The Honorable Ken Schubert
Hearing Date: November 3, 2022 at 2:00 p.m.
With Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC.; ALBERTSON S COMPANIES SPECIALTY CARE, LLC; ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC; THE KROGER CO.; KETTLE MERGER SUB, INC., Defendants.	NO. 22-2-18046-3 SEA PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER ORAL ARGUMENT REQUESTED

I. INTRODUCTION AND RELIEF REQUESTED

Albertsons and Kroger, which are direct competitors, collectively own and operate almost 350 grocery stores in Washington. They recently announced a plan to merge, with the deal closing in early 2024. Numerous state antitrust enforcers, including the Washington Attorney General, have already announced their intention to closely scrutinize the merger of these grocery giants, as will the federal government.

As a condition to the merger, Albertsons plans to issue next Monday, November 7, 2022, a "Special Dividend" of up to $4 billion dollars. Albertsons plans to pay for this dividend by reducing its cash-on-hand by $2.5 billion - almost 75% of its liquid assets - and by borrowing

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the remaining $1.5 billion. Albertsons' credit and liquidity ratings are already low and borrowing to pay for the dividend will significantly hamper Albertsons's ability to compete in what it has described as a fiercely competitive grocery industry.

A $4 billion payment to shareholders means $4 billion less for Albertsons to restock shelves, invest in its stores, and compete for customers, which will be essential for meaningful competition with Kroger during the pending enforcer review, as well if the merger is not approved. Inclusion of this Special Dividend in the merger agreement is an unreasonable restraint of trade and unfair method of competition in violation of RCW 19.86.030 and .020. The Attorney General therefore requests the Court issue a temporary restraining order (TRO) prohibiting the Albertsons Companies, Inc. ("Albertsons"), from issuing the $4 billion "Special Dividend" to its shareholders on November 7, 2022 to preserve the status quo so that Albertsons has the resources it needs to meaningfully compete during the merger review.

II. STATEMENT OF FACTS

A. Competitors Albertsons and Kroger Agreed to Drain Albertsons' Cash and Saddle it With Debt During Regulatory Review of the Proposed Merger

Albertsons, one of the largest full-service grocers in the United States, operates over 200 stores in Washington under the banners Albertsons, Safeway, and Haggen. Hanson Ex. A (9, 38). Kroger, the largest full-service grocer in the United States, has 54 QFCs and 33 Fred Meyer stores in the Puget Sound area alone. Hanson Ex. B (67, 73). Neighborhoods with both Albertsons and Kroger stores are commonplace throughout Washington, making them head-to-head competitors. Hanson Ex. B (86-87). If a consumer's neighborhood Albertsons runs out of baby formula, the nearest store could very well be a Kroger. Likewise, the nearest options for a cashier looking for work near where they live could very well be an Albertsons and a Kroger.

On October 14, 2022, Albertsons disclosed to the SEC that it had "entered into an Agreement" with Kroger. Hanson Ex. C (130). "As part of the transaction, Albertsons Cos. will

pay a special cash dividend of up to $4 billion to its shareholders." Hanson Ex. C (151). Absent a temporary restraining order, the special dividend will be "payable on November 7, 2022"—less than one week from now. *See id.*

Albertsons announced the $4 billion special dividend even though the "transactions contemplated by the Merger Agreement are subject to" additional specified conditions. Hanson Ex. C (130-31). One condition is "the expiration of the waiting period applicable to the transactions contemplated by the Merger Agreement under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ('HSR')." *Id.* Another condition that could prevent the contemplated transactions from being consummated is "any law or governmental order prohibiting the transactions contemplated by the Merger Agreement" Hanson Ex. C (130-31).

B. The Special Cash Dividend's Strain on Albertsons' Liquidity

Even before Albertsons and Kroger's Agreement, Albertsons' long-term credit rating for Albertsons was non-investment grade because it "faces major ongoing uncertainties to adverse business, financial and economic conditions." Hanson Exs. F, G (185-89). Indeed, "borrowing costs are set to rise to the highest level in 15 years" in November 2022. Hanson Ex. H. (190-95).

Despite its speculative grade credit rating, Albertsons intends to further strain its short-term operating ability by draining its cash and saddling itself with debt in order to pay a Special Cash Dividend as part of its Agreement and Plan of Merger with Kroger. Albertsons stated the dividend "will be funded using approximately $2.5 billion of cash on hand with the remainder in borrowings under the Company's existing ABL Facility." Hanson Ex. D (171). As a result, Albertsons' reported cash and cash equivalents will be reduced by approximately 74%—from $3.392 billion to $892 million. *See id.* (*compare* 163 *with* 171).

Albertsons admitted in its recent SEC filing, "We estimate our liquidity needs over the next 12 months to be approximately $10.0 billion." Hanson Ex. D (178). In addition to the $4 billion dividend, those liquidity needs include $6 billion for: "incremental working capital, capital expenditures, pension obligations, interest payments and scheduled principal payments

of debt, dividends on Class A common stock and Convertible Preferred Stock, operating leases and finance leases." Hanson Ex. D (178). However, Albertsons "cash flows from operating activities" alone will not be sufficient to meet the needed $6 billion in liquidity over the next year, "maintain its current debt ratings," or "respond effectively to competitive conditions." *See i* Hanson Ex D (*contrast* 28 *with* 179). Albertsons' representations in a SEC filing support this assessment: "[t]he food and drug retail industry is highly competitive" and that "[w]e and our competitors engage in price and non-price competition which, from time to time, has adversely affected our operating margins." Hanson Ex. A (10).

Instead, Albertsons plans to take on even more debt over the next twelve months. Hanson Ex. A (15). In less than a week, Albertsons plans to drain about 40% of its available line of credit—$3.76 billion—to pay $1.5 billion of the special cash dividend. After that time, Albertsons' ability to borrow for its remaining $6 billion liquidity needs will be reduced to $2.26 billion. Hanson Ex. A (28).

Based on the planned $4 billion dividend, Moody's downgraded Albertsons' existing non-investment grade short-term liquidity rating. The downgrade "reflects Albertsons lower cash balances and reduced revolver availability following the payment of the dividend." Hanson Ex. E (182). Similarly, The Center for Economic Policy and Research, in an article entitled, "Albertsons and Kroger Merger a Win for Private Equity and Loss for Workers," explained that "[a] dividend of this size could bankrupt the debt-ridden supermarket chain." Hanson Ex. I (197-99). Further, "payment of this special dividend sets Albertsons up for failure and provides Kroger with a powerful 'failing firm' defense" so "Kroger can argue that Albertsons will face bankruptcy if the merger is not approved." Hanson Ex. I (197-99).

C. The Cautionary Tale of Albertsons's Prior Safeway Acquisition in Washington

In 2014, Albertsons announced an acquisition of Safeway Inc. Hanson Ex. J (201). After reviewing the transaction, the FTC concluded it would have anticompetitive effects and ordered Albertsons to divest 26 Washington stores. Hanson Ex. L (249-51). Haggen, a regional

supermarket with only 18 stores, purchased 146 of the divested stores, including all 26 Washington stores. *In re HH Liquidation, LLC*, 590 B.R. 211, 219 (Bankr. D.C. Del. 2018)[1].

However, months after the divestiture, Haggen filed for Chapter 11 Bankruptcy and filed a federal lawsuit accusing Albertsons of intentionally sabotaging the divested stores. *Id.*; Hanson Ex. M (262-63). Haggen alleged that Albertsons had overstocked perishable inventory, understocked stable inventory, removed purchased fixtures, provided inaccurate pricing information, cut off advertising, lied about the merchandising data system, and misappropriated Haggen's store opening plan. Hanson Ex. M (262-63).

Meanwhile, Comvest, the private equity firm who owned a majority of Haggen, controlled Haggen's negotiations and saw the divesture as an opportunity for a payout. Comvest paid itself a $20 million dividend. *HH*, 590 B.R. at 237. Comvest structured the deal to extract and separate the real estate assets from the grocery operating business. *Id.* at 231. The operating business' lack of assets deprived Haggen stores of liquidity or the ability to obtain debt financing. *Id.* at 239.

Facing these headwinds, Haggen filed for bankruptcy and Albertsons took the opportunity to repurchase 14 stores it had previously divested. Hanson Ex. N (302-05). Haggen's remaining 15 supermarkets were re-acquired by Albertsons, further reducing competition in Washington grocery markets. Hanson Ex. N (302-05).

D. The State Provided Notice to All Parties

By process server, the State is serving copies of this TRO on all parties' registered agents and is providing courtesy copies of this TRO on the parties' attorneys.

III. STATEMENT OF ISSUES

Whether this Court should grant a Temporary Restraining Order enjoining Albertsons from issuing the $4 billion dividend prior to completion of an investigation of the proposed merger.

[1] Although, this is a bankruptcy case, the matter is cited for its factual determinations, not its law.

IV. EVIDENCE RELIED UPON

The State relies upon the declaration of Amy Hanson, with accompanying exhibits, and the pleadings and record before the Court.

V. AUTHORITY

The State seeks a limited TRO to simply preserve the status quo and prevent Albertsons from draining its cash reserves and saddling itself with additional debt. These are irreversible changes that will weaken its competitive standing as part of its Agreement and Plan of Merger with its competitor, even before federal and state antitrust enforcers have even had an opportunity to review the merger.

The Court may exercise its broad discretion to fashion injunctive relief when the party seeking a preliminary injunction shows (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of have or will result in actual and substantial injury. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998); *see also Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). "[T]hese criteria must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate." *Id.* To establish a clear legal or equitable right, one need not prove the merits of its case, but show instead a likelihood of success on the merits. *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982).

A. The State has a Clear Legal Right—and Obligation—to Prevent an Anticompetitive $4 Billion Dividend

The State has a sovereign interest in the enforcement of the Washington State Consumer Protection Act (CPA) and a right to enforce it per RCW 19.86.080. The State also has a quasi-sovereign interest in fostering fair and honest competition, protecting consumers from anticompetitive and unlawful practices, and supporting the general welfare of consumers and businesses in Washington and its economy. The Attorney General is charged with the constitutional mandate to ensure that companies do not fix prices, limit production, or create

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monopolies or trusts. Wash. Const. art. XII, § 22; RCW 19.86.110; *State v. Tacoma-Pierce Cnty. Multiple Listing Service*, 95 Wn.2d 280, 285, 622 P.2d 1190 (1980) ("The legislature in RCW 19.86.080, .140 has directed that the Attorney General is the sole government official or agency to enforce the Consumer Protection Act.").

The State brings two causes of action: that the agreement between Kroger and Albertsons by which Albertsons pays the special dividend, draining its cash on hand and taking on burdensome debt as part of the parties' merger, constitutes (1) an unreasonable restraint of trade in violation of RCW 19.86.030; and (2) an unfair method of competition in violation of RCW 19.86.020. As discussed below, the State is likely to succeed on the merits of both claims.

1. Albertsons and Kroger Likely Agreed to Restrain Trade

Kroger and Albertsons's agreement that Albertsons will pay a $4 billion dividend to its shareholders constitutes an unreasonable restraint of trade. RCW 19.86.030 declares unlawful "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade."[2] To state a RCW 19.86.030 claim, a plaintiff must allege: (1) an agreement, conspiracy or combination between two or more entities, and (2) the agreement is an unreasonable restraint of trade. *See Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 783 (9th Cir. 1996) (stating elements of claim under section one of the Sherman Act, including one more federal requirement that the restraint affect interstate commerce); *see also Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 55, 738 P.2d 665 (1987).

a. The Agreement is a Likely Unreasonable Restraint of Trade

To plead an unreasonable restraint, a plaintiff must allege the restraint falls under one of three rules of analysis: (1) *per se*, (2) rule of reason, or (3) quick look. *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013). *Per se* restraints fall on one end of the liability

[2] The legislature patterned the statute after Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. *See State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984). For that reason, federal court decisions interpreting the Sherman Act guide Washington courts in construing the state analogue. RCW 19.86.920; *see also Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 54, 738 P.2d 665 (1987).

spectrum comprising naked restraints of trade among competitors—such price-fixing agreements—that are *per se* unlawful. *See White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963). *Per se* illegal agreements "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, [ ] they are deemed unlawful *per se*." *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). On the other end of the liability spectrum are agreements whose competitive effects must be determined through a rule of reason analysis, a highly fact-intensive inquiry which asks whether the anti-competitive effects of the challenged restraint outweigh the pro-competitive benefits. *U.S. v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 668-69 (3d Cir. 1993). The rule of reason analysis requires either (1) "actual anticompetitive effects, such as reduction of output, increase in price, [ ] deterioration in quality of goods or services[,]" or (2) that the defendant possesses market power—"the ability to raise prices above those that would prevail in a competitive market." *Id*. (citations omitted). The analysis generally involves the plaintiff establishing an anticompetitive effect by presenting proof of a relevant product market (which identifies the competitive products at issue), a geographic market (which identifies the geographic boundaries in which the products compete), and that a competitor has market power (the ability to profitably increase prices or reduce output). *See generally Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 887, 885–86, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

On the other hand, a quick look review asks whether "a great likelihood of anticompetitive effects can easily be ascertained" by examining the restraint, and considering defendants' justifications for it. *See Cal. Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). In the spectrum of antitrust analyses, an abbreviated or 'quick-look' analysis is appropriate when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets. *Id*. In other words, quick look review "is

usually best reserved for circumstances where the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications." Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 1911a at 267 (3d. ed. 1996).

b. The Special Divided Agreement and Plan of Merger is an Agreement Between Two or More Entities

Here, "an observer with even a rudimentary understanding of economics" can readily conclude that agreeing Albertsons will drain nearly all its cash reserves and take on debt to pay a $4 billion dividend will have significant competitive effects on Albertsons in the mid-to-long-term. *See Cal. Dental Ass'n*, 526 U.S. at 770. Indeed, Kroger and Albertsons agreed the dividend must be paid before federal and state antitrust enforcers have had an opportunity to review the transaction, which the parties admit is not expected to close until 2024. Accordingly, for the foreseeable future, Albertsons will have less resources to invest in stores, restock its shelves, absorb and adjust to supply shocks and shortages, invest in employees, and otherwise compete aggressively for customers. Albertsons will take on approximately $1.5 billion in additional debt to pay the $4 billion dividend. Furthermore, the planned dividend led to Albertsons' liquidity rating—which was already at speculative—to be downgraded. Coupled with the highest interest rates the country has seen in nearly two decades, the potential for an economic recession, and a prolonged period of uncertainty regarding Albertsons' future during the pendency of the merger review, Albertsons' market position will be severely weakened by paying the dividend.

2. The Agreement is Likely an Unfair Method of Competition

The State is likely to succeed on the merits of its claim Albertsons and Kroger engaged in unfair methods of competition. RCW 19.86.020 prohibits "[u]nfair methods of competition . . . in the conduct of any trade or commerce." Conduct which violates the letter of the antitrust laws, such as an agreement in restraint of trade, also constitutes an unfair method of

competition. *State v. Black*, 100 Wn.2d 793, 800, 676 P.2d 963 (1984) (citing *FTC v. Cement Inst.*, 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793 (1948)). The Washington Supreme Court held that "conduct which threatens an *incipient* violation of" RCW 19.86.030 constitutes a violation of RCW 19.86.020. *Id*. And conduct which violates the *spirit* of the antitrust laws may also constitute an unfair method of competition even though it does not actually threaten to violate the law. *Id.*

An agreement to purchase a competitor conditioned on blunting competition with that competitor is a violation of RCW 19.86.030 as well as an unfair method of competition under RCW 19.86.020. However, even if the agreement to weaken Albertsons (to Kroger's benefit) is not a violation of RCW 19.86.030, it would still violate RCW 19.86.020 in that it violates the spirit of Washington's antitrust laws and is an incipient violation of RCW 19.86.030 in that it will immediately deprive Albertsons of its cash on hand affecting its ability to compete.

B. The State has a Well-Grounded Fear of Immediate Invasion of Its Right to Protect Consumers and Prevent Anticompetitive Conduct

The State has a well-grounded fear of immediate invasion of its right because the anticompetitive dividend is set to be paid this Monday—on November 7, 2022. Once the dividend is paid, it will likely be very difficult to recover in order to put the merging companies back in the position they held before they agreed Albertsons would pay a dividend substantially impairing its ability to compete. Regardless, it is no defense to a TRO to argue that the harm may be "un-done." *Sierracin*, 108 Wn.2d at 62-63 (no irreparable harm need be shown unless the party to be enjoined did not receive notice); *accord County of Spokane v. Loc. No. 1553, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 76 Wn. App. 765, 770, 888 P.2d 735, 739 (1995), *abrogated on other grounds by Riddle v. Elofson*, 193 Wn.2d 423, 439 P.3d 647 (2019). Moreover, if the $4 billion dividend issues, the State will be forced to review the proposed merger under an artificially constructed circumstance conducive to the argument that the merger is necessary because Albertsons is cash-strapped.

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C. The Dividend Will Result in Actual and Substantial Injury

The harm to the State if the dividend occurs is actual and substantial. In a typical merger, the parties include an ordinary course covenant to ensure the business the buyer pays for at closing is the same as it decided to buy at signing, which mitigates "the incentive for the seller to act opportunistically between signing and closing, an incentive sometimes referred to as the moral hazard problem." *Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.*, No. CV 2020-0282-KSJM, 2021 WL 1714202, at *38 (Del. Ch. Apr. 30, 2021) (internal citations and quotations omitted). In an ordinary course covenant a seller will promise to "operate its business in the ordinary course consistent with past practice, taking reasonable steps to preserve its business and goodwill and its relationships with customers, creditors, employees, and suppliers." Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50. Wm. & Mary L. Rev. 2007, 2039 (2009).

Here, however, Albertsons is draining its cash and taking on additional debt, rather than preserving its value. Albertsons plans to issue the dividend in a matter of days. Although the merger is not expected to close until 2024, Albertsons risks significant undercapitalization because its credit and liquidity ratings have been reduced, affecting its ability to keep shelves stocked, pay creditors, borrow capital, and keep workers employed. Supermarkets compete in prices, quality, selection, and customer service. If Albertsons uses its cash on hand and takes on additional debt in the interim it will hamper its ability to compete. The Haggen debacle demonstrates that a cash strapped grocery store facing unexpected headwinds can quickly devolve into a failed firm. And, Albertsons had a front-seat-view to how a failed competitor can easily become an acquisition. At minimum, Albertsons drain of cash and increase in debt limits its ability to fund competition with Kroger who simultaneously announced the opposite tactics. Having less cash on hand and taking on debt risks impairing Albertsons' ability to keep shelves stocked and ensure timely delivery of fresh produce given current inflation concerns, diesel

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shortages, and supply chain issues. Albertsons' dividend does not just harm Albertsons, it harms competition in Washington State and, thus, everyone who shops at its stores and those of its competitors.

Even before the dividend was announced, Albertsons had a speculative credit and liquidity rating. Now that Albertsons announced it is borrowing funds to pay shareholders a dividend, its liquidity rating has been downgraded. Hanson Ex. E (182). The dividend could bankrupt Albertsons, setting it up for failure and for Kroger to "argue that Albertsons will face bankruptcy if the merger is not approved." Hanson Ex. I (197-99).

Companies make failing firm defenses during merger reviews, arguing that the anticompetitive harm of the merger is "preferable to the adverse impact on competition and other losses if the company goes out of business," attempting to show (1) that their resources "were so depleted and the prospect of rehabilitation [was] so remote that [they] faced the grave probability of a business failure, and (2) that there was no other prospective purchaser" but the one that is a party to the agreement. *United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415, 444 (D. Del. July 13, 2017) (internal citations and quotations omitted). During the Haggen debacle, Albertsons was able to reacquire 14 stores there were deemed anticompetitve by the FTC and Haggen, because Haggen was a failed firm. Regardless of whether Albertsons devolves into a failing firm, the $4 billion dividend fundamentally changes the positioning of two competitors. This change will become irreversible on Monday invading Washington consumers' rights to competitive markets and fair methods of competition.

If the dividend goes forward, it will leave Albertsons in a weakened competitive position relative to other supermarkets. It will prevent the State from assessing (and addressing) the true market positions of the merging parties. And it will leave consumers to shop at two of Washington's largest supermarket chains that no longer compete for their business in any meaningful way. The State has a well-grounded fear of an immediate invasion of its rights, and a TRO is the only way to protect consumers and competition among supermarkets.

VI. CONCLUSION

The State respectfully requests that the Court grant its motion and enjoin Albertsons Companies, Inc. from issuing the $4 billion "Special Dividend" to its shareholders on November 7, 2022. A proposed order granting the relied requested accompanies this motion.

DATED this 1st day of November 2022.

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I certify that this memorandum contains _____ words, in compliance with the Local Civil Rules.