war is illustrated by in 1999. *See* PX at 261-2.

wars or selective price reductions that specifically target the cheating competitor's stores.

Moreover, there is a large incentive to coordinate behavior, because even a small increase in prices would be highly profitable. For example, a 1% price increase may double a supermarket's net profits. In addition to coordinating on price, firms also could coordinate on a number of other dimensions of competition, such as level of promotional activity, services, and hours of operation.[33]

5. Entry by New Supermarkets or Expansion by Existing Firms Would Be Unlikely to Occur in a Timely or Sufficient Manner to Prevent the Anticompetitive Effects of the Acquisition.

To defeat or deter the anticompetitive effects of the acquisition, entry must be likely to occur within two years, and at a sufficient scale to constrain the anticompetitive effects.[34] Timely and sufficient entry is unlikely in the Fort Worth metropolitan area. There is no guarantee that entry would be timely. It takes two years or more to open a new store, starting from the time a firm begins to search for a new site. *See* PX 41 at 1016. De novo entry also is a risky proposition. For example, Food Lion's attempted entry in the early 1990s failed and it exited the market after only a few years. PX at ¶ 12.

Another major impediment to significant entry – i.e., entry sufficient to counteract

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[33] *See, e.g., Detroit Auto Dealers Association, Inc. v. FTC*, 955 F.2d 457 (6th Cir. 1992) (affirming FTC decision that auto dealer associations unlawfully restricted competition by agreeing to restrict hours of showroom operation), *cert. denied,* 506 U.S. 973; *see also Local Union No. 89 v. Jewel Tea Co.,* 381 U.S. 676 (1965) (multiemployer agreement between supermarkets and unions not to sell meat between 6 p.m. and 9 a.m.; held protected by labor exemption).

[34]*See FTC v. Cardinal Health, Inc.,* 12 F. Supp.2d 34, 55-58 (D.D.C. 1998); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1071-80 (D. Del. 1991); *Merger Guidelines* § *3.* If entry is unlikely, untimely, or not on a sufficient scale to affect the market, incumbents will be able to raise prices without attracting a counteracting competitive response.

anticompetitive effects of the acquisition – is the need for a network of stores in order to have a significant impact on the market. PX 16 at 431; PX ¶ 10. While some entry is anticipated in response to the general growth in the Fort Worth metropolitan area, none of the entrants is likely to attain within two years the scale needed to counteract the anticompetitive effects of this acquisition.[35] Even with the anticipated entry and expansion, Kroger's post-acquisition market share in metropolitan Fort Worth would still be nearly 30% and the market would remain highly concentrated. PX 62 1168.

. PX ¶ 10.

Recent entry has not significantly affected prices or market shares. Indeed,

. PX at 407; PX at 156.

D. Defendants' Asserted Efficiencies Cannot Save This Transaction

The Supreme Court has stated that "possible economies cannot be used as a defense to illegality" in Section 7 merger cases. *FTC v. Procter & Gamble*, 386 U.S. 568, 580 (1967). *See also Philadelphia Nat'l Bank*, 374 U.S. at 371. Other courts have held that in appropriate circumstances, a defendant can rebut the presumption that a merger would substantially lessen competition by proving "substantial efficiencies that benefit competition and, hence consumers," *FTC v. University Health, Inc.*, 938 F.2d 1206,1222 (11th Cir. 1991). The antitrust agencies

[35]Over the next two years,

similarly consider pro-competitive efficiencies in evaluating a merger's likely competitive effect. *Merger Guidelines* § 4.0, at 18-20. All courts agree that the ultimate issue under Section 7 is whether a proposed merger is likely to lessen competition substantially in any line of commerce in any section of the country. If a merger would have such an impact, proven efficiencies, "however great, will not insulate the merger from a Section 7 challenge." *University Health*, 938 F.2d at 1222 n.29. The efficiency claims that defendants asserted before the Commission are largely unsubstantiated, not merger-specific, and in any event are unlikely to be passed on to consumers. Those efficiency claims cannot save this transaction.

II. THE COURT SHOULD GRANT A PRELIMINARY INJUNCTION AGAINST KROGER'S ACQUISITION OF WINN-DIXIE TEXAS BECAUSE THE FTC IS REASONABLY LIKELY TO SUCCEED ON THE MERITS AND AN INJUNCTION IS IN THE PUBLIC INTEREST

Where, as here, the Commission has demonstrated a likelihood of success on the merits, it is entitled to a preliminary injunction to preserve the Commission's ability to adjudicate the merits and order proper relief. The courts recognize the strong public interest in effective enforcement of the antitrust laws and in preservation of competition while a transaction that poses a significant competitive threat is analyzed in detail. *See, e.g., Warner Communications*, 742 F.2d at 1165. Although private equities may be considered in the balance, courts "must afford such concerns little weight, lest [they] undermine section 13(b)'s purpose of protecting the 'public-at-large, rather than individual private competitors.'"[36]

Potentially illegal acquisitions must be enjoined because firms in a combined operation

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[36]*University Health,* 938 F.2d at 1225 (*quoting National Tea Co.*, 603 F.2d at 697 n.4). *See also Warner Communications*, 742 F.2d at 116; *Bon-Ton Stores*, 881 F. Supp. at 878 (any "[d]oubts as to the necessity of issuing a preliminary injunction should be resolved in favor of granting the injunction. . . . This is often especially true in antitrust cases, where, once the proposed merger or acquisition is consummated, it becomes difficult, and sometimes virtually impossible for a court to 'unscramble the eggs.'") (quotations and citations omitted).

can seldom be reconstituted as separate, viable entities after the acquisition is consummated.[37] As the Ninth Circuit has held, "denial of a preliminary injunction would preclude effective relief if the Commission ultimately prevails" in a full trial. *Warner Communications*, 742 F.2d at 1165. A merger that threatens to reduce competition also should be enjoined to prevent the interim harm to competition that would result even if a suitable divestiture remedy could be devised. "Later remedies cannot remove retroactively the harm that has already occurred. Courts should, therefore, prohibit consummation of a merger pursuant to Section 13(b) where serious questions are raised about its legality."[38]

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[37]Elimination of traditional equity requirements under Section 13(b) manifests congressional recognition of the enforcement problem. *See Weyerhaeuser*, 665 F.2d at 1081 n.20. As the court noted in *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 790 (N.D. Ill. 1978):

> Section 13(b) in part reflects Congress' dissatisfaction with the efficacy of divestiture as a remedy in antitrust cases. To achieve its goal of facilitating successful governmental intervention before the eggs are even cracked, thereby relieving the government from the necessity of trying to unscramble them at some later date, Congress rendered the traditional equity requirements inapplicable in a Section 13(b) suit.

[38]*FTC v. Bass Bros. Enters.*, 1984-1 Trade Cas. (CCH) ¶ 66,041 at 68,622 (N.D. Ohio 1984).

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's request for a preliminary injunction.

Respectfully submitted,

Dated this _____ day of June, 2000.

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