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No. 22-7168

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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DISTRICT OF COLUMBIA, *et al.*,

APPELLANTS,

v.

THE KROGER CO., *et al.*

APPELLEES.

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On Appeal from the United States District Court
for the District of Columbia

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# APPELLEE ALBERTSONS COMPANIES, INC.'S CONSOLIDATED OPPOSITION TO APPELLANTS' MOTION FOR AN INJUNCTION PENDING APPEAL AND MOTION FOR SUMMARY AFFIRMANCE

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**CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 8(a)(4)**

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 8(a)(4) and 26.1, undersigned counsel certifies:

Albertsons Companies Inc. is a publicly traded company incorporated in Delaware and headquartered in Idaho.

No parent corporation and/or publicly held corporation owns 10% or more of Albertsons Companies, Inc.'s stock.

Dated: December 15, 2022 */s/ Edward D. Hassi*

Edward D. Hassi

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

Appellee Albertsons Companies, Inc. ("Albertsons" or "the Company") respectfully opposes the Emergency Motion for an Injunction Pending Appeal and an Immediate Administrative Stay (the "Motion") filed by the District of Columbia, California, and Illinois (the "Appellants") and files a Motion for Summary Affirmance pursuant to Circuit Rule 8(b).

## PRELIMINARY STATEMENT

Appellants have failed three times to persuade the District Court to enjoin Albertsons from paying a duly authorized special dividend (the "Special Dividend") that has been due and owing to its shareholders since November 7, 2022. As the District Court has repeatedly held, Appellants have failed to show they are likely to succeed on the merits of their claims or to demonstrate irreparable harm will occur in the absence of an order enjoining Albertsons' payment of the Special Dividend to its shareholders. Appellants' claims are based on little but pure speculation and baseless assertions that are easily disproven.

Appellants now ask this Court to take the extraordinary step of enjoining payment of the Special Dividend while their meritless appeal of the District Court's denial of their motion for preliminary injunction is pending. Appellants provide no basis to justify such an unprecedented intervention into Albertsons' internal affairs. The District Court did not abuse its discretion in denying the preliminary injunction. It issued a well-reasoned opinion consistent with the

conclusion reached by a Washington state court that considered and rejected a nearly identical motion for preliminary injunction by the State of Washington. Appellants identify no factual or legal error by the District Court, nor could they given that the District Court's findings of fact are well supported by the extensive record.

To obtain an injunction from this Court, Appellants also must establish a threat of irreparable harm to competition and that the balance of equities favor the extraordinary injunctive relief sought. They can do neither, as demonstrated by the District Court's rejection of the Appellants' same arguments. Indeed, Appellants entirely disregard the substantial harm the requested relief would impose on Albertsons and its shareholders. As a result, Appellants fail to meet their burden and their request for injunctive relief should be denied.

For the same reason that this Court should not issue an injunction pending appeal, it should summarily affirm the District Court's denial of the preliminary injunction. The District Court did not abuse its discretion in finding that Appellants have not demonstrated a substantial likelihood of success on the merits of their antitrust claims, including because, as it found, there was no agreement or conspiracy to pay the Special Dividend and no showing that payment of the Special Dividend would have anticompetitive effects. These findings are correct—

and certainly free of clear error—and should be affirmed, and the appeal dismissed.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The Dividend and Proposed Merger

Albertsons' Board of Directors approved the Special Dividend following a broad-ranging strategic review process that began in November 2021 and was publicly announced in February 2022. *See* McCollam Nov. Decl. (Opp. Tab A) ¶ 11. During that process, Albertsons, with the assistance of two highly-sophisticated financial advisors, Goldman Sachs and Credit Suisse, carefully considered several options to return to its shareholders excess capital accumulated due to its strong financial performance. McCollam Nov. Decl. ¶¶ 12, 14, 30, 54; Appellants' Tab 6, Ex 3 p. 2. After a rigorous review of its past and expected performance and projected capital needs, Albertsons determined that it would seek to return capital approximating $4 billion or more. 6/10/22 Presentation (Opp. Tab G) at ACI_DCCID00000076, -0086.

A return of capital can be accomplished in several ways. After considering its options, Albertsons focused on either: (1) issuing a special dividend; or (2) engaging in a share repurchase/tender offer. 6/10/22 Presentation at -0076.

During the strategic review, Kroger approached Albertsons about a potential merger. From the outset of its merger discussions, Albertsons made clear to

Kroger that Albertsons was planning a near-term return of capital to its shareholders. McCollam Nov. Decl. ¶ 21. Albertsons ultimately determined that so long as its merger discussions with Kroger were ongoing, any return of capital would have to take the form of a special dividend, rather than a share repurchase, because the securities laws made it impractical to offer to buy back shares from Albertsons' shareholders while Albertsons had material non-public information concerning a possible merger. 6/10/22 Presentation at -0091; WA Tr. (Opp. Tab E) at 136:1-8. Paying a special dividend raised no such concerns under the securities laws.

Accordingly, when Kroger made its initial offer to Albertsons, Kroger took the position that ***if*** a merger between Kroger and Albertsons were to be announced, and ***if*** Albertsons (and Albertsons alone) elected to pay the Special Dividend, the per-share merger consideration would need to be reduced by an amount equivalent to the Special Dividend. McCollam Nov. Decl. ¶¶ 25, 26, 28.

On October 13, 2022, the Albertsons Board approved a merger with Kroger. McCollam Nov. Decl. ¶ 29. The Merger Agreement expressly permitted (but did not require) Albertsons to pay a special dividend at its discretion, and adjusted per-share merger consideration in the amount of the Special Dividend. *Id.* ¶¶ 23-25, 28; *see also* Motion Tab 4 at 3; *id.* § 6.1(e). To ensure that Albertsons remains a thriving competitor and an attractive acquisition target, the Merger Agreement

further provided that if the special dividend exceeded $4 billion, Kroger would have a right to walk away from the deal. Motion Tab 4 at 16.

Separately, Albertsons' Board considered and approved the payment of the $4 billion Special Dividend on October 13, 2022. The Board reviewed Albertsons' available capital surplus, which, calculated consistent with Delaware law, would have authorized payment of a dividend of nearly $14.7 billion. McCollam Nov. Decl. ¶¶ 31-35. With assistance from its financial advisors and its CFO, the Board also considered its current financial condition, past performance, future projections, economic trends, other uses of capital, and additional relevant information. *Id.* ¶¶ 43-54. The Board then exercised its business judgment in resolving to issue a special dividend of $6.85 per share—totaling approximately $4 billion—to be paid pro rata on November 7 to all Albertsons shareholders of record as of October 24, 2022. *Id.* ¶¶ 1, 16.

**B. The Action Below.**

On October 26, 2022, six attorneys general, including the attorneys general for the Appellants and Washington State sent a letter to the CEO of Albertsons seeking to stop payment of the Special Dividend. Albertsons promptly responded to explain why the concerns expressed were unfounded, and that it was not possible to stop payment of the Special Dividend given the record date had passed. 10/28/22 Response Letter (Opp. Tab H).

On November 2, 2022, Appellants filed a complaint alleging Albertsons and Kroger violated the Sherman Act, 15 U.S.C. § 1, and its state analogues by agreeing to Albertsons' payment of a Special Dividend that would weaken Albertsons' ability to compete, and sought a temporary restraining order ("TRO") enjoining payment of the Special Dividend. Motion Tab 3.

On November 8, 2022, after hearing oral argument, the District Court denied the requested TRO, concluding that Appellants failed to show a likelihood of success on the merits. It found there was "no evidence of an agreement between Albertsons and Kroger to pay the [Special Dividend]," and that, instead, the evidence showed the Special Dividend was consistent with "an independent decision by Albertsons to return value to its shareholders." *See generally*, Motion Tab 2 at 65-74. It also determined that there was "insufficient evidence that Albertsons will not be able to effectively compete, or that [payment of the Special Dividend] will otherwise restrain trade," citing Albertsons' strong revenues and excess cash flow and significant sources of liquidity. *Id.* at 70:15-71:19.

The District Court also concluded that Appellants failed to establish irreparable harm or a public interest in restraining payment of the Special Dividend. Payment of the Special Dividend, as the District Court explained, would not "result in a lessening of competition," and the balance of equities weighed against injunctive relief given the resulting interference in Albertsons' internal

affairs and harm to shareholders who "acted in reliance on the commitment to pay the dividend." *Id.* at 71-73.

On December 5, 2022—nearly a month later—Appellants filed a motion in the District Court for a preliminary injunction. Dist. Ct. Dkt. at 56. The District Court denied the motion on December 12, 2022, again finding that Appellants failed to show a likelihood of success on the merits. The District Court concluded the "new" evidence proffered by Appellants did not warrant reconsideration of the its prior conclusions in the context of the TRO but instead was "consistent with the Court's prior conclusion that Albertsons made a unilateral decision to issue a special dividend to its shareholders" and that payment of the Special Dividend would not weaken Albertsons or have any anticompetitive effects, thus posing no result of irreparable harm in the absence of an injunction. Motion Tab 1 at 3-4.

On December 12, Appellants moved in the District Court for the same injunctive relief pending appeal sought here. Dist. Ct. Dkt. at 66. On December 14, the District Court promptly denied the motion, finding that Appellants did not present "a strong case" or raise a "serious legal question," and that their "claims have substantial weaknesses." 12/14/22 Order (Opp. Tab F) at 4. Moreover, the District Court again found Appellants failed to show "harm to competition or consumers is likely," much less irreparable, and that the "potential economic harm to Albertsons" weighs against an injunction pending appeal. 12/14/12 Order at 5.

### C. The Parallel Washington State Litigation.

On November 2, 2022, the State of Washington filed a parallel action in Washington state court alleging nearly identical claims under Washington state law. Washington sought and obtained a TRO enjoining payment of the Special Dividend through December 9, 2022. *See* Motion Tab 12.

On December 7, 2022, the Washington Superior Court held a full-day evidentiary hearing, including over five hours of testimony from three witnesses: Gary Millerchip, Kroger's CFO, Sharon McCollam, Albertsons' President and CFO, and Professor David Smith, a corporate finance expert. Considering that evidence and after hearing oral argument on December 9, 2022, the Washington court denied Washington's motion for a preliminary injunction, concluding that Washington failed to show an agreement between Kroger and Albertsons to issue the Special Dividend or that payment of the Special Dividend would harm Albertsons' ability to compete. Motion Tab 12 at 4, 6.

The Washington court extended the TRO to December 19, 2022 at 4:30 p.m. PT to allow Washington the opportunity to seek relief from the Washington Supreme Court. *Id*. Washington has filed a motion for an injunction pending appeal in the Washington Supreme Court, which remains pending as of the date of this filing. Albertsons has opposed this motion.

## ARGUMENT

### A. This Court Should Deny Appellants' Motion for Injunctive Relief Pending Appeal.

An injunction pending appeal is an "extraordinary" remedy that Appellants must meet a heavy burden to justify. *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm.*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also John Doe Co. v. Consumer Fin. Protection Bureau*, 849 F.3d 1129, 1131-32 (D.C. Cir. 2017) (A motion for an injunction pending appeal is an "exceptional remedy"). To prevail, Appellants must show that: (1) they are "likely to prevail on the merits of [their] appeal"; (2) that "without such relief, [they] will be irreparably injured"; (3) that the issuance of an injunction would not "substantially harm other parties interested in the proceedings"; and (4) the "public interest" justifies the Court's exercise of its equitable power given the circumstances. *Virginia Petroleum Jobbers*, 259 F.2d at 925; *see also F.T.C. v. Weyerhaeuser Co.*, 648 F.2d 739, 742 (D.C. Cir. 1981); *F.T.C. v. Heinz H.J. Co.*, No. 00-5362, 2000 WL 1741320 at *1 (D.C. Cir. Nov. 8, 2000).

Appellants must meet this burden in light of the appellate standard of review, which requires them to show the District Court "abused its discretion in denying the preliminary injunction." *John Doe Co*., 849 F.3d 1131-32; *see also Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 319 (D.C. Cir. 1987). A court abuses its discretion when "it rests its analysis on an erroneous premise or is

clearly wrong in reaching its conclusions." *White House Vigil for ERA Comm. v. Watt*, 717 F.2d 568, 571 (D.C. Cir. 1983). The District Court did not abuse its discretion: It made neither a factual nor legal error in reaching its conclusions.

1. Appellants Did Not Establish a Likely Violation of Section 1 of the Sherman Act or its State Analogues.

For an injunction pending appeal to issue, Appellants "must show . . . a substantial likelihood of success on the merits." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (internal quotation omitted). Absent such a showing, Appellants are "not entitled to any relief, let alone the extraordinary remedy" they seek here. *Schindler Elevator Corp. v. Washington Metro. Area Transit Auth.*, 514 F. Supp. 3d 197, 212 (D.D.C. 2020), *aff'd*, 16 F.4th 294 (D.C. Cir. 2021).

Appellants allege a violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1,[1] which requires Appellants to show: (1) the existence of an agreement, contract, combination, or conspiracy among two or more persons or entities, (2)

[1] Appellants also brought claims under the District of Columbia Antitrust Act, D.C. Code § 28-4502 and the Illinois Antitrust Act, 740 ILCS 10/3. But the D.C. and Illinois state antitrust laws are virtually identical to and are construed in harmony with the Sherman Act. *See Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc.*, 295 F. Supp. 2d 75, 87 (D.D.C. 2003) (D.C. Code § 28-4502 "parallels § 1 of the Sherman Act"); *Mazanderan v. Indep. Taxi Owners' Ass'n*, 700 F. Supp. 588, 591 n.9 (D.D.C. 1998) (analysis of claims brought under the D.C. Antitrust Act "necessarily follows that of the federal claim"); *Boffa Surgical Group LLC v. Managed Healthcare Assocs. Ltd.*, 47 N.E. 3d 569, 574 (Ill. App. Ct. 2015) (740 ILCS 10/3 is construed "in accordance with the construction given its federal counterpart, section 1 of the Sherman Act").

that unreasonably restrains trade or commerce. Motion at 11. As the District Court correctly held, Appellants cannot satisfy either element. *See* Motion, Tab 1.

*a. The District Court Correctly Found that There Is No Evidence of an Agreement to Pay a Special Dividend or Competitively Weaken Albertsons.*

To establish the requisite illegal agreement to satisfy the first prong of a Section 1 claim, "there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] 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, 753 (1984). Independent action is not proscribed by Section 1 or its state analogues. *Id.* at 761; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (Section 1 "does not reach conduct that is wholly unilateral."). The District Court correctly found that Albertsons and Kroger did not agree to pay the Special Dividend or to competitively harm Albertsons, and that Albertsons instead independently decided to return value to its shareholders. Its findings are fully supported by the facts and the law, and clearly not an abuse of discretion.

As Albertsons' CFO explained and the documentary evidence confirms, Albertsons independently determined to return capital to shareholders in an amount of $4 billion or more. McCollam Nov. Decl. ¶¶ 13-16, 18. It made this decision *before* Kroger first expressed interest in acquiring Albertsons. *Id.* Thus, when

Kroger approached Albertsons, Albertsons informed Kroger of its plans to pay a Special Dividend to return capital to its shareholders in the near term and that any merger agreement would need to account for that return of capital. *Id*. ¶¶ 21-22. Contrary to Appellants' nonsensical assertions that Kroger and Albertsons acted "in concert" to return capital via the Special Dividend as opposed to a tender offer, Motion at 1, 5-6, 13, there is no evidence that Kroger ever discussed a tender offer with Albertsons, nor would such discussion make sense because a merger could not be paired with a tender offer consistent with securities regulations. *See* Motion, Tab 2 at 41:10-41:14; *see also* WA Tr. at 135:22-136:8; 141:4-142:4. The allegation is also nonsensical because the *form* of Albertsons capital return is immaterial to Appellants' claims. The *effect* is the same. Either a tender offer or a dividend would remove $4 billion from the Company's balance sheet. *Id.* at 220:1-12.

Notably, consistent with the District Court's conclusion, the record establishes that Kroger was indifferent to whether Albertsons paid the Special Dividend. As the District Court found, Kroger acknowledged Albertsons' desire to return to capital to its shareholders, subject to certain limitations. Motion Tab 2 at 67:4-20; *see also* WA Tr. at 46:13-23, 100:15-101:4. First, the purchase price Kroger paid for Albertsons would need to be reduced dollar-for-dollar by the amount of the Special Dividend. McCollam Nov. Decl. ¶ 24. Second, the Special

Dividend would be capped at $4 billion to ensure that Albertsons remained a thriving company that could fully support its capital and investment plans. *Id*. ¶¶ 26-28, 57. If the Special Dividend exceeded that amount, Kroger had the right to walk away from the deal. Motion Tab 4 at 16. The Merger Agreement reflects these understandings by *allowing*—but not *requiring*—Albertsons to pay a Special Dividend up to $4 billion, with a dollar-for-dollar reduction in the purchase price. *Id*. ¶¶ 23-24; Motion Tab 4 at 4, 16. The District Court properly concluded as much, finding this makes "good sense." Motion Tab 2 at 66:19-67:8.

Appellants' assertion that Kroger and Albertsons had a common scheme to competitively weaken Albertsons through the Special Dividend is not supported by any evidence and defies common sense. Motion at 13-14. The uncontroverted evidence establishes Albertsons understood Kroger had no interest in acquiring a weakened or cash-poor Albertsons. McCollam Nov. Decl. ¶ 57; *see also* WA Tr. at 102:5-11, 111:6-14 (testimony of Kroger's CFO). Albertsons' CFO explained that it would be self-defeating for Albertsons to weaken itself when it needed to operate as a stand-alone company through the lengthy regulatory review and possibly thereafter. McCollam Nov. Decl. ¶ 57. The District Court credited this testimony (as was well within its discretion), finding that Albertsons and Kroger "are only direct competitors in a few markets," and concluding "it does not make sense" that Kroger would want to "weaken" Albertsons and "then pay almost $25

billion" to acquire it, and that Albertsons has "no incentive to weaken its own economic status" given the possibility the merger "may not be approved by regulators." Motion Tab 2 at 72:1-11. Finally, if Albertsons, its largest shareholders, and Kroger truly had an incentive to "strip" Albertsons of cash and competitively weaken it as Appellants allege, they would not have limited the Special Dividend at $4 billion when the Company's capital surplus was calculated at $14.7 billion. Presumably they would have "agreed" to issue a much larger dividend. As the District Court correctly concluded, Appellants' theories simply don't "make sense." *Id.* Appellants make no attempt to show that these findings were somehow clearly erroneous, as would be required for them to establish a substantial likelihood of success on appeal.

In short, the District Court acted well within its discretion in rejecting Appellants' claim that Kroger and Albertsons "agreed" to issue the Special Dividend to purposefully harm Albertsons. As the District Court found and the factual record confirms, those claims are baseless and should be rejected by this Court.

*b. The District Court Correctly Found that Payment of the Special Dividend Will Leave Albertsons Unable to Effectively Compete or Otherwise Restrain Trade or Competition.*

The record below fully supports the District Court's finding that Appellants failed to meet their burden to show payment of the Special Dividend would

undermine Albertsons' ability to compete or would unreasonably restrain trade, regardless of which standard applies (*e.g.* per se, quick look, or rule of reason). *See N.C.A.A. v. Bd. of Regents*, 468 U.S. 85, 104 (1984) (The "[e]ssential inquiry" is what "impact on competition" the alleged restraint has).

The undisputed testimony of Albertsons' CFO and other documentary evidence established that Albertsons is a thriving business that generates over $75 billion in annual revenues and significant excess cash from operations. McCollam Nov. Decl. ¶¶ 42-55. Albertsons continues to generate excess cash far above what it needs to fund its business investments in recent years. Motion Tab 6 at 2 (showing Albertsons liquidity growing from $3.9B to $7.2B in the last three years). For this reason, Albertsons' Board sought to return excess capital to its shareholders. In cooperation with its financial advisors, Albertsons carefully assessed its past and anticipated future financial performance, ultimately determining that a capital return of $4 billion or more was appropriate. WA Tr. 221:7-222:14; *see also* 6/10/22 Presentation at 8, 18. As part of that assessment, the Board considered and management confirmed that Albertsons would still be able to support its planned investments, even in a recession; compared its financial metrics and debt ratio to its peers; and assured itself Albertsons would remain strong and competitive following the capital return. McCollam Nov. Decl. ¶¶ 42-55.

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Albertsons' Board ultimately declared a special dividend totaling $4 billion, well below the $14.7 billion dividend that would have been permitted under Delaware law based on the Company's capital surplus. Ms. McCollam testified that Albertsons clearly could prudently pay a special dividend of $4 billion and it was "not a close call." McCollam Nov. Decl. ¶ 30. She further explained that Albertsons will fund the Special Dividend with $2.5 billion in excess cash and approximately $1.4 billion drawn from its asset-based lending facility. Contrary to Appellants' assertion that the Special Dividend will "strip" Albertsons of cash and access to credit, after payment, Albertsons will still have over $3 billion in available liquidity, including over $500 million in cash and access to an additional $2.5 billion liquidity under its asset-based lending ("ABL") facility. *Id*. ¶¶ 44-46. Ms. McCollam further testified that she is very confident that Albertsons' remaining $3 billion in available liquidity—combined with Albertsons' revenues and excess cash flow—will be more than sufficient to meet the Company's future capital needs. *Id*. ¶¶ 9-10, 30. [redacted] The District Court correctly credited Ms. McCollam's declaration and the evidence of Albertsons' strong

financial position in concluding that payment of the Special Dividend would not leave Albertsons weakened on unable to compete. Motion Tab 1 at 3-4.

Appellants offer no credible evidence that Albertsons would be left weakened or unable to compete following payment of the Special Dividend, relying instead on unsupported and baseless assertions that were properly rejected. In particular, Appellants' claim that Albertsons will "fall short of its anticipated liquidity needs" and face a "shortfall" fundamentally misinterprets Albertsons' financial statements and misapplies basic accounting principles. *See* Motion at 6-7, 17-18; *Id*. Tab 11 ¶¶ 16-19. As Ms. McCollam and Professor Smith explained, "[n]et income" is not useful for determining Albertsons' liquidity because it incorporates non-cash expenses that do not impact liquidity, and thus effectively double counts certain expenses and misleadingly understates the Company's ability to meet its liquidity needs. *See* McCollam Dec. Decl. ¶¶ 9-11; Smith Decl. (Opp. Tab D) ¶¶ 2-5. The District Court properly concluded Appellants' speculation that Albertsons would face a liquidity shortfall was unsupported given the Company's strong financial position, "projected revenue," and other sources of liquidity. Motion Tab 1 at 3.

Appellants likewise fail to establish a likelihood of success on appeal with respect to the District Court's rejections of the theories regarding Albertsons' use of its ABL facility or "revolver." Motion at 6-8, 17-18. While Section 6.1(n) of

the Merger Agreement limits the use of the ABL to "ordinary course of business consistent with past practice," there is no reason to interpret 6.1(n) as barring Albertsons from drawing on the ABL to execute on its capital investment plans or operate its business if the need should arise in the future. Contrary to Appellants' contention, Albertsons has drawn on the ABL in recent years, *see, e.g.* Motion at 7 (describing use of ABL during COVID pandemic), and Albertsons has not been informed by Kroger that its use of the ABL to partially fund the Special Dividend (which is public knowledge) is inconsistent with the Merger Agreement. Finally, the ABL's interest rate does not preclude its use. Albertsons has drawn on the ABL to fund payment of the Special Dividend, considers interest obligations when assessing expected liquidity needs, McCollam Dec. Decl. ¶¶ 11, and, even with rising interest rates, the interest on the $1.4 billion ABL draw was miniscule in light of Albertsons' overall business and cash flows. *See id.* ¶ 8; McCollam Nov. Decl. ¶¶ 62-65. Appellants' claim that Albertsons would not be able to draw on the ABL to support its business is contradicted by the record, and was properly rejected by the District Court. Motion Tab 1 at 3-4 (rejecting Appellants' assertions and concluding ABL remains an important source of liquidity).

Finally, Appellants' claim that the Special Dividend harms competition in tandem with Merger Agreement covenants requiring Albertsons not to undertake certain acts that would significantly affect the nature of its capital structure without

Kroger's approval is a red herring. Motion at 6-8, 17. These are standard covenants in any merger agreement and simply ensure that Albertsons does not saddle itself with excessive new debt before closing the merger. They do not limit Albertsons' ability to compete given the substantial sources of current and future liquidity at its disposal and Appellants have failed to show that Albertsons will need to raise new debt or that Kroger would unreasonably refuse to permit it to do so should it ever become necessary.

2. The District Court Correctly Found that Appellants Cannot Demonstrate Irreparable Harm.

Appellants still cannot meet the "high standard for irreparable injury" necessary for an injunction to issue. *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 297 (D.C. Cir. 2006). To establish irreparable harm, the Appellants must show the injury alleged is "both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief." *Mexichem Specialty Resins, Inc. v. EPA,* 787 F.3d 544, 555 (D.C. Cir. 2015) (cleaned up). The "possibility of irreparable harm" is not enough; Appellants must demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (internal citations omitted).

The District Court correctly determined that Appellants "have not established that payment of the pre-closing dividend is likely to result in a

lessening of competition, and that is the irreparable harm that they assert here." Motion Tab 2. at 72:21-73:5. Nothing in Appellants' Motion provides any grounds to doubt the District Court's findings, or to find that payment of the Special Dividend will "irreversibly harm" Albertsons' capital structure. Motion at 19-20. [redacted]. Appellants have no credible basis to claim paying the Special Dividend will cause irreparable harm.

Appellants' claim of "irreparable harm" appears to be based largely on Albertsons' representations that it will pay the Special Dividend as soon as possible. Motion at 2, 18-19. Appellants cannot claim there will be irreparable harm from payment of a dividend simply because they do not think that is the best use of the company's capital.[2] As the District Court correctly found, even if payment of the Special Dividend would be hard "to undo," Appellants cannot establish irreparable harm because they have "failed to show that payment of the

[2] Even if payment of the Special Dividend did competitively harm Albertsons by reducing its available cash as Appellants allege (it does not), that harm is not irreparable given Albertsons' excess cash flows and could be addressed through subsequent relief.

[Special Dividend] would likely harm competition" and thus "have not proven that *consumers* will face irreparable harm." 12/14 Order at 5.

3. The District Court Correctly Found that the Requested Injunctive Relief Would Impose Substantial Harm on Albertsons and its Shareholders and Serve No Public Interest.

Appellants' request for an injunction pending appeal should also be denied because the balance of equities clearly weighs against such relief. An injunction would further delay payment of the Special Dividend and inflict substantial harm on Albertsons and its shareholders, and provide no benefit to the public. The District Court has concluded three times that the equities weighed against the requested injunctive relief, and Appellants identify no abuse of discretion or other basis to depart from those findings here. *See, e.g.,* 12/14 Order at 5; Motion Tab 2 at 73.

Appellants seek to substitute their judgment for the business judgment of Albertsons' Board because they (apparently) think Albertsons' excess capital should be used to maximize the Company' available cash rather than returned to Albertsons' shareholders. Motion at 16-18. But Appellants have no right to dictate how a corporation should or should not spend its capital. As the District Court properly recognized, the unprecedented relief sought by Appellants would be a flagrant intrusion into Albertsons' internal affairs. Motion Tab 2 at 73:15-20.

Further suspending payment of the Special Dividend also may erode the confidence of Albertsons' shareholders, who relied on its promise to pay the Special Dividend, and thereby discourage future investment in Albertsons. McCollam Dec. Decl. ¶ 15; *see also* WA Tr. At 250:13-251:15. Thus, while Appellants claim to be concerned with preserving Albertsons' strength going forward, the relief they seek will have the opposite effect.

In addition, the Special Dividend is a contractual obligation Albertsons owes to its shareholders and is now a liability on its books. Under Delaware law, the declaration of a dividend by a corporation's board creates a binding debtor-creditor relationship between the corporation and shareholders as of the record date, and the corporation is liable for the amount of the declared dividend.[3] Suspending payment of the Special Dividend thus renders Albertsons potentially liable to shareholders who have been entitled to receive it since November 7, or who traded in Albertsons' stock in reliance on payment of the Special Dividend. Given the size of the Special Dividend and prevailing interest rates, the harm that shareholders may claim against the Company from further delay on payment of its contractual obligation may be as much as $1 million *per day*. Granting the extraordinary relief Appellants seek—even for a few days—is not only unjustified on the facts but would exacerbate that harm. It would prolong the delay in

[3] *See In Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1175 (Del. 1988).

payment while also pushing payment into the next tax year, posing potential tax consequences for Albertsons' shareholders and disrupting their tax planning.

Appellants suggestion that these harms are "illegitimate" because they are "self-imposed" is meritless. Motion at 20. Regulatory review of a proposed merger is customary and the Merger Agreement specifically provides for it. Appellants' novel and unforeseen challenge to Albertsons' independent decision to pay a dividend to its shareholders in accordance with Delaware law is an extraordinary action with no basis in law or fact. The harm to Albertsons and its shareholders is a direct result of Appellants' unprecedented interference in the Company's internal affairs, not any misdeed by Albertsons.

In contrast, there is no public interest in granting the requested relief given Appellants' failure to prove any threat to competition or the public. The requested relief does not in any way "improve" or "preserve" Albertsons' financial condition or its ability to compete as Appellants allege. Instead, the Special Dividend will remain a liability on Albertsons' balance sheet—so long as it remains unpaid—and thus Albertsons will need to account for it as long as its payment is enjoined. Motion Tab 11 ¶ 40; *see also* Motion Tab 2 at 9:3-10:15, 50:9-51:8. In the meantime, any injunction will continue to generate additional legal exposure for Albertsons.

Finally, as Appellants make clear in their discussion of local supermarkets, "so-called food deserts," and purported post-Merger market concentrations, Appellants' concerns that supposedly justify the extraordinary injunctive relief sought here relate to Albertsons' proposed Merger with Kroger and its potential impacts on competition in the District of Columbia, Illinois, and California. Motion at 1, 4, 18-21. But, as the District Court appropriately recognized, *this case does not concern the Merger*—which is subject to separate and lengthy regulatory review that has just begun. Motion Tab 2 at 7:4-5, 25:15-19. The Merger cannot close until that regulatory review is complete. McCollam Nov. Decl. ¶ 17. Appellants have not shown that payment of the Special Dividend will in any way impede Appellants' merger investigation or their ability to seek appropriate relief if they determine it is warranted after reviewing the Merger. As the District Court properly concluded, any possible concern Appellants could have—unsupported as it is—that the Merger would be justified by Albertsons qualifying as "failing firm" is unfounded: Albertsons has publicly stated that they will not rely on such a defense in support of their Merger. Motion Tab 2 at 72:12-20; McCollam Nov. Decl. ¶¶ 56, 58.

**B. Appellants' Request for an Administrative Stay Should Be Denied.**

This Court should also deny Appellants' request for an immediate administrative injunction. An administrative injunction functions to "give the

court sufficient opportunity to consider the emergency motion for stay" or injunction pending appeal. *Garza v. Hargan*, No. 17–5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017). It is not a decision on the merits of either the motion for an injunction pending appeal or the appeal itself, *id*., and it remains in place only until the Court has the opportunity to rule on the merits of a motion for an injunction pending appeal. *See* D.C. Cir. Handbook of Practice and Internal Procedures at 33; *Deaver v. Seymour*, 822 F.2d 66, 68 (D.C. Cir. 1987) (dissolving a five-day administrative stay once emergency motion decided).

This Court has already set an expedited schedule for consideration of Appellants' Motion such that it can reasonably rule on the motion by the time the Washington state TRO expires. 12/13/22 Per Curiam Order. In the interim, the Washington state TRO remains in effect, preventing Albertsons from paying the Special Dividend until this Court rules on Appellants' Motion. An administrative injunction would serve no purpose and should be denied as unnecessary.

### C. This Court Should Summarily Affirm the District Court's Denial of the Preliminary Injunction.

In addition to denying an injunction pending appeal, Albertsons respectfully requests that this Court summarily affirm the District Court's denial of the motion for a preliminary injunction, pursuant to Circuit Rule 8(b).

A motion for summary disposition is warranted when the merits are "so clear that expedited action is justified" and that "no benefit will be gained from

further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam) (summarily affirming order declining to enjoin agency from disbursing funds); *see also Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam).

This is precisely such a case. As discussed above, the District Court has decisively concluded on multiple occasions that Appellants cannot establish any element of their claims. Specifically, the District Court found Appellants could not prove an agreement between Albertsons and Kroger to pay the Special Dividend or competitively weaken Albertsons, no harm (irreparable or otherwise) would befall consumers or competition if the Special Dividend were paid, and no public interest supported in restraining the Special Dividend under these circumstances. The Superior Court in Washington made the same determinations. Before this Court, Appellants offer no basis in law to suggest that further review will result in a different outcome.

Summary affirmance is therefore appropriate. *See, e.g., Neal v. District of Columbia*, No. 92-7130, 1993 WL 32337, at *1 (D.C. Cir. Jan. 29, 1993) (summarily affirming denial of a preliminary injunction, finding no abuse of discretion); *Sandoz Inc. v. F.D.A.*, No. 06-5204, 2006 WL 2591087, at *1 (D.C. Cir. Aug. 30, 2006) (summarily affirming denial of a preliminary injunction,

finding insufficient likelihood of success); *Tate v. District of Columbia*, No. 03-7013, 2003 WL 21466909, at *1 (D.C. Cir. June 18, 2003) (summarily affirming denial of a preliminary injunction, finding no irreparable harm).

## CONCLUSION

For the foregoing reasons, the Appellants' Motion should be denied and Albertsons' motion for summary affirmance should be granted.

Dated: December 15, 2022

Respectfully submitted,

*/s/ Edward D. Hassi*

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## CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2022, this consolidated opposition to the emergency motion for an injunction pending appeal and motion for summary affirmance, along with attachments, was filed with this Court via CMF/ECF, which will serve all counsel of record registered to use the CM/ECF system, and four paper copies were hand-delivered to the Court. True and correct copies were served via e-mail, with consent, to:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this consolidated opposition and motion for summary affirmance complies with the type-volume limitations in Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 27(d)(1) because the motion consists of 6,166 words, excluding exempted parts. This consolidated opposition and motion complies with the typeface and type style requirement Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface in Times New Roman 14-point font.

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