DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: April 29, 2024 4:35 PM FILING ID: ACF4C56B61F41 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 REPLY IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DEFENDANTS' DIVESTITURE REMEDY FROM HEARING ON PRELIMINARY INJUNCTION	

Defendants' newly proposed revised divesture remedy should be excluded from the PI Hearing. Contrary to Defendants' Opposition, their delivery of an incomplete litigate-the-fix proposal while the parties were in Court last week, plus vague allusions to the *possibility* of a divestiture in Kroger and ACI's October 13, 2022 Merger Agreement do not change this fact.

First, a proposed divestiture is not a defense against a charge that the underlying merger is illegal, and courts consistently hold that such a remedy does not become an element of the government's prima facie case simply because it was "contracted-for" by the Defendants. The appropriate time for the Court to consider Defendants' almost 1,200-page revised divestiture agreement is at trial, after the AG has had sufficient time to review.

Second, Defendants' revised divestiture remedy proposal is untimely, incomplete, and too complex for consideration at the PI hearing. The Defendants' amended divestiture agreement is so complicated that it took them a month (or more) to sign even after they reached a "handshake" deal. And even so, the revised agreement is still incomplete—[redacted]. The stakes of this deal failing are too high for Colorado citizens to deny the AG time to investigate and analyze it. The fact that the AG is left with less than two months of discovery on a brand-new divestiture remedy plan before the PI Hearing is a problem entirely of Defendants' creation, and they should have to bear the consequences of their own deal structure.

Lastly, Defendants brazenly argue they bear no burden, even of production, regarding their revised divestiture remedy proposal. This is contrary to law, as nearly all courts to consider litigate-the-fix proposals have placed the burden on the defendants to show the proffered remedies

would nullify the anticompetitive effects that may result from the merger.

I. ARGUMENT

A. The Court's Consideration of Defendants' Proposed Divestiture Remedy Should Follow from a Ruling the Merger is Illegal at Trial

Congress has developed an orderly process for government review of a proposed merger.[1] The complex divestiture remedy offered by Defendants was not part of that review. References to a potential divestiture in the Merger Agreement were speculative and undefined. Mtn. 2-3. And the proposed divestiture remedy offered previously, nearly a year into that review, appears to be significantly different than the proposed remedy that Defendants finally disclosed during a status conference. Defendants now say that Kroger's purchase of ACI will not happen without the divestiture to C&S and that the remedy is a "core component of this transaction." *See* Opp. 7. If this were true, then Defendants should concede that Kroger could not lawfully merge with ACI, and narrow this case to just the divestiture remedy.

Defendants also argue that a "contracted-for divestiture" is different from a court-ordered divestiture. Opp. 8-10. This makes no sense. If the Court ultimately agrees that Defendants' divestiture remedy plan cures the anticompetitive effects of the Proposed Merger, then the Court would still have to order the divestiture.[2] Defendants contend (without legal support) that when merging parties propose a divestiture, it is a liability defense, but when the government seeks a divestiture, it is a remedy. When the government challenges a merger and seeks a divestiture,

[1] *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended in 15 & 28 U.S.C.).

[2] *See United States v. UnitedHealth Group, Inc.* 630 F. Supp. 3d 118, 128, 155 (D.D.C. 2022) (ordering divestiture despite finding no violation under Section 7 of the Clayton Act and explaining "the Court enters judgment for Defendants . . . and orders that ClaimsXten be divested to TPG.").

rather than a full-stop injunction, that divestiture is considered a remedy—and the government must first prove that the merger is unlawful before a court can consider the government's proposed divestiture remedy. *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (remedy follows a finding that a merger may "substantially lessen competition"). It cannot be that when Defendants propose a divestiture, the divestiture morphs into a part of the government's prima facie case on liability.

The point of a preliminary injunction is to preserve the status quo until a trial on the merits can be held. Mtn. 7-13. Determining whether the revised divestiture proposal sufficiently remedies Defendants' unlawful merger should be reserved for trial.

B. Defendants' Revised Divestiture Remedy Plan is Untimely and Indefinite

Even if it were legally proper for this Court to consider Defendants' divestiture at a PI Hearing, the AG established that Defendants' divestiture remedy plan has come too late to be fairly considered. Mtn. 12-18. Defendants fail to rebut this key point.

Defendants point to decisions denying motions to exclude divestiture remedies, ***but in each case the merging parties offered a definite remedy with sufficient time for the reviewing agency to investigate***. Opp. 15-16. Notable examples include *FTC v. Arch Coal, Inc.* where the merging parties signed a final agreement to sell a single coal mine to the buyer ***before the FTC issued its complaint***. No. 1:04-cv-00534, 2004 WL 7389952 at *2-3 (D.D.C. July 7, 2004). In *FTC v. Libbey, Inc.* the parties signed an amended agreement to sell a single business line ***a week after the FTC sued and the amended merger agreement was fully examined in discovery***. 211 F. Supp. 2d 34, 41-43 (D.D.C. 2002). In *UnitedHealth Group,* the government had ***more than four months to conduct discovery*** on a signed agreement that was announced ***prior to the filing of the complaint*** and that divested a standalone business. 630 F. Supp. at 128, 134 n. 5, 155.

Conversely, district courts like the one in *FTC v. Ardagh* have declined to hear a divestiture proposal at the preliminary injunction stage due to insufficient time to thoroughly investigate it. *See* Mtn. 13. Defendants attempt to distinguish these cases and claim the AG has ample time to investigate their revised divestiture remedy plan because some form of divestiture with an unknown buyer and no defined plan was suggested in their Merger Agreement, and because a significantly different divestiture package was disclosed to regulators in September 2023. Opp. 14. Defendants' arguments are unavailing. As the Motion explained, references to a potential divestiture in the Merger Agreement were speculative and undefined. *See* Mtn. 2-3.

Nearly a year after the Merger Agreement, on September 8, 2023, Defendants announced their first actual agreement on a divestiture remedy. Opp. 4-6. After the government explained why that remedy was inadequate, Kroger indicated that it might attempt to negotiate a revised agreement with C&S. But there was nothing concrete for the government to review until April 22, 2024. On that day, while the parties were in the courtroom for a status conference, Defendants emailed the AG a link to a revised divestiture agreement of 1,175 pages.

No documents related to the newly disclosed remedy plan have been produced to the AG, even though the AG tendered document requests to Defendants before the new plan announcement. It is unclear when those documents will be produced, but at the status conference Defendants would not agree to a deadline earlier than May 17th. The documents needing review will likely number in the tens- to hundreds of thousands and include highly technical information. Only after that review can depositions of relevant parties and non-parties be taken and expert reports drafted. Finally, the AG will need to determine whether the proposed divestiture actually remedies the anticompetitive effects of the merger. Fact discovery for the PI Hearing is set to

conclude on June 22, 2024 – **less than two months from today**. Notably, because the Defendants refuse to concede that the underlying merger is illegal, the AG will need to conduct this extensive remedy analysis simultaneously with review of an unlimited number of third-party productions, and preparing for the up to 50 witness depositions that Defendants claim they need. The AG has proposed closing fact discovery for the trial on August 2, 2024. The schedule driven by Defendants' self-imposed and renegotiable Outside Date simply does not permit enough time to produce and then review documents, conduct depositions, and prepare expert analysis.

In addition to being untimely, Defendants' divestiture proposal remains incomplete, with many material aspects still being negotiated and material facts still undisclosed to C&S, making consideration at the PI Hearing impossible. For example, in the short time that the AG has had to review the proposal, we have already identified the following, with excerpts attached as Exhibit 1:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted].

- [redacted]

Defendants' revised divestiture remedy proposal is a far cry from the final, definitive, timely remedy proposals at issue in *Arch Coal*, *Libbey*, and *UnitedHealth Group*.

The complexity of Defendants' remedy plan is also a key distinguishing factor from the cases Defendants cite. C&S is not buying a complete business unit from ACI or Kroger, but is instead buying a hodgepodge of stores, distribution facilities, private label brands, and manufacturing facilities. This form of divestiture is traditionally disfavored because it is less likely to succeed and because it significantly increases the complexity of analysis.[3] Here, headquarters and regional functions, like IT, pricing, marketing, pharmacy management and compliance and much more, are the subject of a complicated transition services agreement. How all that will work needs to be investigated and understood. These issues go to the critical question of whether C&S can successfully operate as a viable competitor to the expanded Kroger or whether C&S is inadequately prepared and at risk to fail, which may cause a substantial lessening of competition in Colorado. *See* PI Mtn. 17-19, 58-62.

This is not a hypothetical concern. The poster child for failed grocery divestitures is the divestiture to Haggen following the Safeway/ACI merger a decade ago. "Haggen's demise was swift, began immediately, and continued unabated for seven months," ending in bankruptcy because "[i]t turns out that the people in charge . . . to some degree were not prepared." *In re HH*

[3] *See*, *e.g.*, Richard Feinstein, *Negotiating Merger Remedies*, Statement of the Bureau of Competition of the Federal Trade Commission (Jan. 2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf ("In general, a 'mix and match' proposal tends to slow the negotiations down, requiring a more fact-specific, detailed, and time-consuming evaluation of each asset.").

Liquidation, 590 B.R. 211, 220, 237 (Bankr. D. Del. 2018). Problems with Haggen's planning, operations, pricing, and personnel contributed to its failure. *Id.* at 97-101. Similarly, Haggen's "marketing and merchandising capabilities" were insufficient "to handle the enormous expansion that was contemplated"—Haggen lacked "talent or numbers of people in merchandising to adequately negotiate, make decisions, set up pricing, and manage a large chain." *Id.* at 97. As the Haggen failure demonstrates, C&S's transition planning, the IT systems that C&S will use, the personnel who will run the stores, and corporate functions, are critical to the success of the divestiture and must be thoroughly investigated.

Defendants' argument that the AG somehow filed suit too early, while Defendants were trying to "address regulators' concerns," is far from the truth. Serious concerns with the Proposed Merger and Defendants' divestiture remedy plan expressed by the AG, the FTC, and other state attorneys general, went unaddressed, leading the FTC to terminate discussions. Mtn. 2-5. The different changes proposed by Kroger during the investigation process were not approved or agreed to by C&S, making them speculative. More importantly, they failed to address the AG's concerns, causing the AG to fear that Kroger was not taking those concerns seriously. Those fears were confirmed when the AG learned that Kroger viewed the concerns as nothing more than "noise" and a "Christmas wish list."[4] Meanwhile, the clock kept ticking towards the Defendants' self-imposed "Outside Date." The AG had to take action to preserve the current state of competition and filed his lawsuit and the PI Motion.

[4] Defendants also lament having to defend their proposed merger under Colorado law, even sending the AG an "invitation" to join the FTC's case. Opp. 14. Defendants' disdain for having to comply with Colorado law is not a legal argument. *See* Exhibit 2 (4/25/24 AG Response Ltr.).

Defendants had every opportunity to "address regulators' concerns," but failed to do so. Defendants have tried to manipulate the timing of this litigation by refusing to move their Outside Date or agree not to close until a final decision on the merits. The fact that we are now left with less than two months of discovery on a brand-new, but still incomplete, divestiture remedy plan before the PI Hearing is a problem entirely of Defendants' creation, and they—not the people of Colorado—should have to bear the consequences of their own deal structure.

C. The Court Should Continue to Establish Limits and Guardrails

The Motion argued that, if the Court allows presentation of a divestiture remedy at the PI Hearing, then the burden should be on Defendants to show why it resolves the anticompetitive effects of the Proposed Merger. Mtn. 16-18. Defendants now argue that they bear no burden, even of production, regarding their divestiture remedy. Opp. 16-18. They are wrong. Defendants point to the Fifth Circuit's recent decision in *Illumina*, *Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023) to argue the AG "must consider the effect of the divestiture to meet its initial burden of production." Opp. 17-18. Defendants ignore that in *Illumina* the court analyzed the defendant's proposed remedy at the rebuttal stage, requiring the merging parties to affirmatively show why their proposed remedy undermined the FTC's prima facie case to such an extent that there was no longer a probability that the merger would substantially lessen competition. *Illumina*, 88 F.4th at 1058.

Contrary to Defendants' assertions, the AG has never disputed that he retains the ultimate burden of persuasion at trial. PI Mtn. 33. The AG agrees that if Defendants provide all relevant discovery related to their revised divestiture remedy plan by May 17, 2024, as ordered by the Court, remedy evidence should be considered at trial beginning on September 30, 2024.

The questions for the Court are how and when the Defendants' revised divestiture remedy

plan should be analyzed at trial, and who should bear the evidentiary burden to show the sufficiency of the remedy. There are two approaches the Court could implement, consistent with the *Baker Hughes* burden-shifting framework. PI Mtn. 21-23; Opp. 16-17.[5]

The first approach would apply a two-stage process of liability and remedy. In stage one, the Court would assess the legality of the unremedied merger, applying the *Baker Hughes* burden-shifting framework with the ultimate burden of persuasion placed on the AG. The Defendants would be permitted to argue that the merger they originally submitted in their HSR filings did not violate the Antitrust Act.[6] If the unmodified merger is found to violate the Antitrust Act, the remedy would be evaluated in stage two, with the evidentiary burden placed on the Defendants.[7]

Under the second approach, the Court would consider Defendants' revised divestiture remedy plan as rebuttal to liability. Under this approach, the AG must first establish a prima facie case showing that the effect of the unremedied merger is likely to be anticompetitive. *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.D.C. 2019) (prima facie case established if Government shows "that the merger is likely to substantially lessen competition").

If the AG satisfies his burden, the evidentiary burden shifts to Defendants to show the sufficiency of the divestiture remedy, in combination with any other rebuttal arguments. *See*, *e.g.*, *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016) (holding that defendants "bear

[5] These are the same approaches the Court should consider if it permits divestiture remedy evidence at the PI Hearing.

[6] The fact the Antitrust Act allows departure from federal law does not make it unconstitutional as Defendants suggest. *See* MTD Opp.

[7] This approach is consistent with the DOJ's position in *United States v. Assa Abloy AB*. *See* Supplemental Pretrial Brief of Plaintiff United States at 6–13, No. 22-cv-02791 (D.D.C. Mar. 27, 2023), ECF No. 102. That case was settled before the court ruled on the issue.

the burden of showing that [the] remedy would negate any anticompetitive effects of the merger."). This includes establishing that the divestiture buyer will not face impediments that would prevent it from replicating the intensity of pre-merger competition. *See* Mtn. 18.

Finally, and only if the Defendants successfully rebut the presumption, the burden should shift back to the AG to produce additional evidence of anticompetitive effects and merge with the AG's ultimate burden of persuasion. *Baker Hughes*, 908 F.2d 981, 983 (D.C. Cir. 1990).

There are two salient features to both approaches. First, under both approaches the AG may satisfy his prima facie evidentiary burden by focusing on the merger as proposed in the Defendants' HSR filings. This makes sense because the original Merger Agreement is the deal that Defendants repeatedly insist the AG has had ample time to investigate. *See* Opp. 4, 14.

Second, it is Defendants' burden to show that their revised divestiture remedy plan will prevent anticompetitive harm. Nearly all courts that have considered "litigate-the-fix" proposals have placed the burden on the defendants to establish that their proffered remedies nullify the anticompetitive effects that would otherwise result from the merger.[8]

II. CONCLUSION

For the foregoing reasons, the AG respectfully requests that the Court exclude any evidence of Defendants' revised divestiture remedy plan at the PI Hearing. Alternatively, if the Court allows any divestiture evidence at the PI Hearing or at trial, the Court should allocate the rebuttal burden to Defendants to establish that their divestiture remedy plan is sufficient to maintain competition.

[8] *See*, *e.g.*, *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 304 (D.D.C. 2020); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017); *Staples, Inc.*, 190 F. Supp. 3d at 137 n.15; *Sysco Corp.*, 113 F. Supp. 3d at 72–78.

Respectfully submitted this 29th 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 29, 2024.

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