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The Honorable Commissioner Henry Judson
Hearing Date: November 3, 2022 at 2:00 p.m.
With Oral Argument

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

STATE OF WASHINGTON,

Plaintiff,

v.

ALBERTSON S 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

ORDER GRANTING
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER

This matter came before the Court on Plaintiff the State of Washington's Motion for Temporary Restraining Order on November 10, 2022. The Court, having thoroughly considered Plaintiff's Complaint for Injunction, Civil Penalties, and Other Relief Under the Washington State Consumer Protection Act, RCW, 19.86; Plaintiff's Motion for Temporary Restraining Order; the Declaration of Amy Hanson in Support of Motion for Temporary Restraining Order, with exhibits thereto; Defendants' response; the applicable law; and the arguments of counsel; makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1
2 1. Albertsons and Kroger are direct competitors that collectively own and operate
3 almost 350 grocery stores in Washington State.

4 2. On October 13, 2022, Albertsons and Kroger entered an "Agreement and Plan of
5 Merger." The deal is set to close early 2024.

6 3. As part of the merger agreement, Albertsons and Kroger agreed that Albertsons
7 will pay shareholders a "Pre-Closing Dividend" in an amount up to \$4 billion. *Defendants have*
8 *disputed the interrelation between the two. The Complaint alleges that this dividend is 57 times*
9 *as large as the most recent quarterly dividend issued in October 2022.*

10 4. In order to pay shareholders the dividend, Albertsons will use 75% of its liquid
11 assets and borrow about \$1.5 billion. In an October 18, 2022 Form 10-Q filing with the Securities
12 and Exchange Commission, Albertsons disclosed that the November 7, 2022, "Special
13 Dividend" "will be funded using approximately \$2.5 billion of cash on hand, *leaving \$500*
14 *million, with the remainder in borrowings under the Company's existing ABL Facility."*

15 5. Albertsons' payment of the dividend will *impact* its ability to compete and impair
16 competition in grocery retail throughout Washington State.

17 6. On November 1, 2022, Plaintiff filed a Complaint for Injunction, Civil Penalties,
18 and Other Relief Under the Washington State Consumer Protection Act and a Motion for
19 Temporary Restraining order to enjoin Albertsons from distributing its shareholder dividend on
20 November 7, 2022. Plaintiff alleges Defendants' violate RCW 19.86.020 and RCW 19.86.030.

21 7. On November 1, 2022, Plaintiff emailed counsel for Albertsons courtesy copies
22 of the following documents filed on the docket, or otherwise associated with those filings, in this
23 matter as of November 1, 2022:

- 24 a. Complaint for Injunction, Civil Penalties, and Other Relief Under the
25 Washington State Consumer Protection Act, RCW 19.86;
26 b. Summons (60 Day) to Albertsons Companies, Inc.;
- c. Summons (20 Day) to Albertson S Companies Specialty Care, LLC;
- d. Summons (20 Day) to Albertson's LLC;

- 1 e. Summons (20 Day) to Albertson's STORES SUB LLC;
2 a. Case Information Cover Sheet and Area Designation;
3 b. Order Setting Civil Case Schedule;
4 c. Notice of Court Date Ex Parte Commissioners-Seattle;
5 f. [Proposed] Order Granting Plaintiff's Motion for Temporary Restraining
6 Order;
7 g. Plaintiff's Motion for Temporary Restraining Order;
8 h. Notice of Non-Washington Authorities Cited in Plaintiff's Motion for
9 Temporary Restraining Order;
10 i. Declaration of Amy Hanson in Support of Motion for Temporary
11 Restraining Order (with exhibits following by separate emails due to their
12 size); and
13 j. Associated filing receipts.

14 8. On November 2, 2022, Plaintiff served the registered agent for Albertsons
15 Companies, Inc., with the notice of the following documents filed in this matter by process
16 server:

- 17 i. Summons (60 DAY)
18 ii. Complaint for Injunction, Civil Penalties, and other Relief under the
19 Washington State Consumer Protection Act, RCW 19.86;
20 iii. Case Assignment Area Designation and Case Information Cover
21 Sheet;
22 iv. Case Information Cover Sheet and Area Designation;
23 v. Order Setting Civil Case Schedule;
24 vi. Plaintiff's Motion for Temporary Restraining Order;
25 vii. Declaration of Amy Hanson in Support of Motion for Temporary
26 Restraining Order with Exhibits A-N;

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- viii. Notice of Non-Washington Authorities Cited in Plaintiff's Motion for Temporary Restraining Order; and
 - ix. [Proposed] Order Granting Plaintiff's Motion for Temporary Restraining Order; and
 - x. Notice of Court Date.

9. A TRO against Albertsons is necessary to maintain the status quo until the Court can hear the State's Motion for Preliminary Injunction, which has been set for hearing on November 10, 2022 at 3:00 p.m. *before the Honorable Ken Schubert.*

10. *Defendants brought a Motion to Strike portions of the Declaration of Amy Hanson today. In order to give the State an opportunity to respond, the motion should be reserved to the return hearing.*

CONCLUSIONS OF LAW

1. Pursuant to RCW 19.86.080, the Court has jurisdiction over the parties to, and the subject matter of, this petition for civil enforcement.

2. Plaintiff has a clear legal or equitable right to enforce the CPA. RCW 19.86.080. And the Washington Constitution charges the Attorney General with the ensuring that companies do not fix prices, limit production, or create monopolies or trusts. Wash. Const. art. XII, § 22; RCW 19.86.110.

3. A party seeking a preliminary injunction must show (1) a clear legal or equitable right, (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, 957 P.2d 621 (1998).

4. Based on the findings above, Plaintiff has shown the factors necessary for the issuance of a temporary restraining order.

5. There is a substantial likelihood that Plaintiff will prevail on the merits of its RCW 19.86.030 claim that the agreement to pay the Pre-Closing Dividend was an unreasonable

restraint of trade, and its RCW 19.86.020 claim that the agreement to pay the Pre-Closing Dividend is an unfair method of competition.

1 6. Plaintiff has a well-grounded fear of immediate invasion of its clear statutory
2 right to enforce the CPA and constitutional mandate to prevent anti-competitive behavior, and
3 the invasion of its right will result in immediate, irreparable harm to competition.

4 7. Actual and substantial injury will result by allowing Albertsons to distribute its
5 Pre-Closing Dividend on November 7, 2022. Once Albertsons distributes the dividend to
6 shareholders, the money will be irrecoverable, and Plaintiff will be unable to carry out its
7 constitutionally-mandated statutory duty to protect commerce and consumers in the State of
8 Washington.

9 8. By eliminating its cash-on-hand and nearly doubling its debt, Albertsons will be
10 in a weakened competitive position relative to Kroger, thereby harming grocery consumers and
11 workers throughout Washington.

12 9. Balancing the three prongs of the injunction standard in light of competing
13 equities, and taking into account the interests of the parties and of the public, this Court finds
14 that due to the Plaintiff's right to enforce the CPA and the immediate, irreparable harm that will
15 come to the Plaintiff and to consumers of groceries in Washington if the Pre-Closing Dividend
16 is paid, this Court must temporarily enjoin Albertsons Companies, Inc., from paying the
17 Pre-Closing Dividend.

TEMPORARY RESTRAINING ORDER

18 IT IS HEREBY ORDERED as follows:

19 1. Based on the above findings, Plaintiff's Motion for Temporary Restraining Order
20 is GRANTED.

21 2. Albertsons is temporarily RESTRAINED and ENJOINED from issuing its
22 Pre-Closing Dividend, also referred to as Special Dividend, to its shareholders.

23 3. This Order shall become effective immediately and remain in effect through
24 November 10, 2022, unless within that time, an order is entered extending or dismissing the

26 Temporary Restraining Order.

] ORDER GRANTING MOTION
FOR TEMPORARY
RESTRAINING ORDER
CAUSE NO. 22-2-18046-3 SEA

1 . 4. A violation of this Order shall result in a forfeiture and civil penalty, and the
2 Attorney General, acting on behalf of the State, may seek civil penalties pursuant to
3 RCW 19.86.130.

4 5. Pursuant to CR 65(c) and RCW 4.92.080, Plaintiff is not required to give
5 security.

6 6. Motion for Preliminary Injunction will be heard before Judge Ken Schubert
7 November 10, 2022 at 3:00 p.m. via Zoom Video Conference.

8 7. *Relief on the Motion to Strike is reserved to the next hearing.*

9 DATED this 3rd day of November 2022. *4:46 p.m.*

10 **HENRY H. JUDSON**

11 NOV 03 2022

12 COURT COMMISSIONER


13 _____
14 JUDGE/COMMISSIONER

1 Presented by:

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6 Antitrust Division Chief

7 s/ Amy N. L. Hanson

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