

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**RESPONDENTS' MOTION TO MODIFY IN PART
THIS COURT'S MAY 16 ORDER**

On May 16, the Court issued an order denying without prejudice Complaint Counsel's motion to compel Respondents to produce Negotiation Materials related to the amended divestiture package that was executed on April 22, 2024 that may be withheld as privileged. In doing so, the Court stated that Respondents "shall produce responsive non-privileged Negotiation Documents, together with a privilege log in compliance with Instruction 19 of Complaint Counsel's First Request for Production of Documents to Kroger and to Albertsons and Rule 3.38A(a), no later than May 17, 2024." Respondents will be producing "responsive non-privileged Negotiation Documents" on May 17. However, for the reasons explained below, it is not practically possible for Respondents to produce the privilege logs by that date. Respondents respectfully request that the Court modify its order to require the production of privilege logs for any withheld Negotiation Materials by May 24, 2024.

This case is one of four related actions brought by federal or state antitrust enforcers. The plaintiffs in each case are seeking the production of the Negotiation Materials. In the

Colorado action, on April 22—the day the amended divestiture package was executed—the Colorado court ordered the production of the non-privileged Negotiation Materials by May 17, 2024. Kroger and Albertsons then informed the Colorado Attorney General that they would produce privilege logs for any withheld Negotiation Materials by May 28, 2024.

Kroger and Albertsons have sought to produce the Negotiation Materials and their accompanying privilege logs on this same schedule in both this case and the Washington state court action: (1) non-privileged Negotiation Materials will be produced by May 17; and (2) privilege logs of withheld Negotiation Materials will be produced by May 28. Kroger and Albertsons are sequencing the productions this way to ensure that all plaintiffs receive the non-privileged Negotiation Materials as soon as possible. Respondents voluntarily agreed to produce the Negotiation Materials to Complaint Counsel by May 17, which is significantly earlier than the production deadline for the materials in the Scheduling Order and was not a date requested by Complaint Counsel. This production schedule also ensured that Respondents' production was not delayed due to the time-consuming process of compiling a privilege log, which must necessarily occur after the privilege review of the documents is complete. This process requires each log entry to be carefully scrutinized by counsel for Kroger and Albertsons respectively to ensure the accuracy of its contents. Carefully constructing a privilege log is particularly important in this case because Kroger and Albertsons expect all of the plaintiffs to challenge their privilege assertions.

Consistent with this approach, Respondents' opposition to Complaint Counsel's motion to compel stated that Respondents would produce "non-privileged documents in each category of 'Negotiation Materials' identified by Complaint Counsel by May 17." Opp. At 4.

Respondents' opposition also stated that they would produce privilege logs, but did not identify the precise date by which they would produce those logs. *Id.* Respondents apologize for any confusion its brief created on the date by which Respondents intended to produce privilege logs to Complaint Counsel. However, for the reasons explained above, Respondents did not intend to produce privilege logs by May 17 and practically will be unable to compile privilege logs by that date—even though Respondents *will* produce non-privileged Negotiation Materials on May 17. Nevertheless, Respondents will expedite their construction of privilege logs and can produce them by May 24—four days earlier than they had originally anticipated.

Respondents conferred with Complaint Counsel on this motion, and Complaint Counsel opposes the motion. To be clear, Respondents have never represented to Complaint Counsel that they would produce privilege logs by May 17. Respondents and Complaint Counsel have not discussed the specific date by which Respondents would produce privilege logs. Complaint Counsel's motion stated that Kroger's "privilege log is likely weeks away"—indicating that Complaint Counsel did not expect to receive the log on May 17. Mot. at 5. Nor did Complaint Counsel's motion to compel request the production of the logs by a certain date

For these reasons, Respondents respectfully request that the Court modify its May 16 order to permit Respondents to produce a privilege log by May 24, 2024. Respondents are available to discuss this matter with the Court at its convenience.

May 16, 2024

Respectfully submitted,

By: 

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**[Proposed] Order Granting Respondents' Motion to Modify In Part This Court's
May 16 Order**

Having considered the Respondents' motion to modify the Court's May 16 Order, the motion is hereby GRANTED. Respondents shall produce privilege logs of any withheld Divestiture Materials by May 24, 2024.

ISSUED:

Date: _____, 2024

Chief Administrative Law Judge Chappell

STATEMENT REGARDING CONFERRAL WITH COMPLAINT COUNSEL

Pursuant to paragraph 4 of the Scheduling Order, Respondents submit this statement representing that Counsel for Respondents have conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion. As noted above, Complaint Counsel oppose this motion.

/s/ *Sonia K. Pfaffenroth*
Sonia K. Pfaffenroth

Certificate of Service

I hereby certify that on May 16, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I caused the foregoing documents to be served via email to:

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