

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

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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.

Case Number:
2024CV30459

Div.: 414 Ctrm.:

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DEFENDANTS' MOTION FOR PERMANENT INJUNCTION HEARING DATE

This case is one of four cases around the country seeking the same relief: a nationwide permanent injunction against the proposed Transaction between The Kroger Co. and Albertsons Companies, Inc., which includes a divestiture agreement with C&S Wholesale Grocers, LLC. The Transaction has a contractual closing date of October 9, 2024. Following the status conference with this Court on March 11, the federal court presiding over the action brought by the Federal Trade Commission (“FTC”) and eight state attorneys general scheduled a preliminary injunction hearing to begin on August 26, 2024, which was later than expected. Accordingly, Defendants hereby move for a hearing date on the State’s request for a *permanent* injunction to be set on or around September 16, 2024.

Defendants’ proposal to hold one hearing in September on the State’s request for a permanent injunction will obviate the need for this Court to hold two hearings—one on the State’s request for a preliminary injunction and a second on the State’s request for a permanent injunction. It will thus further streamline the issues before this Court by allowing the parties to leverage efficiencies that will result from allowing the FTC action to proceed first. For

these reasons, the State's request to have this Court conduct a preliminary injunction hearing in July or August and a permanent injunction hearing at a later date is not an efficient use of this Court's time and resources. More importantly, a preliminary injunction hearing is not necessary because Defendants have agreed in parallel cases, and will similarly agree here, not to close the Transaction until this Court has had an opportunity to consider the State's request for a permanent injunction, so long as the ruling is entered on or before the Transaction's contractual outside date of October 9, 2024.

In support of this scheduling request, Defendants state as follows:

1. The State's Complaint seeks the same relief as three other currently pending actions around the country. Accordingly, these proceedings need to be coordinated to promote the efficient administration of justice and ensure fairness to all parties, including the companies' employees and their customers.

2. Historically, state attorneys general seeking to enjoin mergers have joined with the FTC in a single suit. To defendants' knowledge, this litigation is only the second time state attorneys general have ever sought to enjoin a nationwide merger before the FTC proceeding has even commenced, with the *Washington* proceeding (described below) being the first. Whatever the scope of Colorado's independent interests, they are narrower than and subordinate to the national interests being pursued by the FTC. The Colorado attorney general could have joined the FTC's suit (as eight other state attorneys general did) but he chose to go at it alone. That may be his prerogative, but the federal proceeding should still take priority.

3. If this case is not dismissed, it will proceed on a parallel track with at least three other suits raising overlapping factual allegations and materially identical legal theories. Specifically:

a. First, the FTC and the attorneys general of eight other states and the District of Columbia brought suit in the U.S. District Court for the District of Oregon. Compl., *FTC v. Kroger Co.*, No. 3:24-CV-347-AN (D. Or. Feb. 26, 2024) (the “FTC Action”). The Complaint in that case includes nearly identical factual and legal allegations to the State’s Complaint here, including allegations of competitive harm specifically in the State of Colorado, as well as many other states around the country. *See, e.g., id.* ¶ 52. **The preliminary injunction hearing in that case is set to begin on August 26 and is expected to end on or around September 13.** The Court in the FTC Action has ordered that “Kroger and Albertsons shall not consummate the Proposed Transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after the court rules on the FTC’s motion for a preliminary injunction, or until after the date set by the District Court, whichever is later.” *Id.*, ECF No. 14 at 1-2.

b. Second, the State of Washington filed suit on January 15, 2024 in Washington state court, alleging harm in Washington only, but seeking an injunction against the Transaction nationwide. *Washington v. Kroger*, No. 24-2-00977-9 (Wash. Super. Ct. Jan. 15, 2024). Defendants have moved to dismiss that Complaint on state law and federal constitutional grounds, and that motion is currently

pending. In the event the motion is denied, **a permanent injunction hearing in the Washington proceeding is scheduled to begin on September 16, 2024.** In conjunction with the Washington lawsuit, Defendants have committed that they will not close the Transaction until five days after the Court's ruling (so long as that ruling occurs by a date certain), thereby obviating the need for any earlier preliminary injunction hearing.

c. Third, 25 private plaintiffs (including two Colorado residents) filed suit in federal court in California seeking to enjoin the Transaction. Compl., *Whalen v. Kroger*, No. 3:23-CV-459 (N.D. Cal. Feb. 2, 2023). The Court recently **stayed** that case pending the outcome of the FTC's Motion for a Preliminary Injunction. See Minute Order, *Whalen*, No. 3:23-CV-459 (N.D. Cal. Mar. 11, 2024), ECF No. 138.

4. On March 11, 2024, this Court held a Virtual Status Conference in which the parties discussed the proposed case schedule, including coordination with other cases. The parties agreed to submit proposed hearing schedules to the Court. On the same day, however, the Court in the FTC Action set the hearing in that case for August 26 through September 13, which was later than any of the parties expected or requested.

5. In light of the scheduling order in the FTC Action, the parties met and conferred multiple times on March 12-13, 2024 to determine the best schedule for this case. During the parties' meet and confers, the State

indicated that it would be prepared to move forward with a hearing on the permanent injunction this fall.

6. The parties were unable to reach an agreement. In brief, the Colorado Attorney General contends that this Court should hold a preliminary injunction hearing in July or August (before the FTC hearing), to be followed by a permanent injunction hearing at some unidentified point in the future—presumably, after the contractual outside date. Defendants, on the other hand, propose that this Court hold only one proceeding in this case: a permanent injunction proceeding beginning on or around September 16, 2024, following the FTC Action. Defendants’ proposed schedule will best serve the interests of justice and efficiency and preserve this Court’s scarce resources.

7. Defendants respectfully submit that their proposal is the better and more efficient approach for the following reasons:

a. A *preliminary* injunction hearing in this case is entirely unnecessary. Defendants have already stipulated in the other cases (1) to an agreed temporary restraining order pending the resolution of the FTC Action; and (2) that they will not close until a date certain in the *Washington* proceedings. Defendants have expressly represented to the Colorado attorney general that they will enter into a similar stipulation in this case. Those stipulations already provide the State with the preliminary relief it is now seeking, and given Defendants’ willingness to make a similar stipulation in this case as well, the State’s pursuit of “preliminary” relief is an illusion and unnecessary. Given Defendants’

stipulations, the State's proposal of holding a July or August *preliminary* injunction hearing will serve no purpose. Instead, such a schedule would effectively require the parties (and the Court) to try the case twice: (1) once on a preliminary basis in July; and (2) again on a permanent basis some time later.

b. In contrast, Defendants' proposal of holding a permanent injunction hearing will streamline proceedings and allow the Court to decide this case in a single hearing. Although the Colorado attorney general might attempt to minimize the differences between preliminary and permanent injunctive relief, the choice between the two procedures is of considerable significance in this case due to the contractual closing date and for other reasons. Defendants would be pleased to address this distinction further at a hearing or, if the Court requests, in additional briefing.

c. In addition to streamlining proceedings by holding one hearing rather than two, Defendants' proposal of allowing the hearing in the FTC Action to proceed first would provide a number of additional efficiencies. For instance, if the FTC prevails in its suit based on *nationwide* allegations of harm (including in Colorado), then Colorado's request for the same injunctive relief may very well be moot, and the hearing in this case would be rendered unnecessary. On the other hand, if Defendants prevail in the federal proceeding then Colorado will have to explain to this Court why the outcome should be different in this State. In contrast, Colorado's allegations cannot provide similar

efficiencies, as they will not resolve claims of predicted harm beyond the State's borders and thus would not similarly reduce the burdens on the parties to the FTC Action. Thus, the FTC hearing will be necessary *regardless* of the outcome in any hearing in this case or any other. Moreover, to the extent expert and fact witnesses in the FTC Action testify as to Colorado issues, the parties may be able to stipulate to those issues in a hearing for this case, thereby streamlining proceedings and reducing the number of days the parties require to try their case to this Court.

d. The parties in the *Washington* proceeding have already agreed to a similar schedule, where the state hearing will begin immediately after the conclusion of the FTC hearing, demonstrating that holding a permanent injunction hearing in September will cause the State no prejudice. In *Washington*, the parties have agreed to hold one hearing on a permanent injunction, which is slated to begin on September 16, 2024. The Colorado Attorney General has not identified any differences in this case that would require a preliminary injunction hearing in addition to a permanent injunction hearing, or its request for injunctive relief to be heard earlier.¹

In sum, holding a single hearing in this case in September (1) will provide for the most efficient resolution of this case and obviate the need for

¹ Count II of the State's Complaint seeks no emergency injunctive relief, is not constrained by Defendants' closing date, and presents no temporal urgency. Trial on that count could proceed at any point in time after the Transaction has closed.

duplicative hearings; (2) will allow for the efficiencies that will result from the FTC Action proceeding first; (3) will not prejudice the State because Defendants have already stipulated to the preliminary relief it requests; and (4) will conform to the schedule already agreed upon in the *Washington* proceedings.

If the Court is not available in September, then Defendants will appear and defend against the *permanent* injunction request on any date set by the Court (recognizing the multiple proceedings set forth above), so long as the Court is able to render a ruling before the contractual closing date. To be clear, however, Defendants object to any request by the Colorado Attorney General to hold only a *preliminary* injunction hearing as that path is unnecessary and wasteful. Whenever the hearing is scheduled, it should be on the State's request for a *permanent* injunction.

Respectfully submitted on the 13th day of March, 2024.

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