UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, et al., **Plaintiffs,** **v.** **THE KROGER CO., et al.,** **Defendants.**	**CIVIL ACTION** **Case No. 1:22-cv-3357-CJN** **Hon. Carl J. Nichols**

DEFENDANT ALBERTSONS COMPANIES, INC.'S
MEMORANDUM OF LAW IN OPPOSITION TO THE
<u>PLAINTIFF STATES' MOTION FOR A PRELIMINARY INJUNCTION</u>

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Defendant Albertsons Companies, Inc. ("Albertsons" of the "Company") hereby submits this brief in opposition to the Motion for a Preliminary Injunction (DE 54) ("PI Motion") filed by the District of Columbia, State of California, and State of Illinois (together, the "Plaintiff States").

PRELIMINARY STATEMENT

Roughly a month ago, this Court denied the Plaintiff States' Motion for Temporary Restraining Order (DE 4) ("TRO Motion") requesting this Court restrain payment of a special dividend (the "Special Dividend") duly approved by Albertsons' board of directors (the "Board"). After considering extensive briefing, declarations from Albertsons' and The Kroger Co.'s ("Kroger") CFOs, and declarations from two experts, this Court concluded that the Plaintiff states were not likely to succeed on the merits of their claims. *See* Declaration of Edward D. Hassi ("Hassi Decl.") Ex. 1 ("TRO Tr."). In particular, this Court concluded that Plaintiff States could not show that that Albertsons and Kroger had agreed to pay the Special Divided or that the Special Dividend would weaken Albertsons. Indeed, Albertsons is a thriving business: it expects to have over $75 billion in revenues in fiscal 2022, is well-capitalized, has limited debt and ample free cash flow, and is more than strong enough financially to return $4 billion to shareholders without delay.

Now, the Plaintiff States seek a preliminary injunction and openly ask the Court to "revisit" (i.e., reconsider) its previous ruling on the TRO Motion. *See* PI Motion at 2. Yet the Plaintiff States have failed to identify any changes since that ruling that warrant departure from the Court's prior decision not to enjoin payment of the Special Dividend. As to matters of fact, the supposedly "new" evidence cited in the PI Motion is based on public documents or produced information that was available at the time of the Court's prior ruling on the TRO Motion. To the

extent any of that is even arguably new, Albertsons addresses those discrete items in the accompanying Supplemental Declarations of Sharon McCollum and Professor David Smith. By the same token, the Plaintiff States do not make any genuinely "new" legal arguments, but instead attempt to repackage the same flawed arguments relating to Albertsons' purported "agreement" with Kroger and the Company's ability to compete after payment of the Special Dividend.

Although Albertsons has tried to focus on the purportedly new points raised by the Plaintiff States' below, it is clear the Plaintiff States still cannot establish the required elements for the extraordinary and unprecedented relief they seek. They continue to have no likelihood of success on their fatally flawed claims and cannot establish a threat of irreparable harm to competition. In addition, the balance of equities still clearly disfavors granting injunctive relief that would not serve the public interest but cause serious and unprecedented harm to Albertsons by disrupting Albertsons' internal corporate governance, displacing the business judgment of the Board, depriving Albertsons' shareholders of their contractual right to receive the Special Dividend, eroding the confidence of the Company's shareholders, and discouraging future investment in the Company. And the indefinite relief the Plaintiff States seek would extend *at least* a year, *see* PI Motion at 2, and impose significant economic harm on Albertsons' shareholders that could exceed $1 million *per day*. Like the TRO Motion before it, the PI Motion should be denied.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are set forth in the Declarations of Sharon McCollam, Albertsons' President and CFO, dated November 4, 2022 (DE 44) ("McCollam 11/4 Decl.") and December 8, 2022 ("MCCollam 12/8 Decl."), and in Albertsons' Opposition to TRO Motion (DE 37) ("TRO Opposition").

In short, Albertsons commenced a broad-ranging strategic review in November 2021 in which it carefully considered numerous strategic options that would return capital to the Company's shareholders in the near term. *See* McCollam 11/4 Decl. ¶¶ 11–13. The options the Board considered included a share repurchase and/or tender offer, including in aggregate amounts in excess of $4 billion, and, later, a sale of the Company accompanied by a Special Dividend. *Id.* at ¶¶ 11-14; Gitlin Decl. in Support of Motion for TRO dated November 2, 2022 (DE 07-02) Ex. 2, at ACI_DCCID-0000076, 0000082-88. Ultimately, the Board settled on the latter. The Company made clear in its discussions with Kroger that it expected to return capital to all Albertsons shareholders on a shorter time horizon. In particular, it planned to do so in the form of a dividend promptly following a merger agreement signing. McCollam 11/4 Decl. ¶ 21.

Accordingly, it was understood that whether Kroger acquired Albertsons or not, Albertsons would return capital to its shareholders. *Id.* ¶ 21. The Merger Agreement reflects that position, giving Albertsons the option (but not the obligation) to issue a Special Dividend of up to $4 billion, which would reduce the per share merger consideration by an amount equivalent to that Special Dividend. *Id.* ¶¶ 21, 24; *see also id.* Ex. A. Albertsons ultimately decided to pay a $6.85 per share Special Dividend to its shareholders with payment on November 7. *Id.* ¶ 1.

On November 2, the Plaintiff States filed a complaint alleging Albertsons and Kroger violated Section 1 of the Sherman Act and certain state analogues by agreeing to Albertsons'

payment of a Special Dividend that would "weaken" Albertsons and harm competition, and sought a TRO restraining payment of the Special Dividend. After considering the parties' submissions, supporting declarations and exhibits, and oral argument, this Court denied the TRO Motion on November 8. *See generally* TRO Tr. Payment of the Special Dividend has been temporarily restrained by order of a Washington state court. Declaration of Sharon McCollam dated December 8, 2022 ("McCollam 12/8 Decl.") ¶ 12. That court heard live testimony from Albertsons' and Kroger's CFOs and Albertsons' expert, Professor Smith, on December 7, and is set to decide a motion for a preliminary injunction on December 9. *See generally* Hassi Decl. Ex. 2 (Rough Transcript of Proceedings, King County Superior Court, Dec. 7, 2022) ("WA Tr."). Absent further relief, the temporary restraining order enjoining payment of the Special Dividend will expire on December 9.

ARGUMENT

I. THE PLAINTIFF STATES BEAR A HEAVY BURDEN OF SHOWING THAT PAYMENT OF THE SPECIAL DIVIDEND SHOULD BE ENJOINED.

The same legal standards the Court applied in denying the Plaintiff States' TRO Motion govern issuance of a preliminary injunction. *Babamuradova v. Blinken*, No. 22-CV-1460 (JDB), 2022 WL 4479801, at *1 (D.D.C. Sept. 27, 2022). Like a TRO, a preliminary injunction is an "extraordinary and drastic remedy" that should be granted sparingly. *Pantoja v. Martinez*, 567 F. Supp. 3d 76, 80 (D.D.C. 2021); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A party seeking a preliminary injunction bears the burden of demonstrating that: "(1) it has a substantial likelihood of succeeding on the merits; (2) it will suffer irreparable harm if the injunction is not granted; (3) other interested parties will not suffer substantial harm if the injunction is granted; and (4) the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Preliminary relief is "never awarded as of right," *Winter*, 555 U.S. at 24, and "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). A movant's failure to establish the required elements for preliminary relief mandates denial of the motion. *Altschuld v. Raimondo,* No. 21-CV-02779 (TSC), 2021 WL 6113563, at *2 (D.D.C. Nov. 8, 2021) ("[E]ach [preliminary injunction] factor must still be present"). Here, as with the TRO Motion this Court previously denied, the Plaintiff States cannot establish that *any* of the elements required to win a preliminary injunction are satisfied – much less all of them – and the PI Motion should be denied as a result.

II. THE PLAINTIFF STATES HAVE NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

To secure a preliminary injunction, the Plaintiff States "must show . . . a *substantial* likelihood of success on the merits." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (emphasis added) (internal quotation omitted). If they cannot show a substantial likelihood of success on the merits, the Plaintiff States are "not entitled to any relief, let alone the extraordinary remedy" of a preliminary injunction. *See Schindler Elevator Corp. v. WMATA*, 514 F. Supp. 3d 197, 212 (D.D.C. 2020), *aff'd* No. 21-7008, 2021 WL 4928730 (D.C. Cir. Oct. 22, 2021). Here, the Plaintiff States' PI Motion "is doomed for a . . . fundamental reason: [Plaintiff States] fail to state a valid cause of action." *Butler v. Georgetown Univ.*, No. 22-CV-1517 (TSC), 2022 WL 1773479, at *3 (D.D.C. June 1, 2022); *see also Unsuck DC Metro v. Wash. Metro. Area Transit Auth.*, No. 20-7051, 2022 WL 683403, at *2 (D.C. Cir. Feb. 11, 2022) ("[W]ithout a cause of action, [Plaintiff] cannot ultimately succeed on the merits of its suit."); *Ark. Dairy Co-op Ass'n, Inc. v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009) (same).

A. The Plaintiff States Cannot Establish A Violation of Section 1 Of The Sherman Act.

The Plaintiff States purport to challenge the Special Dividend as a violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The elements of a Section 1 claim include: (1) the existence of an agreement, contract, combination, or conspiracy among two or more persons or entities, (2) that unreasonably restrains trade or competition. PI Motion at 12. The Plaintiff States cannot establish that Albertsons' independent decision to pay the Special Dividend as the culmination of a capital return strategy it began evaluating long before Kroger ever expressed interest in acquiring Albertsons constitutes an "agreement" with Kroger that unreasonably restrains trade. Indeed, it is black letter law that "[i]ndependent action is not proscribed" by Section 1 or its state analogues. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761

(1984); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (Section 1 "does not reach conduct that is wholly unilateral.").

1. The Plaintiff States Present No New Evidence of An Agreement to Pay a Special Dividend or Competitively Weaken Albertsons.

In denying the TRO Motion, this Court determined there "no evidence of an agreement between Albertsons and Kroger to pay the pre-closing dividend," and, "in fact, the evidence before the Court points to an independent decision by Albertsons to return value to its shareholders." TRO Tr. at 66:19-22. Nothing in the PI Motion constitutes "new" evidence showing an "agreement" between Albertsons and Kroger that unreasonably restrains trade and justifies a departure from this Court's prior well-supported findings.

First, the Plaintiff States emphasize that Albertsons "planned to return capital to shareholders via a tender offer stock buyback . . . and only switched to a dividend because of the merger negotiations." PI Motion at 5-6, 13. This is not disputed, but it is not new evidence of an "agreement" between Albertsons and Kroger to pay the Special Dividend or to competitively weaken Albertsons. Indeed, the Plaintiff States already presented this argument in connection with their TRO Motion. *See* TRO Tr. at 60:25-61:14 (stating "they [Albertsons] reached an agreement with Kroger, and part of the agreement is paying the special dividend in lieu of other options," including a tender offer). But Albertsons has explained that it began a strategic review in November 2021 - long before the Merger with Kroger was a possibility - of means to return capital to its shareholders in the near term, and that the form of a Special Dividend as opposed to a tender offer was ultimately chosen by Albertsons due to the merger discussions with Kroger and securities regulation issues that precluded a tender offer in those circumstances. S*ee id.* at 39:20-41:14; *see also* WA Tr. at 135:22–136:8; 141:4–142:4 The fact that Albertsons ultimately elected to return capital in the form of the Special Dividend as opposed to a tender offer in order

to execute its long-planned near-term return of capital is not proof of an agreement with Kroger to pay a Special Dividend that the Merger Agreement allows but does not require. The Plaintiff States elevate the form of the capital return over the substance by claiming this change somehow proves an "agreement." Moreover, in emphasizing the form of near-term capital return, the Plaintiff States suggest that there would be no harm to competition if Albertsons elected to conduct a tender offer in the same or greater amount than the $4 billion Special Dividend. But executing a tender offer in the same amount as the Special Dividend would have an identical impact on the Company's balance sheet, which eviscerates the Plaintiff States' claim that this use of capital to pay the Special Dividend somehow harms Albertsons or renders it unable to effectively compete in the marketplace.

Second, the Plaintiff States claim that Kroger was "heavily involved in determining the amount of the special dividend," and "the inclusion of a cap on the Special Dividend makes clear that it is a product of Defendants' agreement." PI Motion at 6-7, 13-14. This too is a rehash of issues argued at the TRO hearing and is anything but "new." *See* TRO Tr. at 31:19-32:10 (addressing Plaintiff States' argument that "cap" on amount of dividend is proof of unlawful agreement). The fact that the Defendants negotiated a cap on the amount of any dividend that *could* be paid, does not establish an agreement between Albertsons and Kroger that the Special Dividend *would* be paid, or to competitively weaken Albertsons. Indeed, the Court already found that the Merger Agreement "does not require the payment of the preclosing dividend" and only "caps the amount of the dividend to $4 billion and explains how the purchase price will be adjusted if the dividend is paid" – which "all makes good sense." *Id.* at 66:25-67:8. The Plaintiff States provide no reason for the Court to depart from its prior findings on this point. Indeed, the purported "new evidence" they cite in their PI Motion only confirms that the Special Dividend is

independent of the Merger Agreement and will be paid "*regardless of closing*." *See* PI Motion at 4 (quoting Ex. 2) (emphasis added). To the extent Kroger was involved in determining the maximum amount of the Special Dividend, the Plaintiff States effectively admit the purpose was to ensure that the Special Dividend did *not* weaken Albertsons' ability to compete, which disproves the Plaintiffs' theory of an agreement to harm Albertsons. PI Motion at 6-7, 13; *see also* WA Tr. at 111:21–113:13.

Third, the fact that the Special Dividend and the Merger were announced on the same day and in the same press release does not render the permissive language in the Merger Agreement "irrelevant." PI Motion at 6. Again, the Court has already determined that the Merger Agreement and the press release do not show that Defendants "agreed that Albertsons was obligated to pay the dividend." TRO Tr. at 68:22-69:7. Moreover, the fact that the Merger and Special Dividend were announced together has a straightforward explanation: Albertsons wanted to ensure that the public markets and its shareholders understood that that the merger consideration would be reduced by the amount of the Special Dividend and did not misunderstand that they would be entitled to *both* a Special Dividend payment and unadjusted merger consideration (i.e. more than the top-line merger consideration of $34.10 per share). WA Tr. at 147:7–149:4. Albertsons' efforts to ensure public announcements of the Merger and Special Dividend were not misunderstood by investors cannot be twisted into evidence that Albertsons entered into an agreement with Kroger to pay the Special Dividend when the Merger Agreement itself clearly shows otherwise.

Finally, as a matter of law, the Plaintiff States cite no authority for the counterintuitive proposition that a company's decision to return capital to its own shareholders somehow

establishes an "agreement" with another company. Such independent action cannot be the basis for a claim under Section 1 of the Sherman Act.

2. The Plaintiff States Still Cannot Show Payment Of The Special Dividend Will Leave Albertsons Unable To Effectively Compete Or Otherwise Restrain Trade Or Competition.

To establish likelihood of success on the merits, the Plaintiff States must also credibly allege – and show a likelihood of proving – an unreasonable restraint of trade or commerce, evidenced by an impact on competition. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 98, 104 (1984) ("[E]ssential inquiry" is what "impact on competition" the alleged restraint has). This Court has already determined that the Plaintiff States presented "insufficient evidence that Albertsons will not be able to effectively compete" after payment of the Special Dividend or that payment of the Special Dividend will "otherwise restrain trade," and thus failed to show payment of the Special Dividend will harm competition. TRO Tr. at 69:18-72:20. In particular, the Court found that the Plaintiff States failed to show that "Albertsons will have insufficient liquidity to compete" after payment of the Special Dividend, citing Albertsons' "substantial operating revenues," "excess cash flow," and "earnings before interest, taxes, depreciation, and amortization" ("EBITDA"), as well as available liquidity under its "existing ABL facility." *Id.* None of the arguments presented in the PI Motion undermine the Court's prior findings.

First, as the Court already determined, the record establishes that Albertsons will have more than sufficient resources to effectively compete as it will continue to generate significant excess cash from operations on annual revenues projected to be in excess of $75 billion for fiscal year 2022. McCollam 11/4 Decl. ¶¶ 8-10, 18, 30, 42-56, 59-66.

It was not a "close call" that Albertsons had sufficient resources to pay the Special Dividend on the original payment date of November 7, McCollam 11/4 Decl. ¶ 30,

Second, the Plaintiff States' claim that Albertsons will face a liquidity "shortfall" fundamentally misinterprets Albertsons' financial statements and misapplies basic accounting principles. *See* PI Motion at 7-9, 15-17; Weisbach Supp. Decl. ¶¶ 16-19. Specifically, the Plaintiff States and Professor Weisbach mix apples and oranges in using Albertsons' "net income" from recent years rather than its revenues to assess whether the Company will be able to meet its future liquidity needs. "Net income" is not useful for determining Albertsons' liquidity because it incorporates non-cash expenses that do not impact liquidity (e.g. depreciation and amortization) and is calculated *after* payment of expenses that are included among the Company's liquidity needs (e.g. pension obligations, interest, leases). As a result, using "net income" to evaluate liquidity effectively double counts certain expenses and misleadingly understates the Company's ability to meet its liquidity needs. *See* McCollam 12/8 Declaration ¶¶ 9-11; Smith 12/8 Declaration ¶¶ 2-5. As Ms. McCollam explained in her Nov. 4 Declaration, in its second quarter fiscal 2022 10-Q, the Company estimated its liquidity needs for the next year at $10 billion inclusive of the Special Dividend, and expected that cash flows from operating activities and other sources of liquidity, including the ABL, were sufficient to meet those needs for the next 12 months and the foreseeable future. McCollam 12/8 Decl. ¶ 6. McCollam 11/4 Decl. ¶ 59-61, Ex. E at 31. Ms. McCollam further explained that the Company "has demonstrated a proven track record of generating surplus cash flows" and "expects to continue to generate surplus cash flows in the foreseeable future." McCollam 12/8 Decl. ¶ 7-8; McCollam

11/4 Decl. ¶ 63. [redacted]

[redacted].

Third, the Plaintiff States again misunderstand the company's use of its ABL facility or "revolver," which is a significant source of available liquidity. PI Motion at 9-10, 17-18. While Section 6.1(n) of the Merger Agreement does limit use of the ABL to "ordinary course of business consistent with past practice," ABL facilities exist in part to provide a source of liquidity to support business operations and there is no reason to interpret 6.1(n) as barring Albertsons from drawing on the ABL to execute on its capital investment plans or operate its business if the need should arise in the future (even if that need would not have arisen in absence of the Special Dividend). Moreover, it is public knowledge that Albertsons did draw on the ABL to finance payment of the Special Dividend. The Merger Agreement does not forbid this, and Albertsons has not been informed by Kroger that it views this use of the ABL as inconsistent with the Merger Agreement.[1] Finally, the fact that borrowings under the ABL incur interest does not mean that Albertsons has not contended with the "fiscal implications" of utilizing the ABL." PI Motion at 10. Indeed, when assessing its expected liquidity needs, the Company assesses its expected interest obligations, *see* McCollam 12/8 Decl. ¶¶ 9-10, and the anticipated interest on the $1.4 billion draw, even at rising interest rates, is miniscule in the context of Albertsons' overall business and cash flows. *See* WA Tr. at 178:7-21.

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[1] Relatedly, the Plaintiff States' claim that Albertsons referenced a "misleading" presentation regarding the Company's past use of its ABL facility because the Company previously drew $2 billion from its ABL facility in March 2020. PI Motion at 9-10. The presentation was not misleading because it presented data on ABL usage on a quarterly basis. While Albertsons did draw $2 billion from its ABL in March 2020 to maximize flexibility in the earliest days of the COVID pandemic and related lockdowns, it fully repaid the $2 billion by June 19, 2020 once the pandemic's impact on the business were better understood and the additional cash was not necessary. PI Motion at 9-10; Gitlin 12/1 Decl. Ex. 6.

Finally, the suggestion that Albertsons' projections of future performance are unreasonably optimistic or that it would have particular difficulty raising credit given looming economic challenges and a potential recession is incorrect. PI Motion at 15-16; Weisbach Supp. Decl. ¶¶ 15, 21-23. [REDACTED] *see also* Smith 12/8 Decl. ¶ 4. This makes sense given Albertsons is a consumer staples company, which traditionally performs well during times of economic challenge because its business is tied to non-discretionary spending. Smith 12/8 Decl. ¶ 8. The suggestion that Albertsons' financial projections are unrealistic such that Albertsons will not be able to compete in a possible recession is simply not credible given Albertsons' track record and the steady or even countercyclical nature of its business.

B. THE PLAINTIFF STATES CANNOT ESTABLISH A VIOLATION OF STATE ANTITRUST LAWS.

For the reasons described above, the Plaintiff States still cannot meet their burden to establish a likelihood of success on their claim that Albertsons has violated Section 1 of the Sherman Act. Accordingly, they likewise cannot show Albertsons has violated the District of Columbia Antitrust Act, D.C. Code § 28–4502 or the Illinois Antitrust Act, 740 ILCS 10/3. *See* TRO Opposition at 16.

III. THE PLAINTIFF STATES CANNOT DEMONSTRATE IRREPARABLE HARM.

The Plaintiff States still cannot meet the "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. To establish irreparable harm, the Plaintiff States must show the injury alleged is "both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable

relief." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (cleaned up). A "possibility of irreparable harm" is not enough; the Plaintiff States must demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (internal citations omitted).

This Court has already determined that the Plaintiff States "have not established that payment of the pre-closing dividend is likely to result in a lessening of competition, and that is the irreparable harm that they assert here." TRO Tr. at 72:21-73:5. As explained above, nothing in the PI Motion provides any grounds to reconsider the Court's prior findings on this point, or to find that payment of the of the Special Dividend will "irreversibly harm" Albertsons' capital structure. PI Motion at 25-26. To the contrary, Albertsons has continued its strong financial performance in its recently closed third quarter, confirming it is in a strong position today and will continue to be in a strong position to compete after the Special Dividend is paid. McCollam 12/8 Decl. ¶¶ 6-7; *see also* McCollam 11/4 Decl. ¶¶ 8-10, 18, 30, 42-56, 59-66. Simply put, the Plaintiff States still have no credible basis to challenge the Special Dividend as harmful to competition.

At this stage, the Plaintiff States' claim of "irreparable harm" appears to be based largely on Albertsons' representations that it will pay the Special Dividend as soon as legal restraints on such payment are lifted. *See* PI Motion at 24-25. This should not be a surprise given the Special Dividend is due and owing to Albertsons shareholders. The Plaintiff States cannot claim they will suffer irreparable harm from and block payment of a dividend simply because they do not think payment of the dividend is the best use of the company's capital, and – in the absence of an

injunction – the company will pay such dividend.[2] If so, a State AG or other party could obtain an injunction blocking payment of any dividend they did not think was appropriate.

Here, the Plaintiff States' purported concern is with the Merger and its effect on competition. Albertsons will remain a separate and competitive business until the Merger closes, and it cannot close until cleared under the antitrust laws. McCollam 11/4 Decl. ¶¶ 17, 58. To the extent their concerns go to the Merger, the Plaintiff States will have every opportunity to conduct a full and rigorous review of the Merger through the customary and well-established process, and may seek to enjoin the Merger if they determine – after a thorough investigation – that it is likely to have anticompetitive effects. That process is more than adequate to protect the Plaintiff States' asserted interest in competition.

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTERESTS DOES NOT FAVOR A PRELIMINARY INJUNCTION.

The equities and relevant public interests continue to weigh heavily against the extraordinary and unprecedented relief sought. The Plaintiff States have put forth no new evidence showing Albertsons' independent decision to issue the Special Dividend will harm competition or in some way impede the Plaintiff States' investigation of the Merger or their ability to seek appropriate relief as to the Merger. Any possible concern the Plaintiff States could have – unfounded as it is – that Kroger's acquisition of Albertsons would be justified by Albertsons qualifying as "failing firm" is unfounded: Defendants will not rely on such a defense in support of their Merger. TRO Tr. at 72:12-20.

The issues the Plaintiff States re-raise do not tip the balance of equities in their favor. Temporarily blocking payment of the Special Dividend improve Albertsons' financial condition

[2] Even if payment of the Special Dividend did "harm" Albertsons by reducing its available cash as the Plaintiff States allege (it does not), that harm is not irreparable and could be addressed through subsequent relief, including limits as to future dividend payments.

and better enable Albertsons to compete as the Plaintiff States allege. Once declared, the Special Dividend is owed to shareholders, and the Company must continue to account for that liability on its balance sheets until the Special Dividend is paid. *See* Smith 11/4 Decl. ¶¶ 40-41. Thus, even if an injunction were to issue, Albertsons would not invest more money in any of the items that the Plaintiff States posit in their improperly substituted business judgment.

A PI would, however, substantially injure Albertsons and its shareholders in numerous ways. Under Delaware law, the declaration of an unconditional cash dividend by a corporation's board creates a binding debtor-creditor relationship between the holders of common stock on the record date and the corporation, and the corporation is liable for the amount of the declared dividend.[3] Continued interference with the Special Dividend's payment would subject Albertsons and the Board to the risk of litigation in state and/or federal court.[4] The Plaintiff States' continued efforts to block payment of the Special Dividend also may erode the confidence of the Company's shareholders and discourage future investment in the Company. McCollam 12/8 Decl. ¶ 15; *see also* WA Tr. at 250:13–251:15.

Relatedly, whether Albertsons can or should pay the Special Dividend is an issue to be decided by its Board in accordance with Delaware law. The Plaintiff States' continued efforts to substitute their judgment as to how Albertsons' excess capital is best deployed for that of Albertsons' board of a directors is a gross intrusion into the internal affairs of a private company and at odds with basic norms of Delaware law and private markets. Indeed, it is well-recognized that significant dividend payments by Delaware corporations are commonly funded by debt and

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[3] *See Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1175 (Del. 1988); *Grand Metro. Public Co. v. Pillsbury Co.*, 558 A.2d 1049, 1061 (Del. Ch. 1988); *Baks v. Centra, Inc.*, 1997 WL 819130 (Del. Super. Dec. 15, 1997).

[4] *See In re Sunstates Corp. S'holders Litig.*, C.A. No. 13284, slip op. at 6 (Del. Ch. Apr. 18, 2001); *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 668 (Del. Ch. 1940).

that such acts are well within the business judgment of corporate boards. *See, e.g., Weiss v. Samsonite Corp.*, 741 A.2d 366, 371-72 (Del. Ch. 1999) (noting "dividends and self-tender offers are viewed as conventional methods of delivering to shareholders a return on their investment" and "classic business judgments of the kind that are normally protected by the business judgment rule," including where they require the company to "assume debt").[5] Absent a clear showing that Albertsons' independent decision to pay the Special Dividend constitutes an *unreasonable agreement* in restraint of trade that will cause irreparable harm *to competition* or in violation of state or federal law – a showing which the Plaintiff States do not come close to making here – the Court should not displace the business judgment of a private corporation's board of directors as to the best use of its capital. *See* TRO Tr. at 73:15-74:2 (denying TRO and noting interference with Albertsons' internal governance); *Shelley v. Am. Postal Workers Union*, 775 F. Supp. 2d 197, 210 (D.D.C. 2011) (denying TRO where interference with internal workings of labor unions would not serve public interest).

The Plaintiff States' new arguments that Albertsons will not suffer any significant harm as a result of the requested PI are red herrings and provide no justification to revisit the Court's previous determination that the balance of equities disfavors the requested injunctive relief:

- The Special Dividend is not "unlawful" and must be paid under Delaware law. Plaintiff States' suggestion that the Company does not actually owe the Special Dividend because it is "unlawful" is baseless. PI Motion at 27. Plaintiffs do not dispute that the Special Dividend was validly declared in accordance with Delaware law. *See* TRO Tr. at 66:6-9, 70:8-19. As such, it is due and owing to Albertsons' shareholders. The cases the Plaintiff States cite are not to the contrary. *See Jefferies v. Wm. D. Mullen Co.*, 132 A. 687 (Del. 1926); *Selly v. Fleming Coal Co.*, 180 A. 326 (Del. 1935); *In re Sunstates Corp. S'holders*

[5] The Plaintiff States' claim that "[a]ny defense of the Special Dividend based on Albertsons' citation to Delaware law is a mere distraction" is telling. PI Motion at 18-19. A Delaware corporation's decision to pay a dividend is governed by Delaware law. It is the Plaintiff States who are trying to put a square peg in a round hole by challenging a corporation's decision to pay a dividend – an internal corporate decision governed by state law - as a purported violation of antitrust law.

Litig., C.A. No. 13284, Slip Op. at 6 (Del. Ch. Apr. 18, 2001). Indeed, the Plaintiff States cite no precedent in which a dividend declared was not owed, or any case in which payment of a dividend was validly declared under Delaware law but then deemed unlawful as a violation of an antitrust statute and thus not owed to shareholders.

- Requiring Albertsons to account for the Special Dividend but not pay it harms Albertsons notwithstanding its financial strength. Plaintiffs' suggestion that Albertsons' claim that would have to maintain a liability on its balance sheet for the Special Dividend means an injunction blocking payment would not cause "additional harm" misses the point entirely. PI Motion at 26. As does their assertion that the Company cannot be harmed by an injunction if it truly has ample liquidity to meet its operating needs *and* pay the Special Dividend. *Id.* If the Company must account for the Special Dividend as a liability, but is not allowed to actually pay it for a year or more, the Company will not be able to deploy its excess capital efficiently, including by delivering a promised return on investment to its shareholders. Albertsons has a legitimate concern that interfering with its business judgment and its relationship with its shareholders will cause it significant harm.

- Any harm from the requested PI is not of Albertsons' "own making." Plaintiffs' claim that any harm to Albertsons or its shareholders is harm of Albertsons "own making" is meritless. PI Motion at 26-28. Regulatory review of a proposed merger is customary and expected, and the Merger Agreement specifically provides for it. Challenging a private company's independent decision to pay a dividend in accordance with Delaware law is an extraordinary action with no basis in law or precedent that Defendants could not possibly have foreseen. Here, the harm to Albertsons and its shareholders results directly from the Plaintiff States' unprecedented acts to interfere in Albertsons' internal affairs, not from any act of Albertsons or the customary merger review process.

Finally, as the Court has already determined, a PI would likewise substantially injure Albertsons' shareholders who will be deprived of the Special Dividend they are owed and who traded Albertsons stock in reliance upon payment of the Special Dividend. See TRO Tr. at 73:21-23 (noting harm to Albertsons' shareholders). The Company has received numerous complaints from shareholders – both large and small – as to the economic harm those shareholders have suffered as a result of delay in payment of the Special Dividend. McCollam 12/8 Decl. ¶ 12; *see also* WA Tr. at 249:22–250:12. That harm is particularly significant given the size of the Special Dividend and the indefinite duration of the preliminary injunction sought,

and could amount to $1 million *per day* or more. This substantial harm to shareholders further weighs against issuance of a PI.

V. <u>THE PLAINTIFF STATES MUST POST A BOND TO SECURE AGAINST THE HARM THE REQUESTED PRELIMINARY INJUNCTION IMPOSES ON ALBERTSONS AND ITS SHAREHOLDERS.</u>

A preliminary injunction can be issued "*only* if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained" as a result of an improper injunction. Fed. R. Civ. P. 65(c) (emphasis added); *see also* 15 U.S.C § 26 (requiring "execution of proper bond against damages for an injunction improvidently granted"). The D.C. Circuit has explained that this requirement is important to deter "flimsy claims" and discourage movants from "seeking preliminary injunctions on weak . . . grounds," and rightfully "forc[es] the plaintiff to consider the injury to be inflicted on its adversary in deciding whether to press ahead." *National Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1134 (D.C. Cir. 1992). Although Rule 65(c) exempts "the United States, its officers, and its agencies" from the security requirement, no such exemption is provided to the Plaintiff States, and federal courts require state governments to post security in order to obtain preliminary relief in federal court that may cause harm if improperly granted. *See, e.g.*, *In re Nat'l Credit Mgmt. Grp., L.L.C.*, 21 F. Supp. 2d 424 (D.N.J. 1998). Here, the Plaintiff States continue to pursue "flimsy claims" that have no support in law or fact, and unprecedented injunctive relief that, if granted, will cause significant economic harm to Albertsons and its shareholders. If the Plaintiff States wish to pursue such extraordinary relief, they should be required to post security to protect Albertsons and its shareholders from the damage the requested relief will cause.

CONCLUSION

For the foregoing reasons, the PI Motion should be denied.

Dated this 8th day of December, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

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