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STATE OF COLORADO *ex rel.* PHILIP J. WEISER, Attorney General, Plaintiff, v. THE KROGER CO.; ALBERTSONS COMPANIES, INC.; and C&S WHOLESALE GROCERS, LLC, Defendants.	Case Number: 2024CV30459 Div.: 414 Ctrm.:
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DEFENDANTS' MOTION TO DISMISS COUNT I AS MOOT

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Pursuant to this Court's directive at the December 13, 2024 status conference, Defendants The Kroger Co., Albertsons Companies, Inc., and C&S Wholesale Grocers, LLC, move to dismiss Count I of Plaintiff's Complaint as moot.

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

Defendants in good faith have conferred with opposing counsel regarding the grounds for and relief requested in this motion. The parties were unable to reach agreement on the issues, and Plaintiff the State of Colorado intends to oppose this motion.

INTRODUCTION

Count I of Plaintiff's Complaint—which seeks as its sole remedy an injunction barring the merger of Kroger and Albertsons—is moot and should be dismissed for lack of subject matter jurisdiction. The reason is simple: Two other courts have already enjoined the *same merger* in actions brought by the FTC and the State of Washington, and the parties thereafter formally abandoned the transaction by withdrawing their previously filed notifications of the merger under the Hart-Scott-Rodino Act. Thus, any judgment from this Court "would have no practical legal effect upon an existing controversy." *Campbell v. Meyer*, 883 P.2d 617, 618 (Colo. App. 1994). Courts have repeatedly dismissed on mootness grounds actions seeking to enjoin mergers that have already been enjoined by other courts or abandoned by the parties. *E.g.*, *Arcell v. JetBlue Airways Corp.*, 2024 WL 1878171 (1st Cir. Apr. 29, 2024); *United States v. Mercy Health Servs.*, 107 F.3d 632 (8th Cir. 1997); *FTC v. H.J. Heinz Co.*, 164 F. Supp. 2d 659 (D.D.C. 2001). And after Albertsons and Kroger formally withdrew their notifications of the merger, the FTC dismissed its administrative action as moot. Order Dismissing Complaint, *In the Matter of The Kroger Company and Albertsons Companies, Inc.* (Dec. 27, 2024). This Court should do the same.

Nevertheless, Plaintiff urges the Court to issue a purely advisory opinion. *See* Dec. 13, 2024, Status Conf. Tr. at 5-16. That is not a permissible exercise of the Court's jurisdiction. "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not . . . to declare principles or rules of law which cannot affect the matter in issue before it." *Anderson v. Applewood Water Ass'n, Inc*., 409 P.3d 611, 617 (Colo. App. 2016) (citation omitted).

Plaintiff chose to bring this action knowing that the FTC and Washington were pursuing two separate actions to block the same merger, and insisted on a trial date *after* those other cases would be heard. Plaintiff cannot now claim to be surprised that rulings in those cases could lead to mooting this one. The Court should dismiss Count I.

BACKGROUND

A. The Transaction

On October 13, 2022, Kroger and Albertsons agreed to merge. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law ("Pl.'s FOF/COL") ¶ 9 (Nov. 7, 2024). "The Colorado Attorney General, along with other state attorneys general and the Federal Trade Commission, subsequently began a joint investigation of the Proposed Merger." *Id.* On September 8, 2023, Kroger and Albertsons announced that they had entered into an asset purchase agreement with C&S to divest certain assets in connection with the proposed merger. *See id.* ¶ 10. Kroger and Albertsons entered into an amended asset purchase agreement with C&S on April 22, 2024. *See id.* ¶ 11.

B. The Lawsuits Challenging the Transaction

As this Court is aware, Plaintiff's lawsuit is one of three government actions challenging the same merger.

The Federal Action. On February 26, 2024, the FTC, eight states, and the District of Columbia sued Kroger and Albertsons in the United States District Court for the District of Oregon to enjoin the merger pending the administrative proceedings brought by the FTC. *See* Pl.'s FOF/COL ¶ 24; *FTC v. The Kroger Co.*, No. 3:24-CV-347, Dkt. 1 (D. Or. Feb. 26, 2024). The FTC and state plaintiffs sued under Section 7 of the Clayton Act, which mirrors Colorado's antitrust statute. *Compare* 15 U.S.C. § 18 (making it unlawful to "acquire, directly or indirectly, the whole or any part of the stock or other share capital" of another entity where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"), *with* C.R.S. § 6-4-107 (making it unlawful to "acquire directly or indirectly, the whole or any part of the stock, other share capital, or assets" of another entity "if the effect of the acquisition may substantially lessen competition or tend to create a monopoly").

To avoid duplicative litigation, Kroger and Albertsons invited Plaintiff to join the federal action, *see* Ex. 1, Mar. 29, 2024 Letter to Attorney General Weiser *et al*., but Plaintiff refused, *see* Ex. 2, Apr. 25, 2024 Letter from Deputy Solicitor General Kaufmann.[1] Plaintiff acknowledged that it "could have" joined the FTC action but simply chose not to, stating that "there was no requirement on us to do that." Mar. 25, 2024, Status Conf. Tr. at 13. On August 26, 2024, trial began on the FTC and the state plaintiffs' motion for a preliminary injunction, and lasted three weeks. Pl.'s FOF/COL ¶ 25.

[1] All exhibits are to the Declaration of Luke Westerman, which accompanies this motion.

The Washington State Court Action. On January 15, 2024, the State of Washington filed its own complaint seeking to enjoin the same merger in Washington state court. *Id.* ¶ 21. On September 16, 2024, trial began on Washington's motion for a permanent injunction, and lasted three weeks. *See id.* ¶ 22.

The Present Action. Despite participating in the federal merger review process alongside the FTC and Washington, Plaintiff refused to join the federal-court action. Instead, Plaintiff separately challenged the merger, proceeding under materially identical provisions of Colorado law and asserting the same theories as the FTC and Washington, through some of the same expert witnesses. *See id.* ¶¶ 924-35 & n.1713; Pl.'s Pretrial Br. at 3-6 (Sep. 9, 2024); Pl.'s Mot. & Mem. for Prelim. Inj. at 20-22 (Feb. 14, 2024). Plaintiff "agree[d] that" the governing law is the federal "burden-shifting framework from *United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990)," Pl.'s FOF/COL ¶ 924—the same legal framework the Oregon and Washington courts applied.

Plaintiff also insisted on delaying trial in this case until after the two other actions were heard. For instance, in June 2024, Defendants moved to have the preliminary and permanent injunctions in this action combined to avoid two duplicative hearings, and to have the permanent injunction trial commence on August 12, 2024—*before* the federal trial began. *See* June 10, 2024, Case Mgmt. Conf. Tr. at 15. Plaintiff objected to having only one proceeding, and argued that even pushing the date to August 26, the day the federal trial started, was too soon to hold a trial on the merits. *Id.* at 23-24.

On July 23, 2024, Defendants again moved the Court to consolidate the preliminary and permanent injunction proceedings, and sought an "earlier date" than September 30, 2024 to begin

trial, as early as August 12 or August 26, the day the federal trial began. *See* July 23, 2024 Prehr'g Status Conf. Tr. at 7, 16. Plaintiff again vigorously objected to Defendants "trying to speed everything up." *Id.* at 18. Ultimately, Plaintiff agreed to a joint stipulation that removed the preliminary injunction hearing in this case from the calendar, resulting in the federal trial going first, the Washington trial second, and this trial last. *See* Joint Stipulated Order for Temporary Injunctive Relief ¶ 3 (July 24, 2024); Pl.'s FOF/COL ¶ 25 (federal trial commenced August 26), ¶ 22 (Washington trial commenced September 16), ¶ 18 (Colorado trial commenced September 30). Defendants agreed that, no matter what rulings the courts in the other cases issued, they would not close the merger until five business days after this Court ruled on Plaintiff's request for a permanent injunction. *See* Order re: Pl.'s Mot. for Prelim. Inj. (July 25, 2024).

Trial in this case began on September 30 and concluded on October 24, more than a month after the federal trial ended. Pl.'s FOF/COL ¶ 18.

C. The Federal Court Enjoins the Merger

On December 10, 2024, the District of Oregon granted the FTC and state plaintiffs' motion for a preliminary injunction blocking the merger. *See* Joint Notice of Rulings in Parallel Proceedings (Dec. 11, 2024), attaching *FTC v. The Kroger Co.*, No. 3:24-CV-347, Dkt. 524 (D. Or. Dec. 10, 2024). In a 71-page decision, the court held that the transaction is "presumptively unlawful," and that "[t]he proposed merger between defendants Kroger Company and Albertsons Companies, Inc. is enjoined pending the outcome of the administrative proceedings before the Federal Trade Commission." *Id.* at 36, 71.

D. The Washington Court Enjoins the Merger

On the same day the District of Oregon preliminarily enjoined the merger, the Washington court permanently enjoined it. *See* Joint Notice of Rulings in Parallel Proceedings (Dec. 11, 2024), attaching *Washington v. Kroger Co.*, 24-2-00977-9 (Dec. 10, 2024). In a 121-page order, the court held that "the proposed merger is unlawful" and "permanently enjoin[ed] and restrain[ed] Defendants, their affiliates, successors, transferees, assignees and other officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf or in concert with them, from consummating the Proposed Transaction." *Id.* at 121.

E. The Parties Thereafter Formally Abandon the Merger

On December 10, 2024, the same day as the federal and Washington injunctions, Albertsons served a notice of termination regarding the merger agreement. *See* Ex. 3, SEC Form 8-K, Albertsons Companies, Inc. (Dec. 10, 2024), https://bit.ly/4fhkYEh. The next day, Kroger served its own notice of termination. *See* Ex. 4, SEC Form 8-K, The Kroger Co. (Dec. 11, 2024), https://bit.ly/3BtFq6Y.[2] The same day, Kroger also served a notice of termination of the asset purchase agreement with C&S. Dec. 13, 2024, Status Conf. Tr. at 21.

On December 11, 2024, Albertsons issued a press release announcing that it had sued Kroger for allegedly breaching the merger agreement. *See* Ex. 5, Albertsons Companies, *Albertsons Files Lawsuit Against Kroger for Breach of Merger Agreement* (Dec. 11, 2024), https://bit.ly/3DjjlZw. The complaint in Albertsons' lawsuit, filed in the Delaware Court of

[2] Colorado courts routinely take judicial notice of public records. *See, e.g.*, *People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004); *Vento v. Colorado Nat. Bank*, 985 P.2d 48, 52 (Colo. App. 1999); *see also Gross v. Chembio Diagnostics, Inc.*, 2024 WL 2848982, at *1 (D. Nev. June 5, 2024) (taking judicial notice of SEC filings and other public records in addressing whether case seeking to enjoin merger was moot).

Chancery, is premised on "the failure of the Merger." *Albertsons Co., Inc., v. The Kroger Co.*, No. 2024-1276, Compl. ¶ 296 (Dec. 10, 2024).

On December 13, 2024, Albertsons formally withdrew its notification of the merger under the Hart-Scott-Rodino Act, effective December 12, 2024, informing the U.S. government that the merger would not go forward. *See* Ex. 6. Kroger also issued a formal withdrawal notification. *See* Ex. 7.

F. The FTC Dismisses its Administrative Proceeding as Moot

On December 16, 2024, the FTC, Kroger, and Albertsons jointly moved to dismiss the complaint in the FTC's administrative proceeding "because it is now moot." *See* Ex. 8.

On December 27, 2024, the FTC dismissed the administrative action. The Commission noted that Kroger and Albertsons "have informed Complaint Counsel that they have each terminated their proposed acquisition and that both Respondents have withdrawn their Hart-Scott-Rodino Notification and Report Forms regarding the proposed acquisition that was the subject of this proceeding and have no intent to refile." Ex. 9, Order Dismissing Complaint, *In the Matter of The Kroger Company and Albertsons Companies, Inc.*, No. 9428(Dec. 27, 2024).

G. This Court Orders Briefing on Mootness

On December 13, 2024, this Court held a status conference. On the record, Kroger and Albertsons represented to the Court that "[t]he merger agreement has been terminated, and the merger is not going to proceed in Colorado or elsewhere." Dec. 13, 2024, Status Conf. Tr. at 20 (Albertsons' counsel); *see id.* at 19 (Kroger's counsel) ("[T]he merger has been terminated."). C&S also represented to the Court that Kroger had "sent a termination notice to C&S terminating the divestiture agreement." *Id.* at 21. The Court ordered briefing on the jurisdictional question of

whether Count I of Plaintiff's Complaint, which seeks as its only remedy an order enjoining the same merger, is moot. *Id.* at 30-32.

LEGAL STANDARD

"Mootness is a jurisdictional prerequisite that can be addressed at any stage during the proceedings." *Diehl v. Weiser*, 444 P.3d 313, 316 (Colo. 2019). A lawsuit seeking injunctive relief becomes moot "when prospective relief is unnecessary to remedy an existing controversy or prevent its recurrence." *State Bd. of Chiropractic Exam'rs v. Stjernholm*, 935 P.2d 959, 970 (Colo. 1997).

ARGUMENT

I. COUNT I IS MOOT BECAUSE IT SEEKS TO ENJOIN A MERGER THAT TWO COURTS HAVE ALREADY ENJOINED AND THE PARTIES HAVE ABANDONED

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not . . . to declare principles or rules of law which cannot affect the matter in issue before it." *Anderson v. Applewood Water Ass'n, Inc.*, 409 P.3d 611, 617 (Colo. App. 2016) (citation omitted).

"When an actual controversy no longer exists, an issue becomes moot." *DePriest v. People*, 487 P.3d 658, 662 (Colo. 2021). "A case is moot when a judgment, if rendered, would have no practical legal effect upon an existing controversy." *Campbell v. Meyer*, 883 P.2d 617, 619 (Colo. App. 1994); *accord Stjernholm*, 935 P.2d at 970 (same). Once a claim is moot, "[a]ny decision on the merits would result in an advisory opinion, and [courts] should not issue such opinions." *People in Interest of Vivekanathan*, 338 P.3d 1017, 1020 (Colo. App. 2013).

Under these black-letter principles, a decision by this Court on whether to enjoin the Kroger and Albertsons merger would have absolutely "no practical effect" on any existing controversy.

The merger has been enjoined by two other courts and formally abandoned by the parties. Simply put, the Kroger-Albertsons merger is dead.

Under similar circumstances, courts routinely dismiss lawsuits seeking to enjoin mergers as moot. In *Arcell v. JetBlue Airways Corp.*, 2024 WL 1878171, at *1 (1st Cir. Apr. 29, 2024), for instance, the First Circuit dismissed a parallel antitrust action as moot given the "entry of judgment [in a separate action] enjoining the merger, the stipulated dismissal of the airlines' appeal of that injunction ruling, and the publicly-announced abandonment of the merger." And in *FTC v. H.J. Heinz*, 164 F. Supp. 2d 659 (D.D.C. 2001), the United States District Court for the District of Columbia explained that the plaintiff had "no warrant . . . to seek an injunction maintaining the 'status quo' when the status quo does not include merger plans." *Id.* at 660; *cf. also Gross v. Chembio Diagnostics, Inc.*, 2024 WL 2848982, at *3 (D. Nev. June 5, 2024) ("The Court also agrees with Defendants that Plaintiff's request for an injunction enjoining the merger is moot because the merger already happened.").

Courts have dismissed merger actions as moot even where the parties urged the court to issue an advisory opinion. In *United States v. Mercy Health Services*, 107 F.3d 632 (8th Cir. 1997), a party to a merger announced in a press release "that it had abandoned its proposed merger," while an appeal of an order denying a motion to enjoin the merger was pending. *Id.* at 635. Despite that the merger had been abandoned, the FTC and defendants—like Plaintiff here—urged the appellate court to issue a decision on the theory that doing so would resolve issues that could provide guidance in future potential merger transactions. *Id.* The Eighth Circuit refused and dismissed the appeal as moot: "We may not consider an appeal, even if all of the parties involved wish us to, if the relief ultimately obtained would be meaningless and the resultant opinion no more than

advisory." *Id.* at 636. The court explained that, "[w]hile we understand that the parties in this case have expended significant resources in this litigation, and that each would like a favorable decision from this Court to influence possible future litigation, the parties' mere desire for a ruling does not revive a dead case into a live controversy. Now that the United States has been given all of the relief it has sought by its party opponents' decision to abandon the merger, the United States has no continuing stake in this litigation." *Id.* at 637.

The same is true here. The court in the federal action found the proposed Kroger-Albertsons merger "presumptively unlawful," and contrary to "[t]he overarching goals of antitrust law," and issued a preliminary injunction. *FTC v. The Kroger Co.*, No. 3:24-CV-347, Dkt. 524 at 36, 71 (D. Or. Dec. 10, 2024). The court in the Washington action held "the proposed merger unlawful" and issued an order "permanently enjoining and restraining" the transaction. *Washington v. Kroger Co.*, 24-2-00977-9 at 121 (Dec. 10, 2024). Though Defendants disagree with those decisions, they provided the same relief Plaintiff sought here: "The proposed merger of Kroger and Albertsons must be enjoined." *E.g.*, Pl.'s FOF/COL at 1. Given that the parties thereafter formally abandoned the merger, Plaintiff thus "has been given all of the relief it has sought." *Mercy Health Servs.*, 107 F.3d at 637; *see New York v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (affirming dismissal of state's request for injunctive relief where another court had already granted "all of the injunctive relief requested in the present case"); *Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977) (per curiam) ("[A]ny application for injunctive relief is now moot, in view of [a related state-court injunction]."); *Does 1-2 v. Hochul*, 2021 WL 4172915, at *1 (E.D.N.Y. Sept. 14, 2021) (denying motion for a temporary restraining order as moot where another federal district court had already "granted a TRO awarding the same relief that Plaintiffs

seek here—namely, a TRO enjoining the State of New York from enforcing" vaccine regulation); *Eggers v. City of Key West*, 2008 WL 5070261, at *7 (S.D. Fla. Nov. 25, 2008) (request for injunction moot because challenged acts were already enjoined by another court); *Kramer v. NCS Pearson, Inc.*, 2003 WL 21640494, at *3 (D. Minn. July 9, 2003) (denying motion for TRO as moot where judge in another district already granted the same relief).

In short, a litigant's mere desire for a decision that it thinks could theoretically "influence possible future litigation . . . does not revive a dead case into a live controversy." *Mercy Health Servs.*, 107 F.3d at 637; *accord Cameron v. Carroll & Co.*, 138 Colo. 432, 433 (1959) (rejecting government agency's request for court to issue ruling to provide guidance on vague statute in action that became moot while on appeal). The Court should dismiss Count I as moot.

II. NO EXCEPTION TO MOOTNESS APPLIES

Plaintiff contends that this Court should enter an order enjoining a merger that is already enjoined and abandoned under two exceptions to the mootness doctrine. *See* Dec. 13, 2024, Status Conf. Tr. at 13-16. Neither exception applies.

A. The Voluntary Cessation Exception Does Not Apply

Plaintiff argues that the "voluntary cessation exception" to mootness permits the Court to issue an advisory opinion. *Id.* at 13. That is wrong. "The voluntary cessation exception 'exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct.'" *Portley-El v. Colo. Dep't of Corr.*, 519 P.3d 1119, 1123 (Colo. App. 2022) (citation omitted). "The rationale behind this exception is obvious: If a defendant's voluntary cessation of a challenged practice could deprive a court of its power to determine the legality of the practice, then in each case, the defendant would be 'free to return to

[its] old ways.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) and citing federal decisions).

Where a voluntary cessation is not the result of such gamesmanship, the exception does not apply. Rather, "courts have declined to apply the doctrine when the facts do not suggest any 'arguable manipulation of [a court's] jurisdiction.'" *Pub. Citizen, Inc. v. Fed. Energy Regul. Comm'n*, 92 F.4th 1124, 1128 (D.C. Cir. 2024) (citing cases). Thus, the voluntary cessation exception is inapplicable where the cessation stems from external factors, such as a court order prohibiting the conduct that was abandoned. *See Mokdad v. Sessions*, 876 F.3d 167, 171 (6th Cir. 2017) ("[T]he 'voluntary cessation' exception to mootness has no play in this case. The voluntary-cessation doctrine does not apply here because the government's actions were not voluntary. . . . TSC thus made the determination that Mokdad is not currently on the No Fly List to comply with a court order—hardly a voluntary action."); *see also Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011) ("The FTC's abandonment of the Extended Enforcement Policy was not voluntary. The agency most assuredly did not alter its definition of 'creditor' in order to avoid litigation. Rather, intervening legislation simply nullified the FTC's policy statement that all lawyers who bill their clients after services are rendered are covered by the Red Flags Rule and the FACT Act.").

Here, the parties did not abandon the merger out of gamesmanship to avoid this Court's review. Rather, after two hard-fought trials, two courts *blocked* the merger as violating state and federal antitrust laws. The Washington court issued a *permanent* injunction. And there is no possibility that the parties will attempt to resurrect the now-enjoined merger. The day the merger was enjoined, Albertsons sent Kroger a termination notice and sued Kroger for allegedly breaching

the merger agreement. Both Kroger and Albertsons have formally and unequivocally abandoned the merger and have confirmed that on the record in representations to this Court. Under these circumstances, it is plain that Kroger and Albertsons did not abandon the merger as an effort to obtain a dismissal from this Court so they could carry out the merger later, and thus the voluntary cessation exception to mootness does not apply.

The situation here is nothing like that in *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989), the principal decision Plaintiff invokes. *See* Dec. 13, 2024, Status Conf. Tr. at 14-15.[3] There, the court found an appeal was not moot after parties to a merger transaction carefully and narrowly asserted no "present intention" to proceed, and that position "seem[ed] timed to head off an adverse determination on the merits." 867 F.2d at 106. Courts have found *R.C. Bigelow* inapposite where, as here, the abandonment of the merger came after orders enjoining the merger and public announcements unequivocally terminating the merger, and was thus not a mere effort to evade a decision on the merits. *See Mercy Health Servs.*, 107 F.3d at 637 n.5 (finding *R.C. Bigelow* inapposite and dismissing as moot claim seeking to enjoin merger); *Arcell*, 2024 WL 1878171, at *1 (similar). The Second Circuit itself cabined *R.C. Bigelow* to situations where the abandonment of a transaction was "a strategic litigation ploy" to avoid a ruling on the merits. *E.I.*

[3] Plaintiff also relies on *May Department Stores Co. v. State*, 863 P.2d 967 (Colo. 1993), and *Old Homestead Bread Co. v. Marx Baking Co.*, 108 Colo. 375 (1941). *See* Dec. 13, 2024, Status Conf. Tr. at 13-14. Those cases are inapposite. The courts there did not even address mootness, and merely made the unremarkable observation that a defendant's hollow promise to discontinue unlawful conduct is insufficient by itself to secure a dismissal of a claim, particularly "when abandonment seems timed to anticipate suit, and there is a probability of resumption." *May Dep't Stores*, 863 P.2d at 979 n.24 (citation omitted); *see also Old Homestead Bread*, 108 Colo. at 381 (quoting *Bradford Baking Co. v. Weber Baking Co.*, 185 P. 417, 418 (Cal. Dist. Ct. App. 1919), which found that "a voluntary abandonment would not afford the plaintiff adequate relief, as the defendant might later decide to resume the use of the [improper] label."). As noted, the record here shows unequivocally that the abandonment of the merger was not an effort to evade a ruling from this Court and the merger cannot reasonably be expected to recur.

Dupont de Nemours & Co. v. Invista B.V., 473 F.3d 44, 47 (2d Cir. 2006) ("The doctrine of voluntary cessation will not preserve an otherwise moot claim where, as here, the party that alleged wrongdoing claims the action is moot, and where the cessation by the alleged wrongdoer was not 'a unilateral action taken for the deliberate purpose of evading a possible adverse decision by this court.'" (quoting *R.C. Bigelow*, 867 F.2d at 106)). Plaintiff cannot come close to making that showing here. The voluntary cessation exception therefore does not permit review of Plaintiff's moot claim.

B. The Public Importance Exception Does Not Apply

Plaintiff alternatively invokes the "public importance exception" to mootness, asserting that "the Court can decide an issue that is otherwise moot when the case involves an issue of great public importance." Dec. 13, 2024, Status Conf. Tr. at 15-16. That too fails.

Even if the "public importance" exception applied in the trial-court context,[4] that exception traditionally is reserved for cases in which the constitutional rights of the parties or others would be "in jeopardy if no ruling is rendered." *Bestway Disposal v. Pub. Utils. Comm'n*, 184 Colo. 428, 431 (1974); *accord Campbell*, 883 P.2d at 619 (declining to apply exception where "plaintiffs have not demonstrated any adverse consequences [on the constitutional rights of others] that would compel a court to invoke this exception"); *Vail Corp. v. Vail Town Council*, 2024 WL 3872806, at *4 (Colo. App. Aug. 8, 2024) ("This exception often involves matters that can affect a great number of individuals and affect constitutional rights or important institutions and procedures.").

[4] *See, e.g.*, *Campbell*, 883 P.2d at 619 ("[A]n *appellate court* may hear a moot case if the matter involves a question of great public importance or an allegedly recurring constitutional violation." (emphasis added)); *People v. Vasquez*, 2024 WL 4850705, at *4 (Colo. App. Nov. 21, 2024) ("*Appellate courts* may review a moot case if it involves 'a question of great public importance or an allegedly recurring constitutional violation.'" (emphasis added)).

An advisory opinion on whether a nonexistent merger can proceed comes nowhere close to satisfying that standard. No remaining issue in this case implicates *anyone's* constitutional rights. Nor will a decision on the viability of a now defunct merger affect the lives of any—much less a "great number" of—people if there is no ruling from this Court, especially given that two courts have already issued lengthy opinions enjoining the merger and preventing the purported anticompetitive effects from the merger. *Vail Corp.*, 2024 WL 3872806, at *4.

Beyond that, the "public importance" exception applies only to legal questions that are not dependent on the unique facts of a given case, because issues "peculiarly geared to the particular set of circumstances" are a poor vehicle to provide broad guidance on important questions. *W-470 Concerned Citizens v. W-470 Highway Auth.*, 809 P.2d 1041, 1044 (Colo. App. 1990). This case is highly fact-specific. Plaintiff's proposed findings of fact and conclusions of law include *259 pages* of proposed factual findings for Count I alone. And Plaintiff concedes that the "fundamental antitrust questions" at issue in this case "are unique to the factual record in this litigation." Pl.'s FOF/COL ¶ 1064. There is no "public importance" to answering intensely fact-specific questions about factual circumstances that no longer exist.

Plaintiff contends that the Court should issue a ruling to provide future guidance on the constitutional arguments raised by Defendants. Dec. 13, 2024, Status Conf. Tr. at 15. But the Court already issued a decision on these questions in the context of Defendants' motion to dismiss. *See* Order re: Defs.' Mot. to Dismiss at 13-23 (June 26, 2024). And in its post-trial proposed conclusions of law, Plaintiff took the position that "[n]o evidence presented at trial disturbs these rulings." Pl.'s FOF/COL ¶¶ 1107, 1118. Plaintiff's strategic pivot on this issue to avoid dismissal does not justify this Court issuing an advisory opinion where no mootness exception applies.

CONCLUSION

For the foregoing reasons, the Court should dismiss Count I of Plaintiff's Complaint as moot. In addition, the Court should dismiss C&S from this action, as C&S is not named as a defendant in Count II, Plaintiff's only remaining cause of action.

Dated: January 8, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

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 January 8, 2024, including the following:

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