Hon. Marshall Ferguson
Hearing Date: April 26, 2024 at 1:30 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

THE KROGER CO.;
ALBERTSONS COMPANIES, INC.;
ALBERTSON'S COMPANIES SPECIALTY CARE, LLC;
ALBERTSON'S LLC;
ALBERTSON'S STORES SUB LLC;
and KETTLE MERGER SUB, INC..

Defendants.

No. 24-2-00977-9 SEA

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

I. INTRODUCTION

The State's Response concedes that this action is the first time in history that a State has sought to enjoin a nationwide merger under state antitrust law. Mot. 1-2. The State's suggestion that the Complaint's requested relief is "commonplace," Resp. 8, and that Defendants' arguments "have previously been considered and rejected," Resp. 2, is belied by the State's failure to cite *any* precedent in which *any* state sought similar relief. The Response thus confirms that the State seeks to usher in a new age of merger enforcement, in which any state attorney general has license to enjoin any out-of-state transaction under state law without regard to its nationwide impacts. Resp. 2. This Court should reject the State's unprecedented overreach.

Rather than confronting the serious legal issues raised in Defendants' Motion and the consequences of the State's heavy-handed approach, the Response largely attacks strawman arguments about preemption, declaratory relief, and the scope of the Consumer Protection Act ("CPA").

First, the State offers no real defense of the disproportionality between its allegations of Washington-specific harm and its request for nationwide injunctive relief. Although the State resists the label of "nationwide injunction," Resp. 14-15, it concedes that it seeks to prohibit the merger in all 50 states. On these facts, the State cannot show that the sweeping relief sought—which would enable one state to dictate merger policy for the entire country—is appropriately tailored to the alleged harm.

Second, the State fails to address the significant constitutional and comity concerns with its requested relief. The U.S. Supreme Court's balancing test under the Dormant Commerce Clause, as articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is binding precedent.

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

The State's perfunctory *Pike* analysis, Resp. 22-23, cannot overcome the clear imbalance between the Complaint's Washington-specific allegations and the extraterritorial effects of its requested relief in all other states. And the State's refusal to even *acknowledge* the multiple parallel actions challenging the merger on the same grounds and seeking the same relief, Mot. 5, underscores its failure to rebut Defendants' Full Faith and Credit and comity arguments.

Third, the State's so-called "express lane" to avoid the merits of the Motion by focusing on possible relief *other than* a nationwide injunction, Resp. 2, is a road to nowhere. The only tangible, non-advisory relief the Complaint actually seeks is an order enjoining the merger across the country. That relief is impermissible.

Finally, dismissal would not prejudice the State or its ability to act on behalf of Washingtonians. The FTC, eight other states, and the District of Columbia jointly sued to enjoin this same transaction under the Clayton Act, *see FTC v. The Kroger Co.*, No. 3:24-cv-347 (D. Or.) ("FTC Action"), and Defendants have invited the State to join that suit, which does not suffer from the legal infirmities raised here. *See* Defs.' Mar. 29, 2024 Letter to R. Ferguson (Ex. A). Joining the FTC Action—which is consistent with long-standing practice and constitutional limitations regarding merger litigation—would enable the State to litigate this nationwide merger while appropriately considering the interests of Washingtonians and conserving taxpayer resources.

II. ARGUMENT

A. The State's Proposed Injunction Is Disproportionate to the Alleged Harm

The State agrees that "[i]njunctions must be tailored to remedy the specific harms shown," Resp. 12 (quoting Mot. 9), but refuses to apply that rule.

The State confuses the merger itself, which is a contract between out-of-state companies

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

governed by Delaware law, and the merger's predicted *effects*, which are nationwide. Resp. 15. As the merger itself will be consummated out-of-state, *see* Resp. 8, the State has authority to address only the *effects* of the merger within Washington. Mot. 7-8.

The State's requested relief far exceeds that narrow mandate. Although it resists the "nationwide injunction" label as a "red herring," Resp. 14, the State does not dispute that its requested injunction would have nationwide effect. The State's requested relief would thus dictate merger policy for the entire country based on alleged harm in Washington alone. Such sweeping relief would exceed both the State's own mandate and that of this Court. *See, e.g.*, *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023) (rejecting nationwide injunction where harm alleged was "not shared nationwide").

The State misses the point of Defendants' divestiture arguments, which highlight the overbroad relief sought. Mot. 9-10. Of course, divestiture is not *always* an appropriate remedy in merger cases.[1] But the State does not dispute that a Washington-specific divestiture would be *more tailored* to address its alleged Washington-specific harms. Resp. 14-18. The Complaint's fatal flaw is the State's *insistence* on nationwide relief against the *entire* transaction, rather than state-specific relief. Resp. 15. That requested remedy is plainly "more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." Mot. 7 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

B. The State's Requested Relief Contravenes the U.S. Constitution

Contrary to the State's distortions, Defendants' Motion presents an *as-applied* constitutional challenge to the State's novel lawsuit, Mot. 10-13, not a facial attack on the CPA, *contra* Resp. 4. The State's defense of the CPA *generally* fails to confront Defendants' *actual* arguments for dismissal, much less rebut them.

[1] Divestiture as a court-ordered *remedy* after trial is different from the contractual divestiture in this case, which must be addressed at the liability phase. *See Illumina, Inc. v. FTC*, 88 F.4th 1036, 1057 (5th Cir. 2023).

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

First, the State's response to Defendants' actual argument—a straightforward as-applied Dormant Commerce Clause challenge under *Pike*, Mot. 10-12—consists of two conclusory paragraphs declaring the issue premature. Resp. 22-23. The State fails to address the reality that the merger's alleged effects in Washington, even if proven, cannot outweigh the extraterritorial effects of a nationwide injunction in all other states. Mot. 9-10. The State refuses to engage with Defendants' authority explaining as much, including *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350 (Fed. Cir. 2013), and *Hyatt Corp. v. Hyatt Legal Services*, 610 F. Supp. 381, 385 (N.D. Ill. 1985), which are directly on point. Mot. 11.

Second, the State wrongly suggests that *Pike* was overruled. Resp. 22. Although a plurality in *Pork Producers* sought to narrow *Pike*, the *majority* of the Supreme Court disagreed. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 402 (2023) (Roberts, J., concurring). *Pike* is binding precedent, and "the extraterritoriality analysis [is a] facet[] of the *Pike* test." *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 719 (2007). Under *Pike*, the extraterritorial effects of the State's proposed remedy are "clearly excessive" compared to any Washington-specific effects. Mot. 11-12.

Third, the State's assertion that *Washington Bankers Association v. State*, 198 Wn.2d 418, 452 (2021), eliminates *Pike* is incorrect. The parties in *Washington Bankers* "d[id] not contest *Pike*'s applicability," and *Washington Bankers* involved a *facial* challenge to a tax law, not an enforcement action seeking nationwide relief. *Id.* Thus, the State's suggestion that *Washington Bankers* "made clear" that *Pike* does not apply to facially neutral laws, Resp. 22, is simply wrong.

Fourth, the State overreads *State v. Sterling Theatres Co.*, 64 Wn.2d 761 (1964), which addressed a broad preemption argument that businesses with sufficient interstate activities were categorically "exempt from the scope of the state law." *Id.* at 765. The actual enforcement action at issue in *Sterling* was focused on theaters *in Seattle*—a "primarily local impact." *Id.* at 764. Here, Defendants raise no facial challenge to the CPA and do not seek to limit the

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

State's authority to enforce the CPA *within its own borders*. *Contra* Resp. 20-21. With *Sterling* properly framed, the State's suggestion that the U.S. Constitution does not apply to "state antitrust law," Resp. 18-21, offends basic rules of federalism.

Finally, the State's argument that the Full Faith and Credit Clause should not apply without a judgment, Resp. 23, ignores that its requested injunction conflicts with other state laws and would prohibit other courts' consideration of the merger under those laws (or applicable federal law). A state may not "project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." Mot. 12 (quoting *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504-05 (1939)); *see Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235-36 (1998) (invalidating extraterritorial injunction against witness testifying). The State does not dispute that the merger is *lawful* under other states' laws, Resp. 24, yet it asks this Court to prohibit other courts from making that judgment.

C. Interstate Comity Precludes the State's Action

The State does not acknowledge the elephant in the courthouse: the FTC Action involving nine attorneys general. Mot. 5. Nor does the State contest that it could bring an identical claim under the Clayton Act, or that the FTC Action provides an efficient forum for all interested parties (including the State) to be heard. Mot. 13-14. Yet the State persists in this unprecedented action, without regard to constitutional limitations, potentially inconsistent court rulings, and the significant practical concerns arising from this unnecessary parallel proceeding. In short, the State's position flouts basic principles of interstate comity.

D. The State's Purported Alternative Remedies Cannot Save the Complaint

The State's focus on *other* possible remedies—divestiture and declaratory relief—cannot salvage its impermissible request for nationwide relief. Resp. 11. At most, the State's arguments would yield a partial dismissal or an order striking the request for nationwide injunctive relief, not denial of Defendants' Motion. *See Perez v. Leprino Foods Co.*, 2018 WL

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

1426561, at *3 (E.D. Cal. Mar. 22, 2018) (noting overlap between striking and dismissing improper relief). Regardless, neither alternative remedy is permissible.

First, although the State argues that the possibility of divestiture should save the Complaint, Resp. 9, the State has not sought any state-specific relief, including a divestiture. This case should not proceed on a hypothetical divestiture the State has not requested.

Second, the State's reliance on declaratory relief as a standalone remedy likewise fails. Where "no monetary or injunctive relief is available" and a declaratory judgment would not independently remedy the alleged injury, a plaintiff "lacks standing to assert any remaining claims for declaratory relief." *Karl v. City of Bremerton*, 7 Wn. App. 2d 1047, 2019 WL 720834, *6 (2019). Because the State alleges the *only* relief that would redress its claimed injury is a nationwide injunction, the State "lacks standing to assert any remaining claims for declaratory relief." *Id.*

The State's reliance on *State v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 276 (1973), is misplaced. That case involved *injunctive* relief, and the declaratory relief at issue was expressly in service of *other* private lawsuits. *Id.* Those real-world implications are absent here.

III. CONCLUSION

Defendants respectfully request that this Court dismiss the Complaint.

DATED this 17th day of April, 2024.

Respectfully submitted,

By: *s/ Pallavi Mehta Wahi*

Pallavi Mehta Wahi, WSBA #32799
Christopher M. Wyant, WSBA #35561
Aaron Millstein, WSBA #44135
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Phone: (206) 623-7580
Fax: (206) 623-7022

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

Email: pallavi.wahi@klgates.com
chris.wyant@klgates.com
aaron.millstein@klgates.com

I certify that this memorandum contains 1750 words, in compliance with the Local Civil Rules.

s/ Matthew M. Wolf

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

s/ Mark A. Perry

Mark A. Perry (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW, Suite 600
Washington, DC 20036
Phone: (202) 682-7511
Fax: (202) 857-0940
Email: mark.perry@weil.com

Attorneys for Defendants The Kroger Co. and Kettle Merger Sub, Inc.

s/ Claire Martirosian

Daniel M. Weiskopf, WSBA No. 44941
Claire Martirosian, WSBA No. 49528
McNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101
Phone: (206) 467-1816
Email: dweiskopf@mcnaul.com
cmartirosian@mcnaul.com

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

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

s/ Edward D. Hassi
Edward D. Hassi (*pro hac vice*)
Leah S. Martin (*pro hac vice*)
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 383-8000
Email: thassi@debevoise.com
lmartin@debevoise.com

Michael Schaper (*pro hac vice*)
Shannon Rose Selden (*pro hac vice*)
J. Robert Abraham (*pro hac vice*)
Morgan Davis (*pro hac vice*)
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001
Phone: (212) 909-6000
Email: mschpaer@debevoise.com
srselden@debevoise.com
jrabraham@debevoise.com
mdavis@debevoise.com

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

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

Attorneys for Defendants Albertsons Companies, Inc., Albertsons Companies Specialty Care, LLC, Albertson's LLC, and Albertson's Stores Sub LLC

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

CERTIFICATE OF SERVICE

I certify that on this date I arranged for a copy of the foregoing document to be served on the parties listed below by King County eFiling Application, to:

State of Washington	
Amy N. L. Hanson	amy.hanson@atg.wa.gov
Paula Pera C.	paula.pera@atg.wa.gov
Miriam R. Stiefel	miriam.stiefel@atg.wa.gov
Helen Lubetkin	helen.lubetkin@atg.wa.gov
Glenn D. Pomerantz	Glenn.Pomerantz@mto.com
Kuruvilla J. Olasa	Kuruvilla.Olasa@mto.com
Lauren Ross	Lauren.Ross@mto.com
Xiaonan April Hu	April.Hu@mto.com
Carson J. Scott	Carson.Scott@mto.com
James Berry	james.berry@mto.com
Daniel Zea	daniel.zea@mto.com
Kate Iiams, Paralegal	kate.iiams@atg.wa.gov
Michelle Oliver, Paralegal	michelle.oliver@atg.wa.gov
Keriann Snider, Paralegal	keriann.snider@atg.wa.gov
Grace Monastrial, Paralegal	grace.monastrial@atg.wa.gov
Electronic Inbox	atseaef@atg.wa.gov
Valerie Balch	Valerie.balch@atg.wa.gov
Ashley Locke	Ashley.locke@atg.wa.gov
Robert Bowen	Robert.Bowen@mto.com

Albertsons Companies, Inc.; Albertson's Companies Specialty Care, LLC; Albertson's LLC; and Albertson's Stores Sub LLC	
Daniel M. Weiskopf	dweiskopf@mcnaul.com
Claire Martirosian	cmartirosian@mcnaul.com
Thao Do	tdo@mcnaul.com
Jennifer Hickman	jhickman@mcnaul.com
Lisa Nelson	lnelson@mcnaul.com
Richard W. Redmond	rredmond@mcnaul.com
Edward D. Hassi	thassi@debevoise.com
Shannon Rose Selden	srselden@debevoise.com
Michael Schaper	mschaper@debevoise.com
J. Robert Abraham	jrabraham@debevoise.com
Leah Martin	lmartin@debevoise.com
Morgan A. Davis	mdavis@debevoise.com
Jaime Fried	jmfried@debevoise.com
Mari Cardenas	mcardena@debevoise.com

K&L GATES LLP
925 FOURTH AVENUE, SUITE 2900
SEATTLE, WA 98104-1158
TELEPHONE: +1 206 623 7580
FACSIMILE: +1 206 623 7022

Marie S. Ventimiglia	msventim@debevoise.com
Natascha Born	nborn@debevoise.com
Mike Cowie	mike.cowie@dechert.com
James A. Fishkin	james.fishkin@dechert.com
Enu Mainigi	emainigi@wc.com
A. Joshua Podoll	apodoll@wc.com
Jonathan Pitt	jpitt@wc.com

Invervenor: C&S Wholesale Grocers, LLC	
Brendan T. Mangan	Brendanmangan@dwt.com
Caleah N. Whitten	Caleahwhitten@dwt.com

DATED this 17th day of April, 2024.

s/ Pallavi Mehta Wahi

Pallavi Mehta Wahi
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Phone: (206) 623-7580
Fax: (206) 623-7022
Email: Pallavi.Wahi@klgates.com

Exhibit A

Arnold & Porter

March 29, 2024

VIA EMAIL

Robert W. Ferguson
Attorney General of the State of Washington

Jonathan Mark
Senior Assistant Attorney General
Antitrust Division Chief

Paula Pera C.
Amy N. L. Hanson
Miriam R. Stiefel
Helen M. Lubetkin
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Re: *Washington v. The Kroger Co.*, 24-2-00977-9 SEA (Wash. Super. Ct.): Defendants' Request for Joint Proceedings

Mr. Attorney General:

Because the above-captioned case is one of three government enforcement actions seeking to enjoin The Kroger Co.'s acquisition of Albertsons Companies Inc. on a nationwide basis, we ask that you consider consolidating your case (the "Washington Case") with the federal case brought by the Federal Trade Commission ("FTC"), eight states, and the District of Columbia: Compl., *FTC v. The Kroger Co.*, No. 3:24-cv-00347-AR (D. Or.) (the "Federal Case") by joining as a plaintiff in the Federal Case.

The Federal Case has been scheduled for a hearing on plaintiffs' motion for injunctive relief between August 26 and September 16, 2024, while the Washington Case is not scheduled to begin until September 16. Litigating all antitrust challenges to the Kroger-Albertsons merger in a single proceeding will benefit all parties, save millions of dollars in taxpayer money, avoid unnecessary and duplicative litigation, and ensure a final resolution of all critical issues in a timely manner. Below are a few additional reasons why we believe you should accept our proposal and agree to consolidation and join as a plaintiff in the Federal Case.

First, the issues raised in the Washington case overlap completely with those raised in the Federal Case. Specifically, the Federal Case seeks to represent the citizens of the entire United States, including the citizens of Washington. The Federal Case alleges that the proposed Transaction will likely cause anticompetitive harm in Washington. *See, e.g.*, Fed. Compl. ¶¶ 52, 80. And the Federal Case relies on the same legal principles as the Complaint in your case. In fact, as the Complaint in the Washington Case acknowledges, Washington law generally *requires* Washington courts to follow federal law unless there is a specific basis to depart from that law. Compl. ¶ 64; *see State v. LG Elecs., Inc.*, 185 Wash. App. 123, 134, 340 P.3d 915, 920 (2014) ("[D]eparture from federal law . . . must be for a reason rooted in [Washington's] own statutes or case law and not in the general policy arguments that this court would weigh if the issue came before us as a matter of first impression." (citation omitted)). In short, because both the Washington Case and the Federal Case require a court to determine the competitive effects of a merger that has not yet closed, the factual and legal issues in both cases are materially identical.

Washington will, of course, be free to raise any factual or legal arguments that it believes are unique to it in the joined case. But to the extent that you believe there are any material factual or legal distinctions between the Washington Case and the Federal Case, we ask that you state them specifically in response to this letter.

Second, duplicative litigation would impose unnecessary burdens on Washington taxpayers. Litigation is expensive, and Washington's legal fees are likely to be particularly expensive given that it has hired Munger Tolles & Olsen LLP, a California law firm with rates exceeding $1,000 per hour, per attorney. Indeed, given the extensive discovery and trial preparation process that will have to take place on an extremely expedited timeframe, the costs that Washington taxpayers will have to bear for the State's litigation are certain to be significant. Coordination with the FTC and other states in the Federal Case, by contrast, will allow Washington to benefit from splitting the costs of investigating the matter and preparing for trial, thereby reducing the time and taxpayer money Washington will have to spend litigating this case.

Third, Washington will suffer no prejudice as a result of consolidation. Indeed, eight other states and the District of Columbia have already joined the FTC challenge, demonstrating that coordination among the states and the FTC is feasible and efficient. Those states have pooled their

resources and coordinated their efforts to litigate *nationwide* issues in a single *nationwide* case on behalf of all consumers *nationwide*. If Washington were to join the Federal Case, it would be able to raise any arguments and evidence that it sees fit, and it would not be prejudiced by a single consolidated proceeding. Again, to the extent Washington believes it has unique legal or factual arguments, it would be free to raise those arguments in a consolidated proceeding.

Fourth, Washington has already participated in coordinated investigative efforts with other government enforcers. Before filing the Washington Case, Washington served as liaison counsel for all the states investigating the proposed merger. In that role, Washington coordinated directly and effectively with the FTC and other states to distribute investigatory materials and develop strategy. Although Washington abandoned that formal liaison role when it chose to litigate on its own, you have nonetheless acknowledged the need to coordinate litigation between the Washington Case and the Federal Case. For example, you have agreed that the federal trial should proceed before the Washington trial. Insisting on separate litigation will only make coordination efforts more complicated.

Fifth, Washington has already expended significant unnecessary public and private resources by insisting on duplicative litigation against Kroger and Albertsons separate from other state attorneys general. In October 2022, Washington filed a lawsuit in Washington state court challenging Albertsons' payment of a Dividend to its shareholders, which Washington alleged was made in conjunction with the proposed Transaction. Around the same time, the attorneys general of California, Illinois, and the District of Columbia brought a materially identical challenge to the dividend payment in federal court in the District of Columbia. Washington refused to coordinate litigation efforts with those state attorneys general. As you are aware, the plaintiffs in both the Washington state and federal dividend cases eventually voluntarily dismissed their complaints after having their claims rejected at multiple levels of the state and federal judiciaries. But Washington's refusal to coordinate meant that it ended up spending three times as much time and energy on litigating a case that was entirely duplicative of other coordinated litigation, and which ultimately proved meritless.

For these reasons and others, the Washington Case should be joined or consolidated with the Federal Case to allow for a single streamlined proceeding that will avoid further duplicative litigation, alleviate unnecessary burdens on Washington state courts, and minimize further waste of Washington taxpayer resources. Although Washington may have been concerned that the FTC and the nine other attorneys general would not ultimately seek to enjoin the merger when Washington first filed its litigation in January of this year, there is no conceivable reason to keep litigating in Washington state court now that the Federal Case has been commenced. We are not aware of any case in history in which a state attorney general has decided to challenge a merger in parallel with a merger challenge from the federal government. We do not believe there is a reason to break new ground in this suit, particularly when the FTC and nine other attorneys general are

litigating the same issues in the pending Federal Case.

Finally, as you know, in a suit by the Attorney General under the Washington Consumer Protection Act, the prevailing party "may recover the costs of said action including a reasonable attorney's fee." RCW 19.86.080. In *State v. Black*, 100 Wn.2d 793 (1984), the Washington Supreme Court recognized "the Attorney General has an important role to play in enforcing th[e] State's antitrust laws," but it nonetheless affirmed the imposition of costs and attorneys' fees against the State in light of "the complexity of th[e] case, the enormous amount of time and energy spent in discovery and the duplicative nature of lawsuit," specifically citing the fact that the "Attorney General need not have brought th[e] suit as an identical civil action was filed [in federal court]." *Id.* at 806. If Washington refuses to join the Federal Case and continues to insist on duplicative and unnecessary litigation, we hereby reserve our right to seek appropriate relief against Washington, including but not limited to attorneys' fees.[1]

We would be pleased to discuss any questions or concerns you may have.

Sincerely,

/s/ *Matthew M. Wolf*
Matthew M. Wolf
Sonia Kuester Pfaffenroth
Arnold & Porter Kaye Scholer LLP

/s/ Mark A. Perry
Mark A. Perry
Luna Ngan Barrington
Weil, Gotshal & Manges LLP

Counsel for The Kroger Co.

/s/ Enu Mainigi
Enu Mainigi
Williams & Connolly LLP

[1] Because your litigation is entirely duplicative of the Federal Case, Washington is unlikely to be able to recover attorneys' fees for its litigation efforts, even if it were to prevail. *See, e.g.*, *Black Lives Matter Seattle-King Cnty. v. Seattle Police Dep't*, 516 F. Supp. 3d 1202, 1213 (W.D. Wash. 2021) (excluding "those hours that are not reasonably expended because they are 'excessive, redundant, or otherwise unnecessary.'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

/s/ Edward D. Hassi
Edward D. Hassi
Debevoise & Plimpton LLP

/s/ Michael G. Cowie
Michael G. Cowie
Dechert LLP

Counsel for Albertsons Companies, Inc.