DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
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.	FILED IN DENVER DISTRICT COURT MAY 03 2024 DENVER, COLORADO COUNTER CLERK KL COPY ▲ **COURT USE ONLY** ▲
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INTRODUCTION AND STATEMENT OF INTEREST OF THE UNITED STATES

The Antitrust Division of the Department of Justice enforces the federal antitrust laws and has a strong interest in ensuring that antitrust enforcement promotes competition. As part of its mission to safeguard competition, the Antitrust Division routinely works alongside state Attorneys General, and accordingly has a strong interest in maintaining the robust complementary federal-state antitrust enforcement regime set forth in the federal antitrust laws and parallel state laws.

This lawsuit involves the application of the Colorado Antitrust Act ("CAA") to a prospective merger between The Kroger Co. ("Kroger") and Albertsons Companies, Inc. ("ACI") (collectively, "Defendants"). In its first cause of action ("Count I"), Colorado alleges that the proposed merger violates C.R.S. § 6-4-107 and has requested, *inter alia*, that the Court "enjoin and restrain Defendants and all persons acting on their behalf from consummating the Proposed Merger"; and "[a]ward such other relief as the Court deems just and proper." Compl. IX, XI(b), (h). Defendants have moved to dismiss Count I, arguing that an injunction blocking a merger between two companies with nationwide operations—one potential form of relief requested by Colorado—would undermine principles of interstate comity and federalism, impose a disproportionate remedy to the harms alleged, and implicate potential issues under the U.S. Constitution. Defs' Mot. to Dismiss ("MTD") at 10.

The United States respectfully submits this brief under 28 U.S.C. § 517 to explain that Defendants' motion to dismiss misunderstands the respective roles of federal and state antitrust enforcement. Defendants are incorrect to categorically assert that Colorado's lawsuit undermines the dual antitrust enforcement regime set forth in the federal antitrust laws and parallel state laws. And the remedial issues Defendants raise—along with the constitutional questions assertedly

implicated by those issues—are fact-intensive determinations improper for adjudication in this posture.

LEGAL BACKGROUND

For more than a century, independent enforcement of state and federal antitrust laws has protected the American economy from corporate conduct, including mergers, that threatens to harm competition. Indeed, some state antitrust laws predate the federal antitrust laws.[1]

At the federal level, Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18, and requires advance notification of large mergers, as well as detailed filings about the merging companies, to the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC"), 15 U.S.C. § 18(a). Where appropriate, the DOJ and FTC are authorized to seek various forms of injunctive relief in federal court.[2]

State Attorneys General often join federal agencies as co-plaintiffs in these lawsuits, but their enforcement roles are by no means limited to pursuing cases under federal law. Federal enforcement stands alongside a "long history" of states "providing common-law and [state] statutory remedies against monopolies and unfair business practices." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 388 (2015) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)). Thus, beyond the many examples of successful cases brought jointly by federal and state enforcement

[1] *See* David K. Millon, *The First Antitrust Statute*, 29 Washburn L.J. 141, 141 (1990) ("No less than eleven . . . states passed various forms of antitrust legislation before Congress approved the Sherman Act in 1890.").

[2] The FTC (and, in certain industries, other agencies) may also enforce Section 7 in administrative proceedings. The federal government may challenge a merger under Sections 1 and 2 of the Sherman Act too. *See, e.g.*, *United States v. First Nat'l Bank of Lexington*, 376 U.S. 665, 666 (1964); *United States v. Rockford Mem. Corp.*, 898 F.2d 1278, 1280 (7th Cir. 1990); Complaint at ¶¶ 76-79, *United States v. Visa Inc.*, No. 20-cv-07810 (N.D. Cal. Nov. 5, 2020).

agencies as co-plaintiffs, state agencies have historically complemented federal antitrust enforcement efforts in their investigatory capacity;[3] in their regulatory capacity;[4] in their legislative capacity;[5] in their capacity as plaintiffs in parallel lawsuits;[6] and in negotiating the form and scope of relief in their *parens patriae* capacity to remedy the effects of anticompetitive behavior.[7]

Dual federal and state enforcement vindicates states' authority as separate sovereigns to protect competition in matters of both regional and national concern. States can often provide unique perspectives on the competitive harm of certain restraints within their jurisdictions, and state antitrust laws can provide bases for seeking and tailoring certain remedies. *See, e.g.*, Final Judgment, *United States v. Twin Am., Inc.*, No. 12-cv-8989, 2015 WL 9997203, at *2 (S.D.N.Y. Nov. 17, 2015) (order of disgorgement under New York law); Consent Judgment, *Colorado v.*

[3] For example, in 2010, Texas opened an investigation into Apple's e-book pricing in parallel to the DOJ's investigation of the same conduct. Through this investigation, Texas independently collected a substantial amount of documents and testimony and retained its own economist to interpret and communicate the data collected. *See In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 679 (S.D.N.Y. 2012).

[4] *See* Chris Cumming, *States Aim to Combat Private-Equity Healthcare Takeovers*, WSJ (Apr. 18, 2024), at https://www.wsj.com/articles/state-private-equity-healthcare-takeovers-cb43f70b (noting that more than a dozen states have enacted statutes authorizing reviews of healthcare acquisitions).

[5] For example, following a lawsuit challenging Blue Cross Blue Shield's use of anticompetitive most favored nation clauses, the State of Michigan enacted laws that banned the use of such clauses by insurers, health maintenance organizations, and nonprofit health care corporations in contracts with providers, despite no parallel federal ban. *See* Mich. Comp. Laws § 500.3405a.

[6] *See, e.g.*, *New York v. Facebook*, No. 20-cv-03589 (D.D.C.).

[7] For example, the states in their *parens patriae* capacity negotiated monetary relief totaling over $500 million from Apple in the e-books case, returning over 200% of overcharges to e-book buyers. *See* Press Release, U.S. Dep't of Justice, Supreme Court Rejects Apple's Request to Review E-Books Antitrust Conspiracy Findings (Mar. 7, 2016), at https://www.justice.gov/opa/pr/supreme-court-rejects-apples-request-review-e-books-antitrust-conspiracy-findings.

UnitedHealth Grp. Inc., No. 2019CV31424 (Colo. Dist. Ct.), at 5-7 (ordering remedies beyond those sought by federal government).

The federal antitrust laws do not preempt or otherwise preclude parallel state lawsuits to protect the public from a potentially anticompetitive merger. That remains true even when states seek remedies different from those sought in an existing federal lawsuit. The federal government may decline to challenge a transaction or forgo certain relief—but under the Clayton Act, the government does not *approve* mergers, and the government is not aware of any court that has held that the Clayton Act preempts or otherwise precludes state action that would go further. *Cf. ARC*, 490 U.S. at 103 (state antitrust laws permitting suit by indirect purchasers not preempted); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 132 (1978) (state antitrust laws prohibiting discriminatory pricing within exclusion of Clayton Act § 2(b) not preempted).

ARGUMENT

Defendants' arguments misapprehend the roles of state and federal antitrust law, and in any event are premature. Their argument that comity principles preclude the State from pursuing its own independent state law claim flies in the face of the long history of independent state and federal antitrust enforcement. The argument also misunderstands the nature of the Clayton Act, which is simply a prohibitory statute that does not provide a vehicle for affirmatively approving transactions under federal law. Meanwhile, Defendants' arguments on potential conflicts that could hypothetically be caused by injunctive remedies are premature—the court would not determine the proper relief for a violation until it makes factual determinations giving rise to liability.

I. THERE IS NO CONFLICT BETWEEN FEDERAL AND STATE ENFORCEMENT EFFORTS AT THIS JUNCTURE

Defendants are wrong to suggest that a state-law injunction preventing the merger of two companies with nationwide operations would necessarily upset principles of interstate comity and federalism. *See* MTD 20.

At the outset, Defendants' threshold assumption that "basic respect for interstate comity would militate in favor of the State joining the [FTC Action] that has already been filed under the Clayton Act," MTD 20, is incorrect. While the United States often partners with states in enforcement actions, no freestanding comity principle directs that states can only vindicate their sovereign interests by joining federal enforcement actions. To the contrary, there is a longstanding history of parallel state and federal lawsuits arising from the same or similar conduct. *Compare, e.g.*, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C.), *with State of New York v. Microsoft Corp.*, No. 98-1232 (D.D.C.); *FTC v. Facebook, Inc.*, No. 20-cv-03590 (D.D.C.), *with State of New York v. Facebook, Inc.*, 20-cv-03589 (D.D.C.).

Defendants' contrary argument appears also to assume that if Colorado were to prevail, it would be improper to block a merger based on harms in a specific regional market, notwithstanding its impacts in other regional markets. *See* MTD 3, 14-15. But such an outcome is fully consistent with the merger-enforcement scheme established in the Clayton Act. An injunction blocking a merger is proper under the Clayton Act if there is a reasonable probability of substantially lessening competition in *any* relevant market; courts do not attempt to balance effects in various markets. *See, e.g.*, 15 U.S.C. § 18 (prohibiting mergers that may substantially lessen competition "in *any line of commerce* or in any activity affecting commerce in *any section of the country*") (emphasis added); *United States v. Anthem, Inc.*, 855 F.3d 345, 368 (D.C. Cir. 2017) (merger's "anticompetitive effects in the Richmond market" was an "independent basis for the injunction,

even absent a finding of anticompetitive harm in the fourteen-state national accounts market"); *Brown Shoe Co. v. United States*, 370 U.S. 294, 337 (1962) (Section 7 proscribes mergers "if anticompetitive effects . . . are probable in 'any' significant market"). Thus, under the Clayton Act, an injunction blocking a transaction would be appropriate if a plaintiff, such as Colorado, showed a reasonable probability that Kroger's acquisition of Albertsons would substantially lessen competition in at least one geographic market within Colorado, irrespective of the effects in other geographic markets.

Moreover, Defendants' apparent suggestion that Colorado's attempt to block the merger sits in tension with the divestiture proposals by Defendants in *FTC v. Kroger Co.*, No. 3:24-cv-347 (D. Or.) ("FTC Action"), is misleading as a matter of fact. The FTC filed an action in February 2024 seeking a preliminary injunction against the consummation of the merger. *See* Complaint at ¶¶ 118, 124, Dkt. No. 1, *FTC v. Kroger Co.*, No. 3:24-cv-347 (D. Or. Feb. 26, 2024) ("FTC Compl."). And like Colorado, the FTC alleged in its complaint that Defendants' divestiture proposals were inadequate to remedy the potential anticompetitive harm from the merger. *Id.* ¶¶ 105-117.

II. DEFENDANTS' REMEDIAL OBJECTIONS AS TO COUNT I ARE PREMATURE

Defendants argue that Count I should be dismissed because Colorado's requested injunction is disproportionate to the harms alleged and thus categorically barred as a matter of law. They ask the Court to adjudicate the propriety of an injunction relative to the harms that may result from the transaction before engaging in any fact-finding as to the scope of those harms, any analysis of what would be necessary to remediate those harms, or any determination as to liability. This argument misapprehends the fact-bound nature of antitrust remedies and is premature at the dismissal stage.

There is a proper sequence for adjudicating antitrust claims: A court first determines whether defendants are liable, and then crafts an appropriate remedy given its factfinding on the equitable considerations presented. *See* 15 U.S.C. § 25 (courts must find a "violation[]" before ordering an injunctive remedy that "prevent[s] or "restrain[s]" that violation); *accord* C.R.S. § 6-4-119 ("It is the intent of the general assembly that, in construing this article, the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws."); *Amos v. Aspen Alps 123, LLC*, 280 P.3d 1256, 1262 (Colo. 2012) (Colorado courts "look to federal antitrust cases as [their] guide when interpreting the Colorado Antitrust Act"). Courts routinely adjudicate cases in accordance with the principle that court-ordered remedies—including the type of injunctive relief that Colorado seeks in this case—are properly determined following the determination of liability. *See* Pls. Opp. to Defs. Mot. to Dismiss ("Colo. Opp.") at 6-7, 10; *see also United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 556 (1971) (courts do "not reach the question of remedy" if there is "no violation of § 7"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 141 (1969) (court must find "actual or threatened violation of the antitrust laws" to "justify [an] injunction"). Only after finding a violation and understanding of its scope can a court address the central "question of an antitrust remedy"—"the discovery of measures effective to restore competition." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 336 (1961).

This Court would not be the first to deny on the basis of prematurity Defendants' improper request to dismiss a state-law merger challenge to this transaction. In *Washington v. The Kroger Co.*, 24-2-00977-9 (Wash. Super. Ct.), King County Superior Court Judge Marshall Ferguson denied a nearly identical motion to dismiss filed by Defendants, which argued that one of Washington's requested forms of relief—an injunction blocking the merger—should result in

dismissal of Washington's entire claim. Ruling from the bench, Judge Ferguson denied Defendants' motion, explaining that the form of relief requested by Washington was not a basis for dismissal at the pleading stage. *See* MLex, *Kroger-Albertsons Deal Challenge by Washington State Can Proceed, State Judge Rules* (Apr. 26, 2024), at https://content.mlex.com/#/content/1559360/kroger-albertsons-deal-challenge-by-washington-state-can-proceed-state-judge-rules.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss as it pertains to Count I.

DATED this 3rd day of May, 2024.

Respectfully submitted,

s/ Andrew W. Chang

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have directed Department of Justice personnel in Colorado to serve by hand the foregoing document on May 3, 2024, which will be placed on the Court's docket no later than May 6, 2024. The foregoing document will therefore be served on all counsel who have entered an appearance in this matter through Colorado Courts E-Filing.

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