DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: April 22, 2024 3:53 PM FILING ID: 204274CA84795 CASE NUMBER: 2024CV30459 ▲ COURT USE ONLY ▲
STATE OF COLORADO *ex rel.* PHILIP J. WEISER, Attorney General, Plaintiff, v. THE KROGER CO.; ALBERTSONS COMPANIES, INC.; and C&S WHOLESALE GROCERS, LLC, Defendants.	Case Number: 2024CV30459 Div.: 414
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DEFENDANTS' OPPOSITION TO THE STATE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DEFENDANTS' DIVESTITURE REMEDY FROM HEARING ON PRELIMINARY INJUNCTION

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Defendants The Kroger Co. ("Kroger"), Albertsons Companies, Inc. ("Albertsons"), and C&S Wholesale Grocers ("C&S") respectfully submit this Opposition to the State of Colorado's ("the State") Motion in Limine to Exclude Evidence of Defendants' Divestiture Remedy from Hearing on Preliminary Injunction ("Mot.").

INTRODUCTION

In this merger challenge under the Colorado Antitrust Act, the State, as the plaintiff, bears the burden of *proving* that Kroger's proposed merger with Albertsons (the "Transaction") "may substantially lessen competition" in Colorado. C.R.S. § 6-4-107.[1] Because the Transaction has not yet closed, the Court must "'mak[e] a prediction about the future,' and that prediction must be informed by 'record evidence' and a 'fact-specific showing' as to the proposed merger's likely effect on competition." *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 141 (D.D.C. 2022) (quoting *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 192 (D.D.C. 2018)). Here, the Transaction consists of two parts: (1) Kroger's acquisition of Albertsons and (2) the concurrent divestiture of hundreds of stores and other assets to a well-established grocery operator, C&S. One will not happen without the other. To predict the future impact of the Transaction, the Court must consider *all* components of the Transaction.

The State, however, asks this Court to ignore the divestiture to C&S and the commercial reality of the Transaction and instead evaluate the future impact of a fictitious transaction without a divestiture. But as courts addressing identical motions have repeatedly held, "excluding evidence and argument regarding the [divestiture] would be tantamount to turning a blind eye to the elephant in the room." *FTC v. Arch Coal, Inc.*, No. 04-CV-0534, 2004 WL 7389952, at *3 (D.D.C. July 7,

[1] The standards under the Colorado Antitrust Act and the federal Clayton Act are materially the same, and thus federal decisions are persuasive in interpreting the Colorado Antitrust Act. *People v. N. Ave. Furniture & Appliance, Inc.*, 645 P.2d 1291, 1295–96 (Colo. 1982).

2004); *see also Illumina, Inc. v. FTC*, 88 F.4th 1036, 1057 (5th Cir. 2023). Indeed, the State concedes it is asking the Court to "depart from" the uniform body of federal law, Mot. 11, which "requires the Court to review the entire transaction in question," *Arch Coal*, 2004 WL 7389952, at *3 (emphasis in original). Although the State insists that the existing federal caselaw is "misguided," Mot. 11, law and logic refute the State's self-serving position that divestiture evidence is irrelevant. This Court should reject it and deny the Motion.

A divestiture has been a part of the Transaction since the start: Kroger and Albertsons' Merger Agreement contemplates the divestiture of hundreds of stores, and Kroger and Albertsons executed a divestiture agreement with C&S pursuant to that Merger Agreement. The initial divestiture agreement provided for divestment of nearly half of Albertsons' store locations in Colorado. As of March 25, 2024—and as disclosed to the Court—the parties had reached a "handshake agreement" to amend the divestiture agreement in response to feedback from regulators, including the Colorado Attorney General. And since the State filed its motion—making ad hominem accusations that Defendants are engaged in litigation "gamesmanship," Mot. 2—the parties have executed (and disclosed to the State) a formal amendment to the divestiture agreement, which now provides for the divestiture of 91 out of the 105 Albertsons stores in Colorado as well as two distribution facilities in Colorado (among other assets). *See* Ex. A (Kroger 8-K (Apr. 22, 2024)).

Unsurprisingly, given the importance of the divestiture to properly evaluating the competitive effects of the Transaction, the State's Complaint and preliminary injunction briefing focus heavily on the divestiture. Compl. ¶¶ 173–85; Pl.'s Mot. for Prelim. Inj. at 49–64. But despite its own pleadings and in tacit recognition that the divestiture addresses any Colorado-specific issues, the State asks that this Court exclude divestiture evidence at the

preliminary injunction hearing. The State's request would allow the State to shirk its burden of showing a "reasonable probability" of success on the merits that the *actual transaction at issue* may substantially lessen competition in Colorado. *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 252 (Colo. App. 2006).

Recognizing the obvious flaws in its position, the State falls back on procedural arguments. It contends it will not have time to analyze the C&S divestiture prior to the preliminary injunction hearing scheduled *four months from now*, even though Defendants have already provided significant discovery on this aspect of the Transaction—with many details of the divestiture remaining unchanged—and even though merger litigation is, by necessity, expedited. The State also makes a vague request for "limits and guardrails" on the presentation of divestiture evidence, asking the Court to relieve the State of its burden to show that the Transaction may harm competition. Mot. 16. Given the executed amendment to the divestiture agreement and the Court's order of April 22, the State's request for a disclosure deadline is now moot. And the State's request that the divestiture be considered part of Defendants' "rebuttal burden," rather than the State's initial burden to establish a prima facie case of competitive harm, Mot. 17, is a backdoor attempt to relieve the State of its burden of proof by mischaracterizing the actual transaction at issue. In antitrust law, as in other areas of the law, "the burden of proof or persuasion on the essential elements of the claim remains with the plaintiff." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1057–58 (Colo. 1992). This Court should reject the State's efforts to obtain an injunction through rhetoric and counterfactuals instead of carrying its burden to *prove* likely harm to competition through *evidence* based on commercial reality.

BACKGROUND

A. Divestiture Is An Integral Component Of The Transaction

A divestiture of stores is—and always has been—a key component of the Transaction. From the outset, Kroger and Albertsons contemplated that Kroger would divest hundreds of stores and related assets to a third-party buyer in connection with the proposed merger. Indeed, the Merger Agreement, signed on October 13, 2022 and made public the following day, explicitly provided that the merger would be accompanied by a divestiture of up to 650 stores and additional supporting assets. Pl.'s Mot. for Prelim. Inj. at 3, 14.

Immediately after announcing the merger, Kroger and Albertsons began a dialogue with the Federal Trade Commission ("FTC") and a coordinated group of state regulators (which at the time included Colorado) regarding the competitive effects of the proposed merger and ways to resolve any potential competitive concerns. In this case, as in prior retail grocery mergers, a proposed divestiture was the targeted mechanism to address these potential concerns. Many consumers shop for groceries near where they live, Compl. ¶ 94, and in localities served by both Kroger and Albertsons stores, a well-designed divestiture will resolve any conceivable competitive concerns about the Transaction.

On September 8, 2023, Kroger and Albertsons announced they had entered into an agreement with C&S to divest 413 stores, eight distribution centers, two regional offices, various grocery store banners, a license to the Albertsons banner in four states, and certain private label brands ("Initial C&S Divestiture"). *See* Compl. ¶¶ 173–85; Kroger Press Release (Sept. 8, 2023), https://bitly.ws/WuvK. The agreement also allowed Kroger to increase the size of the divestiture package by up to 237 additional stores. Kroger Press Release (Sept. 8, 2023), https://bitly.ws/WuvK. After announcing the divestiture agreement, Kroger and Albertsons continued discussions with the FTC and state attorneys general (including the Colorado Attorney

General) about the scope of the divestiture, which included a revised proposal that would have resulted in the divestment of additional Albertsons stores in Colorado. During those continued discussions, a private action seeking to enjoin the merger was dismissed for impermissibly failing to "account for the fact that up to 650 stores may be divested before the merger" and "continu[ing] to insist (erroneously) that the divestiture is simply not relevant." Order Granting Mot. to Dismiss First Am. Compl. at 3, *Whalen v. Kroger*, No. 23-CV-459, ECF No. 120 (N.D. Cal. Dec. 20, 2023).

On February 14, 2024, the State broke from the FTC and other states and filed this go-it-alone Complaint. By the time it did so, the State had collected extensive discovery from Defendants, including a "stack of hard drives in [counsel's] office with terabytes of data that were produced" long before discovery even began in this lawsuit. Status Conf. Tr. at 34 (Mar. 25, 2024) (A. Biller). That discovery included information about C&S's experience in the grocery business, its plans to operate the divested stores, and the leadership team put in place to do so. The State knew then that Defendants were negotiating amendments to their divestiture package to address regulators' concerns, including the State's Colorado-specific concerns, yet it chose to file suit anyway.

B. Continuing Negotiations with C&S Regarding Divestiture

After reviewing the Initial C&S Divestiture, the FTC, the State, and others continued to insist that the Transaction would be anticompetitive, notwithstanding the transfer of hundreds of stores and supporting assets to C&S. Accordingly, in order to dispel any doubt about the competitive benefits of the Transaction, Kroger continued to negotiate with C&S on a revised divestiture package. As counsel for Kroger informed this Court on March 25, 2024, Kroger reached a "handshake" deal with C&S on a revised divestiture package to enhance the deal previously announced in September 2023.

Even after the "handshake" deal, Defendants' efforts to finalize that deal involved sophisticated parties with sophisticated counsel negotiating over a multi-billion dollar contract that is part of an even larger multi-billion dollar merger. The State's lone-wolf approach to merger enforcement and the uncertainty regarding the legal challenges to the merger have not made things easier. Indeed, the State's lawsuit here appears to be a naked attempt to procure a second bite at the apple in the event the federal lawsuit filed by the FTC, eight other states, and the District of Columbia fails. Compl., *FTC v. Kroger Co.*, No. 24-CV-347, ECF No. 1 (D. Or. Feb. 26, 2024). No State in history has attempted a similar tactic prior to this merger, and structuring a deal around such contingencies requires deliberation and compromise. The time needed for the parties to finalize the divestiture proposal was not, as the State suggests, an effort to sandbag regulators, but rather an effort to carefully address concerns raised by the FTC, the State, and other regulators in a context made all the more difficult by the State's litigation strategy.

C. Updated C&S Divestiture Package

On April 22, 2024, Kroger announced an updated, binding divestiture agreement with C&S, which it promptly disclosed to the State. *See* Ex. A (Kroger 8-K (Apr. 22, 2024)). The amended divestiture package should put to rest any competitive concerns raised by the FTC and other regulators, including the State. Under the updated agreement, Kroger will divest 579 grocery stores in eighteen states and Washington, D.C.; four banners with significant brand equity, as well as a licensing of two additional banners in certain states; and five popular private-label brands with perpetual licenses to product recipes and formulations, as well as long-term supply arrangements for two of those private-label brands (O Organics and Signature). Most relevant here, Kroger will divest 91 of Albertsons' 105 stores in Colorado (~87%) and two distribution facilities, along with other non-store assets, and also will provide C&S a royalty-free license to use the Safeway banner in Colorado in perpetuity.

ARGUMENT

At the upcoming preliminary injunction hearing, this Court will be asked to predict the likely competitive effects of the proposed Transaction in Colorado. That Transaction includes not just Kroger's purchase of Albertsons, but also the concurrent divestiture of hundreds of stores and other assets to C&S, including *nearly all* of Albertsons' Colorado store locations. As a matter of law and common sense, the Court cannot evaluate the Transaction's likely competitive effects in Colorado without considering *all* elements of the Transaction, including the robust, Colorado-specific divestitures, which will allow C&S to preserve the existing competition in the state. To allow otherwise would call upon this Court to analyze—and potentially enjoin—a commercial transaction that simply does not exist.

The State's Motion presents three arguments about evidence related to the C&S divestiture: (1) divestiture evidence is relevant only to the question of "remedy," and therefore should be excluded from the preliminary injunction hearing; (2) the Court should exclude divestiture evidence at the preliminary injunction hearing because Defendants allegedly delayed producing a revised divestiture agreement; and (3) if the Court decides to allow evidence of the proposed divestiture, the Court should establish "guardrails" for the presentation of evidence, including setting a date for the disclosure of a supplemental divestiture agreement and absolving the State of its burden to prove a substantial lessening of competition. None of these arguments holds water.

I. A CONTRACTED-FOR DIVESTITURE IS RELEVANT TO ANTITRUST LIABILITY

In moving to exclude divestiture evidence from the preliminary injunction hearing, the State asks this Court to evaluate and preliminarily enjoin a fictitious merger. The C&S divestiture is a core component of this Transaction; the merger will not proceed without the divestiture. As such, evaluating whether *this* Transaction may "substantially lessen competition" in the future

requires considering the anticipated effects of both the merger *and* the divestiture on the competitive landscape in Colorado. Thus, in evaluating a motion for a preliminary injunction—which is predicated on the State's ability to establish a probability of success on the merits—the Court *must* account for the proposed divestiture. The State's efforts to artificially cabin the scope of this proceeding have no legal merit.

First, federal courts have repeatedly held that a divestiture agreed upon by the parties in connection with a merger under review is relevant to the overall competitive effects of the proposed merger at the *liability* stage. Most on point, in *Arch Coal*, the court denied the FTC's request to exclude evidence of the parties' proposed divesture. *See Arch Coal*, 2004 WL 7389952, at *1. The court reasoned that "determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the entire transaction in question." *Id.* at 3. The court was therefore "unwilling simply to ignore the fact of the divestiture," and rejected many of the arguments the State offers here, including that the preliminary injunction stage was intended to preserve the status quo; the divestiture package was not part of the original transaction; the divestiture deal was not final or concrete; and the defendants were seeking to evade or manipulate antitrust review. *Id.* at *1.

Other courts have reached this commonsense conclusion. *See, e.g.*, *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 at 137 (finding evidence at trial established that the scope of the divestiture was sufficient to preserve competition); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 307 (D.D.C. 2020) (evaluating divestiture agreement and denying injunctive relief); *AT&T Inc.*, 310 F. Supp. 3d at 217 n.30 (D.D.C. 2018) (considering effect of parties' post-merger contract at the liability stage due to its "real-world effect" on the competitive landscape); *FTC v. Libbey*, 211

F. Supp. 2d 34, 46 (D.D.C. 2002) (requiring evaluation of parties' new agreement in deciding whether an injunction should be issued).

Just last year, the United States Court of Appeals for the Fifth Circuit held that so-called "remedial" contract offers designed to address concerns from antitrust regulators "should be addressed at the liability—not remedy—stage of the Section 7 proceedings." *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1057 (5th Cir. 2023). The Fifth Circuit reasoned that such offers were "different in kind from a Commission-or-court-ordered remedy, which . . . can be imposed only on the basis of a violation of the law, *i.e.*, after a finding of liability." *Id.* at 1056. Similar reasoning applies here to a divestiture package agreed to by merging parties pursuant to a binding contract entered before the merger's consummation.

The divestiture of hundreds of stores and other assets to C&S is not a proposed "remedy" after a judicial ruling that the merger will likely have anticompetitive effects; rather, it is a voluntary, pre-judgment effort to structure the Transaction in a way that eliminates any anticompetitive effects in Colorado that may result from the merger. The Court must consider the effect of the divestiture on the post-merger landscape when assessing whether the Transaction "may substantially lessen competition." For instance, the State alleges that "in Gunnison, the only Supermarkets are City Market [Kroger] and Safeway [Albertsons]," asserting that "[t]he merger would result in a monopoly for Kroger in this market." Compl. ¶ 141. But once Kroger divests the Gunnison Safeway (as provided by the revised divestiture package), there will be no alleged monopoly in Gunnison, and the State's arguments related to that alleged market will crumble. *See UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 137 ("The evidence at trial established that the scope of the divestiture is also sufficient to preserve competition"). And as noted above, Kroger is set to divest the vast majority (~87%) of Albertsons stores in Colorado.

To be sure, divestiture does sometimes arise in the context of post-liability remedies, when the *plaintiff* requests a divestiture of assets as a remedy after a finding of liability or where a court orders divestiture. *See, e.g.*, *California v. Am. Stores Co.*, 495 U.S. 271, 281 (1990); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329–31 (1961). In those cases, divestiture is appropriately termed a "remedy," because it is a "means of . . . redressing a wrong" found by a court to arise from the parties' proposed transaction. *Remedy*, Black's Law Dictionary (11th ed. 2019). But as one court remarked, the Supreme Court's use of the term "remedy" when discussing divestiture in *that* context "says nothing about whether the merger-challenging plaintiff must address offered and executed agreements made before any liability trial, let alone liability finding; that is, whether [regulators] must address the circumstances surrounding the merger as they actually exist." *FTC v. Microsoft Corp.*, No. 23-CV-2880, 2023 WL 4443412, at *15 (N.D. Cal. July 10, 2023). Accordingly, the State's "reliance on cases like . . . *du Pont*—which concerned *court-ordered* divestitures *after* a finding of Section 7 liability—to support its position that the [divestiture] is a remedy is misplaced." *Illumina*, 88 F.4th at 1056. Notably, the State has not requested divestiture as a "remedy" here.

The State admits, as it must, that federal law is squarely against it. Mot. 10. Yet it argues that "this [issue] is a good place to depart from misguided district court interpretations of federal law," opining that "this Court is authorized to interpret the Antitrust Act independently of any federal antitrust legal precedent" and citing the legislature's deletion of a predecessor provision in the Colorado Antitrust Act of 1992 instructing courts to "use as a guide interpretations given by the federal courts to comparable federal antitrust laws." Mot. 10–11 (citing former C.R.S. § 6-4-119). But the Colorado Supreme Court has made clear—long before the Colorado Antitrust Act of 1992 instructed Colorado courts to consider federal-court interpretations of federal law—that

"federal decisions construing the Sherman and Clayton Acts, although not necessarily controlling on our interpretation of the Colorado law, are nevertheless *entitled to careful scrutiny* in determining the scope of the state antitrust statute," *N. Ave. Furniture & Appliance, Inc.*, 645 P.2d at 1295–96 (emphasis added). Tellingly, the State relied on this very authority in its preliminary injunction motion, urging that federal decisions "may be 'helpful to an understanding' of issues raised under Colorado antitrust law." Mot. for Prelim. Inj. at 20–21. The State cannot cherry-pick which federal decisions the Court should follow and which it should disregard. In any event, none of the State's policy arguments alter the fact that the proposed divestiture is part of the Transaction under review and must be considered in order to assess the Transaction's likely competitive effects.[2]

Second, the State's position that divestiture should be excluded from the preliminary injunction hearing is without any legal support and runs counter to the text of the antitrust statute the State seeks to enforce. The State's argument rests on its contention that the proposed divestiture is a "putative remed[y]," Mot. 9, but as discussed above, the divestiture is an integral part of the Transaction that bears on the question of liability, not a "remedy" to be considered only

[2] If federal precedent were irrelevant to interpreting the Colorado Antitrust Act, the statute likely would be unconstitutionally vague. *See, e.g.*, *Cline v. Frink Dairy Co.*, 274 U.S. 445, 454–55 (1927) (holding prior Colorado antitrust law was unconstitutionally vague). The phrase "may substantially lessen competition" is inherently vague and constitutionally adequate only insofar as it incorporates the large body of antitrust common law, giving fair notice to merging parties and preventing arbitrary enforcement. *See State v. Shaw*, 847 S.W.2d 768, 775 (Mo. 1993) ("Thus, were we forced to address the constitutionality of the phrase 'unfair practices' in isolation, we might be hard-pressed to hold that that phrase is sufficiently definite to meet the demands of the constitution."); Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 Fla. St. U. L. Rev. 709 (2018). If, as the State suggests, the Colorado Antitrust Act does not incorporate that body of common law, it is unconstitutionally vague and subject to the kind of arbitrary interpretation and enforcement the State advocates for here. This Court should not adopt an interpretation of the statute that would raise such concerns.

after a court finds liability. If the Transaction—*including* the divestiture—will not substantially lessen competition in Colorado, then the State cannot prevail in this litigation.

Because the divestiture goes to the merits, it *must* be considered at the preliminary injunction stage. "A preliminary injunction is an extraordinary remedy, and, therefore, a court may deny a motion for preliminary injunction solely on the ground that the plaintiff did not show a probability of success on the merits." *Tesmer*, 140 P.3d at 252. Accordingly, the State bears the burden of showing a "reasonable probability" of success on the merits. *Id.* The "merits" in this case include whether the State can meet its burden to *prove* that "the effect of the acquisition may substantially lessen competition." C.R.S. § 6-4-107(1). Considering the effect of the entire Transaction in this context is neither speculative nor premature; it is required.

A preliminary injunction proceeding that fails to account for the full Transaction at issue would be illogical and inefficient. The purpose of the divestiture is to address the competitive concerns raised by the State and others; the State cannot blind itself to the actual Transaction before the Court. This Court should reject the State's position, which "continue[s] to insist (erroneously) that the divestiture is simply not relevant." Order Granting Mot. to Dismiss First Am. Compl. at 3, *Whalen v. Kroger*, No. 23-CV-459, ECF No. 120 (N.D. Cal. Dec. 20, 2023).

II. THE STATE'S PROCEDURAL ARGUMENTS ARE PREMATURE AND INAPPOSITE

Recognizing the mountain of directly on-point and persuasive case law rejecting its exact legal position, Mot. 10, the State suggests there is a procedural reason to exclude divestiture evidence from the preliminary injunction hearing: The four months before the preliminary injunction hearing in August supposedly do not give the State sufficient time to analyze the proposed divestiture. Mot. 13–16. That argument is essentially moot now that Kroger has agreed

to make discovery regarding the divestiture available by May 17, 2024, but to the extent the State continues to press this argument, it fails for at least three reasons.

First, the State has no support for its extraordinary request to prevent the Court from assessing the actual Transaction before the Court. As noted above, if the divestiture is excluded, the Court would be left to analyze a hypothetical transaction that the parties *could* have pursued but did not. An assessment of whether *that* transaction should be preliminarily enjoined says nothing about the likely competitive effects of the *actual* Transaction that Kroger and Albertsons pursued. Simply put, the preliminary injunction hearing *cannot be conducted* without taking the divestiture into account.

Second, there is no basis for the State's contention that four months is insufficient time to prepare for trial. Merger litigation is fast work: Since 2015, the average time from a complaint filed by the FTC to a *decision* was just 5.9 months. Dechert LLP, *DAMITT Q3 2023: Merger Control Is a Marathon, Not a Sprint*, (Oct. 30, 2023), https://bit.ly/4dbSoEz. All parties face time pressure in preparing for trial, but in merger litigation, it is the *defendants* that are most disadvantaged, because they have had no prior opportunity for discovery (unlike the FTC and the state attorneys general, who often conduct years' long investigations). But defendants manage and work through those time pressures, like all other litigants. Especially now that the proposed divestiture has been signed and disclosed, the State cannot credibly claim that the amount of time in which Defendants must complete *all* discovery for the preliminary injunction hearing is insufficient for the State to take discovery on one specific issue.

Notably, any burden imposed on the State by the schedule is a problem of its own making, since it was the State that insisted on the earliest hearing date of all the pending litigations against the Transaction. The State also rejected Defendants' request for a single permanent injunction

hearing, instead fighting to have separate preliminary and permanent injunction hearings. Second Status Report and Hearing to Set Prelim. Inj. Hearing at 2. And the State has refused to join the FTC's action or to coordinate efforts with the other attorneys general challenging this Transaction, even though doing so would conserve party and judicial resources and save taxpayers millions of dollars in the process. *See* Ex. B (Mar. 29, 2024 Letter to Colo. Att'y Gen.). Having pressed for this schedule—with full knowledge that the parties were negotiating a revised divestiture proposal—the State cannot now complain that it is too abbreviated.

The lone authority the State cites in support of its request—*FTC v. Ardagh*—underscores the weakness of the State's position. In *Ardagh*, the FTC learned about a proposed divestiture for the first time the night before the deposition of a defendant's CEO. Tr. of Prehearing Conference at 27–35, *FTC v. Ardagh*, No. 13-CV-1021 (D.D.C. Sept. 24, 2013), https://bit.ly/49J8RNt. Just *three* weeks before the preliminary injunction hearing, the merging parties advised the court that they were "still in negotiations," and had no binding contract or even a divestiture buyer. *Id.* at 21, 28–29. In those circumstances, the FTC's claims of prejudice were concrete and ripe. But even there, the court expressed concerns that excluding the divestiture evidence would result in an "advisory opinion," *id.* at 36, and the parties settled once the divestiture package was finalized, *Ardagh*, ECF No. 151.

The circumstances in *Ardagh* could not be more different from those here. The divestiture of up to 650 stores was written into the Merger Agreement, the initial divestiture package and divestiture buyer were disclosed in September 2023 (more than seven months ago), the State was a party to continuing investigation and negotiations with regulators as to the divestiture in the five months prior to filing this lawsuit, an amended divestiture package has been agreed to and disclosed to the State, and the preliminary injunction hearing is approximately four months away.

Indeed, while the State makes vague claims of prejudice, it never actually articulates *how* or why it will be unable to address the divestiture at the upcoming preliminary injunction hearing.

Third, the State accuses Defendants of "hoping to win by ambush" and lying in wait to "spring their 'real' divestiture remedy plan on the Attorney General as late in the process as possible." Mot. 13, 15. That accusation is unmoored from reality. Kroger and Albertsons are parties to a multi-billion-dollar merger and, with C&S, an accompanying divestiture package likewise worth several billion dollars. Although the parties are endeavoring to work collaboratively, they nonetheless remain *competitors* with their own interests and expectations. Many terms of the proposed divestiture had to be negotiated with C&S even after the "handshake" deal reached before March 25, 2024. The parties are not sandbagging the State or the Court—they have been working vigorously to negotiate a revised divestiture package that addresses the State's competitive concerns with the merger, with the hope of making this proceeding unnecessary. These concerns were raised by the FTC and various state regulators, *including* the Colorado Attorney General; the State cannot now complain about Kroger and Albertsons taking sufficient time to craft a revised divestiture package that responds to their regulatory concerns. The amended divestiture agreement was signed in the early morning hours of April 22, and the Colorado Attorney General was apprised of this development fewer than four hours later. There is no ambush here.

The State's appeal to academic sources (but no facts) is equally unpersuasive.[3] As the law review article cited by the State acknowledges, "Courts generally have denied agency motions in

[3] For every law review article proposing restrictions on the consideration of divestiture evidence in merger trials, there is another article explaining that such an approach runs contrary to longstanding practice and precedent. Matt Reilly et al., *Merger Remedy Divestitures: the Agencies Zig and the Courts Zag*, 37 Antitrust 1, 15–16 (Summer 2023), https://bit.ly/3JbtyqB (explaining

limine to exclude consideration of these remedies, at least where the merging parties have offered a definite remedy with sufficient time for the reviewing agency to investigate." Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, 85 Antitrust Law Journal No. 3, at 622 (2024). Despite the State's attempts to mischaracterize the history of the divestiture, this is simply not the sort of "late-stage" proposal offered to take regulators by surprise. All parties have understood from the outset that the Transaction included a divestiture component, and there is more than sufficient time for the State to evaluate the proposed divestiture.

III. THIS COURT SHOULD DENY THE STATE'S ALTERNATIVE REQUESTS FOR PROCEDURAL HANDICAPS ON THE DEFENSE PRESENTATION

Finally, the State's alternative arguments requesting two "limits" and "guardrails" on Defendants' ability to present evidence at the preliminary injunction are either moot or legally foreclosed.

First, the State's request for a deadline to produce any revised divestiture package is now moot, given the parties' revised agreement and the Court's order at today's hearing.

Second, the State suggests it should not bear the burden of addressing the divestiture package as part of its "prima facie case showing that the merger is illegal," and that "the presentation of the remedy plan" should instead be a part of Defendants' "rebuttal burden." Mot. 17. This argument is just another iteration of the State's debunked theory that the proposed divestiture is irrelevant to liability.

A challenge to a merger is evaluated under a three-part burden-shifting framework. First, the plaintiff must show "that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area," giving rise to a "presumption that the

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that courts permit parties to litigate the fix and are questioning the agencies' preferred standard for evaluating divestitures, which breaks from prior agency practice).

transaction will substantially lessen competition." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). Next, "[t]he burden of *producing* evidence to rebut this presumption then shifts to the defendant." *Id.* (emphasis added). Finally, "[i]f the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, *which remains with the government at all times*." *Id.* at 983 (emphasis added). The typical way for a plaintiff to establish a prima facie case in a horizontal merger case (like this one)—and indeed, the *only* basis on which any horizontal merger has been enjoined—is by showing that the merger will result in market concentration in properly defined relevant markets that exceeds certain economic thresholds. *See id.* at 982–83.

Here, to meet its initial burden and make a prima facie showing that the Transaction will lead to undue concentration, the State must demonstrate that post-Transaction, the market concentration will exceed these thresholds in appropriately defined markets. And to do that, it must evaluate the market shares that will *actually* result from the Transaction, which requires consideration of the effect of the divestiture. *See Arch Coal*, 2004 WL 7389952, at *3. To hold otherwise would allow the State to "meet its prima facie burden with market-share statistics that have no connection to the post-acquisition world." *UnitedHealth Grp.*, 630 F. Supp. 3d at 133. The State's request that the "burden" of presenting divestiture evidence shift to Defendants thus improperly seeks to diminish the State's burden in establishing a prima facie case of competitive harm.

Illumina—cited by the State—is not to the contrary. Mot. 17 (citing *Illumina*, 88 F.4th at 1058). There, the court assessed the significance of the defendants' "Open Offer," a long-term contract that the acquiring party offered to its customers (and soon-to-be business rivals) to

alleviate the government's competitive concerns, opining that the "Open Offer" was properly considered as part of the defendants' rebuttal case. 88 F.4th at 1057. The court there, however, was evaluating an open promise to customers that represented a "post-signing, pre-closing adjustment to the status quo," not a divestiture of assets conveyed as part of the primary transaction. *Id.* at 1056. That is different from the proposed divestiture here, which has always been contemplated as part of the merger and which, when executed contemporaneously with the merger, would alter the market concentration statistics the State must analyze to make its prima facie showing. Put otherwise, the proposed divestiture is part of the Transaction under review, while the Open Offer in *Illumina* was a standalone promise to enter into *future* contracts with customers. And notably, even in *Illumina*, the government addressed the Open Offer in its case-in-chief. *Id.* at 1057. Here, because the divestiture is part of the Transaction, the State must consider the effect of the divestiture to meet its initial burden of production and, ultimately, its burden of persuasion.

In any event, the court in *Illumina* expressly declined to shift to the defendants the burden of *persuasion*, which at all times remains with the plaintiff. 88 F.4th at 1058. The burden-shifting framework never relieves the plaintiff of its ultimate burden of persuasion and never puts the onus of proving the adequacy of the divestiture on the defendants as, for example, an affirmative defense does. *See Baker Hughes*, 908 F.2d at 991–92. It is the State's burden at all times to persuade the Court that the Transaction, as a whole and including the divestiture, may substantially lessen competition. The State cannot shift that burden onto Defendants.

CONCLUSION

For these reasons, this Court should deny the Motion in full.

DATED this 22nd day of April, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been served on all counsel who have entered an appearance in this matter through Colorado Courts E-Filing, on April 22, 2024, including the following:

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