

1 ELLEN F. ROSENBLUM  
Attorney General State of Oregon  
2 MARCUS HULL  
Senior Assistant Attorney General  
Washington State Bar No. 35986  
3 1162 Court St NE  
Salem, OR 97301  
4 [marcus.hull@doj.state.or.us](mailto:marcus.hull@doj.state.or.us)  
TIM D. NORD  
5 Senior Assistant Attorney General  
Oregon State Bar No. 882800  
6 1162 Court St NE  
Salem, OR 97301  
7 [tim.d.nord@doj.state.or.us](mailto:tim.d.nord@doj.state.or.us)  
CHERYL FAYE HIEMSTRA  
8 Assistant Attorney General  
Oregon State Bar No. 133857  
9 1162 Court St NE  
Salem, OR 97301  
10 [cheryl.hiemstra@doj.state.or.us](mailto:cheryl.hiemstra@doj.state.or.us)

11  
12 **STATE OF WASHINGTON**  
**KING COUNTY SUPERIOR COURT**

13 STATE OF WASHINGTON,

14  
15 Plaintiff,

16 v.

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

20 Defendants.  
21

NO. 22-2-18046-3 SEA

BRIEF FOR THE STATE OF OREGON AS  
AMICUS CURIAE IN SUPPORT OF THE  
STATE OF WASHINGTON'S COMPLAINT  
FOR INJUNCTION

22 **INTRODUCTION AND INTEREST OF AMICUS**

23 The State of Oregon, by and through Attorney General Ellen F. Rosenblum, files this  
24 amicus brief in support of the State of Washington's Complaint for a Preliminary Injunction.  
25 Oregon files this brief to protect competition in its markets and Oregon consumers that will be  
26 harmed if Albertsons proceeds with its proposed Special Dividend before the lawfulness of the

1 merger can be fully litigated. The State of Oregon urges this Court to grant plaintiff State of  
2 Washington’s Complaint for a Preliminary Injunction.

3 **ARGUMENT**

4 **I. Attorneys General Have Unique Understanding of Antitrust Impacts of Defendants’**  
5 **Actions**

6 Like the Washington Attorney General, the Oregon Attorney General is duty-bound to  
7 uphold Oregon’s Antitrust Act for the benefit of commerce and for the benefit of the public. The  
8 Legislative Assembly of Oregon declared the purpose of Oregon’s antitrust laws “to encourage  
9 free and open competition in the interest of the general welfare and economy of the state, by  
10 preventing monopolistic and unfair practices, combination and conspiracies in restraint of trade  
11 and commerce, and for that purpose to provide means to enjoin such practices and provide  
12 remedies for those injured by them.” Or. Rev. Stat. §646.715. State Attorneys General are  
13 uniquely situated to bring cases with uniquely local impacts such as a transaction like this-  
14 involving full-service grocery retailers. While this merger is subject to review by Federal  
15 enforcers, the Oregon Attorney General has unique knowledge regarding the potential effects the  
16 proposed transaction could have on local markets due to an understanding of the unique  
17 geography, communities, travel patterns, and various socioeconomic factors present in Oregon  
18 and the Northwest. The Oregon Attorney General is reviewing and will continue to review the  
19 proposed merger of Defendants for impacts on competition and consumers in Oregon.

20 **II. The Proposed Dividend and Merger Create Substantial Competition**  
21 **Concerns in Both Oregon and Washington**

22 Albertsons operates over 121 stores in Oregon. Kroger has 51 Fred Meyer and 4 QFC  
23 stores in Oregon. The companies compete against each other throughout Oregon. Of Fred  
24 Meyer’s stores, 41 stores operate in the same city as an Albertsons store. In some Oregon cities  
25 such as The Dalles, Sandy, Tillamook, and Florence Defendants appear to be the only major

26 ///

1 grocery retailers and head-to-head competitors. Common ownership would remove the head-to-  
2 head competition these defendants currently face.

3 Similar to what occurred in Washington, Albertsons' acquisition of Safeway Inc. resulted  
4 in reduced competition in Oregon. Pursuant to the FTC's divestment order in the Safeway-  
5 Albertsons merger, Albertsons was ordered to divest 20 Oregon stores.<sup>1</sup> As a result, Haggen  
6 purchased these stores. Haggen no longer operates any stores in Oregon. Following Haggen's  
7 bankruptcy filing, Albertsons repurchased seven Oregon stores it had divested to operate them  
8 under the Albertsons banner, and shuttered stores as well, showing the divestitures failed, and  
9 competition suffered.<sup>2</sup> In the words of the Haggen bankruptcy court, "Haggen's demise was  
10 swift, began immediately, and continued unabated for seven months, ending in its September  
11 2015 bankruptcy filing and complete liquidation." *In re HH Liquidation*, 590 B.R. 211, 237  
12 (2018).

13 **III. The Court Should Grant a Preliminary Injunction to Prevent Irreparable**  
14 **Injury**

15 Oregon supports the well-founded arguments of the State of Washington in seeking an  
16 injunction. Further, the Court's Findings of Fact and Conclusions of Law as to the Temporary  
17 Restraining Order are equally applicable to the Oregon Attorney General's authority to enforce  
18 Oregon's antitrust laws to prevent harm to competition. Entry of an injunction by the court will  
19 maintain the existing competitive status quo, and avoid injury to Oregon consumers, while the  
20 Oregon Attorney General's investigation is conducted.

21 ///

22  
23 <sup>1</sup> Decl. Of Amy Hanson in Support of Temporary Restraining Order, Exhibit L, at 222, 247-249  
24 (*Federal Trade Commission Decision and Order In the Matter of Cereberus, et. Al and Safeway*  
*Inc., Docket No. C-4504, 141 0108*).

25 <sup>2</sup>"Albertsons buys Haggen, and will continue to operate 15 stores under Haggen brand." *Puget*  
26 *Sound Business Journal*, March 14, 2016.  
<https://www.bizjournals.com/seattle/news/2016/03/14/albertsons-buys-haggen-will-continue-to-operate-15.html>.

1 For efficiency, Oregon will not repeat Washington’s arguments, but, the Defendants’  
2 responses demonstrate that equity does not lie in Defendants favor. On one side of the balance,  
3 the Special Dividend, in conjunction with the merger, presents risk of irreparable harm. On the  
4 other side of the balance, Defendants and in particular Albertsons have not provided justification  
5 for the need to strip the company of cash and to take on debt, other than to assert it is consistent  
6 with a strategy to return capital. No evidence has been submitted that the very large Special  
7 Dividend is consistent with past business practices or that the amount was decided prior to  
8 negotiations with Kroger. Defendants’ arguments that the merger agreement is not expressly  
9 contingent upon the Special Dividend fails to address whether the Special Dividend was integral  
10 to the parties’ agreement, or how it will not impact Albertsons’ competitiveness going forward.  
11 Furthermore, if and when a dividend issues, the cash is no longer available for Albertsons’  
12 operations; it is gone forever. The Special Dividend at issue will not only have a long-term  
13 negative effect for Washington consumers, but Oregon consumers as well. None of Defendants’  
14 arguments go to the equities the Attorneys General raise.

15 In contrast, the CFO of Albertsons admits that a reason for the Special Dividend was the  
16 merger agreement, as it was made “...with the understanding that the sale of the Company may  
17 be the subject of a potentially lengthy antitrust review of the Proposed Merger by the relevant  
18 antitrust authorities.” Declaration of Sharon McCollam in Support of Albertsons Companies  
19 Opposition to Wash. Motion for Temporary Restraining Order, at 5. This statement both  
20 confirms that the Special Dividend does in fact arise due to the proposed merger, and shows it  
21 may not have occurred but for the parties reaching an agreement to merge. The fact that  
22 Albertsons Board had sole authority to approve the Special Dividend does not alleviate the  
23 Attorneys General’s competition concerns or immunize the parties conduct from the antitrust  
24 laws. Kroger and Albertsons were negotiating the merger agreement, and the information and  
25 specifics regarding the dividend were discussed with Kroger during that time: “Since Kroger  
26 would be buying Albertsons shares from Albertsons’ stockholders, Kroger expected the Special

1 Dividend payment to reduce the price it was willing to pay for Albertsons shares.” Declaration of  
2 McCollam at 7. Furthermore, “In its initial offer, Kroger stated: ‘To the extent Albertsons  
3 announces a special dividend, the Albertsons stock price would be reduced, as would our offer  
4 price, by that special dividend per share.’ Declaration of McCollam at 7. And the amount and  
5 specifics as to the dividend appears to have changed as the negotiations and discussed between  
6 the competitors continued.<sup>3</sup>

7 Defendants emphasize that the merger agreement is not *contingent* on the issuance of the  
8 Special Dividend. While the merger might not be explicitly conditional on the Special Dividend  
9 it is certainly *connected*. The gutting of cash reserves is in furtherance of the anticompetitive  
10 effort by making Albertsons a better – easier to purchase – suitor to Kroger, now tied to being  
11 acquired. It clearly reduces Albertsons’ ability to aggressively compete with Kroger during the  
12 pendency of the proposed merger.

13 Defendants also emphasize that the Special Dividend was a unilateral business decision.  
14 But a unilateral business decision, or an agreement between competitors, can evidence a  
15 conspiracy to restrain trade, depending on the circumstances. The Supreme Court has long held  
16 that business behavior may provide circumstantial evidence of a tacit or express agreement.  
17 *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S. Ct. 257,  
18 259, 98 L. Ed. 273 (1954). Indeed, “circumstantial evidence is the lifeblood of antitrust law.”  
19 *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13, 93 S.Ct. 1096, 35 L.Ed.2d 475  
20 (1973). Even assuming an entirely unilateral decision to issue the Special Dividend, such  
21 conduct nevertheless may provide circumstantial evidence from which a factfinder could infer an  
22 agreement to restrain trade in these circumstances. The Supreme Court’s decision in *F.T.C. v.*  
23 *Actavis, Inc.*, 570 U.S. 136 (2013) demonstrates the importance of considering a business  
24 decision beyond face value. In *Actavis*, the Court considered whether an “unusual” settlement

25 \_\_\_\_\_  
26 <sup>3</sup> ACI\_DCCID-00000194 at -197, Document Produced to the State of Oregon by the Office of  
the Attorney General for the District of Columbia, which is permitted to receive it pursuant to the  
Oregon Antitrust Act and is the subject of a contemporaneous motion to seal.

1 agreement between brand name and generic drug manufacturers consisting of a reverse payment  
2 scheme violated antitrust laws. 570 U.S. at 145, 147. There, the Circuit Court dismissed the  
3 complaint and held the agreement immune from antitrust scrutiny because the anticompetitive  
4 effects fell within the bounds allowed by the patent. Id. at 141. But the Supreme Court  
5 disagreed. Although the Court assumed the anticompetitive effect fell within the patent, that did  
6 not answer “the antitrust question.” Id. at 147. The Court then weighed settlement policies  
7 against antitrust policies, and held in favor of antitrust policies. Id. at 153. Among them, the  
8 potential for genuine adverse effect on competition, the justification for the decision, and  
9 whether the goal of the decision could be achieved another way. Id. at 153-158 (“Although the  
10 parties may have reasons to prefer settlements that include reverse payments, the relevant  
11 antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to  
12 share patent-generated monopoly profits, then, in the absence of some other justification, the  
13 antitrust laws are likely to forbid the arrangement.”). The Special Dividend raises similar  
14 concerns. Simply claiming the decision was made unilaterally does not foreclose the inference  
15 of a conspiracy or address and alleviate anticompetitive concerns.

16 **CONCLUSION**

17 The Court should grant the preliminary injunction sought by the State of Washington.

18 DATED: this 9<sup>th</sup> day of November, 2022.

19 ELLEN F. ROSENBLUM  
20 Oregon Attorney General

21   
22 \_\_\_\_\_  
23 MARCUS HULL  
24 Senior Assistant Attorney General  
25 Washington State Bar No. 35986  
26 1162 Court St NE  
Salem, OR 97301  
[marcus.hull@doj.state.or.us](mailto:marcus.hull@doj.state.or.us)

CERTIFICATE OF SERVICE

I certify that on the date noted below, I arranged for a copy of the foregoing State or Oregon – Amicus Curiae to be served on the parties listed below by King County eFiling Application, to:

Amy N.L. Hanson  
Holly A. Williams  
Rachel A. Lumen  
Valerie K. Balch  
Miriam R. Stiefel  
Assistant Attorneys General  
Antitrust Division  
Washington State Office of the Attorney  
General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7744  
[amy.hanson@atg.wa.gov](mailto:amy.hanson@atg.wa.gov)  
[holly.williams@atg.wa.gov](mailto:holly.williams@atg.wa.gov)  
[rachel.lumen@atg.wa.gov](mailto:rachel.lumen@atg.wa.gov)  
[valerie.balch@atg.wa.gov](mailto:valerie.balch@atg.wa.gov)  
[miriam.stiefel@atg.wa.gov](mailto:miriam.stiefel@atg.wa.gov)  
Attorneys for Plaintiff State of  
Washington

  X   via King County eFiling Application  
and EMail

Michael J. Rosenberger  
Gordon Tilden Thomas Cordell  
600 University Street, Suite 2915  
Seattle, WA 98101  
(206) 464-7744  
[mrosenberger@gordontilden.com](mailto:mrosenberger@gordontilden.com)  
Attorneys for Albertsons Companies, Inc.;  
Albertson’s Companies Specialty Care,  
LLC; Albertson’s LLC; Albertson’s Stores  
Sub LLC

  X   via King County eFiling Application  
and EMail

1 Pallavi Mehta Wahi,  
2 Christopher M. Wyant,  
3 Aaron Millstein,  
4 K&L Gates LLP  
5 925 Fourth Avenue, Suite 2900  
6 Seattle, WA 98104  
7 [pallavi.wahi@klgates.com](mailto:pallavi.wahi@klgates.com)  
8 [chris.wyant@klgates.com](mailto:chris.wyant@klgates.com)  
9 [aaron.millstein@klgates.com](mailto:aaron.millstein@klgates.com)  
10 Attorneys for The Kroger Co.

X via King County eFiling Application  
and EMail

11 DATED: this 9<sup>th</sup> day of November, 2022.

12 ELLEN F. ROSENBLUM  
13 Oregon Attorney General

14   
15 \_\_\_\_\_  
16 MARCUS HULL  
17 Senior Assistant Attorney General  
18 Washington State Bar No. 35986  
19 1162 Court St NE  
20 Salem, OR 97301  
21 [marcus.hull@doj.state.or.us](mailto:marcus.hull@doj.state.or.us)