

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

**DISTRICT OF COLUMBIA, *et al.*,**

**Plaintiffs,**

**v.**

**THE KROGER CO., *et al.*,**

**Defendants.**

**Case No. 1:22-cv-3357 (CJN)**

**Hon. Carl J. Nichols**

**ALBERTSONS COMPANIES INC.’S MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFFS’ MOTION FOR A TEMPORARY INJUNCTION PENDING APPEAL**

Defendant Albertsons Companies Inc. (“Albertsons”) submits this memorandum of law in opposition to Plaintiffs’ Motion for a Temporary Injunction Pending Appeal (ECF No. 66) (“Pl. Mot.”).

For the third time in front of this Court,<sup>1</sup> Plaintiffs seek to restrain Albertsons from paying a duly authorized special dividend that has been due and owing to its shareholders since November 7, 2022. This Court has twice rejected that request—once in the context of Plaintiffs’ motion for a temporary restraining order and again in the context of Plaintiffs’ motion for a preliminary injunction—after finding based on an extensive factual record that Plaintiffs cannot establish a likelihood of success on their fatally flawed claims. *See* Order Denying Motion for Preliminary Injunction (ECF No. 65) (“PI Order”); Declaration of Edward D. Hassi dated December 10, 2022 (ECF No. 60-4), Ex. 1 (“TRO Hearing Tr.”) at 65:9-74:2 (denying Plaintiffs’

---

<sup>1</sup> Plaintiffs also have filed a similar motion in the D.C. Court of Appeals.

Motion for a Temporary Restraining Order). As this Court properly found, the special dividend is not the product of conspiracy between Albertsons and Kroger, and there is no evidence that its payment will impede Albertsons' ability to compete.

This Court should reject Plaintiffs' third request, this time made in the context of Plaintiffs' pending appeal, for similar reasons. Plaintiffs cannot establish a greater likelihood of success on their fatally flawed claims on appeal than in this Court, as required for this Court to grant a stay pending appeal. This Court's factual findings were not clearly erroneous as would be required for Plaintiffs to succeed on appeal; to the contrary, they are well-supported by the extensive documentary evidence in the record. In addition, Plaintiffs cannot satisfy the other three requirements for a stay to issue. Neither they nor others face a prospect of irreparable harm from Albertsons' payment of the special dividend, and the balance of equities clearly favors denying the injunctive relief requested.

### **ARGUMENT**

A stay or injunction pending appeal is an extraordinary remedy and the standards applied are substantially the same as those applied to a motion for preliminary injunction. *Alcestra Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 324 (D.D.C. 2018); *Mylan Labs, Inc. v. Leavitt*, 495 F. Supp. 2d 43, 47 (D.D.C. 2007) ("An indefinite stay pending appeal is an extraordinary remedy, and is to be granted only after careful deliberation has persuaded the Court of the necessity of the relief" (quotations and citation omitted)). To obtain an injunction pending appeal, the movant must demonstrate: (1) a substantial likelihood of success on the merits of the appeal; (2) a likelihood of irreparable harm absent a stay; (3) that an injunction will not harm others; and (4) that the public interest favors granting the stay. *Mylan Labs.*, 495 F. Supp. 2d at 46. Plaintiffs cannot satisfy any of these factors, much less all of them.

*First*, Plaintiffs cannot establish a substantial likelihood of success on appeal. This Court has considered and rejected the claims Plaintiffs seek to press on appeal, which means that they must make an especially “impressive” showing of likelihood of reversal on appeal. *Mylan Labs.*, 495 F. Supp. 2d at 46 (finding that the requisite “impressive” showing of likely reversal was not satisfied where it had previously considered the exact same issue earlier in the case: “the same issue presented a second time in the same case in the same court should lead to the same result” (internal marks and citation omitted; cleaned up)); *see also Alcestra Therapeutics, Inc.*, 318 F. Supp. 3d at 324 (denying injunction pending appeal where movants’ arguments “reflect disagreement” with court’s denial of preliminary injunction). Plaintiffs cannot make any such showing, much less an impressive one.

This Court’s rulings denying the TRO and preliminary injunction were made after its careful consideration of the factual record. As this Court found, that record establishes that Albertsons and Kroger did not enter into an “agreement” or otherwise conspire to pay the special dividend or competitively harm Albertsons. To the contrary, the evidence establishes the special dividend was consistent with “an independent decision by Albertsons to return value to its shareholders.” TRO Hearing Tr. at 66:19-22. Moreover, Plaintiffs have provided “insufficient evidence that Albertsons will not be able to effectively compete, or [that payment of the special dividend] will otherwise restrain trade, during the pendency of the merger review.” TRO Hearing Tr. at 69:18-71:19. As this Court explained, payment of a \$4 billion special dividend was well within Albertsons’ corporate means, in light of its annual revenue, cash flow, liquidity, and valuation. *Id.*

This Court’s findings are consistent with those of the Washington King County Superior Court, which last week denied the same injunctive relief after similarly finding no evidence of an

agreement between Kroger and Albertsons to issue the special dividend (only Kroger's acquiescence to Albertsons' unilateral decision to issue a special dividend) or harm to Albertsons as a result of payment of the special dividend that would impede Albertsons' ability to compete or otherwise restrain trade. *See* Defendant the Kroger Co.'s Notice of Supplemental Authority (ECF No. 61), Attachment A.

In challenging this Court's findings on appeal, Plaintiffs will face a very steep uphill battle. They will be required to establish that this Court abused its discretion in denying the requested injunction and that its factual determinations in support of that denial were clearly erroneous—that is, unsupported by the evidence or any reasonable inferences—despite the well-reasoned decisions issued by this Court (twice) and the Washington state court. *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). It is insufficient that Plaintiffs “disagree[ ]” with this Court. Pl. Mot. at 3.

Plaintiffs make no effort to demonstrate how they will satisfy these appellate standards and instead simply regurgitate the same arguments they unsuccessfully made (twice) in this Court. While Plaintiffs assert that they have raised a “substantial legal question” worthy of review (*id.* at 3), they identify no such substantial question, cite no case law that establishes that this Court's denial of the injunction constituted an abuse of discretion, and identify no facts overlooked or ignored by this Court. Indeed, Plaintiffs' claims find no support in fact or law and any appeal of this Court's prior decisions denying the requested injunctive relief will be meritless.

*Second*, Plaintiffs will not suffer irreparable injury if this Court denies the requested injunctive relief. To be sure, Albertsons intends to promptly pay the special dividend once the temporary restraining order in Washington state expires on December 19, 2022. But the payment

of the dividend in and of itself is not a harm. And, as this Court has already found, Plaintiffs have utterly failed to offer any proof that the planned return of capital will have any harmful effect on Albertsons' ability to compete or competition more broadly. TRO Hearing Tr. at 72:21-73:5.

*Third*, contrary to Plaintiffs' contention (PI Mot. at 4-5), a continued injunction will significantly harm Albertsons and its shareholders. As this Court previously recognized, injunctive relief harms Albertsons by displacing the business judgment of its board of directors. TRO Hearing Tr. at 73:15-23. It harms Albertsons by exposing it to potential liability due to non-payment of the special dividend,<sup>2</sup> by implicating Albertsons' credibility in public markets, and by discouraging investment. Declaration of Sharon McCollam dated December 10, 2022 (ECF No. 60-1) ¶¶ 12-13, 15. And it harms Albertsons by prolonging the period in which its shareholders are deprived of the dividend they were promised but have not yet received. Indeed, given the special dividend's size and prevailing interest rates, the harm that shareholders may claim against the Company from further delay on payment of its contractual obligation may be as much as \$1 million *per day*. Plaintiffs ignore entirely the substantial economic harm their requested relief would impose on Albertsons' shareholders.

*Fourth*, there is no public interest at stake. As the Court has already determined, payment of the special dividend poses no threat to competition, and thus no harm to the public. TRO Hearing Tr. at 73:6-14. Plaintiffs offer no argument, much less proof, as to why the Court's prior findings should be revisited.

---

<sup>2</sup> Under Delaware law, the declaration of a dividend by a corporation's board creates a binding debtor-creditor relationship between the corporation and shareholders as of the record date, and the corporation is liable for the amount of the declared dividend. *See, e.g., In Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1175 (Del. 1988).

Plaintiffs alternatively request an “administrative injunction” lasting two weeks to enable appellate review. Pl. Mot. at 5. Plaintiffs offer no independent support for such relief, and it should be denied for the same reasons as the stay pending appeal.

**CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiffs’ motion for a temporary injunction pending appeal.

Dated: December 14, 2022

Respectfully submitted,

/s/ Edward D. Hassi

**DEBEVOISE & PLIMPTON LLP**

Edward D. Hassi  
(thassi@debevoise.com)  
Leah S. Martin  
(lmartin@debevoise.com)  
801 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Tel.: (202) 383-8000  
Shannon Rose Selden (*pro hac vice*)  
(srselden@debevoise.com)  
J. Robert Abraham (*pro hac vice*)  
(jrabraham@debevoise.com)  
919 Third Avenue  
New York, NY 10022  
Tel.: (212) 909-6000

**JENNER & BLOCK LLP**

Stephen L. Ascher (*pro hac vice*)  
(sascher@jenner.com)  
William S.C. Goldstein (*pro hac vice*)  
(wgoldstein@jenner.com)  
1155 Avenue of the Americas  
New York, NY 10036  
Tel.: (212) 891-1600  
Gabriel K. Gillett (*pro hac vice*)  
(ggillett@jenner.com)  
Miriam J. Wayne (*pro hac vice*)  
(mwayne@jenner.com)  
353 North Clark Street  
Chicago, IL 60654  
Tel.: (212) 840-7290

*Counsel to Defendant Albertsons Companies, Inc.*