DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: March 21, 2024 3:47 PM FILING ID: 50CAF4B2D8E82 CASE NUMBER: 2024CV30459 ▲ COURT USE ONLY ▲
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 The Kroger Co. ("Kroger") and Albertsons Companies, Inc. ("Albertsons") respectfully move to dismiss the State of Colorado's ("State") Complaint under C.R.C.P. 12(b)(5), or, at minimum, to strike the State's requests for injunctive relief under C.R.C.P. 12(f).

CERTIFICATION PURSUANT TO C.R.C.P. 121 § 1-15(8)

Pursuant to C.R.C.P. 121 § 1-15(8), the undersigned counsel contacted counsel for the State and conferred regarding the grounds for and relief requested in this Motion. The Parties were unable to reach agreement on the issues, and the State stated that it intends to oppose this Motion.

INTRODUCTION

Kroger and Albertsons operate in a fiercely competitive and rapidly evolving environment. Consumers increasingly purchase their groceries through a wide variety of expanding grocery retailers, including big-box stores like Walmart, club stores like Costco, and online retailers like Amazon. To keep pace with that robust competition and achieve significant efficiencies, Kroger entered into an agreement to acquire Albertsons (the "Transaction"). Kroger and Albertsons strongly believe that the Transaction will combine two complementary organizations—benefiting consumers, associates, and communities alike.

Anticipating a rigorous regulatory clearance process, Kroger agreed to divest hundreds of stores, distribution centers, and other related assets to a well-established grocery operator, C&S Wholesale Grocers ("C&S"). Given the localized nature of grocery competition, those targeted divestitures will resolve any competitive concerns that regulators may have about the Transaction. Indeed, at the time the State brought this suit, Kroger was still in discussions with the Federal Trade Commission ("FTC") and other state attorneys general regarding the terms of the divestiture.

Rather than wait for the FTC divestiture negotiations to conclude, the State brought this go-it-alone Complaint, alleging potential harm only in Colorado, but nonetheless seeking to enjoin

the entire Transaction on a nationwide basis, in its own state court, under state law, and without the input of any other interested party. In contrast, the FTC, eight states, and the District of Columbia—consistent with longstanding merger-review practice and precedent—worked together to file a joint lawsuit in federal court under the federal Clayton Act alleging potential harm in various states (including Colorado) and seeking the same relief sought by Colorado. *See FTC v. Kroger Co.*, No. 3:24-CV-347 (D. Or.) ("FTC Action"). There is no reason why the State could not challenge the Transaction on the exact same basis alleged in the Complaint in coordination with the FTC and other states' federal litigation. The State's heavy-handed and duplicative approach to this merger litigation serves no public purpose; indeed, only one other attorney general (for the State of Washington) has taken the same headline-grabbing approach.

Critically, the State's Complaint seeks to enjoin the Transaction *nationwide*, despite being brought in the name of Coloradans only, alleging harm in Colorado alone, and invoking Colorado state law. This lawsuit thus elevates the Colorado Attorney General's agenda above the laws and policies of all other states, paying no heed to the hundreds of millions of out-of-state citizens who have no say in Colorado's political process, no vote in its elections, and no channel through which to voice their concerns about the State's expansive request for relief. No court in history has endorsed the State's impractical and Balkanized view of state merger-enforcement authority. This Court should not be the first. This Court should instead dismiss the State's overbroad and unprecedented merger challenge for multiple reasons.

First, the State's requested nationwide injunctive relief is not tailored to the alleged harm, and therefore is unavailable as a matter of law. Even if the State could prove its Colorado-specific allegations, Colorado-specific equitable relief (*i.e.*, divestitures) would be the remedy—not an injunction against the Transaction with nationwide effect. As the U.S. Supreme Court has held,

"divestiture [is] the most suitable remedy" in merger challenges, *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990), and divestiture "should always be in the forefront of a court's mind," *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961).

Second, the U.S. Constitution limits the extraterritorial application of Colorado law. The Transaction does not pose even *arguable* competitive concerns in many states, and the laws of those states would allow the very same merger that the State now asks this Court to enjoin nationwide. The State cannot, consistent with constitutional limits, wield its local antitrust law to dictate merger policy for the rest of the country.

Third, principles of interstate comity prohibit the State from seeking an injunction with nationwide application. The vehicle for a nationwide antitrust suit is the Clayton Act, 15 U.S.C. § 18, which provides a cause of action that all states and the federal government have a right to enforce. In fact, the FTC has filed suit under the Clayton Act in the District of Oregon, and eight other states and the District of Columbia have joined in that suit. If the State seeks a nationwide injunction affecting *all* citizens of the United States, it must join the other attorneys general and the FTC to pursue such a remedy under federal law in federal court. The State may not impose its own antitrust merger policy onto the rest of the nation.

Finally, although the Complaint is focused on the State's challenge to the proposed Transaction under C.R.S. § 6-4-107 (Count I), the State has also shoe-horned in an unrelated and implausible claim that Kroger and Albertsons entered into unlawful "no-poach" and "no solicitation" agreements in violation of C.R.S. § 6-4-104 during a brief 10-day workers' strike in January 2022 (Count II). Count II rests on a distorted reading of a single email from an Albertsons employee, which suggests (at most) a unilateral decision by Albertsons to protect its own business interest, not any unlawful *agreement* between competitors. Regardless, even if the State had

plausibly alleged such an agreement, the alleged conduct would not constitute a violation of the Colorado Antitrust Act, which does not apply to agreements in furtherance of labor relations. *Compare* C.R.S. § 6-4-104 (prohibiting certain agreements restraining "trade or commerce"), *with* C.R.S. § 6-4-109(1) ("The labor of an individual is not . . . an article of trade or commerce"). Moreover, any injunctive relief sought in connection with Count II would be moot considering that the purported agreement has ended and the State alleges no ongoing conduct to enjoin.

In short, the State's unprecedented claims are inconsistent with the constitutional limits and norms governing our federal system, and they are improperly pleaded on every level.

STATEMENT OF FACTS

A. The U.S. Merger Review Process

In the United States, the FTC or the Antitrust Division of the U.S. Department of Justice ("DOJ") reviews major mergers and acquisitions. *See* FTC, *Premerger Notification and the Merger Review Process*, https://bit.ly/4btKs0f. When two parties agree to a large merger or acquisition, they must submit a Hart-Scott-Rodino ("HSR") filing to the federal government, which provides documents containing background information about the parties and the transaction to help the government analyze the transaction's potential competitive effects. *See id.*

While state attorneys general may review mergers, neither Colorado nor any other state has a merger-review regime comparable to the HSR process. Consequently, state merger investigations generally require close coordination with the FTC and DOJ. *See generally* FTC, *Protocol for Coordination in Merger Investigations*, https://bit.ly/42Atf1d ("To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division or the FTC and the State Attorneys General will cooperate in analyzing the merger").

If the FTC has concerns about a transaction, it can seek a preliminary injunction in federal

court to block the transaction, *see* 15 U.S.C. § 53(b), and it often does so in conjunction with state attorneys general. Indeed, that is exactly what has happened in the FTC Action here.

B. The Transaction

On October 13, 2022, Kroger agreed to acquire Albertsons for $24.6 billion, subject to certain adjustments ("Merger Agreement"). Compl. ¶ 53; *see* Ex. A.[1] Kroger operates grocery stores in 35 states, and its loyalty program "covers 60 million households." Compl. ¶ 19 & n.7. Albertsons operates grocery stores in a different subset of 34 states, many of which contain no Kroger stores at all. *See id.* ¶ 22 n.8. To address any competitive concerns raised by antitrust authorities, however, the Merger Agreement contemplates the divestiture of up to 650 stores and related assets. Ex. A at 65.

On September 8, 2023, Kroger and Albertsons announced that they had entered into an agreement with C&S to divest 413 stores, eight distribution centers, two offices, various grocery store banners, a license to the Albertsons banner in four states, and certain private label brands ("C&S Agreement"). *See* Compl. ¶ 173-185; Kroger Press Release (Sept. 8, 2023), https://bitly.ws/WuvK. The C&S Agreement allows Kroger to require C&S to purchase up to 237 additional stores. Kroger Press Release (Sept. 8, 2023), https://bitly.ws/WuvK. After announcing the C&S Agreement, Kroger and Albertsons continued discussions with the FTC and state attorneys general (including the Colorado Attorney General) about the scope of the divestiture.

On February 14, 2024, while divestiture discussions remained ongoing, the State broke from the FTC and other states and filed this Complaint.

[1] Exhibit A is the Merger Agreement. The Complaint relies on that Agreement, making it appropriate for consideration on a motion to dismiss. *See Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005).

C. Other Lawsuits Challenging the Transaction

There are now three other pending lawsuits around the country seeking the same relief as the State's Complaint here: an injunction against the Transaction on a nationwide basis.

First, on February 26, 2024, the FTC, eight states, and the District of Columbia sued Kroger and Albertsons (but not C&S) in the District of Oregon to enjoin the Transaction under Section 7 of the Clayton Act. Compl., *FTC v. Kroger Co.*, No. 3:24-CV-347 (D. Or. Feb. 26, 2024). The FTC Complaint specifically alleges harm in a number of Colorado markets. *Id.* ¶ 52. The court in the FTC Action has now set an evidentiary hearing on plaintiffs' preliminary injunction motion, which is scheduled to begin on August 26, 2024. FTC Action, ECF No. 74.

Second, on January 15, 2024, the State of Washington filed a complaint in Washington state court challenging the Transaction under Washington law. That lawsuit alleges potential harm in Washington only, but—like the instant Complaint—seeks to enjoin the Transaction on a nationwide basis. Compl., *Washington v. Kroger*, No. 24-2-00977-9 (Wash. Super. Ct. Jan. 15, 2024). Kroger and Albertsons have moved to dismiss the Washington complaint on similar grounds to this motion. The motion to dismiss the Washington complaint is pending.

Third, in February 2023, twenty-five private plaintiffs (including two Colorado residents) sought to enjoin the Transaction under Section 7 of the Clayton Act in California federal court. Compl., *Whalen v. Kroger*, No. 3:23-CV-459 (N.D. Cal. Feb. 2, 2023). That court denied the plaintiffs' preliminary injunction motion and dismissed their initial complaint for lack of standing, explaining that Defendants' proposed divestiture "could have a significant effect" on the court's analysis, and reasoning that it would be inappropriate to adjudicate the claims without accounting for that divestiture proposal. *Whalen*, ECF No. 91 at 1-2. The court subsequently dismissed the plaintiffs' amended complaint, criticizing the plaintiffs for again failing to "account for the fact

that up to 650 stores may be divested before the merger" and "continu[ing] to insist (erroneously) that the divestiture is simply not relevant." *Whalen*, ECF No. 120 at 3. After the plaintiffs filed yet another amended complaint, the court stayed that action on March 11, 2024 pending resolution of the preliminary injunction motion in the FTC Action. *Whalen*, ECF No. 138.

D. The Complaint's Allegations

Despite participating in the federal merger review process alongside the FTC—and in coordination with other states—the State has refused to join the state attorneys general challenging the Transaction under federal law in the FTC Action. Instead, the State brings two claims under Colorado law: (1) Count I invokes C.R.S. § 6-4-107, cites federal caselaw interpreting the Clayton Act, and alleges that the Transaction is likely to substantially lessen competition in Colorado, Compl. ¶¶ 247-50; (2) Count II alleges that, during a 10-day employee strike against King Soopers (a Kroger-owned supermarket) in 2022, Albertsons and Kroger purportedly entered into an unlawful agreement that Albertsons would not hire employees or solicit pharmacy customers from King Soopers, in violation of C.R.S. § 6-4-104. *Id.* ¶¶ 251-64.

1. Count I: The State's Request to Enjoin the Transaction Nationwide

The State's allegations of potential harm from the Transaction are geographically limited. *Id.* ¶¶ 94-97. The State lists 39 separate "city areas" in Colorado that allegedly constitute markets for analyzing the Transaction's competitive effects. *Id.* ¶¶ 97, 106. The State identifies no relevant geographic market or harm outside Colorado. *Id.* ¶ 108.

Although the Complaint acknowledges Kroger's proposed divestiture to C&S, it contends that the divestiture is inadequate to remedy the alleged anticompetitive effects of the Transaction in Colorado. *See id.* ¶¶ 188-246. For example, the State asserts that "[t]he divestiture package does not include enough stores in Colorado," *id.* ¶ 189, "[t]he number of stores also fails to address all local markets," *id.* ¶ 190, and "[t]he divested stores in Colorado all come from the [Albertsons]

side," *id.* ¶ 191. It also alleges that, "[i]n Colorado, all but two of the divested stores will have to be re-bannered" to "a largely unknown brand in Colorado," asserting that, "[i]n Colorado, th[e] risk is particularly high" that customers "will go elsewhere after re-bannering." *Id.* ¶¶ 196-197.

The Complaint acknowledges that the Transaction will have effects nationwide. The State emphasizes Kroger's "national operations," *id.* ¶ 10, and Albertsons' "massive national infrastructure," *id.* ¶ 29. The State notes that Defendants are citizens of Delaware (C&S), Idaho (Albertsons), and Ohio (Kroger). *Id.* ¶¶ 2-4. It recognizes that "Kroger operates 2,719 stores across the United States" but only "148 stores in Colorado"; it also notes that Albertson's "operates 2,271 stores across the United States" but only "105 stores" in Colorado. *Id.* ¶¶ 10-11, 22-23.

The State gestures at the potential effects of the Transaction and divestiture "[o]n a national level," *id.* ¶ 175, noting that "C&S will be required to re-banner over 80% of divested stores across the country," *id.* ¶ 196, that "Kroger and ACI have invested in massive nationwide private label development and manufacturing infrastructures," *id.* ¶ 209, and that the divestiture "ha[s] taken a mix-and-match approach" "[o]n a national basis," *id.* ¶ 212. The State also briefly challenges C&S's distribution capabilities in other states, noting, for example, that "C&S is not receiving any distribution centers in Illinois, Texas, or Alaska," nor "receiving adequate distribution centers in California," "Arizona[,] and Nevada." *Id.* ¶¶ 219-20. At no point, however, does the Complaint allege any concrete harms that would flow from the Transaction outside of Colorado. Thus, while the State acknowledges the nationwide effects of the Transaction, it asks this Court to permanently enjoin the Transaction based *solely* on alleged harms in Colorado. Request For Relief ¶ b.

2. Count II: The State's No-Poach/Non-Solicitation Allegations Related to Albertsons' Communications During a 10-Day Strike in 2022

The State alleges a "history of collusion . . . in the form of unlawful no-poach and non-solicitation agreements," *id.* ¶ 149, based on a single email read out-of-context in which an

Albertsons employee stated an "inten[t]" to not hire striking employees from King Soopers (a Kroger store banner) and to not solicit pharmacy customers from King Soopers during a 10-day strike by United Food and Commercial Workers Local 7 ("UFCW") employees at King Soopers in January 2022, *id.* ¶¶ 151-53, 254-55. The State identifies no promise, agreement, or even any action by Kroger as part of the supposed "agreements"; indeed, the Complaint acknowledges there was no reciprocal action by Kroger. *Id.* ¶ 158. Nor does the State allege any injury arising from the purported "agreements." Nonetheless, the State demands $2,000,000 in civil penalties—an amount untethered to any factual allegations. Request For Relief ¶¶ e-f.

LEGAL STANDARD

In "review[ing] a C.R.C.P. 12(b)(5) motion to dismiss," a court must "accept all factual allegations in the complaint as true, viewing them in the light most favorable to the plaintiff, but [it is] not required to accept bare legal conclusions as true." *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 409 P.3d 331, 334 (Colo. 2018); *see Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (adopting federal plausibility standard from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). "Under this standard, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Abu-Nantambu-El v. State*, 433 P.3d 101, 103 (Colo. App. 2018) (quotation marks omitted). A complaint that seeks an impermissible remedy cannot, as a matter of law, plausibly allege any set of facts that would entitle the plaintiff to relief. *See, e.g.*, *Gold Run, Ltd. v. Bd. of Cnty. Comm'rs*, 554 P.2d 317, 319 (Colo. App. 1976) (affirming dismissal because the relief sought was not "an appropriate remedy under the facts of this case"); *Brown v. Aetna Life Ins. Co.*, No. 13-CV-131, 2013 WL 3442042, at *4 (W.D. Tex. July 8, 2013) (surveying caselaw).[2]

[2] C.R.C.P. 12(f) "authorizes a party to move to strike 'any redundant, immaterial, impertinent, or scandalous matter' from any pleading." *Barnes v. State Farm Mut. Auto. Ins. Co.*, 497 P.3d 5, 8 (Colo. App. 2021) (quoting C.R.C.P. 12(f)). When other forms of relief are available, some courts

ARGUMENT

This Court should dismiss Count I because the State can allege no set of facts that would entitle it to the only tangible remedy it seeks: a sweeping injunction with nationwide effect based solely on alleged anticompetitive harm in Colorado. At minimum, the Court should strike the State's request for a nationwide injunction as an unavailable remedy.[3] This Court should likewise dismiss Count II because (1) the Complaint fails to plausibly allege an *agreement* to restrain trade or commerce during a 10-day labor strike, as required to state a claim under C.R.S. § 6-4-104; and (2) Colorado law exempts labor from the scope of its state antitrust law.

I. THE STATE'S REQUEST FOR INJUNCTIVE RELIEF WITH NATIONWIDE EFFECT IS UNAVAILABLE AS A MATTER OF LAW (COUNT I)

The State's unprecedented request for a nationwide injunction against the Transaction under state law fails for at least three reasons: (A) the nationwide injunctive relief sought is a disproportionate, and thus improper, remedy for the local harms alleged; (B) the State's decision to seek such overbroad, nationwide relief under its own law, in its own court, based solely on alleged harm in Colorado, contravenes the Commerce and Full Faith and Credit Clauses of the U.S. Constitution; (C) the State's requested remedy tramples fundamental principles of interstate comity and federalism. For these reasons, Count I should be dismissed.

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therefore have treated requests for unavailable forms of relief as a basis for a motion to strike. *See, e.g.*, *Gray v. City of Santa Fe, N. M.*, 89 F.2d 406, 410 (10th Cir. 1937) ("When a complaint otherwise states a good cause of action" but "alleges the wrong measure of damage or demands relief to which the plaintiff is not entitled, especially where there is a prayer for general relief[,] [t]he remedy is by motion to strike." (footnotes omitted)); *see also Scalia v. Cnty. of Kern*, 308 F. Supp. 3d 1064, 1089-90 (E.D. Cal. 2018).

[3] The State's other remedies for Count I—declaring the Transaction unlawful and awarding costs and fees, Compl., Request ¶¶ b, g—do not provide any cognizable relief from the alleged harm and are not justiciable. *See State v. Hill*, 530 P.3d 632, 634 (Colo. 2023). But even if those remedies were viable on their own, striking the State's improper request for a nationwide injunction would still be appropriate under C.R.C.P. 12(f). *Supra* at 9.

A. The State's Proposed Injunction Is Disproportionate to the Harm It Alleges

There is an irreconcilable disconnect between the State's allegations and its requested relief. The State seeks to permanently enjoin the Transaction nationwide, but it relies on Colorado law, invokes the jurisdiction of Colorado courts, and alleges harm to competition within Colorado alone. Yet the State's request for *nationwide* relief is a matter of national concern; it is not for the State to dictate merger policy for the entire country.

1. Injunctive Relief Must Be Tailored to the Harm Alleged

The State is authorized to seek injunctive relief for a violation of the Colorado Antitrust Act. C.R.S. § 6-4-112. But that authority has limits, and nothing in that statute displaces the rule that "traditional principles of equity govern the grant of injunctive relief." *Am. Stores.*, 495 U.S. at 281 (citation omitted); *see* State's Prelim. Inj. Mot. at 20-21 & n.25 (noting federal law is persuasive as to the Colorado Antitrust Act). Three such limits apply here.

First, a court may enjoin "only the specific conduct that it determines was improper," and the State alleges harm to competition in Colorado only. *State ex rel. Meyer v. Ranum High Sch.*, 895 P.2d 1144, 1145 (Colo. App. 1995); *see* C.R.C.P. 65(d) (requiring specificity for orders granting injunctive relief). An injunction "is too broad" when "its terms are more restrictive than as required by the facts." *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380, 383 (Colo. App. 1983); *see Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). "If a less drastic remedy" than a nationwide injunction would be "sufficient to redress" the alleged "injury, no recourse to the additional and extraordinary relief of [such] an injunction [is] warranted." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). And an injunction "is overly broad if it contains prohibitions which are unnecessary to effectuate the purposes of the injunction." *People v. Wunder*, 371 P.3d 785, 790 (Colo. App. 2016).

Courts tailoring injunctive relief have acknowledged the "'increasingly controversial' nature of nationwide injunctions" and have limited the geographic scope of those injunctions. *See City and Cnty. of San Francisco v. Barr*, 965 F.3d 753, 764-66 (9th Cir. 2020). In *San Francisco*, for example, the Ninth Circuit held that a "district court abused its discretion by issuing a nationwide injunction without determining whether [the] [p]laintiffs needed relief of this scope to fully recover," noting that the plaintiffs "advance[d] no reason why limiting the injunction along state boundaries would not grant them full relief." *Id.* at 764. In the same vein, just last year, a federal court in Washington rejected a request from Colorado and 16 other states for a nationwide injunction concerning the availability of an FDA-approved medication, "find[ing] a nationwide injunction inappropriate where the record d[id] not demonstrate a nationwide impact of sufficient similarity to Plaintiffs' situation." *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash.), *opinion clarified*, 669 F. Supp. 3d 1057 (E.D. Wash. 2023). And in *Colorado Cross Disability Coalition v. Abercrombie & Fitch Co.*, the Tenth Circuit expressed "no doubt that" an individual plaintiff alleging disability discrimination against a store chain could not "seek[] a nationwide injunction in her own right . . . to challenge accessibility barriers at stores she never intends to visit." 765 F.3d 1205, 1212 (10th Cir. 2014).

Second, these equitable limitations on injunctive relief apply with particular force in the antitrust context. *See Am. Stores Co.*, 495 U.S. at 282-83. As the Colorado Supreme Court has explained, "[s]tate antitrust legislation serves the important function of protecting the public against illegal trade restraints *beyond the reach of federal law*," and is directed primarily to state-specific issues. *See People v. N. Ave. Furniture & Appliance, Inc.*, 645 P.2d 1295 (Colo. 1982) (emphasis added). Thus, previous Colorado antitrust actions have focused on the *local* effects of the alleged harm. *See, e.g.*, *id.*; *State ex rel. MacFarlane v. Boulder Rental Prop. Ass'n, Inc.*, No.

1980-CV-1583, 1981 WL 11409, at *2 (Colo. Dist. Ct. Mar. 11, 1981) (addressing price fixing for "rental prices of residential properties *in the State of Colorado*" (emphasis added)).

The State's invocation of *state* antitrust law to enjoin a transaction *nationwide* is unprecedented. Prior state-law merger enforcement cases from around the country are rare and have focused on localized relief. *See, e.g.*, *State v. Coca Cola Bottling Co. of Sw.*, 697 S.W.2d 677, 680 (Tex. App. 1985)) (assessing merger challenge by state of Texas under state law limited to "the San Antonio area only"); *California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1216 (1988) (Mosk, J., concurring in part) (analyzing merger challenge by state of California under state law, concluding "this action—even if it results in an order of divestiture—plainly cannot, and indeed does not even purport to, determine whether the [merger] may proceed or survive outside California"). Indeed, even when states independently sue under *federal* law, their complaints generally allege local harm and seek local remedies. *See, e.g.*, *Am. Stores*, 495 U.S. at 274 (analyzing allegations of harm in "62 California cities" and seeking divestiture of "all of the acquired assets located in California" under the Clayton Act).

Third, "divestiture [is] the most suitable remedy in a suit for relief from a § 7 [Clayton Act] violation." *Am. Stores*, 495 U.S. at 284; *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 792 (9th Cir. 2015) ("The customary form of relief in § 7 cases is divestiture."). While "drastic," divestiture is nonetheless the "most effective[] of antitrust remedies." *E. I. du Pont*, 366 U.S. at 326. Divestiture is particularly well-suited for this case, in which the alleged markets are highly localized, *see* Compl. ¶ 97 (alleging 39 "city areas" as geographic markets), and where divestitures would resolve alleged competitive issues within the State's borders. Divestiture "is simple, relatively easy to administer, and sure," and it "should always be in the forefront of a court's mind." *E. I. du Pont*, 366 U.S. at 330-31.

2. The State's Request for Nationwide Injunctive Relief Is Overbroad

The State's unprecedented demand for nationwide relief based on alleged harms in Colorado is far "more restrictive than [i]s required by the facts" alleged. *Green*, 673 P.2d at 383.

The Complaint itself demonstrates the incongruence between the State's alleged harm and its proposed remedy. The Complaint alleges harm related to the Transaction's purported anticompetitive effects solely in Colorado. It is expressly limited to "local markets" in Colorado, listing the "relevant geographic markets" as certain "city areas" exclusively within the State. Compl. ¶¶ 78, 97; *see id.* ¶ 108 (alleging that applying "a more narrow geographic market . . . there would be 253 geographic markets in Colorado"), *id.* ¶ 99 (alleging that the Transaction would "harm suppliers and workers in Colorado and weaken the state's supply chain resiliency"). And it asserts that "[t]he relevant markets are highly concentrated in Colorado." *Id.* ¶ 145.

The State also alleges anticompetitive effects unique to Colorado. For example, it asserts that "[p]eople [in Grand County, Colorado] already suffer from higher 'resort' prices" because "the only two Supermarkets in the county" are "a Safeway in Fraser, and a City Market in Granby." *Id.* ¶ 142. It alleges that the Transaction will be particularly harmful "in Gunnison" because "the only Supermarkets are City Market and Safeway." *Id.* ¶ 141. The State also details features of its local markets that are "important to Colorado consumers" in particular, such as "local Colorado products," including peaches from the "Palisade growing region," which "are a strong draw for Colorado customers." *Id.* ¶¶ 132-33, 136.

Similarly, the State objects to the divestiture on the ground that, as proposed, it does not do enough in Colorado—irrespective of its nationwide effectiveness. According to the Complaint, "[t]he divestiture package does not include enough stores *in Colorado*," *id.* ¶ 189 (emphasis added), "[t]he number of stores also fails to address all *local* markets," *id.* ¶ 190 (emphasis added), and "[t]he divested stores *in Colorado* all come from the [Albertsons] side," *id.* ¶ 191 (emphasis

added). The State also alleges that, "[i]n Colorado, all but two of the divested stores will have to be re-bannered" to "a largely unknown brand in Colorado," meaning that, "[i]n Colorado, th[e] risk is particularly high" that customers "will go elsewhere after re-bannering." *Id.* ¶¶ 196-97.

Given the State's focus on Colorado, its requested relief—a *nationwide* injunction—is far "more restrictive than [i]s required by the facts" alleged. *Green*, 673 P.2d at 383. The State acknowledges that the Transaction is nationwide, and that Defendants are citizens of Delaware, Idaho, and Ohio. Compl. ¶¶ 2-4. It admits that "Kroger operates 2,719 stores across the United States," but only "148 stores in Colorado." Compl. ¶¶ 10-11. And "60 million households" are part of Kroger's loyalty program. *Id.* ¶ 19. Likewise, Albertsons "operates 2,271 stores across the United States," but only "105 stores in the State of Colorado." Compl. ¶¶ 22-23. The State also emphasizes that the divestiture will take place "[o]n a national level," *id.* ¶ 175, noting that "C&S will be required to re-banner over 80% of divested stores across the country," *id.* ¶ 196. Thus, unlike historical state-specific merger enforcement actions, *supra* at 12-13, the State seeks relief that undisputedly will have profound consequences beyond its borders. Unlike those cases, the Transaction here has a nationwide effect, and is certainly are not "beyond the reach of federal law" such that Colorado law should govern rather than the Clayton Act. *See N. Ave. Furniture*, 645 P.2d at 1295.

Ultimately, in light of its localized allegations, the State "advance[s] no reason why limiting the injunction along state boundaries would not grant [the State] full relief." *San Francisco*, 965 F.3d at 764. Despite the Supreme Court's admonition that divestiture "should always be in the forefront of a court's mind," *E. I. du Pont*, 366 U.S. at 330-31, the State has *not* requested a divestiture tailored to address the alleged harms to Colorado consumers. Instead, it seeks to enjoin the entire Transaction, affecting all 2,719 Kroger stores and 2,271 Albertsons

stores, Compl. ¶¶ 10-11, 22-23, based on the Transaction's alleged Colorado-specific effects. That demand "is too broad" for what is "required by the facts" alleged. *Green*, 673 P.2d at 383. Because "a less drastic remedy" than a nationwide injunction would be "sufficient to redress" the State's alleged "injury, no recourse to the additional and extraordinary relief of [such] an injunction [is] warranted." *Monsanto Co.*, 561 U.S. at 165-66.

B. The U.S. Constitution Prohibits Using State Law to Enjoin the Transaction Nationwide

Although state antitrust laws barring transactions that substantially lessen competition have been in effect for decades, no state has attempted to seek nationwide injunctive relief of the type sought by the State (and Washington) in connection with this Transaction. And for good reason: Enjoining a nationwide transaction based on alleged anticompetitive effects in a single state violates the U.S. Constitution's Commerce and Full Faith and Credit Clauses. Indeed, those constitutional provisions are especially salient here in light of the FTC Action pending in the District of Oregon—which attorneys general representing eight states and the District of Columbia have joined—and which seeks, under federal law, the same nationwide relief sought here.

1. The State's Requested Remedy Violates the Commerce Clause

"Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause) authorizes Congress to 'regulate Commerce with foreign Nations, and among the several States.'" *People v. Helms*, 396 P.3d 1133, 1140 (Colo. App. 2016) (quoting U.S. Const. Art. I § 8, cl. 3). The Commerce Clause also "prohibits certain state actions that interfere with interstate commerce," an application "referred to as the 'dormant' Commerce Clause." *Id.* (citation omitted).

The dormant Commerce Clause prohibits states from taking actions imposing excessive extraterritorial burdens affecting commerce in other states. *See Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (striking down Illinois statute regulating corporate takeovers

because it "directly regulate[d] transactions which take place across state lines, even if wholly outside the State"); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature").

Under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court must examine whether "the burden imposed on [interstate] commerce" by a state law is "clearly excessive in relation to the putative local benefits." *Id.* at 142; *see Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 391 (2023) (Sotomayor, J., concurring in part) (explaining *Pike* test). Invoking *Pike*, the Colorado Supreme Court has recognized that state acts may be unconstitutional where they "impose a burden on commerce which is clearly excessive" in relation to the local interests at stake, especially when the subject matter is not "traditionally of local concern." *Mountain States Tel. & Tel. Co. v. Pub. Utilities Comm'n of Colo.*, 763 P.2d 1020, 1032 (Colo. 1988).

Like state statutes, overbroad injunctive orders that excessively burden interstate commerce violate the dormant Commerce Clause. In *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350 (Fed. Cir. 2013), for example, the court reversed a nationwide injunction, explaining that, while a state may "conclude that its own unfair competition law has been violated, and it may prohibit any future conduct within its borders that would cause continued violation of its law," a state "is not permitted . . . to extend its unfair competition law to other states." *Id.* at 1359; *compare Hyatt Corp. v. Hyatt Legal Servs.*, 610 F. Supp. 381, 385 (N.D. Ill. 1985) (finding nationwide injunction concerning advertising practices would place an "excessive burden on [interstate] commerce in light of the interest sought to be protected"), *with Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 119-21 (1978) (upholding state law restricting retail gasoline services

solely "within the state"). Here, as in *Allergan*, the State's authority may extend to "prohibit[ing] any future conduct" within Colorado if that conduct would violate Colorado antitrust law. *Allergan*, 738 F.3d at 1359. But the State may not apply its state antitrust law to regulate the Transaction's effects in other states. *Healy*, 491 U.S. at 337 ("[N]o State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.").

The State's requested remedy is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The Transaction is a merger agreement governed by out-of-state law involving out-of-state companies. Other than the transfer of Colorado-specific assets, no aspect of the Transaction will occur in Colorado, and enjoining the Transaction wholesale would be "invalid regardless of whether [C.R.S. § 6-4-107's purported] extraterritorial reach was intended by the legislature." *See Healy*, 491 U.S. at 336; *Shearson Lehman Bros. Inc. v. Greenberg*, 60 F.3d 834 (9th Cir. 1995) (unpub.) (rejecting nationwide injunction against business practices that were "not local decisions; they necessitate[d] decision-making at the national level"). In addition, the State's professed local interests "could be promoted as well with a lesser impact on interstate activities" with a locally tailored remedy. *Pike*, 397 U.S. at 142.

In sum, the State's Colorado-specific allegations represent the local interests of one state, but the State seeks a remedy that would have extraterritorial effects in all others. On those allegations, the *Pike* balance cannot possibly tip in the State's favor. *See id.*

2. Applying Colorado Law to Enjoin the Transaction Nationwide Would Contravene the Full Faith and Credit Clause

The Full Faith and Credit Clause, U.S. Const. art. IV, § 1, prevents one state from "determining the extraterritorial effect of [its] own laws and judgments." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality op.). The purpose of the Clause is to mitigate the "risk that two or more States will exercise their power over the same case or controversy" and

to avoid "the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue." *Underwriters Nat'l Assur. Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982). The Clause does not allow "one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504-05 (1939); *see Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1135 (W.D. Wash. 2011) (analyzing potential conflicts with other state laws under Full Faith and Credit Clause). Accordingly, state court "[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998). "If in [the] application [of the Clause,] local policy must at times be required to give way, such is part of the price of our federal system." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (quotation marks omitted).

Applying Colorado law to enjoin this Transaction nationwide would prevent the citizens of other states from enjoying the procompetitive benefits flowing from the Transaction. For instance, while the State alleges that the Transaction would "result in a monopoly" in Gunnison, Compl. ¶ 141, it cannot possibly allege the same for any city in—for example, Massachusetts—where Kroger owns no stores. Accordingly, even if the State's theory of liability were correct *in Colorado* (it is not), the application of Massachusetts antitrust law in Massachusetts would yield the opposite conclusion. *See HendrixLicensing.com*, 766 F. Supp. 2d at 1135; *see also Baker*, 522 U.S. at 235. The same is true for citizens in states and cities throughout the country where there is no overlap between Kroger and Albertsons. Those citizens would lose the procompetitive benefits of this Transaction based on one suit brought by an attorney general who does not

represent them and under the laws of a state in which they cannot vote.

C. Interstate Comity Precludes Nationwide Relief

Basic principles of federalism and interstate comity likewise preclude one state from dictating merger policy nationwide. As with other issues of nationwide importance, "[a]llowing Colorado to" obtain an injunction with nationwide effect to remedy a state-specific alleged harm would "create a chaotic state-by-state patchwork, at odds with our Nation's federalism principles." *Trump v. Anderson*, 144 S.Ct. 662, 672 (2024) (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment); *see also* Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095, 2138 (2017) (arguing that, to preserve "state law comity," courts must "limit[] an injunction only to jurisdictions where the asserted injury [i]s cognizable"). "Laws have no force of themselves beyond the jurisdiction of the state which enacts them." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). Colorado legislators enacted the Colorado Antitrust Act to protect Colorado citizens. In contrast, the Clayton Act provides a vehicle for the State (in addition to the FTC, all other states, and individual consumers) to pursue nationwide relief. Indeed, prior to the Transaction, it appears every state action seeking to enjoin a nationwide merger pre-closing has relied on the Clayton Act. *See, e.g.*, *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 186 (S.D.N.Y. 2020) (merger challenge by 14 state attorneys general after FTC settlement).

If the State seeks to enjoin the Transaction on a nationwide basis, then basic respect for interstate comity would militate in favor of the State joining the federal litigation that has already been filed under the Clayton Act. That federal lawsuit—by a *federal* agency and nine other attorney general offices—purports to give voice to the citizens of *all* states, including Colorado. The federal action also does not pose the practical problems inherent in the State's unprecedented attempt to devolve merger enforcement into a state-by-state free-for-all. For example, the federal action will avoid preclusion issues that may arise from multiple suits seeking the same nationwide

relief; it will also provide for nationwide service of process to secure documents and testimony from key out-of-state witnesses. 15 U.S.C. § 23 (providing nationwide subpoena power); *cf. Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1341 (Fed. Cir. 2003) (noting federal statue was enacted to allow nationwide relief "in a single federal proceeding in order to avoid the problem of multiple suits under individual state statutes").

II. THE STATE FAILS TO STATE A CLAIM UNDER C.R.S. § 6-4-104 (COUNT II)

The State's tag-along conspiracy claim under Section 6-4-104 is facially implausible and should also be dismissed. Section 6-4-104 prohibits contracts, combinations, and conspiracies "in restraint of trade or commerce. C.R.S. § 6-4-104. Stating a claim under section 6-4-104 therefore requires alleging (1) an agreement that (2) unreasonably restrains trade or commerce. *See Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1220 n.1 (10th Cir. 2009); *see N. Ave. Furniture & Appliance, Inc.*, 645 P.2d at 1294; *see also* Compl. ¶¶ 100, 112, 137, 148 (relying on federal law). The State does not plausibly allege either.

A. The State Fails to Plausibly Allege an Unlawful Agreement

The Complaint's theory of "agreement" hinges on a single email from an Albertsons employee during a 10-day union strike in January 2022. Compl. ¶ 153. The State's attempt to fabricate an unlawful agreement from that email is both facially implausible and misleading.

To plead an unlawful agreement, the State must adequately allege either direct or circumstantial evidence showing Defendants "consciously committed themselves to a common scheme designed to achieve an unlawful objective." *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1179 (10th Cir. 2019) (cleaned up). When relying on circumstantial evidence, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Instead, "[t]here must be evidence that tends to exclude the possibility

that [Defendants] were acting independently." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); *see also Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (Section 1 of the Sherman Act "does not reach conduct that is 'wholly unilateral'").

Applying the Sherman Act's "agreement" requirement at the pleading stage, the U.S. Supreme Court in *Twombly* held that a complaint that alleged conscious parallel conduct between competitors "without that further circumstance pointing toward a meeting of the minds" required dismissal. *Twombly*, 550 U.S. at 557. Under *Twombly*, allegations of parallel conduct that "could just as well be independent action" do not "plausibly suggest[]" an agreement to restrain trade. *Id.*

The factual allegations proffered by the State suggest *unilateral* action only. The State repeats the "formulaic recitation" of an "agreement," *Twombly*, 550 U.S. at 555, but the factual allegations and email snippets in the Complaint at most suggest that Albertsons (and Albertsons *alone*) did not intend to hire striking Kroger workers or solicit pharmacy customers during the 2022 King Soopers strike. Compl. ¶ 152. Specifically, the cited email from an Albertsons employee (titled "Union Communications") recites that *Albertsons* does not "intend to hire any King Soupers [sic] employees" or "solicit or publicly communicate that King Soupers [sic] employees should transfer their scripts." Compl. ¶ 153. There are many legitimate business reasons why Albertsons would independently determine not to hire striking workers or specifically solicit Kroger pharmacy customers, including that strikes are short and striking workers typically return to their employer once the strike concludes (and thus are not a good investment) or that advertising for prescription transfers should not be focused on any particular type of customer.

Tellingly, although the State alleges that an Albertsons executive confirmed in sworn testimony to the existence of an agreement, Compl. ¶ 156, it notably does not quote from or attach that testimony. And for good reason: that testimony does not exist. To the contrary, that executive

(and others whose testimony is referenced in the State's complaint, *see* Compl. ¶ 253) testified under oath that there was no agreement between Kroger and Albertsons, and that Albertsons' internal practices to not hire striking workers or solicit pharmacy customers from select competitors were unilateral business decisions made for legitimate business purposes. While the State may not agree with Albertsons' internal hiring and advertising practices, the State is not empowered to condemn such unilateral business decisions as unlawful agreements to restrain trade. *See Llacua*, 930 F.3d at 1179-80 (rejecting wage-fixing claims where the wages were consistent with each rancher's unilateral business judgment).

The State similarly fails to allege any basis to infer that Kroger "agreed" to anything. *See Ass'n of Surgical Assistants v. Nat'l Bd. of Surgical Tech. & Surgical Assisting*, No. 22-CV-2363, 2023 WL 7277313, at *8 (D. Colo. Sept. 29, 2023) (communications did not "plausibly indicate that [defendant] was taking anything other than independent action rather than concerted action"); *Llacua*, 930 F.3d at 1178 (affirming dismissal where complaint lacked allegations that defendants "explicitly agreed to any limitation on their behavior"). Indeed, the only reference to action by *Kroger* is the vague allegation that "[t]he existence of the agreement also was relayed" to various Kroger executives, notwithstanding that the cited communication contained no mention of an "agreement," but rather stated that a "response" was received from Albertsons regarding its "position." Compl. ¶ 161. Thus, the Complaint does not even allege the sort of "parallel conduct" that the Supreme Court found *inadequate* to state a claim in *Twombly*. 550 U.S. at 553-54.

The State's allegations bear no resemblance to the kinds of bilateral "no-poach" or "non-solicitation" agreements that courts have found unlawful, wherein *both* employers agree *with each other* not to solicit or poach the others' employees (or customers). *See, e.g.*, *United States v. DaVita Inc.*, No. 1:21-CR-229, 2022 WL 266759, at *1 (D. Colo. Jan. 28, 2022) (alleging

concerted action to "allocate senior-level employees by not soliciting *each other's* senior level employees across the United States" (emphasis added)). While the Complaint alleges Albertsons' unilateral intent, it is glaringly devoid of any similar allegations as to Kroger's conduct, and that pleading failure alone renders the State's conspiracy claim implausible. *See id.* In addition, the Complaint also fails to allege any of the circumstantial "plus factors" that courts consider in assessing whether the parties reached an unlawful agreement, such as negotiation, offer, acceptance, or a meeting of the minds; nor does the State allege any enforcement method or remedy for Kroger if Albertsons changed its "intent." *See* Compl. ¶ 152.

In sum, the Albertsons email cannot plausibly be read as evidencing any agreement between Kroger and Albertsons, much less an anticompetitive one. It is a brief communication between two employers in relation to a union's communications to its members during a 10-day strike. Defendants are not aware of any court finding a plausible claim in circumstances like these (under state law or the Sherman Act), particularly where the State does not even *allege* any injury. The State's plea for $2,000,000 in civil penalties is unsupported and should be dismissed.[4]

B. The State Does Not Plausibly Allege An Agreement Not to Hire Striking Workers in "Restraint of Trade or Commerce"

Count II also fails to the extent the State purports to allege an agreement to not hire striking workers because any such agreement is not a "restraint of trade or commerce" under Colorado antitrust law. As explained above, C.R.S. § 6-4-104 provides that certain agreements in "restraint

[4] To the extent the State maintains its perfunctory request for injunctive relief as to Count II, that requested remedy also should be stricken as moot under C.R.C.P. 12(f). *See supra* at 9. The Complaint plainly alleges that the purported agreements between Albertsons and Kroger applied "during the strike" by King Soopers employees, which started in January 2022 and ended after 10 days. Compl. p. iii, ¶¶ 150-52, 254-64. The Complaint does not allege any ongoing agreement. Thus, the alleged conduct at issue in Count II ended more than two years ago, and a court order enjoining Defendants from engaging in that long-concluded conduct "would have no practical effect on an existing controversy." *People ex rel. C.G.*, 410 P.3d 596, 599 (Colo. Ct. App. 2005).

of trade or commerce" are unlawful. But C.R.S. § 6-4-109 provides expressly that: "(1) The labor of an individual is not . . . an article of trade or commerce." As such, employer actions relating to labor issues fall outside the scope of the Colorado Antitrust Act.

In interpreting a prior version of the Colorado Antitrust Act, the Colorado Supreme Court explained that the labor exemption excludes bona fide labor activities from the scope of the antitrust laws. *N. Ave. Furniture*, 645 P.2d at 1296; *see Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996) (explaining federal labor exemption applies to employers' activities as well as union activities); *see also Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974) (reasoning that, without an employer exemption, antitrust law would "discourage[e] bargaining on the part of management"). Thus, under the statute's plain text, even if the State did plausibly allege the existence of an agreement that Albertsons would not hire striking Kroger workers (it did not), such agreement would not restrain "trade or commerce" as defined by Colorado law.

The Complaint alleges that Albertsons's communication was tied directly to an ongoing labor dispute, *see* Compl. ¶ 157, and did *not* represent an effort to "restrain" trade. In fact, the very email cited in the Complaint was between "employees responsible for labor relations," and the subject of the email is "Union Communications." Compl. ¶ 153. Moreover, the purported "agreement" not to hire Kroger workers allegedly took place during the ten days the union went on strike against Kroger, and—based on the State's own theory—was a communication made in response to the strike. Compl. ¶ 152; *see Brown*, 518 U.S. at 254. Even accepting the Complaint's mistaken accusations, therefore, the State's allegations would not plausibly establish a violation of the Colorado Antitrust Act.

CONCLUSION

For these reasons, this Court should dismiss the Complaint in full.

DATED this 21st day of March, 2024.

Respectfully submitted,

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I HEREBY CERTIFY that the foregoing document has been served on all counsel who have entered an appearance in this matter through Colorado Courts E-Filing, on March 21, 2024, including the following:

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