NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7168

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

DISTRICT OF COLUMBIA, *et al.*,
APPELLANTS,

v.

THE KROGER CO., *et al.*,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL AND AN IMMEDIATE ADMINISTRATIVE STAY

Appellants seek time-limited relief to allow the Court to evaluate important antitrust claims solidly grounded in settled precedent. Kroger and Albertsons's $4 billion "special dividend" scheme—which includes onerous restrictions on Albertsons's use of credit and debt after it hemorrhages an unprecedented amount of capital—reflects concerted action that may irreparably harm competition before regulators can review its proposed merger with Kroger. That Kroger and Albertsons offer no procompetitive justification for their arrangement underscores the likelihood of finding an antitrust violation here. And it further confirms that

enjoining the dividend's payment during this appeal will advance the significant public interest in antitrust enforcement with minimal prejudice to private interests. Regardless of whether the merger is consummated, the one-two punch of a massive dividend combined with credit and debt restrictions will leave Albertsons less able to compete than before the deal was struck—which can augur inflated prices, inferior service, or even store closures in under-resourced neighborhoods.[1]

DISCUSSION

I. The Court Should Grant An Injunction Pending Appeal.

A. Appellants will likely prevail on the merits.

1. Albertsons and Kroger's scheme constitutes concerted action.

Section 1 of the Sherman Act outlaws "[e]very contract, combination . . . or conspiracy" that unreasonably restrains trade, 15 U.S.C. § 1, whether the agreement arises from a written contract, or from the "acquiescence" or "direct, joint action" of the parties, *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942).

Contrary to Kroger's assertions (Opp. 21-23), concerted action is a question of law, not fact, in this case because the district court's errors resulted from its misapprehension of the legal standards for finding an antitrust agreement. As Kroger admits, "the Merger Agreement" is an "agreement" "between Kroger and

---

[1] Appellants will timely respond to Kroger's and Albertsons's cross-motions for summary affirmance in a separate filing in accordance with Federal Rule of Appellate Procedure 27(a)(3)(A).

Albertsons," and it "includes a $4 billion threshold on" the special dividend, which was added at Kroger's "insistence." Kroger 24, 28-29. Albertsons further acknowledges that, under appellants' theory, the special dividend works "in tandem with" the merger agreement's credit and debt restrictions. Albertsons 18. A written agreement between two competitors that limits one's ability to make independent financing decisions, and that contemplates conduct that may diminish competition, establishes concerted action under Section 1 as a matter of law. *See Am. Needle, Inc. v. NFL*, 560 U.S. 183, 189 (2010) (defining "concerted action" as joint conduct that "deprives the marketplace of independent centers of decisionmaking" (internal quotation marks omitted)). The district court legally erred in concluding otherwise.

But to the extent the district court made factual findings on this issue, it clearly erred. The court largely ignored appellants' considerable evidence of Kroger's direct involvement in coordinating the timing, amount, and form of the special dividend. Tr. 66-69. The court also overlooked the fact that this case involves an express agreement between competitors, the paradigmatic example of concerted action. Tr. 66-69. In light of that evidence, the court clearly erred in accepting the say-so of Kroger and Albertsons executives denying any agreement. Tr. 68.

Kroger and Albertsons maintain that no evidence of concerted action exists in this case because the record supposedly does not "exclude the possibility" that they "acted independently" since their conduct has a "unilateral" explanation.

Kroger 20, 31; Albertsons 11-14. But there is no unilateral explanation for the merger agreement or its credit and debt restrictions. Nor is there a plausible story that the special dividend is the sort of "*wholly* unilateral conduct" that Section 1 does not reach. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (emphasis added). Indeed, because this case involves direct evidence of an agreement between competitors, Kroger and Albertsons cannot evade Section 1 liability with self-serving unilateral explanations. *See, e.g.*, *Robertson v. Sea Pines Real Est. Cos., Inc.*, 679 F.3d 278, 289-90 (4th Cir. 2012) (holding that evidence need not "exclude the possibility of independent action" where concerted action is "plainly documented" (internal quotation marks omitted)).

Besides, even if the dividend originated as a unilateral decision, concerted action is not defeated simply because "one of the means used to effectuate" a scheme involved "independent action." *Poller v. CBS, Inc.*, 368 U.S. 464, 468-69 (1962) (holding that a Section 1 agreement may exist even if a lawful unilateral act is "part and parcel of" it). Here, Kroger and Albertsons declared in the joint press release announcing their "definitive agreement" that the "special cash dividend" was "part of the transaction." Press Release (Oct. 14, 2022), https://tinyurl.com/ypkx8dxf; *see* Kroger 29 (acknowledging that this "press statement" "summarizes the Merger Agreement"). Those public statements leave no doubt that, even if the special dividend began as a unilateral idea, it soon became "part and parcel of" a horizontal

combination and thus is properly considered concerted action under Section 1. *See Poller*, 368 U.S. at 468-69; *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (imposing liability even if "the means used to accomplish the unlawful objective are in themselves lawful" or "wholly innocent").

Seeking to rewrite the Sherman Act, Kroger makes the remarkable claim that a "contract" between rivals is not "concerted action." Opp. 24, 28-29. But if a "contract" among competitors is not a "contract" under Section 1, then words have no meaning, and the Supreme Court has been wrong about the Sherman Act for more than a century. *See, e.g.*, *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898); *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1143 (10th Cir. 1997) (en banc) ("To hold otherwise would be to read the words 'contract' and 'combination' out of section 1."). Here, unlike the parties in the cases it cites (Opp. 28-29), Kroger was deeply involved in the merger agreement and the special dividend, and Kroger admittedly acquiesced in both. *See Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1080-82 (11th Cir. 2016) (involving party who "refused to participate" and "never acquiesced" in challenged conduct); *Toscano v. Pro. Golfers Ass'n*, 258 F.3d 978, 984 (9th Cir. 2001) (similar, "defendants *merely accepted*" rules and "played *no role in creating*" them (emphases added)).

Kroger cannot distinguish *Masonite* on the ground that it involved a per se illegal price-fixing conspiracy. Opp. 27. The issue of concerted action "is different

from and antecedent to the question" of whether an arrangement "unreasonably restrains trade." *Am. Needle*, 560 U.S. at 186. Plaintiffs, in other words, need only show "an agreement" to establish concerted action, they need not show "an agreement" to act unlawfully. *See id.* at 186, 196-99. So, if a price-fixing agreement can be formed through "acquiescence," *Masonite*, 316 U.S. at 276, then surely an agreement to suppress competition in the supermarket industry can be formed through Kroger's acquiescence in the special dividend scheme.

Lastly, Kroger and Albertsons struggle (and fail) to explain why their scheme to cash-strap Albertsons makes no economic sense. Albertsons 11-14; Kroger 30-31. But as appellants have explained (Mot. 13-14), it was perfectly rational for Kroger to agree to a dividend that weakens Albertsons in conjunction with credit and debt restrictions that make it less likely Albertsons could discipline Kroger with competition. Potential acquirers regularly target companies that they expect will weaken during merger review—so much so that courts have recognized a "weakened competitor" defense in some cases. *See ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 572 (6th Cir. 2014). And Albertsons, too, had every reason to agree to a special dividend, since its controlling shareholders stand to gain the most from the $4 billion dividend.

2. The special dividend scheme fails antitrust scrutiny.

Kroger and Albertsons do not deny that a horizontal combination violates Section 1 if it restricts competitors' independent decisions or otherwise curtails their freedom to compete. Motion 14-16; *see Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (holding that Section 1 prohibits concerted action that "hinders competition"). Because that is precisely what the special dividend scheme does, this Court need go no further to find a likelihood of success on the merits.

Kroger asserts that appellants cannot prove a Section 1 violation without first defining a "relevant market." Kroger 33-34 (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018)). But the very point of quick-look review is to invalidate obviously "anticompetitive" arrangements *without* "elaborate industry analysis." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986). The special dividend scheme is just such an arrangement, as it renders Albertsons unable to compete as effectively as it previously did. Nothing else need be shown on this front.

Nor is market definition necessary under the rule of reason, given that this case involves a horizontal restraint rather than a vertical one. *See Am. Express*, 138 S. Ct. at 2285 & n.7. As the Supreme Court has explained, vertical restraints (involving firms at different levels of the distribution chain) "often pose no risk to competition unless the entity imposing them has market power," and thus market definition is critical in such cases. *Id.* But horizontal restraints (involving firms at

the same level of the distribution chain) necessarily "involve agreements between competitors not to compete in some way," and so courts may "not need to precisely define the relevant market to conclude that these agreements were anticompetitive." *Id.* Appellants accordingly need not define a market to show that the special dividend scheme here is likely anticompetitive—especially since Albertsons and Kroger still cannot muster any procompetitive justification for their arrangement.

Albertsons misses the point in insisting (Opp. 15-16) that it is a "strong" and "thriving business" with "excess cash." All of that could be true, and the special dividend scheme could *still* be anticompetitive. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) ("[I]t is not necessary to show that the challenged arrangement suppresses all competition between the parties."). The question is not whether Albertsons will retain *some* ability to compete or even a strong ability to compete. The question is whether, as a result of the special dividend scheme (*i.e.*, the combination of the dividend's payment and related restrictions on Albertsons's borrowing capacity), Albertsons's competitiveness will be diminished compared to its previous ability. Neither Albertsons nor Kroger addresses that question, and the district court, too, made no clear finding on it, *see* Tr. 66-73.

Despite conceding that the merger agreement "limits" its use of the credit revolver, Albertsons brushes this concern aside on the ground that "Albertsons has not been informed by Kroger" that the merger agreement precludes use of the

revolver "to partially fund the Special Dividend." Opp. 17-18. Kroger's silence, however, is cold comfort from an antitrust perspective, especially given the conspicuous absence of any mention of the issue in Kroger's brief. There is accordingly no reason to think that the credit revolver will stave off the anticompetitive effects of the special dividend scheme.

Albertsons further concedes that the merger agreement forbids it from altering aspects of its capital structure "without Kroger's approval." Opp. 18-19. But it says that this is a "red herring" because these restrictions are "standard" in merger agreements. Opp. 19. That too is beside the point. The anticompetitive impact of a contractual term is not ameliorated by how frequently it appears in other agreements, which may or may not contain the related restrictions that make the special dividend scheme so problematic as an antitrust matter.

B. An injunction pending appeal is necessary to avoid irreparable harm to competition and consumers.

Albertsons acknowledges (Opp. 20) "it will pay the Special Dividend as soon as possible." And neither Albertsons nor Kroger denies that paying the dividend may moot any appeal of the order denying a preliminary injunction. Albertsons 19-21; Kroger 35-36. Nor could they. Even the district court "acknowledge[d] the possibility that, absent an injunction, Albertsons will pay the Pre-Closing Dividend during the pendency of Plaintiffs' appeal and 'effectively . . . moot' the appeal." 12/15/22 Order 4. An imminent likelihood of irreparable harm is thus apparent in

light of the special dividend scheme's significant anticompetitive potential. *See Population Inst. v. McPherson*, 797 F.2d 1062, 1081-82 (D.C. Cir. 1986).

Rather than address this point head-on, Albertsons and Kroger instead try to downplay the anticompetitive tendencies of their arrangement. Albertsons 19; Kroger 35. But as explained, the special dividend scheme is likely to suppress competition by diminishing Albertsons's ability to compete relative to its competitiveness *absent* the special dividend and interrelated credit and debt restrictions. Contrary to Albertsons's assertions (Opp. 20), this is not a dispute about "the best use of the company's capital." It is a dispute about an agreement between rivals that involves the use of one entity's capital and a debt-related covenant to suppress competition. That is a serious antitrust concern, and it should not be mooted before this Court can decide the merits of this appeal.

Nor has there been any "delay" in this case that would foreclose relief. *Cf.* Kroger 35-36. In the few weeks between the TRO hearing and appellants' motion for a preliminary injunction, the special dividend was temporarily restrained by the Washington state court's decision, and appellants spent that time developing an evidentiary record. Appellants' diligent efforts to litigate their claims before moving for a preliminary injunction hardly compares to the delay evident in the cases Kroger cites. *See Huntco Pawn Holdings, LLC v. DOD*, 240 F. Supp. 3d 206, 233 (D.D.C.

2016) (14-month delay); *City of Tempe v. FAA*, 239 F. Supp. 2d 55, 65 n.13 (D.D.C. 2003) (5-month delay).

C. The equities and public interest support the requested relief.

Kroger and Albertsons do not deny the many equitable and public-interest considerations that support relief. Mot. 20-21. This includes the fact that an injunction pending appeal will not delay the proposed merger; that Albertsons faces no serious legal exposure under Delaware law for failing to pay an unlawful dividend; and that the public has a strong interest in effective antitrust enforcement. That is reason enough to balance the equities and public interest in favor of appellants. *See FTC v. Weyerhaeuser Co.*, 648 F.2d 739, 741 (D.C. Cir. 1981).

Kroger and Albertsons accuse appellants of trying to "weaponize antitrust law" to interfere with their business decisions. Kroger 37; Albertsons 21-23. But it is precisely the role of antitrust courts to investigate such decisions and to prevent them from obstructing the competitive free-market process, especially when, as here, they result from the concerted action of rival firms. *See, e.g.*, *FTC v. Actavis, Inc.*, 570 U.S. 136, 155-59 (2013). To the extent enjoining the unlawful dividend would "erode the confidence of Albertsons' shareholders" and "discourage future investment" (Albertsons 22), or "tarnish Kroger's and Albertsons' reputations in the marketplace" (Kroger 37), Albertsons and Kroger have only themselves to blame.

See Cuomo v. U.S. Nuclear Reg. Comm'n, 772 F.2d 972, 977 (D.C. Cir. 1985) ("[S]elf-imposed costs are not properly the subject of inquiry.").

II. The Court Should Issue A Temporary Administrative Injunction.

Albertsons asserts (Opp. 25) that an administrative injunction would "serve no purpose" because this Court can decide whether to grant an injunction pending appeal before the Washington TRO expires on Monday. But the question is not whether the Court is *capable* of ruling on appellants' motion over the weekend, it is whether that exceedingly brief period provides the necessary "breathing space" to do so. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1076 (D.C. Cir. 1981) (R.B. Ginsburg, J.). Nothing in Albertsons's or Kroger's filings suggests that it would.

CONCLUSION

The Court should grant an injunction pending appeal and, if necessary, an emergency administrative injunction while deciding whether to grant an injunction pending appeal.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

/s/ Bryan J. Leitch
BRYAN J. LEITCH
Assistant Attorney General
Bar Number 1016484
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6524
(202) 741-0649 (fax)
bryan.leitch@dc.gov

December 2022

CERTIFICATE OF SERVICE

I certify that on December 16, 2022, this reply was filed with this Court via CMF/ECF and four paper copies were delivered to the Court. True and correct copies were served via e-mail, with consent, to:

Adam B. Banks
adam.banks@weil.com

Andrew Santo Tulumello
drew.tulumello@weil.com

Jeffrey H. Perry
jeffrey.perry@weil.com

Mark Andrew Perry
Mark.Perry@weil.com

Michael B. Bernstein
michael.b.bernstein@arnoldporter.com

Sonia Kuester Pfaffenroth
sonia.pfaffenroth@arnoldporter.com

Jason C. Ewart
jason.ewart@arnoldporter.com

Matthew M. Wolf
matthew.wolf@arnoldporter.com

Edward David Hassi
thassi@debevoise.com

Gabriel K. Gillett
ggillett@jenner.com

Johan Robert Abraham
jrabraham@debevoise.com

Leah S. Martin
lmartin@debevoise.com

Miriam J. Wayne
mwayne@jenner.com

Shannon Rose Selden
srselden@debevoise.com

Stephen Ascher
sascher@jenner.com

William S.C. Goldstein
wgoldstein@jenner.com

Zachary B. Cohen
zcohen@jenner.com

As a courtesy, the undersigned sent copies via first-class mail, postage prepaid, to:

Adam B. Banks
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Sonia Kuester Pfaffenroth
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, NW
Washington, DC 20001

Edward David Hassi
Debevoise & Plimpton LLP
801 Pennsylvania Avenue NW
Washington, DC 20004

/s/ Bryan J. Leitch
BRYAN J. LEITCH

CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 27(d)(1) because the motion contains 2592 words, excluding exempted parts. This motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

/s/ Bryan J. Leitch
BRYAN J. LEITCH