Hon. Ken Schubert
Hearing Date: November 10, 2022
With Oral Argument

SUPERIOR COURT 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

DEFENDANT THE KROGER CO.'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

The Kroger Co. ("Kroger") respectfully submits this Opposition to the Motion for a Preliminary Injunction ("Motion") submitted by the Washington State Attorney General ("State").

Kroger entered into an Agreement and Plan of Merger ("Merger Agreement") with Albertsons Companies, Inc. ("Albertsons") on October 13, 2022. But this lawsuit is not about the Merger Agreement or the contemplated acquisition of Albertsons by Kroger. Rather, the State asks this Court to take the unprecedented step of invoking Washington's antitrust laws to enjoin the payment of a special dividend that Albertsons unilaterally declared and plans to issue to its shareholders ("Pre-Closing Dividend"). The propriety of the Pre-Closing

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Dividend is for Albertsons alone to determine, exercising its fiduciary duty to its shareholders, and presents a question governed by Delaware corporate law, not Washington antitrust law.

Kroger had, and has, nothing to do with the Pre-Closing Dividend. Kroger did not conceive of, encourage, design, or require the Pre-Closing Dividend as part of its deal with Albertsons. The authority to declare and pay the Pre-Closing Dividend rested, and continues to rest, solely with Albertsons. The Pre-Closing Dividend is not "a condition" of the Merger Agreement, nor does the Merger Agreement require Albertsons to declare or issue the Pre-Closing Dividend. Indeed, the State cannot point to any specific provision in the Merger Agreement that creates an obligation to pay the dividend. Albertsons made clear to Kroger from the beginning of discussions that it intended to pay a special dividend to its shareholders whether or not it engaged in any transaction. The Merger Agreement thus merely contemplates the possibility that Albertsons might pay the Pre-Closing Dividend and contains terms adjusting the merger price if it did so. That is not an agreement.

After holding a hearing and considering substantially the same evidence as the State presented in this case under a virtually identical statute, a federal court recently found, expressly and unequivocally, that Albertsons and Kroger did *not* reach an "agreement" regarding the payment of the Pre-Closing Dividend or its amount. *See* Decl. of Christopher Wyant in Support of Opp. to Pls' Mtn. for Preliminary Injunction ("Wyant Decl."), Ex. 1 at 66-69. In a suit brought against Kroger and Albertsons by three state Attorneys General challenging the Pre-Closing Dividend under the Sherman Act and analogous state statutes, a federal judge in the U.S. District Court for the District of Columbia found on November 8, 2022 that the plaintiff states had failed to show either a reasonable likelihood of success on the merits or irreparable harm to the public or plaintiffs — both required elements of the State's motion in this case. *Id.* at 69-73.

The same result is warranted here. Whatever the State's view of the merits of Albertsons' decision to pay the Pre-Closing Dividend, there was no (1) agreement or

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conspiracy (2) to restrain trade. That is fatal to the State's claims. There was no agreement or joint decision between Kroger and Albertsons to issue the Pre-Closing Dividend; Albertsons unilaterally decided what it wanted to do, told Kroger, and then the Merger Agreement included contract terms reflecting the possibility of a Pre-Closing Dividend. Albertsons was free to decline to pay some or all of the Pre-Closing Dividend without consequence; the Merger Agreement does not dictate a dividend, or its timing or amount.

The State also offers no plausible allegations, let alone evidence, to show that the payment of the Pre-Closing Dividend would "restrain trade" — in other words, that it would have any anticompetitive effects. To make that showing, the State has to properly define one or more relevant markets and allege facts about competition within those markets (e.g., facts about market power, market share, and competitors) that provide proof that the payment of the Pre-Closing Dividend will harm competition, customers, prices, or workers. The State utterly fails to make that showing. It introduces no facts about grocery store markets in the state of Washington and pleads nothing about Kroger's or Albertsons' competitors, market shares, or market power. Instead, the State attempts to show anticompetitive effects by weaving together a narrative of past transactions that have nothing to do with this deal and asking the Court to believe that Kroger entered into an economically irrational conspiracy in which it obligated itself to pay almost $25 billion for — and then intentionally weaken — the Albertsons business.

For these reasons, the State fails to satisfy any of the three factors required for this Court to issue a preliminary injunction. The State cannot demonstrate that (1) any of its claims are likely to succeed on the merits because it fails to show that there was an agreement between Defendants to engage in conduct that would harm competition in a well-defined antitrust market. The State also cannot demonstrate that Albertsons' payment of the Pre-Closing Dividend would (2) immediately invade a well-grounded right to protect Washington

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consumers from anticompetitive conduct or (3) cause actual and substantial harm to grocery store competition in Washington.

II. STATEMENT OF FACTS

Kroger, an Ohio Corporation, was founded in 1883. Kroger is a leading food retailer, but its business also includes robust retail pharmacies and fuel centers. Decl. of Gary Millerchip in Opp. to Pls.' Mtn. for Preliminary Injunction ("Millerchip Decl."), at ¶ 3. Kroger operates in a fiercely competitive environment under a variety of banner names and formats, including supermarkets, seamless digital shopping options, price-impact warehouse stores, and multi-department stores. Kroger also operates various manufacturing facilities that produce high-quality private-label products that provide extraordinary value for its customers. *Id*. ¶ 4.

On October 13, 2022, Kroger entered into the Merger Agreement with Albertsons. *Id.* ¶ 5. Kroger strongly believes that the proposed merger would combine two complementary organizations, bringing benefits to consumers, associates, and communities alike. *Id.* ¶ 7. Kroger knew, however, that the transaction would be subject to an extensive regulatory clearance process, and it expects to make divestitures as a part of that process. *Id.* Kroger is confident that both the Federal Trade Commission ("FTC") and state Attorneys General, including Washington's, will engage in a robust review of the proposed transaction. *Id.* Kroger is committed to working cooperatively in that process to secure the necessary approvals for the transaction. *Id.*

Contrary to the State's allegations, Albertsons is not paying the Pre-Closing Dividend "as a result of the" Merger Agreement or any other type of agreement with Kroger. Compl. ¶ 13; Motion at 16. From the beginning of the discussions between Kroger and Albertsons, Albertsons made it clear that it intended to declare and pay the Pre-Closing Dividend regardless of whether or not there was a transaction with Kroger. Millerchip Decl. ¶ 12. The authority to declare and pay the Pre-Closing Dividend rests solely with Albertsons. The

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Merger Agreement neither requires nor authorizes Albertsons to pay the Pre-Closing Dividend, and Kroger has no right under the Merger Agreement to force Albertsons to pay the Pre-Closing Dividend. *Id.* ¶ 13. Rather, the Merger Agreement contemplates the fact that Albertsons could unilaterally and independently declare a Pre-Closing Dividend and accounts for that possibility by providing for a dollar-for-dollar reduction in the price paid to Albertsons' shareholders by Kroger if Albertsons pays the dividend. *Id.*

With respect to Albertsons' possible Pre-Closing Dividend, Kroger had to ensure: (1) that the merger consideration paid by Kroger would be adjusted to account for the value of the Pre-Closing Dividend and (2) that the Pre-Closing Dividend would not have a deleterious effect on the financial strength and stability of Albertsons. *Id.* ¶ 14. As to the former, the Merger Agreement defines "Common Merger Consideration" to mean "(i) an amount in cash equal to (a) $34.10 *minus* (b) the per share amount of the Pre-Closing Dividend payable to each holder of Company Common Stock . . . ." *Id.* ¶ 16. That construct is the only reason the Merger Agreement even mentions the Pre-Closing Dividend. *Id.*

As to the latter, Kroger's management and Board have a fiduciary duty to Kroger's shareholders to ensure the Albertsons business would be as strong and financially sound at closing as it was when Kroger agreed to pay almost $25 billion to acquire it. *Id.* ¶ 17. Kroger has no interest in an Albertsons business that is financially or competitively "weakened." *See id*; Compl. ¶ 4. To the contrary, Kroger has every financial and economic incentive to ensure the competitiveness of the business it agreed to acquire, including ensuring that Albertsons remains viable over the extended time period between now and closing. Millerchip Decl. ¶ 17. Indeed, the strategic rationale for the proposed merger depends on integrating an operationally and competitively vibrant Albertsons business into Kroger in order to better serve customers throughout the country. *Id.*

Given all of these considerations, the management and Board of Kroger determined that it was consistent with their fiduciary duties to enter into the Merger Agreement

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notwithstanding the fact that Albertsons could unilaterally declare a Pre-Closing Dividend of up to $4 billion. *Id.* ¶ 19. Albertsons announced the Pre-Closing Dividend alongside the Merger Agreement — necessitated by the fact that the Merger Agreement includes mechanics for accounting for the dividend — but that announcement did not transform Albertsons' decision to declare and pay the dividend into an agreement with Kroger to do so.

In declaring a Pre-Closing Dividend, Albertsons stated that it intended to pay the dividend on November 7, 2022. Again, the Merger Agreement did not require Albertsons to pay the Pre-Closing Dividend at all, much less on November 7, 2022 or any other date. On November 3, 2022, Commissioner Judson issued a temporary restraining order enjoining Albertsons from paying the Pre-Closing Dividend until after this Court holds a hearing on November 10, 2022 to consider the State's Motion.

III. STATEMENT OF THE ISSUE

Whether the Court should deny the State's motion for a preliminary injunction where (1) the State is unlikely to succeed on the merits because (a) there is no agreement between Kroger and Albertsons to issue the Pre-Closing Dividend, and (b) the State failed to offer sufficient evidence to demonstrate that the Pre-Closing Dividend would constitute an unlawful restraint of trade or unfair method of competition under Washington state law; (2) the State failed to show a well-grounded fear of an immediate invasion of its right to protect Washington consumer from anticompetitive conduct; or (3) the State failed to show that grocery store competition or consumers in Washington would be actually and substantially harmed by Albertsons' payment of the Pre-Closing Dividend.

IV. EVIDENCE RELIED UPON

This Opposition relies on: the declaration of Kroger Senior Vice President and Chief Financial Officer Gary Millerchip; an exhibit attached to Mr. Millerchip's declaration; the declaration of Christopher Wyant attaching a copy of a hearing transcript from the U.S.

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District Court for the District of Columbia and a letter sent to Kroger and Albertsons by the State and five other state Attorneys General; and the pleadings and papers on file.

V. ARGUMENT

Even if this action existed in isolation, the State's Motion should be denied on the merits. But this is not the only action in which state Attorneys General have asserted claims against Kroger and Albertsons based on the same evidence and arguments regarding the Pre-Closing Dividend. Six states initially sent a joint letter to Kroger and Albertsons complaining about the payment of the dividend. *See* Wyant Decl., Ex. 2. Four states chose to challenge the payment of the Pre-Closing Dividend under various antitrust laws in two different forums. The State chose to file suit under Washington's antitrust laws in this Court, while the Attorneys General of the District of Columbia, California, and Illinois chose to file suit under Section 1 of the Sherman Act and its analogues under D.C. and Illinois law in the federal district court for the District of Columbia.

While these four state Attorneys General sued under different laws and in different forums, they allege the same theory — that Kroger and Albertsons entered into an anticompetitive agreement related to the payment of the Pre-Closing Dividend that constitutes an unreasonable restraint of trade. The various federal and state statutes all contain materially similar prerequisites. And to support their allegations, the states relied on nearly identical evidence — (1) the Merger Agreement, (2) the press release announcing the transaction, and (3) certain presentations to the boards of Kroger and Albertsons — from which they argue an anticompetitive agreement can be inferred. Kroger and Albertsons countered the states' allegations with substantially similar evidence: a robust rebuttal of the states' misguided interpretation of these documents, supported by declarations from the Chief Financial Officers of Kroger and Albertsons.

On November 8, 2022, after robust questioning of the parties, the federal court in D.C. issued a bench ruling denying the District of Columbia, California, and Illinois's request for

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preliminary injunctive relief, explaining at length why the plaintiff states were unlikely to succeed on the merits of their claim under the Sherman Act or its analogues under D.C. or Illinois law. Wyant Decl., Ex. 1 at 66-74. Among other things, the court found that there was "no evidence of an agreement between Kroger and Albertsons to pay the pre-closing dividend. In fact, the evidence before the Court points to an independent decision by Albertsons to return value to its shareholders." *Id.* at 66. The court also found that the Pre-Closing Dividend, if paid, would not weaken Albertsons or lessen competition in any market. *Id.* at 69-72.

Even if the State is not formally precluded from relitigating this issue, basic principles of comity, equity, and fairness merit the same conclusions here as those reached by the federal court in D.C. — that there was no agreement between Kroger and Albertsons to pay the Pre-Closing Dividend and no evidence that the payment of the Pre-Closing Dividend would harm competition.[1] The same facts cannot show "no agreement" and "no harm" on Tuesday in the District of Columbia and an "agreement" and "harm" on Thursday in Washington. The standard for finding an unreasonable restraint of trade under RCW 19.86.030 is the same as it is under Section 1 of the Sherman Act. Washington offers *no* additional facts that would permit this Court to reach different conclusions than those reached by the U.S. District Court for the District of Columbia. Accordingly, the State's Motion should be denied.

A. THE STATE'S REQUEST FOR A PRELIMINARY INJUNCTION IS MERITLESS AND SHOULD BE DENIED

The requirements that a party must meet to obtain a preliminary injunction are stringent because an injunction is "an extraordinary remedy" that "should be used sparingly and only in a clear and plain case." *Huff v. Wyman*, 184 Wn.2d 643, 648, 361 P.3d 727

[1] The State separately is requesting that the Court continue the preliminary injunction hearing to allow the State an opportunity to cross-examine Defendants' witnesses. But the State already agreed to the November 10, 2022 hearing date, and the State should not be permitted to change the date at the last minute.

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(2015) (quoting *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000)). Accordingly, the party seeking a preliminary injunction must show (1) "a clear legal or equitable right," which is established by showing a likelihood of success on the merits, (2) "a well-grounded fear of immediate invasion of that right," and (3) "that the acts complained of have or will result in actual and substantial injury." *Rabon v. City of Seattle*, 135 Wn.2d 278, 284-85, 957 P.2d 621 (1998). Critically, the "entitlement to an injunction should be clear; a court will not issue an injunction in a doubtful case." *Speelman v. Bellingham/Whatcom Cnty. Hous. Auths.*, 167 Wn. App. 624, 630-31, 273 P.3d 1035 (2012) (citing *Rabon*, 135 Wn.2d at 284-285). The State does not satisfy any of these requirements.

1. THE STATE CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

The State's novel attempt to use Washington's antitrust laws to enjoin the payment of a dividend by a public company fails because the State does not properly state an antitrust claim under RCW 19.86.030 or 19.86.020 — Washington's equivalent of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act — must less offer evidence demonstrating that it is likely to win any of its speculative claims.[2]

To state a claim under RCW 19.86.030, plaintiffs must plead sufficient facts to establish: "(1) the existence of an agreement, and (2) that the agreement was [a]n unreasonable restraint of trade" under a *per se* rule of illegality, a "quick look" analysis, or a rule of reason analysis. *Zunum Aero, Inc v. Boeing Co.*, No. C21-0896JLR, 2022 WL 3346398, at *3 (W.D. Wash. Aug. 12, 2022) (quoting *FTC v. Qualcomm, Inc.*, 969 F.3d 974,

[2] "RCW 19.86.030 'is essentially identical to section 1 of the Sherman Act,' and 'courts are to be guided by federal decisions interpreting comparable federal provisions' when construing RCW 19.86.030 claims." *See Zunum Aero, Inc. v. Boeing Co.*, No. C21-0896JLR, 2022 WL 3346398, at *3 (W.D. Wash. Aug. 12, 2022) (quoting *Murray Pub. Co. v. Malmquist*, 66 Wn. App. 318, 325, 832 P.2d 493 (1992)). RCW 19.86.020, in turn, "is taken verbatim from section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984).

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989 (9th Cir. 2020)). As to RCW 19.86.020, the Washington Supreme Court explicitly adopted "a narrower interpretation of 'unfair methods of competition' than that given by federal courts" in interpreting FTC Act Section 5. *Black*, 100 Wn.2d at 799, 803. Under that narrower standard, "[w]here conduct is motivated by legitimate business concerns, there can be no violation of RCW 19.86," Washington's Consumer Protection Act. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 54, 738 P.2d 665 (1987). "Contracts entered for legitimate business purposes do not violate the Act." *Id.*, 108 Wn.2d at 56.

The State's claims fail as a matter of law for three distinct and independently sufficient reasons. ***First***, the State alleges that Defendants had an "agreement that Albertsons will pay a $4 billion dividend," Motion at 14, but the facts clearly show that no such agreement exists. The decision to pay the Pre-Closing Dividend was a unilateral decision made by Albertsons prior to entry into the Merger Agreement and without regard to whether the transaction with Kroger was entered into. *See* Millerchip Decl. at ¶¶ 10-13.

For its claims to succeed, the State must present direct or circumstantial evidence that Defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective," which the State alleges is the payment of the Pre-Closing Dividend. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). To make this showing, the State must present evidence "that tends to exclude the possibility" that the defendants acted to address legitimate business concerns. *Id.*; *see also In re Coordinated Pretrial Proc. in Petroleum Prod. Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990) ("plaintiff must come forward with sufficiently unambiguous evidence that tends to exclude the possibility that the defendants were acting lawfully") (internal quotation marks omitted).

The State has failed to show that Kroger and Albertsons entered into any kind of anticompetitive agreement. The only "evidence" of an agreement that State cites is:

- The Pre-Closing Dividend is referenced in the Merger Agreement, including in a recital referencing the fact that the Albertsons board previously "declared a

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Pre-Closing Dividend," Motion at 13;

- The Pre-Closing Dividend was announced in press a release announcing the merger, Compl. ¶ 30; Motion at 7, 12; and
- The Pre-Closing Dividend was addressed in slide decks regarding the transaction presented to Kroger's and Albertsons' boards, Motion at 13; Hanson Decl. in Support of the Motion ("Hanson Decl."), at Exs. P, Q, R.

None of these facts, viewed individually or collectively, are sufficient to show an agreement between Kroger and Albertsons to pay the Pre-Closing Dividend, let alone an agreement to "cripple[] Albertsons' ability to compete." Motion at 2; *see also* Compl. ¶ 7.

Nothing in the four corners of the Merger Agreement evidences an agreement between Kroger and Albertsons that Albertsons must issue the Pre-Closing Dividend. Instead, as noted above, the Merger Agreement reflects the fact that Albertsons might declare a Pre-Closing Dividend and adjusts the purchase price to account for that possibility. *See* Millerchip Decl. at ¶¶ 15-16. Contractually, Kroger has no claim of breach regardless of whether Albertsons issues, does not issue, or changes the amount of the dividend.

The State points to two provisions of the Merger Agreement, but neither demonstrate an agreement to pay the Pre-Closing Dividend. The State first observes that "Defendants agreed the dividend would not exceed $4 billion." Motion at 13. The Merger Agreement does "cap" any Pre-Closing Dividend but only insofar as it gives Kroger the option to walk away from the deal if Albertsons chooses to issue a Pre-Closing Dividend larger than $4 billion. That, however, is not an *agreement* that Albertsons *must* pay any dividend of any size. The choice to pay a Pre-Closing Dividend was and is Albertsons' alone to make.

The State also points to a recital of the Merger Agreement, which notes that "Albertsons' board 'declared a Pre-Closing Dividend.'" Motion at 13. But the State nowhere explains how that fact reflects an *agreement* between Albertsons and Kroger that Albertsons

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must pay the Pre-Closing Dividend. The State claims that because Kroger signed the Merger Agreement containing this recital, "both parties knew that the dividend was approved." *Id.* Yet that only underscores the point that Albertsons' board had *already independently and unilaterally declared* the Pre-Closing Dividend *prior to* entering the Merger Agreement — not that there was an agreement with Kroger that it must do so.

In the end, the fact that the Merger Agreement mentions the Pre-Closing Dividend does not transform Albertsons' independent action into concerted action. "[T]he simple existence of the contract . . . standing alone" is not sufficient to "satisfy the concerted action requirement." *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1081 (11th Cir. 2016); *see also Toscano v. Pro. Golfers Ass'n*, 258 F.3d 978, 984 (9th Cir. 2001) (no concerted action where defendants "had no involvement in the establishment or enforcement of the allegedly anticompetitive" conduct). If the rule were otherwise, "contractual partners would potentially be on the hook for any future conduct the other party engages in under color of the contract." *Procaps*, 845 F.3d at 1081. Such a result would dramatically and inappropriately expand the reach of federal and state antitrust laws. Because the decision to declare and pay the Pre-Closing Dividend was made unilaterally and independently by Albertsons, there is no concerted action. *See, e.g.*, *Monsanto Co.*, 465 U.S. at 761 ("[i]ndependent action is not proscribed" by Section 1).

Moreover, the Merger Agreement references the Pre-Closing Dividend to address entirely legitimate business concerns. *See id.* at 764. As directors of an Ohio corporation, the members of Kroger's board of directors have a fiduciary duty (under Ohio law) not to "waste" Kroger's "corporate assets." *Maas v. Maas*, 161 N.E.3d 863, 876 (Ohio Ct. App. 2020). Accordingly, in entering into the Merger Agreement with Albertsons, the Kroger board owed a duty to Kroger shareholders to ensure that Albertsons, during the period between signing and closing of the transaction, would not take any action — e.g., paying a value-destructive Pre-Closing Dividend — that would harm the value of Albertsons' business. Consistent with

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its fiduciary duties, Kroger obtained several contractual provisions in the Merger Agreement to ensure that Albertsons would maintain the competitiveness of its business during the period between signing and closing of the transaction, including:

(i) as a condition to Kroger's obligation to consummate the transaction, that no material adverse effect with respect to Albertsons shall have occurred, (Millerchip Decl. at Ex. A (Merger Agreement), § 7.3(a));

(ii) that Albertsons conduct its business in the ordinary course of business consistent with past practice (*id.* § 6.1(a)); and

(iii) that Albertsons use commercially reasonable efforts to preserve its business organizations, goodwill, and material assets, and maintain its rights, franchises, and existing relationships with customers, suppliers, employees, business associates, and other persons with which Albertsons has material business dealings (*id.*).

These provisions of the Merger Agreement — which the State ignores — demonstrate that Kroger, like any acquiring party in a merger, sought to ensure that the value of the business it was acquiring would not be diminished during the time between signing and closing. *See In re: McCormick & Co., Inc.*, 217 F. Supp. 3d 124, 132 (D.D.C. 2016) ("Following *Twombly*, courts dismiss Section 1 complaints when there is an independent business justification for the observed conduct and no basis for rejecting it as the explanation for the conduct.").

The State next relies on a press release describing the Pre-Closing Dividend "[a]s part of the transaction." Motion at 12. But this is not evidence of an agreement between Kroger and Albertsons to pay the Pre-Closing Dividend, much less the dispositive evidence the State claims. Rather, it reflects the fact that the Merger Agreement allowed Albertsons to issue a Pre-Closing Dividend, and Albertsons decided to do so. It is not evidence that Kroger and Albertsons agreed that the Dividend must or should be paid — and it does not substitute for

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the actual terms of the Merger Agreement, which govern the transaction and impose no such requirement. The State itself recognizes that the Pre-Closing Dividend "will be paid to Albertsons' shareholders regardless of whether the proposed merger is ever completed." Compl. ¶ 2. In other words, the Pre-Closing Dividend is "part of the transaction" only insofar as Albertsons made the unilateral decision to declare it, and the Merger Agreement accommodates that decision. The Merger Agreement does not reflect Kroger's agreement that it should be paid (or should not be paid) — the dispositive factor for antitrust purposes. A press release about the merger does not change that fact.[3]

Finally, the State cites materials presented to the Albertsons board as circumstantial evidence of an agreement. *See* Motion at 13. This effort fails. Even assuming *arguendo* that the State's characterization of the Albertsons' materials is accurate, it does not provide evidence of an agreement between Kroger and Albertsons to issue the Pre-Closing Dividend. The Kroger documents cited in support of the State's Motion confirm Kroger's understanding that Albertsons planned to issue the Post-Closing Dividend *regardless* of whether a merger occurred. *Compare* Hanson Decl. Ex. R-2 at 8 *with* Millerchip Decl. at ¶ 12.

Plaintiffs in antitrust cases are required to make more than conclusory allegations of an agreement; they must plead sufficient facts that plausibly support the inference of an agreement and "tend[] to exclude the possibility" of independent action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 556 (2007). Here, the State fails to offer any direct or circumstantial evidence that Kroger played any role whatsoever in Albertsons' unilateral decision to issue the Pre-Closing Dividend, let alone that there is an agreement between Kroger and Albertsons to "weaken Albertsons (to Kroger's benefit)." Motion at 19-20. The State cannot and does not explain why it would it make economic sense for Kroger or

[3] A federal court in D.C. similarly found that the language in this press release is "consistent with the fact that Albertsons had determined to pay the dividend unilaterally and that the dividend would affect the purchase price, not an agreement between Kroger and Albertsons, that Albertsons was required to pay the dividend." Wyant Decl., Ex. 1 at 67.

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Albertsons to enter into such an agreement, which would run contrary to Kroger's strong economic interest in maintaining the financial viability of Albertsons. *See Vantico Holdings S.A. v. Apollo Mgmt., LP*, 247 F. Supp. 2d 437, 453, 458-59 (S.D.N.Y. 2003) (denying preliminary injunction where plaintiffs produced no evidence that defendant would risk its investment in a competitor by attempting to "sabotage" its business). Indeed, a federal court in D.C. found, on a record materially similar to the one before this Court, that the plaintiff states had failed to demonstrate that either Albertsons or Kroger had an incentive to weaken Albertsons' business during the merger review process. Wyant Decl., Ex. 1 at 71-72.

At base, the only agreement between Defendants that the State can plausibly point to is the Merger Agreement. But the mere existence of the Merger Agreement does not establish concerted action *with respect to the issuance of the Pre-Closing Dividend*; instead, the State must prove that the Merger Agreement terms related to the Pre-Closing Dividend constitute concerted action under settled antitrust law. The State failed to meet that burden, and its antitrust claims against Kroger fail for that reason alone.

Second, the State fails to properly plead the elements of an unreasonable restraint of trade claim under a *per se*, a "quick look," or a rule of reason approach. Although the State includes the standard for a *per se* claim in its motion, it does not attempt to allege that an agreement to issue a Pre-Closing Dividend is *per se* unlawful. Nor could it. *Per se* treatment is limited to restraints that "always or almost always tend to restrict competition and decrease output." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) (quoting *Bus. Elecs. Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 723 (1988)); *see also Zunum Aero, Inc.*, 2022 WL 3346398, at *4 ("per se treatment is reserved for conduct that is 'manifestly anticompetitive' and without 'any redeeming virtue'") (internal citation omitted). The Supreme Court has repeatedly held that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *See, e.g.*, *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-

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608 (1972). As a result, Supreme Court has placed only a few manifestly anticompetitive business practices — namely, price fixing, bid rigging, and market allocation — into the *per se* category. A Pre-Closing Dividend is not among those practices.

Even if the Court were to assume, counterfactually, that Kroger and Albertsons reached an "agreement" to pay the Pre-Closing Dividend, it is not the type of agreement that always or almost always tends to restrict competition or a business practice with which courts have "considerable experience." Tellingly, the State cites no case in which a court has found the payment of a dividend before the consummation of a transaction constitutes an antitrust violation. That alone is fatal to the State's undeveloped suggestion that *per se* analysis could apply here.

Instead, in an attempt to sidestep its obligation to plead actual facts to support its claims, the State asks the court to adopt the "quick look" approach to analyze its claims. Motion at 15. However, for this approach to apply, a plaintiff must "plausibly allege that a 'quick look' at the arrangement in question leads unquestionably to the conclusion that it will have an anticompetitive effect on consumers and markets." *PBTM LLC v. Football Nw., LLC*, No. C19-2081-RSL, 2022 WL 670920, at *6 (W.D. Wash. Mar. 7, 2022); *see also Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005) (the challenged conduct must be "inherently suspect" to apply the quick look approach). Where the allegations "leave open the possibility" that the conduct would have "no effect at all on competition," the quick look approach is not appropriate. *PBTM LLC*, 2022 WL 670920, at *6; *see also California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1138 (9th Cir. 2011) (en banc) (finding the quick look approach inappropriate where the challenged conduct had an "uncertain effect [on] … competitive behavior").

A company's unilateral decision to issue a dividend to its shareholders is not even close to "inherently suspect." The State's failure to plead facts about competitors or competition in any relevant market (as explained below) is fatal to its conclusory assertion

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that the competitive harm from the agreement is "obvious." *See, e.g.*, *Murray Pub. Co.*, 66 Wn. App. at 329 ("Given the lack of evidence regarding possible competitors and the nature of the [product market at issue], the record does not support the trial court's conclusory determination that the impact of the restraint is 'obvious' and 'total.'"). Accordingly, an abbreviated "quick look" analysis is inappropriate here. *See NCAA v. Alston*, 141 S. Ct. 2141, 2155-56 (2021).

Finally, the State sets out the standard for the rule of reason — the prevailing and proper standard under which to analyze the State's claims — but it fails to plead facts that satisfy that standard — namely, facts (1) defining a relevant product and geographic market and (2) analyzing the actual competitive effects and/or Defendants' market power in any such relevant market. *See* Motion at 15 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 887, 885–86 (2007)).

The State fails to define a relevant product or geographic market at all. This alone is fatal. *See Am. Express*, 138 S. Ct. at 2285 ("[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market"); *Cabela's Retail, Inc. v. Hawks Prairie Inv., LLC*, No. 11-CV-5973-RBL, 2013 WL 3089516, at *8 (W.D. Wash. June 18, 2013) (rejecting claim under RCW 19.86.030 where the plaintiff had "not attempted to define the relevant market").

The State also fails to allege facts that show that Kroger and Albertsons' purported agreement related to the Pre-Closing Dividend had or is likely to "result[] in actual injury to competition." *Murray Pub. Co.*, 66 Wn. App. at 326. To show harm to competition, the State must show that Defendants' actions have had or are likely to have "an actual adverse effect on competition as a whole in the relevant market." *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993). The failure to allege facts establishing that the "market as a whole has suffered an anti-competitive injury . . . alone is

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fatal" to the State's claims. *Asa Accugrade, Inc. v. Am. Numismatic Ass'n*, 370 F. Supp. 2d 213, 216 (D.D.C. 2005).

Proving that a restraint would harm competition requires either "direct" evidence of actual competitive harm or "indirect" evidence — *i.e.*, "proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express*, 138 S. Ct. at 2284. If "the exercise of market power is not plausible, the challenged practice is legal." *Alston*, 141 S. Ct. at 2156 (quoting 7 Areeda & Hovenkamp, Antitrust Law ¶ 1507a, p. 444 (4th ed. 2017)).

The State offers no direct evidence of harm and it does not even suggest that Kroger or Albertsons has market power in any relevant market. To the contrary, the State admits that the grocery industry is "highly competitive." Motion at 22; *see also id*. at 2 (characterizing the grocery industry as "fiercely competitive"). Nothing in the State's Complaint or its briefing to date describes the competitors Albertsons and Kroger face in any relevant market or their actual or potential ability to maintain competition in any such market. *See Top Notch Sols., Inc. v. Crouse & Assocs. Ins. Brokers, Inc.*, No. C17-827 TSZ, 2017 WL 5158525, at *4 (W.D. Wash. Nov. 7, 2017) ("To show the requisite actual injury, a party must identify the relevant market, including its geographic scope and set of 'reasonably interchangeable' products, and present evidence regarding competitors with the actual or potential ability to 'deprive each other of significant levels of business.'") (internal citation omitted).

Instead, the State offers two conclusory, speculative theories of competitive harm, one entirely brand new. First, the State alleges that Albertsons will have a "weakened competitive position" after paying the Pre-Closing Dividend. Motion at 17. The only actual fact the State alleges that could even suggest that the payment of the Pre-Closing Dividend may affect Albertsons' competitiveness is that Albertsons will have less liquidity after it pays the Pre-Closing Dividend. But the State fails to provide evidence showing how Albertsons having somewhat less liquidity will substantially lessen competition in a highly competitive industry.

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See Am. Express, 138 S. Ct. at 2288 ("This Court will 'not infer competitive injury . . . absent some evidence that tends to prove that output was restricted or prices were above a competitive level.'") (internal citation omitted). No economic theory states that the payment of dividends of any size, without more, detracts from a company's ability to compete. Even if Albertsons' market position were weakened by the payment of the Pre-Closing Dividend (which it will not be), the State has to show how the weakening of a single competitor would harm competition as a whole in a well-defined relevant market. The State does not do that. *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) ("removal of one or a few competitors need not equate with injury to competition").

Second, the State drops its unsupported theory that the payment of the Pre-Closing Dividend would enable Kroger to make a "failing firm" defense so "Kroger can argue that Albertsons will face bankruptcy if the merger is not approved." Compl. ¶¶ 9, 39; *see also* Pls' Mtn. for TRO at 4, 12. Instead, the State pivots to a novel theory: that Defendants plan to undercapitalize stores that may be included in the SpinCo — a mechanism contemplated in the Merger Agreement as one way to effectuate certain potential divestitures — which will doom SpinCo to fail and enable Kroger to reacquire the SpinCo stores in bankruptcy. Motion at 13-14. This theory is new — the Complaint mentions SpinCo only once to note that "the ability of this divestiture to create a viable competitor remains to be seen," Compl. ¶ 8 — and it fails on its own terms.

Like its first theory, the State's new SpinCo theory is not supported by any actual evidence, much less evidence sufficient to show harm to *competition* in Washington. The SpinCo is not even anticipated to include any stores in Washington. *See* Millerchip Decl. ¶ 20; *see also* Hanson Decl. Ex. Q at 4. Moreover, the State fails to cogently explain why Kroger would have any incentive to weaken stores that it eventually may own or have to divest to obtain regulatory approval of this transaction. Any proposed store divestitures will be subject to scrutiny by state Attorneys General, including the State, and require approval by

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the FTC or, if the FTC challenges the transaction, a federal district court. Were the Albertsons business actually to weaken during the pendency of the transaction, Defendants might not be able to convince the FTC or state Attorneys General that divesting those stores either to third parties or via the SpinCo would preserve competition, which could imperil the transaction. Thus, the economic incentives on Kroger are exactly the opposite of the State's unsupported speculation.

Nor, more importantly, does the State connect its SpinCo theory to the alleged agreement to pay a Pre-Closing Dividend. The State fails to allege facts that show that any potential divestitures to SpinCo or any third party has anything to do with the Pre-Closing Dividend or to support its completely speculative assertion that Defendants "plan to undercapitalize SpinCo stores." Motion at 24. The Court should reject this newly invented theory out of hand.

In sum, under any of the three analytical approaches, the State fails to adequately allege an antitrust claim under RCW 19.86.030.

Third, the State attempts to salvage its claims by arguing that even if the purported agreement does not violate RCW 19.86.030, it still violates RCW 19.86.020 because it violates the "*spirit* of Washington's antitrust laws and is an incipient violation of RCW 19.86.030." Motion at 19. This argument too fails. As explained above, the State alleges no facts from which this Court could infer any antitrust violation under RCW 19.86.030. It fails to plead any of the facts required in antitrust cases, including facts showing likely competitive harm or supporting the type of market analysis that is essential to show that harm. The State's resort to framing the conduct as an "incipient" violation of RCW 19.86.030 does not save its claim. Regardless of the framing, the Pre-Closing Dividend does not violate the letter or the "spirit" of any law under Washington's Consumer Protection Act, RCW 19.86 et seq. As to the "spirit" of those laws, in passing the Act, the Washington legislature "specifically recognized that acts or practices which are reasonable business practices . . . are not the kind

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of acts sought to be prohibited" under RCW 19.86.030 or 19.86.020. *Black*, 100 Wn.2d at 802-03 (citing RCW 19.86.920). "By expressly allowing for reasonable business practices," the Washington legislature recognized that "businesses need some latitude within which to conduct their trade." *Id.* at 803. A public company's decision to pay a dividend to its shareholders is the epitome of a decision "motivated by legitimate business concerns," thus it cannot be a violation of RCW 19.86.020. *Id.*; *see also Sierracin Corp.*, 108 Wn.2d at 54.

2. THE STATE CANNOT DEMONSTRATE AN IMMEDIATE INVASION OF A CLEAR LEGAL OR EQUITABLE RIGHT

The State has no well-grounded fear of immediate invasion of its right to protect Washington consumers from anticompetitive conduct. *Rabon*, 135 Wn.2d at 285-86; Motion at 20. As explained above, the State's fear that the Pre-Closing Dividend is "an anticompetitive agreement amongst competitors that will intentionally weaken Albertsons" is not well-grounded; it is unmoored from the actual facts in the record. Motion at 22. The payment of the Pre-Closing Dividend will not affect Albertsons' ability to compete in the "highly competitive" grocery industry, *id.*, nor will it prevent Albertsons from continuing to invest in its stores or pay its workers competitive wages. The concerns that the State raises related to the Pre-Closing Dividend are illusory and unrelated to the merger. The State uses the guise of the merger to attempt to challenge Albertsons' unilateral decision to pay the Pre-Closing Dividend. The State has no basis for challenging that decision under Washington's antitrust laws, thus it fails to establish a well-grounded fear of an immediate invasion of a right that it has the authority to protect.

The State will continue to have the ability to investigate Kroger's acquisition of Albertsons to ensure that the transaction does not result in any anticompetitive effects on Washington consumers or workers. Denying this Motion will not inhibit the State's investigation of the transaction in any way. As noted, Kroger remains committed to working

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with the State to address any competitive concerns that the State may have arising from the transaction. *See* Millerchip Decl. ¶ 17.

3. THE STATE CANNOT DEMONSTRATE ACTUAL AND SUBSTANTIAL HARM TO COMPETITION

Finally, the State cannot demonstrate that a preliminary injunction is needed to prevent actual and substantial harm to competition in Washington or to Washington consumers, on whose behalf the State brings these claims. *See Rabon*, 135 Wn.2d at 285. To make this showing, the State needs to "set forth proof" of the antitrust injury it alleges is likely to result from the payment of the Pre-Closing Dividend. *See Wash. Fed'n of State Emps., Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 891, 665 P.2d 1337 (1983).

The State makes the baseless, conclusory argument that the Pre-Closing Dividend will weaken Albertsons' financial condition and lead to the underfunding of the SpinCo stores and thus, result in harm to competition. Motion at 23. But as explained above, the State fails to plead any predicate facts necessary to show harm to competition. The State fails to define a relevant product market or a relevant geographic market. It fails to offer evidence of any actual anticompetitive effects. And it fails to show that that either Defendant has market power in any relevant market. Taken together, the State fails to show how Albertsons' payment of the Pre-Closing Dividend would have a negative impact on competition or consumers in any theoretical relevant market.

As "support" for its speculative arguments, the State first describes the alleged harm from the "failed" divestiture of certain grocery stores to Haggen. Motion at 23. The State's claims related to alleged harm from the Haggen divestiture are irrelevant. The Complaint here challenges and alleges harm flowing from the payment of a Pre-Closing Dividend, not the merger itself or any divestiture. Alleging that harm resulted from some prior, completely unrelated divestiture is not a substitute for properly alleging harm flowing from the conduct actually challenged here.

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The State next mischaracterizes the plain meaning of certain Merger Agreement terms to claim that Defendants will underfund the SpinCo stores. Motion at 23. The State cites the definition of two terms, "Four-Wall EBITDA" and "SpinCo Consideration Adjustment Amount," to wrongly suggests that these definitions indicate that "SpinCo will be deprived of substantial funding for key needs from day one." Motion at 8 n. 4-5. The State misinterprets the import of these terms. These terms are only used to describe how the consideration that Kroger pays to acquire Albertsons would be adjusted if SpinCo were created. They do *not* indicate anything about the actual funding or assets that would be provided to SpinCo and its new owner. The State also fails to provide the appropriate context. SpinCo is one alternative divestiture buyer option that — like any other divestiture buyer — would be subject to scrutiny by state Attorneys General and FTC review and approval. Accordingly, Kroger and Albertsons will have strong incentives to ensure that SpinCo is adequately funded and capitalized if the SpinCo option is utilized.

As the terms of the Merger Agreement establish, Kroger's interest is in ensuring that Albertsons and all its stores remain viable and healthy until the acquisition closes, whether or not the Pre-Closing Dividend is paid. The State has offered no evidence to plausibly suggest that the Pre-Closing Dividend is intended to destroy Albertsons as a viable competitor or that Kroger would stake the fate of a nearly $25 billion transaction on a plan to undercapitalize stores that it may need to divest to obtain approval of the transaction.

The State's claim that a preliminary injunction is necessary because "damages will be insufficient to restore competition" allegedly lost as a result of the payment of the Pre-Closing Dividend misses the point. Motion at 23. But the State totally fails to show that Albertsons' payment of the Pre-Closing Dividend is likely to harm competition in any way. Because the State fails to make this showing, the choice of remedy is irrelevant. Accordingly, the Court should deny the State's request for a preliminary injunction.

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VI. CONCLUSION

For these reasons, the State's request for a preliminary injunction should be denied.

DATED this 9th day of November, 2022.

Respectfully submitted,

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I certify that this memorandum contains 7,501 words, in compliance with the Local Civil Rules.

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