The Honorable Ken Schubert
Hearing Date: November 10, 2022 at 3:00 p.m.
With Oral Argument

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 MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF STATE OF WASHINGTON'S MOTION FOR A PRELIMINARY INJUNCTION

I. PRELIMINARY STATEMENT AND RELIEF REQUESTED

The State of Washington's (the "State") Motion (the "PI Motion") for an order enjoining payment of a special dividend duly approved by the board of directors (the "Board") of Albertsons Companies, Inc. ("Albertsons" or the "Company") should be denied. The State's request is founded on the fundamentally misguided and incorrect assertion that the Company's payment of a special dividend to its shareholders (the "Special Dividend") will impair the Company's ability to compete while its proposed merger (the "Merger") with The Kroger Co. ("Kroger") is under

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antitrust review and thereafter. That is not the case. Albertsons is a thriving business. It expects to have over $75 billion in revenues in fiscal 2022, following a strong $71.9 billion performance in fiscal 2021. It is well-capitalized, with limited debt and ample free cash flow. Albertsons is in a strong position financially – more than strong enough to return $4 billion to shareholders without delay. The Special Dividend's size reflects the Company's strength, not an attempt to weaken it, as the State mistakenly claims.

The Special Dividend was properly approved by the Board on October 13, announced to the market on October 14, and, as of November 7, is a due and owing liability of the Company, payable pro rata to holders of its common stock as of the October 24 record date. The State seeks to prevent distribution of the Special Dividend to shareholders already entitled to receive it – but it does not and could not seek to unwind the Company's obligation to pay the Special Dividend in the first place. The State's request that this Court prevent Albertsons from returning capital due and owing to its shareholders is extraordinary and unprecedented. Based on nothing but speculation, hyperbole, and an expert report lacking any significant Company-specific analysis, the State asks this Court to displace the independent and carefully considered business judgment of the Company's Board and management (with advice from two expert financial advisors), and strip Albertsons' shareholders of their contractual and statutory right to payment of a duly declared dividend. The State cannot point to any precedent supporting such drastic intervention. It has no basis in law or in the facts of the Company's financial performance, and is not necessary to preserve the State's antitrust review of the Merger. Moreover, the claim the State alleges – that Albertsons and Kroger have agreed that Albertsons would pay the Special Dividend, resulting in competitive harm in violation of Washington state law – is baseless, disproven by a simple review of the Merger Agreement, and nonsensical. Albertsons cannot be certain the Merger will be

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approved by antitrust regulators and would not sabotage its ability to operate independently as a result. Nor would it make sense for Kroger to willingly pay nearly $25 billion to acquire Albertsons if it were unable to effectively compete in the markets it serves.

The State focuses on the Special Dividend's sticker price, and asserts without basis that its size creates an imminent threat to competition that must be restrained. But whether a dividend payment is detrimental to the Company's ability to compete is not judged in a vacuum. It is judged in the context of the Company's financial condition. As Albertsons' CFO's sworn testimony shows, Albertsons has ample resources to permit it to return capital to its shareholders via a dividend *without* impairing its competitiveness in any alleged market and *without* creating any risk of insolvency. It is "not a close call," Declaration of Sharon McCollam ("McCollam Decl.") ¶ 31, and the State's arguments to the contrary are baseless and based on misunderstandings of the facts.

The State's theory that Albertsons' return of capital to shareholders somehow has bearing on the State's antitrust merger review or constitutes an independent violation of antitrust law is also incorrect. Although the Special Dividend and the Merger were announced simultaneously, and Kroger took the Special Dividend into account in calculating its purchase price, the Board considered and approved payment of the Special Dividend and the Merger separately. Whether and when to pay the Special Dividend is a decision that Albertsons made and had the authority to make on its own; Kroger did not participate except to ensure that if a Special Dividend was paid, it would not exceed a certain amount, and that the amount so paid was properly subtracted form the price Kroger was paying. No agreement with Kroger, including the Merger Agreement, requires Albertsons to pay the Special Dividend. The Special Dividend and the Merger function wholly independently of each other. The Special Dividend was declared on October 13 and would have been paid on November 7 to all of Albertsons' shareholders as of the record date ***regardless***

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of whether the Merger receives regulatory approval and is consummated. The Special Dividend is in no way conditioned on the Merger's closing. The Merger was also approved on October 13 and announced on October 14, but is subject to extensive antitrust review. The Board carefully considered the Special Dividend's effect on the Company's balance sheet and its ability to operate between announcement and closing of the Merger, whether the Merger is or is not consummated. Albertsons is confident in its financial future and that paying the Special Dividend will not interfere with its ability to compete in its ferociously competitive industry.

Further delaying payment of the Special Dividend also harms Albertsons and disrupts securities markets. Critically, for this Court's analysis, once a dividend has been duly declared by the board of directors of a Delaware corporation – as it has here – the Company owes a contractual debt to pay it, and its shareholders may sue to collect it. That means the preliminary relief the State seeks exposes the Company to claims by shareholders who purchased Albertsons' stock before the record date with an expectation that they would receive their share of the Special Dividend. The requested relief also does not in any way "improve" or "preserve" Albertsons' financial condition as the State suggests. Instead, the Special Dividend will remain a liability on Albertsons' balance sheet that is due and owing and – so long as it remains unpaid – it will continue to generate additional legal exposure for the Company. Indeed, if anything were to hurt Albertsons' ability to compete, it is the State's efforts (in concert with other state regulators) to delay payment of the Special Dividend and the growing harm those efforts are imposing on the Company.

An injunction is not necessary to facilitate the State's antitrust review, or to preserve competition. In *District of Columbia et al. v. Kroger Co. et al.*, No. 1:22-cv-3357-CJN (D.D.C.) ("Federal Action"), Judge Carl Nichols of the U.S. District Court for the District of Columbia considered exactly that question at a hearing on Tuesday, November 8, and soundly rejected a

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virtually identical request from the District of Columbia, California and Illinois. *See* Declaration of Edward D. Hassi ("Hassi Decl.) Ex. A (Federal Action Order); Ex. B (Federal Action Transcript) at 65:9-74:2. The D.C. District Court frequently is tasked with resolving novel and complex issues of antitrust law and it undertook a thorough review and interrogation of the anti-competitive allegations and the effect of the Special Dividend. After reviewing the underlying factual record (including nearly identical declarations by the same company executives and expert witnesses to those submitted here) and hearing extensive argument from the parties, the D.C. Court concluded the movant states had not met their burden to show an illegal agreement between Albertsons and Kroger to pay the Special Dividend or to competitively harm Albertsons, or that Albertsons would in fact be weakened by paying the Special Dividend, and thus could not establish a likelihood of success on the merits of a claim under federal or state antitrust statutes as required to win extraordinary preliminary relief blocking payment of the Special Dividend. *See* Hassi Decl. Ex. B at 66:2-72:20. The PI Motion fails because the State – just like the movants in the Federal Action – cannot show it is likely to succeed on the merits of its claims.

The TRO granted here by Commissioner Henry Judson on November 3, 2022 is not to the contrary. That was based on a more limited factual record that the Commissioner stated he had not had a full opportunity to review because it had been filed with the Court just that morning. In his order, Commissioner Judson cited the need to "maintain the status quo" pending this Court's review of the State's claims and purported bases for preliminary relief sought in the PI Motion. Order Granting Plaintiff's Motion for a Temporary Restraining Order, at 4, *Washington v. Albertsons Co*., No. 22-2-18046-3 SEA (Wash. Super. Ct. King Cnty Nov. 3, 2022).

In its haste to enjoin the Special Dividend, the State shows no regard whatsoever for the business judgment of the Board, the Company's strong post-dividend financial position, or the

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significant disruption such extraordinary intervention would have on Albertsons, its shareholders, and its business. Nor does the State offer a viable basis to believe a preliminary injunction is necessary to preserve the State's antitrust review of the Merger. The balance of equities weighs heavily against issuance of a preliminary injunction, and any such extraordinary relief to enjoin payment is not in the public interest. The PI Motion should be denied.

II. RELEVANT FACTUAL BACKGROUND

A full recitation of the relevant facts is set forth in the accompanying Declaration of Sharon McCollam, Albertsons' President and CFO. The Special Dividend was approved after a broad-ranging strategic review that began in November 2021 and was publicly announced in February 2022. Each option Albertsons considered during that review, begun long before Kroger and Albertsons commenced discussions relating to the Merger, likely would have resulted in returning capital to Albertsons' shareholders. *See* McCollam Decl. ¶¶ 11–13.

One strategic alternative Albertsons considered to return capital to shareholders was to repurchase shares. The Board, advised by management and consulting financial professionals, considered options to pay amounts even larger than $4 billion to shareholders. *Id.*; *see also* Hanson Decl. Ex. P, at -076. Albertsons carefully assessed the effect such a return of capital to its shareholders would have on its balance sheet, and its advisors provided it benchmarks to assess the Company's resulting liquidity ratio as compared to its peers. McCollam Decl. ¶ 14; *see also* Hanson Decl. Ex. P, at -082-88.

Another strategy Albertsons considered was the sale of the Company. By mid-June 2022, discussions with Kroger were ongoing. The Board narrowed Albertsons' strategic alternatives to two: (1) a sale of the Company to Kroger, or (2) a share repurchase/tender offer, Hanson Decl. Ex. P, at -076, ultimately settling on the former. Because the sale to Kroger is not expected to close until 2024 and therefore would not offer Albertsons shareholders any near-term liquidity, the Company made clear in its discussions with Kroger that it expected to return capital to all Albertsons shareholders on a shorter time horizon. In particular, it planned to do so in the form of a dividend promptly following a merger agreement signing. McCollam Decl. ¶ 21. Accordingly, when Kroger made its initial offer to Albertsons, Kroger took the position that ***if*** a Kroger-Albertsons transaction 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 that Special Dividend. *Id.* ¶ 21; *see also* McCollam Decl. Ex. A. The Merger Agreement reflects that position. McCollam Decl. ¶ 24.

In sum, it was understood from the beginning that whether Kroger acquired Albertsons or not, Albertsons would return capital to its shareholders. *Id.* ¶ 21. In other words, if there were no Merger, Albertsons still would have returned at least $4 billion to its shareholders. Albertsons ultimately decided to pay a $6.85 per share Special Dividend to its shareholders with payment occurring on November 7. *Id.* ¶ 1.

III. ARGUMENT

A. The State Bears A Heavy Burden To Show Payment Of The Special Dividend Should Be Restrained.

The Supreme Court of Washington has warned that preliminary relief – including the preliminary injunction sought here – is a "transcendent" and "extraordinary remedy" which "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) (quoting *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000)). These principles should apply with particular force to a requested injunction to restrain a $4 billion financial transaction that has

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already been announced to the public markets. To be entitled to preliminary relief, the State must establish (1) "a clear legal or equitable right"; (2) "a well-grounded fear of immediate invasion of that right"; and (3) "that the act complained of will result in actual and substantial injury." *Huff*, 184 Wn.2d at 651, 361 P.3d at 731. A movant's "[f]ailure to establish any one of these requirements results in denial" of the motion. *Id.* These criteria must also "be examined in light of equity, including the balance of the relative interests of the parties and the interests of the public." *Id.*

B. The State Has Not Demonstrated A Clear Legal Or Equitable Right.

To establish a "clear legal or equitable right," the State must establish that it is likely to prevail on the merits. *Huff*, 184 Wn.2d at 652, 361 P.3d at 731-32. "A doubtful case" is not sufficient. *Id.* Here, the State cannot establish that it is likely to prevail on the merits and the PI Motion should be denied. *See, e.g.*, *Roostertail Rest., Inc. v. Loc. 8, Hotel, Motel, Rest. Emps. & Bartenders Union*, No. 836751, 1977 WL 20613, at *1 (Wash. Super. Nov. 14, 1977) (denying motion to enjoin picketing by union not in violation of Washington law).

1. The State Cannot Establish A Violation Of RCW 19.86.030.

The State purports to challenge the Special Dividend as a violation of RCW 19.86.030, which is the State's version of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[1] The elements of an RCW 19.86.030 claim are: (1) the existence of an agreement, contract, combination, or conspiracy among two or more persons or entities (2) that unreasonably restrains trade or competition. PI Motion at 12. Plaintiff cannot establish that Albertsons' independent

[1] RCW 19.86.030 is "essentially identical to section 1" and "[i]n construing RCW 19.86.030, courts are to be guided by federal decisions interpreting comparable federal provisions." *Murray Pub. Co., Inc. v. Malmquist*, 66 Wash. App. 318, 325, 832 P.2d 493, 497 (1992).

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decision to pay the Special Dividend as part of a capital return strategy it began evaluating long before Kroger ever expressed interest in acquiring Albertsons constitutes an "agreement" with Kroger that unreasonably restrains trade. Indeed, it is black letter law that "[i]ndependent action is not proscribed" by Section 1 or its state analogues. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (Section 1 "does not reach conduct that is wholly unilateral.").

a. There Is Neither an "Agreement to Pay The Dividend" Nor An "Agreement To Weaken Albertsons."

There is a fundamental mismatch between the "agreement" as alleged and the State's purported evidence of that agreement. The State appears to allege two variations of the alleged agreement. The first is an "agree[ment] that Albertsons would issue a $4 billion 'special' dividend today [November 7]." PI Motion at 1; *see also id.* at 12 ("Defendants' [sic] jointly agreed to issue the $4 billion dividend."). The second is an "agreement to weaken Albertsons (to Kroger's benefit)." *Id.* at 19-20; *see also id.* at 19 (alleging that Albertsons and Kroger are "[t]wo competitors agreeing to blunt competition"). But the State's evidence is the Merger Agreement itself, the accompanying press release, and the discussions (and related materials) leading up to the Merger Agreement. *Id.* at 12-13. Evidence that the parties agreed to merge does not prove the agreements alleged by the State. *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1081 (11th Cir. 2016) ("[A] contract can serve as the basis for a Section 1 claim only if it embodies an agreement to unlawfully restrain trade.").

To establish the requisite illegal agreement, "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 Service*

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Corp., 465 U.S. 752, 764 (1984). The State largely relies solely upon what it (incorrectly) believes is direct evidence – the Merger Agreement and Albertsons' accompanying press release. But direct evidence must be "explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 58 (D.D.C. 2016) (quotation and citations omitted). Direct evidence "usually take[s] the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy." *See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627-29 (7th Cir. 2010). Albertsons and Kroger never agreed, in the Merger Agreement or elsewhere, to issue the Special Dividend or harm Albertsons' ability to compete.

The State fundamentally misreads the Merger Agreement; it is not the "smoking gun" that the State thinks it is. *See In re Domestic Airline Travel Antitrust Lit.*, 221 F. Supp. 3d at 58 (direct evidence is "extremely rare" and "is usually referred to as the 'smoking gun'") (internal quotation marks omitted)). As Albertsons' CFO has explained under oath, there is ***nothing*** in the Merger Agreement that requires Albertsons to pay the Special Dividend. McCollam Decl. ¶ 23. To the contrary, as summarized below, the Merger Agreement merely ***permits*** Albertsons to pay the Special Dividend and ensures that any such payment is reduced from the merger price paid by Kroger.

First, Kroger sought and received assurances in Section 6.1 of the Merger Agreement that Albertsons would not materially change the nature or quality of its business before the Merger closes. And Section 6.1(e) ***allows*** but does not ***require*** the Company to pay the Special Dividend before the Merger closing. *Id.* ¶¶ 22-23, 27; *see also* Hanson Decl. Ex. C at WA000227. And the other financing restrictions in Section 6.1 of the Merger Agreement are standard restrictions in every merger agreement, and in any event, Kroger is obligated under the Merger Agreement to

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"not unreasonably withhold, condition[], or delay[]" consent for Albertsons to borrow or raise more money. *Id.* at -226.

Second, Kroger also made clear that it had an interest in ensuring that the purchase price that it will pay for Albertsons fairly reflects any Special Dividend; accordingly, it included a mechanism to adjust the per-share purchase price. If Albertsons elected to pay the Special Dividend, the per-share purchase price Kroger will pay is reduced, on a dollar-for-dollar basis, to account for the precise value of the capital that the Company elects to return to shareholders via the Special Dividend. McCollam Decl. ¶¶ 24, 26; *see also* Hanson Decl. Ex. C at WA000218.

This share price adjustment provision simply adjusts the price per share paid if the Merger closes. It does not make closing in anyway dependent on, or driven by, payment of the Special Dividend. To the contrary, the Merger Agreement provides that whether or not the Company pays the Special Dividend, Kroger and the Company would be obligated to consummate the Merger. Consummation of the Merger depends solely on the satisfaction of the conditions to closing contained in Article VII of the Merger Agreement, and those conditions to closing are not dependent on or related to the Special Dividend. McCollam Decl. ¶ 25; *see also* Hanson Decl. Ex. C at WA000231. Thus, far from pushing Albertsons to pay a dividend that would "cripple Albertsons' ability to compete," PI Motion at 2, Kroger sought only to confirm that any Special Dividend would be (i) appropriately sized, and (ii) subtracted from the purchase price, McCollam Decl. ¶ 28.

And there certainly is nothing in the Merger Agreement whereby Albertsons agreed "to weaken [itself] (to Kroger's benefit)" as the State alleges. Because Kroger plans to acquire Albertsons, including its assets and liabilities, Kroger made clear that it had every incentive to ensure the Special Dividend does not impair Albertsons' ability to operate competitively during

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the potentially significant interval between the Merger Agreement signing and closing. Kroger made clear to Albertsons that it wanted to ensure that payment of the Special Dividend would not harm the Company. Kroger did not participate in the decision to pay the Special Dividend, the Special Dividend is not contingent on the Proposed Merger closing, the payment of the Special Dividend was not done at Kroger's request, and was not intended to facilitate or affect the Proposed Merger. McCollam Decl. ¶¶ 16, 20, 22-23, 25, 29-30.

The State also misconstrues Albertsons' press release. *See* PI Motion at 12. It is evidence of neither version of the State's alleged agreement. The "connection" between the Special Dividend and the Merger that Albertsons referred to in that press release was how Kroger's purchase price would be adjusted downwards by Albertsons' independent decision to pay the Special Dividend, as described above. McCollam Decl. ¶ 29. It is not an admission that Albertsons entered into an agreement with Kroger to pay the Special Dividend, let alone an admission of an imagined intent to weaken Albertsons. Rather, that statement was necessary to ensure that investors properly understood that the merger price would be reduced by the Special Dividend. *Id*.

Albertsons' discussions with Kroger regarding the size and timing of the Special Dividend also do not support either version of the State's alleged agreement. Nor do they reflect an admission of an agreement. *See* PI Motion at 10. The fact that Kroger expressed to Albertsons that it wished to limit the amount of the special dividend does not reflect an agreement that Albertsons would in fact "issue a $4 billion 'special' dividend." It was a discussion, later reflected in the Merger Agreement itself, about how ***if*** Albertsons chose to pay the Special Dividend, then Albertsons ***could*** pay ***up to*** $4 billion. But Albertsons remained free to not issue a dividend at all, to issue a dividend ranging in size from one penny to $4 billion, or to issue a dividend greater than $4 billion and risk Kroger walking away from the Merger. And the fact that Albertsons told Kroger

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approximately when it intended to pay the Special Dividend does not evidence that Kroger agreed to anything, but rather something much more mundane – a company keeping its potential acquirer informed regarding the current and near-future state of its finances. Finally, Kroger's expressed preference that the Special Dividend be $500 million less than the amount of capital Albertsons contemplated returning to its shareholders absent the merger vis-à-vis a share repurchase/tender offer, *see* Hanson Decl. Ex. P, at -086, undermines the State's allegation that Albertsons and Kroger agreed "to weaken Albertsons (to Kroger's benefit)." Kroger would not seek to limit the size of the Special Dividend if the aim was to "weaken Albertsons" as the State alleges.

The State further fundamentally misconstrues Albertsons' internal documents and its intentions prior to entry into the Merger Agreement. *See* PI Motion at 13. Following initiation of its strategic review in November 2021, Albertsons intended to return capital to its shareholders. McCollam Decl. ¶¶ 13, 20-21. The internal documents the State cites, Hanson Decl. Ex. P, at -091, do not contradict this. They identify one strategy to return capital to shareholders in the near term, a share repurchase/tender offer, that was under consideration if merger discussions with Kroger terminated. But they also identify how Albertsons could return near-term capital to its shareholders if merger negotiations with Kroger continued and ultimately led to an agreement. Hanson Decl. Ex. P at -085 (evaluating the issuance of a special dividend versus a tender offer); *see also* McCollam Decl. ¶ 21 (describing how when Kroger made its initial offer, Kroger "accepted as a given that Albertsons would be returning capital to ACI stockholders through a special dividend"). Accordingly, the States have not demonstrated that Albertsons' "own documents undermine [its] claim" that the Special Dividend or a similar type of near-term return of capital was long-planned before the Merger with Kroger was under consideration. *See* PI

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Motion at 13. The fact that the Special would be paid after the Merger was announced is not an admission that it was not part of a longstanding plan to return capital. *See id.* at 10.

To the extent that the State asserts that the Merger Agreement and press release are circumstantial evidence, that too fails because they do not evidence what the State must prove. The State must prove "a conscious commitment to a common scheme designed to achieve an unlawful objective," *Monsanto Co.,* 465 U.S. at 764, and it does not even come close. What has the State proved? An agreement to merge, wherein the consummation of that merger is contingent upon antitrust review. McCollam Decl. ¶ 17. But the mere signing of a merger agreement is not a Sherman Act Section 1 violation, as the State cannot in good faith contest. And even if this Court finds that Albertsons and Kroger agreed to pay the Special Dividend (which they did not), that too is insufficient. There is no "unlawful objective" about a company paying a dividend that is permissible under its governing state's corporate law. *See infra* 17-18 (discussing how the payment of the Special Dividend is lawful under Delaware corporate law).

The State alleges but fails to offer a single shred of evidence to support its claim that the "unlawful objective" of the alleged "common scheme" is the purported competitive harm to Albertsons that will follow the payment of the Special Dividend and "cripple its ability to compete during the merger review." PI Motion at 1. Merely alleging an unlawful or common scheme does not make it true, particularly where such allegations are contradicted by common sense and the undisputed evidentiary record, including Albertsons' CFO's sworn testimony. *See* McCollam Decl. ¶¶ 63-65. As she attests:

> It is not in ACI's or Kroger's interest to weaken the Company's competitive strength while the Proposed Merger is pending regulatory review. The grocery industry is intensely competitive. Given the risk that the Proposed Merger will not be consummated, it would not make sense for ACI to harm its own competitive position and risk falling behind its

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> competitors such as Amazon, Walmart, Costco and others. Nor would it make sense for Kroger to pay $24.6 billion for a competitively weakened ACI; again, Kroger will need the full strength of the combined company to compete with Amazon, Costco, Walmart, and many others in the industry.

Id. ¶ 64.

Finally, the State raises a variety of purported concerns stemming from the State's one-sided analysis of historical grocery mergers, *see* PI Motion at 4-5, 23-24 (discussing prior acquisitions and divestments involving Washington grocers), and its fear that the "SpinCo" contemplated by the Merger Agreement, to which some number of stores may be divested to address competitive concerns in select markets, will not have sufficient resources to succeed. *See* PI Motion at 7-8, 17, 23-24 (alleging SpinCo "is poised to be an underfunded company from day one" and will be "deprive[d]" of "rent money, corporate or divisional overhead, and technology funds"). While an assessment of historical grocery mergers and the viability of SpinCo are issues that may be relevant to an analysis of the competitive effects of *the Merger* itself, they are utterly irrelevant to the alleged agreement at issue here concerning payment of the Special Dividend, which has nothing to do with SpinCo. Moreover, SpinCo is not anticipated to include any grocery stores in Washington. The State's concerns as to these topics can and will be addressed in the lengthy merger review process that is just starting, but they are not a basis to infer an illegal agreement as to payment of the Special Dividend itself.

b. Payment Of The Special Dividend Will Not Leave Albertsons Unable To Effectively Compete Or Otherwise Restrain Trade Or Competition.

To establish likelihood of success on the merits, the State must also credibly allege – and show a likelihood of proving – an unreasonable restraint of trade or commerce, evidenced by an

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impact on competition. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 98, 104 (1977) ("[E]ssential inquiry" is what "impact on competition" the alleged restraint has). In applying this standard, the State's reliance on the "quick look" or *per se* analysis is novel and misplaced. The rule of reason is the presumptive analysis, and must apply to unique fact patterns like this. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Courts have been crystal clear that the *per se* or "quick look" analysis are inappropriate in novel scenarios. *See, e.g.*, *Arizona v. Maricopa Cty.*, 457 U.S. 332, at 349-51 n. 19 (1982); *California ex rel. Harris v. Safeway, Inc.*, 651 F. 3d 1118, 1133 (9th Cir. 2011). Regardless, the State cannot bear its burden to show any unreasonable restraint on trade because the Special Dividend will not detrimentally impact Albertsons' ability to compete.

After payment of the Special Dividend, Albertsons will have more than sufficient resources to compete vigorously, continue with its current strategic and operating plans, and honor its agreements with the unions and its commitments to its associates to increase wages. McCollam Decl. ¶¶ 9, 56, 62, 74. Albertsons estimates its liquidity needs over the next 12 months to be approximately $10.0 billion (inclusive of the Special Dividend). *Id.* ¶¶ 67-68. After payment of the Special Dividend, Albertsons will have ample cash resources – $500 million in cash, $2.5 billion available under its already existing asset-based lending facility, and projected annual revenues of $75 billion – to meet those needs. *Id.* ¶¶ 47-48. These annual revenues generate free cash flow significantly above Albertsons' annual operational costs, even taking into account the Special Dividend. *Id.* ¶ 70. Thus, the Company projects that its liquidity position will improve in the three-year period following payment of the Special Dividend. *Id.* ¶¶ 58-59.

The State's oft-repeated concerns about a potential recession do not lead to a different conclusion. The factual record shows that Albertsons carefully considered whether it would have adequate resources to execute on its three-year plan, and determined that it could – not only based

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on its projected numbers, but even if it fell short of those projections. Moreover, the risk of rising interest rates does not pose a significant risk to the Company because most of its borrowing is at fixed rates. *Id.* ¶ 72. Accordingly, Albertsons will be able to pay for necessary capital improvements and pensions and will continue to pay the same wages with or without the Special Dividend and in a variety of financial circumstances. *Id.* ¶¶ 73-75.

The State's argument to the contrary is based on incorrect assumptions, including a complete disregard for the free cash flows produced by the more than $75 billion in projected annual revenues. *Id.* ¶¶ 48, 53-61, 68-71. The State's expert opinion from Professor Weisbach, predicated on these mistaken facts and discussing corporate finance in the abstracted – without any consideration for Albertsons' specific financial situation –does not come close to carrying the State's burden. As demonstrated in the expert declaration of Professor Smith, submitted herewith, Professor Weisbach's opinion lacks any serious financial analysis of Albertsons' financial condition, and fails to even consider the fact that Albertsons generates free cash flow as a result of its substantial operating revenues, which are projected to exceed $75 billion next year, or the fact that after paying the Special Dividend, the Company will have access to approximately $3 billion in liquidity. Declaration of Professor David C. Smith ("Smith Decl.") ¶ 8(f). Professor Smith also explains that the claim that Albertsons will have difficulty raising capital is unsupported by any concrete analysis of the Company, and inconsistent with the facts, *id*. ¶ 8, 19-36, and that there are important business reasons for companies like Albertsons to return capital to their investors. *Id*. ¶¶ 10-16.

Delaware corporate law – not the Sherman Act or state competition laws – sets the guidelines Delaware corporations must follow in determining whether and when they have the "surplus" required to pay a dividend. That law is clear, and the Company took it carefully into

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account. It permits "directors of every corporation . . . [to] declare and pay dividends upon the shares of its capital stock . . . [o]ut of its surplus, as defined and computed in accordance with §§ 154 and 244 of this title." 8 DGCL § 170(a)(1). "Surplus" is defined by 8 DGCL § 154, as excess of net assets over the par value of the corporation's issued stock, which is in effect the amount by which total assets exceed total liabilities. Section 154 does specifically prescribe the manner in which a corporation must value its assets and liabilities for the purpose of calculating surplus, and courts should not disturb a corporation's determination of its surplus so long as it "evaluate[s] assets and liabilities in good faith, on the basis of acceptable data, by methods that they reasonably believe reflect present values, and arrive[s] at a determination that is not so far off the mark as to constitute actual or constructive fraud." *Klang v. Smith's Food & Drug Centers, Inc.*, 702 A.2d 150, 152, 155 (Del. 1997).

The Company had ample surplus to pay the Special Dividend. Based on the fair value of its assets, its DGCL "surplus" was nearly $14.7 billion – more than 3.5 times the size of the Special Dividend. In an excess of caution, Albertsons confirmed that it had ample surplus to pay the Special Dividend even if its assets were conservatively assessed at book value rather than fair market value. Even on a book value basis (which, contrary to Professor Weisbach's opinion and the State's misstatement regarding what Albertsons has said on the subject, *see* PI Motion at 10, is not the correct way to calculate surplus, *see* Smith Decl. ¶ 8(f)(iv)), Albertsons calculated its surplus to be over $4.7 billion, again, substantially in excess of the Special Dividend. McCollam Decl. ¶¶ 35-39. Neither the State nor its expert dispute that the Special Dividend was declared in accordance with Delaware corporate law governing the payment of dividends. Weisbach Decl. ¶¶ 24-25.

The Board also carefully evaluated and determined that after paying the Special Dividend, the Company would still have more than sufficient resources to continue with its current strategic and operating plans, and compete vigorously in the marketplace whether or not the Merger closes. McCollam Decl. ¶ 44. These discussions occurred over a period of months during which the Company considered a variety of capital return strategies that would have returned, if anything, even more capital to the Company's shareholders than the Special Dividend. Among other things, the Board considered and confirmed that the Company would still be able to make planned investments, compared its financial metrics and debt ratio to its peers', and assured itself that the Company would remain strong and competitive post-payment, regardless of outcome on the Merger. *Id.* ¶ 45; *see also* Hanson Decl. Ex. P at -084.

Albertsons did not seek new sources of capital to fund the Special Dividend. The Company has over $3 billion cash on hand of which $2.5 billion will be used to fund the Special Dividend. The Company also can access approximately $1.4 billion from its already existing asset-based lending facility. After payment of the Special Dividend, Albertsons will have a healthy liquidity position of approximately $3 billion, consisting of $500 million in cash and $2.5 billion available under its asset-based lending facility, and continuing access to cash in the form of projected annual revenues of $75 billion. The Company will have ample free cash flow to operate and invest in its stores and meet all of its obligations – and will have a leverage ratio of just under 2.0x, well below the leverage ratios under which the Company has historically and successfully operated. McCollam Decl. ¶¶ 46-51. Finally, Albertsons' credit ratings have not been downgraded as a result of the Special Dividend. *Id.* ¶¶ 53-56.

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In short, the State's focus on the top-line number is misguided and inadequate to support the relief it seeks. The financial status of the Company as attested to by its CFO confirms the Special Dividend is not excessive, let alone anticompetitive or an unreasonable restraint on trade.

2. The State Cannot Establish A Violation Of RCW 19.86.020.

Albertsons' independent decision to pay the Special Dividend does not constitute an unfair method of competition actionable under RCW 19.86.020 for multiple reasons. The State alleges that a violation of RCW 19.86.020 can be either an actual or incipient violation of RCW 19.86.030 or conduct that "violates the *spirit* of the antitrust laws." PI Motion at 19. But, as described above, Albertsons has not violated (nor is about to) violate RCW.19.86.030, nor does the State have any evidence that a unilateral decision to issue a dividend violates "the spirit" of the antitrust laws.

Furthermore, RCW 19.86.020 does not apply to "reasonable business practices" or to acts or practices that are not injurious to a substantial portion of the public. *State v. Black*, 100 Wn.2d 793, 802-803 (1984); *see also Buffets, Inc. v. Klinke*, 73 F.3d 965, 970 (9th Cir. 1996); *Husky Intern. Trucks, Inc. v. Navistar, Inc.*, 2010 WL 4053082, at *5 (W.D. Wash. Oct. 14, 2010). The Supreme Court of Washington has emphasized that businesses must be afforded some "latitude" in conducting their affairs and that actions "motivated by legitimate business concerns" are not "not the kind of conduct within the scope of RCW 19.86.020." *Black*, 100 Wn.2d at 802-83. As discussed above, Albertsons' independent decision to pay the Special Dividend is a reasonable business judgment motivated by legitimate business concerns – including the need to return surplus capital to shareholders in accordance with Delaware corporate law – and cannot be the basis for a claim under RCW 19.86.020. *See Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 678 (Wash. 1987) (finding that the defendant's "valid business reasons" for entering into the contracts with its suppliers precluded a claim that defendant unreasonably restrained trade).

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Nor is the payment of a Special Dividend by a corporation to its shareholders in accordance with the law of its state of incorporation an act directed at the public such that it could injure a substantial portion of the public. *See Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 794 (1986) (dismissing claim brought on the basis of an "essentially private transaction" that was not likely to repeat itself among the general public). And even if payment of the Special Dividend could *in theory* impact the general public as the State suggests, the factual record establishes that Albertsons' payment of the Special Dividend will not *in fact* leave Albertsons unable to compete in the markets it serves or to meet its obligations to its employees, customers, and other counterparties. *See supra* at 14 (citing McCollam Decl. ¶¶ 9, 62, 62, 74). In short, because State has failed to show the Special Dividend is likely to competitively harm Albertsons, it cannot show the Special Dividend is likely to cause substantial harm to the public writ large as required to state a claim under RCW 19.86.020.

3. A Federal Court Has Already Determined Substantially Similar Claims Are Not Likely To Succeed on Their Merits And Refused To Enjoin Payment Of The Special Dividend.

In passing the Washington Consumer Protection Act, the Washington state legislature stated its intent that state courts be guided by the decisions of federal courts interpreting federal antitrust and consumer protection statutes. RCW 19.86.920 (stating WA courts should "be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters"). As noted above, a D.C. federal court has already determined that the District of Columbia, Illinois and California are unlikely to succeed on the merits of their claims under Section 1 of the Sherman Act and its D.C. and Illinois state law analogues because, among other things, there was no evidence of an agreement between Albertsons and Kroger

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regarding whether the Special Dividend would or would not be paid, or that Albertsons would be competitively weakened as a result its independent decision to pay a dividend in accordance with Delaware corporate law. *See* Hassi Decl. Ex. B at 66:15-18 ("[P]laintiffs have failed to demonstrate an agreement or conspiracy between Kroger and Albertsons to pay the preclosing dividend to Albertsons' shareholders and/or an agreement to make Albertsons 'cash poor.'"). Here, as discussed above, the statutes the State purports to enforce - RCW 19.86.030 - is "essentially identical" to Section 1 of the Sherman Act. *Murray Pub. Co., Inc.*, 66 Wash. App. 318, at 325, 832 P.2d 493, at 497. Moreover, the theories advanced by the movants in the Federal Action – that Albertsons and Kroger entered into an "agreement" to pay the Special Dividend to competitively weaken Albertsons during the period in which the Merger is under antitrust review – are substantially similar to those put forward by the State here. As a result, this Court should not construe Washington state law to forbid independent business conduct relating to the internal affairs of a Delaware corporation that is not only a product of reasonable business judgment, but that a federal court has already determined is not in violation of Section 1 of the Sherman Act or similar state laws. *See Blewett v. Abbott Labs*., 938 P.2d 842, 846 (Wash. App. Div. 1 1997) ("In directing courts to be "guided by" federal law, the Legislature presumably intended to minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct.").

C. The State Cannot Demonstrate A Well-Grounded Fear of Immediate Invasion of Its Rights Nor Actual or Substantial Harm.

There is no evidence to support the State's claim that it has a well-grounded fear of immediate invasion of its rights or faces imminent harm. The State's speculation regarding

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Albertsons' ability to compete in the markets it serves or pay its debts in the ordinary course appears to be based almost entirely on the generic fears of their expert, Professor Weisbach. None of that analysis is sufficiently concrete, or specific to Albertsons, to support the State's extraordinary request that this Court intercede in the Company's corporate governance and prohibit the return of capital from surplus. Meanwhile, Albertsons has provided credible, sworn testimony from its CFO that the Company is in strong financial condition today and will be in strong financial condition after the Special Dividend is paid. McCollam Decl. ¶¶ 8-10, 18, 31, 44-62, 66-74. Albertsons has also submitted an expert report explaining the massive deficiencies in the generic "opinions" set forth in Professor Weisbach's report. *See* Smith Decl. The State simply has no credible basis to challenge the Special Dividend itself or that payment of the Special Dividend is "likely to result in a lessening of competition." Hassi Decl. Ex. B. at 72:21-73-6 (denying TRO and concluding movant states failed to establish payment of Special Dividend would cause irreparable harm sufficient to justify preliminary relief).

Albertsons will remain a separate and competitive business until the Merger closes, and it cannot close until cleared under the antitrust laws. *Id.* ¶ 17, 65. To the extent its concerns go to the Merger, the State will have every opportunity to conduct a full and rigorous review of the Merger through the customary and well-established process, and may seek to enjoin the Merger if they determine – after a thorough investigation – that it is likely to have anticompetitive effects. That process is more than adequate to protect the State's asserted interest in competition.

D. The Balance of Equities and Public Interests Do Not Favor Preliminary Relief.

The equities and relevant public interests weigh heavily against the extraordinary relief sought. The State has not established that it or competition broadly will suffer any harm in the absence of an injunction blocking payment of the Special Dividend. Albertsons' independent

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decision to issue the Special Dividend will in no way impede the State's investigation of the Merger or their ability to seek appropriate relief. *See* Hassi Decl. Ex. B. at 73:6-14 (concluding TRO was not "in the public interest" given movant states' failure to show "there will be harm to competition" from payment of Special Dividend).

A preliminary injunction would, however, substantially injure shareholders who have traded in or held Albertsons' stock since the Special Dividend's declaration in reliance of its payment on November 7. Hassi Decl. Ex. B at 73:21-23 (finding "TRO would harm at least certain shareholders . . . who acted in reliance on the commitment to pay the dividend"). Albertsons has a huge number of retail shareholders and employees who were expecting to receive a substantial dividend payment on November 7. Some of those shareholders may well have made other expenditures in reliance on that expectation. Continuing to postpone that payment upsets their expectations and threatens them with significant harm.

In addition, the average trading volume in Albertsons' stock in the twenty days preceding the announcement of the Special Dividend was 3.3 million shares per day. Trading volume in Albertsons' stock increased significantly between the declaration of the Special Dividend and the record date, including by a factor of over 12 on October 14, as summarized below.

	13-Oct-22	14-Oct-22	17-Oct-22	18-Oct-22	19-Oct-22	20-Oct-22	21-Oct-22
Closing Price	$28.63	$26.21	$26.43	$26.74	$27.20	$27.50	$21.08
Volume (in mm of shares)	29.0	40.6	13.2	14.5	12.4	11.7	14.6
Volume / Pre Announcement Volume (20 day average)	8.8x	12.2x	4.0x	4.4x	3.8x	3.5x	4.4x
Trades (000 of orders)	179	207	81	68	84	78	81
Trades / Pre Announcement Trades (20 day average)	7.6x	3.0x	2.5x	3.1x	2.8x	3.0x	1.6x

Source: S&P Capital IQ (price and volume); Bloomberg (trading)

Trading in Albertsons' stock has continued to be at these elevated levels from the Special Dividend record date through November 1. In the seven-day period between the announcement date and the record date, 136.0 million Albertsons' shares exchanged hands. In the seven-day

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period between the record date and November 1, 2022, 37.4 million Albertsons shares exchanged hands. Crucially, the announcement of the Special Dividend had a very significant effect on the price of Albertsons stock, because the Special Dividend provides a return to stockholders as of the record date of October 20, 2022, but not to those acquiring shares thereafter. As expected given the size of the Special Dividend, the price per share of the stock was marked down by $6.85 from the close ($27.50) on October 20 to the October 21 opening price of $20.65. An improvidently granted preliminary injunction risks irreparable harm to those who have traded (potentially as high as 25% of the value of each share, based on the stock price before and after the record date) as their identity cannot readily be traced. Indeed, such a preliminary injunction would create a class of winners and losers in a multitude of ways, including:

- Sellers who transacted after the record date sold their shares too cheaply as the price per share that they transacted upon assumed that the dividend would be paid to the seller and not the buyer. In the case of an injunction, these sellers would have received a raw deal.

- Buyers who transacted after the record date bought the shares at (in a post-injunction world) artificially low prices. In the case of an injunction, these buyers will receive windfalls.

In addition to this direct financial harm, a preliminary injunction would also undermine the functioning of the public securities markets as to future trading of Albertsons' securities (and perhaps more broadly if shareholders no longer have certainty that dividends validly declared will in fact be paid).

An injunction would also injure Albertsons because canceling or even continuing to postpone the Special Dividend exposes Albertsons to significant claims. Under Delaware law, the declaration of an unconditional cash dividend by a corporation's board creates a binding debtor-creditor relationship between the holders of common stock on the record date and the corporation,

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and the corporation is liable for the amount of the declared dividend.[2] Any interference with the Special Dividend's payment after its announcement would, under Delaware law, render Albertsons potentially liable to the holders of its common stock as of the record date for the amount of the Special Dividend and subject the Board to the risk of litigation in state and/or federal court.[3] Even with an injunction in place, shareholders could argue the Company still owes the payment. Given the extensive trading of Albertsons' stock following announcement of the Special Dividend, this exposure is potentially significant. In addition, given the Special Dividend was validly declared and due for payment on November 7, the Company is required to carry it as a liability on its balance sheet. As a result, any continuing restraint on payment of the Special Dividend will not free up Albertsons' working capital as the State suggests; instead, it will negatively impact Albertsons' liquidity situation. *See* Smith Decl. ¶¶ 71-73; Hassi Decl. Ex. B at 73:15-23 (concluding TRO "would harm Albertsons" by interfering with internal corporate decision that Special Dividend was in the company and shareholders' interest).

Finally, whether Albertsons can or should pay the Special Dividend is to be decided by its Board in accordance with Delaware law and is not a question for antitrust regulators. Absent a clear showing that Albertsons' independent decision to pay the Special Dividend constitutes an *unreasonable agreement* in restraint of trade that will cause irreparable harm *to competition* or in violation of state or federal law – a showing which has not been made – the Court should not

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[2] *See In Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1175 (Del. 1988) ("[U]pon a valid declaration of a dividend, the corporation becomes indebted to the stockholder, and the stockholder may recover the declared amount in any action, ex contract, against the corporation."); *Grand Metropolitan Public Ltd. Co. v. Pillsbury Co.*, 558 A.2d 1049, 1061 (Del. Ch. 1988).

[3] *See In re Sunstates Corp. S'holders Litig.*, 2001 WL 432447, at *3 (Del. Ch. Apr. 18, 2001) ("The declaration of a lawful dividend has long been understood to give stockholders as of the record date standing to sue at law for the recovery of the amount due."); *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 668 (Del. Ch. 1940).

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interfere with a private corporation's internal affairs. *See Shelley v. Am. Postal Workers Union*, 775 F. Supp. 2d 197, 210 (D.D.C. 2011) (denying TRO where interference with internal workings of labor unions would not serve public interest).

IV. CONCLUSION

For the foregoing reasons, the PI Motion should be denied.

I certify that this document contains 8394 words in compliance with the Stipulation and Order to Modify Briefing Schedule and Increase Word Limit entered November 7, 2022.

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