DATE FILED: April 18, 2024 4:52 PM
FILING ID: 36994CF84C5A5
CASE NUMBER: 2024CV30459

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 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**
PHILIP J. WEISER, Attorney General ARTHUR BILLER, Atty. Reg. No. 53670* Assistant Attorney General STEVEN M. KAUFMANN, Atty. Reg. No. 14153* Deputy Solicitor General BRYN A. WILLIAMS, Atty. Reg. No. 58468* First Assistant Attorney General ROBIN E. ALEXANDER, Atty. Reg. No. 48345* Assistant Attorney General IAN L. PAPENDICK, Atty. Reg. No. 57522* Assistant Attorney General ARIC J. SMITH, Atty. Reg. No. 57461* Assistant Attorney General Ralph L. Carr Judicial Center 1300 Broadway, 10th Floor Denver, CO 80203 Telephone: (720) 508-6000 Facsimile: (720) 508-6040 Arthur.Biller@coag.gov Steve.Kaufmann@coag.gov Bryn.Williams@coag.gov Robin.Alexander@coag.gov Ian.Papendick@coag.gov Aric.Smith@coag.gov *Counsel of Record	Case No. 24CV30459 Div.: 414

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

STATUTES

TABLE OF AUTHORITIES

PAGE

I. INTRODUCTION

The Defendants' Merger would have a devastating effect in Colorado, giving Kroger dominant market power in local markets across the state. The Complaint details a presumptive violation of the Colorado Antitrust Act—a law that the Attorney General unquestionably has the authority to enforce, including by seeking an injunction to prevent harm to Colorado consumers.

Defendants move to dismiss because, in their view, the Attorney General is powerless to protect Colorado from this unlawful Merger. That is untrue for three reasons. First, Defendants' argument that divestiture is the only appropriate remedy raises fact-intensive questions that cannot be resolved on the pleadings. Second, blackletter antitrust law provides that a permanent injunction is the proper remedy to prevent an anticompetitive Merger. Third, Defendants' appeals to the Constitution and comity ignore basic principles of federalism, clear Congressional intent, and the long history of jurisprudence affirming that states are co-equal enforcers of the antitrust laws, even when such enforcement has effects beyond state borders.

Defendants also argue that the Complaint does not adequately allege unlawful no-poach and non-solicitation agreements between Kroger and Albertsons (ACI). During the January 2022 labor strike by the United Food and Commercial Workers (UFCW) against Kroger—when the UFCW was seeking better wages and protections for frontline workers who had risked their health during the pandemic to ensure a continued supply of groceries to their communities—Kroger and ACI agreed that Safeway would not hire employees or solicit pharmacy customers from King Soopers. Defendants ignore well-pleaded allegations and cite information outside the Complaint to raise factual disputes not appropriately resolved on the pleadings. They also falsely claim that their unlawful no-poach agreement is blessed by an antitrust exemption reserved for union

activities and collective bargaining, disregarding contrary Colorado precedent.

Defendants' Motion to Dismiss should be denied.

II. BACKGROUND

A. The Merger Eliminates Competition Between Direct Competitors

Kroger proposes to acquire all outstanding stock in ACI, becoming the owner of ACI's assets in Colorado, giving Kroger over a 50% market share in Colorado. Compl. at ii, ¶¶ 54. The Attorney General properly alleges that supermarkets comprise the relevant product market. *Id.* ¶¶ 80-88, 93. Because consumers shop locally for groceries and do not regularly travel unreasonable distances for groceries, the Attorney General has alleged at least thirty-nine relevant geographic markets within the state. *Id.* ¶¶ 94-98. The increase in market concentration in these markets makes the transaction presumptively unlawful. *Id.* ¶¶ 106-07.

The Merger would eliminate head-to-head competition between Kroger and ACI on price, quality, variety, customer service, and local supply. Consumers check prices at both stores, including promotional coupons (*Id.* ¶ 138); Kroger and ACI recognize this and respond accordingly. *Id.* ¶¶ 82-82, 124, 126. Kroger and ACI also compete to obtain the best supply of fresh local products. *Id.* ¶¶ 132-37. Moreover, the variety and availability of different products in each store means that consumers regularly shop in each store and benefit from the redundancy of two separate supply chains. *Id.* ¶¶ 126, 138, 144.

Competition between the two chains benefits workers and suppliers as well as consumers. To compete on customer service and quality, Kroger and ACI usually aggressively compete for labor, which benefits workers in terms of pay and opportunities. *Id.* ¶¶ 120-123. Competition for local products benefits local suppliers of, for example, fresh produce, dairy, and packaged goods.

Id. ¶¶ 136-37. To secure supplies of these goods, Kroger and ACI raise their payments to suppliers, provide more transparent and reliable contracts, and improve supply networks. *Id.* ¶ 137. The Merger would eliminate this competition.

In some markets, Kroger and ACI are the only choices available to consumers. *Id.* ¶¶ 141-43. Following the Merger, many consumers would face a monopoly. *Id.* The Merger would also dangerously weaken supply chains to many communities, leaving them vulnerable to food shortages. *Id.* ¶ 144.

Defendants' proposed divestiture remedy has fatal shortcomings. C&S lacks the experience and infrastructure required to compete effectively against Kroger in the way ACI does today. C&S currently operates only 23 retail stores, but post-Merger C&S would be expected to operate almost twenty times as many. *Id.* ¶¶ 49, 175. C&S has a paltry private label program, operates only a single retail pharmacy, and has no modern loyalty program. *Id.* ¶¶ 51-52.

C&S will not compete effectively with Kroger. Under Defendants' plan,[1] C&S would remain reliant on Kroger—a critical competitor—for key competitive functions, as detailed in the Complaint. *Id.* at ¶¶ 228-29. C&S does not have a modern loyalty card program and would face serious impediments to building one given the lack of loyalty program assets in the divestiture package. *Id.* ¶¶ 223-24. C&S would not receive sufficient employees or distribution facilities to operate their 413 new stores. *Id.* ¶¶ 217-21. Kroger would keep ACI's most popular private label brands. *Id.* ¶¶ 203-10. Finally, C&S would be saddled with the costs and burdens of re-bannering stores and integrating complex IT systems. *Id.* ¶¶ 196-202, 212-16. The proposed plan sets up

[1] While Defendants claim to have a new divestiture proposal, they have not disclosed it.

C&S to fail, as the divestiture plan in the ACI/Safeway merger set up Haggen to fail.

B. Kroger and ACI Entered into No-Poach and Non-Solicitation Agreements to Restrain Competition

In January 2022, the UCFW Local 7 union went on strike against King Soopers for ten days. Compl. ¶¶ 150-51. Kroger feared losing its employees and customers during the strike, and ACI wanted to help Kroger "hold the line" during negotiations with the union to secure favorable terms. *Id.* ¶¶ 152, 157. ACI therefore secretly agreed that it would not hire any King Soopers workers or solicit its pharmacy customers during the strike. *Id.* ¶¶ 152-53, 157.

Defendants reached the agreements in an email: ACI's Senior VP of Labor Relations responded to his counterpart at Kroger that ACI did not "intend to hire" any King Soopers employees and did not "intend to solicit" its pharmacy customers. *Id.* ¶ 153. Employees of both companies then relayed the agreements to other executives. *Id*. ¶¶ 154-55, 159-61. One senior employee even cautioned his colleagues not to forward the agreements, while another expressed disappointment that the no-poach agreement had not gone further. *Id*. ¶¶ 155, 158. Worse, Defendants have apparently reached similar no-poach agreements in the past, documented by another email sent during the strike indicating that ACI previously agreed not to hire Kroger employees in Portland. *Id*. ¶ 162.

III. LEGAL STANDARD

Dismissal "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quotation marks omitted). On a motion to dismiss, "all averments of material fact must be accepted as true, and all of the allegations in the complaint must be viewed in the light most favorable to the plaintiff." *Pub. Serv. Co. of Colorado*

v. Van Wyk, 27 P.3d 377, 386 (Colo. 2001). Furthermore, "the court may only consider matters stated within the complaint itself, and may not consider information outside of the confines of that pleading." *Id*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007); *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (adopting *Twombly*/*Iqbal* standard).

IV. ARGUMENT

A. The law authorizes the Attorney General to enjoin the Merger.

The Attorney General's detailed allegations of increased market concentration and loss of head-to-head competition establish that the Merger "may substantially lessen competition" and injure the grocery store customers, employees, and suppliers that the Antitrust Act protects. C.R.S. § 6-4-107(1). The General Assembly authorized the Attorney General to "institute actions or proceedings to prevent or restrain" such unlawful mergers. C.R.S. § 6-4-112(1). Defendants' argument that the requested injunction is "improperly tailored" raises questions of fact, is facially incorrect under Colorado law, and states no basis for dismissal on the pleadings.[2] With no grounds to challenge the adequacy of the allegations under the Antitrust Act, Defendants resort to raising fact disputes and meritless challenges to the Attorney General's authority.

1. Defendants' fact-intensive argument about the proper remedy cannot be resolved on a motion to dismiss.

Whether a divestiture, or any other remedy, would restore competitive conditions as they

[2] In five pages of argument that the State's proposed injunction is "improperly tailored," Defendants point to only a single case that resulted in dismissal, but that case involved a statute that did not grant authority to challenge mergers—an argument Defendants have not raised here. *State of California ex rel. Van de Kamp v. Texaco, Inc*., 46 Cal. 3d 1147, 1150-51 (1988).

exist today, requires extensive factual inquiry following a finding of liability. As such, it cannot be resolved at the pleading stage.

Even when divestiture is a proper remedy, it must "give the divested [entity] an opportunity to establish its competitive position." *Ford Motor Co. v. U.S.*, 405 U.S. 562, 575 (1972); *U.S. v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 206 (D.D.C. 1982) ("the divesting corporation" must "establish the newly-divested business with a sound financial structure."). The inquiry hinges on whether the divestiture (i) includes all assets necessary for the buyer to compete effectively and sustainably, (ii) ensures the buyer is capable of using the divested assets as effectively as the seller does, and (iii) leaves the buyer with the incentive to compete as effectively as the seller does. *See, e.g., U.S. v. Aetna*, 240 F. Supp. 3d 1, 64-74 (D.D.C. 2017); *F.T.C. v. Sysco*, 113 F. Supp. 3d 1, 73-77 (D.D.C. 2015); *F.T.C. v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47-48 (D.D.C. 2002); *United States v. Franklin Electric Co.*, 130 F. Supp. 2d 1025, 1033-34 (W.D. Wis. 2000).

The Complaint amply demonstrates why the proposed divestiture remedy does not meet these factors, such as that C&S is inexperienced in grocery retail, will remain reliant on a key competitor to operate, and will not receive sufficient assets to compete effectively. *Supra* II.A. To demonstrate that divestiture is appropriate, Defendants must contest these facts and many others. *St. Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 792 (9th Cir. 2015) (courts "must consider whether [a divestiture] will effectively [restore competition] under the facts."); *F.T.C. v. PepsiCo, Inc.*, 477 F.2d 24, 29, fn. 8 (2d Cir. 1973) (courts must review evidence to determine if the buyer "can survive as a viable, independent entity.").

Moreover, "[a]ny determination of whether divestiture would be an appropriate remedy in this case is, of course, premature" before a finding of liability is made. *Cia. Petrolera Caribe, Inc.*

v. Arco Caribbean, Inc., 754 F.2d 404, 430 (1st Cir. 1985); *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (remedy follows a finding that a merger's effect may be "substantially lessen competition"). In a merger case, "[a] range of injunctive relief is possible and . . . the relief ordered is highly dependent upon the proof adduced at trial." *Cia. Petrolera*, 754 F.2d at 430.

2. A permanent injunction is the appropriate remedy, authorized by law, and not a basis for dismissal.

a) A permanent injunction is an appropriate remedy to the harms alleged.

Ignoring the express provisions of the Antitrust Act, which directs that unlawful mergers may be "prevented or restrained," Defendants mistakenly argue that the requested injunction is overbroad. Case law recognizes that "[t]he preferred remedy" for an unlawful merger is "a 'full stop injunction' preventing the parties from completing their unlawful merger." *United States v. Energy Solutions*, 265 F. Supp. 3d 415, 446 (D. Del. 2017) (*citing, inter alia*, *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963)). This is true regardless of whether the harm would occur in a single market or many. Indeed, harm to competition in just one market "provides an independent basis for the injunction, even absent a finding of anticompetitive harm" in other markets. *United States v. Anthem*, 855 F.3d 345, 368 (D.C. Cir. 2017); *Phila. Nat. Bank*, 374 U.S. at 357-61, 363 ("direct and immediate" effects in a single local market suffice to justify an injunction).

The Attorney General has alleged in detail the many dimensions of head-to-head competition that would be eliminated by this Merger. *See supra* II.A.[3] This competition benefits

[3] Evidence of "substantial competition" between the merging parties can suffice to "demonstrate that a merger threatens competitive harm independent from an analysis of market shares." Merger Guidelines § 2.2, U.S. Dept. of Justice & Fed. Trade Comm'n (2023). However, in this case the resulting market shares also make the Merger presumptively unlawful. Compl. ¶¶ 104-08.

Coloradans by keeping prices competitive, maintaining customer service and quality, ensuring access to local products, protecting access to a range and variety of products (including resilient supply chains), providing jobs, and supporting local suppliers. *Id.*

The requested injunction is appropriately tailored because it is the remedy that will stop the illegal activity in light of how Defendants structured their transaction. The remedy in an antitrust case "must be 'effective to redress the violations' and 'to restore competition.'" *Ford*, 405 U.S. at 573; *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001) (merger remedies must "recreate pre-merger competition."). Kroger would acquire all stock in ACI, thus owning all of ACI's stores, other physical assets, and all business operations in Colorado and elsewhere. *Supra* II.A. Enjoining the stock purchase is thus necessary to effectively "redress the violation" and maintain "pre-merger competition." *Ford*, 405 U.S. at 573; *H.J. Heinz*, 246 F.3d at 726.

This is true notwithstanding Defendants' argument that "[t]he Complaint alleges harm related to the Transaction's purported anticompetitive effects solely in Colorado." Mtn. at 14-15. There is no rule that an action to prevent harm within the state must limit its effects to the state's borders. *See*, *e.g.*, *People v. Helms*, 396 P.3d 1133, 1140-41 (Colo. App. 2016) (affirming that Colorado statutes may be enforced against conduct occurring partially outside of the state); *State ex rel. Suthers v. Tulips Investments, LLC*, 343 P.3d 977, 981-82 (Colo. App. 2012) (holding that Colorado courts can order out-of-state entities to comply with state statutes). Colorado law permits an injunction even if it has effects outside the state.

In a merger involving national grocery store chains, *any* remedy drawn purely "along state boundaries," Mtn. at 15, would be ineffective to "recreate pre-merger competition." *H.J. Heinz*, 246 F.3d at 726. While the Complaint focuses on the Merger's effects in Colorado, it also makes

clear that those effects cannot be assessed or avoided by considering only assets within the state. To compete, Defendants rely on massive national infrastructure to support supply chains, private label brands, loyalty programs, and other essential business operations. *Supra* II.A. Defendants' argument flies in the face of reality by suggesting that a remedy focused only on stores within Colorado, that does not account for associated national operations, would be "'effective to redress the violations' and 'to restore competition.'" *Ford*, 405 U.S. at 573.

Recent experience with grocery store mergers underscores the dangers of divestiture as a remedy. Following the ACI/Safeway merger, the divestiture to Haggen utterly failed to restore premerger competition. Compl. ¶¶ 34-46. That divestiture comprised 146 stores across multiple states. *Id.* ¶¶ 36-37. Haggen declared bankruptcy within months of the merger, and its collapse as a competitor harmed employees, consumers, and local communities. *Id.* ¶¶ 43-45.

b) Defendants' argument that divestiture is the only proper remedy misconstrues the law.

Defendants point to cases stating that "divestiture [is] the most suitable remedy," but these cases are inapposite when applied to the present Merger. Mtn. at 13 (*citing Am. Stores*, 495 U.S. at 284). Defendants' authorities discussed the most effective remedies for **mergers which had already been consummated** and were subsequently declared unlawful. *See Am. Stores*, 495 U.S. at 276, 284; *U.S. v. E.I. du Pont de Nemours & Co.*, 336 U.S. 316, 318-19 (1961); *St. Alphonsus*, 778 F.3d at 781-82. When seeking to remedy a **past merger**, a divestiture may be more effective than other, more limited relief. *See*, *e.g.*, *St. Alphonsus*, 778 F.3d at 793 (divestiture superior to defendant's "proposed 'conduct remedy.'"). And sometimes the most effective post-merger remedy is *complete* divestiture of the acquired company, i.e., a return to the pre-merger status quo. *du Pont*, 366 U.S. at 328 ("the Government is entitled to a decree directing complete divestiture,"

as "partial divestiture is not an effective remedy"); *Am. Stores*, 495 U.S. at 284-85 (suitable remedy was an order to "divest itself of the stock held in violation" of the law). In these cases, the courts aim to achieve the same result as if the merger had been enjoined *ex ante*.

Further, Defendants ignore the fundamental principle of the cases they rely on: a divestiture, like any other remedy, is insufficient where it fails to restore pre-acquisition competition. *St. Alphonsus*, 778 F.3d at 792 (even where divestiture is "the most straightforward way to restore competition," a court must nonetheless "consider whether it will effectively do so.").

3. A dispute over remedies is not grounds for dismissal.

Even if the requested injunction were ultimately not granted, that would not be grounds for dismissal. Dismissal is warranted "only if the court concludes that the plaintiff is not entitled to ***any relief*** under the facts pleaded." *Gatrell v. Kurtz.*, 207 P.3d 916, 917 (Colo. App. 2009) (emphasis added); *Flemming v. Colo. State Bd. of Educ*., 400 P.2d 932, 934 (Colo. 1965) ("[T]he prayer of a complaint is not the statement of the cause of action, and if the allegations . . . state a cause of action or show one entitled to relief, it should be granted regardless of the remedy sought."). Defendants do not claim that there is no possible relief under the Antitrust Act. Rather, they present a fact dispute over what particular injunction or divestiture should be the remedy to their unlawful merger. This is simply not a basis for dismissal. [4]

B. The Constitution and principles of federalism fully support this Action to enjoin a merger that threatens competition in Colorado.

[4] Defendants' claim that the Attorney General could not obtain declaratory relief alone is also meritless. Their sole authority states that a plaintiff does not have standing "to bring [a] declaratory judgment claim" when they do not have a "legally protected interest." *State v. Hill*, 530 P.3d 632, 636 (Colo. 2023). Defendants do not, and under the Antitrust Act cannot, claim that the Attorney General lacks a legally protected interest in enforcing the state's antitrust laws. C.R.S. § 6-4-112.

Defendants claim to be immune from state antitrust law because they operate in multiple states and because an injunction prohibiting the Merger would impact their business outside of Colorado.[5] They have it backwards. The U.S. Constitution, principles of federalism, state and federal antitrust law, and interstate comity all affirm the Court's ability to grant appropriate injunctive relief after consideration of the facts. *Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments").

1. The Commerce Clause does not prohibit Colorado from enjoining a merger with substantial effects in the state.

The dormant Commerce Clause poses no limitation to the present action, which represents a nondiscriminatory exercise of the state's authority to protect important local interests.

a) The Commerce Clause does not forbid state action that is non-discriminatory and supported by Congress.

The U.S. Supreme Court's decision in *National Pork Producers v. Ross* reiterates a long-established principle: the "very core" of the dormant Commerce Clause is to prevent discrimination against out-of-state interests. 598 U.S. 356, 369 (2023); *People v. Boles*, 280 P.3d 55, 62 (Colo. App. 2011) ("a dormant Commerce Clause analysis [asks] whether [an action] discriminates against interstate commerce"). Defendants do not claim the requested relief is discriminatory on its face, in its intent, or in effect. Commerce Clause challenges that do not allege

[5] Defendant C&S prudently declined to join Kroger and ACI's meritless constitutional and comity arguments.

any such discrimination routinely fail. *National Pork Producers*, 598 U.S. at 370.

Defendants' position is made worse by the fact that Congress has signaled strong support for state antitrust enforcement. The law insulates state activity from scrutiny under the Commerce Clause if Congress "clearly allow[s]" the state to act. *Am. Trucking Assn's, Inc. v. N.Y. State Thruway Auth.*, 886 F.3d 238, 245 (2d Cir. 2018). The Supreme Court has long recognized that Congress "intended the federal antitrust laws to supplement, not displace" state enforcement, *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989), and state laws form "an integral part of the congressional plan for protecting competition." *Am. Stores*, 495 U.S. at 284. There is no preemption even where a state's antitrust enforcement "affects interstate commerce." *Pounds Photographic Labs, Inc. v. Noritsu America Corp.*, 818 F.2d 1219, 1226 (5th Cir. 1987) (*citing Standard Oil Co. v. Tennessee*, 217 U.S. 413, 422 (1910)). This Congressional approval is fatal to any Commerce Clause challenge.

b) Any claim that the requested relief excessively burdens interstate commerce involves significant questions of fact not appropriately resolved on a motion to dismiss.

When faced with a nondiscriminatory exercise of state authority, challengers must demonstrate that the "burden[s] imposed on [interstate] commerce [are] clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) (*citing Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960). Defendants have outlined no such excessive burdens. If they had, weighing those burdens against the local interests at issue would be a factual determination, inappropriate for resolution on the pleadings.

As here, Commerce Clause challenges to state laws often "overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule;" cases invoking *Pike* frequently turn

on discriminatory effects. *National Pork Producers*, 598 U.S. at 377. The *Pike* test is not "a roving license" for courts to decide what actions "are appropriate for state[s] . . . to undertake," and a state action may survive *Pike* even where it has substantial effects in other states. *Id.* at 380, 383-84 (citation omitted); *see also Archer Daniels Midland Co. v. State*, 690 P.2d 177, 187 (Colo. 1984) ("virtually every regulation will have some effect on interstate commerce;" *Pike* does not require "the least burdensome alternative."). Moreover, the *Pike* test does not protect "particular . . . firms" or "particular structure[s] or methods of operation," even where those firms operate largely outside a state's bounds. *Pike*, 397 U.S. at 384 (citation omitted).

Defendants' *Pike* challenge fails. The Complaint outlines the important local interests at stake and the inadequacy of the proposed divestiture remedy. Compl. ¶¶ 106-108, 109-144, 147-163, 188-243. Defendants point to no specific burdens beyond that the transaction involves assets outside the state, Mtn. at 18, which does not constitute an excessive burden. *National Pork Producers*, 598 U.S. at 374 ("many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior"); *Riverton Produce Co. v. State*, 871 P.2d 1213, 1221 (Colo. 1994) (state laws that burden interstate commerce are not "per se" invalid) (citation omitted). Here, it is impossible to protect Coloradans from the Merger without considering and impacting out-of-state assets, including supply chains, private label products, IT systems, and more.

Defendants' claim that "the *Pike* balance cannot possibly tip in the State's favor," Mtn. at 18, thus fails, but it also need not be decided here. Balancing interests and burdens involves many questions of fact, and Defendants do not cite a single case wherein *Pike* was used to strike down state action on a motion to dismiss. *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) ("*Pike* may be impossible to apply without some factual inquiries").

c) The extraterritoriality doctrine invoked by Defendants is disfavored and fails to apply to the facts of this case, which has a strong Colorado connection.

Perhaps recognizing they are not entitled to dismissal under *Pike*, Defendants claim that the Commerce Clause prohibits "imposing excessive extraterritorial burdens affecting commerce in other states." Mtn. at 16. This attempts to combine the *Pike* test with the so-called "extraterritoriality doctrine"—which has itself been at least severely curtailed, if not disavowed, by the U.S. Supreme Court. *National Pork Producers*, 598 U.S. at 371-74.

National Pork raises serious questions as to whether an "extraterritoriality doctrine" applies absent discriminatory state action. Otherwise, the "extraterritoriality doctrine" could turn into an "'almost *per se*' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State.'" *Id.* at 371. The Court explicitly rejected this approach which Defendants now embrace. *Id.* The Court explained that "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior," and such a doctrine would forbid "valid exercises of the States' constitutionally reserved powers." *Id.* at 374-75 (citation omitted).

In addition to running into the limitations on "extraterritoriality" imposed by *National Pork*, the only decisions cited by Defendants finding an impermissible extraterritorial effect were those involving activity *entirely* outside the state. *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013) (the state is not "permitted to regulate commerce entirely outside of the state's borders"); *Hyatt Corp. v. Hyatt Legal Servs.*, 610 F. Supp. 381, 385 (N.D. Ill. 1985) (requested injunction would affect "advertising and promotion in areas which have little, if any, effect on the strength of plaintiff's trademark within Illinois"); *Shearson Lehman Bros. Inc. v. Greenberg*, 60 F.3d 834 at *3 (9th Cir. 1995).

Defendants cannot argue that the requested relief is wholly extraterritorial. The Merger involves extensive assets within Colorado, and others which have powerful effects inside its borders. *Supra* II.A. The Commerce Clause does not prohibit state regulation of a transaction that occurs partially, even primarily, outside of a state. On the contrary, state action may stand even where its requirements fall "solely on interstate companies" and its practical effect is "to shift market share from one set of out-of-state firms . . . to another." *National Pork Producers*, 598 U.S. at 383-84. Defendants' attempt to merge the extraterritoriality doctrine with the *Pike* test has no basis in law; the Commerce Clause does not protect a merger that occurs partially in Colorado and has a substantial local nexus. Defendants' extraterritoriality claim, therefore, fails.

2. Defendants' Full Faith and Credit argument lacks merit.

Defendants' argument that the Full Faith and Credit Clause of the Constitution bars a public enforcement action against a national corporation is wrong. The Full Faith and Credit Clause "requires every State to give a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it," *Marworth, Inc. v. McGuire*, 810 P.2d 653, 656 (Colo. 1991), but it "applies only to the final judgments of sister states." *Grynberg v. Phillips*, 148 P.3d 446, 450 (Colo. App. 2006) (*citing Marworth*, 810 P.2d 653). Defendants do not point to any judgment of a sister state which would be deprived of res judicata effect by this action.

Defendants argue that enjoining the Merger "would prevent the citizens of other states from enjoying the procompetitive benefits flowing from the Transaction," even where the laws of those jurisdictions do not forbid the Merger.[6] Mtn. at 19. The Court need look no further than the cases

[6] Defendants cannot justify a merger that is unlawful in one state by arguing that it may provide benefits in other states. *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D.N.Y. 1958)

cited by Defendants to conclude that this argument is meritless. Where a private party operating in multiple states commits acts that violate the laws of a particular state, the Full Faith and Credit Clause does not prevent that state from enforcing its own laws. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 284, 286 (1980) (states' "interest in [limiting] the potential liability of companies that transact business within the State . . . is not strong enough to prevent other States with overlapping jurisdiction over [] injuries" from enforcing state law). The Supreme Court recognizes that situations "frequently arise in which application of either the law of one state or the contrary law of another is consistent with . . . the Full Faith and Credit Clause." *Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1135 (W. D. Wash. 2011) (citations omitted).

The Full Faith and Credit Clause requires states to give effect to the judgments of another state's court that has properly exercised jurisdiction over the dispute. *Sherrer v. Sherrer*, 334 U.S. 343, 352 (1948). It does nothing to prevent a state from enforcing its own laws where that enforcement has some effect outside the state's borders.

3. Colorado acting independently to enjoin a merger prohibited by state law does not offend interstate comity.

Defendants make a final, imprecise appeal to interstate comity. This appeal overlooks a century and a half of judicial tradition establishing the states as co-equal antitrust enforcers and amounts to a claim that if Colorado wishes to enjoin the Merger, it needs to join the FTC in suing under the Clayton Act. That is not in the best interest of Colorado, nor is it required by law.

("Any alleged benefit to [consumers in one market] . . . cannot, under the law, be bought at the expense of other consumers . . . where the effects of the merger violate the Act."); *U.S. v. Anthem*, 236 F. Supp. 3d 171, 252 (D.D.C. 2017) ("[N]o court has held that a potential general benefit to consumers . . . can negate competitive harm.").

Defendants invoke the recent Supreme Court concurrence in *Trump v. Anderson* to claim that the requested relief would "'create a state-by-state patchwork, at odds with our Nation's federalism principles.'" Mtn. at 20 (*citing* 144 S. Ct. 662, 672 (2024) (Sotomayor, J., concurring)). This reads the *Anderson* decision out of context. The majority in that case grounded its decision in the fact that, "'[i]n the context of a Presidential election, state-imposed restrictions implicate a *uniquely* important national interest.'" *Id.* at 670 (*citing Anderson v. Celebrezze*, 460 U.S. 780, 794–795 (1983)) (emphasis added). The Court found that authority over national elections rests exclusively with Congress. *Id.* at 668-70.

The same cannot be said for antitrust enforcement. States are independent sovereigns authorized to enforce their own laws absent "clear and manifest" preemption by Congress. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). No argument for such preemption exists here. *See supra* IV.B.1(a). Many state antitrust laws predate federal antitrust law, and the U.S. Supreme Court has recognized this as "an area traditionally regulated by the States." *ARC America Corp.*, 490 U.S. at 101. If Congress were concerned about patchwork enforcement, it could impose a "single . . . nationwide rule." *National Pork Producers*, 598 U.S. at 382. It has not done so.[7]

Just as the General Assembly is not required to defer to Congress in legislating to protect competition, the Attorney General is not required to defer to federal enforcers. *State of Ga. v.*

[7] Defendants gesture at Congress's decision to allow nationwide relief under federal trademark law to avoid differing adjudications under state law. But Congress has not applied this reasoning—which was concerned with states establishing conflicting private rights over the same intellectual property—to public antitrust enforcement. Mtn. at 20-21 (*citing Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1341 (Fed. Cir. 2003)). On the contrary, in 2023 Congress affirmed its support of independent state action through the State Antitrust Enforcement Venue Act, which made clear that an attorney general's choice of venue should be honored. Pub. L. 117-328, Div. GG, Title III, § 301, Dec. 29, 2022, 136 Stat. 5970 (amending 28 U.S.C. § 1407).

Pennsylvania R. Co., 324 U.S. 439, 447 (1945) ("The fact that the United States may bring . . . suits for injunctions under [antitrust] laws does not mean that [the state] may not."). Neither is this Court limited to the strictures of federal law[8] or separate federal proceedings. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 225 (2020) (in "independently reviewing the legality of the Proposed Merger," courts are "not bound by the conclusions of [federal] agencies."). While Defendants may prefer that Colorado join the FTC, this concern is based not on the desire to protect interstate comity, but rather the desire to avoid submitting to state law in state court.

C. The Complaint Adequately Alleges Unlawful No-Poach and Non-Solicitation Agreements (Count II).

To state a claim under C.R.S. § 6-4-104, a complaint must allege (1) an agreement that (2) unreasonably restrains trade or commerce. The Complaint here plausibly alleges both. Defendants, however, argue that the Complaint suggests only unilateral action by ACI. Mtn. at 21-24.[9] Defendants (1) wrongly rely on cases alleging *circumstantial* evidence of an agreement, ignoring the substantial *direct* evidence of express agreements alleged in the Complaint; and (2) improperly raise factual disputes at the pleading stage by citing to evidence outside the Complaint.

[8] Notably, this Court is authorized to interpret the Antitrust Act independently of federal antitrust precedents. In enacting the Antitrust Act last year, the General Assembly expressly deleted a provision of the predecessor Antitrust Act instructing courts to "use as a guide interpretation given by the federal courts to comparable federal antitrust laws." Former C.R.S. § 6-4-119.

[9] Defendants also challenge the Attorney General's requested remedies for Count II. Regarding injunctive relief (Mtn. at 24, n. 4), contrary to Defendants' contention, a request for this remedy is not moot because the wrong may be ongoing, or is at least capable of repetition evading review, *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983) (en banc), as shown by the allegations that Defendants previously entered into no-poach agreements and that ACI wanted the current agreement to go further. Compl. ¶¶ 158, 162. To the extent Defendants contest the request for civil penalties (Mtn. at 9), C.R.S. § 6-4-113 provides that the Attorney General has the authority "to seek the imposition of a civil penalty for any violation" of the Antitrust Act, basing the amount, in part, on "effective deterren[ce]." *Id*. § 6-4-113(1) & (2)(f).

1. The Complaint plausibly alleges the existence of express agreements between the Defendants.

a) The Complaint alleges direct evidence of the unlawful agreements.

An illegal agreement "may be established by either direct or circumstantial evidence." *Beltran v. InterExchange*, *Inc.*, 176 F. Supp. 3d 1066, 1072 (D. Colo. 2016) (agreement may be "tacit or express") (*citing Twombly*, 550 U.S. at 553). Sufficiently detailed allegations of direct evidence are adequate to state a claim, rendering circumstantial evidence unnecessary. *Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010). Accordingly, Defendants' reliance on cases pertaining to *circumstantial* evidence of agreements (Mtn. at 21-25) is misplaced.

Direct evidence is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1177 (10th Cir. 2019). The Complaint alleges ample direct evidence of the no-poach and non-solicitation agreements. Defendants reached their agreements in an email from Senior Vice President of Labor Relations for ACI, Daniel Dosenbach, in response to his counterpart at Kroger, Jon McPherson, stating that (1) "[W]e don't intend to hire any King Soupers [sic] employees" and (2) "With regards to Rx, we don't intend to solicit or publicly communicate that King Soupers [*sic*] employees should transfer their scripts to us." Compl. ¶ 153. Because this email between Defendants is the document by which the illegal agreements were reached and must be viewed in the light most favorable to the Attorney General,[10] *Van Wyk*, 27 P.3d at 386, it is sufficient standing alone to plead the

[10] Defendants' argument that the email does not show an agreement because ACI stated its "intent" to not hire Kroger's workers or solicit their customers (Mtn. at 24) strains credulity and is belied by subsequent emails in which Kroger and ACI affirmed that they had an agreement, as detailed in the Complaint and discussed below. Regardless, that argument is also at best an inference, and at this stage, all inferences must be drawn in favor of the Attorney General.

existence of an agreement. *See In re Commodity Exch.*, 213 F. Supp. 3d 631, 659 (S.D.N.Y. 2016) (direct evidence of an agreement can be an "email in which competitors agreed."); *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 289-90 (4th Cir. 2012) (content of written by-laws established plausible claim of conspiracy). Like *Robertson*, which involved a challenge to written rules, the challenged restraints here are written in an email that leaves no uncertainty about the agreements' "plainly documented" terms, rendering circumstantial facts "superfluous." *Id*. at 289-90.

In addition to this "single email" embodying the written agreements (Mtn. at 21), the Attorney General's Complaint alleges more direct evidence in the form of emails further memorializing the agreements and relaying their terms to senior executives at both companies. ACI's Group Vice President of Labor Relations, Brent Bohn, forwarded the two agreements to other ACI executives, instructing them to "make sure the Denver team understands the below two things" and warning them, "**Please don't forward the email.**" Compl. ¶ 155 (emphasis added). Within Kroger, Mr. McPherson similarly relayed the agreements to fellow Kroger executives, including Kroger CEO Rodney McMullen and President of the King Soopers & City Market Division, Joe Kelley. *Id*. ¶¶ 161, 259. Todd Broderick, ACI's Denver Division President, restated the agreements in an email to ACI's COO Susan Morris, stating "***we have agreed*** to not hire [King Soopers'] employees and not actively solicit their pharmacy customers." *Id*. ¶¶ 160, 258 (emphasis added). Mr. Broderick also confirmed the existence of the no-poach agreement in testimony given to the F.T.C. *Id.* ¶ 156. Another ACI employee, Shane Dorcheus, similarly stated "***we agreed*** to not hire any existing employees" from King Soopers and "to not target King's Pharmacy Customers." *Id.* ¶ 159 (emphasis added).

These detailed factual allegations of multiple emails and statements that senior employees "agreed" ACI would not hire workers from King Soopers or solicit its pharmacy customers constitute direct evidence of the illegal no-poach and non-solicitation agreements. No inference is required to establish the fact of the agreements; the emails plainly state that Defendants "agreed." *See Tunica Web Advertising v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410 (5th Cir. 2007) (email communications showed conspiracy because they contained direct evidence stating that the parties entered into a "gentlemen's agreement" not to deal with another company). Because the Attorney General challenges two agreements reached by an email that is reproduced verbatim in the Complaint, bolstered by allegations of additional emails relaying the agreements to senior executives and/or explicitly referencing their existence, Defendants' cited authority dismissing circumstantial conspiracy allegations is irrelevant. The Complaint's factual allegations amount to the "smoking guns" that so often elude antitrust enforcers—namely, "direct evidence . . . that officials of the defendants had met and agreed explicitly on the terms of a conspiracy . . ." *See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010).

b) The Complaint also posits circumstantial evidence.

In any event, the Complaint alleges ample circumstantial evidence corroborating the existence of the agreements.[11] With respect to the no-poach agreement, the Complaint alleges that Mr. Broderick told another ACI employee, Andy Lukes, that he "wish[ed] [ACI] would have gotten ***an agreement*** from King[Soopers] that they would not poach [ACI] employees ***either***." Compl.

[11] Defendants fault the Attorney General for supposedly failing to allege "plus factors." Mtn. at 24. However, alleging plus factors is only necessary where a complaint alleges parallel conduct and not direct evidence. *See In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 47 (9th Cir. 2022); *Twombly*, 550 U.S. at 556-57.

¶ 158 (emphasis added). Mr. Lukes' email relaying Mr. Broderick's desire to obtain a no-poach agreement in the other direction raises a reasonable inference that Kroger first "got[] an agreement" from ACI that it would not hire striking King Soopers employees.

The Complaint further alleges that Defendants attempted to hide their actions, supporting an inference of misconduct. Mr. Bohn's instruction to recipients not to forward his email (*id*. ¶ 155) suggests a consciousness of guilt and an effort to minimize a paper trail of misconduct. *See SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432 (4th Cir. 2015) ("These alleged attempts to hide their actions could suggest that the defendants knew their actions 'would attract antitrust scrutiny.'"). Mr. Bohn's "Please don't forward" instruction further undermines Defendants' contention that ACI had "legitimate business reasons" not to hire striking workers or solicit King Soopers' pharmacy customers. Mtn. at 22.

c) Defendants' arguments that the Complaint alleges only unilateral conduct raise improper fact disputes.

In an effort to cast the agreements as "unilateral business decisions" by ACI, Defendants argue that the executives referenced in the Complaint "testified under oath that there was no agreement between Kroger and [ACI]" and that ACI had an internal practice of not hiring striking workers. Mtn. at 23. Defendants' assertions based on information outside the Complaint are, at best, fact disputes that cannot be resolved at the pleading stage. *Van Wyk*, 27 P.3d at 386. The Attorney General is not required to prove his case at this stage; rather, he need only make allegations that state a plausible claim for relief. *Twombly*, 550 U.S. at 556; *Deslandes v. McDonald's USA*, *LLC*, 81 F.4th 699, 705 (complaint need not contain enough to win; rather, it need only state a plausible claim). Where there are two plausible explanations for the alleged conduct—one advanced by the defendant and the other by the plaintiff—the complaint survives a

motion to dismiss. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.2011). In any event, Defendants' self-serving testimony is not credible in light of their contemporaneous emails memorializing that they "agreed" and ACI's decision to share its supposed "practices" with a competitor while warning against dissemination to its own employees. Compl. ¶¶ 153, 155, 157-160, 258.

Defendants also appear to suggest that a complaint does not state a cognizable antitrust claim if it is based on an agreement by which only one party refrains from a specified action (e.g., hiring the other party's employees). They cite no case law holding as much, Mtn. at 23-24, and indeed, this is not the law. An unlawful agreement merely requires "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Here, the agreement did not need to be reciprocal because the union struck only Kroger, not ACI. ACI had its reasons for conspiring with Kroger, and the purpose of that conspiracy was unlawful. *See United States v. Suntar Roofing*, *Inc.*, 897 F.2d 469, 473 (10th Cir. 1990) ("an agreement to allocate or divide customers between competitors within the same horizontal market[] constitutes a per se violation of § 1 of the Sherman Act."); *United States v. eBay*, *Inc.*, 968 F. Supp. 2d 1030, 1038-39 (N.D. Cal 2013) (no-hire agreement allocates the labor market and, if naked, may constitute a per se violation of § 1). The companies viewed each other as unique competitors for labor—Kroger was focused on the risk that it might lose employees to ACI during the strike and that the union would pit the companies against one another, while ACI's goal was to help Kroger "hold the line" in its negotiations with the UFCW for the mutual unlawful benefit of both Defendants. Compl. ¶¶ 152, 157.

2. The Complaint adequately alleges an unlawful no-poach agreement "in restraint of trade or commerce."

Defendants also argue that C.R.S. § 6-4-109 exempts the no-poach agreement from

antitrust law. Mtn. at 24-25. Not so. Defendants ignore dispositive Colorado case law establishing that the labor exemption solely safeguards union activity and collective bargaining from antitrust liability, and does not exempt collusion among competing employers from antitrust scrutiny. Defendants' reading of the statute is inimical to the purpose of the antitrust laws, including the Antitrust Act's express purpose of "protect[ing] workers." C.R.S. § 6-4-102(1)(a)(II).

In *People v. N. Ave. Furniture & Appliance*, *Inc.*, 645 P.2d 1291, 1299 (Colo. 1982)—a case cited multiple times by Defendants (*see* Mtn. at 12, 15, 21, 25)—the Colorado Supreme Court held that Colorado's labor exemption (formerly codified at C.R.S. § 6-4-103) applies only "to those concerted **employee activities** arising out of an employment relationship and directed to the improvement of wages, hours of work and other conditions of employment." (Emphasis added). In so holding, the Court adhered to "the basic analytical framework developed by federal courts with respect to the labor exemption in antitrust prosecutions." *Id*. at 1294, 1299.

The federal framework makes clear that the purpose and effect of the labor exemption is to safeguard activities and agreements on the part of labor and similar organizations with respect to their furnishing of labor, and does not provide a safe haven for "employers to ban together for joint action in fixing the wages," or other such illicit agreements. *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605-06 (S.D.N.Y. 1970). Many plaintiffs have brought challenges to unlawful no-poach agreements, none of which has been dismissed under the labor exemption. *See*, *e.g.*, *United States v. DaVita Inc.*, No. 1:21-CR-229, 2022 WL 266759, *3 (D. Colo. Jan. 28, 2022); *Hunter v. Booz Allen Hamilton*, *Inc.,* 418 F. Supp. 3d 214 (S.D. Ohio 2019); *eBay*, 968 F. Supp. 2d at 1039.

As Defendants note (Mtn. at 25), federal law recognizes a nonstatutory labor exemption encompassing agreements among employers in some limited circumstances. *See*, *e.g.*, *Brown v.*

Pro Football, Inc., 518 U.S. 231, 238 (1996). But this exemption only "applies where needed to make the collective-bargaining process work," and does not "insulate from antitrust review every joint imposition of terms by employers." *Id*. at 234, 250. Following *Brown*, the Ninth Circuit in *California ex rel. Harris v. Safeway*, *Inc.*, 651 F.3d 1118 (9th Cir. 2011) held that the nonstatutory exemption did not permit employers to share revenue during a strike, as such an agreement was not approved or regulated by labor law, and was not "necessary to permit meaningful collective bargaining to take place." *Id*. at 1129-30.

Defendants' no-poach agreement clearly falls outside the parameters of *Brown*. Defendants identify no authority establishing that a secret agreement among employers not to hire striking employees is a practice sanctioned by federal labor laws, nor do they argue that the agreement here was "necessary to permit meaningful collective bargaining to take place." *Safeway*, 651 F.3d at 1129-30. Instead, Defendants take the position squarely rejected by *Safeway* that "anything goes" in the context of a labor dispute. *Id*. at 1130; *see* Mtn. at 25. Unable to demonstrate their entitlement to Colorado's labor exemption, Defendants cannot prevail on their motion.

CONCLUSION

The Attorney General respectfully requests that the Court deny Defendants' Motion to Dismiss.

Respectfully submitted this 18th day of April, 2024.

PHILIP J. WEISER
Attorney General

/s/ Arthur Biller
ARTHUR BILLER, 53670*
Assistant Attorney General
STEVEN M. KAUFMANN, 14153*
Deputy Solicitor General
BRYN A. WILLIAMS, 58468*
First Assistant Attorney General
JASON SLOTHOUBER, 43496*
Senior Assistant Attorney General
ROBIN E. ALEXANDER, 48345*
IAN L. PAPENDICK, 57522*
ARIC J. SMITH, 57461*
ELIZABETH HEREFORD, 58252*
CONOR MAY, 56355*
Assistant Attorneys General
SOLEIL BALL VAN ZEE, 59644*
SAVANNAH HOOK, 58152*
Assistant Attorney General Fellows
*Counsel of Record

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS** has been served on all counsel of record through Colorado Courts E-Filing, on April 18, 2024.

s/ Jennifer Reynard
Jennifer Reynard, Senior Paralegal