

Congress of the United States

Washington, DC 20515

November 3, 2022

Mr. Stephen Feinberg and Mr. Frank Bruno
Co-Chief Executive Officers
Cerberus Capital Management
875 Third Avenue, 10th Floor
New York, NY 10022

Dear Mr. Feinberg and Mr. Bruno:

We write regarding our concerns with Kroger Company's (Kroger) proposed \$24.6 billion acquisition of Albertsons Companies, Inc. (Albertsons), a company in which your firm has held a controlling interest since 2005.¹ Your firm and other Albertsons shareholders appear poised to cash in with a \$4 billion dividend from Albertsons, extracting a massive profit at the expense of the overall health of the company, even as the merger threatens consumers, workers, and competition.² Private equity has played a harmful role across the economy – from health care, to housing, to retail – and we are concerned that this deal is a new opportunity for private equity to profit while American families and workers foot the bill. We therefore ask that you pause the payment of this dividend and that you provide answers to our questions about the impacts of the Kroger-Albertsons merger.

Cerberus Capital Management's Payday Would Weaken Albertsons' Financial Position

Kroger and Albertsons announced a massive merger agreement under which Kroger would acquire all outstanding shares of Albertsons' stock at a total value of \$24.6 billion. As part of this merger agreement, in part to preemptively address competition concerns, the two companies announced the creation of a new company, "SpinCo" which would consist of 100 to 375 stores divested from the merged entity.³ We are troubled by this merger, which threatens to reduce competition, hurt workers, and raise grocery prices for American families.⁴

This deal appears structured to benefit your private equity firm – which will ultimately earn \$5.2 billion for its shares,⁵ a "rate of return of 200% over the life of the investment"⁶ – and its allies regardless of whether the acquisition goes through. As part of the merger agreement, Albertsons

¹ Private Equity Wire, "Cerberus Capital set for big payday from Kroger's \$24.6bn deal for Albertsons," October 10, 2022, <https://www.privateequitywire.co.uk/2022/10/18/317961/cerberus-capital-set-big-payday-krogers-246bn-deal-albertsons>; Wall Street Journal, "Kroger to Buy Albertsons in \$24.6 Billion Deal That Would Create New Grocery Giant," Jaewon Kang, October 14, 2022, https://www.wsj.com/articles/kroger-to-merge-with-albertsons-in-a-24-6-billion-deal-11665745735?mod=hp_lead_pos4.

² Kroger, "Kroger and Albertsons Companies Announce Definitive Merger Agreement," press release, October 14, 2022, <https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx>.

³ *Id.*

⁴ Letter from Senator Elizabeth Warren to FTC Chair Lina Khan, October 25, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.10.25%20Letter%20to%20FTC%20re%20Kroger-Albertsons%20Merger1.pdf>.

and Kroger announced a “special cash dividend of up to \$4 billion to its shareholders,” payable on November 7, 2022, long before the deal can be finalized.⁷ As one observer noted, this merger “will be a spectacular windfall for Cerberus, enriching the PE firm and its owners while putting the future of the Albertsons chain and its workers at risk.”⁸

Under the ownership of Cerberus, Albertsons has already acquired several competitors through transactions that have harmed consumers.⁹ In one particularly egregious example, Albertsons acquired Safeway in 2015, a transaction that the Federal Trade Commission (FTC) indicated would give the company monopoly power in 130 local markets.¹⁰ To address those concerns, Albertsons agreed to sell off 168 stores, a structural remedy similar to the approach proposed by Kroger and Albertsons in last week’s merger announcement.¹¹ However, just months after the Albertsons-Safeway acquisition, Haggen Holdings LLC, which bought most of the divested stores, filed for bankruptcy – allowing Albertsons to scoop up 33 of the stores it had previously sold, including 10 in locations that the FTC said would give the company monopoly or duopoly power.¹² For more than a half dozen of the stores, Albertson paid just \$1 to buy them back.¹³

The “special cash dividend” included in the proposed Kroger-Albertsons acquisition is particularly troublesome because of the adverse impact on long-term competition in this industry. Rather than using these funds to invest in workers, improve stores, reduce prices, or simply strengthen Albertsons’ cash reserve, the \$4 billion will go directly to Cerberus and other shareholders – a hit that risks “bankrupt[ing] the debt-ridden supermarket chain.”¹⁴

⁵ Private Equity Wire, “Cerberus Capital set for big payday from Kroger’s \$24.6bn deal for Albertsons,” October 10, 2022, <https://www.privateequitywire.co.uk/2022/10/18/317961/cerberus-capital-set-big-payday-krogers-246bn-deal-albertsons>.

⁶ Bloomberg, “Cerberus’ 16-Year Albertsons Bet a Tale of Twists, Turns,” Kameron Leach, October 19, 2022, <https://www.bloomberg.com/news/articles/2022-10-19/cerberus-16-year-albertsons-investment-a-tale-of-twists-turns>.

⁷ Kroger, “Kroger and Albertsons Companies Announce Definitive Merger Agreement,” press release, October 14, 2022, <https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx>.

⁸ Center for Economic and Policy Research, “Albertsons and Kroger Merger a Win for Private Equity and Loss for Workers,” Eileen Appelbaum, October 19, 2022, <https://cepr.net/albertsons-and-kroger-merger-a-win-for-private-equity-and-loss-for-workers/>.

⁹ Bloomberg, “Cerberus’ 16-Year Albertsons Bet a Tale of Twists, Turns,” Kameron Leach, October 19, 2022, <https://www.bloomberg.com/news/articles/2022-10-19/cerberus-16-year-albertsons-investment-a-tale-of-twists-turns>.

¹⁰ Wall Street Journal, “Albertsons to Buy Back 33 Stores It Sold as Part of Merger with Safeway,” Brent Kendall, November 24, 2015, https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193?mod=article_inline.

¹¹ Reuters, “Analysis: Kroger, Albertsons spin-off is extra ammunition in regulatory battle,” Abigail Summerville and Anirban Sen, October 17, 2022, <https://www.reuters.com/business/retail-consumer/kroger-albertsons-spin-off-is-extra-ammunition-regulatory-battle-2022-10-17/>.

¹² Wall Street Journal, “Albertsons to Buy Back 33 Stores It Sold as Part of Merger with Safeway,” Brent Kendall, November 24, 2015, https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193?mod=article_inline.

¹³ *Id.*

¹⁴ Center for Economic and Policy Research, “Albertsons and Kroger Merger a Win for Private Equity and Loss for Workers,” Eileen Appelbaum, October 19, 2022, <https://cepr.net/albertsons-and-kroger-merger-a-win-for-private-equity-and-loss-for-workers/>.

Albertsons reported having only \$3.2 billion in liquid capital in its most recent filing, combined with \$4.7 billion in debt held by the company.¹⁵ At any point during the FTC’s review, it would be outrageous for Kroger and Albertsons to claim the “failing firm” defense in this matter and argue that, after sucking \$4 billion in capital out of Albertsons, the acquisition must proceed because Albertsons can no longer operate independently.¹⁶ We have raised this concern with the FTC,¹⁷ and we hope you would avoid any such bad-faith argument. In October 2022, a bipartisan letter from six state Attorneys General called on Albertsons to delay this dividend, citing the “anticompetitive effects” of the proposed merger and the concerns that the special dividend would “hamper [Albertsons’] ability to meaningfully compete” before the merger is approved.¹⁸ If the merger is ultimately not approved, this payout could threaten Albertsons’ ability to compete and pay the debts its private equity owners saddled it with, giving the company yet another reason to jack up prices on consumers and cut benefits for workers.

If the merger is approved, the \$4 billion payout will weaken both the merged entity and the new SpinCo company, saddling those companies with excess debt rather than allowing them to invest in workers, improving stores, or reducing prices for customers. This approach – “an elaborate shell game that pumps companies full of debt” – is all too familiar to observers of private equity’s damage to the nation’s retail landscape.¹⁹

And it is not clear that Albertson’s Board of Directors and executive management are making decisions that are in the best long-term interest of the company and its customers. Two members of the Albertsons board that approved the special dividend are Cerberus executives, while the Cerberus-led ownership group controls more than 50% of the voting power.²⁰ Moreover, “Albertsons’ executive team would reap a combined payout of about \$97 million.”²¹

Furthermore, the \$4 billion dividend – which is a strategic decision that will impact Albertsons ability to compete and operate – is part of the definitive merger agreement negotiated between Kroger’s and Albertsons’ respective representatives. As you know, “gun-jumping,” which occurs when parties to a merger collaborate on competitive decisions prior to the consummation of a

¹⁵ BIG, “The Smash and Grab of Kroger-Albertsons,” Matt Stoller, October 18, 2022, <https://mattstoller.substack.com/p/the-smash-and-grab-of-kroger-albertsons>.

¹⁶ Center for Economic and Policy Research, “Albertsons and Kroger Merger a Win for Private Equity and Loss for Workers,” Eileen Appelbaum, October 19, 2022, <https://cepr.net/albertsons-and-kroger-merger-a-win-for-private-equity-and-loss-for-workers/>.

¹⁷ Letter from Senator Elizabeth Warren to FTC Chair Lina Khan, October 25, 2022, <https://www.warren.senate.gov/imo/media/doc/2022-10-25%20Letter%20to%20FTC%20re%20Kroger-Albertsons%20Merger1.pdf>.

¹⁸ Letter from Attorneys General of the District of Columbia, Arizona, California, Idaho, Illinois, and Washington State to Albertsons Companies, Inc. CEO Vivek Sankaran, October 26, 2022, <https://oag.dc.gov/sites/default/files/2022-10/Letter-to-Albertsons-Kroger-10-26-22-FINAL.pdf>.

¹⁹ Business Insider, “How private equity firms cash in on struggling businesses like Toys R Us and leave retail employees high and dry,” Paul Constant, May 7, 2022, <https://www.businessinsider.com/how-private-equity-firms-cash-in-on-struggling-retailers-2022-5>.

²⁰ Securities and Exchange Commission, Schedule 14A Proxy Statement, Albertsons Companies, Inc., June 24, 2021, https://www.sec.gov/Archives/edgar/data/1646972/000114036121022208/nc10025568x2_def14a.htm#tEC.

²¹ Forbes, “Here Are Two Lesser-Known Winners In The Kroger-Albertsons Merger,” Brandon Kochkodin, October 14, 2022, <https://www.forbes.com/sites/brandonkochkodin/2022/10/14/here-are-two-less-known-winners-in-the-kroger-albertsons-merger/?sh=6d7841213bc3>.

merger, is a violation of Section 1 of the Sherman Act²². The FTC should consider this aspect, as well, as it undertakes its investigation.

A Kroger-Albertsons Merger Would Harm Consumers and Workers

There is mounting evidence that even as your firm would receive a massive windfall, workers and consumers would lose out if this merger were to proceed. Both Albertsons and Kroger have faced extensive allegations of worker abuses. Thousands of Albertsons and Kroger workers have gone on strike for better conditions in Colorado,²³ California,²⁴ and Oregon in just the past two years.²⁵ A Brookings Institution study analyzing worker compensation found that major retail companies, including both Kroger and Albertsons, “offered only modest or negligible extra compensation to workers while earning windfall profits,”²⁶ while a survey of Kroger employees found that 75% of Kroger workers reported being food insecure, and more than 60% did not earn “enough money to pay for basic expenses every month.”²⁷

Kroger and Albertsons’ records with consumers is equally alarming, with both companies profiting off the coronavirus pandemic and the resulting economic impacts while American families struggled with high costs and record levels of food insecurity.²⁸ Both companies faced allegations of price-gouging during the pandemic,²⁹ and continued to post “eye-popping” profits during 2021 even as they raised prices on consumers and bragged about their abilities to pass on the impact of inflation.³⁰ In November 2021, the FTC opened an inquiry into the grocery industry and ordered Kroger and several other dominant players to turn over information regarding supply

²² 15 U.S.C. § 1; Federal Trade Commission, “The Rhetoric of Gun-Jumping,” remarks, William Blumenthal, November 10, 2005, https://www.ftc.gov/sites/default/files/documents/public_statements/rhetoric-gun-jumping/20051110gunjumping.pdf.

²³ NBC News, “Kroger workers’ strike in Colorado ends after 10 days, tentative deal reached,” Maura Barrett, January 21, 2022, <https://www.nbcnews.com/business/kroger-workers-strike-colorado-ends-10-days-tentative-deal-reached-rcna13053>.

²⁴ NPR News, “California grocery workers vote to authorize strike,” March 28, 2022, <https://www.npr.org/2022/03/28/1089110574/california-grocery-workers-vote-to-authorize-strike>.

²⁵ Insider, “Kroger-owned grocery chains are desperately trying to replace striking workers as employees walk off the job at the height of the holiday shopping season,” Bethany Biron, December 17, 2021, <https://www.businessinsider.com/kroger-scrambles-to-replace-striking-workers-during-holiday-season-2021-12>.

²⁶ Brookings Institution, “Windfall profits and deadly risks: How the biggest retail companies are compensating essential workers during the COVID-19 pandemic,” Molly Kinder, Laura Stateler, and Julia Du, November 2020, <https://www.brookings.edu/essay/windfall-profits-and-deadly-risks/>.

²⁷ New York Times, “Business Booms at Kroger-Owned Grocery Stores, but Workers Are Left Behind,” Sapna Maheshwari and Michael Corkery, February 12, 2022, <https://www.nytimes.com/2022/02/12/business/kroger-grocery-stores-workers-pay.html>.

²⁸ Insider, “You know who’s not hurting from inflation? Big business.” Andy Kiersz, November 9, 2021, <https://www.businessinsider.com/corporate-profits-are-high-despite-inflation-and-shortages-2021-11>.

²⁹ Austin American-Statesman, “H-E-B, Costco, Walmart, Albertsons among grocery stores accused of price-gouging eggs in federal suit,” Heather Osbourne, May 6, 2020, <https://www.statesman.com/story/news/coronavirus/2020/05/06/h-e-b-costco-walmart-albertsons-among-grocery-stores-accused-of-price-gouging-eggs-in-federal-suit/1237229007/>.

³⁰ Detroit Free Press, “Kroger, other retailers see ‘eye-popping profits’ as workers reap little benefit,” Sue Selasky, December 4, 2020, <https://www.freep.com/story/news/local/michigan/2020/12/04/kroger-walmart-amazon-profits-covid-19-pandemic/6458910002/>; CNN, “Grocery stores are excited to charge you higher prices,” Nathaniel Meyersohn, June 18, 2021, <https://www.cnn.com/2021/06/18/business/grocery-store-inflation-kroger-albertsons/index.html>.

chain disruptions and rising prices.³¹ Grocers Association Senior Vice President Chris Jones called out “destructive anticompetitive tactics that have been ignored by federal agencies for decades,” while FTC Chair Lina Khan said the study could “shed light on market conditions and business practices that may have worsened these disruptions and led to asymmetric effects.”³²

Conclusion

The proposed Kroger-Albertsons merger would result in a multi-billion dollar windfall for your firm, leaving consumers and workers to pay the price. The \$4 billion dividend payout to your company and to other shareholders represents an immediate threat. We therefore ask that you immediately pause this dividend payment, and that you provide answers to the following questions by no later than November 17, 2022.

1. Why is the payment of the \$4 billion dividend part of this merger agreement between Kroger and Albertsons?
2. What was Kroger’s (or its representatives’) role in negotiating this strategic provision which will impact Albertsons’ operational and competitive capabilities?
3. How much of the \$4 billion dividend payout is Cerberus scheduled to receive?
4. How much will Cerberus receive from the Kroger-Albertson acquisition in addition to the dividend?
5. Why was the \$4 billion dividend payout scheduled to be paid out prior to the merger?
6. With the \$4 billion dividend payout in place, what will be the total debt burden of the merged company?
 - a. How much are the estimated annual debt payments for this merged entity?
 - b. If the \$4 billion dividend was instead used to reduce debt, how much would the annual debt payments cost the company?
7. With the \$4 billion dividend payout in place, what will be the total debt burden of “SpinCo”?
 - a. How much are the estimated annual debt payments for “SpinCo”?
 - b. If the \$4 billion dividend was instead used to reduce debt, how much would the annual debt payments cost “SpinCo”?
8. In the event the merger is denied by regulators, is there any process to claw back all or part of this dividend payment?
9. Experts have raised concern that the dividend payout will raise the risk that Kroger and Albertsons will rely on the “failing firm” defense as a justification for the merger.
 - a. Have the Kroger or Albertson’s Boards, or Cerberus officials, discussed such an option?

³¹ CNN, “The FTC wants information from Amazon, Walmart and other giant stores about empty shelves and rising prices,” Nathaniel Meyersohn, November 30, 2021, <https://www.cnn.com/2021/11/30/business/amazon-walmart-kroger-supply-chain-ftc/index.html>.

³² *Id.*

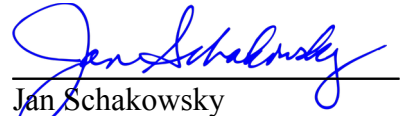
- b. Will you commit on behalf of Cerberus officials with the voting power to reject the merger not to use such a defense as regulators review the transaction?

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator



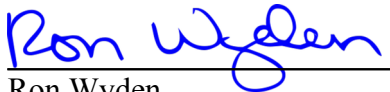
Jan Schakowsky
Member of Congress



Bernard Sanders
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Katie Porter
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Ron Wyden
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