The Honorable Ken Schubert

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, v. ALBERTSONS COMPANIES, INC., ALBERTON S COMPANIES SPECIALTY CARE, ALBERTSON'S LLC, ALBERTSON'S STORES SUB, KROGER CO., KETTLE MERGERS SUB, INC. Defendants.	No. 22-2-18046-3 **STATE OF COLORADO'S *AMICUS CURIAE* BRIEF**

INTEREST OF AMICUS

The State of Colorado, by and through Attorney General Philip J. Weiser, files this *amicus curiae* brief in support of the State of Washington's Motion for Preliminary Injunction to enjoin payment of a $4 billion special dividend by Albertsons Companies, Inc. ("Albertsons") to its shareholders. Colorado supports Washington's application because it will protect Colorado's grocery shoppers and maintain the status quo pending review of Albertsons' proposed merger with The Kroger Co. ("Kroger").

The Colorado Attorney General is charged with enforcing the Colorado Antitrust Act of 1992, which includes the authority to block mergers where the effect "may be to

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substantially lessen competition." C.R.S. §§ 6-4-107, 6-4-111. State Attorneys General are uniquely positioned to evaluate the effect of mergers such as this one in the grocery industry because the impacts will be felt at a local level within each state.

The potential impacts of this proposed merger are particularly concerning in Colorado. Kroger operates 148 stores in Colorado (under the King Soopers and City Market banners),[1] and Albertsons operates 105 stores (under the Albertsons and Safeway banners).[2] There are numerous markets throughout Colorado where Kroger and Albertsons compete head-to-head for the same supermarket customers, including some in which customers have few, if any, alternatives to these two companies to meet their supermarket needs. As a result, the proposed merger in Colorado could result in higher prices for consumers, lower wages and lost jobs for workers, as well as increased buying power for a merged firm that could negatively impact farmers and other local businesses.

The Colorado Attorney General is investigating this proposed merger and has an interest in ensuring that his review, and any potential remedies or enforcement actions, are not prejudiced by Albertsons depleting its cash reserves and taking on debt in the name of providing its shareholders with a premature cash-out.

ARGUMENT

As Washington has argued, Albertsons' planned special dividend will deplete the company's cash reserves and saddle it with significantly more debt. This lessens Albertsons' ability to compete not only during the pendency of the merger review, but also in the event that the merger is blocked and Albertsons has to continue on its own. The special dividend also risks devaluing any stores that would be part of a potential divestiture by limiting Albertsons' ability to make capital improvements to those stores, provide routine

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[1] *See* Kroger Colorado State Impact, *available at* https://www.thekrogerco.com/wp-content/uploads/2022/01/Kroger-FactSheet-Colorado.pdf. (last visited December 6, 2022).

[2] *See* https://local.albertsons.com/co.html (2 Albertsons stores) (last visited December 6, 2022); https://local.safeway.com/safeway/co.html (103 Safeway stores) (last visited December 6, 2022).

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maintenance, or even ensure proper inventory. That, in turn, could poison the well for any potential divestiture remedy.

None of this is conjecture. The failed divestiture that was part of Albertsons' merger with Safeway Inc. ("Safeway") in 2015 provides an instructive case study in how a firm can evade effective compliance with antitrust remedies. As required by that merger review decision, Albertsons divested 146 stores to Haggen, Inc. ("Haggen"). But several months after the divestiture, Haggen went bankrupt. As detailed below, Haggen was stripped of cash due to its private equity shareholder paying itself a dividend and accelerating a loan repayment, and the divestiture was allegedly sabotaged by Albertsons. In the end, Albertsons reacquired many of the divested stores and bought the Haggen brand name. Given this past history, Albertsons not only does not deserve any benefit of the doubt but should be prevented from taking any actions that prejudice an effective merger review in this case. In short, that requires enjoining the special dividend.

A. In Its Prior Acquisition Of Safeway, Albertsons Nullified A Divestiture That Was Plagued By Undercapitalization And A Similarly Poorly-Timed Dividend.

In 2015, Albertsons merged with Safeway. Decision and Order, *In re Cerberus Inst. Partners V, L.P.*, No. C-4504 (FTC July 2, 2015) (the "FTC Order").[3] To allow the merger to proceed, however, the FTC required Albertsons to divest 168 stores, which were then sold to various purchasers. *See id.* Haggen purchased almost all those divested stores—146 total. Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re Cerberus Inst. Partners V, L.P.* ("FTC Analysis") at 5.[4] Haggen was a regional grocer that only operated 18 stores at the time but sought to seize what it viewed as a strong opportunity to expand.[5] *See In re HH Liquidation, LLC*, 590 B.R. 211, 219 (D. Del. Bankr. 2018).

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[3] The FTC Order is attached to the Declaration of Amy Hanson in Support of Temporary Restraining Order (Sub 12) as Exhibit L.

[4] Attached hereto as Exhibit 1.

[5] Although Haggen did not operate any stores in Colorado, the story that follows portends the potential harm that could befall Colorado consumers if Albertsons pays the special dividend before merger review is complete.

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Shortly after acquiring the divested stores, however, Haggen accused Albertsons of anticompetitive conduct and filed a lawsuit against Albertsons, alleging violations of the FTC's divestiture orders, attempted monopolization, breach of the purchase agreement between Albertsons and Haggen, fraud, and unfair competition, among other claims. *See* Compl., *Haggen Holdings, LLC v. Albertsons LLC*, No. 1:15-cv-00768-GMS (D. Del. Sept. 1, 2015) ("Haggen Compl.").[6] Haggen claimed that Albertsons made false representations about the divested stores to induce Haggen to acquire the stores under an expedited timeframe; misused Haggen's confidential information to implement strategies to draw customers away from Haggen; provided inaccurate inventory data to disrupt the transition of the stores to Haggen; provided inaccurate and misleading pricing information to cause Haggen to overprice its goods; sabotaged inventory at the divested stores; improperly removed store fixtures and inventory; disrupted Haggen advertising for the new stores; and failed to perform routine maintenance prior to transfer of the stores. *See id.* ¶ 8.

Haggen was plagued by other issues that should ring alarm bells here as well. Namely, in conjunction with the divestiture acquisition, Haggen paid a $20 million dividend to its private equity shareholder and paid off a preexisting $25 million loan to that same shareholder, all the while taking out more debt to fund the acquisition. *See In re HH Liquidation*, 590 B.R. at 236-37. As a result of these actions, Haggen was left severely undercapitalized and ultimately triggered an event of default under its loan facility. *See id.* at 238. Haggen also faced severe headwinds at the divested stores because customers could no longer use their Albertsons loyalty rewards at the divested stores, and the combined Albertsons/Safeway remained as a direct competitor in those markets. *Id.* at 227, 230.

Ultimately, Haggen could not stay afloat and filed for bankruptcy on September 8, 2015, pursuant to Chapter 11 of the Bankruptcy Code. *Id.* at 219. A series of asset sales occurred through the bankruptcy court, enabling Albertsons to buy many of the stores back

[6] Attached hereto as Exhibit 2.

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at a discount and making a mockery of the divestiture remedy. In 2015—just months after the divestiture to Haggen—Albertsons re-acquired 35 stores from Haggen. Albertsons Form 10-K (Fiscal Year Ending Feb. 24, 2018) at 43.[7] Then, in 2016, Albertsons bought another 29 stores from Haggen, 15 of which were from the prior divestitures.[8] *Id.*

As for the rest of Haggen's stores, although other purchasers were found for some, many ultimately were shuttered.[9] Consequently, due in large part to Albertsons' actions, the remedies imposed in the Albertsons/Safeway merger not only failed to address the competitive harm created by the merger, but resulted in the weakening of a pre-existing competitor.

In short, Albertsons managed to re-acquire 50 of its stores, plus gain another 14 stores, and eventually bring Haggen, its former competitor, under its own corporate umbrella, all in less than a year from the date of the FTC's final order approving the Safeway merger and mandating divestiture.

B. The Court Should View Albertsons' Proposed Dividend Coupled With A Proposed Merger With Great Skepticism.

As the Haggen saga shows, adequate capitalization to maintain stores in a strong competitive position—whether in case the merger is blocked or a divestiture remedy is pursued—is critical to long-term competition in the grocery business. The Haggen saga also shows Albertsons has previously found a way to frustrate the government's ability to alleviate

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[7] Attached as Exhibit 3.

[8] As part of that same deal, Albertsons also acquired certain trade names and other intellectual property from Haggen, which allowed Albertsons to operate stores under the Haggen name. Albertsons Form 10-K (Fiscal Year Ending Feb. 24, 2018) at 43. Indeed, to this day, Albertsons operates certain of its stores under the Haggen brand name. *See, e.g.*, https://albertsonscompanies.com/home/default.aspx ("Albertsons Companies") (last visited December 6, 2022).

[9] Relevant orders approving sales and store closures in the Haggen bankruptcy (*In re HH Liquidation, LLC*, No. 15-11874 (KG)) can be found at Docket Nos. 839, 840, 841, 843, 844, 845, 846, 847, 863, 910, 950, 1111, 1114, 1702. *See also* Anna Marum, *Bankruptcy court approves sale of Haggen stores to Albertsons, union 'pleased,'* The Oregonian, Mar. 29, 2016, available at https://www.oregonlive.com/window-shop/2016/03/court_approves_haggen_sale.html (last visited December 6, 2022).

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competitive harm resulting from a merger. A similar risk is presented here by the $4 billion special dividend declared contemporaneously with the merger. The Court should consider not only the potential impact the special dividend may have in the near term while the merger is under government review, but also the potential impact in the event divestiture is ordered or the merger is blocked and Albertsons continues to compete in the market on its own.

Stripped of much of its liquidity and saddled with higher debt, there can be no question that Albertsons will be worse off if the merger is blocked. Alternatively, in the event of divestiture, any divested stores may be devalued by failure to make capital improvements or even provide routine maintenance, adequate and appropriate inventory, and competitive wages.

Haggen provides a cautionary tale for this proposed merger—stripped of capital through a dividend and accelerated debt repayment to its private equity shareholder, overburdened with debt, and having bought stores that were poorly positioned to compete, Haggen was dead in the water, and so was the FTC's divestiture remedy. The court should act to prevent a similar fate here.

Taking Albertsons' prior conduct into account is appropriate. Indeed, looking at historical conduct is routine in the merger context. For instance, when reviewing mergers, courts examine whether there has been "a history of collusion or attempted collusion" in the relevant market as "highly probative of likely harm from a merger" because the merger may lead to so-called "coordinated effects." *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at *27 (D.D.C. Nov. 15, 2022) (citing *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989)).

Additionally, it is well-settled that courts should exercise their discretion to protect their jurisdiction and to avoid harm to parties by seriously considering past questionable conduct. In evaluating equitable relief, for example, courts employ the doctrine of unclean

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hands. *See, e.g.*, *Income Investors v. Shelton*, 3 Wn. 2d 299, 602, 101 P.2d 973 (1940) ("It is a well-known maxim that a person who comes into an equity court must come with clean hands. A person may, by his misconduct, be precluded from a right to an accounting in equity by virtue of the maxim stated."); *Burt v. Washington State Dep't of Corr.*, 191 Wn. App. 194, 210 361 P.3d 283 (2015) (quotation omitted) ("It is well settled that a party with unclean hands cannot recover in equity."). In another example of how courts address questionable prior bad conduct, courts can impose an adverse inference where parties fail to preserve relevant evidence for trial. *See Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 135, 307 P.3d 811 (2013) ("In deciding whether to apply a spoliation inference, this court has used two general factors: (1) the potential importance or relevance of the missing evidence and (2) the culpability or fault of the adverse party."). To be clear, we are not suggesting that Albertsons has destroyed evidence in this case; the point is to take into account Albertsons' prior bad conduct to prevent it from acting—through payment of the special dividend—in a way that would undermine the ability of the courts to impose effective antitrust remedies should the law so warrant.

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In this case, there is reason for concern on the face of the timing and amount of the $4 billion special dividend and its potential impact on any possible antitrust remedy that would address concerns about this merger. But those concerns are multiplied given Albertsons' prior history of frustrating a merger remedy. That prior history not only shows the potential anticompetitive effects of the special dividend but should tip the balance of the equities in favor of a preliminary injunction. Indeed, Albertsons should face the highest degree of skepticism to ensure that it is not once again allowed to creatively skirt government merger enforcement authority. Consequently, the Court should not permit Albertsons to prejudice any potential merger remedy, up to and including blocking the merger in its

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entirety, by downgrading its finances and lessening its ability to compete in advance of the ultimate merger review.

I certify this motion contains 2,189 words, in compliance with the Local Civil Rules

DATED: December 6, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused true and correct copies of the foregoing document to be served upon the following, at the addresses stated below, via the method of service indicated.

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Dated this 6th day of December, 2022 in Seattle, Washington.

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