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KING COUNTY  
SUPERIOR COURT CLERK  
E-FILED  
CASE #: 22-2-18046-3 SEA

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ALBERTSONS COMPANIES, INC.;  
ALBERTSON'S COMPANIES SPECIALTY  
CARE, LLC; ALBERTSON'S LLC;  
ALBERTSON'S STORES SUB LLC; THE  
KROGER CO.; KETTLE MERGER SUB,  
INC.,

Defendants.

NO. 22-2-18046-3 SEA

ALBERTSONS COMPANIES, INC.'S  
OPPOSITION TO THE STATE OF  
WASHINGTON'S MOTION TO  
CONTINUE HEARING ON ITS MOTION  
FOR PRELIMINARY INJUNCTION AND  
TO EXTEND TEMPORARY  
RESTRAINING ORDER

**I. INTRODUCTION**

The State of Washington now seeks to delay the hearing on its motion for a preliminary injunction until December 2. That motion should be denied. The Temporary Restraining Order (TRO) preventing Albertsons from distributing a duly issued Special Dividend to its stockholders is an "extraordinary remedy" that "should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Huff v. Wyman*, 184 Wn.2d 643, 648, 361 P.3d 727, 730 (2015). The State's attempt to extend that TRO into a preliminary injunction is a question

1 requiring urgent review by this Court. Such review is already overdue: the PI hearing was  
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3 scheduled for November 10, as required by the local rules, but the State requested and received  
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5 an extension to November 17. No further delay is warranted. Defendants are prepared to go  
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7 forward as scheduled and the State should be too.  
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9         This motion is only the State’s latest attempt to move the goalposts, after a federal court  
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11 rejected a TRO sought by Washington DC and two other states asserting virtually the same  
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13 claims based on the same arguments that the State asserts here. The State has agreed in filing  
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15 after filing after filing that its preliminary injunction motion would be heard November 10,  
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17 2022—the date the State concedes was “dictated by the local court rules.” Mot. 4; *see also* Mot.  
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19 5, 6. First, the State asked this Court to require live testimony from witnesses. Then, after the  
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21 Court granted that request, the State demanded broad document and custodial email productions  
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23 prior to the witness testimony on November 17. And after the Court granted *that* request in part,  
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25 and after Defendants promptly produced documents in response to all requests endorsed by the  
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27 Court, the State then insisted that one day of testimony was insufficient and that the hearing  
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29 should be continued to December. Enough is enough.  
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31         Against this backdrop, the State offers no valid reason to delay the hearing until  
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33 December. The State *already* had most of the documents Defendants have produced and now, in  
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35 many cases, re-produced. Many were obtained from the Federal Trade Commission and the  
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37 District of Columbia and included as exhibits to the State’s own preliminary injunction motion.  
38  
39 *See, e.g.*, Nov. 7, 2022 Hanson Decl. Exs. P, Q, and R. Others were publicly available, and yet  
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41 others do not relate to the substantive issue before the Court. Moreover, the Court *already*  
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43 rejected the State’s oral request for a continuance when it set witness testimony for November 16  
44  
45 and committed to issue a decision after oral argument on November 17. The State has identified

1 no change since that November 10 hearing that would justify a further delay now. The hearing  
2  
3 should go forward as planned.  
4

## 5 II. AUTHORITY

### 6 7 **A. The State Repeatedly Assented To Holding The Preliminary Injunction Hearing** 8 **Without Need For More Documents Or Delay.** 9

10 Although the State now insists that it needs more time to review documents in advance of  
11 the preliminary injunction hearing, the State has repeatedly acquiesced to holding a preliminary  
12 injunction hearing before receiving any document productions. The State’s willingness to move  
13 forward without receiving documents was not some isolated event. Nearly *every day* since the  
14 TRO issued, and in court filing after court filing, the State assented to holding a preliminary  
15 injunction hearing on November 10 without ever suggesting it needed to first obtain and review  
16 any documents. Tellingly, even as the State moved this Court to require live witness testimony  
17 on November 10, the State said nothing at all about needing to first obtain documents or about  
18 needing a delay to further develop its case.  
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28 The State’s repeated silence on the subject of documents and delay is indisputable. For  
29 example:  
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- 31  
32 • On November 3, the State set the preliminary injunction hearing for November  
33 10, without asking for any documents to be produced in advance. *See* Dkt. 50,  
34 Not. of Hrg.  
35
- 36 • On November 3, in response to a question from the Commissioner, the State  
37 stated unequivocally: “As of this morning, the parties have agreed to schedule the  
38 preliminary injunction here in court for November 10th.” Later in the hearing, the  
39 Commissioner relied on this statement in ruling that “Judge Schubert would hear  
40 a motion for preliminary injunction ... on November 10.” *See* Declaration of  
41 Edward Hassi (Hassi Decl.), Ex. C.  
42  
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- On November 4, in the parties’ joint stipulation, the State agreed to a hearing date of November 10 without asking for any documents to be produced in advance. *See* Dkt. 50, Am. Not. of Hrg.
- On November 6, the State served written discovery requests, including requests for production of documents, seeking responses by thirty days from service, *i.e.*, December 6, long after the hearing scheduled for November 10. *See* Hassi Decl., Ex. A (Nov. 6, 2022 Email from K. Hitchcock re Discovery).
- On November 7, the State filed its motion for preliminary injunction, which notes the hearing date of November 10 without asking for any documents to be produced in advance, and refers to the State’s request for production of documents without suggesting any need for expedition. *See* Mot. for PI at 1, 3, 7.
- On November 8, the State requested “the opportunity to call the companies’ declarants as witnesses” and for “a short continuance of the TRO and preliminary injunction hearing in order to find the time to take that testimony,” without mentioning any need for documents related to the testimony or otherwise in advance of the hearing. Mot. to Subpoena at 1-2, 6.
- On November 10, in the State’s reply brief in support of its preliminary injunction motion, the State argued that a preliminary injunction was warranted based on “[r]eview of the merger agreement and related public documents,” while suggesting “additional discovery” would be helpful for the merits stage. Reply ISO PI Mot. at 2.

On the brink of the hearing, the State now insists that it must have additional time “to review the documents obtained and to prepare to examine the witnesses.” Mot. at 8. If the State truly needed time to collect and review discovery before the preliminary injunction hearing, it would have said so before the November 10 hearing. But the State did not. Instead, the State’s motion for testimony asked *only* for testimony and did not ask either for additional documents or for more time. The State cannot change its position now in an attempt to justify further delay.

The State’s own delay in bringing suit further undermines its claim to need more time to conduct the preliminary injunction hearing. The Special Dividend was announced publicly on

1 October 14, but the State did not sue to enjoin the Special Dividend until weeks later, after it had  
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3 time to gather information to support its theories. That delay alone weighs heavily against—not  
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5 for—granting a TRO or preliminary injunction. *See Oakland Tribune, Inc. v. Chronicle Publ’g*  
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7 *Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a preliminary  
8  
9 injunction implies a lack of urgency and irreparable harm”); *Hi-Rise Technology, Inc. v.*  
10  
11 *Amateurindex.com*, 2007 WL 1847249, at \* 4 (W.D. Wash. June 27, 2007) (“Such a long delay  
12  
13 in seeking relief weights against granting a temporary restraining order or a preliminary  
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15 injunction.”). “[E]quity aids the vigilant, not those who slumber on their rights.” *Arnold v.*  
16  
17 *Melani*, 75 Wn.2d 143, 147 (1968).

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19 **B. The State Offers No Valid Factual, Practical, Or Legal Basis For Further Delay.**

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21 None of the arguments the State advances in support of its motion come close to  
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23 justifying a further delay of the preliminary injunction hearing and testimony scheduled for  
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25 November 16 and 17.

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27 *First*, the State’s contends that it needs additional time to review the documents produced  
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29 by Defendants because it received the documents in rolling productions beginning on November  
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31 11, the day after the Court ordered such productions. That is not true. At least 42% of the  
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33 material produced by Albertsons between November 11-13 that the State has noticed for  
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35 potential use at the hearing was *already* in the State’s hands or publicly available when the State  
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37 filed its preliminary injunction motion on November 7. *See* Hassi Decl. ¶ 16. Indeed, the State  
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39 attached some of those same documents to its motion. *See* Nov. 7, 2022 Hanson Decl., Exs. P, Q,  
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41 and R. The State likely has a complete set of the documents that Albertsons had already  
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1 produced to the FTC and District of Columbia Attorney General<sup>1</sup>—which is presumably why the  
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3 State would not answer when asked point blank which documents it had in its possession. Hassi  
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5 Decl. ¶ 12. And roughly 40% of the material produced that the State has identified for potential  
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7 use at the hearing is not even relevant to the Special Dividend (as opposed to the Merger  
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9 Agreement). *Id.* ¶ 16. So what documents did the State get for the first time over the weekend  
10  
11 that it has identified for potential use at the hearing that actually relate to the Company’s decision  
12  
13 to pay the Special Dividend? Just 25 pages of Albertsons’ board minutes and a one-page  
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15 document attached to Albertsons’ CFO’s declaration in federal district court. That’s it. *See id.*  
16  
17 The timing of producing those documents is no basis for a continuance.  
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19 Nor is it true that the State needs a continuance because of Albertsons’ response to the  
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21 State’s Civil Investigative Demand or the State’s draft protective order. Mot. at 3. The State’s  
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23 CID sought the documents that Albertsons had produced to the FTC and the D.C. Attorney  
24  
25 General, but as noted above the State apparently *already had* those documents when it moved for  
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27 a preliminary injunction. The State also takes issue with Albertsons not immediately responding  
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29 to the draft order on Sunday, November 6. Mot. at 3. But the State ignores that a protective order  
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31 was not a priority for facilitating production because, at that point in time, the State *already had*  
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33 the documents it was requesting and the parties were not preparing for an evidentiary hearing.  
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40 <sup>1</sup> Albertsons previously produced documents to the Federal Trade Commission (FTC) and the D.C. Attorney  
41 General in response to Civil Investigative Demands. As reflected in a letter dated October 31, Albertsons was  
42 prepared to produce these same records to the State in late October if given assurances the documents would be  
43 afforded confidential treatment *See* Hassi Decl., Ex. B (Oct. 31, 2022 Letter to Hanson re CID). And this this letter  
44 was only sent after the State *ignored* Albertsons’ prior email requesting that it treat any documents produced as  
45 confidential. The next Albertsons heard about the issue was when the State filed its suit. Any delay to the State’s  
receipt of documents produced to the FTC and the D.C. Attorney General is a problem of the State’s making.

1 See Hassi Decl. ¶ 14 (describing Albertsons’ document production); *see, e.g.*, Reply ISO PI Mot.  
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3 2-3, 4 (discussing SEC filings and other public records).  
4

5 Given the State’s prior possession of or access to many of the documents it requested,  
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7 and Albertsons’ prompt production of the remainder, the State has had sufficient time to prepare  
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9 for the November 16-17 preliminary injunction hearing.<sup>2</sup> Nor are the additional materials sought  
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11 by the State, and the time supposedly needed to review them, necessary to decide the issue  
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13 presented. As a federal district court has already found in rejecting a TRO sought by the District  
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15 of Columbia, California, and Illinois, the papers are more than sufficient to decide the State has  
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17 not carried its heavy burden to show likelihood of success on the merits because it cannot show  
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19 the Special Dividend was an illegal agreement to restrain trade or harm consumers. *See* Dkt. 84,  
20  
21 Declaration of Edward Hassi, Ex. B (Federal Action Transcript of Proceedings Nov. 8, 2022) at  
22  
23 65:9-74:2.  
24

25 *Second*, the State’s plan to use confidential and highly confidential documents during the  
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27 hearing is not a “practical consideration[.]” that warrants a continuance. *See* Mot. at 10. As the  
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29 State well knows, there are multiple ways to allow sensitive materials to be used at a hearing  
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31 streamed via Zoom. Hassi Decl. ¶ 13. Adopting any one of those ways—such as either of the two  
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33 that Albertsons proposed to the State as part of a meet-and-confer on November 11, and which  
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35 were emailed to the State on November 15, to address hearing logistics—would alleviate the  
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37 State’s sudden concern about keeping Albertsons’s sensitive information confidential. *See id.* ¶  
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42 <sup>2</sup> The State’s reliance on *Nw. Gas Ass’n v. Washington Utilities & Transp. Comm’n*, 141 Wash. App. 98 (2007) is  
43 misplaced. Critically, the appellate court held that the plaintiff pipeline operators were likely to succeed on the  
44 merits of their claim that Washington’s Public Records Act did not require public disclosure of detailed pipeline  
45 data. 141 Wash. App. at 115-120. Here, the State does not and cannot show a likelihood of success, so the standard  
for obtaining a preliminary injunction is simply not met.

1 13. The State’s unilateral refusal to take advantage of these options is not grounds for delay,  
2  
3 however.

4  
5 *Third*, the State has not established good cause for extending the TRO for another two  
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7 weeks. To establish good cause, the State must show it needs more time “despite [its] diligent  
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9 efforts.” Mot. at 9. But the State has acted anything but diligently in this proceeding. The State  
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11 has had since October 14, when the Special Dividend was announced publicly, to start preparing  
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13 its case. Yet it did not file its motion for a TRO until November 1, did not request to call  
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15 witnesses for the preliminary injunction hearing until November 8, and did not request  
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17 documents for use in the preliminary injunction hearing until November 10—the same day the  
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19 TRO was set to expire and the preliminary injunction was set to be decided. And, despite alerting  
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21 Albertsons on Friday, November 11 that the State would file a motion seeking to delay the  
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23 November 16 hearing, the State waited until November 14 to actually make that application. This  
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25 again demonstrates that the State has not acted with diligence and undermines the State’s Hail  
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27 Mary seeking further unnecessary delay.

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29 The federal cases the State cites to show it has “good cause” to extend the TRO are all  
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31 inapposite. *See* Mot. at 9. In *S.E.C. v. Comcoa Ltd.*, 887 F. Supp. 1521, 1526 & n7. (S.D. Fla.  
32  
33 1995), the defendant failed to object, and thus consented, to the extension of the TRO for as long  
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35 as the court deemed necessary to decide a suite of interrelated motions, including a motion to  
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37 dismiss, a motion to vacate the TRO, and a motion for a preliminary injunction. Here, Albertsons  
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39 has consented to the extension of the TRO through November 17 only, and the Court is  
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41 considering only one substantive motion: the State’s motion for a preliminary injunction. In *SEC*  
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43 *v. One or More Purchasers of Call Options for the Common Stock of CNS, Inc.*, 2006 WL  
44  
45 3004875, \*1-2 (E.D. Pa. 2006), the SEC requested an extension of the TRO because the agency



1 was working with the Swiss government to determine the identities of the unknown defendants.  
2  
3 Here, there is no uncertainty as to the parties. Finally, in *Flying Cross Check, L.L.C. v. Cent.*  
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5 *Hockey League, Inc.*, 153 F. Supp. 2d 1253, 1260, the court was considering a motion to set  
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7 aside a TRO after the defendant removed to federal court, not a motion to extend a TRO pending  
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9 a delayed preliminary injunction hearing (indeed, plaintiff had not even moved for a preliminary  
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11 injunction at the time of the court’s decision). *Id.* at 1258.

12  
13         Moreover, delaying this hearing again would cause Albertsons further prejudice. As  
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15 Albertsons has described in its prior filings, Albertsons, its shareholders, and the market more  
16  
17 generally suffer harm each day the TRO remains in effect and Albertsons is unable to issue the  
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19 dividend that it announced and promised. *See* Dkt. 84, Hassi Decl. Ex. B at 73:21-23 (finding  
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21 “TRO would harm at least certain shareholders . . . who acted in reliance on the commitment to  
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23 pay the dividend”). Continuing to postpone that payment upsets their expectations and threatens  
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25 them with significant harm. In addition, the Company has now invested significant resources to  
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27 secure the availability of its Chief Financial Officer, Sharon McCollam, and prepare for the  
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29 forthcoming hearing on November 16 and 17 (after already preparing for this hearing last week).  
30  
31 This is a distraction to the Company’s executives and further delay will only impose additional  
32  
33 costs and distraction to the Company for what is ultimately a meritless claim.

### 34 35 36 37 38 39 40 41 42 43 44 45

**III. CONCLUSION**

For the foregoing reasons, Albertsons respectfully requests that the Court deny the State’s  
request to extend the preliminary injunction hearing to December 2, 2022.

1 I certify that this document contains 2,757 words, in compliance with Local Rules.  
2

3 DATED this 15th day of November, 2022.  
4

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34  
35  
36  
37 DATED this 15th day of November, 2022, at Seattle, Washington.

38  
39 s/ Michael Rosenberger  
40 Michael Rosenberger, WSBA #17730