IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA,
STATE OF CALIFORNIA, and
STATE OF ILLINOIS,

Plaintiffs,

v.

THE KROGER CO., and
ALBERTSONS COMPANIES, INC.

Defendants.

Case No. 1:22-cv-3357-CJN

DEFENDANT THE KROGER CO.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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The Kroger Co. ("Kroger") respectfully submits this Memorandum in Opposition to the Motion for a Preliminary Injunction ("PI Motion") (ECF No. 54) submitted by the District of Columbia, the State of California, and the State of Illinois ("Plaintiffs").

INTRODUCTION

More than a month ago, Plaintiffs filed an Emergency Motion for a Temporary Restraining Order ("TRO Motion"), asking this Court to take the unprecedented step of invoking Section 1 of the Sherman Act and analogous provisions under D.C. and Illinois law to enjoin the payment of a special dividend that Albertsons Companies, Inc. ("Albertsons") unilaterally declared and plans to issue to its shareholders ("Pre-Closing Dividend"). This Court denied that Motion, explaining that Plaintiffs' novel antitrust claims were not likely to succeed on the merits, and reasoning that there was "no evidence of an agreement between Albertsons and Kroger to pay the pre-closing dividend." TRO Hr'g Tr. at 66:19-20. "In fact," this Court held, "the evidence before the Court point[ed] to an independent decision by Albertsons to return value to its shareholders." *Id.* at 66:20-22.

Plaintiffs now return to this Court asking for the same injunctive relief without providing any new evidence that the Pre-Closing Dividend was the result of an agreement involving Kroger. On the contrary, Plaintiffs rely on the same evidence that the Court already found insufficient to establish an unlawful agreement under Section 1 of the Sherman Act: (1) the existence of the Merger Agreement itself, (2) various provisions in the Merger Agreement, (3) the timing of the Pre-Closing Dividend, and (4) the size of the Dividend. Pls.' Mem. in Supp. of Prelim. Inj. at 7 ("Pls.' PI Mem."). At the TRO hearing on November 8, 2022, the Court found this same evidence insufficient to show an agreement between Kroger and Albertsons to issue the Pre-Closing

Dividend. The same inputs should yield the same outcome; this Court should reject Plaintiffs' efforts to double-down on the same novel and implausible antitrust theory.

In any event, Plaintiffs' PI Motion fails for the same reasons as its TRO Motion and for other independent reasons. Fundamentally, Plaintiffs' Section 1 and analogous state-law claims require an agreement between Kroger and Albertsons to pay the Pre-Closing Dividend. But as this Court correctly held, there is no such agreement. Kroger had, has, and will have nothing to do with the Pre-Closing Dividend. Kroger did not conceive of, encourage, design, or require the Pre-Closing Dividend as part of its deal with Albertsons. Albertsons made clear to Kroger from the beginning of discussions that it intended to return significant liquidity to its shareholders whether or not it engaged in any transaction. The Merger Agreement thus acknowledges the possibility that Albertsons might pay the Pre-Closing Dividend and, as this Court found, "take[s] account of how it would affect the purchase price." TRO Hr'g Tr. at 69:2-3. But the authority to declare and pay the Pre-Closing Dividend rested, and continues to rest, solely with Albertsons. The Pre-Closing Dividend is not a condition of the Merger Agreement, and the Merger Agreement does not require Albertsons to declare or issue the Pre-Closing Dividend. *See* TRO Hr'g Tr. at 67:20-22 ("[N]othing in the merger agreement obligates Albertsons to . . . pay the dividend.").

In short, there was no agreement to issue the Pre-Closing Dividend because there was no joint decision; Albertsons unilaterally decided what it wanted to do, told Kroger about that decision, and Kroger and Albertsons ensured that the Merger Agreement included contract terms accommodating that decision. Albertsons was free to decline to pay some or all of the Pre-Closing Dividend to its shareholders without consequence; the Merger Agreement does not dictate the Dividend, much less the Dividend's timing or amount.

Moreover, Plaintiffs offer no plausible allegations, let alone evidence, that the payment of the Pre-Closing Dividend would negatively impact competition, customers, prices, employees, or any other party. At bottom, Plaintiffs theory of the alleged antitrust conspiracy cannot be reconciled with Kroger's rational self-interest: Plaintiffs would have the Court believe that Kroger entered into an economically detrimental conspiracy in which it obligated itself to pay almost $25 billion for—and then intentionally weaken—the Albertsons' business.

The end result is that Plaintiffs fail to satisfy any of the factors required for this Court to issue a preliminary injunction. Plaintiffs cannot demonstrate a likelihood of success on the merits (*i.e.*, that there is an agreement to engage in conduct that would harm competition in a well-defined antitrust market), any irreparable harm (*i.e.*, significant harm to competition resulting from that conduct), that the balance of equities weighs in Plaintiffs' favor, or that a preliminary injunction is in the public interest. This Court should decline Plaintiffs' efforts to relitigate the TRO Hearing and deny Plaintiffs' request for a preliminary injunction.

STATEMENT OF FACTS

Kroger, an Ohio Corporation, was founded in 1883. Kroger is a leading food retailer, but its business also includes robust retail pharmacies and fuel centers. Decl. of Gary Millerchip in Support of Kroger's Opposition to the PI Motion ("2d Millerchip Decl.") ¶ 3. Kroger operates in a fiercely competitive environment under a variety of banner names and formats, including supermarkets, seamless digital shopping options, price-impact warehouse stores, and multi-department stores. *Id.* ¶ 4. Kroger also operates various manufacturing facilities that produce high quality private-label products. *Id.*

On October 13, 2022, Kroger entered into the Merger Agreement with Albertsons. *Id.* ¶ 5. Kroger strongly believes that the proposed merger would combine two complementary organizations, bringing benefits to consumers, associates, and communities alike. *Id.* ¶ 7. Kroger knew, however, that the transaction would be subject to an extensive regulatory clearance process, and it expects to make divestitures as a part of that process. *Id.* Kroger is confident that the Federal Trade Commission, the Attorney General for the District of Columbia, and state attorneys general, including the California and Illinois Attorneys General, will engage in a robust review of the proposed transaction. *Id.* Kroger is committed to working cooperatively in that process to secure the necessary approvals for the transaction. *Id.*

Contrary to Plaintiffs' allegations, the Pre-Closing Dividend is not "concerted action that is part of the merger," nor was it "a product of an agreement between Kroger and Albertsons." Pls.' PI Mem. at 4-5. From the beginning of its discussions with Kroger, Albertsons made it clear that it intended to declare and pay the Pre-Closing Dividend regardless of whether or not there was a transaction with Kroger. 2d Millerchip Decl. ¶ 12.

The authority to declare and pay the Pre-Closing Dividend rests solely with Albertsons. *Id.* ¶ 13. The Merger Agreement does not require Albertsons to pay the Pre-Closing Dividend, and Kroger has no right under the Merger Agreement to force Albertsons to pay the Pre-Closing Dividend. *Id.* Rather, the Merger Agreement contemplates the fact that Albertsons could unilaterally and independently declare a Pre-Closing Dividend, and it addresses the impact of such a dividend by providing for a dollar-for-dollar reduction in the price paid to Albertsons' shareholders by Kroger if Albertsons pays the dividend. *Id.*

Albertsons' plan to issue a Pre-Closing Dividend had two effects on the merger. ***First***, the merger consideration to be paid by Kroger needed to be adjusted to account for the value of the Pre-Closing Dividend. *Id.* ¶ 14. As such, the Merger Agreement defines "Common Merger Consideration" to mean "(i) an amount in cash equal to (a) $34.10 *minus* (b) the per share amount of the Pre-Closing Dividend payable to each holder of [Albertsons'] Common Stock . . . ." *Id.* ¶ 16. That construct is the only reason the Merger Agreement even mentions the Pre-Closing Dividend.

Second, the Merger Agreement includes a $4 billion cap on any Pre-Closing Dividend so that the Dividend does not have a deleterious effect on Albertsons' financial strength and stability. *Id.* ¶¶ 14, 18-19. Kroger's management and Board have a fiduciary duty to Kroger's shareholders to ensure that Albertsons' business is as strong and financially sound at closing as it was when Kroger agreed to pay almost $25 billion to acquire it. *Id.* ¶ 17. Kroger has no interest in an Albertsons business that is financially or competitively "battered." Compl. at 3. To the contrary, Kroger has every financial and economic incentive to ensure the competitiveness of the business it agreed to acquire. 2d Millerchip Decl. ¶ 17. Indeed, the strategic rationale for the proposed merger depends on integrating an operationally and competitively vibrant Albertsons business into Kroger in order to better serve customers throughout the country. *Id.*

Given all of these considerations, the management and Board of Kroger determined that it was consistent with their fiduciary duties to enter into the Merger Agreement on the understanding that Albertsons could unilaterally declare a Pre-Closing Dividend of up to $4 billion. *Id.* ¶ 20. Albertsons' decision to announce the Pre-Closing Dividend alongside the Merger Agreement was necessitated by the fact that the Merger Agreement includes mechanics for accounting for the Dividend. That announcement did not transform Albertsons' unilateral decision to declare and pay the Dividend into an agreement with Kroger to do so.

PROCEDURAL HISTORY

When Albertsons declared its Pre-Closing Dividend, it stated that it intended to pay the dividend on November 7, 2022. The Merger Agreement did not require Albertsons to pay the Pre-

Closing Dividend at all, much less on November 7, 2022 (or any other date). Plaintiffs filed this suit seeking to enjoin the dividend and, on November 8, 2022, this Court denied Plaintiffs' TRO Motion, finding that Plaintiffs failed to demonstrate either a likelihood of success on the merits or irreparable harm. TRO Hr'g Tr. at 73:6-74:2.

The Court held that Plaintiffs failed to produce sufficient evidence to support two key elements of their Section 1 claim: (1) an unlawful "agreement" that (2) would likely have anticompetitive effects (i.e., "restrain trade"). *Id.* at 66:13-22, 69:18-24. ***First***, the Court found Plaintiffs "failed to demonstrate an agreement or conspiracy between Kroger and Albertsons to pay the preclosing dividend to Albertsons' shareholders and/or an agreement to make Albertsons 'cash poor.'" *Id.* at 66:13-18. In fact, this Court found "*no evidence*" of an agreement to pay the dividend, instead holding that the evidence "point[ed] to an *independent* decision by Albertsons to return value to its shareholders." *Id.* at 66:19-22 (emphases added). Considering the totality of the evidence, this Court rejected Plaintiffs' argument that the Merger Agreement and joint press release required payment of the Pre-Closing Dividend, instead finding that: (1) *nothing* in the Merger Agreement obligates Albertsons to pay the Pre-Closing Dividend; (2) the unrebutted declarations of Kroger and Albertsons leadership affirm that Defendants never entered into an agreement; and (3) the Merger Agreement referred to the cap on the Pre-Closing Dividend only to ensure Albertsons' viability and to account for the effect of the size of any Pre-Closing Dividend on the purchase price. *Id.* at 67:18-69:7.

Thus, in denying Plaintiffs' motion, this court identified a different, more plausible explanation about who decided to pay the Pre-Closing Dividend based on Plaintiffs' evidence: Albertsons "unilaterally" decided to pay the Dividend, and Kroger negotiated terms to allow Kroger to withdraw from the merger if the Dividend exceeded a threshold that might undermine the financial and competitive viability of the company that it sought to acquire. *Id.* at 67:4-17. That reasoning "makes good sense," this Court explained, *id.* at 67:4, because "neither Kroger nor Albertsons has an incentive to economically weaken Albertsons during the pendency of the merger review," *id.* at 71:23-25, and "Albertsons and Kroger are only direct competitors in a few markets," *id.* at 72:1-2. In contrast, the Court noted, "[i]t does not make sense" that "Kroger would want to weaken Albertsons during the two-year period of merger review before the acquisition is final and then pay almost $25 billion to acquire a weakened Albertsons." *Id.* at 72:3-7. Indeed, the Court observed, Albertsons has no sound reason to weaken its economic viability in light of the fact that regulators may not approve the merger, and because Defendants have affirmatively represented to the Court that they will not make a "failing firm defense" during the merger review. *Id.* at 72:12-20.

Second, the Court held that, even if there were an agreement between Kroger and Albertsons to pay the Pre-Closing Dividend, Plaintiffs failed to produce sufficient evidence that the issuance of the Dividend would harm competition during the merger review process. *Id.* at 69:18-24. The Court emphasized that Albertsons authorized the Pre-Closing Dividend separately from the merger, that two separate financial advisors reviewed the payment of the Dividend, and that Albertsons would have sufficient surplus after paying the Dividend even under a conservative calculation. *See id.* at 70:4-19. More importantly, the Court held that Plaintiffs had "failed to show that after payment of the [Pre-Closing Dividend], Albertsons w[ould] have insufficient liquidity to compete," *id.* at 70:20-22, noting that Plaintiffs had "essentially ignored" key evidence regarding Albertsons' financial state, *id.* at 70:23; *see also id.* at 70:23-71:19.

This Court also held that Plaintiffs failed to establish the final three elements required to grant a TRO, which mirror the elements that must be met to issue a preliminary injunction. The

Court first held that Plaintiffs had failed to establish irreparable harm absent a TRO. *Id.* at 72:21-73:23. As described above, the Court found that Plaintiffs had not established that payment of a Pre-Closing Dividend would "result in a lessening of competition"—the irreparable harm that Plaintiffs asserted and continue to assert. *Id.* at 73:3-4. The Court next held that the final two factors—the balance of the equities and the public interest—were not "particularly critical in light of [the Court's] determination that [Plaintiffs had] failed to satisfy the first two factors." *Id.* at 73:7-8. In briefly considering these factors, the Court did not identify any public harms arising from the Pre-Closing Dividend but noted that a TRO would harm Albertsons and its shareholders. *See id.* at 73:10-23. In light of the evidence before it, this Court held that Plaintiffs had failed to establish the elements of a TRO and denied Plaintiffs' TRO motion. *See id.* at 73:24-74:2.

Plaintiffs now return to this Court with the same factual evidence and legal arguments that this Court found insufficient at the TRO Hearing to request the substantially same relief.[1]

STATEMENT OF THE ISSUE

Whether the Court should deny Plaintiffs' motion for a preliminary injunction where (1) Plaintiffs are unlikely to succeed on the merits because (a) there is no agreement between Kroger and Albertsons to issue the Pre-Closing Dividend; and (b) Plaintiffs failed to provide sufficient facts to demonstrate that the Pre-Closing Dividend would constitute an unlawful restraint of trade; (2) Plaintiffs failed to show irreparable injury in the absence of a preliminary injunction; (3) the equities do not favor extraordinary relief; and (4) the public interest would not be served by such relief.

[1] In parallel with this litigation, the King County Superior Court in Washington issued a temporary restraining order on an emergency basis, enjoining Albertsons from paying the Pre-Closing Dividend on November 3, 2022. The King County Superior Court has extended the temporary restraining order through December 9, 2022 so that the court can conduct a preliminary injunction hearing.

LEGAL STANDARD

Like a temporary restraining order, a preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) ("[T]he party seeking the relief . . . carries the burden of persuasion."). A request for a preliminary injunction is analyzed under the same standard that applies to a request for a temporary restraining order. *Nguyen v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 27, 33 (D.D.C. 2020). To succeed on a motion for a preliminary injunction, the moving party must: "(1) establish a likelihood of 'succe[ss] on the merits'; (2) show 'irreparable harm in the absence of preliminary relief'; (3) demonstrate that the equities favor issuing an injunction; and (4) persuade the court that 'an injunction is in the public interest.'" *Trump v. Thompson*, 20 F.4th 10, 31 (D.C. Cir. 2021) (quoting *Winter*, 555 U.S. at 20); *see also Cityfed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995).

ARGUMENT

As this Court held at the TRO Hearing, Plaintiffs' novel antitrust claims fail at the first step of the preliminary injunction analysis because they are unlikely to succeed on the merits. Plaintiffs' current PI Motion cites no new evidence to disturb that conclusion, and that fact alone is reason to deny the motion. In any event, a renewed analysis of the same facts unsurprisingly yields the same conclusion. Regardless of the procedural label Plaintiffs use for their motion, Albertsons' unilateral decision to pay the Pre-Closing Dividend does not give rise to an antitrust violation.

I. Plaintiffs' Motion Should Be Summarily Denied as an Effort to Relitigate the Denial of Its TRO

To state a claim under Section 1 of the Sherman Act,[2] Plaintiffs must produce sufficient facts to establish that Defendants (1) "entered into some contract, combination, conspiracy or other concerted activity" that (2) "unreasonably restricts trade in [a] relevant market." *See Dial a Car, Inc. v. Transp., Inc.*, 884 F. Supp. 584, 591 (D.D.C. 1995). This Court denied Plaintiffs' TRO Motion primarily because they failed to demonstrate a likelihood of success on the first element: that Albertsons' Pre-Closing Dividend was the product of an *agreement* between Kroger and Albertsons. TRO Hr'g Tr. at 66:13-69:17. While Plaintiffs continue to second-guess Albertsons' finances and argue about its ability to compete after the Pre-Closing Dividend, they offer no new evidence to disrupt the conclusion that Albertsons' decision to pay a Dividend was not attributable to any agreement between *Kroger* and Albertsons.

This Court can and should deny Plaintiffs' request for a preliminary injunction on that basis alone. This PI Motion is "little more than a poorly disguised effort to reopen and reargue the earlier unsuccessful [temporary restraining order] motion." *See New York v. Nuclear Regul.*

[2] The analysis of Plaintiffs' federal antitrust claim guides the analysis of Plaintiffs' state-law claims under DC Code 28-4502 and 740 ILCS 10/(3). Because the language of DC Code 28-4502 parallels Section 1, courts analyze claims under DC Code 28-4502 as following federal antitrust claims under Section 1. *See, e.g.*, *GTE New Media Servs., Inc. v. Ameritech Corp.,* 21 F. Supp. 2d 27, 45 (D.D.C. 1998) ("Because these provisions essentially track the language of §§ 1, 2 of the Sherman Act, respectively, much of the analysis for federal antitrust claims will provide much force in the context of these provisions."). Similarly, "except where the language and structure of the Illinois Act indicate that a different result was intended, Sherman Act Section 1 cases will be followed by the Illinois courts when construing Section 3(2)," the section under which Plaintiffs purport to bring their Illinois antitrust claim. 740 Ill. Comp. Stat. Ann. 10/3. Accordingly, the analysis of the state law claims here necessarily follows Kroger's Section 1 arguments. *See Mazanderan v. Indep. Taxi Owners' Ass'n, Inc.*, 700 F. Supp. 588, 591 n.9 (D.D.C. 1988) ("Analysis of plaintiff's state antitrust claim [under DC law] necessarily follows that of the federal claim . . . ."); *BookXchange FL, LLC v. Book Runners, LLC*, No. 19-CV-506, 2019 WL 1863656, at *4 (N.D. Ill. 2019) (holding that plaintiff's failure to state a claim under the Sherman Act, "in turn, dooms its claim under the Illinois Antitrust Act").

Comm'n, 550 F.2d 745, 758 (2d Cir. 1977). It "s[eeks] the same basic relief and relie[s] upon virtually identical arguments and substantially similar evidence." *Id.* That Plaintiffs purport to offer some new evidence in support of this motion "does not undermine the thesis that [this motion] [i]s, in essence, a request for reconsideration of the court's denial of the first motion for a [temporary restraining order]." *Id.*; *see also Alliance v. Pena*, No. 2:16-CV-294-RMP, 2016 WL 9131966, at *1 (E.D. Wash. Nov. 1, 2016) (finding that a motion for a preliminary injunction was "essentially a motion for reconsideration" of the court's denial of a previous request for a preliminary injunction because it "repeat[ed] most of the same arguments contained in [the] prior briefs").

This Court routinely denies relief where, as here, the moving party offers no new evidence and attempts only to revive previously rejected factual or legal arguments. *See, e.g.*, *Heart 6 Ranch, LLC v. Bernhardt*, 365 F. Supp. 3d 105, 116-17 (D.D.C. 2019) (denying plaintiff's motion for preliminary injunction where the court previously denied plaintiff's request for a temporary restraining order and plaintiff "submitted no new evidence that would alter the reasoning on which the prior denial was based"); *Johnson v. Holway*, 329 F. Supp. 2d 12, 14-16 (D.D.C. 2004) (similar).

That is the case here. Plaintiffs' request for a preliminary injunction relies on the same arguments and factual evidence that this Court found insufficient to meet the same legal standard at the TRO hearing.

Specifically, Plaintiffs offer the following exhibits in support of their motion:

- PI Mot. Ex. 1: Merger Agreement.
- PI Mot. Ex. 2: Excerpt from Project Acorn Preliminary Discussion Materials, bearing Bates stamps KR-FTC-CID-000001 to -065.
- PI Mot. Ex. 3: Excerpt from Albertsons' 11/8/22 Presentation to the Court.

- PI Mot. Ex. 4: Excerpt from Discussion Materials, September 2022, bearing Bates stamps ACI_DCCID-00000305 to -315.
- PI Mot. Ex. 5: Excerpt from Discussion Materials, September 2022, bearing Bates stamps ACI_DCCID-00000238 to -257.
- PI Mot. Ex. 6: Excerpt from Albertsons' Form 10-K for fiscal year ending February 26, 2022.
- PI Mot. Ex. 7: Excerpt from Albertsons' Form 10-Q for quarter ending June 20, 2020.
- PI Mot. Ex. 8: Excerpt from Update on Strategic Alternatives, Project Apple, June 10, 2022, bearing Bates stamps ACI_DCCID-00000068 to -105.
- PI Mot. Ex. 9: Letter from Ted Hassi to States Attorneys General, October 28, 2022.

None of these exhibits—which were all available to Plaintiffs at the TRO Hearing—includes new facts to rebut the Court's earlier finding the Pre-Closing Dividend was not the product of an *agreement* between Kroger and Albertsons. In fact, five of the nine exhibits already were presented to the Court, either with the TRO Motion or at the TRO hearing: **Exhibits 1, 3, 5, and 8-9**. *Compare* Gitlin Decl. ISO TRO Motion ("1st Gitlin Decl.") at 2-3, *with* Gitlin Decl. ISO PI Motion ("2d Gitlin Decl.") at 2.

The remaining four exhibits cover no new ground. To begin, **Exhibits 4, 6 and 7** do not relate to Kroger at all. **Exhibit 4** contains discussion materials from September 2022 prepared for Albertsons by its bankers, *see* 2d Gitlin Decl., Ex. 4, which Plaintiffs use to support the fact that Albertsons was considering a tender offer before it decided to issue a special dividend. Pls' PI Mem. at 5. But Plaintiffs have already made that argument, and this Court has already rejected it. *Compare* TRO Hr'g Tr. at 60:20-61:10 (arguing that Albertsons was considering a tender offer, rather than a special dividend, prior to the Merger Agreement), *with* Pls.' PI Mem. at 5-6 (asserting that Albertsons decided to issue a Pre-Closing Dividend, rather than a tender offer, once it decided to pursue a merger). **Exhibits 6 and 7** are just Albertsons' SEC Filings, which Plaintiffs use to support their same flawed interpretation of the Company's finances. *Compare* TRO Hr'g Tr. at 47:25-48:4, *with* Pls.' PI Mem. at 9; *compare also* Compl. ¶ 29, *with* Pls.' PI Mem. at 7 n.4, 22.

Exhibit 2 is the only new evidence that relates to Kroger. It is a set of Kroger's preliminary discussion materials analyzing the financial impact of the proposed merger. *See* 2d Gitlin Decl., Ex. 2. Far from providing new support for Plaintiffs, however, this document undermines Plaintiffs' entire theory of the case. It states unambiguously that "[Albertsons] is considering a special dividend *with or without a transaction* with [Kroger]." *Id.* at 44 (emphasis added). That statement confirms what Defendants argued at the TRO hearing: the Pre-Closing Dividend was independent of the merger, and the Merger Agreement simply accounted for the size of the Dividend in the final per-share price that Kroger would pay. *Compare* Pls.' PI Mem. at 4 (noting that the Pre-Closing Dividend would occur "regardless of closing" (quoting Ex. 2)), *and id.* at 5 (noting that the Pre-Closing Dividend "could potentially negatively impact [Albertsons'] standalone capital structure" (quoting Ex. 2)), *with* TRO Hr'g Tr. at 68:14-21, 69:22-70:7.

Because Plaintiffs have offered no new evidence establishing that Kroger and Albertsons entered into an agreement to effectuate the Pre-Closing Dividend or to limit Albertsons' ability to compete, this Court should summarily deny Plaintiffs' Motion for a Preliminary Injunction on the same grounds that it denied Plaintiffs' TRO Motion. *See Johnson*, 329 F. Supp. 2d at 14-16.

II. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits

In any event, Plaintiffs' novel attempt to use federal and state antitrust laws to enjoin the payment of a dividend by a company fails because Plaintiffs do not state a cognizable antitrust claim, much less offer evidence demonstrating that they are likely to win on the merits. *See Dial a Car*, 884 F. Supp. at 591. Plaintiffs in antitrust cases are required to make more than conclusory allegations of an agreement; they must plead sufficient facts to plausibly support the inference of concerted action. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Here, Plaintiffs fail to offer any facts from which the court could plausibly infer that Kroger played any role in Albertsons' unilateral decision to issue the Pre-Closing Dividend. Contrary to Plaintiffs' unstated assumption, the mere existence of the Merger Agreement does not establish concerted action; on the contrary, Plaintiffs must prove that the Merger Agreement's terms related to the Pre-Closing Dividend constitute concerted action under settled antitrust law. Plaintiffs fail to meet that burden, and thus their antitrust claims against Kroger fail.

A. Plaintiffs' Evidence Fails to Establish an Anticompetitive Agreement Between Kroger and Albertsons

As in the TRO Motion, Plaintiffs claim that Kroger and Albertsons had a "horizontal agreement to issue the special dividend," Pls.' PI Mem. at 11; *see* Pls.' Mot. for TRO at 6, but the facts clearly demonstrate that no such agreement exists. Rather, Albertsons made a unilateral decision to pay the Pre-Closing Dividend prior to entry into the Merger Agreement and without regard to whether Kroger and Albertsons ultimately merged. 2d Millerchip Decl. ¶ 12. The absence of evidence showing concerted action is fatal to Plaintiffs' claims.

For their antitrust conspiracy claims to succeed, Plaintiffs must present direct or circumstantial evidence that Defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Under this standard, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *see also First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 279-84 (1968). Thus, "[t]here must be evidence that tends to *exclude* the possibility that [Defendants] were acting independently." *Monsanto Co.*, 465 U.S. at 764 (emphasis added); *see also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (Section 1 of the Sherman Act "does not reach conduct that is wholly unilateral"). "At all times . . . the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff." *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1488 (D.C. Cir. 1984).

Plaintiffs have failed to show that Kroger and Albertsons entered into any kind of anticompetitive agreement. As explained above, none of Plaintiffs' evidence—viewed individually or collectively—is sufficient to show an agreement between Kroger and Albertsons to pay the Pre-Closing Dividend, let alone an agreement to "hamper Albertsons' ability to compete." Pls.' PI Mem. at 12.

First, Plaintiffs' key "direct" evidence is the Merger Agreement itself, which, as this Court has recognized, rebuts rather than supports Plaintiffs' theory. *Compare* Pls.' PI Mem. at 13, *with* TRO Hr'g Tr. at 67:23-68:1. The Merger Agreement does not include any provision whereby Kroger and Albertsons agree that Albertsons must issue the Pre-Closing Dividend; Kroger has no claim of breach regardless of whether Albertsons issues, does not issue, or changes the amount of the dividend. The fact that Kroger has no right to demand payment of the Pre-Closing Dividend under the Merger Agreement illustrates that the Dividend was not "part of" the Agreement. *Contra* Pls.' PI Mem. at 4. The Pre-Closing Dividend is related to the merger only insofar as Albertsons made the unilateral decision to declare it, and the Merger Agreement accounts for the effects of that decision. *Contra id.* at 6.

As such, the text of the Merger Agreement—which does not require the payment of a Pre-Closing Dividend—stands in contrast with an entire body of Delaware cases finding that a "Pre-Closing Dividend was 'part of the Merger'" (for appraisal or taxation purposes) when the dividend "was conditioned on the Transaction's approval." *See, e.g.*, *In re GGP, Inc. S'holder Litig.*, 282 A.3d 37, 58-60 (Del. 2022); *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191

(Del. Ch. 2007) ("Thus, defendants specifically condition payment of the $6 cash 'special dividend' on shareholder approval of the merger agreement. Additionally, the payment becomes due upon or even after the effective time of the merger. These facts belie the claim that the special dividend has legal significance independent of the merger."). In other words, Delaware law recognizes the commonsense principle that, if parties agree to *require* a dividend as part of a complex, multi-billion-dollar merger, they will include some enforcement mechanism in the contract. The Defendants here did not, and that fact is dispositive.

That the Merger Agreement contains provisions related to the Pre-Closing Dividend does not transform Albertsons' independent action into a common scheme. The Merger Agreement does not *require* that Albertsons pay the Pre-Closing Dividend; rather, it discusses the effects of any Pre-Closing Dividend that Albertsons might independently decide to pay, including the manner in which the amount of the dividend, if paid, will affect the purchase price. *See* 2d Millerchip Decl. ¶¶ 9-11, 14-19. Contrary to Plaintiffs' attempts to distort the contractual language, *see* Pls.' PI Mem. at 6-7, Defendants' inclusion of a termination clause if Albertsons ultimately decided to pay a Pre-Closing Dividend exceeding a threshold is not equivalent to an agreement as to the Dividend's payment.

Plaintiffs argue that the Merger Agreement's "cap" of $4 billion on the Pre-Closing Dividend somehow shows an agreement that Albertsons would be required to make the payment (at all, or in any amount below the cap). Pls.' PI Mem. at 13. This argument only demonstrates Plaintiffs' gross misunderstanding of the business considerations that go into a merger of this nature. The Merger Agreement includes a $4 billion cap on any Pre-Closing Dividend because the amount of the dividend could have implications for Kroger's financing of the deal and the debt structure of the combined company post-closing. 2d Millerchip Decl. ¶¶ 18-20.

Accordingly, Kroger wanted to ensure that any Pre-Closing Dividend would not affect either Albertsons' ability to execute on its pre-merger business plan and remain a competitive business preclosing or Kroger's financing of the deal. *Id.* ¶ 18. If Albertsons had decided to pay a Pre-Closing Dividend greater than the cap, Kroger would have had the ability to terminate its obligation to acquire Albertsons in light of the financial implications to Kroger. *Id.* ¶ 19. None of this means that Defendants *agreed* that Albertsons must pay the dividend or agreed to the amount of any dividend.

Instead, as courts around the country recognize, an acquiror's insistence on a contractual provision intended to ensure the continuing financial viability of the target company does not establish concerted action. *Cf. Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1081 (11th Cir. 2016) (rejecting the argument that "the simple existence of [a] contract . . . standing alone, is enough to satisfy the concerted action requirement"); *Toscano v. Pro. Golfers Ass'n*, 258 F.3d 978, 984 (9th Cir. 2001) (no concerted action where defendants "had no involvement in the establishment or enforcement of the allegedly anticompetitive" conduct). If the rule were otherwise, "contractual partners would potentially be on the hook for any future conduct the other party engages in under color of the contract." *Procaps*, 845 F.3d at 1081. Such a result would dramatically and inappropriately expand the reach of the Sherman Act.

Plaintiffs cite *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939), for the red herring argument that "agreements under Section 1 are not limited to enforceable contracts entered into for consideration." *See* Pls.' PI Mem. at 14. But Kroger has not relied on a mere lack of consideration to rebut Plaintiffs' claims; it has instead explained that there was no anticompetitive agreement at all.

Plaintiffs also fail to provide circumstantial evidence of an agreement between Kroger and Albertsons to pay the Pre-Closing Dividend. Plaintiffs place great weight on the fact that Albertsons originally considered distributing cash as a "tender offer" rather than a dividend. Pls.' PI Mem. at 5-6, 13. But, as explained at the TRO Hearing, "[y]ou can't do a tender offer while you're doing a public company merger, because there are securities law issues that could arise with respect to inside information related to the merger." TRO Hr'g Tr. at 41:10-14. Albertsons' "initial idea of a capital return to shareholders . . . only became . . . a dividend . . . after negotiation" of the merger with Kroger because, once Defendants decided to pursue a merger, a tender offer was no longer possible. *Contra* Pls.' PI Mem. at 7.

Plaintiffs next point to the timing of the dividend and a press release describing the Pre-Closing Dividend as being paid "in connection with" the merger. *See* Pls.' PI Mem. at 4 n.2, 6. But the press statement simply summarizes the Merger Agreement and, as set forth above, the Merger Agreement clearly does not require Albertsons to pay the Pre-Closing Dividend. Moreover, announcing the Dividend on the same day served public transparency, as the size of any Pre-Closing Dividend would affect the purchase price. *See* TRO Hr'g Tr. at 34:7-16. In this vein, Plaintiffs also assert that Defendants "timed the Dividend with the merger" and that Albertsons' announcement of the Pre-Closing Dividend created "an obligation to pay it," making the "permissive language in the Merger Agreement . . . irrelevant." Pls.' PI Mem. at 6. To begin, Plaintiffs seemingly concede that the Merger Agreement is "permissive"—that is, it merely *permitted*, but did not require—Albertsons to issue the Pre-Closing Dividend. While it is true that the Pre-Closing Dividend became obligatory for Albertsons to pay after Albertsons decided to declare it, Plaintiffs fail to explain why Albertsons' unilateral and independent declaration gives rise to an agreement between Defendants to pay the Pre-Closing Dividend.

In sum, Albertsons made the decision to declare and pay the Pre-Closing Dividend unilaterally and independently. "Independent action is not proscribed" by Section 1, *Monsanto*, 465 U.S. at 761, and a preliminary injunction is not appropriate where, as here, Plaintiffs have failed to "exclude the possibility that [Kroger and Albertsons] acted independently," *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 133, 139 (D.D.C. 2006) (denying preliminary injunction in Sherman Act case where plaintiffs failed to "exclude the possibility that the defendants acted independently").

Plaintiffs' additional evidence further undermines their suggestion that the Pre-Closing Dividend resulted from concerted action. For instance, Plaintiffs cite a Kroger presentation that discussed the Pre-Closing Dividend, but that presentation expressly states that the Dividend will be paid "regardless of closing." Pls.' PI Mem. at 4 (quoting Ex. 2). The presentation therefore underscores what the Merger Agreement states in plain terms: that the Pre-Closing Dividend would be paid *regardless* of the merger. The same presentation explains: "Given current liquidity available, [Albertsons] is considering a special dividend *with or without a transaction with [Kroger]*." Pls.' PI Mem., Ex. 2 at 44 (emphasis added).

Ultimately, Plaintiffs' argument mistakes an "agreement" for an "accommodation." A hypothetical serves to illustrate. Imagine that you own a large tract of resource-rich waterfront property that you would like to monetize. There are many ways to monetize the property—*e.g.*, subdivide the property, sell timber, lease the waterfront—and, among the various options, you decide to sell off some of your timber and then sell the entire parcel to a real estate developer. You identify a potential developer and begin to negotiate a contract. During the course of negotiations, you tell the developer that you intend to sell some of the timber on the land. Because each tree harvested will result in a corresponding decrease in land value, you and the developer negotiate the following terms: (1) the purchase price will decrease by a set amount for each tree harvested; (2) if you harvest more than 200 trees, the developer can cancel the deal.

No reasonable interpretation of these events would lead to the inference that you and the developer have *agreed* that you will harvest the trees. The terms of the contract do not state that you *must* harvest the trees or that you must harvest a certain number of trees. Nothing in the deal suggests that the developer even wants you to harvest the trees. Instead, you and the developer have agreed only that, *if* you harvest any trees, *then* the purchase price will decrease accordingly. The parties have mutually agreed on the consequences that flow from your independent decision because that decision affects the value of the parcel. But you have in no way *agreed* with the developer that you will harvest trees; the developer has simply accommodated your decision to do so.

Plaintiffs would have this Court reject this more logical explanation. This Court should again decline that invitation. Where an innocent explanation of the challenged conduct "is plausible and more logical than a theory of concerted action, then a conspiracy may not be found." *Kreuzer*, 735 F.2d at 1488. There is no agreement here.

B. Plaintiffs' Theory of Agreement "Does Not Make Sense"

As this Court noted when it denied Plaintiffs' TRO, "[i]t does not make sense . . . that Kroger would want to weaken Albertsons during the two-year period of merger review before the acquisition is final and then pay almost $25 billion to acquire a weakened Albertsons." TRO Hr'g Tr. at 72:3-7; *see id.* at 71:23-25 ("[N]either Kroger nor Albertsons has an incentive to economically weaken Albertsons during the pendency of the merger review.").

Plaintiffs accordingly miss the mark by arguing that "intent is not a necessary element of a Section 1 violation." Pls.' PI Mem. at 19. The Court never suggested that intent is an element of Plaintiffs' claim. But an *agreement* is. This Court's holding therefore reflects Supreme Court precedent, which explains that "if the factual context renders [a plaintiff's antitrust] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. That straightforward legal principle is fatal to Plaintiffs claims, particularly where, as here, they rely so heavily on speculation and circumstantial evidence. *See, e.g.*, Pls.' PI Mem. at 20-21; *see also Matsushita*, 475 U.S. at 587.

Kroger's "strategic rationale for the proposed merger depends on integrating an operationally and competitively vibrant Albertsons business into Kroger in order to better serve customers throughout the country." 2d Millerchip Decl. ¶ 17. As at the TRO stage, that evidence remains "essentially unrebutted." TRO Hr'g Tr. at 68:14-21. Moreover, as directors of an Ohio corporation, the members of Kroger's board of directors have a fiduciary duty (under Ohio law) not to "waste[]" Kroger's "corporate assets." *Maas v. Maas*, 161 N.E.3d 863, 876 (Ohio Ct. App. 2020). Accordingly, in entering into the Merger Agreement with Albertsons, the Kroger Board owed a duty to Kroger shareholders to ensure that Albertsons would not take any action during the period between signing and closing of the transaction—*e.g.*, paying a value-destructive Pre-Closing Dividend—that would harm the value of the Albertsons business.

In contrast with the evidence showing a well-reasoned business judgment by Kroger's Board and officers, Plaintiffs continue to offer their same speculation that the Pre-Closing Dividend will hamstring Albertsons' ability to compete and will irreparably harm Albertsons "well into the future," even beyond the two-year period anticipated for the regulatory approval. Pls.' PI Mem. at 2. But as the evidence shows, Plaintiffs' reasoning is backwards. Kroger has a strong economic interest in *maintaining* the financial and competitive viability of Albertsons, not torpedoing it. *See Vantico Holdings S.A. v. Apollo Mgmt., LP*, 247 F. Supp. 2d 437, 453, 458-59

(S.D.N.Y. 2003) (denying TRO where plaintiffs produced no evidence that defendant would risk its investment in a competitor by attempting to "sabotage" its business); *see also* 2d Millerchip Decl. ¶ 17.

The four corners of the Merger Agreement bear out Kroger's business justification for the merger. Kroger obtained several contractual provisions in the Merger Agreement to ensure that Albertsons would maintain the competitiveness of its business during the period between signing and closing of the transaction, including: (i) as a condition to Kroger's obligation to consummate the transaction, that no material adverse effect with respect to Albertsons shall have occurred (Merger Agreement § 7.3(a)); (ii) that Albertsons conduct its business in the ordinary course of business consistent with past practice (*id.* § 6.1(a)); and (iii) that Albertsons use commercially reasonable efforts to preserve its business organizations, goodwill, and material assets, and maintain its rights, franchises, and existing relationships with customers, suppliers, employees, business associates, and other persons with which Albertsons has material business dealings (*id.*).[3] Finally, the fact that Kroger insisted on the right to terminate the merger if Albertsons exceeded a $4 billion threshold on the Pre-Closing Dividend is evidence that it did not want Albertsons to expend all its liquidity prior to the merger (*id.* § 1.1 (defining Pre-Closing Dividend)). That is the exact opposite of what one would expect if Kroger wanted to *weaken* its acquisition target.

Considered in "totality," *FTC v. Lukens Steel Co.*, 454 F. Supp. 1182, 1189 (D.D.C. 1978), these provisions reflect the economic realities of the transaction and the steps that Kroger took to ensure that the merger was an economically sound business decision. Plaintiffs have not offered any evidence to overcome this "obvious alternative explanation." *Twombly*, 550 U.S. at 567.

[3] The Merger Agreement is attached as Exhibit A to the 2d Millerchip Declaration.

In the face of this evidence, Plaintiffs attempt to rehabilitate their theory in two ways. ***First***, they argue—without any evidence or legal support—that "acquiring a weaker Albertsons benefits Kroger, because of the strong assets it can acquire, the weak assets it may divest, and even the potential to reacquire some of those assets once any threat they once posed is neutralized." Pls.' PI Mem. at 20. This argument is difficult to follow, but it appears to assume that Albertsons will intentionally weaken certain unidentified stores, then divest those weakened stores as part of the merger review, then later attempt to re-purchase those stores without any regulatory objection after the merger has cleared. *See id.* Beyond the raw speculation needed to reach that conclusion, Plaintiffs fail to explain how or why Defendants could expect that federal antitrust regulators would allow them to divest certain stores as part of their merger review only to approve Kroger's re-acquisition of them. Indeed, that sequence of events would directly undermine the very purpose of divestiture, and this Court should not presume (particularly without any evidence) that Defendants would expect that the FTC would allow it and build the Merger Agreement around that assumption.

Second, Plaintiffs offer the non-responsive argument that "it is not at all unusual, let alone irrational, for companies to buy weakened competitors." Pls.' PI Mem. at 20. Initially, Plaintiffs offer no evidence to support that contention. *See id.* But even if it is the case that companies sometimes acquire companies that are not as strong or competitive, it is illogical that an acquiror would commit to pay a fixed purchase price for a target company based on the financial and operating profile of that target, then purposefully seek to weaken the target company, including by weakening its financial and operating profile during the pendency of the transaction. Under those circumstances (as here), the acquiror would remain obligated to pay the original fixed purchase price, which would not decrease. According to Plaintiffs, the acquiror would thus intentionally overpay for a target. That is illogical. Plaintiffs' assertion that Kroger is seeking to weaken Albertsons while remaining obligated to pay the approximately $25 billion purchase price is not only unsupported by the evidence, it flies in the face of common business sense. As explained above, companies like Kroger seek to—and have a duty to—*create* value for shareholders after the acquisition of a target company, not lose it.

In the end, Plaintiffs' confused theory of the case might be explained by comparing the current PI Motion with their Complaint, which contained a much different theory. As alleged in the Complaint, Albertsons' goal in issuing the Pre-Closing Dividend was not to return excess liquidity to its investors, but to "batter[]" itself so badly that regulators would later approve the merger because the company will be classified as a "flailing" or "failing" firm. Compl. at 3. In other words, Plaintiffs alleged that the purpose of the dividend from the beginning was to self-sabotage Albertsons' business to the point where Albertsons would effectively lose its ability to compete with anyone. *See id.*; *see also id.* ¶¶ 48, 55-56, 61, 70. As implausible as that theory may be in its own right, Defendants have now removed any doubt, representing to Plaintiffs and to this Court that it will not invoke the "failing firm" defense in the regulatory approval process. TRO Hr'g Tr. at 72:12-20 (holding that the "failing firm defense" is "essentially a non-issue" based on Defendants' representations); *see also* Kroger Opp. to TRO at 15-16. With that argument off the table, Plaintiffs' conspiracy theory truly "does not make sense" and warrants no credence from this Court. TRO Hr'g Tr. at 72:3-7.

C. Plaintiffs Fail to Establish a Restraint of Trade

At the TRO Hearing, this Court held that, even if there were an agreement, there was "insufficient evidence that Albertsons will not be able to effectively compete or will otherwise restrain trade" following the Pre-Closing Dividend. TRO Hr'g Tr. at 69:21-24. Again, Plaintiffs' renewed motion cannot change that conclusion. If Plaintiffs had somehow established an anticompetitive agreement, they would still fail to establish that Albertsons' dividend would likely restrain trade.

1. The Rule of Reason Applies to Plaintiffs' Claims

In antitrust cases, courts presumptively apply the rule-of-reason analysis, which requires a "fact-specific" assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). Plaintiffs must show that Defendants' actions "targeted, or 'had an actual adverse effect on[,] competition as a whole in the relevant market.'" *Gross v. Wright*, 185 F. Supp. 3d 39, 49 (D.D.C. 2016) (quoting *Asa Accugrade, Inc. v. Am. Neumatic Ass'n*, 370 F. Supp. 2d 213, 215 (D.D.C. 2005)). The failure to establish that the "market as a whole has suffered an anti-competitive injury . . . alone is fatal" to a Sherman Act claim. *Asa Accugrade*, 370 F. Supp. 2d at 216. Under the rule-of-reason analysis, proving that a restraint would have substantial anticompetitive effects thus requires either evidence of actual competitive harm, which Plaintiffs concede they cannot show, or "proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express Co.*, 138 S. Ct. at 2284.

Contrary to Plaintiffs' arguments, the "quick look" analysis does not apply here. Pls.' PI Mem. at 22-23. Indeed, courts have made clear that the quick-look approach is permissible only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Courts have been crystal clear that neither a *per se* nor a quick-look analysis is appropriate in novel or "rare" scenarios. *See, e.g.*, *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, at 349-51 n.19 (1982); *NCAA v. Alston*, 141 S. Ct. 2141, 2155-56 (2021); *United States v.*

Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001); *see also* Compl. ¶ 58. The novel application of the antitrust laws pressed by Plaintiffs here is not appropriate for a truncated antitrust analysis.

2. *Under Any Antitrust Lens, Plaintiffs Fail to Show a Plausible Restraint of Trade*

The crux of any Section 1 claim is an agreement that "unreasonably restricts trade in [a] relevant market." *Dial a Car*, 884 F. Supp. at 591. At the end of the day, Plaintiffs fail to establish an unreasonable restraint of trade under a *per se*, a quick-look, or a rule-of-reason approach.[4]

First, without its "failing firm" theory, Plaintiffs are left to rely on the allegation that Albertsons will have less "available cash" after it pays the Dividend, which will "hamper its ability to compete." *See, e.g.*, Pls.' PI Mem. at 12, 17, 26; Compl. ¶ 61. To Kroger's knowledge, there is no case in history allowing an antitrust theory to proceed on this basis. But in any event, Plaintiffs' allegation of "hamper[ed] competition" is based on pure speculation rather than evidence. *See Am. Express*, 138 S. Ct. at 2288 ("This Court will not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.") (quotation marks omitted). Plaintiffs make broad macroeconomic statements about an impending recession, Pls.' PI Mem. at 15; Compl. ¶ 20, and they speculate about how Albertsons' reduced liquidity will affect its hiring practices, its "promotions and advertising," its capital investments, its loyalty programs, and its repairs and

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[4] Plaintiffs acknowledged in their TRO Reply that the *per se* rule does not apply here. *See* Pls.' Reply ISO TRO at 10. That concession is necessary. *Per se* treatment is limited to restraints that "always or almost always tend to restrict competition and decrease output." *Am. Express Co.*, 138 S. Ct. at 2283 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). The Supreme Court has repeatedly held that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *See, e.g.*, *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979). As a result, the Supreme Court has placed only a few manifestly anticompetitive business practices—namely, price fixing, bid rigging, and market allocation—into the *per se* category. A company's unilateral decision to issue a Pre-Closing Dividend is not among those practices.

improvements, Pls.' PI Mem. at 1, 15-16; Compl. ¶¶ 61-62. But Plaintiffs provide no *fact*s demonstrating how Albertsons' reduced liquidity will lead to reduced competition in any given market. *See Twombly*, 550 U.S. at 555. In reality, Plaintiffs have no idea how a sophisticated business like Albertsons' will allocate its resources in the future, and its speculative allegations only serve to illustrate as much. *See Am. Express*, 138 S. Ct. at 2288.

Second, despite the Supreme Court's admonition that "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition," *id.* at 2285, Plaintiffs do not even attempt to identify a relevant market here, *see* Pls.' PI Mem. at 24 n.11. Instead, Plaintiffs state that they "would establish" relevant markets in the future (they do not say when), *id.*, and they appear to fall back on the Complaint's allegations that an appropriate relevant geographic market is "no larger than the District," *see* Compl. ¶ 78, suggesting a District resident in Navy Yard might regularly travel to Tenleytown to purchase bread. They also allege that a consumer might shop for milk anywhere in Los Angeles. *Id.* ¶ 85 ("The relevant geographic markets in California may include areas no larger than city and suburb markets."). The Complaint further implies that competition in Illinois should be measured statewide, from Chicago to Carbondale. *See id.* ¶ 51 (estimating statewide Illinois shares resulting from the merger). Without a coherent market definition to speak of, Plaintiffs' antitrust theory fails at the outset. *See Am. Express*, 138 S. Ct. at 2285 ("[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market."); *see also Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008) ("Failure to allege a legally sufficient market is cause for dismissal of the claim."); *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008) (similar).

Third, Plaintiffs' failure to identify a relevant geographic market unmasks their flawed antitrust theory because the dividend-based claim is *necessarily* nationwide in scope. Albertsons is a nationwide supermarket chain, with more than 1,800 grocery stores across the United States. Compl. ¶ 5. The thrust of Plaintiffs' Motion is that the Dividend will leave Albertsons, *as a company*, with insufficient cash to compete with Kroger. *See, e.g.*, Pls.' PI Mem. at 2, 25; Compl. ¶ 56. But this theory depends on *nationwide* allegations; Plaintiffs focus on Albertsons' market capitalization, *id.* ¶ 24, its debt, *id.* ¶ 56, 59, its net receivables, *id.* ¶ 24, its liquidity needs, *id.*, its bond rating, *id.* ¶ 23, and other similar *nationwide* economic statistics, *id.* ¶ 23-25. At no point do Plaintiffs explain why Albertsons' alleged *nationwide* lack of cash will lead to reduced competition targeted to the geographic regions of D.C., Illinois, California, or any other sub-market that they might eventually attempt to identify in the future. They offer no explanation of Albertsons' corporate structure or its regional allocation of resources. Indeed, following Plaintiffs' logic, Albertsons would be categorically incapable of competing *anywhere* as a result of the dividend. *Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 53-54 (2d Cir. 2016) (dismissing antitrust claims where alleged casino market implausibly excluded relevant geographic areas). Yet as this Court acknowledged, "Albertsons and Kroger are only direct competitors in a few markets," and Plaintiffs offer no plausible basis to conclude that a weakened Albertsons would benefit either party in those markets. TRO Hr'g Tr. at 72:1-7.

Put differently, Plaintiffs' alleged geographic markets cannot plausibly be linked to an alleged anti-competitive *dividend* in this case. As courts around the country recognize, under these circumstances, the inability to identify a relevant market in the Complaint is not a "factual inquiry," or a simple pleading failure that could be cured by amendment. *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997) (recognizing that an appropriate market definition is often a factual inquiry but affirming dismissal where proposed market was implausible); *see also Gross*, 185 F. Supp. 3d at 50, 52-53 (recognizing that "Plaintiffs' characterizations of the relevant market for antitrust purposes have been imprecise and inconsistent" and dismissing claim for failure to allege market power). It is a fatal flaw in Plaintiffs' claims, and it warrants denial of their motion.

Finally, for similar reasons, Plaintiffs fail to adequately allege that either Defendant has or could exercise market power. As the Supreme Court has recognized, if "the exercise of market power is not plausible, the challenged practice is legal." *Alston*, 141 S. Ct. at 2156 (quoting 7 Areeda & Hovenkamp, Antitrust Law ¶ 1507a, p. 444 (4th ed. 2017)). Plaintiffs' PI Motion barely mentions "market power" at all, and the Complaint's only discussion of market power involves Plaintiffs' conclusory assertions about the likely impact of the *merger* in the District of Columbia, Illinois, and California. Compl. ¶¶ 35-55. There, Plaintiffs attempt to import the analytical framework used to review mergers—summing Kroger's and Albertsons' market shares and performing an HHI calculation—to purportedly show market power. *Id.* ¶¶ 44-46. But Plaintiffs are not challenging the merger in this suit; they are challenging an alleged agreement to issue the Pre-Closing Dividend. And as to that conduct, they offer no factual allegations (or even a coherent theory) of how Defendants' conduct could enhance Kroger's market power. *See, e.g.*, *id.* ¶ 41 (showing Kroger with a 13.9% market share in D.C.).

* * * *

At the end of the day, Plaintiffs' speculation that the Pre-Closing Dividend will irrevocably "batter[]" Albertsons is unsupported and implausible. Compl. at 3. As the Merger Agreement reflects, consummating the transaction may require the divestiture of certain Albertsons and Kroger stores, and it further contemplates that Albertsons may spin off certain stores to its shareholders in connection with the transaction. If Albertsons' business weakens during the pendency of the transaction, it may not be able to divest those stores (either to third parties or via a potential spin-off)—which could imperil the entire transaction. Thus, Kroger's economic incentives are exactly the opposite of Plaintiffs' unsupported speculation.

In sum, under any of the three analytical approaches, Plaintiffs fail to adequately allege an antitrust claim under Section 1 of the Sherman Act or any of its state analogs.

III. Plaintiffs Cannot Demonstrate Irreparable Harm

Plaintiffs also cannot demonstrate that a preliminary injunction is needed to prevent immediate or substantial harm to competition. *Winter*, 555 U.S. at 20.

Plaintiffs present a circular theory of irreparable harm. Having based the alleged merits of their case on the assumption that the Pre-Closing Dividend lessens competition, Plaintiffs argue that their residents will be irreparably harmed by that alleged reduction in competition. Because Plaintiffs have failed to show that the Pre-Closing Dividend will negatively impact competition, they lack any viable theory of irreparable harm. Moreover, the payment of the Pre-Closing Dividend will not affect Plaintiffs' (or the Federal Trade Commission's or other state attorneys generals') ability to review the merger and ensure it does not harm competition.

Again, Plaintiffs simply "cannot demonstrate that there will be harm to competition from payment of the [Pre-Closing Dividend]." TRO Hr'g Tr. at 73:10-12.

IV. Plaintiffs' Request Is Neither Equitable nor in the Public Interest

While Kroger is agnostic about whether Albertsons pays the Pre-Closing Dividend, let there be no mistake: Plaintiffs' motion is a thinly veiled attempt to use the antitrust laws to prevent a publicly traded company from returning money to its shareholders. As a consequence, Plaintiffs' motion threatens to injure all Albertsons shareholders and any market participant who acted in reliance on Albertsons' declaration of the Dividend. *See* TRO Hr'g at 73:15-23; *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, 460 F. Supp. 2d 1012, 1029 (S.D. Iowa 2006) ("[T]he public interest would not be served by preventing the free market from taking its natural course."). If governments (and individual plaintiffs) were allowed to weaponize antitrust law to seek judicial review of every such business decision, our nation's economy would grind to a halt. *See Alston*, 141 S. Ct. at 2163-64 ("[J]udges make for poor central planners and should never aspire to the role.") (internal quotation marks omitted).

CONCLUSION

For these reasons, Plaintiffs' request for a preliminary injunction should be denied.

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Respectfully submitted,

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