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10 Attorneys for the Plaintiff, the STATE OF CALIFORNIA, ex rel
11 BILL LOCKYER

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14

15 STATE OF CALIFORNIA, ex rel BILL LOCKYER,

16 Plaintiff,

17 v.

18 SAFEWAY, INC., dba Vons, a Safeway Company,
19 ALBERTSONS, INC., RALPHS GROCERY
COMPANY, a division of the Kroger Company,
20 FOOD 4 LESS FOOD COMPANY, a division of the
Kroger Company, and DOES 1 through 100, inclusive,

21 Defendants.
22

Case No.

**COMPLAINT FOR
DECLARATIVE AND
INJUNCTIVE RELIEF,
ATTORNEYS' FEES, AND
OTHER EQUITABLE RELIEF
BASED ON VIOLATIONS OF
THE SHERMAN ACT, 15 U.S.C.
SECTION 1**

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24 COMES NOW, Bill Lockyer, Attorney General of the State of California, and alleges the
25 following:
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1 **I.**

2 **JURISDICTION AND VENUE**

3 1. This complaint is filed and this action instituted to prevent and restrain the
4 violation by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1). Jurisdiction for the
5 Attorney General to commence this action for injunctive and declaratory relief is conferred by the
6 Clayton Act, 15 U.S.C. § 26. This court has jurisdiction over these claims pursuant to 18 U.S.C.
7 § 1337, as they arise under the Sherman Act, 15 U.S.C. § 1 and as they affect a substantial
8 volume of commerce, including a significant amount of products traveling in the flow of goods
9 across state lines, and which activities have a significant impact on competition and revenue in
10 commerce.

11 2. Venue is proper in the Central District of California because each of the
12 defendants transacts business in this district and is found here. The interstate trade and
13 commerce involved and affected by the alleged violations of the antitrust laws is carried on in
14 material part within the Central District of California.

15 **II.**

16 **PARTIES**

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18 3. Bill Lockyer is the Attorney General of the State of California, and as such,
19 is the chief law enforcement officer of the state, and is thus empowered to bring this suit on
20 behalf of the state and on behalf of its general economy and the welfare of persons residing in this
21 state.

22 4. Defendant Ralphs Grocery Company, (“Ralphs”) is, and at all relevant
23 times was, a division of the Kroger Company (an Ohio corporation) doing business and operating
24 numerous retail supermarkets throughout Southern California.

25 5. Defendant Safeway, Inc, dba Vons, (“Safeway”) is, and at all relevant
26 times was, a California corporation, doing business and operating numerous retail supermarkets

1 throughout Southern California.

2 6. Defendant Albertsons, Inc., (“Albertsons”) is, and at all relevant times
3 was, an Idaho corporation doing business and operating numerous retail supermarkets throughout
4 Southern California.

5 7. Defendant Food 4 Less Foods Company (“Food 4 Less”) is, and at all
6 relevant times was, a division of the Kroger Company (an Ohio corporation) doing business and
7 operating numerous retail supermarkets throughout Southern California.

8 8. The true names and capacities of defendants named as DOES 1 through
9 100 are unknown and are therefore sued by fictitious names. Plaintiff will amend this complaint
10 to show the true names and capacities when they are ascertained.

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12 **III.**

13 **DEFINITIONS**

14 9. “Supermarket” means a full-line retail grocery store: (a) that carries a wide
15 variety of food and grocery items in standard consumer sizes in particular product categories,
16 including bakery goods, dairy products, refrigerated and frozen foods and beverages, fresh and
17 prepared meats and poultry, produce, beverages, shelf-stable foods, staple food stuffs (such as
18 flour, sugar, coffee and tea) and non-food grocery items (such as soaps, detergents, paper goods
19 and health and beauty aids) and (b) that has over \$2,600,000 in annual sales.

20 10. “Mutual Strike Assistance Agreement” (hereinafter “the Agreement”) is
21 the agreement and document at issue in this complaint. It was entered into and signed by Ralphs,
22 Albertsons and Safeway, to share costs and revenue among the defendants’ Southern California
23 area stores in the event of a unionized supermarket strike or lockout.

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1 IV.

2 **TRADE AND COMMERCE**

3 11. The relevant line of commerce or product market is retailing by
4 supermarkets of food and non-food grocery items.

5 12. The relevant geographic markets are local markets in Southern California
6 from San Luis Obispo to the Mexico border. These local markets include, but are not limited to
7 the local areas of Metropolitan Los Angeles, San Fernando Valley, Santa Barbara and Simi
8 Valley.

9 13. Defendants compete directly against each other in one or more local
10 geographic markets throughout Southern California, which are within the area embraced by the
11 Mutual Strike Assistance Agreement.

12 14. Defendants sell in Southern California substantial quantities of food and
13 non-food grocery products which are sold, manufactured and shipped in interstate commerce.
14 Defendants are each engaged in interstate commerce and their activities are in the flow of and
15 substantially affect interstate commerce; interstate commerce has been and will be affected by the
16 agreement described in this complaint.

17 V.

18 **CONDUCT OF THE DEFENDANTS**

19 15. Supermarkets Ralphs, Safeway and Albertsons are currently bargaining
20 with the United Food and Commercial Workers' Union (the "union") on a multi-employer basis
21 for a new collective bargaining agreement. The collective bargaining agreements between
22 defendants Ralphs, Safeway and Albertsons and the unions expired October 5, 2003.

23 16. Food For Less is not participating in the bargaining with defendants
24 Ralphs, Safeway and Albertsons.

25 17. Under certain circumstances, Ralphs, Albertsons and Safeway may bargain
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1 as a multi-employer unit with a common union about issues intimately related to wages, hours and
2 working conditions without facing antitrust liability for a joint agreement they may reach. Under
3 these conditions, some agreements may enjoy “non-statutory” immunity from the antitrust laws.
4 (Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel (1965) 381 U.S.
5 676.) However, this non-statutory immunity from antitrust liability applies to conduct growing
6 out of and directly related to the lawful operation of the bargaining process (Brown v. Pro
7 Football, Inc. (1996) 518 U.S. 231, 250). The immunity does not extend to agreements with non-
8 parties to the collective bargaining unit. Nor does it extend to agreements in restraint of trade
9 once the labor dispute ends.

10 18. On or about August 5, 2003, Ralphs, Albertsons and Safeway entered a
11 Mutual Strike Assistance Agreement (“the Agreement”) to share certain costs and revenue in the
12 event of a unionized strike or lockout arising out of negotiations for a collective bargaining
13 agreement. This Agreement commits Ralphs, Albertsons, Safeway and Food 4 Less to share
14 revenues and costs with each other disproportionately earned or lost as a result of the strike or
15 lockout. The Agreement’s cost and revenue sharing mechanism--based on a set margin
16 established before the strike and lockout period--essentially freezes the pre-strike market share.

17 19. Food 4 Less is not an “employer” as the term is defined within the
18 Agreement and is not a party to the Agreement.

19 20. The Agreement contains a provision defining the start and end of
20 the revenue sharing period. This provision provides that, under the agreement, the revenue and
21 cost sharing period continues for a period of time following the week in which the strike or
22 lockout ends. Accordingly, Ralphs, Albertsons, Safeway and Food 4 Less will share costs and
23 revenue even after the strike and lockout period ends.

24 21. On October 11, 2003, after expiration of the union’s and defendants
25 Ralphs’, Albertsons’ and Safeway’s collective bargaining agreement, Safeway workers went on
26 strike regarding issues involving their pensions and benefits. In solidarity with Safeway, Ralphs

and Albertsons locked out their workers. The union pulled picket lines from Ralphs' chain for the apparent purpose of diverting picket-crossing patrons away from Albertsons and Safeway. Plaintiff is informed and believes that while all may be losing some revenue, Ralphs is losing the least revenue.

22. The defendants' Agreement is an unlawful combination and conspiracy in restraint of interstate trade. This unlawful combination and conspiracy is not exempt from the antitrust laws under the "non-statutory labor exemption" for the following reasons: (a) the agreement extends beyond the time of the labor dispute; and (b) it includes a supermarket which is not a party to the collective bargaining process, or a member of the multi-employer bargaining unit.

VI.

FIRST CAUSE OF ACTION

Violations of Sherman Act, 15 U.S.C. § 1
(Illegal Combination in Restraint of Trade, Injunctive Relief)

23. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 22 above as though the same were fully and completely set forth herein.

24. On or about August 4, 2003 and continuing to date, defendants have engaged in an unlawful combination and conspiracy in restraint of the above described interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

25. The above described combination and conspiracy consists of a continuing agreement, understanding and concert of action among defendants, the substantial terms of which are:

Defendants would share certain costs and revenue disproportionately earned or lost during a unionized strike or lockout period, and for a period of at least two weeks thereafter. Such agreement affects competition now, even though payments based on the Agreement will not be made until after the strike and lockout period ends, because the agreement concerns

1 defendants' sales during the current strike and lockout period.

2 26. Pursuant to and in effectuation of the above stated combination and
3 conspiracy, defendants did those things which, as above alleged, they combined and conspired to
4 do.

5 27. The above-stated combination and conspiracy has anti-competitive effects,
6 including, but not limited to:

7 (a) Restraining trade and competition because the sharing of cost
8 disproportionately earned creates a disincentive to discount and disincentive to increase market
9 share.

10 (b) Restraining trade and competition between supermarkets involved in a
11 labor dispute and a competing supermarket which is not involved in the labor dispute.

12 (c) Depriving consumers of the benefit of full competition among and between
13 defendants for the sale of food and non-food grocery items for a period beyond the end of the
14 strike and lockout.

15 28. As a direct result of the defendants' agreement to prolong their cost and
16 revenue sharing beyond the strike and lockout period, a not insubstantial amount of commerce is
17 affected in the relevant geographic and product markets. Defendants operate scores of
18 supermarket chains throughout Southern California, each having millions of dollars in annual
19 sales, with significant sales during the prolonged cost-sharing period.

20 29. Defendants' agreement to prolong their cost and revenue sharing beyond
21 the strike and lockout period will result in or threaten serious irreparable harm in at least one of
22 the following ways, among others: the agreement constitutes an unreasonable restraint of trade in
23 violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and restrains competition by creating
24 disincentives for the supermarkets to compete for business.

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VI.

SECOND CAUSE OF ACTION
Violations of Sherman Act, 15 U.S.C. § 1
(Illegal Combination in Restraint of Trade, Declaratory Relief)

30. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 22 above as though the same were fully and completely set forth herein.

31. On or about August 4, 2003 and continuing to date, defendants have engaged in an unlawful combination and conspiracy in restraint of the above described interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

32. The above described combination and conspiracy consists of a continuing agreement, understanding and concert of action among defendants, the substantial terms of which are:

Defendants would share certain costs and revenue disproportionately earned or lost during a unionized strike or lockout period, and for a period of at least two weeks thereafter. Such agreement affects competition now, even though payments based on the Agreement will not be made until after the strike and lockout period ends, because the agreement concerns defendants' sales during the current strike and lockout period.

33. Pursuant to and in effectuation of the above stated combination and conspiracy, defendants did those things which, as above alleged, they combined and conspired to do.

34. The above-stated combination and conspiracy had the following anti-competitive effects, among others:

(a) Restraining trade and competition because the sharing of cost disproportionately earned creates a disincentive to discount and disincentive to increase market share.

(b) Restraining trade and competition between supermarkets involved in a

1 labor dispute and a competing supermarket which is not involved in the labor dispute.

2 (c) Depriving consumers of the benefit of full competition among and between
3 defendants for the sale of food and non-food grocery items for a period beyond the end of the
4 strike and lockout.

5 35. As a direct result of the defendants' agreement to prolong their cost and
6 revenue sharing beyond the strike and lockout period, a not insubstantial amount of commerce
7 was affected in the relevant geographic and product markets. Defendants operate scores of
8 supermarket chains throughout Southern California, each having millions of dollars in annual
9 sales, with significant sales during the prolonged cost-sharing period.

10 36. Defendants' agreement to prolong their cost and revenue sharing beyond
11 the strike and lockout period will result in or threaten serious irreparable harm in at least one of
12 the following ways, among others: the agreement constitutes an unreasonable restraint of trade in
13 violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and restrains competition by creating
14 disincentives for the supermarkets to compete for business by discounting prices.

15 37. There exists an actual controversy between plaintiff and defendants in that
16 plaintiff contends that the Agreement is illegal and that defendants should not share revenues as
17 provided in the Agreement, while defendants contend that the Agreement is legal. Defendants
18 will continue to operate on the assumption that it is a legal and enforceable agreement, unless this
19 court issue judgment declaring that it is not.

20 **VII.**

21 **PRAYER**

22 **WHEREFORE**, plaintiff prays for judgment against defendants as follows:

- 23 1. For a preliminary injunction to be issued preventing and restraining
24 defendants from violating the antitrust laws; and
25 2. For a declaratory judgment declaring the Mutual Strike Assistance
26

1 Agreement a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and that the agreement is
2 not exempt from the antitrust laws pursuant to the non-statutory labor exemption.

3 3. That plaintiff recover its costs of suit, including reasonable attorney fees
4 attributed to Causes of Action 1 through 2; and

5 4. For such other and further legal and equitable relief as the Court may
6 deem just and proper.

7 Dated: February 2, 2004.

8
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