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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
STATE OF COLORADO, *ex rel*. PHILIP J. WEISER, Attorney General, Plaintiff, v. THE KROGER CO.; ALBERTSONS COMPANIES, INC.; and C&S WHOLESALE GROCERS, LLC, Defendants.	**COURT USE ONLY**
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PLAINTIFF'S SECOND STATUS REPORT AND REQUEST TO SET PRELIMINARY INJUNCTION HEARING

Plaintiff, the State of Colorado, by and through its Attorney General, Philip J. Weiser ("Plaintiff" or "Attorney General") submits the following status report following-up on the scheduling of a hearing for the Attorney's General's Motion and Memorandum for Preliminary Injunction (the "PI Motion"), as discussed during the status conference on March 11, 2024. **The Attorney General respectfully requests that the Court schedule a hearing on the PI Motion on dates previously offered by the Court and reserved by the Parties, to take place starting on July 19, 2024, through August 2, 2024.**

At the Status Conference held on March 11, 2024, all parties to this case, by agreement, asked the Court to hold available certain dates listed in the Court's March 9, 2024 Order—July 19, 2024 through August 16, 2024—for a hearing on the Attorney General's PI Motion. The parties agreed that they would revert to the Court with a request to set dates for a hearing on the PI Motion within the date range held available by the Court.

The purpose of that joint request was to avoid a direct scheduling conflict with the preliminary injunction hearing in *FTC, et al. v. The Kroger Co., et al.*, No. 3:24-cv-00347 (D. Or.) (the "FTC Case"), where a schedule was expected to be set later on the same day as the Status Conference in this action. We now have that schedule: the court in the FTC Case has set a preliminary injunction hearing to begin on August 26, 2024.

There is therefore no scheduling conflict with the dates that the parties requested the Court to hold. The Attorney General therefore requests that the Court schedule a hearing for the PI Motion to start on July 19, 2024, and run through August 2, 2024.

Unfortunately, Defendants do not agree to this request, notwithstanding their prior agreement to hold a hearing on the PI Motion sometime between July 19 and August 16. Instead, Defendants propose that the Court accelerate a full trial on the merits to start on September 16, 2024. In connection with that proposal, Defendants offered that they would not close on the Proposed Merger before September 30, 2024, the next business day after the end of trial (assuming a two-week trial)—meaning, unless the Court were to issue an immediate decision after the trial, the Defendants would be free to close. Defendants' unwillingness to delay the closing until after the Court renders a decision is precisely why the Court must hear the PI motion in July—to preserve the status quo until a trial on the merits can be held.

Defendants have told the Attorney General that their position is that this proceeding should trail the FTC Case, which in their view is the "main event." Colorado consumers, workers, and suppliers who would be irreparably harmed by this Proposed Merger may beg to differ. A post-merger Kroger would account for over 50% of all supermarket sales in the state and will wield tremendous market power to increase prices on consumers, cut jobs, and put local suppliers out of business. *See, e.g.*, Compl. ¶¶ 99-163. The Attorney General commenced this case precisely to ensure that these Colorado-specific concerns are heard by a Colorado court, pursuant to Colorado's own antitrust laws. Defendants' preference for a federal forum should be rejected and the Court should hear the PI Motion.

The PI Motion seeks to preserve the status quo and maintain the current state of competition in the market pending a final decision on the merits. This case was commenced on February 14, 2024, and a typical schedule in a complex case like this in Denver District Court would be to hold trial in January 2025, if not later. This is especially true when, like here, there remains discovery that needs to be conducted, including as to the Attorney General's no-poach and non-solicitation claims, and as to what is likely to be an incredibly complex new divestiture proposal offered by Defendants. There is no sound basis to accelerate that timeline here.

First, Defendants seek to artificially impose time pressure on a merits trial here because the merger agreement between Kroger and ACI has an "Outside Date" to close by October 9, 2024. Essentially, if Kroger and ACI do not close on the Proposed Merger by the Outside Date, then either side may terminate the Proposed Merger, with certain exceptions. Having imposed this deadline on themselves, the Defendants now seek to impose it on the Attorney General and this Court as well. The Court should not adopt Defendants' artificial timeline, which they themselves have the power to extend by agreement.[1] An artificial and modifiable deadline negotiated between the merging parties should not be treated as an ironclad limit on the ability of the Attorney General to obtain the necessary evidence to try this case or limit this Court's ability to thoroughly review evidence presented at trial and decide this case based on a full record. Rather, Defendants' pressure to close is one of the many reasons why a preliminary injunction is necessary here.[2]

Second, Defendants' proposal will not provide sufficient time for discovery in this complex case to be prepared for a full trial on the merits. In particular, Defendants' proposed schedule will not afford sufficient time for discovery on Defendants' anticipated new divestiture remedy proposal. Defendants' current divestiture plan is totally inadequate, and the Attorney General understands that Defendants will make a new proposal at some point during this litigation. When this occurs, time for fact discovery and expert analysis will be necessary to study the new proposal's potential competitive effects, and for the Attorney General to engage with Defendants in a meaningful dialogue about whether any such proposal is sufficient to remedy the anticompetitive harms of the merger. A September merits trial is simply premature and impractical under these circumstances.

By way of illustration, Defendants offered their current divestiture plan on September 8, 2023. Thereafter, the Attorney General, the FTC, and other state attorneys general investigating the Proposed Merger spent nearly five months investigating, analyzing, and engaging with the Defendants about the divestiture. That effort involved document and information requests, written questions and answers, sworn testimony at investigative hearings, and multiple calls with Defendants and their counsel. More extensive steps will need to be taken with any new proposal to both analyze the adequacy of a proposed remedy and, if inadequate, prepare for a trial on the

[1] Article IX, Section 9.1 of the merger agreement contemplates amendment by mutual agreement of the parties until the merger has closed.

[2] Courts are free to ignore merging parties' "outside dates." *See, e.g.*, Brent Kendall, *Judge Sets March 19 as Start Date for AT&T-Time Warner Antitrust Trial*, The Wall Street Journal, available at https://www.wsj.com/articles/at-t-time-warner-spar-with-government-over-trial-start-date-1512652679.

merits—but that will not be possible to accomplish before a September trial when a revised proposal has yet to be presented.

Other aspects of the case would also require more time to develop, such as on the Attorney General's second cause of action related to Kroger and ACI's unlawful no-poach and non-solicitation agreements. Overall, a September trial would require truncated discovery that would likely close sometime in July. That is not enough time to fully develop the record for a complex antitrust trial on the merits.

Third, the logistics of a trial starting on September 16, 2024, are highly problematic. Trial in *Washington v. The Kroger Co. et al.*, No. 24-2-00977-9, King County, Washington, Superior Court (the "Washington Case)", filed earlier than this case and where discovery is already underway, starts on that same day. That could present serious challenges with witness availability.

Fourth, the arguments that Defendants presented to the Attorney General about "efficiencies" are speculative and illogical—a red herring. Although testimony by Defendants' witnesses in other proceedings would be admissible here against Defendants as admissions by party opponents and as potential prior inconsistent statements for impeachment, those evidentiary rules might not obviate the need for those witnesses to testify here. Defendants have indicated that some stipulations may be reached in subsequent proceedings here based on what transpires in the FTC Case, but that is speculative and in any event is not a reason for the Court to forego a hearing on the PI Motion. Regardless, efficiencies realized from an earlier proceeding may apply no matter which case goes first—this case, the Washington case, or the FTC Case.

The July hearing requested by the Attorney General will result only in a preliminary determination by the Court, a decision which may be maintained, supplemented, or altered as appropriate when the Court makes a final determination on the merits. Hearing arguments for a preliminary injunction in July will in no way preclude the Court from considering testimony, stipulations, or other relevant developments in the FTC and Washington Cases, as may be appropriate, nor will it preclude the Court from incorporating evidence from the PI hearing to streamline the subsequent trial on the merits.[3]

The only reason the Attorney General agreed to wait on scheduling in the FTC Case was to avoid a direct conflict with the FTC Case, which would present challenges with witness availability. That impediment has been removed, and a hearing on the PI Motion should be scheduled.

The Attorney General respectfully requests that the Court set a hearing on the PI Motion starting on July 19, 2024, through August 2, 2024.

[3] C.R.C.P. 65(a)(2) explicitly provides for efficiencies by contemplating that "any evidence received upon an application for a preliminary injunction which would be admissible upon a trial on the merits becomes part of the record on the trial and need not be repeated upon the trial."

Respectfully submitted this 13th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served on all counsel for Defendants who have entered an appearance in this matter through Colorado Courts E-Filing, on March 13, 2024.

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