DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: April 8, 2024 5:56 PM FILING ID: 14A963D4D5959 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** ▲
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PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DEFENDANTS' DIVESTITURE REMEDY FROM HEARING ON PRELIMINARY INJUNCTION

Plaintiff, the State of Colorado, upon relation of Philip J. Weiser, Attorney General for the State of Colorado (hereinafter the "Attorney General" or "Plaintiff"), by and through undersigned counsel, moves this Court *in limine* to exclude any evidence of Defendants' divestiture remedy plan at the preliminary injunction hearing.

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I. INTRODUCTION

Defendants' proposed divestiture remedy should be excluded from the preliminary injunction hearing. First, a divestiture is a potential remedy to an otherwise unlawful merger, not a defense against a charge that a merger is illegal. Consideration of a potential divestiture remedy thus does not come into play until after a determination that a merger is illegal. It is an issue for trial, not for a preliminary injunction. On a preliminary injunction, the question is whether to preserve the status quo pending trial. What relief may be warranted to address Defendants' unlawful merger—be it a permanent injunction, Defendants' proposed divestiture, a different divestiture, or conduct remedies—is not necessary to granting a preliminary injunction.

Moreover, even if the Court takes the view that a divestiture remedy can be considered at the preliminary injunction stage in some cases, it is inappropriate in this case because Defendants continue to withhold their final divestiture remedy plan from enforcers. Defendants have employed a litigation-focused strategy from day one that was designed to shield their proposed divestiture remedy from government scrutiny until as late in the game as possible, hoping to win by ambush rather than on the merits. Defendants' initial regulatory filings presenting their Proposed Merger for approval did not contain a divestiture remedy plan. No divestiture remedy plan was presented until September 8, 2023, almost a year after the Proposed Merger was announced. That plan failed to remedy the anticompetitive effects of the Proposed Merger. After almost five months of engagement on the divestiture remedy plan between Defendants and the Attorney General and the FTC, Defendants failed to make any changes to their plan to address the Attorney General's and the FTC's concerns.

That remains the case today. Nearly two months after this lawsuit was filed—and contrary to their representation to the Court on March 25, 2024, that a new divestiture remedy plan would be revealed in a matter of days—Defendants have still not disclosed any new plan and will not commit to any timeline to do so, despite the rapidly ticking clock. Defendants' conduct makes their strategy clear—present the Attorney General with a moving target and as little time as possible to conduct discovery on it, hoping to win by gamesmanship rather than on the merits. This conduct should not be tolerated by the Court. It is now too late for Defendants to present a new divestiture remedy plan in time for a preliminary injunction hearing to take place in just four months. Evidence of a divestiture remedy should be excluded.

II. BACKGROUND

A. Divestiture Remedy Plan Discussions

Kroger and ACI entered into a merger agreement on October 13, 2022 (the "Merger Agreement" or "Proposed Merger"), and publicly announced the Proposed Merger the following day. Recognizing the anticompetitive nature of the Proposed Merger, the Merger Agreement contemplated a divestiture of up to 650 stores. The stores were unspecified and there was no divestiture buyer identified. Similarly, there was no mention of any other assets contemplated for divestiture, such as store banners, specific lines of business, private label brands, manufacturing plants, customer loyalty data, etc. The Merger Agreement instead provided Kroger and ACI might create a new company to be spun-off from ACI, referred to as "SpinCo." The Merger Agreement anticipated that a limited number of stores could be divested to SpinCo.

Kroger and ACI were aware their deal presented serious antitrust concerns at its inception and therefore committed before the Merger Agreement was signed to hunker down for a long legal

battle in the likely event U.S. regulators attempted to block the deal. Brendan Case & Leah Nylen, *Kroger CEO Vows Legal Fight for Albertsons Deal if Necessary*, Bloomberg (May 10, 2023, 3:45 PM), *available at* https://www.bloomberg.com/news/articles/2023-05-10/kroger-ceo-vows-legal-fight-for-albertsons-deal-if-necessary?sref=CmfPEO7A. As Kroger CEO Rodney McMullen publicly stated, "Usually you wouldn't commit in advance to litigate. In this case we both committed to litigate in advance." *Id*.

Kroger and ACI subsequently made pre-merger notification filings with the federal government pursuant to the Hart-Scott-Rodino Act ("HSR Act"), 15 U.S.C. § 18a, on November 3, 2022. The Attorney General obtained those filings shortly thereafter. The purpose of the HSR Act is to provide the government with information about proposed mergers and to stay those mergers pending such review. Kroger and ACI's HSR filings and disclosures to the State did not contain any more information about a potential divestiture remedy.

The FTC subsequently issued "Second Requests" to Kroger and ACI on December 5, 2022, seeking additional information about the Proposed Merger. The Attorney General similarly issued subpoenas seeking detailed information relevant to the Proposed Merger. Over the next several months, Kroger and ACI produced millions of documents and voluminous data to government enforcers.

On September 8, 2023, eleven months after announcing the Proposed Merger, Kroger and ACI finally revealed a divestiture remedy plan, and disclosed C&S as their sole chosen divestiture

buyer. Notably, the announcement of the divestiture remedy plan on September 8, 2023, was after the agreed-upon cutoff dates for document collection pursuant to the Second Requests.[1]

Over the course of the next four-plus months, the FTC extended its timing agreement with Kroger and ACI. During this time the States and the FTC studied the divestiture remedy plan and engaged in detailed discussions with Defendants, including with Defendants' technical experts. The States and the FTC raised shortcomings in the plan with Defendants; in response Kroger floated potential changes to the plan—changes that were at times contradictory to earlier proposed changes, and none that were ever finalized with C&S and presented to the States and the FTC.

On January 31, 2024, after nearly five months of discussions and investigation of the divestiture remedy, the FTC notified Kroger and ACI that it was terminating discussions about the divestiture remedy because Defendants were not addressing the FTC's articulated concerns, and further discussions would not be productive. Over the next two weeks, the Attorney General nevertheless held virtual meetings with each Defendant to reiterate his own concerns about the Proposed Merger and the divestiture remedy, and to elicit information from Defendants. Defendants did not present any other proposed modifications to the divestiture remedy plan during those discussions or indicate that the Attorney General's concerns would be addressed in a future proposal. The Attorney General then filed this lawsuit on February 14, 2024.

[1] For the vast majority of the requests in the Second Requests, Kroger and ACI were not required to produce documents created after May 23, 2023; and for a smaller subset of documents, Kroger and ACI did not have to collect documents past August 2023. As a result, many categories of documents about the September 2023 divestiture remedy plan have yet to be disclosed, such as the final weeks of negotiation between Kroger and C&S and subsequent actions by Defendants that are required by the divestiture agreement, such as which employees from Kroger and ACI will be made available to C&S.

Since those last discussions before the filing of this lawsuit, Defendants have not engaged with the Attorney General on their plans for a divestiture remedy. At a hearing on March 25, 2024, Kroger's counsel told the Court that Kroger had a "handshake" deal with C&S on a revised divestiture remedy plan that supersedes the September 8, 2023 plan, and that Defendants would present that new remedy plan in the coming days. Defendants, however, still have not disclosed any details about that "handshake" deal or made any representations about when any new divestiture remedy plan will be disclosed. And in discussing scheduling for this matter, Defendants have refused to commit to any deadline by which they will present a new divestiture remedy.

B. Divestiture Remedy Plan Complexities

The September 8, 2023 divestiture remedy plan was highly complex, as any superseding plan will be, which will require significant expert analysis and discovery to investigate. Under the September 8, 2023 divestiture remedy plan, C&S was to pay $1.9 Billion to acquire 413 stores, eight distribution centers, five private label brands, and three banners (QFC, Mariano's, and Carrs, none of which have stores in Colorado). C&S would also gain an exclusive license to use the Albertsons banner in Colorado, Wyoming, Arizona, and California. In Colorado, C&S would acquire 52 ACI stores—50 Safeway and two Albertsons bannered stores—and the ACI Denver distribution center. Because Kroger would retain the remaining 49 ACI stores in Colorado and the Safeway banner, C&S would have to convert the 50 Safeway stores it acquires into Albertsons bannered stores. Across the country, C&S would have to re-banner over 80% of the acquired stores.

The Defendants' September 8, 2023 divestiture remedy plan notably fails to include a whole host of assets necessary for C&S to survive as a viable competitor, such as manufacturing capacity, national brand-equivalent private label brands, data analytics, and a loyalty program, among other things. That plan also includes a complex Transition Services Agreement ("TSA"), pursuant to which C&S will rely on Kroger—its key competitor—for critical functions like pricing, marketing, loyalty program, inventory management, IT, and distribution for up to two years. These are just a sampling of the kind of issues that require analysis and discovery, and any changes in a new divestiture remedy plan will likewise require discovery and careful scrutiny of these kinds of issues.

C. Case Schedule Requirements

Defendants still have not disclosed what their ultimate divestiture remedy plan is and refuse to commit to a deadline by which they will do so. On March 29, 2024, the Attorney General sent a proposed case schedule to Defendants that included a deadline of April 8, 2024 for Defendants to disclose their new divestiture remedy plan, just four months before the start of the preliminary injunction hearing. That deadline reflects the Attorney General's assessment of the latest date by which meaningful discovery and analysis of a new divestiture remedy plan could be completed before the preliminary injunction hearing. Defendants have rejected this proposal. On April 5, 2024, Defendants submitted a redline to the proposed schedule that removed the divestiture proposal deadline entirely. Ex. 1 (Defendants' Proposed Schedule). Defendants' illogical proposed schedule asks the Attorney General to complete expert reports about Defendants' unknown divestiture remedy plan by June 12, 2024. *Id*. That means the Attorney General would have less than two months to conduct discovery and expert analysis on Defendants' new divestiture

remedy plan—an impossibility because the new remedy plan is undisclosed and unknown. Defendants either misrepresented to the Court that their new divestiture remedy plan was all but done on March 25, 2024, or they are attempting to gain an unfair advantage in these proceedings.

III. ARGUMENT

A. Defendants' Divestiture Plan Is a Proposed Remedy Not Appropriately Considered at the Preliminary Injunction Stage

Defendants' yet to be revealed final divestiture proposal is an attempt to allay antitrust concerns and constitutes a proposed remedy. *Cal. v. Am. Stores Co.*, 495 U.S. 271, 280-82 (1990) (divestiture decrees remedy unlawful mergers); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 792–93 (9th Cir. 2015) (divestiture is a customary form of relief in Clayton Act § 7 cases).

The Court's consideration of the appropriate remedy should follow from a trial on the merits and a ruling that the merger is illegal. *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo. App. 2006) ("The parties will have a full opportunity at the trial on the merits to determine the final relief, in any, to which plaintiffs are entitled."); *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 556 (1971) (courts do "not reach the question of remedy" if there is "no violation of § 7"); *Am. Stores*, 495 U.S. at 284 (remedy follows a finding that a merger may "substantially lessen competition").

Because a preliminary injunction proceeding does not reach the ultimate merits of the transaction, this Court cannot resolve what the appropriate remedy would be if the Attorney General ultimately proves, at trial, a violation of the Colorado State Antitrust Act of 2023 (the "Antitrust Act"). *FTC v. Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008) ("Of course, neither court nor agency has found [Defendant's] acquisition [] unlawful. Therefore, the FTC may

not yet claim the right to have any remedy necessary to undo the effects of the merger, as it could after such a determination."); *see FTC v. Food Town Stores, Inc.,* 539 F.2d 1339, 1345 (4th Cir. 1976) (holding FTC was "entitled to preserve the status quo pending adjudication" regardless of what "ultimate remedy" might eventually be deemed appropriate). "Any determination regarding 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).

A preliminary injunction is not a trial on the merits. *See Anderson v. Pursell*, 244 P.3d 1188, 1196 (Colo. 2010), *as modified on denial of reh'g* (Jan. 10, 2011) (*quoting Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 839 (Colo.App.2007)) ("[F]indings made by a trial court after a preliminary injunction hearing are not determinative of the ultimate merits of the case."). The point of a preliminary injunction is not to determine how to remedy illegal conduct. Rather, the purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. *Anderson*, 244 P.3d at 1196 (*quoting Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982) (en banc)). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Preliminary relief is warranted under C.R.C.P. 65(a) if the Attorney General can show there is a ***reasonable probability*** that the effect of the acquisition *may* substantially lessen competition

or tend to create a monopoly pursuant to C.R.S. § 6-4-107(1),[2] but the determination of the exact nature, scope, and magnitude of the impact of the transaction is left to the merits proceeding. *See FTC v. Warner Commc'ns Inc*., 742 F.2d 1156, 1162 (9th Cir. 1984) (When "presented with conflicting evidence" on a "merger's probable effect on competition," a court in a preliminary injunction proceeding should not "make a final determination," but should undertake "only a preliminary assessment" of the merits.); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016) (quoting *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989)) (At the preliminary injunction phase, the FTC is not required to establish that the proposed merger would in fact violate Clayton Act § 7 and any doubts regarding the competitive effects of the merger should be "resolved against the transaction.").

Accordingly, in "granting a preliminary injunction, the court should not attempt to do what can be done only after a full hearing and final decree." *Litinsky v. Querard*, 683 P.2d 816, 819 (Colo. App. 1984). Absent full adjudication on the merits, the full scope of competitive harm may not be ascertained, making discussion of putative remedies speculative and premature. Until the Court can fully evaluate the Proposed Merger's likely impact on Colorado consumers and the loss of head-to-head competition between Kroger and ACI, for example, it would be impossible for the Court to determine whether the Defendants' self-interested offer of a divestiture remedy alleviates those anticompetitive effects. It would defy law and logic for this Court to determine that

[2] The Attorney General may obtain a preliminary injunction of this merger if he shows: (1) there is a ***reasonable probability*** of success on the merits ; (2) there is a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) there is no plain, speedy, and adequate remedy at law; (4) the granting of a preliminary injunction will not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. *Rathke,* 648 P.2d at 653-54; *City of Golden v. Simpson,* 83 P.3d 87, 96 (Colo. 2004).

Defendants' divestiture remedy package sufficiently addresses the Proposed Merger's anticompetitive effects based on an incomplete and contested preliminary record.

Federal case law confirms that courts routinely consider proposed remedies as part of *merits* adjudications of challenged mergers where the harm of those mergers has already been determined in full. *See Illumina, Inc. v. FTC*, 88 F.4th 1036, 1058 (5th Cir. 2023) (considered proposed remedy in merits adjudication); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (considered divestiture remedy following merits adjudication); *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019) (considered proposed remedy as part of trial on the merits).[3] That is not the case here, where the entire purpose of the preliminary injunction proceeding is to preserve the status quo to allow full consideration on the merits in due course. It is worth noting that this preliminary injunction proceeding is necessary because Defendants refuse to agree that they will not close on the Proposed Merger until after a final decision on the merits.

The Attorney General acknowledges that there are non-binding federal district court rulings where courts considered remedial measures at the preliminary relief stage. *See FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 304-08 (D.D.C. 2020); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 72-78 (D.D.C. 2015); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 114 (D.D.C. 2004); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 55 (D.D.C. 2002). But these cases are distinguishable on the law and the facts. This case is brought under the ***Colorado*** Antitrust Act. Importantly, this Court is authorized to interpret the Antitrust Act independently of any federal antitrust legal precedent. In enacting the Antitrust Act last year, the Colorado General Assembly expressly deleted a provision of the

[3] The appropriate allocation of evidentiary burdens at trial is beyond the scope of this brief but the Attorney General can provide furthering briefing on this issue at another time deemed appropriate by the Court.

predecessor Colorado Antitrust Act of 1992 instructing courts to "use as a guide interpretations given by the federal courts to comparable federal antitrust laws." Former C.R.S. § 6-4-119. This is a good place to depart from misguided district court interpretations of federal law, which is what the Colorado General Assembly expressly intended.

Putting aside the impropriety of considering remedial measures at the preliminary relief stage, the circumstances of the federal district court cases allowing presentation of divestiture evidence at the preliminary injunction stage were very different from this case. The proposed remedies in those district court cases involved standalone business lines and single or few markets. Conversely, in this case the proposed divestiture involves a hodge podge of assets from both Kroger and ACI, including hundreds of stores from many different store banners, various distribution centers, assorted private label brands, four different IT systems, unspecified employees from across divisions and departments, and a convoluted TSA that will intertwine C&S with Kroger for up to two years.

More importantly, the divestitures in those cases were offered or incorporated into the merger agreements themselves, enabling the FTC and district court to subject the proposals to detailed scrutiny, including full discovery. For example, in *FTC v. Arch Coal, Inc.*, the district court admitted evidence related to an agreement to sell a coal mine to a buyer if the original transaction was permitted to close. *FTC v. Arch Coal, Inc.*, No. 1:04-cv-00534, 2004 WL 7389952 at *2-3 (D.D.C. July 7, 2004). In permitting the introduction of this evidence, the district court noted that the merging parties in that case had signed a definitive and final agreement to sell the coal mine to the buyer during the pendency of the FTC's investigation and before the FTC issued its complaint. *See id*.

Similarly, the district court in *FTC v. Libbey, Inc*. considered a signed amended merger agreement that allowed the seller to keep assets to remain competitive in the market at issue instead of transferring those assets to the buyer. *Libbey*, 211 F. Supp. 2d at 41. The merging parties signed the amended agreement a week after the FTC sued and the amended merger agreement was fully examined in discovery. *Id*.

In both *Arch Coal* and *Libbey*, there was no ambiguity regarding which firms would own which assets and on what terms if the transactions at issue were permitted to close. The government also had a full opportunity to consider the changes to the transactions in fact and expert discovery and were not presented with moving targets.

By contrast in this case, the Defendants did not include a divestiture remedy proposal in their HSR filings presenting the Proposed Merger for approval by federal regulators. The first time Defendants presented the divestiture remedy was on September 8, 2023, and Kroger and ACI thereafter floated potential modifications to it several times, adding more stores, taking some stores out, and otherwise altering the package. None of those modifications were finalized in an agreement with C&S. Not until the March 25, 2024, scheduling hearing before this Court, did Kroger disclose that it had a "handshake" deal with C&S further modifying the divestiture. As of the date of this filing, however, no new divestiture agreement has been produced, nor have any details of that "handshake" deal been disclosed. There is also no guarantee that the proposal will not change again before trial. Defendants continue to make their divestiture remedy a moving target despite insisting that they wish to imminently close their transaction.

In circumstances like this, courts have declined to hear the divestiture proposal at the preliminary injunction stage because there is insufficient time to thoroughly investigate it[4]. Here too, the Court should preclude Defendants from offering evidence at the preliminary injunction hearing relating to Defendants' uncertain remedy proposal.

In sum, the point of a preliminary injunction proceeding is not to determine how to fix the Defendants' illegal conduct to comply with the law, it is to determine whether Defendants' conduct is probably unlawful and should be stopped pending trial. This is especially true when the divestiture remedy package at issue is unknown and could change again before trial.

B. The Court Should Exclude Consideration of the Divestiture Remedy and Should Not Permit Defendants to Game the Merger Investigation Process and These Proceedings

Defendants are part of a growing trend among merging firms asking trial courts to determine the legality of their merger "as remedied" by a voluntary "fix" rather than based on the merger agreement in their original HSR submission. *See, e. g.*, Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. Rev. 165, 167 n.15 (2010) (addressing the origins of "litigating the fix" cases).

Allowing merging parties to litigate-the-fix ("LTF") encourages "the parties to hide competitive problems rather than voluntarily disclosing and remedying problems in the transaction

[4] Tr. of Prehearing Conference at 27-35, *F.T.C. v. Ardagh*, 13-cv-1021 (D.D.C. Sept. 24, 2013) [hereinafter *Ardagh* Transcript], *available at* https://www.ftc.gov/sites/default/files/documents/cases/130924ardaghtranscript.pdf (deciding to exclude defendant's divestiture proposal, in part, because it could not be thoroughly investigated in time for the preliminary injunction hearing).

that is notified in their HSR filing." Ex. 2, Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, 85 Antitrust Law Journal No. 3, at 626 (2024) [hereinafter *Fixing "Litigating the Fix"*]. This failure to self-disclose problems increases costs and raises the risk to agencies overseeing the merger review process. *Id*. at 626, 640. "Allowing late-stage LTF proposals also incentivizes firms to attempt to gain a litigation advantage by reducing the amount of time and information available to the agencies to investigate the proposed remedy." *Id*. at 640. Allowing post-complaint LTF proposals permits "the defendant to bet on the court erring in its favor…." *Id*. As such, some antitrust scholars recommend prohibiting LTF proposals in their entirety.[5]

Other antitrust scholars recommend a process of discovery evaluating post-complaint LTF proposals with waiting periods analogous to the HSR process. *Fixing "Litigating the Fix"*, at 641. Under this process, the court, as part of its case management order, would instruct the merging parties to submit a "remedy filing" that articulates the precise terms of the remedy, provide the government a timeframe to issue discovery on the remedy, and provide for time after compliance with discovery requests before commencing briefing and trial. *Fixing "Litigating the Fix"*, at 642, 661. Such an approach: (1) provides ample time for government investigation; (2) ensures the government and court have sufficient information regarding a definitive remedy proposal; and (3) allocates the evidentiary burden to the merging parties to establish that their remedy proposal is

[5] *Cf*. John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement*, CPI Antitrust Chron., Aug. 2021, *available at* https://cssh.northeastern.edu/wp-content/uploads/2021/08/CPI-Kwoka-Weber-Waller-FINAL.pdf (Advocating for the antitrust agencies to challenge any transaction that may substantially harm competition in its entirety, unless- and only unless- the parties propose and implement before consummation to the satisfaction of the agencies a viable divestiture to a suitable buyer. Also arguing the merging parties should be required to submit their commitments in their original HSR itself or in response to a second request from the antitrust agencies, and these commitments should become an integral part of their merger proposal.).

sufficient to eliminate anticompetitive effects. *Id*. at 641-653. Conversely, no scholars advocate that courts allow merging parties to engage in the type of gamesmanship at issue in this case.

Against this backdrop and as a policy matter, post-complaint divestiture remedy offers should not be considered at preliminary injunction hearings. Defendants did not include a divestiture proposal in their HSR filings presenting the Proposed Merger for government approval. In fact, Defendants failed to present a divestiture remedy plan until nearly a year after announcing the Proposed Merger. Defendants' delay in presenting their divestiture remedy plan shielded material information from investigators because it came after the agreed-upon cutoff dates for document collection pursuant to the FTC's investigation.

Despite nearly five months of continued engagement from the Attorney General and the FTC regarding deficiencies in their original divestiture remedy proposal, Defendants refused to make changes to address the government's concerns. The Attorney General therefore filed suit and seeks preliminary relief to prevent Defendants from closing.

Now that the Complaint is filed, Defendants plan to spring their "real" divestiture remedy plan on the Attorney General as late in the process as possible to truncate the Attorney General's review and ability to conduct discovery on the plan—all due to an "Outside Date" the Defendants could freely renegotiate.[6] Defendants hope the Court will not pick up on the fact that all time pressures in this case are a result of Defendants' own delay and deadlines they artificially created. Defendants designed this scheme to evade proper regulatory and judicial review of their divestiture

[6] Defendants' threat that the transaction must happen now, or it will not happen at all, is illusory. *Whole Foods*, 548 F. 3d at 1041 (remanding and instructing the lower court to "remember that a 'risk that the transaction will not occur at all,' by itself, is a private consideration that cannot alone defeat the preliminary injunction").

remedy and hope to win by ambush. Rather than designing a remedy strong enough to convince regulators of their ability to restore competition, Defendants are hoping to offer less and use an accelerated litigation timeframe to their advantage.

Courts should deter this type of conduct, give enforcers a fair opportunity to investigate, and permit the courts to consider proposed mergers based upon full consideration of facts. Merging parties should be incentivized to cooperate and be transparent with government regulators during the investigatory phase before lawsuits are filed. Litigants should not be able to surprise the courts and opposing parties with newly created evidence (that requires due evaluation) shortly before a hearing on the case.

Excluding evidence of post-complaint divestitures from a preliminary injunction hearing—by their nature fast-moving, emergency procedures—would accomplish this goal but still allow Defendants to present their post-complaint remedy proposal at trial.

C. At a Bare Minimum, the Court Should Establish Limits and Guardrails

If the Court allows Defendants to present their divestiture proposal at the preliminary injunction hearing or even at a trial on merits, the Court should establish guardrails. First, the Court should stop Defendants' continuous movement of the goalposts by providing a deadline by which Defendants must provide their final divestiture agreement. That deadline, which has now passed for the preliminary injunction hearing, is needed to assure that Defendants provide their new divesture plan and all related documents to the Attorney General with sufficient time to permit the Attorney General to conduct discovery and expert analysis on the plan. Undoubtedly, Defendants' own experts have for some time been evaluating the new divestiture remedy plan as

it has been developed.[7]

The Attorney General proposed Defendants provide their final divestiture agreement by April 8, 2024. Defendants rejected this proposal and the very notion of any such deadline. Nor have Defendants given any indication when their final divestiture remedy plan will be made available. A divestiture remedy proposal delivered even on April 8, 2024, would be exceedingly difficult to properly vet in time for a preliminary injunction hearing on August 12, 2024, but the Attorney General was willing to try to work within those parameters. Evidence of a divestiture remedy proposed after the date of this filing should be excluded from the preliminary injunction hearing.[8]

Second, if the Court determines Defendants' currently operative remedy plan, as presented on September 8, 2023,[9] is relevant to analyzing the Attorney General's "reasonable probability" of success in a preliminary injunction proceeding, presentation of that remedy plan should be as part of Defendants' rebuttal burden and not part of the Attorney General's initial burden to make a prima facie showing that the merger is illegal. *Illumina*, *Inc. v. F.T.C.*, 88 F.4th 1036, 1058 (5th Cir. 2023) (analyzing a proposed remedy at the rebuttal stage and stating that the merging parties are required to ""'***affirmatively show***[]' why the [divestiture] undermined [the FTC's] prima facie showing to such an extent that there was no longer a probability that the . . . merger would 'substantially

[7] We are quickly approaching the time in which Defendants must provide their new divestiture remedy plan to the Attorney General in advance of the trial on the merits. If such plan is not soon presented to the Attorney General, then the trial may need to be continued.

[8] When a remedy is proposed very late in the merger review process, courts have refused to allow introduction of evidence relating to it. *See Ardagh* Transcript, at 13–37 (defendant proposed its remedy in the eleventh hour and the court refused to allow introduction of evidence relating to it).

[9] Any new forthcoming divestiture remedy plan should be excluded at the preliminary injunction hearing.

lessen competition.'"); *Sysco Corp.*, 113 F. Supp. 3d at 72–78 (assigning defendants the rebuttal burden of establishing that the proposed divestiture was sufficient to maintain competition.).

This approach would require Defendants to disclose expert reports on the viability of the divestiture remedy plan, in the first instance, with the Attorney General then submitting rebuttal reports. Defendants would then have the burden to show that the proposed remedy would dispel any substantial doubts and serious questions about the transaction's legality. *Fed. Trade Comm'n v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016) ("Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger and that their claimed efficiencies are: (1) merger specific; and (2) reasonably verifiable by an independent party."). This includes establishing that the divestiture buyer will not face impediments that would prevent it from replicating the intensity of pre-merger competition.[10] Lastly, at the preliminary injunction hearing, "all doubts as to the remedy are to be resolved in [the government's] favor." *E.I. du Pont de Nemours & Co.*, 366 U.S. at 334.

IV. CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court exclude any evidence of Defendants' divestiture remedy plan at the preliminary injunction hearing. Alternatively, if the Court allows any divestiture evidence at the preliminary injunction hearing, any such evidence should be limited to a divestiture remedy that is disclosed by an immediate and firm deadline—which the Attorney General contends has already come and gone—and the Court

[10] In *Sysco Corp.* and *Aetna, Inc.* the district courts rejected the defendants' proposed remedies, concluding that the divestiture buyers would face impediments that would prevent them from replicating the intensity of pre-merger competition. *Sysco Corp.*, 113 F. Supp. 3d at 72–78; *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 59-74 (D.D.C. 2017).

should allocate the rebuttal burden to Defendants to establish that their divestiture remedy plan is sufficient to maintain competition.

Respectfully submitted this 8th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served on all counsel for Defendants who have entered an appearance in this matter through Colorado Courts E-Filing, on April 8, 2024.

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