UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, *et al.*,

Plaintiffs,

v.

THE KROGER CO., *et al.*,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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On December 1, 2022, Plaintiffs moved for a Preliminary Injunction ("Motion") to prevent Albertsons from issuing its $4 billion Special Dividend in connection with its proposed merger with Kroger. Because this Court had denied Plaintiffs' TRO motion on November 8, the Court ordered Defendants to "focus on the new arguments raised in the [Preliminary Injunction] Motion." Those new arguments reinforce the existence of an agreement violating Sherman Act Section 1 and confirm the probable reduction of Albertsons' competitiveness relative to today if the Special Dividend is paid. These arguments demonstrate the likelihood of success and likelihood of irreparable harm and thus the need for a preliminary injunction.

The evidence of agreement: First, Albertsons originally planned a tender offer, and Albertsons conceded at the TRO hearing, like its CFO did at a Washington State evidentiary hearing, that this was the preferred means of returning value to shareholders, such that the Special Dividend approach was adopted *only* because of the agreement with Kroger. Second, Kroger heavily negotiated the size, form, and timing of the Dividend. Third, Defendants' joint announcement of the Merger Agreement, and Albertsons' same-day declaration of the Special Dividend in connection with the merger, bound Albertsons to pay it, meaning that Kroger not only agreed that Albertsons could, but that it would pay the Special Dividend of exactly $4 billion.

The evidence of effects: Albertsons believes it will need $6 billion in liquid capital completely aside from the Dividend for the next year, but after it pays the Dividend, Albertsons will only be able to meet that stated need by generating additional cash over an indeterminate period of time. During much of the time when Albertsons is recouping the $4 billion it paid out in the Dividend, it will have a balance sheet with significantly less cash and less of its revolving credit facility to draw on than it did pre-issuance. That diminished liquidity, together with the Merger Agreement's other restrictive terms, will reduce Albertsons' competitiveness, which violates Section 1 well before Albertsons gets into any real financial trouble, let alone becomes a "failing firm."

Plaintiffs' new proof of Albertsons' revolving credit facility's unavailability, and expert analysis dispelling Defendants' argument that Albertsons can immediately draw on annual revenues, rebuts Defendants' only effects arguments that, because of the rapid sequence of TRO briefings, Plaintiffs had not neutralized by the TRO hearing, and on which the Court relied in denying that motion.

In response, Defendants run as far away from the Court's directive as they can. They insist, as they did in prior briefing, that Albertsons always planned to pay back shareholders, but that does not respond to Plaintiffs' new argument or even explain *why* Albertsons abandoned its preferred course in favor of agreement with Kroger. They make sweeping statements about Kroger having "nothing to do with the Pre-Closing Dividend" (Kroger Opp. at 2), without accounting for the evidence of Kroger's role in negotiating the amount and timing of the Special Dividend. And they act as if the Merger Agreement's permitting Albertsons to pay the Dividend, rather than mandating it, is the end of the Section 1 conversation, when Plaintiffs' new arguments about other circumstances that converted the permission into an obligation explain why it is only the beginning. They do not even try to resuscitate their arguments about annual revenues, and across 50 pages of briefing, Defendants' only acknowledgement of the Merger Agreement's restrictions on Albertsons' ability to use its revolver is conclusory speculation from Albertsons (at 12) that Kroger would be fine with deviations from the Merger Agreement that raises more questions than it answers, given that Kroger must now agree to any borrowing.

In sum, Plaintiffs make new arguments, in some instances based on new evidence—and, as detailed herein, even further reinforced by Wednesday's evidentiary hearing in Washington—establishing that the agreed-upon Dividend will likely render Albertsons unable to compete as strongly as it can today, in violation of federal and state antitrust laws. Defendants largely do not meaningfully respond, and when they do, they improperly attempt to pick off pieces of Plaintiffs' evidence rather than address it as a whole. Properly understood, the alleged agreement—as evidenced

by the Merger Agreement and the context that explains Kroger's connection to the Special Dividend and the restrictions on Albertsons' ability to easily recoup its cash—would reduce competition, irreparably harming competition and consumers.

I. PLAINTIFFS ARE LIKELY TO PROVE THAT DEFENDANTS' AGREEMENT VIOLATES THE ANTITRUST LAWS.

The Plaintiffs will likely succeed on the merits,[1] because since the November 8 hearing, Plaintiffs have confirmed that the Dividend was specifically negotiated and agreed to between the parties; the terms of the Merger Agreement that restrict Albertsons' borrowing, including from its revolver, work alongside the Dividend to restrict Albertsons' access to capital; and Albertsons will have insufficient liquidity to compete at the same level it does today. This reduction in competition constitutes the irreparable harm that injunctive relief is necessary to prevent, and the public interest is best served by markets that ensure the benefits of competition flow to consumers. Finally, the balance of equities tilts significantly towards protecting competition. Any alleged harm to Albertsons caused by the delay is belied by the fact that no shareholder suit has yet been filed.

A. Further Investigation Combined with New Fact Evidence Demonstrates that the Dividend Is the Product of Agreement by the Parties.

It has been clear since the announcement of the proposed merger that the Dividend was linked to the merger (Margrabe Decl. Ex. 1 (Kroger and Albertsons Companies' Announcement of Definitive Merger Agreement, October 14, 2022) ("As part of the transaction, Albertsons Cos. will pay a special cash dividend of up to $4 billion to its shareholders)) ("Press Release"). Plaintiffs' investigation following the November hearing has clarified the agreement to make the payment.

[1] Defendants quibble with whether a quick-look analysis should apply over the Rule of Reason, *see FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986), but have yet to identify a procompetitive justification, foreclosing any argument that procompetitive justifications outweigh the anticompetitive effects Plaintiffs will show.

1. There Would Not Be a Special Dividend Absent the Merger

WA PI Tr. 145:4 (McCollam).[3] Indeed, without a merger, Albertsons would have "pivoted to a tender offer," because it was "absolutely committed that a better alternative was a tender offer." WA PI Tr. 218:2-3, 245:10-11 (McCollam). Both Kroger and Albertsons acknowledge this basic fact. Kroger Opp. at 18; Albertsons Opp. at 7. Ms. McCollam was unambivalent in her testimony in Washington, which is consistent with documents created in the ordinary course, that the *only* reason a Special Dividend was issued rather than some other form of capital return was because of the Merger Agreement. WA PI Tr. at 218:2-3 (McCollam); 2nd Gitlin Decl. Ex. 3 at 5.

2. Kroger Specifically Negotiated the Amount of the Dividend

[2] "McCollam Decl." refers to the declaration submitted in opposition to Plaintiffs motion for TRO, ECF No. 35-1. "McCollam Supp. Decl." refers to the declaration submitted in opposition to Plaintiffs motion for PI [ECF No. 59-2].

[3] The notation "WA PI Tr." is used to refer to the rough, redacted version of the transcript of the December 7, 2022 hearing in *State of Washington v. Albertsons Companies, Inc., et al*, Cause No. 22-2-18046-3 (Margrabe Decl. Ex. 2). The notation "DC TRO Tr." refers to the transcript of this Court's November 8, 2022 hearing.

which is precisely what it later announced its intention to do. 1st Gitlin Decl. Ex. 6 at -250; see also Margrabe Decl. Ex. 4 at -317.

Thus, Kroger's claim that it "had, has, and will have nothing to do with the Pre-Closing Dividend," Kroger Opp. at 2, is demonstrably false. Not only that, but elsewhere in its brief, where Kroger offers the more modest defense that it had no control over the Dividend, Kroger mistakes the standard for determining whether Kroger joined an anticompetitive agreement as outlined in *In re Ry. Indus. Empl. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 494 (W.D. Pa. 2019) (citing *In re Magnesium Oxide Antitrust Litig.*, No. CIV. 10-5943 DRD, 2011 U.S. Dist. LEXIS 121373, at *17 (D.N.J. Oct 20, 2011)). Kroger Opp. at 14. Contrary to Kroger's claim, Plaintiffs, are not required to show that Kroger "knew of or participated in every transaction in furtherance of or related to" Defendants' agreement. *In re Magnesium Oxide Antitrust Litig.*, No. CIV. 10-5943 DRD, 2011 WL 5008090, at *17 (D.N.J. Oct. 20, 2011) (citing decisions). It does not matter that, after Kroger and Albertsons negotiated the amount and cap, and announced the Dividend in connection with the merger, it was Albertsons' job to pay it and Kroger just "acquiesced"; while Kroger persuaded the

Washington court today that this was enough to take Defendants' agreement out of Section 1 territory,[4] federal antitrust law for at least the past eight decades has held otherwise. *See U.S. v. Masonite Corp.*, 316 U.S. 265, 276 (1942) (holding that the "fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action").

Plaintiffs have shown Kroger's knowledge of and intent to join the plan to pay an anticompetitive Dividend. Indeed, if one aligns Kroger's hypothetical landowner's "resource-rich waterfront property" sale (at 19-20) to the actual facts here, then (1) the real-estate developer enters purchase negotiations understanding that the landowner wants to harvest trees and insists on a mutually agreeable tree-harvesting plan, (2) the developer negotiates the cap on how many trees could be harvested from the property pre-sale (and prohibits any replanting), and (3) the developer and landowner together announce to the tree-buyer that the two have worked out a deal, and that the landowner is now promising to harvest the negotiated maximum number of logs. That is clearly an agreement, just as properly characterizing the facts here ignored or mischaracterized by the Defendants in their briefing knock their conduct well past the line of an agreement subject to Section 1 scrutiny.

3. Kroger and Albertsons Agreed on the Timing of the Announcement, Guaranteeing Payment

The parties also agreed on the timing of the announcement of the Dividend. Internally, Albertsons' board approved the merger and the Dividend in the same meeting. 2nd Gitlin Decl. Ex. 1 (Merger Agreement) at 1 (Recitals Section). The press release announcing the merger and proclaiming that "[a]s part of the transaction," Albertsons would issue the Special Dividend, Margrabe Decl. Ex. 1 (Press Release), was required to be "reasonably agreed upon" by the Defendants and jointly issued, 2nd Gitlin Decl. Ex. 1 (Merger Agreement) at § 6.8. This

[4] Order Denying State of Washington's Motion for Preliminary Injunction and Extending Temporary Restraining Order Until 4:30 PM on December 19, 2022, ¶10 (King Cty., Wash. Sup. Ct. Dec. 9, 2022) (ECF No. 61-1).

announcement not only created a legal requirement to pay this dividend under Delaware law (if this Court does not find its issuance to violate antitrust law), but also, with wording approved by Kroger, made payment of the full amount announced mandatory. Despite all of Defendants' protestations that the Dividend resulted from Albertsons' unilateral action, the agreement to issue it became inescapable through Defendants' joint action. Kroger itself knew this: internal documents from the negotiations over the special dividend make clear that Albertsons "will" pay the dividend, and Kroger's CFO agreed it was "unambiguous." [REDACTED] WA PI Tr. 54:8 – 55:2) (Millerchip). (Millerchip). Kroger admits (Opp. at 18) that upon announcement, Albertsons became obliged to pay it.

Albertsons claims that the Defendants jointly announced the Special Dividend and merger at the same time because otherwise, shareholders would believe they were entitled to the full merger consideration ***and*** the Special Dividend. Albertsons Opp. at 9. This explanation misses the point that the parties agreed that these two events would happen simultaneously. If issuing the Special Dividend were an action Albertsons could and did take unilaterally, then Albertsons could have elected to announce and pay it at any time, either before a merger (as they had planned to in July) or once the merger was complete. There would have been no risk of shareholder confusion if it had announced a $6.85 per share dividend one day and a merger where shareholders would receive $27.25 per share the next, certainly if Kroger had no say in the matter. The obvious explanation is the correct one: the dividend and the Merger Agreement were inextricably intertwined.

Kroger's so-called "acquiescence" to the capital return only to the extent it was contingent on certain negotiated terms is precisely the type of agreement that violates the antitrust laws.[5]

[5] Notably, this is direct evidence—an admitted agreement—meaning Defendants' quoting case law that "[t]here must be evidence that tends to exclude the possibility that [Defendants] were acting independently" are entirely inapposite as the agreement is explicit. Kroger Opp. at 14 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 at 764 (1984).

Defendants' attempts to distinguish an agreement from an accommodation or acquiescence ignores that "the concerted action element of section 1 of the Sherman Act" is met where "the seller coerces a buyer's acquiescence" in an illegal agreement. *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137, 1142 (10th Cir. 1997) (discussing tying arrangements). "The essence of section 1's contract, combination, or conspiracy requirement in the tying context is the *agreement,* however reluctant, of a buyer to purchase from a seller a tied product or service along with a tying product or service. To hold otherwise would be to read the words "contract" and "combination" out of section 1." *Id.* at 1142-43. What is true in tying cases is as true in any other situation where one party coerces another to go along with an illegal act: "the essence of section 1 . . . is the agreement." *Id.* Here the weight of the evidence demonstrates Kroger agreed to go along with Albertsons' plan to pay a dividend which would have the effect of lessening competition—that is, it was not even coerced. *Accord*, *Masonite Corp.*, 316 U.S. at 276.

4. Defendants' Contention that There Is No Agreement Depends on Disregarding Basic Axioms of Antitrust Analysis

In an effort to beat back Plaintiffs' Section 1 claim, Defendants do two things antitrust precedent does not allow. First, Defendants pretend that extrinsic circumstantial evidence of how an agreement affects competition cannot be used to interpret the competitive import of a written agreement. They say the Merger Agreement never required the Dividend's payment or gave Kroger any right to determine it. As Plaintiffs have explained, however, the Section 1 agreement here is anchored by a written agreement—the Merger Agreement—the effects of which are understood by looking at circumstantial evidence of its effects. Plaintiffs' Motion introduces new analysis of how, even though the Merger Agreement makes payment of the Special Dividend permissive and gives Kroger no right to decide its amount below $4 billion, Kroger's joint announcement of it with Albertsons made its payment exact and mandatory. (Compl. ¶¶30-33) Defendants' harping on the

Merger Agreement's permissive text as a defense "fails, as it ignores Plaintiffs' well-pleaded allegations of a horizontal agreement beyond the written agreements between Defendant[s]." *In re Dealer Mgmt. Sys. Antitrust Litig.*, 362 F. Supp. 3d 510, 535 (N.D. Ill. 2019); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1147 (N.D. Cal. 2009) (written agreements need not be illegal on their own but rather "may be considered with the pleadings as a whole" in finding conspiracy was plausibly alleged).

More broadly, Defendants erroneously analyze seriatim the components of the agreement they do address, rather than take on their anticompetitive impact collectively. It is hornbook law that Defendants cannot "compartmentaliz[e]" the "various factual components" of Defendants' agreement that Plaintiffs have alleged "and wip[e] the slate clean after scrutiny of each," by discussing each in isolation. *Cont. Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). For example, Albertsons asserts (at 8) that Defendants' negotiation of a cap does not establish "that the Special Dividend *would* be paid." But to make that assertion Albertsons must ignore that its contemporaneous announcement of the dividend made its payment a fait accompli (absent Court intervention). It must also ignore Kroger's own CFO's sworn testimony two days ago that Kroger understood Albertsons fully intended to pay that money to its shareholders one way or another and conditioned its agreement to merger on finding a mutually agreeable path for the two to happen in tandem. WA PI Tr. 54:8 – 55:2 (Millerchip); Margrabe Decl. Ex. 3 [REDACTED]

Kroger at least admits (Opp. at 18) that "the Pre-Closing Dividend became obligatory for Albertsons to pay after Albertsons decided to declare it." However, Kroger's contention that the announcement that the "Special Dividend has been declared in connection with [Albertsons] entering into" the Merger Agreement "served public transparency," does not reckon with Plaintiffs' new argument that the declaration *together with* entry into the Merger Agreement and other evidence of Albertsons' prior plans, the Merger Agreement's negotiation, and the Agreement's other restrictions

violates Section 1. Kroger is thus improperly "dismembering" the alleged agreement "and viewing its separate parts," instead of "looking at it as a whole." *Cont. Ore*, 370 U.S. at 699 (citing *United States v. Patten*, 226 U.S. 525, 544 (1913)).

B. Further Investigation Combined with New Expert Analysis Demonstrates That Albertsons Cannot Easily Tap Its Revenues or Revolving Credit Facility for Liquidity.

In his initial Declaration, Professor Weisbach explained how Albertsons' decision to issue a $4 billion dividend, combined with its poor credit rating, a likely recession, and the borrowing strictures imposed on it by the Merger Agreement left it vulnerable to a liquidity crunch that would keep it from making investments in remaining competitive. *See* Weisbach 11/2 Decl. ¶¶ 21-22. Albertsons responded that this was not so because it enjoyed a "surplus" under Delaware law, and because it would generate cash—either because it anticipated $75 billion in revenue or a sufficiently high EBITDA—to make up for any liquidity shortfall resulting from issuance of the Special Dividend. Professor Weisbach refuted each of these arguments. *See generally* Weisbach 11/30 Decl.

Albertsons yesterday submitted new declarations from Ms. McCollam and Professor Smith. Neither even mentions the Delaware "surplus" metric, much less do they attempt to defend it; nor does either of them attempt to defend EBITDA as a measure of the cash that Albertsons will generate. See generally McCollam Supp. Decl. and Smith 12/8 Decl. Ms. McCollam has also abandoned serious defense of the argument that Albertsons' revenues can be tapped to restore lost liquidity. And for good reason: if revenue were an appropriate estimate of the cash that Albertsons is generating then it could, by its own logic, issue a $40 billion dividend and still have tens of billions of dollars left to put toward its liquidity needs. Professor Smith, for his part, does not endorse revenue as the proper measure.[6] See generally Smith Decl. [ECF No. 60-3]. Instead, he proposes yet another alternative metric that he did

[6] Professor Smith only discusses revenue to dispute Professor Weisbach's claim that Albertsons is unlikely to generate $75 billion in revenue in the coming year. Smith 12/8 Decl. ¶ 7.

not mention before, and that Ms. McCollam does not discuss at all: operating cash flows.[7] Smith 12/8 Decl. ¶ 2.

Albertsons now, on its third attempt to propose a measure of the cash that its operations contribute to liquidity, has finally identified the one it presumably believes to be correct. However, identifying the "right" measure answers the wrong question, because no matter how one measures future revenue streams, Albertsons cannot tap them to meet its present liquidity needs. Thus, unless and until Albertsons recoups the $4 billion in liquidity that it spends on the Special Dividend, meeting its liquidity needs will require it to divert cash from other uses, including its investments in competition. Weisbach 12/9 Decl. ¶ 4; Weisbach 11/2 Decl. ¶ 13 & n.5.

With the additional evidence of an agreement Plaintiffs submit additional expert analysis on its effects. It is undisputed that once Albertsons has paid the Dividend, it will have merely $3 billion of liquidity of the $6 billion needed. McCollam Decl. at ¶¶44-45. Professor Weisbach, an expert in corporate finance, demonstrates that in the absolute best case, Albertsons' will nonetheless be $800 million shy of their needs after paying the costs necessary to acquire that revenue. Weisbach Supp. Decl. ¶ 23. Under the more likely calculation of income from revenue, the shortfall will be closer $1.3 billion. Thus, even if Albertsons is able to access all of its cash *and* its revolver, it will by its own estimation have insufficient liquidity to meet its needs.

The evidence also shows Albertsons has agreed with Kroger to foreclose its own access to the revolver, tying Albertsons's hands in its competition with Kroger. The language of the Merger Agreement (2nd Gitlin Decl. Ex. 1) at § 6.1(n)(i) prevents Albertsons from "incur[ing], assum[ing], guarantee[ing], or otherwise becom[ing] liable" for any debt, excepting the revolver "in the ordinary

[7] Professor Smith used this term once in his initial declaration, but it clearly referred to a different concept, since his claim that Albertsons "identified that its liquidity needs never exceeded its operating cash flows," Smith 11/4 Decl. ¶ 28, cannot be reconciled with the claim that Albertsons had $3.5 billion in operating cash flows in fiscal year 2021 but upwards of $4.75 billion in liquidity needs. Smith 12/8 Decl. ¶¶ 2, 4.

course of business consistent with past practice," thus making further access to the revolver contingent on historical practice. 2nd Gitlin Decl. Ex. 1 (Merger Agreement) at § 6.1(n)(i)(A). Further investigation by Plaintiffs makes clear that it is not at all consistent with past practice, for Albertsons to use the revolver to maintain liquidity in the ordinary course. 2nd Gitlin Decl. Ex. 6 (Excerpt from Albertsons' Form 10-K for fiscal year ending Feb. 26, 2022) at 84. The only time since 2019 the revolver has been accessed in anything like the fashion Albertsons now suggests it would do so going forward was in early 2020, when, as the COVID-19 pandemic began to sweep across the nation, Albertsons drew $2 billion to maintain liquidity given the uncertain times, and repaid it within the year. *Id.* This is not a past practice of using the revolver to supplement cash on hand to maintain sufficient liquidity to operate after paying a dividend 57 times larger than Albertsons historical dividends. Rather it demonstrates the revolver generally is used as an emergency reserve for times of uncertainty. *Id.*

Albertsons now attempts to rewrite the plain language of Section 6.1 to fit its preferred interpretation. Albertsons Opp. at 12. Albertsons, while acknowledging that the Revolver does not fit within the exception for "ordinary course of business consistent with past practice," asserts that notwithstanding the language cited earlier *in the same sentence*, there is "no reason to interpret" the Merger agreement as saying the words Defendants agreed on. *Id.* Albertsons then notes that it "has not been informed by Kroger that it views this use of the ABL as inconsistent with the Merger Agreement." *Id.* Kroger has not mentioned, let alone disavowed its right or intention to enforce Section 6.1(n), not in its Opposition to TRO, not in its Opposing to PI, not in either of the hearings in open court, and not in any public statement. That silence from the acquirer speaks volumes in the face of the target's presumptuousness, and it is a silence that otherwise extends to both parties with respect to the Merger Agreement's restrictions on Albertsons identified in Plaintiffs' Complaint and Motion. Indeed, despite being inarguably on notice this time (*see, e.g.*, Mot. at 1,-2, 8,-9, 11-12, 14-15, 17-18,

22-23, 27), except for the above, Kroger and Albertsons say not a word about these restrictions.

Albertsons' inability to access new capital, including the revolver, means even the remarkably large shortfalls projected based on Ms. McCollam's estimates understate the problem. McCollam Decl. ¶59; Weisbach Supp. Decl. ¶ 16, 23. Without the $2.5 billon remaining with the revolver, Albertsons' liquidity shortfall will grow to—depending on which measure the Court uses—either $3.3 billion or $3.8 billion less liquidity than Albertsons stated it needs. McCollam Decl. ¶¶44-45; Weisbach Supp. Decl. ¶ 16, 23.

The point is not that Albertsons will be insolvent, only that it cannot compete as it does today. While Albertsons will have a reduced ability and incentive to compete on those metrics, or on terms like workers' pay or pensions, Kroger will not face the disciplining pressure of Albertsons' competition. Therefore, through the course of the merger review (and thereafter, if the merger is blocked), Kroger will be able to extract supracompetitive prices, while if the merger is consummated, the weaker Albertsons' assets (physical and intangible) will remain beneficial to Kroger.

In Ms. McCollam's supplemental declaration, she (and Albertsons) make a great deal out of Albertsons' paying down the balance on the revolver by $200 million in the short time since that debt was incurred. McCollam Supp. Decl. ¶8. This decision to pay down the dividend, however, must be understood to be a choice made while subject to litigation, and there is no certainty that Albertsons would continue to act in the same way once litigation ends. As courts have noted in other contexts, Defendants burden is a "heavy one" to demonstrate it is "*absolutely clear*" that the conduct Plaintiffs have complained are not going to recur when their evidence is based on voluntary post-complaint action. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 67 (1987) (quoting *U.S. v. Phospate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)).

II. PLAINTIFFS SATISFY THE OTHER FACTORS NECSSARY TO ESTABLISH ENTITLEMENT TO A PRELIMINARY INJUNCTION

Plaintiffs will prevail on the merits, but if the Court has any doubts, this Circuit maintains the rule that a plaintiff who presents evidence strongly favoring an injunction on the three other factors need only raise a "serious legal question" and need not show a likelihood of success on the merits. *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014).

A. Plaintiffs Will Suffer Irreparable Harm Without a Preliminary Injunction.

Plaintiffs have demonstrated a likelihood of success on the merits—an apprehension of an imminent injury to competition itself. Therefore, Plaintiffs have also demonstrated an irreparable harm because "[i]n the antitrust context, '[r]easonable apprehension of threatened injury' can constitute irreparable harm." *United States v. Trib. Publ'g Co.*, No.CV1601822ABPJWX, 2016 WL 2989488, at *2 (C.D. Cal. Mar. 18, 2016) (quoting *Am.Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985)). As described above, this harm stems from the payment of the Special Dividend, which Albertsons has repeatedly, publicly (including in open court) committed to do as soon as all court orders preventing it have expired. Therefore, only an injunction can prevent irreparable harm from occurring.

Defendants claim that Plaintiffs are improperly trying to interfere with the free market (*see, e.g.*, Kroger Opp. at 30-31), "weaponize antitrust law to seek judicial review of every business decision," *id.*, or claim a freewheeling power to "obtain an injunction blocking payment of any dividend they did not think was appropriate." Albertsons Opp. at 15. According to this hyperbole, granting Plaintiffs' motion would create harm by intruding into the internal workings of businesses. Plaintiffs are not trying to "obtain an injunction blocking payment of [a] dividend they [do] not think [is] appropriate," *id.*; Plaintiffs seek to enjoin Defendants from violating the antitrust laws, to which

there is no business judgment rule exception.[8]

And there is no reason to expect frequent such suits: Defendants suggest a slippery slope but concede that the conduct Plaintiffs challenge is exceedingly rare. Mr. Millerchip testified that the issuance of a special dividend alongside a merger is "quite rare." WA PI Tr. 115:5-8 (Millerchip). Ms. McCollam agreed that it was "unusual," and that the joint press release announcing the merger and Special Dividend was unprecedented. *Id.* at 147:7-16 (McCollam). Nor does either Defendant engage with an additional factor that makes this situation unusual: the fact that Albertsons' board is "controlled" by a consortium of large investors who can take actions—including issuing an enormous dividend that will overwhelmingly serve to enrich them and deliver returns to their own investors—without ensuring that the corporation itself is left able to compete just as effectively during the merger's review. 2nd Gitlin Decl. Ex. 6 (Albertsons' 10-K) at 30.

B. The Balance of Equities Favors Plaintiffs

Plaintiffs, as well as consumers in Plaintiff states, have a strong interest in enjoying the benefits of a free and competitive market, and harm to competition is of great weight. *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) (citation omitted). Preliminary relief simply would maintain the status quo until regulatory authorities can complete their review of the merger.

This delay would not interfere with Defendants' proposed merger. Defendants also will suffer no harm, irreparable or otherwise, by issuance of an injunction. Because Delaware law does not demand the payment of an unlawful dividend, there is no law requiring Albertsons to sequester or otherwise hold separate the $4 billion. *See, e.g.*, *In re Sunstates Corp. S'holders Litig.*, C.A. No.

[8] Nor is there a Delaware Corporate law exception, despite Defendants pointing to Delaware law on surplus, (Kroger Opp. at 7), when agreements to pay dividends exist, (Kroger Opp. at 15-16), and determining the lawfulness of an action (Albertsons Opp. at 17-18).

13284, slip op. at 6 (Del. Ch. Apr. 18, 2001). To the extent Albertsons chooses to do so there can be no additional harm whether the money is paid in a dividend or held in a bank account. Further, despite Albertsons' doomsaying and despite more than a month delay between the announced date of payment and today, it does not identify a single shareholder action seeking to enforce this supposed contractual right to a dividend that has been filed. *See* Albertsons Opp. at 16.

Albertsons also claims that if the Court grants Plaintiffs' request, it may experience harm in the form of decreased access to capital markets. WA PI Tr. at 250:24 – 251:15 (McCollam); *See also* McCollam Supp. Decl. ¶ 15 (claiming continued inability to pay dividend will "erode the confidence of the Company's shareholders and will discourage future investment in the Company"). This harm is utterly speculative. Albertsons has not shown that it has experienced any decline in confidence from the capital markets to date, or will going forward. Albertsons similarly has offered no support for its representation (at 2, 19) that the failure to issue this Dividend imposes harm on Albertsons shareholders that "could exceed $1 million per day." (emphasis omitted). [9]

C. Issuance of the Injunction Is in the Public Interest

The public interest is served by ensuring that there are no unreasonable restraints on competition. *Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc.*, 295 F.Supp.2d 75, 96 (D.D.C. 2003); *F.T.C. v. Swedish Match*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) ("There is a strong public interest in effective enforcement of the antitrust laws . . . ."). The restraints on competition in violation of Section 1 that will occur if the Special Dividend is paid will injure not only to Plaintiffs, but to the entire public. It is in the interest of everyone who needs to eat—that, is everyone—to

[9] The D.C. Circuit rarely requires the District (or other sovereigns) to post bond because, as then-judge Jackson explained, "[it is] presumably solvent and will comply with legitimate orders issued by courts." *CEF Energia, B.V. v. Italian Republic*, No. 19-3443, 2020 WL 4219786, at *7 (D.D.C. July 23, 2020) (K.B. Jackson, J.). Because Albertsons has not shown that it has suffered, or is likely to suffer, any harm from the issuance of an injunction, Plaintiffs should not be required to post bond. Fed. R. Civ. P. 65(c) (security need only be "proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained").

maintain healthy competition among and between supermarkets, which means maintaining a well-capitalized and sufficiently liquid Albertsons. Therefore, this Court should grant Plaintiffs' motion and enjoin payment of the Special Dividend.

III. CONCLUSION

For the foregoing reasons, the Court grant Plaintiffs' motion for Preliminary Injunction, and enjoin Defendants from issuing the Special Dividend until further order from this Court.

Dated: December 9, 2022

Respectfully submitted,

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