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THE HONORABLE KEN SCHUBERT

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

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

NO. 22-2-18046-3 SEA

ORDER DENYING STATE OF
WASHINGTON'S MOTION FOR
PRELIMINARY INJUNCTION AND
EXTENDING TEMPORARY
RESTRAINING ORDER UNTIL 4:30
PM ON DECEMBER 19, 2022

This matter came before the Court for hearing on the State's Motion for Preliminary Injunction on December 9, 2022. The Court heard argument from the parties and considered the pleadings and record before the Court, including the following:

1 1. The State’s Complaint for Injunction, Civil Penalties, and Other Relief Under the
2 Washington State Consumer Protection Act, RCW 19.86 *et seq.*;

3 2. The State’s Motion for Preliminary Injunction;

4 3. Declaration of Michael Steven Weisbach in Support of the State’s Motion for
5 Preliminary Injunction and exhibits thereto;

6 4. Declaration of Amy N.L. Hanson in Support of the State’s Motion for Preliminary
7 Injunction and exhibits thereto;

8 5. Defendant The Kroger Co.’s Opposition to the State’s Motion for Preliminary
9 Injunction;

10 6. Declaration of Gary Millerchip in Opposition to the State’s Motion for Preliminary
11 Injunction and exhibits thereto;

12 7. Declaration of Christopher Wyant in Opposition to the State’s Motion for
13 Preliminary Injunction and exhibits thereto;

14 8. Albertsons Companies, Inc.’s Memorandum of Law in Opposition to the State’s
15 Motion for Preliminary Injunction;

16 9. Declaration of Sharon McCollam and exhibits thereto;

17 10. Declaration of Edward D. Hassi and exhibits thereto;

18 11. Declaration of Professor David C. Smith;

19 12. State of Washington’s Reply in Support of Its Motion for Preliminary Injunction;

20 13. Supplemental Declaration of Michael Steven Weisbach in Support of Motion for
21 Preliminary Injunction;

22 14. Brief for the State of Oregon as Amicus Curiae in Support of the State of
23 Washington’s Complaint for Injunction;

1 8. Albertsons would have preferred to implement a tender offer for a number of
2 reasons outlined by Goldman Sachs and CreditSuisse. Ex. 16 (ACI_DCCID-00000068, at -085).

3 9. In June of 2022, Kroger expressed an interest in acquiring Albertsons through a
4 merger. Albertsons would not be able to move forward with both a tender offer and the merger
5 due to concerns of a SEC violation. As a result, Albertsons would only be able to return capital to
6 its shareholders through a special dividend if it wanted to move forward with the merger.

7 10. The negotiations between Albertsons and Kroger recognized Albertsons' intent to
8 return capital and Albertsons informed Kroger of its interest in issuing a special dividend. Kroger
9 negotiated to limit the size of the special dividend to \$4 billion. The parties did not agree that
10 Albertsons would issue that special dividend nor did Kroger require Albertsons to do so. Kroger
11 merely acquiesced to allow Albertsons to issue a special dividend if Albertsons, unilaterally,
12 decided to do so. If Albertsons issued a special dividend, the parties' merger agreement accounted
13 for the impact that disbursement had on Albertsons' value dollar for dollar.

14 11. The merger agreement acknowledges that Albertsons may pay shareholders a
15 "Pre-Closing Dividend" in an amount up to \$4 billion, which is about \$6.85 per share.

16 12. To pay the dividend, Albertsons will use \$2.5 billion of its \$3 billion cash on hand
17 and will also use about \$1.5 billion of its line of credit. In an October 18, 2022 Form 10-Q filing
18 with the SEC, Albertsons disclosed that "The Special Dividend . . . will be funded using
19 approximately \$2.5 billion of cash on hand with the remainder in borrowings." This will leave
20 Albertsons with about \$500 million of cash on hand and \$2.6 billion remaining in its line of credit.

21 13. The State failed to show that Albertsons's payment of the dividend will impair its
22 ability to compete during regulatory review of the merger or harm competition in grocery retail
23 markets in Washington State communities.

1 14. The testimony of the respective Chief Financial Officers of Albertsons and Kroger,
2 supported by the analysis of their financial advisors, establishes that Albertsons generates
3 significant free cash flow, will continue to do so, and will also continue to be able to meet all of
4 its capital and operational needs, even after payment of the special dividend.

5 15. On November 1, 2022, the State filed a Complaint for Injunction, Civil Penalties,
6 and Other Relief Under the Washington State Consumer Protection Act and a Motion for
7 Temporary Restraining Order to enjoin Albertsons from distributing its shareholder dividend on
8 November 7, 2022. The State alleges Defendants violated RCW 19.86.020 and RCW 19.86.030.

9 16. The State provided due and proper notice to all parties before the Preliminary
10 Injunction Hearing.

11 17. On November 3, 2022, the Court Commissioner issued a temporary restraining
12 order to remain in effect through the Court's hearing on the State's Motion for Preliminary
13 Injunction, which this Court extended through December 9, 2022.

14 **CONCLUSIONS OF LAW**

15 1. Pursuant to RCW 19.86.080, the Court has jurisdiction over the parties to, and the
16 subject matter of, this motion for preliminary injunction.

17 2. Pursuant to CR 65, Defendants received adequate notice and opportunity to
18 respond to the State's Motion for Preliminary Injunction.

19 3. Pursuant to *Rabon v. City of Seattle*, 135 Wn.2d 278, 284 (1998), a party seeking
20 a preliminary injunction must show (1) a clear legal or equitable right, (2) a well-grounded fear of
21 immediate invasion of that right, and (3) that the acts complained of have or will result in actual
22 and substantial injury. "In deciding whether a party has a clear legal or equitable right, the court
23 examines the likelihood that the moving party will prevail on the merits." *Id.* at 285.

1 4. Based on the findings above, the State has failed to establish the factors necessary
2 for the issuance of a preliminary injunction. The State has not established a likelihood that it will
3 be able to prove at trial that Albertsons and Kroger made an agreement in unreasonable restraint
4 of trade or commerce in violation of RCW 19.86.030.

5 5. The State has not established a likelihood that it will be able to prove at trial that
6 Albertsons' payment of the Special Dividend is an unfair method of competition in violation of
7 RCW 19.86.020.

8 6. Considering equity, including the balance of the relative interests of the parties and
9 the interests of the public, does not warrant entry of a preliminary injunction.

10 7. Despite denying a preliminary injunction, a Court may find good cause to extend
11 the current TRO to allow the unsuccessful party an opportunity to appeal its ruling. *See e.g., Seiu*
12 *Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 390, 377 P.3d 214,
13 220 (2016) (“Therefore, the trial court denied SEIU's motions for a preliminary and permanent
14 injunction. However, the trial court found good cause to extend the current TRO until November
15 5 to allow SEIU to appeal its ruling.”). Good cause exists because denying the preliminary
16 injunction without extending the TRO would allow Albertsons to immediately issue the special
17 dividend without recourse from the State. This Court will extend the TRO until December 19,
18 2022. *See also* RCW 7.40.210 (providing for the suspension of an order dissolving an injunction
19 upon the filing of a motion to reinstate the order).

20 **ORDER**

21 Based on the above findings, IT IS HEREBY ORDERED as follows:

- 22 1. The State of Washington's Motion for Preliminary Injunction is DENIED;
23 2. The TRO is extended until 4:30 pm on December 19, 2022.

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Dated this 9th day of December, 2022.

E-signature on last page.
JUDGE KEN SCHUBERT

King County Superior Court
Judicial Electronic Signature Page

Case Number: 22-2-18046-3
Case Title: STATE OF WASHINGTON VS ALBERTSONS COMPANIES INC
ET AL
Document Title: ORDER RE DENYING PRELIMINARY INJUNCTION

Signed By: Kenneth Schubert
Date: December 09, 2022



Judge: Kenneth Schubert

This document is signed in accordance with the provisions in GR 30.

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O=KCDJA, CN="Ken Schubert:
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