DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202 (303) 606-2300	DATE FILED March 5, 2025 1:15 PM CASE NUMBER: 2024CV30459
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** ▲ Case Number: 24CV30459 Division: 414
ORDER RE: DEFENDANTS' MOTION TO DISMISS COUNT I AS MOOT	

THIS MATTER is before the Court on Defendants' attached Motion to Dismiss Count I as Moot filed on January 8, 2025 ("Motion"). The Motion has been fully briefed. THE COURT having considered the Motion, responsive pleadings, the attached exhibits, the applicable legal authority, the Court's file, and being otherwise fully advised in the premises, HEREBY GRANTS Defendants' Motion for the following reasons:

BACKGROUND

Plaintiff, State of Colorado, through its Attorney General, Philip J. Weiser, ("State") brought this cause of action ("Count I") for declaratory and injunctive relief under Section 107 of the Colorado Antitrust Act, C.R.S. § 6-4-107 (2024), against Defendants The Kroger Co. ("Kroger"), Albertsons Companies, Inc. ("Albertsons"), and C&S Wholesale Grocers, LLC ("C&S"). The State sought to prevent Kroger and Albertsons from merging into one larger company, as well as to prevent C&S from acquiring certain Kroger and Albertsons' assets in Colorado. Notably, the State's lawsuit is one of three government actions challenging the same merger. The Federal Trade Commission ("FTC") filed suit in federal district court seeking a preliminary injunction of the merger pending the administrative proceedings brought by the FTC, and the State of Washington sued to permanently enjoin the merger in Washington state court.

Several months into discovery, the parties stipulated to a preliminary injunction and proceeded to trial on the merits. Of the three cases brought against Defendants, the 16-day trial before this Court was held last.

On December 10, 2024, after the close of trial but before this Court issued its ruling, both the United States District Court for the District of Oregon and the Washington State Court enjoined the merger. *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, 2024 WL 34000098 (D. Or. Dec. 10, 2024) (the "Oregon Order"); *Washington v. Kroger Co.*, 24-2-00977-9 (Dec. 10, 2024) (the "Washington Order"). That same day, Albertsons served a notice terminating the merger agreement, and Kroger terminated its asset purchase agreement with C&S.

On December 11, 2024, Albertsons issued a press release announcing it had sued Kroger for allegedly breaching the merger agreement. The complaint, filed in the Delaware Court of Chancery, is based on the "failure of the Merger." *Albertsons Co., Inc., v. The Kroger Co.*, No. 2024-1276, Compl. ¶ 296 (Dec. 10, 2024). Two days later, on December 13, 2024, Albertsons formally withdrew its Hart-Scott-Rodino Act ("HSR") merger notification, effective December 12, 2024, informing the U.S. government that the merger would not proceed. Kroger also submitted a formal withdrawal notification.

On December 16, 2024, the FTC, Kroger, and Albertsons jointly moved to dismiss the FTC's administrative proceeding, stating the case was now moot. The FTC dismissed the action, noting that Kroger and Albertsons had formally terminated their proposed acquisition, withdrawn their HSR filings, and had no intent to refile. *See* Order Dismissing Complaint, In the Matter of The Kroger Company and Albertsons Companies, Inc., No. 9428 (Dec. 27, 2024).

LEGAL STANDARD

This Court lacks jurisdiction to rule on a matter that no longer presents a live case or controversy. "Mootness is a jurisdictional prerequisite that can be addressed at any stage during the proceedings." *Diehl v. Weiser*, 2019 CO 70, ¶ 9. A claim is moot when any judgment rendered will have no practical effect upon an existing controversy. *Education ReEnvisioned BOCES v. Colorado Springs Sch. Dist. 11*, 2024 CO 29, ¶ 26. "When issues become moot because of subsequent events . . . courts will generally decline to render an opinion on the merits." *Diehl*, ¶

10. "There are a number of exceptions to the mootness doctrine." *Portley-El v. Colo. Dep't of Corr.*, 2022 COA 86, ¶ 19; *see also Grossman v. Dean*, 80 P.3d 952, 960 (Colo. App. 2003). "First, a court may resolve what is an otherwise moot case when the issue involved is one that is capable of repetition, yet evading review." *Grossman*, 80 P.3d at 960. "Second, a court may decide a moot case involving issues of great public importance or recurring constitutional violations." *Grossman*, 80 P.3d at 960. Finally, "a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice." *Nakauchi v. Cowart*, 2022 COA 77, ¶ 25.

ANALYSIS

I. MOOTNESS DOCTRINE

Defendants argue that Count I is moot because any ruling would have no practical effect on an existing controversy. The State seeks a declaration that a merger between Kroger and Albertsons would violate the Colorado Antitrust Act.[1] However, declaratory relief is available only when there is a currently justiciable issue, not merely the possibility of a future claim. *Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 698 (Colo. 2002). A plaintiff must assert present and cognizable rights, requiring an adjudication based on established facts rather than a hypothetical dispute. *Farmers Ins. Exch. v. Dist. Court*, 862 P.2d 944, 947 (Colo. 1993). Courts lack jurisdiction to issue advisory opinions where a ruling would provide no present relief. *Farmers*, 862 P.2d at 947; *Bickel v. City of Boulder*, 885 P.2d 215, 234 (Colo. 1994).

A case becomes moot when an actual controversy ceases to exist. *DePriest v. People*, 2021 CO 40, ¶ 8. If an event renders it impossible for the court to grant effectual relief, the claim must be dismissed. *DePriest*, ¶ 8. Here, the controversy vanished when Defendants abandoned the merger, which was enjoined by two courts on December 10, 2024. *See* Oregon Order; *see also* Washington Order. Despite the State's suggestion that the Merger Agreement "may still be

[1] While the State's requested injunctive relief effectively seeks to bar Kroger and Albertsons from merging now or in the future, the Court notes that any injunction it might have granted would have been narrowly tailored to address only the specific facts of this case and limited to the proposed merger and divestiture currently at issue. Complaint at 35 ("Plaintiff respectfully requests that this Court . . . [e]njoin and restrain Defendants and all persons acting on their behalf from consummating the Proposed Merger *or from carrying out any other transaction, contract, agreement, plan, or understanding that would combine Kroger with [Albertsons]*") (emphasis added).

operative," Defendants publicly abandoned the deal, withdrew their HSR filings, and initiated litigation over the break-up fee—not the viability of the agreement itself. *Albertsons Co., Inc., v. The Kroger Co.*, No. 2024-1276, Compl. ¶ 296 (Dec. 10, 2024). Additionally, the U.S. District Court for the District of Oregon enjoined the merger "pending the outcome of administrative proceedings before the FTC," after which the FTC dismissed its case as moot.

The Court's role is to resolve actual controversies, not to issue opinions that have no practical effect. *See Anderson v. Applewood Water Ass'n, Inc.*, 2016 COA 162, ¶ 26. Since any ruling here would amount to an advisory opinion, dismissal is required. *See DePriest*,¶ 8; *Campbell v. Meyer*, 883 P.2d 617, 619 (Colo. App. 1994); *State Bd. of Chiropractic Ex. v. Stjernholm*, 935 P.2d 935, 970 (Colo. 1997) (en banc). The Kroger-Albertsons merger is defunct, and the State has already received the relief it sought—the merger was enjoined by other courts. A ruling here would serve no purpose. *United States v. Mercy Health Servs.*, 107 F.3d 632, 637 (8th Cir. 1997). Courts routinely dismiss claims as moot when another court has already granted the requested relief. *See New York v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987); *Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977); *Eggers v. City of Key West*, 2008 WL 5070261, at *7 (S.D. Fla. Nov. 25, 2008).

When a merger is enjoined and subsequently abandoned, any related request for declaratory or injunctive relief is moot. *See Mercy Health Servs.*, 107 F.3d at 635; *Arcell v. JetBlue Airways Corp.*, 2024 WL 1878171, at *1 (1st Cir. Apr. 29, 2024). Courts have dismissed such cases as moot even when parties sought advisory rulings for potential future guidance. In *Mercy Health*, the Eighth Circuit refused to rule on an abandoned merger, rejecting arguments that a decision would aid future litigation. 107 F.3d at 636–37. The same applies here: two courts enjoined the merger, and Defendants formally abandoned it. The State does not seek a declaration regarding the validity of a general statute, ordinance, or regulation that might govern future mergers. *Cf. Russell v. City of Central*, 892 P.2d 432 (Colo. App. 1995) (holding that a declaratory judgment was not moot where the validity of a generally applicable amendment was challenged). Instead, it asks the Court to assess competitive harm in a market that will never materialize and to enjoin a merger that no longer exists—despite having neither challenged the validity of state antitrust law nor sought relief beyond halting the merger itself. With Defendants' abandonment of the

transaction, the State has already obtained all the relief it requested, leaving nothing for the Court to adjudicate beyond a hypothetical dispute.

II. EXCEPTIONS TO THE MOOTNESS DOCTRINE

a. Public Importance Exception

The State invokes the "great public importance" exception to the mootness doctrine, asserting that both statutory interpretation issues of first impression and the defendants' constitutional challenges warrant its application. However, Defendants contend—and the Court agrees—that the State has failed to establish the availability of this exception when a case becomes moot at the trial court level.

The sole purpose of the public importance exception is "to establish a precedent for future action by trial courts," a function reserved for appellate courts. *Rocky Mountain Ass'n of Credit Mgmt. v. Dist. Ct. of City & Cnty. of Denver, in Second Jud. Dist.*, 565 P.2d 1345, 1346 (Colo. 1977); *Larimer Cnty. Bd. of Equalization v. 1303 Frontage Holdings LLC*, 2023 CO 28, ¶ 67 (finding under the public importance exception, "we may choose to decide an issue *so as to establish* a precedent for future action by trial courts" (emphasis added) (citation omitted)). However, trial court decisions do not create binding precedent for other trial courts. Because a trial court ruling could *never* fulfill this purpose, there is no justification for applying the public importance exception at the trial court level. The State cites no case—nor has the Court identified one—where the exception has been applied at the trial court level.

The cases cited by the State further emphasize the exceptions precedential setting purpose. In *Frontage Holdings,* 2023 CO 28, ¶ 67, the Colorado Supreme Court applied the public importance exception to establish precedent on a legal question with the potential to impact Colorado's entire property tax system—affecting every taxpayer and taxpaying authority in the state—as well as multiple pending lawsuits raising the same issue. Similarly, in *Education reEnvisioned BOCES v. Colorado Springs School District 11*, 2024 CO 29, ¶ 28, the Colorado Supreme Court addressed whether a board of cooperative education services ("BOCES") could open a new school without a school district's consent. The Court found the issue significant because other BOCES might seek to exercise similar authority in the future, as evidenced by the

plaintiff's stated intent to continue opening schools like Orton Academy. *Education reEnvisioned*, ¶ 29. The same principle was applied in *Feigin v. Colorado Nat'l Bank, N.A.*, where the Court recognized the exception when matters of public interest were likely to recur, emphasizing the "reasonable certainty" that the same parties would litigate the issue again. 897 P.2d 814, 817 (Colo. 1995). In each case, the legal questions were recurring, and the Court's decision established precedent with substantial statewide implications.

To the extent the State implicitly argues that this Court should decide its now-moot complaint seeking to block a merger that no longer exists—so that one of the parties could appeal and obtain a precedential ruling from a higher court—the logical flaws in this reasoning are clear. If this Court were to issue a ruling on Count I, the State would necessarily lose, as the Court could not find any threat to competition in Colorado from a non-existent merger. Such a ruling would be of no value to other trial courts, even if it had precedential effect.

Further, appellate review of that decision would be unavailable, as there would be no aggrieved party. Appeals brought solely to generate precedent are barred. The Colorado Supreme Court has made clear:

> Appeals are not allowed for the mere purpose of delay, or to present purely abstract legal questions however important or interesting, but to correct errors injuriously affecting the rights of some party to the litigation. Only parties aggrieved may appeal. The word 'aggrieved' refers to a substantial grievance; the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation.

Miller v. Reeder, 401 P.2d 604, 605 (Colo. 1965); *see also City and County of Broomfield v. Farmer Reservoir and Irr. Co.*, 235 P.3d 296, 302 (Colo. 2010) (holding that appealing merely to obtain a precedential ruling is not a valid ground for appeal). Because the State's implied argument leads to a legally impermissible result, the public importance exception is inapplicable in this context.

Regardless of whether the exception is available at the trial court level, the State raises several questions of statutory interpretation, including the appropriate method for defining the

relevant market, the proper framework for analyzing divestiture, and the scope of available remedies under the Colorado Antitrust Act. The State contends that these are not abstract or esoteric legal questions but rather substantive issues with the potential to determine the outcome of future merger cases and that industry participants contemplating future mergers will look to it for guidance on the scope of the Colorado Antitrust Act.

First, the State's request for guidance on future state merger cases is unpersuasive. While the precise contours of the public importance exception to mootness remain undefined in Colorado, prior cases have applied it only where binding precedent was necessary to resolve recurring constitutional or statutory issues that could broadly impact the rights of many if no ruling is rendered. *Bestway Disposal v. Public Utilities Commission*, 520 P.2d 1039, 1040 (Colo. 1974) (emphasizing the need for authoritative decisions when an issue is likely to recur and affects a broad group). In contrast, state merger litigation is rare, and any decision by this Court would not bind other courts.

Second, the State's assertion that a ruling from this court would resolve Defendants' constitutional challenges is equally unpersuasive. The State acknowledges that the Court has already addressed Defendants' constitutional issues in its Order issued on June 26, 2024, and merely contends that a Commerce Clause sub-issue remains unresolved. However, extensive rulings from Oregon and Washington—though non-binding, just as an opinion from this Court would be—have already ruled on identical arguments raised by Defendants.[2] Moreover, because the Colorado Antitrust Act closely mirrors the federal Clayton Act, ample persuasive authority exists to resolve any remaining questions. If further clarification is needed, it should come from the legislature, not through a nonbinding advisory opinion from this Court.

Finally, the State erroneously equates "great public importance"—a legal term of art that serves as an exception to the mootness doctrine—with the level of public attention this case has received. While the State argues that the case carries special significance for Coloradans, profoundly affecting virtually every resident, public interest in a case does not confer legal significance under the mootness doctrine. The concept of "great public importance" is not

[2] Although the parties' briefing does not address whether the doctrine of *res judicata* affects this Court's ability to rule on identical issues raised in parallel litigation, it is highly likely that the Washington Order precludes this Court from considering many of Defendants' constitutional challenges.

measured by media coverage or public discourse; instead it turns on the broader legal and policy implications of a court's ruling. Here, it defies logic to suggest that resolving novel legal questions in a now-abandoned merger case remains essential to the public interest when no merger has occurred or will ever occur, and thus no change—harmful or otherwise—will take place. Any alleged harm was hypothetical from the outset, as merger law is inherently prophylactic, requiring courts to assess the likelihood of future competitive harm in a post-merger market. Those speculative threats vanished the moment the merger was abandoned. With no actual impact on Colorado residents to address and no practical benefit to issuing a ruling on a now-impossible market scenario, the case fails to meet the legal standard for an issue of "great public importance" under the mootness exception.

b. Voluntary Cessation Exception

The State also invokes the voluntary cessation exception to the mootness doctrine. This exception prevents a defendant from evading judicial review by ceasing a challenged practice only to resume it later. As courts have explained, if a defendant's voluntary cessation of allegedly unlawful conduct automatically mooted a case, the defendant would be "free to return to [its] old ways." *Portley-El v. Colo. Dep't of Corr.*, 2022 COA 86, ¶ 19 (citation omitted). However, where the cessation is not the result of gamesmanship, the exception does not apply. Courts have consistently declined to apply this exception in the absence of an "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).

The voluntary cessation exception is particularly inapplicable where a party ceases conduct due to external factors, such as a court order prohibiting the challenged practice. See, e.g., *Mokdad v. Sessions*, 876 F.3d 641, 648 (6th Cir. 2017) (holding that the voluntary cessation doctrine does not apply where a party's actions were compelled by a court order rather than taken voluntarily); *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011) (finding no voluntary cessation where intervening legislation, rather than the agency's choice, nullified the disputed policy).

The State argues that, despite Defendants' decision to abandon the merger, they remain free to return to their old ways. *Portley-El*, ¶ 19. The Court disagrees. This case does not arise from any past or ongoing anticompetitive conduct by Defendants; instead, it concerns the potential

competitive harm their proposed merger was alleged to pose. Unlike cases where a party ceases challenged conduct only to resume it later, merger litigation is inherently preemptive—addressing what parties seek to do rather than what they have already done. Here, with the merger abandoned, the alleged threat has been entirely eliminated, leaving no conduct to enjoin and nothing to which Defendants could revert.

Moreover, Defendants did not abandon the merger to evade judicial review. Two courts—after a full trial on the merits and a separate preliminary injunction hearing—blocked the merger as violating state and federal antitrust laws. The Washington court issued a permanent injunction. There is no possibility that the parties will revive the enjoined merger. The day the injunction was entered, Albertsons sent Kroger a termination notice and sued Kroger for breach of the merger agreement. Both parties have formally and unequivocally abandoned the merger, confirming as much on the record before this Court. *See JetBlue Airways*, 2024 WL 1878171, at *1 (dismissing case as moot after public abandonment of merger).

Under these circumstances, it is clear that Defendants did not abandon the merger as a tactical maneuver to obtain dismissal while secretly planning to proceed with the deal later. Because there is no reasonable expectation that the alleged antitrust violation will recur, the voluntary cessation exception does not apply. *See Portley-El*, ¶ 20 (holding that voluntary cessation moots an issue where "interim relief has irrevocably eradicated the effects of an alleged violation" and there is no reasonable expectation of recurrence). The Court need not enjoin a merger that has been definitively abandoned and cannot be resurrected.

c. Capable of Repetition yet Evading Review Exception

The "capable of repetition, yet evading review" exception does not apply when the challenge concerns a specific application of the law rather than the law itself. *See Freedom from Religion Foundation, Inc. v Romer*, 921 P.2d 84, 88 (Colo. App. 1996). The exception is applicable in cases where (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) that there is a reasonable expectation that the same complaining party will be subjected to the same action again. *See People v. Garcia*, 2014 COA 85, ¶ 22. Although, at a glance, the first element may seem applicable here, the second is clearly not. Defendants have shown that the merger is effectively dead. They have publicly abandoned the

merger, withdrawn their HSR filings, and terminated the divestiture agreement between Kroger and C&S. As such, there is no reasonable expectation that Defendants would attempt to revive this merger.

To be clear, while it is possible that Kroger and Albertsons might seek to merge again in the future, any such attempt would not be influenced or precluded by a ruling from this Court at this time. Even if the State were granted injunctive relief, this would not bar Kroger and Albertsons from pursuing a future merger. *See Rome v. Mandel*, 2016 COA 192M, ¶ 73 (vacating injunction that was not narrowly tailored to address the specific conduct at issue); *see also Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380, 383 (Colo. App. 1983) (modifying an injunction because its terms were more restrictive than as required by the facts). The Court's decision would only address the specific merger attempt initiated in 2022, which has now been abandoned, and would determine whether that particular merger was anticompetitive. Given the ever-fluctuating landscape of the grocery industry, a merger deemed anticompetitive today could potentially be procompetitive tomorrow. *Mercy Health Services*, 107 F.3d at 637.

Furthermore, a finding that the State failed to prove the now-abandoned merger would have had anticompetitive effects, would not grant Kroger and Albertsons a blanket, permanent right to merge at will, regardless of future developments. *Id.* It is possible that a merger that was permissible in the past might become anticompetitive in the future. A favorable decision for Defendants here would not provide an indefinite license for them to merge without regard to changing circumstances. The State would still have the opportunity to investigate any future merger attempt for anticompetitive effects and could seek injunctive relief to prevent it. *Id.* Should such a case arise, the court would assess the relevant facts at that time to determine if the new merger would have anticompetitive effects.

CONCLUSION

In light of these considerations, the Court declines to issue a ruling with no current relevance based solely on the speculative potential utility it might have in an uncertain future. While the Court recognizes the State's significant investment in this litigation and its desire for a decision to guide future actions, the mere wish for a ruling does not transform a moot issue into a live controversy. Because the State has been given all of the relief sought by its party opponents'

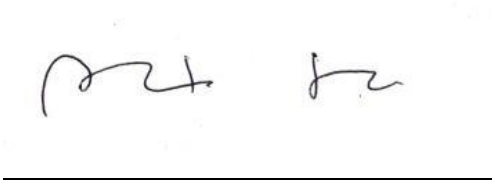
decision to abandon the merger, the State has no continuing stake in the litigation of Count I. The Court concludes, in all of the circumstances, that Count I is moot.

Accordingly, the Court HEREBY GRANTS Defendants' Motion to Dismiss Count I as Moot. It is further ORDERED that Defendant C&S is DISMISSED from this action, as C&S is not a named defendant in the only remaining cause of action.

SO ORDERED.

DATED: March 5, 2025

BY THE COURT:



ANDREW J. LUXEN
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 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 ▲ Case Number: 2024CV30459 Div.: 414 Ctrm.:
Randall H. Miller, # 33694 Luke Westerman, # 51243 ARNOLD & PORTER KAYE SCHOLER LLP 1144 Fifteenth Street, Suite 3100 Denver, Colorado 80202 Phone: (303) 863-2363 Fax: (303) 863-2301 randy.miller@arnoldporter.com luke.westerman@arnoldporter.com Matthew M. Wolf (admitted *pro hac vice*) Sonia K. Pfaffenroth (admitted *pro hac vice*) Jason Ewart (admitted *pro hac vice*) Kolya D. Glick (admitted *pro hac vice*) ARNOLD & PORTER KAYE SCHOLER LLP 601 Massachusetts Avenue NW Washington, DC 20001 Phone: (202) 942-5462 Fax: (202) 942-5999 matthew.wolf@arnoldporter.com sonia.pfaffenroth@arnoldporter.com jason.ewart@arnoldporter.com kolya.glick@arnoldporter.com Mark A. Perry (admitted *pro hac vice*) WEIL, GOTSHAL & MANGES LLP 2001 M Street, NW, Suite 600	

Washington, D.C. 20036 Phone: (202) 682-7000 Fax: (202) 857-0940 Mark.Perry@weil.com Luna Ngan Barrington (admitted *pro hac vice*) WEIL, GOTSHAL & MANGES LLP 767 5th Avenue, New York, New York 10153 Phone: (212) 310-8421 luna.barrington@weil.com Bambo Obaro (admitted *pro hac vice*) WEIL, GOTSHAL & MANGES LLP 201 Redwood Shores Parkway, Redwood Shores, California 94065 Phone: (650) 802-3083 bambo.obaro@weil.com *Counsel for Defendant The Kroger Co.* Maureen R. Witt, #10665 Alexander D. White, #48767 HOLLAND & HART LLP 555 17th Street, Suite 3200 Denver, CO 80202 Phone: (303) 295-8000 mwitt@hollandhart.com adwhite@hollandhart.com Enu Mainigi (admitted *pro hac vice*) Jonathan Pitt (admitted *pro hac vice*) Joshua A. Podoll (admitted *pro hac vice*) WILLIAMS & CONNOLLY LLP 680 Maine Ave., S.W. Washington, D.C. 20024 Phone: (202) 434-5000 emainigi@wc.com jpitt@wc.com jpodoll@wc.com Michael G. Cowie (admitted *pro hac vice*) James A. Fishkin (admitted *pro hac vice*)	

DECHERT LLP 1900 K Street N.W. Washington, DC 20006 Phone: (202) 261-3339 mike.cowie@dechert.com james.fishkin@dechert.com *Counsel for Defendant Albertsons Companies, Inc.* Kathryn A. Reilly, #37331 Jennifer J. Oxley, #51587 WHEELER TRIGG O'DONNELL LLP 370 Seventeenth Street, Suite 4500 Denver, CO 80202-5647 Phone: (303) 244-1800 reilly@wtotrial.com oxley@wtotrial.com Renata B. Hesse (admitted *pro hac vice*) Samantha F. Hynes (admitted *pro hac vice*) Daniel J. Richardson (admitted *pro hac vice*) SULLIVAN & CROMWELL LLP 1700 New York Avenue, NW, Suite 700 Washington, DC 20006-5215 Phone: (202) 956-7500 hesser@sullcrom.com hyness@sullcrom.com richardson@sullcrom.com Steven L. Holley (admitted *pro hac vice*) SULLIVAN & CROMWELL LLP 125 Broad St. New York, NY 10004 Phone: (212) 558-4737 holleys@sullcrom.com *Counsel for Defendant C&S Wholesale Grocers, LLC*	
DEFENDANTS' MOTION TO DISMISS COUNT I AS MOOT	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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,

/s/ Randall H. Miller
Randall H. Miller, # 33694
Luke Westerman, # 51243
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street, Suite 3100
Denver, Colorado 80202
Phone: (303) 863-2363
Fax: (303) 863-2301
randall.miller@arnoldporter.com
luke.westerman@arnoldporter.com

Matthew M. Wolf (*pro hac vice*)
Sonia K. Pfaffenroth (*pro hac vice*)
Jason Ewart (*pro hac vice*)
Kolya D. Glick (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
Phone: (202) 942-5462
Fax: (202) 942-5999
matthew.wolf@arnoldporter.com
sonia.pfaffenroth@arnoldporter.com
jason.ewart@arnoldporter.com
kolya.glick@arnoldporter.com

Mark A. Perry (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
2001 M Street, NW, Suite 600
Washington, D.C. 20036
Phone: (202) 682-7000
Mark.Perry@weil.com

Luna Ngan Barrington (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
767 5th Avenue,
New York, New York 10153
Phone: (212) 310-8421
luna.barrington@weil.com

Bambo Obaro (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway,
Redwood Shores, California 94065
Phone: (650) 802-3083
bambo.obaro@weil.com

Counsel for Defendant The Kroger Co.

/s/ *Maureen R. Witt*
Maureen R. Witt, #10665
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
Phone: (303) 295-8000
mwitt@hollandhart.com

Enu Mainigi (*pro hac vice*)
Jonathan Pitt (*pro hac vice*)
Joshua A. Podoll (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
680 Maine Ave., S.W.
Washington, D.C. 20024
Phone: (202) 434-5000
emainigi@wc.com
jpitt@wc.com
apodoll@wc.com

Michael G. Cowie, (*pro hac vice*)
James A. Fishkin, (*pro hac vice*)
DECHERT LLP
1900 K Street N.W.
Washington, DC 20006
Phone: (202) 261-3339
mike.cowie@dechert.com

james.fishkin@dechert.com

Counsel for Defendant Albertsons Companies, Inc.

/s/ *Kathryn A. Reilly*
Kathryn A. Reilly, #37331
Jennifer J. Oxley, #51587
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Phone: (303) 244-1800
Email: reilly@wtotrial.com
oxley@wtotrial.com

Renata B. Hesse (*pro hac vice*)
Samantha F. Hynes (*pro hac vice*)
Daniel J. Richardson (*pro hac vice*)
SULLIVAN & CROMWELL LLP
1700 New York Avenue, NW, Suite 700
Washington, DC 20006-5215
Phone: (202) 956-7500
hesser@sullcrom.com
hyness@sullcrom.com
richardson@sullcrom.com

Steven L. Holley (*pro hac vice*)
SULLIVAN & CROMWELL LLP
125 Broad St
New York, NY 10004
Phone: (212) 558-4737
holleys@sullcrom.com

Counsel for Defendant C&S Wholesale Grocers, LLC

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:

State of Colorado

Steven M. Kaufmann
Bryn A. Williams
Arthur Biller
Ian L. Papendick
Robin E. Alexander
Aric J. Smith
Conor J. May
Office of the Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6000

/s/ Christina Cleveland
Christina Cleveland