

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**COMPLAINT COUNSEL’S RENEWED MOTION TO COMPEL KROGER’S
PRODUCTION OF DOCUMENTS RELATING TO NEGOTIATION
OF NEW DIVESTITURE AGREEMENTS**

Pursuant to 16 C.F.R. § 3.38(a), Complaint Counsel move for an order compelling Respondent The Kroger Company to produce “Negotiation Documents,” as defined in Complaint Counsel’s May 6, 2024, Motion to Compel (“Prior Motion”). This Court denied without prejudice the Prior Motion based on Kroger’s representation that it “will produce all non-privileged documents by May 17, 2024, and that [it] will also produce a privilege log listing any withheld materials.” May 16, 2024, Order on Prior Mot. (the “Order”) at 4. Those representations have proven false.

First, Kroger has neither produced nor logged Negotiation Documents exchanged between its outside counsel and counsel for divestiture buyer C&S Wholesale Grocers, LLC (“C&S”). Kroger’s failure violates the Order. Communications by counsel are expressly included in the defined term “Negotiation Documents” used in the Order. Order at 2. Respondents represented that all Negotiation Documents would be produced or logged. RC Opp. to Prior Mot. at 4; RC Mot. to Modify at 1.

Second, the Order directed that privilege logs be produced “in compliance with Instruction I9 of Complaint Counsel’s First Request for Production of Documents to [Kroger] and Rule 3.38A(a).” *Id.* at 4. Kroger did not even try to comply. For example, it failed to log attachments to emails, did not identify the individuals named, and omitted filenames and email subjects. Despite the clear language of the Order, Kroger instead asserts that its logs comply with [REDACTED], which does not apply here. Ex. A. In any event, Kroger’s “privilege log” is so deficient that it fails to satisfy any standard.

Third, Kroger failed to honor its promise to produce “drafts of the updated divestiture agreement (with redactions for attorney comments or sections bearing on the sufficiency of the package from a litigation perspective).” RC Opp. to Prior Motion at 4. Kroger instead redacted every provision of the New Divestiture Agreements that was subject to negotiation.

Fourth, Kroger produced only a handful of documents in the other two Negotiation Documents categories that were the subject of the Prior Motion: communications with C&S about the composition of the divestiture package and Kroger’s commercial analysis of potential divestiture packages. Whether these documents were logged is unclear, both because of the log’s deficiencies and because Kroger erroneously relies on [REDACTED], which does not require logging communications between a party and its counsel. Ex. B ¶ 28.

Fifth, Kroger is withholding responsive correspondence solely between businesspeople at C&S and Kroger, or between businesspeople who merely copy counsel, on the grounds that [REDACTED]. See, e.g., Ex. C at PRIVLIT00585. Kroger’s use of the documents does not render them privileged.

This Court should find that Kroger has failed to sustain its burden to establish a basis for withholding Negotiation Documents exchanged with outside counsel for C&S or with C&S businesspeople, whether or not counsel are copied, and should order Kroger to produce such documents and serve a privilege log conforming to its Order.

BACKGROUND

Complaint Counsel has been diligently seeking production of Negotiation Documents since it subpoenaed C&S on March 21, 2024, and issued Requests for Productions to Kroger on April 2, 2024. Ex. D. Respondents have refused to disclose who conducted divestiture negotiations and refused to collect documents from outside counsel. *Compare* Ex. E ¶ 4 with Ex. F (responding to Ex. E without addressing ¶ 4); Ex. G (requesting outside counsel custodians). When Complaint Counsel moved for relief, Kroger promised to either produce or log all Negotiation Documents. RC Opp. to Prior Motion at 9. This Court ruled that “Respondents will be held to their representations” that “they will produce all non-privileged documents . . . and that they will also produce a privilege log listing any withheld materials.” Order at 4.

On May 24, 2024, Kroger served a privilege log that ignored the Order’s requirement to comply with Instruction I9 of Complaint Counsel’s RFPs. *See id.* Kroger did not:

- Identify and separately log attachments;
- State the name, title, and employer of each email author, addressee, and recipient; or
- Describe the subject matter in sufficient detail.

See Ex D at 22. Kroger omitted filenames and email subjects of withheld documents, providing only an attorney-drafted “Document Description.” Ex. C. Some descriptions are misleading. For example, Kroger logged a January 15, 2024, document as { [REDACTED] }

[REDACTED]

{REDACTED}. *Id.* at PRIVLIT03579. Albertsons logged the same email, including the subject line, {REDACTED}, and email addresses from {REDACTED} {REDACTED} Ex. H at 3040. Only Albertsons' log indicates that the communication is about {REDACTED} and provides the information necessary to challenge the privilege claim.

Neither Kroger's document production nor its log includes the vast majority of Negotiation Documents: outside counsel's communications with C&S. Such documents exist. *See, e.g.,* Ex. I (Kroger outside counsel forwarding correspondence with C&S). Kroger has intentionally omitted outside-counsel-to-outside-counsel communications from its logs and productions. *See* Ex. J at fifth bullet.

Kroger produced a few drafts of the New Divestiture Agreements but redacted all provisions subject to negotiation or every page between the recitals and the signature block. *See, e.g.,* Exs. K, L. It produced only a handful of documents from the other categories of Negotiation Documents. Just two weeks from the close of fact discovery, Complaint Counsel still has neither the complete set of Negotiation Documents nor an adequate privilege log for assessing Kroger's privilege claims.

LEGAL STANDARD

"A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery." 16 C.F.R. § 3.38(a). "Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . an answer to any requests for . . . documents . . . be served or disclosure otherwise be made." *Id.* "Any person withholding material responsive to . . . a request for production . . . pursuant to § 3.37" is

required to “describe[] the nature of the documents” in a manner that “will enable other parties to assess the claim.” 16 C.F.R. § 3.38A(a). “Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Daniel Chapter One*, 2009 WL 569694, at *2 (F.T.C. Jan. 9, 2009).

ARGUMENT

Kroger has not disputed the relevance of the Negotiation Documents. Complaint Counsel is entitled to explore whether C&S sought and obtained the assets needed to compete effectively. Contrary to this Court’s Order, Kroger is withholding relevant documents without logging them, baselessly claiming privilege over communications between businesspeople, and withholding documents without providing sufficient information to permit Complaint Counsel to analyze privilege claims. Redacted documents produced by Kroger shows that its claims of privilege are grossly overbroad. Kroger has failed to sustain its claims of privilege over the Negotiation Documents, and the Court should order their production.

I. RESPONDENTS DID NOT COMPLY WITH THIS COURT’S ORDER TO PRODUCE OR LOG ALL NEGOTIATION DOCUMENTS.

This Court’s Orders required Kroger either to produce Negotiation Documents by May 17, 2024, or include them in a privilege log that complied with Instruction I9 of Complaint Counsel’s RFP by May 24, 2024. Order; May 17 Order on Mot. to Modify. The term “Negotiation Documents” includes communications with counsel, but Kroger’s log omits outside counsel communications (*see* Ex. J) and does not conform to the Court’s orders.

Kroger may argue that it is common to exclude outside counsel as custodians and not to log their documents, but Complaint Counsel expressly requested outside counsel custodians (Ex. G), and the Prior Motion expressly sought such communications. Prior Mot. at 1 (defining Negotiation Documents to include “communications between Respondents and C&S, whether

through businesspeople or counsel”). Kroger did not object to this definition, nor ask that it be limited to Kroger’s chosen custodians, and the Court adopted it. Order at 2. Kroger’s failure to log outside counsel communications violates the Court’s Orders and improperly blocks scrutiny of the divestiture negotiations.

Kroger’s log also violates the Court’s orders because it does not provide sufficient information to evaluate privilege claims, does not log each member of a withheld family of documents, and provides no way to connect withheld attachments to produced emails. Kroger’s omission of filenames does not allow assessment of what a document might really be about. In meeting and conferring, Kroger offered to provide filenames and subjects only if Complaint Counsel agreed not to challenge its privilege log. Ex. M.

II. RESPONDENTS’ OVERBROAD PRIVILEGE CLAIMS SHOULD BE REJECTED.

Kroger’s overbroad claims of privilege, work product, and joint defense/common interest should be rejected.

First, the best examples of Kroger’s overbroad privilege claims are the draft contracts from which all sections subject to negotiation have been redacted. *See* Exs. K, N. Kroger produced only one C&S communication with redactions, and its contents do not support the privileges claimed. *See* Exs. C, O at PRIVLIT01943.

Second, Kroger improperly claimed privilege over information solely because it was provided to counsel. “Simply ‘cc-ing’ an attorney on an email is not sufficient to invoke the privilege.” *Murray v. Mayo Clinic*, 2016 WL 10646315, at *3 (D. Ariz. July 20, 2016). Non-privileged documents do “not acquire protection merely because they were transferred to” counsel. *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 679-80 (2d Cir. 1987). Even if counsel’s selection of the document for review were opinion work product, including this

information in the privilege log waived the protection. *See Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991). Yet Kroger claims providing information to counsel renders it privileged. For example, in Exhibit O, Kroger redacts a summary of a prior discussion between { [REDACTED]

{ [REDACTED] } writes just below, { [REDACTED] }

Ex. O at 2. Kroger describes this document as { [REDACTED]

{ [REDACTED]

{ [REDACTED]

{ [REDACTED] } (Ex. C at PRIVLIT01943) but Kroger's counsel's interest in the document's contents does not render it privileged.

Over 700 documents are described in Kroger's log as { [REDACTED]

{ [REDACTED] } without an attorney in the To: or From: field.

Ex. C. These include communications between Kroger's { [REDACTED]

{ [REDACTED]

{ [REDACTED] }—i.e., Negotiation Documents. *See, e.g.*, Exs. P, Q. None of these documents is privileged.

Third, Kroger has claimed privilege over communications with C&S when they were adverse. For example, the email in Exhibit O was sent eight days after { [REDACTED]

{ [REDACTED]

{ [REDACTED] } (Ex. R) and a month before { [REDACTED]

{ [REDACTED] } (Ex. S), notwithstanding { [REDACTED] }. No

common interest existed because Kroger and C&S were adversaries with respect to { [REDACTED]

{ [REDACTED] }. Therefore, any disclosure of privileged

information by { [REDACTED] } in Exhibit O waived any privilege. C&S had no common interest in defending a divestiture agreement { [REDACTED] } nor a merger to which it was not a party. Indeed, { [REDACTED]

{ [REDACTED] }
 Ex. T at 3. If Respondents shared work product with C&S during negotiations, they should not have expected the work product to remain confidential given the conflict between the parties, and such documents should be produced because Complaint Counsel has substantial need of the information, which it cannot obtain elsewhere. *See* 16 CFR § 3.31(c)(5). Respondents did not share a common interest with C&S from at least January 15, 2024, the date of Exhibit T, until the execution of the New Divestiture Agreements on April 22, 2024. Respondents should produce communications between C&S and the Respondents, including between outside counsel, during that period.

III. RESPONDENTS FAILED TO CARRY THEIR BURDEN TO WITHHOLD RELEVANT DOCUMENTS.

Kroger “carr[ies] a heavy burden” to justify withholding relevant documents. *Daniel Chapter One*, 2009 WL 569694, at *2. Its refusal to collect and log documents exchanged between its outside counsel and C&S means it has failed for the vast majority of Negotiation Documents. *See In re Chevron Corp.*, 2013 WL 11241413, at *5 (D.D.C. Apr. 22, 2013) (failing to log documents after being ordered to waive privilege). Even if Kroger had logged outside counsel documents, its claims of privilege, work product, and common interest would fail for the following reasons.

On January 15, 2024, C&S told Kroger { [REDACTED] }, and on February 8, 2024, C&S informed Kroger that { [REDACTED] } { [REDACTED] }. *See supra*. Any privileged document shared in this period among Respondents and

C&S lost its privileged status because the common interest doctrine did not apply. Joint defense doctrine was also inapplicable, even though C&S became a co-defendant in Colorado state litigation during that period, because C&S did not share Respondents' interest in defending the merger until April 22, 2024, when it became party to the New Divestiture Agreements, which will be consummated only if the merger is not enjoined. *See Columbia Sportswear Co. v. 3MD, Inc.*, Civ. No.: 03:17–CV–0342–AC, 2017 WL 6550490, at *4 (D. Or. Dec. 21, 2017) (holding joint defense only protects communications in furtherance of the parties' shared legal interest).

Complaint Counsel has “substantial need of the materials” to test Respondents' claim that the divestiture includes “all the assets and personnel C&S will need to compete,” Kroger Answer at 3, and no way to obtain “the substantial equivalent of the materials by other means.” 16 CFR § 3.31(c)(5). Respondents claim that disclosure of Negotiation Documents will necessarily reveal litigation strategy, but Kroger has already asserted that it negotiated a divestiture package that it thought would best survive litigation (*see, e.g.*, RC Opp. to Prior Mot. at 2-3) and has disclosed the subjects of negotiation by redacting them from drafts of the New Divestiture Agreements, Exs. K, N. Production of communications in which Kroger negotiated the current divestiture package would not reveal anything about Kroger's litigation strategy that it has not already disclosed.

CONCLUSION

Complaint Counsel respectfully requests Kroger be ordered to produce documents and a compliant privilege log as set forth in the attached Proposed Order.

Dated: June 4, 2024

Respectfully submitted,

By: s/ Laura R. Hall
Laura R. Hall

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326- 3282
Email: lhall1@ftc.gov

Counsel Supporting the Complaint

Ex. A

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. B

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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

FEDERAL TRADE COMMISSION,
STATE OF ARIZONA,
STATE OF CALIFORNIA,
DISTRICT OF COLUMBIA,
STATE OF ILLINOIS,
STATE OF MARYLAND,
STATE OF NEVADA,
STATE OF NEW MEXICO,
STATE OF OREGON, and
STATE OF WYOMING,

Plaintiffs,

v.

THE KROGER COMPANY and
ALBERTSONS COMPANIES, INC.,

Defendants.

Case No.: 3:24-cv-00347-AN

**CASE MANAGEMENT AND
SCHEDULING ORDER**

Upon consideration of the parties Joint Motion for Entry of a Case Management and Scheduling Order, it is hereby ORDERED that the Motion is GRANTED.

It is further ORDERED that the following provisions shall govern in this action:

- A. **TEMPORARY RESTRAINING ORDER**: The Court entered the Stipulation and Temporary Restraining Order on February 27, 2024. Under that Temporary Restraining Order, the Defendants have agreed not to close their transaction until after 11:59 PM Eastern Time on the fifth business day after the Court rules on the Plaintiffs' request for a preliminary injunction or until after the date set by the Court, whichever is later.

B. DISCOVERY

1. Initial Disclosures. The parties shall exchange initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) on the date listed in the schedule set forth herein.
2. Fact Discovery. Fact discovery shall commence and end on the dates listed in the schedule set forth herein, except that to the extent a third-party deposition is properly noticed, but the third party's schedule does not reasonably accommodate a deposition before the end of fact discovery, a later deposition may occur a reasonable time before the evidentiary hearing in this matter. Any other modification to the end date of discovery must be agreed to in writing by the parties.
3. Production of Investigative Materials. On March 1, 2024, Plaintiff FTC produced to Defendants copies of all third-party investigational hearing transcripts and declarations. Plaintiff FTC substantially completed the production of its investigative file on March 11, 2024. Plaintiffs' productions shall include all non-privileged investigation materials, including all documents, communications, data, information, declarations, transcripts of testimony, and/or other materials, whether draft or final, that they directly or indirectly received from any third party during their investigations of Kroger's proposed acquisition of Albertsons. Plaintiff States shall substantially complete their productions by the later of (i) April 15, 2024, or (ii) seven days after entry of a Protective Order in this case. For the avoidance of doubt, each Plaintiff shall produce non-privileged materials contained within such Plaintiff's investigative file that are not included in Plaintiff FTC's productions.
4. Pre-Trial Discovery Conference. The parties are excused from the obligation to confer pursuant to Federal Rule of Civil Procedure 26(f).

5. Third-Party Discovery. No party issuing a third-party subpoena for the production of documents or electronically stored information shall request a return date sooner than seven calendar days after service. Each side shall produce all materials received pursuant to a third-party subpoena, including any declarations or affidavits obtained from a third party, to the other side within three business days of receiving those materials. Production shall occur in the format the materials were received. Notwithstanding the prior provisions of this paragraph, in the event a third party produces documents or electronic information that is not Bates-stamped, the party receiving the documents shall Bates-stamp the documents or electronic information and produce them in a reasonable timeframe.
6. Limitations on Party and Third-Party Declarations or Letters. No side may introduce as evidence a declaration, letter of support, or affidavit from a party or third-party witness if such declaration, letter of support, or affidavit was executed or served less than two days prior to his or her agreed-to deposition date. In any event, no party or third-party declaration, letter of support, or affidavit may be introduced as evidence in this case if it was executed or served less than fourteen calendar days before the close of fact discovery, unless otherwise agreed to in writing by the parties.
7. Document Requests and Production. No more than 25 requests for production may be served on any party in this action. There shall be no limit on the number of requests for production that the parties may include in subpoenas served on third parties. Objections to requests for the production of documents shall be served no later than seven calendar days after service of document requests. Within three calendar days of service of any such objections, the parties shall meet and confer

about resolving the objections. A party shall make good faith efforts to substantially comply with requests for production no later than thirty calendar days after the date of service. The parties are not required to produce to each other in discovery in this case any documents Defendants previously produced to the FTC as part of the FTC's investigation of Kroger's acquisition of Albertsons, FTC File No. 231-0004 or that are produced in the Part 3 administrative proceeding, *In re The Kroger Company & Albertsons Companies, Inc.*, Dkt. No. 9428 (FTC).

8. Requests for Admission. Each side shall serve no more than 10 requests for admission on the other side. There shall be no limit on requests for admission for purposes of authentication and admissibility of documents, data, or other evidence.
9. Interrogatories. Each side shall serve no more than 10 interrogatories on the other side. The parties shall serve objections and responses to interrogatories no later than fourteen calendar days after the date of service of interrogatories. The parties shall serve interrogatories by the date set forth in the schedule herein.
10. Expert Reports. Plaintiffs and Defendants shall serve expert reports, rebuttal expert reports, and reply expert reports on the dates set forth in the schedule herein, and shall not produce any expert report, report amendment, supplemental declaration, or similar document less than seven calendar days prior to their deposition.
11. Expert Materials Not Subject to Discovery. Expert disclosures, including each side's expert reports, shall comply with the requirements of Federal Rule of Civil Procedure 26(a)(2), except as modified herein:
 - a) Neither side must preserve or disclose, including in expert deposition testimony, the following documents or materials:

- i. any communication or work product shared between any of the parties' counsel and their expert(s) or consultants, or between any of the experts themselves;
- ii. any form of communication or work product shared between an expert(s) and persons assisting the expert(s);
- iii. an expert's notes, unless they constitute the only record of a fact relied upon by the expert in formulating an opinion in this case;
- iv. drafts of expert reports, analyses, or other work product; or
- v. data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report, except as set forth in 12(b).

b) The parties agree that they shall disclose the following materials on the same day that they submit the corresponding expert reports:

- i. a list by Bates number of all documents relied upon by the testifying expert(s);
- ii. copies of any materials relied upon by the expert not previously produced that are not readily available publicly; and
- iii. for any calculations appearing in the report, all data and programs underlying the calculation, including all programs and codes necessary to recreate the calculation from the initial ("raw") data.

12. Disclosure of Experts. The parties shall disclose the names and subject matter of each expert on the date set forth in the schedule herein.

13. Exchange of Witness Lists.

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- a) *Preliminary Fact Witness Lists:* The parties shall exchange preliminary party and third-party fact witness lists no later than 5:00 p.m. Eastern time on the date set forth in the schedule herein. Preliminary fact witness lists shall be limited to no more than 25 fact witnesses per side. The preliminary fact witness list shall include the following information if known to the disclosing party: (a) the witness's name and employer; (b) the name, address, telephone number, and email address of the witness's counsel (or, if not represented by counsel, the witness's address, telephone number, and email address); and (c) a summary of the general topics of the witness's anticipated testimony. Each party's preliminary fact witness list shall represent a good faith assessment of the witnesses the party reasonably anticipates it may present at the evidentiary hearing. Plaintiffs shall jointly submit one list and Defendants shall jointly submit one list.
- b) *Final Witness Lists:* The parties shall exchange final witness lists on or before 5:00 p.m. Eastern time on the date set forth in the schedule herein. The final witness list shall represent a good faith effort to identify all witnesses the producing party expects that it may present at the evidentiary hearing, other than solely for impeachment. Final witness lists shall be limited to no more than 20 fact witnesses plus experts. Final witness lists shall include for each witness: (a) an indication of whether the witness will offer expert testimony and (b) a summary of the general topics of each witness's anticipated testimony. Each side's final witness list shall be limited to witnesses who appeared on either side's preliminary fact witness list or were deposed in this

matter or the Part 3 administrative proceeding, or any third-party witness who provides a declaration in this matter or the Part 3 administrative proceeding, provided that the other side has had a reasonable opportunity to depose such witnesses, and any testifying experts. Additional witnesses may be added to either side's final fact witness list after the date set forth in the schedule herein only by agreement of the parties or with leave of the Court for good cause shown.

14. Depositions.

- a) Number of Depositions. Each side may depose an unlimited number of party and third-party witnesses. In addition to the depositions permitted under the first sentence in 14(a), there may be one 30(b)(6) deposition notice served on each Defendant. Depositions of all individuals designated as representatives for purposes of one 30(b)(6) deposition notice shall count as one deposition for purposes of this paragraph. The parties shall consult with each other prior to confirming any deposition to coordinate the time and place of any deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness's schedule.
- b) Allocation of Time. All depositions, including depositions of individual fact and expert witnesses, shall last no more than seven hours. For the avoidance of doubt, a deposition pursuant to Rule 30(b)(6) may last up to nine hours if more than one individual is designated to provide testimony. If both Plaintiffs and Defendants issue a subpoena to depose the same third-party fact witness, they shall allocate the time evenly between them. Unused time in any side's

allocation of deposition time shall not transfer to the other side.

Notwithstanding the prior provisions of this paragraph, Plaintiffs shall be allocated seven hours for depositions of any divestiture buyer or employee of any divestiture buyer or any employee, agent, or consultant of any Defendant.

- c) Notice. The parties may not serve a deposition notice or deposition subpoena less than seven calendar days before the noticed date for the deposition. The parties shall consult with each other prior to confirming any deposition to coordinate the time and place of the deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness's schedule. If a party serves a third party with both a subpoena for the production of documents or electronically stored information and a subpoena for deposition testimony, the deposition date must be at least seven calendar days after the original return date for the document subpoena.
- d) Deposition Designations. The parties agree to work in good faith to reach agreement regarding the need, and, if appropriate, a procedure for deposition designations by the close of fact discovery.
- e) Remote Depositions. The parties intend to negotiate and submit to the Court a Remote Deposition Protocol.

15. Expert Depositions. Each side may take one deposition of each of the other side's testifying experts. Unless the parties agree or the Court orders otherwise, expert depositions must be completed on or before the Close of Expert Discovery deadline identified in the schedule set forth herein.

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16. Discovery Uses. All discovery taken in this case can be used in connection with the Part 3 administrative proceeding (FTC Dkt. No. 9428), however the deadlines and limitations set forth in this Case Management Order shall exclusively govern written discovery and depositions in this action. The parties agree that witnesses who are deposed in this action shall not be deposed in the Part 3 administrative proceeding unless the presiding Administrative Law Judge in the Part 3 proceeding orders otherwise. Discovery obtained by a party in the Part 3 administrative proceeding may be used in this case only if it has been obtained and served on all parties by the end of fact discovery in this action.

17. Resolving Discovery Disputes. Before filing any discovery-related motion, the parties (and any third parties whose discovery is at issue) must meet and confer within three calendar days of a request to meet and confer about the dispute. Any motion seeking relief from the court shall be filed within five calendar days of reaching impasse. Any brief in opposition to the motion shall be filed no later than two calendar days after the motion was filed. When a motion to compel discovery is granted, any discovery ordered to be produced shall be produced within seven calendar days. The procedures provided for in this paragraph are without prejudice to following the procedure in Local Rule 26-3.

C. **MOTIONS AND BRIEFING**

18. Plaintiffs shall file a single memorandum in support of the requested preliminary injunction by the date set forth in the schedule herein. This brief is not to exceed 50 pages.

19. Defendants shall file a single opposition to the Plaintiffs' requested preliminary injunction by the date set forth in the schedule herein. This brief is not to exceed 50 pages.
20. Plaintiffs shall file a single reply memorandum in further support of a preliminary injunction by the date set forth in the schedule herein. This brief is not to exceed 35 pages.
21. Any motions *in limine*, including any *Daubert* motions, shall be filed by the date set forth in the schedule herein. Responses to motions *in limine* and *Daubert* motions shall be filed by the date set forth in the schedule herein.
22. Each side's proposed findings of fact and conclusions of law shall be filed by the date set forth in the schedule herein. Each side's proposed findings of fact and conclusions of law shall not exceed 100 pages.

D. EVIDENTIARY HEARING

23. At any evidentiary hearing regarding Plaintiffs' requested preliminary injunction, each side shall have 40 hours to present its case, including opening arguments and any Plaintiff rebuttal case. Time shall be counted using a chess clock kept by the parties. Time spent conducting a direct examination shall count against the side conducting that direct examination; time spent conducting a cross-examination shall count against the side conducting that cross-examination. Closing arguments will not be counted against either side's allotted time.

E. OTHER MATTERS

24. Service. Service of any documents not filed via ECF, including pleadings, discovery requests, Rule 45 subpoenas for testimony or documents, expert disclosure, and

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delivery of all correspondence, whether under seal or otherwise, shall be by electronic mail or electronic file transfer to the following individuals designated by each party:

For Plaintiffs:

To the FTC: James Weingarten (jweingarten@ftc.gov)
Charles Dickinson (cdickinson@ftc.gov)
Rohan Pai (rpai@ftc.gov)
Laura Hall (lhall1@ftc.gov)
Corene Wint (cwint@ftc.gov)
Rachel Ma (rma@ftc.gov)

To State of Arizona: Robert Bernheim (Robert.Bernheim@azag.gov)
Jayme Weber (Jayme.Weber@azag.gov)

To State of California: Nicole Gordon (Nicole.Gordon@doj.ca.gov)
Shira Hoffman (Shira.Hoffman@doj.ca.gov)

To District of Columbia: Amanda Hamilton (Amanda.Hamilton@dc.gov)
Will Margrabe (will.margrabe@dc.gov)

To State of Illinois: Paul Harper (Paul.Harper@ilag.gov)
Brian Yost (Brian.Yost@ilag.gov)

To State of Maryland: Schonette Walker (swalker@oag.state.md.us)
Gary Honick (ghonick@oag.state.md.us)

To State of Nevada: Lucas Tucker (LTucker@ag.nv.gov)
Samantha Feeley (sfeeley@ag.nv.gov)

To State of New Mexico: Jeff Herrera (jherrera@nmag.gov)
Julie Meade (jmeade@nmag.gov)

To State of Oregon: Cheryl Hiemstra (Cheryl.Hiemstra@doj.state.or.us)
Angie Milligan (amilligan@lvklaw.com)
Christine Ortez (cortez@lvklaw.com)

To State of Wyoming: Will Young (william.young@wyo.gov)

For Defendants:

To Kroger: Matthew Wolf (matthew.wolf@arnoldporter.com)
Sonia Pfaffenroth (sonia.pfaffenroth@arnoldporter.com)
Joshua Davis (joshua.davis@arnoldporter.com)

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Michael Kientzle (michael.kientzle@arnoldporter.com)
Jason Ewart (jason.ewart@arnoldporter.com)
Yasmine Harik (yasmine.harik@arnoldporter.com)
John Holler (john.holler@arnoldporter.com)
Christina Cleveland (christina.cleveland@arnoldporter.com)

Mary Perry (mark.perry@weil.com)
Luna Barrington (luna.barrington@weil.com)
Bambo Obaro (bambo.obaro@weil.com)
Luke Sullivan (luke.sullivan@weil.com)

To Albertsons:

Ted Hassi (thassi@debevoise.com)
Michael Schaper (mschaper@debevoise.com)
Shannon R. Selden (srselden@debevoise.com)
J. Robert Abraham (jrabraham@debevoise.com)
Natascha Born (nborn@debevoise.com)
Jamie Fried (jmfried@debevoise.com)
Mari Cardenas (mcardena@debevoise.com)
Tom E. Buckley (tebuckley@debevoise.com)
Heather T. Mehler (htmehler@debevoise.com)
Marie Ventimiglia (msventim@debevoise.com)

Mike Cowie (mike.cowie@dechert.com)
James Fishkin (james.fishkin@dechert.com)
Thomas Miller (thomas.miller@dechert.com)

Enu Mainigi (emainigi@wc.com)
Jonathan B. Pitt (jpitt@wc.com)
A. Joshua Podoll (apodoll@wc.com)

In the event the volume of served materials is too large for email and requires electronic data transfer by file transfer protocol or a similar technology, or overnight delivery if agreed by the parties, the serving party shall telephone or email the other side's principal designee when the materials are sent to provide notice that the materials are being served. For purposes of calculating discovery response times under the Federal Rules of Civil Procedure, electronic delivery shall be treated the same as hand delivery. Service of correspondence or formal papers by 11:59 p.m.

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Eastern Time shall be considered filed on that day. For purposes of this provision, service of discovery requests or productions from parties or third parties after 5:59 p.m. Eastern Time shall be considered served the next business day.

25. Answer. Defendants shall answer the complaint on or before the date set forth in the schedule herein.
26. Nationwide Service of Process. Good cause having been shown in view of the geographic dispersion of potential witnesses in this action, the parties shall be allowed nationwide service of process of discovery and trial subpoenas pursuant to Federal Rule of Civil Procedure 45 and 15 U.S.C. § 23, to issue from this Court that may run into any other federal district requiring witnesses to attend this Court. The availability of nationwide service of process, however, does not make a witness who is otherwise “unavailable” for purposes of Federal Rule of Civil Procedure 32 and Federal Rule of Evidence 804 available under these rules regarding the use at trial of a deposition taken in this action.
27. Protective Order Concerning Confidentiality. The parties anticipate requesting entry of a Protective Order concerning confidentiality of materials produced in this action.
28. Privilege Logs. The parties agree to suspend the obligations of Federal Rule of Civil Procedure 26(b)(5)(A) to produce a log of materials withheld from discovery in this case (excluding Defendants’ productions made during the course of the FTC’s pre-complaint investigation). Notwithstanding the foregoing, the parties shall log withheld materials that are: (1) authored by, addressed to, or received from any third party or (2) internal to a party that are not authored by, sent to, or received from the

party's in-house or outside attorneys; provided that, documents or communications subject to the joint defense agreement with respect to the Proposed Transaction entered into between the Defendants and documents or communications sent solely within or among Plaintiffs' organizations and any other state, federal, or local law enforcement agency (including persons employed by or acting on behalf of Plaintiffs or such other agencies) shall not be logged. For purposes of this paragraph, a "third party" excludes a party's retained expert and persons assisting the expert within the meaning of Federal Rule of Civil Procedure 26.

29. Witness Disclosure. Each side shall provide opposing counsel a list of witnesses that that side intends to present, including the order in which the witnesses shall be presented, no later than 8:00 pm Eastern Time two calendar days before the witness is intended to be called. A list of all exhibits anticipated to be admitted on direct examination of the particular witness, unless used for purposes of impeachment or to refresh the witness's recollection, shall be disclosed to opposing counsel by 5:00 pm Eastern Time one calendar day prior to the hearing day when such witness is intended to be called.

30. Inadvertent Production of Privileged Material. Pursuant to Federal Rule of Civil Procedure 16(b)(3)(B)(iv) and Federal Rule of Evidence 502(d), inadvertent production of documents or communications containing privileged information or attorney work product shall not be a basis for loss of privilege or work product of the inadvertently produced material, provided that the producing party notifies the receiving party within three business days of learning of the inadvertent production that the production was inadvertent and that the material should be considered

privileged. When a party determines that it has inadvertently produced privileged material, it shall notify other parties, who shall promptly return, sequester, or delete the privileged material from their document management systems. Within two business days of identifying inadvertently produced information or documents(s), the party seeking clawback of such materials shall provide a revised privilege log for the identified information or documents. A party may move the Court for an order compelling production of the material, but such party may not assert as a ground for entering such an order the mere fact of inadvertent production. The party asserting the privilege must submit a copy of the material at issue for in camera review.

31. Attorney Work-Product. The parties shall neither request nor seek to compel the production of any privileged interview notes, interview memoranda, or recitations of information contained in such notes or memoranda, created by any party's counsel, except as specified in Paragraph 11 of this Order. Nothing in this Order requires the production of any party's attorney work-product, confidential attorney-client communications, communications with or information provided to any potential expert witness (whether retained or not), or materials subject to the deliberative-process privilege or any other privilege.

32. Electronically Stored Information. The parties agree as follows regarding the preservation and production of electronically stored information ("ESI"):

- a) All parties have established litigation holds to preserve ESI that may be relevant to the expected claims and defenses in this case. In addition, the parties have taken reasonable steps to ensure potentially relevant information shall not be automatically deleted.

- b) If a party desires to use Technology Assisted Review (“TAR”), it shall meet and confer with the other side and negotiate in good faith on the reasonable use of such technology, unless a party is using a TAR protocol that has previously been implemented in connection with the Second Request related to Kroger’s acquisition of Albertsons. The use of TAR shall not relieve a party of the obligation to conduct a reasonable search for documents responsive to document requests and produce non-privileged, responsive documents found as a result of that search.
- c) All parties shall produce ESI in the form or forms that facilitate efficient review of ESI. In general, the parties shall produce ESI according to the same ESI technical specifications used by Defendants in the FTC’s pre-complaint investigation.

33. Evidentiary Presumptions.

- a) All documents produced by a Defendant either in response to document requests in this litigation or in the course of the FTC’s pre-complaint investigation of the proposed acquisition, FTC File No. 231-0004, or any prior FTC or Plaintiff States’ investigation, are presumed to be authentic and admissible. All documents produced by third parties from their files shall be presumed to be authentic within the meaning of Federal Rule of Evidence 901 and admissible. If a party serves a specific written objection to a document’s authenticity or admissibility, the presumption of authenticity or admissibility shall no longer apply to that document, and the parties shall promptly meet and confer to attempt to resolve the objection.

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- b) Any party may challenge the authenticity or admissibility of a document for good cause shown, and if necessary may take discovery related solely to authenticity or admissibility of documents.

34. Modification of Scheduling and Case Management Order. Any party may seek modification of this Order for good cause, except that the parties may also modify discovery and expert disclosure deadlines by agreement.

SCHEDULE

Event	Date
Discovery Commences	March 20, 2024, as stipulated (ECF No. 84)
Defendants' Answer to Plaintiffs' Complaint	April 29, 2024
Exchange Initial Disclosures	Within 5 business days of entry of this Order
Plaintiffs Serve Preliminary Fact Witness List	April 24, 2024
Defendants Serve Preliminary Fact Witness List	May 1, 2024
Plaintiffs Serve Expert Witness List	May 3, 2024
Defendants Serve Expert Witness List	May 10, 2024
Deadline to Serve Written Discovery Requests to Parties	May 14, 2024
Deadline to Serve Written Discovery Requests to Third Parties	May 14, 2024
Close of Party Fact Discovery	June 11, 2024
Close of Third-Party Fact Discovery	June 11, 2024
Plaintiffs' Initial Expert Report(s)	June 18, 2024
Defendants' Rebuttal Expert Report(s)	July 1, 2024
Plaintiffs' Reply/Rebuttal Expert Reports	July 12, 2024
Close of Expert Discovery	July 22, 2024
Plaintiffs' Memorandum of Law in Support of Preliminary Injunction Motion	July 24, 2024

Event	Date
Exchange of Final Witness Lists and Exhibit Lists	August 7, 2024
Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction	August 9, 2024
Objections to Exhibits	August 14, 2024
Deadline for Motions <i>In Limine</i> and <i>Daubert</i> Motions	August 14, 2024
Plaintiffs' Reply to Defendants' Opposition to Preliminary Injunction Motion	August 19, 2024
Responses to Motions <i>In Limine</i> and <i>Daubert</i> Motions	August 21, 2024
Pre-Hearing Conference	August 23, 2024
Evidentiary Hearing Begins	August 26, 2024
Proposed Findings of Fact and Conclusions of Law	10 days after the evidentiary hearing concludes

SO ORDERED:

April 12th, 2024



 UNITED STATES DISTRICT JUDGE

Ex. C

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. D

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

**COMPLAINT COUNSEL'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
RESPONDENT THE KROGER COMPANY**

Pursuant to Federal Trade Commission's Rule of Practice, 16 C.F.R. § 3.37, and the Definitions and Instructions set forth below, Complaint Counsel hereby requests that Respondent The Kroger Company produce all Documents, electronically stored information, and other things in its possession, custody, or control that are responsive to the following requests:

REQUESTS FOR DOCUMENTS

1. All Communications and agreements with Albertsons, any third party, or any agent or representative of the Company concerning the Proposed Transaction or any litigation concerning the Proposed Transaction.
2. All Board minutes and presentations relating to the Proposed Transaction, the Proposed Divestiture, or Albertsons.

3. All performance evaluations, including self-evaluations, for Rodney McMullen, Stuart Aitken, Todd Foley, Gary Millerchip, Yael Cosset, Todd Kammeyer, Monica Garnes, James (Keith) Shoemaker, Tammy DeBoer, Joseph Kelley, David Richard, Thomas L. Schwilke, Michael Marx, Kenneth Kimball, Tim Massa, Jon McPherson, Leroy Westmoreland, Sean Hammond, and Ian Adams.

4. Documents sufficient to show any compensation any Company employee has received or may receive in connection with the Proposed Transaction.

5. All Documents on which the Company intends to rely in the Litigation.

6. All Documents identified in, relied upon, or reviewed in answering interrogatories served on the Company in the Litigation.

7. All Documents, discovery responses, transcripts, and court filings produced, received, or filed in any other litigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024CV30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23cv459 (N.D. Cal.).

8. The Company's "fact books," for example KRPROD-FTC-2R-014963714 and KRPROD-FTC-2R-014941948, for 2022 and 2023, all drafts of the Company's 2022 and 2023 "fact books," and all communications constituting or reflecting the drafting of the Company's 2022 and 2023 "fact books."

9. All Documents concerning the Company's implementation of its "HPR" rule or policy, such as described in KRPROD-FTC-2R-001518128 and KRPROD-FTC-2R-000745595, in which the Company made changes to its pricing in response to the pricing of a designated "HPR."

10. All Documents concerning Albertsons's promotional pricing, including any pricing changes the Company implemented or considered in response to Albertsons's promotional pricing.

11. All Documents analyzing or evaluating the Company's private label offerings, or comparing the Company's private label offerings to national brand equivalents or Albertsons's private label offerings, including, but not limited to, Documents discussing quality; freshness; assortment; innovation; pricing; sales trends; profitability; cost and time to develop, acquire, produce, and launch; brand equity; advertising; marketing; or consumer preference.

12. All Documents from January 1, 2014, to the present relating to any re-bannering of Company stores, including but not limited to:

- a. each store that was converted to a new banner;
- b. the expected, and actual, timeline for each store's conversion to a new banner;
- c. the expected, and actual, cost of each store's conversion, including but not limited to, downtime, grand opening expenses, banner launch, signage, décor, technology, and systems expense;
- d. the expected, and actual, Plans for store operating formats; and
- e. the expected, and actual, sales impact from each store's conversion to a new banner.

13. All Documents assessing the impact of entry, opening, remodeling, or closing of any Albertsons store on the Company's business or of any Company store on Albertsons's business.

14. Documents sufficient to show the time and expenses expended to open the five most recently opened Company stores in each of the following states: Alaska, Arizona, California, Colorado, District of Columbia, Idaho, Illinois, Indiana, Louisiana, Maryland, Montana, New Mexico, Nevada, Oregon, Texas, Utah, Virginia, Washington, Wyoming.

15. Documents sufficient to show all Company store closures from January 1, 2022, to the present, currently open stores identified for potential closure, and the process and criteria for selecting stores to close.

16. Documents sufficient to show all Company store openings from January 1, 2022, to the present and any Plans for new stores or store relocations or expansions, including postponed or abandoned Plans, as well as the process and criteria for selecting new store locations and the reasons for the opening, relocation, postponement, abandonment, or other decision.

17. Documents sufficient to show the Company's implementation of the Stores as an Asset program, including:

a. the Company stores at which the Stores as an Asset program has been implemented fully or partially;

b. all specific Stores as an Asset initiatives implemented at each store and the associated results on EBITDA or other metrics;

c. any store venues or services removed at Company stores in connection with the Stores as an Asset program;

d. any Company stores categorized as "Red," "at Risk," and/or "underperforming" in the Stores as an Asset program; and

e. any new versions of, or updates to the information in, KRPROD-FTC-2R-014938971.

18. All Documents prepared for or used in any Stores as an Asset training sessions, including

(a) all operational "See and Act Guides" distributed to Company employees as a part of the Stores as an Asset program, and associated communications, including but not limited to the "Premium Operational Segment See & Act Guide," "Competitive Operational Segment See &

Act Guide,” “Value Operational Segment See & Act Guide,” and “Advantaged Operational Segment See & Act Guide;” and (b) the Stores as an Asset “Decision Tree to Guide Venue Placement” tool and communications relating to its distribution to Company employees.

19. All Documents containing or discussing any contractual provision in a collective bargaining agreement or employment agreement that gives any Company employees the right to elect whether they will transfer to C&S post-Proposed Divestiture or remain employed by the Company or Albertsons, or discussing any effect of such a provision.

20. All Documents from January 1, 2019, to the present concerning actual or potential strike votes, strikes, boycotts, pickets, or hand billing by unionized employees.

21. All Documents from January 1, 2019, to the present concerning multi-employer or coordinated bargaining with Albertsons or any other unionized employer in the context of collective bargaining with Unions including, but not limited to, Documents discussing wages, benefits, pension, or health and welfare issues.

22. All Documents prepared for the Company by any third-party consultant, advisor, or similar concerning the Company’s labor relations strategy, including but not limited to the labor relations implications of the Proposed Transaction and the Company’s “Associate Choice” strategy.

23. Documents responsive to Specification 51 of the Second Request.

24. All Documents and data created, received, or relied upon by the Company to estimate, plan for, or achieve the cost efficiencies or revenue synergies anticipated or projected from the Proposed Transaction, including, but not limited to:

a. negotiation Plans for national brands, fresh, and private label suppliers, including but not limited to the “Factpacks” and “internal and external engagement models and plans to capture...efficiencies” referred to in KR-FTC-2R-000030836;

b. all Documents, including contracts, joint business Plans, notices of promotion allowances, invoices, or other materials, relied upon to generate sourcing synergies estimates for the top 20 vendors who account for the largest projected savings in each of the following categories: (1) national brands; (2) fresh; (3) own brands; (4) goods not for resale;

c. all Documents, underlying data, analyses, and assumptions relied upon to generate supply chain and manufacturing efficiencies estimates related to, but not limited to, “Day 1 / H1 Continuity,” “E-Commerce Initiatives,” “Optimize Ways of Working,” “Own More Transportation,” “Reconfigure Asset Base,” and “Seperation [sic] Reallocations” referred to in KR-FTC-2R-000030864;

d. all Documents, underlying data, analyses, and assumptions relied upon to generate costs to achieve synergies, including, but not limited to, those referred to in KR-FTC-2R-000030864, at -867;

e. all Documents, underlying data, analyses, and assumptions relied upon to generate general and administrative efficiencies estimates, including “cost reductions in corporate and divisional overhead” referred to in the “Kroger/Albertsons – Updated Synergies Estimates” letter dated January 23, 2024;

f. all Documents, underlying data, analyses, and assumptions relied upon to generate synergies estimates related to revenue from increased sales, revenue from alternative profit streams, and revenue from health and wellness; and

g. all Documents relied upon to allocate or showing any methodology considered to allocate any cost efficiencies or revenue synergies anticipated or projected from the Proposed Transaction to the store or region level.

25. All Communications with any supplier discussing contract terms that may apply if the Proposed Transaction is consummated, including any supplier commitments to contract with the merged firm on particular terms.

26. All Documents analyzing or discussing cost savings projected or achieved at Harris Teeter, Roundy's, or any other Grocery Retailer chain following the Company's acquisition of that chain.

27. All Documents describing or reflecting the Company's strategic price increase or price rebalancing strategies, policies, or practices, for example, as described in the investigational hearing of Andy Groff at pp. 192-200.

28. All documents analyzing or discussing pricing changes or pricing investments Planned, projected, considered, or implemented at Harris Teeter, Roundy's, Albertsons, or any other Grocery Retailer chain acquired or proposed to be acquired by the Company.

29. All Communications with C&S or any other potential divestiture buyer relating to the Proposed Divestiture.

30. All Documents analyzing the Proposed Divestiture, including analysis regarding the asset package or any alternative package; C&S or any alternative buyer; transaction terms; transition services; human resources; any post-closing transition Plan; and the valuation of assets included within the package, including real estate, pharmacy prescription files, intellectual property, and

inventory; including any sensitivity analysis regarding the proposed asset package prepared for or by the Company or its advisors.

31. Store characteristics data for 2023 responsive to Specification 2 of the Second Request.

32. Store transactional data for 2023 responsive to Specification 3 of the Second Request.

33. Store revenue, cost, financial, and operational data for 2023 responsive to Specification 4 of the Second Request.

34. Store income statements for 2023 responsive to Specification 5(a) of the Second Request.

35. 2023 TDLinx data corresponding to “Exhibit 6-1 HIGHLY CONFIDENTIAL” provided in response to Specification 6 of the Second Request.

36. Customer loyalty data for 2023 responsive to Specification 12 of the Second Request.

37. Price zone Documents sufficient to show each price zone established, deleted, enlarged, decreased, or consolidated in any way since the Company’s response to Specification 11 of the Second Request, and for each such change, Documents sufficient to show the change and the rationale for such changes, including, but not limited to, any updates to the following exhibits to the Company’s Sept. 13, 2023 narrative response to Second Request Specification 11: Exhibit 11-1, Exhibit 11-2, Exhibit 11-3, Exhibit 11-4, Exhibit 11-5, Exhibit 11-6, Exhibit 11-7, Exhibit 11-8, Exhibit 11-9, and Exhibit 11-10.

38. For each competitor as a whole and each competitor location listed by the Company in its response to Specification 6 of the Second Request, price-checking Documents (including data) responsive to Specification 24(c)(i)-(ii), (c)(v), and (d) of the Second Request, including, but not limited to, any updates to the following exhibits to the Company’s Sept. 13, 2023 narrative

response to Second Request Specification 24: Exhibit 24-1, Exhibit 24-4, Exhibit 24-5, Exhibit 24-6, Exhibit 24-7, Exhibit 24-8, and Exhibit 24-9.

39. Separately for calendar years 2022 and 2023, Documents and data sufficient to show the private label products sold at each of the Company's stores, including the following information about the product: the Company store number(s) in which the product was sold, item number (i.e., SKU and UPC), brand name, the year when the product was first offered in stores, item description, department and category, and whether the Company manufactured the item.

DEFINITIONS

For the purposes of these Requests, the following definitions apply:

D1. The terms “the Company” or “Kroger” mean The Kroger Company; its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing.

D2. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25 percent or more) or total ownership or control between the Company and any other Person.

D3. The term “Albertsons” means Albertsons Companies Inc.; its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing.

D4. The terms “and” and “or” have both conjunctive and disjunctive meanings.

D5. The term “Board” means the Board of Directors of the Company collectively, and any and all of the members of the Company’s Board of Directors individually.

D6. The term “C&S” means C&S Wholesale Grocers, LLC, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

D7. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access Documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments

include Microsoft SharePoint sites, eRooms, Document management systems (*e.g.*, iManage), intranets, web content management systems (“CMS”) (*e.g.*, Drupal), wikis (*e.g.*, Confluence), work tracking software (*e.g.*, Jira), and blogs.

D8. The term “Communication” means any and all written, oral, telephonic, or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any person(s), including but not limited to any statements, inquiries, discussions, conversations, dialogues, correspondence, consultations, negotiations, agreements, understandings, meetings, letters, emails, faxes, notations, telegrams, advertisements, interviews, and all other Documents as herein defined. The phrase “Communication between” includes instances where one party addresses a communication to the other party but the other party does not respond, as well as instances in which the other party responds.

D9. The term “Documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in the possession, custody, or control of the Company, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including Documents contained in Collaborative Work Environments and other Document databases as well as copies of Documents that are not identical duplicates of the originals in a person’s files; and copies of Documents the originals of which are not in the possession, custody, or control of the Company. Employee-Owned Devices used to store or transmit Documents responsive to these Requests are considered in the possession, custody, or control of the Company.

“Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or

historical data describing or relating to any Document. Unless otherwise specified, “Documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; architectural plans and engineering blueprints; and Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

D10. The terms “each,” “any,” and “all” mean “each and every.”

D11. The term “Employee-Owned Device” means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.

D12. The term “Entity” means any natural Person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural Person, foundation, fund, institution, facility, division, department, unit, society, union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

D13. The term “Grocery Retailer” means a self-service retail food store with food (*e.g.*, fresh meat and seafood, dairy products, frozen foods, beverages, bakery goods, dry groceries, etc.) and non-food (*e.g.*, soaps, detergents, health and beauty aids) products that households consume, or any Entity that operates such stores.

D14. The term “including” means “including, but not limited to.”

D15. The term “Litigation” means this proceeding, In the Matter of The Kroger Co. and Albertsons Companies, Inc., FTC Docket No. 9428, and the case *Federal Trade Commission, et*

al. v. Kroger Company, et al., No. 3:24-cv-00347-AN (D. Or.), including any subsequent change in court venue for purposes of those proceedings.

D16. The term “Messaging Application” refers to any electronic method that has ever been used by the Company and its employees to communicate with each other or entities outside the Company for any business purposes. “Messaging Application” includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (*e.g.*, Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”

D17. The term “operate” with reference to any Entity means to directly or indirectly own or lease the Entity, manage Entity’s operations on behalf of another Person, have the power to appoint the majority of the Entity’s governing board or body, or otherwise directly or indirectly control the Entity, including through employment.

D18. The term “Person” includes the Company and means any natural Person, corporate Entity, partnership, association, joint venture, government Entity, or trust.

D19. The terms “Plan,” “Plans,” or “Planned” refer to tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

D20. The term “Proposed Divestiture” means any transaction or series or combination of transactions whereby, directly or indirectly, any assets being divested in connection with the Proposed Transaction are transferred to or acquired, directly or indirectly, including a divestiture of the assets identified in Appendix C to the Subscription Agreement by and between C&S Wholesale Grocers, LLC and Synergy Investment Corp. dated as of September 8, 2023, but also

any other divestiture of assets in connection with the Proposed Transaction, including any potential divestitures that were considered but rejected.

D21. The term “Proposed Transaction” means Kroger’s proposed acquisition of Albertsons as described in the Agreement and Plan of Merger By and Among Albertsons Companies, Inc. The Kroger Co. and Kettle Merger Sub, Inc. dated October 13, 2022, or any other proposed, contemplated, discussed, or related transaction between Kroger and Albertsons.

D22. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

D23. The term “Relevant Product” as used herein means retail sales by Grocery Retailer stores.

D24. The term “sales” means net sales, *i.e.*, total sales after deducting discounts, returns, allowances and excise taxes. “Sales” includes sales of the Relevant Product, whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.

D25. The term “Second Request” means the Request for Additional Information and Documentary Materials issued to the Company by the Federal Trade Commission on December 5, 2022.

D26. The term “Union” means any organized association of workers, regardless of whether the workers are covered by a collective bargaining agreement.

D27. Any word or term that the Company considers vague or insufficiently defined has the meaning most frequently assigned to it by the Company in the ordinary course of business.

INSTRUCTIONS

For the purposes of these Requests, the following instructions apply:

11. Unless otherwise specified, each request calls for Documents received, created, or dated from January 1, 2021, to the present.

12. Unless modified by agreement with Complaint Counsel, these Requests require a complete search of all the files of the Company. The Company shall produce all responsive Documents, wherever located, that are in the actual or constructive possession, custody, or control of the Company and its representatives, attorneys, and other agents, including, but not limited to, consultants, accountants, lawyers, or any other person retained by, consulted by, or working on behalf or under the direction of the Company.

13. These Requests shall be deemed continuing in nature and shall be supplemented in the event that additional Documents responsive to these Requests are created, prepared, or received between the time of the Company's initial response and the date established by the Court for trial in the above-captioned proceeding.

14. The Company does not need to reproduce Documents that the Company previously produced to the Federal Trade Commission.

15. For specifications that request Documents or data responsive to a Second Request specification, the Second Request definitions are incorporated by reference.

16. All Documents responsive to these Requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:

a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files;

- b) Shall be marked on each page with corporate identification and consecutive document control numbers;
- c) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;
- d) Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (e.g., a chart or graph), makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-colored photocopy, or a like-colored JPEG format image;
- e) Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original Documents; and
- f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive Documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's Documents, and if submitted in paper form, the box number containing such Documents. Complaint Counsel will provide a sample index upon request.

17. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with Complaint Counsel. If any document responsive to a particular Request contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document.

a) The term “Sensitive Personally Identifiable Information” means an individual’s Social Security Number alone; or an individual’s name, address or phone number in combination with one or more of the following:

- date of birth,
- driver’s license number or other state identification number, or a foreign country equivalent,
- passport number,
- financial account number, and
- credit or debit card number.

b) The term “Sensitive Health Information” includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

18. Forms of Production: The Company shall submit all Documents as instructed below absent written consent from Complaint Counsel.

a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original Documents:

- i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(ii), (a)(iii) and (a)(iv).

ii. Submit emails in image format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

iii. Submit email attachments in image format other than those identified in subpart (a)(i) with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
Parent Email	The Document ID of the parent email.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

iv. Submit all other electronic Documents other than those described in subpart (a)(i)

in image format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
Modified Date	The date the file was last changed and saved.

Metadata/Document Information	Description
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

v. Submit Documents stored in hard copy in image format accompanied by OCR

with the following information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.

vi. Submit redacted Documents in PDF format accompanied by OCR with the metadata and information required by relevant document type described in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above.

b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.

c) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in its computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact Complaint Counsel to determine, with the assistance of Complaint Counsel, whether and in what manner the Company may use such software or services when producing materials in response to these Document Requests.

d) Produce electronic file and image submissions as follows:

i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;

ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats;

iii. All Documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Company's compliance with these Document Requests; and

iv. Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.

v. Each production shall be submitted with a transmittal letter that includes the matter name and Docket Number 9428; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of Documents; and a list of load-file fields in the order in which they are organized in the load file.

19. If any Documents are withheld or redacted from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes each Document's authors, addresses, date, a description of each Document, and all recipients of the original and any copies. Attachments to a Document should be identified as such and entered separately on the log. For each author, addressee, and recipient; state the person's full name, title, and employer or firm; and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each Document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Complaint Counsel or a court to assess the applicability of the privilege claimed under 16 CFR § 3.38A. For each Document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the Document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive Document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Company that were not directly or

indirectly furnished to the Company or any third-party, such as internal firm memoranda, may be omitted from the log.

I10. If Documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy, but the Company has reason to believe such Documents have been in existence, state the circumstances under which they were lost or destroyed, describe the Documents to the fullest extent possible, state the request(s) to which they are responsive, and identify persons having knowledge of the content of such Documents.

I11. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by 16 C.F.R. § 3.37(b), or any extension thereof, shall be waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.

I12. All objections must state with particularity whether and in what manner the objection is being relied upon as a basis for limiting the scope of any search for Documents or withholding any responsive Documents. If you are withholding responsive information pursuant to any general objection, you should so expressly indicate. If, in responding to any request, you claim any ambiguity in interpreting either the request or a definition or instruction applicably thereto, set forth as part of your response the language deemed to be ambiguous and the interpretation used in responding to the request, and produce all Documents that are responsive to the request as you interpret it.

I13. Whenever necessary to bring within the scope of a request a response that might otherwise be construed to be outside its scope, the following construction should be applied:

- a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;
- b) Construing the singular form of any word to include the plural and plural form to include the singular;
- c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;
- d) Construing the masculine form to include the feminine form and vice versa; and
- e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters.

I14. Unless otherwise stated, construe each request independently and without reference to any other purpose of limitation.

I15. Any questions you have relating to the scope or meaning of anything in these Requests should be directed to Charles Dickinson at (202) 326-2617 or cdickinson@ftc.gov.

I16. For productions smaller than 10 GB, the Company’s response to these Requests shall be submitted to Complaint Counsel through email and using secure file transfer protocols (“FTP”). For instructions on submitting through FTP, please contact Corene Wint (cwint@ftc.gov), Rachel Ma (rma@ftc.gov), Amare Ashmeade (aashmeade@ftc.gov), Jacob Warren (jwarren1@ftc.gov), John Yoon (jyoon2@ftc.gov), and Kayla Willey (kwilley@ftc.gov). For productions larger than 10 GB, the Company shall submit its response to these Requests

through IDE, EIDE, or SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure. These should be addressed to the attention of Donald King, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day. A transmittal cover letter for a mailed production shall still be sent via electronic mail to: Charles Dickinson at cdickinson@ftc.gov.

Dated: April 2, 2024

By: *s/ Elizabeth Arens*
Elizabeth Arens
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3552
Email: earens@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2024, I caused the foregoing document to be served via email to:

Michael B. Bernstein
Matthew Wolf
Sonia Pfaffenroth
Joshua Davis
Michael Kientzle
Jason Ewart
Yasmine Harik
Christina Cleveland
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Telephone: (202) 942-5227
Email: michael.b.bernstein@arnoldporter.com
Email: matthew.wolf@arnoldporter.com
Email: sonia.pfaffenroth@arnoldporter.com
Email: joshua.davis@arnoldporter.com
Email: michael.kientzle@arnoldporter.com
Email: jason.ewart@arnoldporter.com
Email: yasmine.harik@arnoldporter.com
Email: christina.cleveland@arnoldporter.com

John Holler
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019
Telephone: (212) 836-7739
Email: john.holler@arnoldporter.com

Mark Perry
Luke Sullivan
Weil, Gotshal & Manges LLP
2001 M Street, NW, Suite 600
Washington, DC 20036
Telephone: (202) 682-7511
Email: mark.perry@weil.com
Email: luke.sullivan@weil.com

Luna Barrington
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8421
Email: luna.barrington@weil.com

Bambo Obaro
Weil, Gotshal & Manges LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3083
Email: bambo.obaro@weil.com

Counsel for The Kroger Company

Edward Hassi
Debevoise & Plimpton LLP
801 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 383-8135
Email: thassi@debevoise.com

Michael Schaper
Shannon R. Selden
J. Robert Abraham
Natascha Born
Jaime Freilich-Fried
Marieugenia Cardenas
Tom E. Buckley
Heather T. Mehler
Marie Ventimiglia
Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, NY 10001
Telephone: (212) 909-6737
Email: mschaper@debevoise.com
Email: srselden@debevoise.com
Email: jrabraham@debevoise.com
Email: nborn@debevoise.com
Email: jmfried@debevoise.com
Email: mcardena@debevoise.com

Email: tebuckley@debevoise.com
Email: htmehler@debevoise.com
Email: msventim@debevoise.com

Mike Cowie
James Fishkin
Dechert LLP
1900 K Street, NW
Washington, DC 20006
Telephone: (202) 261-3339
Email: mike.cowie@dechert.com
Email: james.fishkin@dechert.com

Thomas Miller
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
Telephone: (215) 994-2906
Email: thomas.miller@dechert.com

George L. Paul
White & Case LLP
701 13th Street, NW
Washington, DC 20005
Telephone: (202) 626-3656
Email: gpaul@whitecase.com

Counsel for Albertsons Companies, Inc.

s/ Elizabeth Arens
Elizabeth Arens
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3552
Email: earens@ftc.gov

Counsel Supporting the Complaint

Ex. E

From: [Hall, Laura](#)
To: [Sonia Pfaffenroth](#)
Cc: [Holler, John](#); [Dickinson, Charles](#); [Wolf, Matthew M.](#); [Shultz, Matthew M.](#); [Yasmine Harik -contact](#); [Kientzle, Michael](#); [Davis, Joshua M.](#); [Pfaffenroth, Sonia Kuester](#); [Glick, Kolva](#); [Cleveland, Christina](#); [jmfried@debevoise.com](#); [Luna.Barrington@weil.com](#); [Luke.Sullivan@weil.com](#); [Jason.Kleinwaks@weil.com](#); [nborn@debevoise.com](#); [thassi@debevoise.com](#); [mcardena@debevoise.com](#); [srselden@debevoise.com](#); [james.fishkin@dechert.com](#); [mschaper@debevoise.com](#); [jrabraham@debevoise.com](#); [mike.cowie@dechert.com](#); [mark.perry@weil.com](#); [Sarah.Sternlieb@weil.com](#); [Bambo.Obaro@weil.com](#); [jpitt@wc.com](#); [msventim@debevoise.com](#); [emainigi@wc.com](#); [apodoll@wc.com](#); [tebuckley@debevoise.com](#); [htmehler@debevoise.com](#); [thomas.miller@dechert.com](#); [Bergman, David B.](#); [Reagan, Austin](#); [Marra, Bryan M.](#); [Camilla.Brandfield-Harvey@weil.com](#); [Nicole.Zelada@weil.com](#); [Pai, Rohan](#); [Weingarten, James](#); [RobertBernheim-contact](#); [BrianYost-contact](#); [SchonetteWalker-contact](#); [NicoleGordon-contact](#); [JuliaMeade-contact](#); [Ma, Rachel](#); [ShiraHoffman-contact](#); [AmandaHamilton-contact](#); [CherylHiemstra-contact](#); [WillMargrave-contact](#); [JeffHerrera-contact](#); [WilliamYoung-contact](#); [LucusTucker-contact](#); [ChristineCortez-contact](#); [PaulHarper-contct](#); [Wint, Corene](#); [GaryHonick-contact](#); [JaymeWeber-contact](#); [AngieMilligan-contact](#); [SamanthaFeeley-contact](#); [Holley, Steven L.](#); [Kelly, Stephanie M.](#); [Richardson, Daniel J.](#); [Bock, Karl L.](#); [Hesse, Renata](#); [Keeley, Julian M.](#)
Subject: FTC v. Kroger - invocation of common interest doctrine
Date: Friday, April 26, 2024 5:18:00 PM

Dear Sonia,

Thank you for your time earlier today. The purpose of today's meet and confer was to discuss Kroger's instruction to C&S to invoke the common interest doctrine to withhold communications relating to discussions among C&S and Respondents Kroger and Albertsons regarding negotiation of new divestiture package and/or transition services agreement. As you were not prepared to answer specific questions about the scope of privileges being claimed over communications among Kroger, Albertsons and C&S on the phone, I am setting forth below our questions. At your request, I have copied counsel for C&S.

1. Please provide the Joint Defense and Common Interest Agreement to which Kroger, Albertsons and C&S are party.
2. What is the common legal interest among Kroger, Albertsons and C&S?
3. How do negotiations over, e.g., the inclusion of particular assets in the divestiture package or the provision of particular services under the transition services agreement constitute attorney work product?
4. Who conducted negotiations with respect to the April 2024 divestiture asset purchase agreement and the transition services agreement?
 - a. Did negotiations about the inclusion of particular assets in the divestiture package occur between businesspeople?
 - b. Were there non-attorney advisors who participated in the negotiation of the divestiture package on behalf of one or more of the parties?
5. You stated that privilege and/or attorney work product is being claimed over communications between businesspeople relating to negotiation of the divestiture and transition services agreement. Please provide any authority supporting this claim of privilege and/or work product.
6. Is privilege and/or attorney work product being claimed over arms-length negotiations regarding the divestiture asset purchase agreement and transition services agreement?
7. Is privilege and/or attorney work product being claimed over drafts of the divestiture asset purchase agreement and transition services agreement exchanged among the parties?
8. Is privilege and/or attorney work product being claimed over otherwise non-privileged communications involving only one of the parties to the Joint Defense and Common Interest

Agreement regarding formulation of negotiating position and/or discussing another party's negotiating position with respect to the divestiture and/or transition services? E.g., if two businesspeople at C&S are discussing that a particular asset is important to have in the divestiture package for their post-divestiture operations, is privilege and/or attorney work product being claimed over such a communication?

9. Is privilege and/or attorney work product being claimed over otherwise non-privileged communications between a party to the Joint Defense and Common Interest Agreement and its non-attorney advisors (e.g., Boston Consulting Group) regarding the composition of the divestiture package or the transition services agreement?
10. Are there any communications between C&S and Kroger and/or Albertsons subsequent to the signing of the initial divestiture-related agreements in September 2023 as to which privilege and/or attorney work product is not claimed? What are the subjects of those communications?
11. Are there any documents in the possession of C&S, Kroger or Albertsons relating to post-September 2023 negotiations over the divestiture and the transition services agreement as to which privilege and/or attorney work product is not claimed?

Best,

Laura R. Hall
Senior Trial Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
(202) 326-3282
lhall1@ftc.gov

Ex. F

May 6, 2024

VIA EMAIL

Laura Hall
Senior Trial Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave. NW
Washington, DC 20580
lhall1@ftc.gov

Re: *FTC v. The Kroger Co.*, No. 3:24-00347-AN (D. Or.) / In re The Kroger Co./Albertsons Companies, Inc., Dkt. No. 9428 (FTC) – Privilege Issues

Dear Laura:

Thank you for your message, which references the conversation between the FTC and Defendants on April 26 regarding privilege issues implicated by the FTC’s request for documents related to the updated divestiture package. Your email states that Defendants “were not prepared to answer specific questions about the scope of privileges being claimed over communications among Kroger, Albertsons and C&S on the phone” and poses a number of specific questions on this issue. For the sake of clarity, on our prior call, Defendants explained the privilege and work product issues implicated by the FTC’s request for divestiture-related materials, listened to the FTC’s questions, and committed to following up on them. Defendants explained that it was necessary to consult with C&S prior to engaging on the FTC’s questions because C&S is also a party to the joint defense agreement but was not a participant on the meet and confer. Plaintiffs’ suggestion that Defendants were “not prepared” to address these issues misconstrues the discussion. This communication responds to the FTC’s questions on behalf of Defendants and C&S.

We endeavor to answer the questions the FTC has raised in good faith, based on the information available at this time. Defendants are currently reviewing divestiture-related materials, and the ongoing nature of that review limits Defendants’ ability to answer highly specific questions about the potential application of privilege or work-product protections to specific documents. Nevertheless, we are providing the answers available

at this time, and we are happy to continue having an open dialogue on these issues as we complete our review of the materials (and once a privilege log is produced).

At core, many of your questions ask whether Defendants intend to assert privilege and/or work product protections over divestiture-related documents. The answer is that Defendants expect many divestiture-related documents will be covered by one or more of the following privileges and protections.

First, many of the divestiture-related documents are or contain protected work product “created in anticipation of litigation.” *In re Grand Jury Subpoena (Mark Torf/Torf Env’t Mgmt.)*, 357 F.3d 900, 905 (9th Cir. 2004). Indeed, the divestiture transaction arose “because of the prospect of litigation” and as part of an effort to avoid or prevail in any litigation challenge or otherwise obtain regulatory approvals for the Kroger-Albertsons merger and accompanying divestiture, and was negotiated while active litigation was pending. *Id.* at 907. But for the prospect of litigation challenging the merger and accompanying divestiture and the antitrust concerns expressed by the FTC and other regulators, none of Kroger, Albertsons, or C&S would have engaged in many of the divestiture-related communications.

Documents created “in anticipation of litigation” are protected by the work product doctrine if, “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of the prospect of litigation.*” *Id.* at 907 (emphasis added). This standard does not consider “whether litigation was a primary or secondary motive behind the creation of a document,” but instead “considers the totality of the circumstances and affords protection when it can be fairly said that the ‘document . . . would not have been created in substantially similar form but for the prospect of that litigation.’” *Id.* at 908 (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)). For many divestiture-related documents, that standard will be satisfied. Indeed, although the divestiture was developed and refined to avoid any antitrust concerns in connection with the merger, from the start, the divestiture-related communications between Kroger, Albertsons, and C&S anticipated and accounted for the prospect of litigation challenging the merger and accompanying divestiture.

Second, some divestiture-related documents may also be covered by the attorney-client privilege. Where a company retains a lawyer, there “is a rebuttable presumption that the lawyer is hired ‘as such’ to give ‘legal advice,’ whether the subject of the advice is criminal or civil, business, tort, domestic relations, or anything else.” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (quoting *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)). Divestiture-related communications between Kroger and its counsel relate to Kroger’s interest in structuring a deal that could avoid litigation

threatened and ultimately initiated by the FTC and certain states. These confidential communications were made “for the purpose of giving legal advice” and are therefore privileged. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011).

Third, divestiture-related documents may be protected by the common interest doctrine. Although the disclosure of otherwise privileged information in the presence of a third party typically waives the attorney-client privilege, the common interest exception allows “attorneys for different clients pursuing a common legal strategy to communicate with each other.” *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). To invoke the common-interest exception to waiver over a particular communication, “the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten.” *Id.*

Here, Kroger, Albertsons, and C&S entered into a Joint Defense, Common Interest, and Confidentiality Agreement that memorializes the parties’ interest to “evaluat[e] certain legal issues in connection with the Divestiture Transaction and develop[] joint positions, all for the purpose of obtaining regulatory approvals and defending any challenge to the Transaction and/or the Divestiture Transaction that might arise in any administrative or judicial proceeding.” The joint effort to satisfy regulatory concerns and prepare for litigation challenges to the merger and accompanying divestiture constitutes a common interest among Kroger, Albertsons, and C&S, and this common interest underlies the parties’ Joint Defense Agreement.

To be clear, we do not take the position that all divestiture-related documents are necessarily privileged or otherwise protected from disclosure, and we will produce non-privileged documents related to the divestiture (as set forth in our responses to your requests). But a context-specific review of the requested documents will ultimately determine which are covered by the privileges and protections identified above. That review is ongoing; however, based on our review to date, we expect we will produce divestiture-related documents that are not covered by the privileges and protections outlined above. Indeed, Defendants have already produced thousands of non-privileged documents related to the divestiture in their Second Request productions.

I hope this addresses the FTC's questions about privilege at this stage. We are available to further confer on this issue as well, including as our review of these materials progresses.

Sincerely,

A handwritten signature in blue ink that reads "Sonia K. Pfaffenroth". The signature is written in a cursive, flowing style.

Sonia Kuester Pfaffenroth

Ex. G

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. H

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. I

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. J

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. K

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. L

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. M

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. N

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. O

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. P

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. Q

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. R

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. S

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. T

CONFIDENTIAL - REDACTED IN ENTIRETY

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)

Complaint Counsel respectfully submits this Statement, pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice and Provision 4 of this Court's Scheduling Order. Complaint Counsel has attempted to confer in good faith with counsel for Respondent The Kroger Company ("Kroger") to obtain the documents requested in its Renewed Motion to Compel Kroger's Production of Documents Relating to Negotiation of New Divestiture Agreements on a timely basis without the Court's intervention.

On May 24, 2024, Kroger served its privilege log. Ex. A.

On May 25, 2024, Complaint Counsel wrote to Kroger's counsel about the failure to provide sufficient information in its privilege log, and requested filenames for each document entry. Exs. B, C. On May 26, 2024, Complaint Counsel forwarded these emails to a wider distribution list. Ex. D, E.

On May 26, 2024, Complaint Counsel wrote to counsel for Kroger and Albertsons raising issues with respect to both privilege logs. Ex. F. Complaint Counsel offered to meet and confer over the holiday weekend and separately with each Respondent. *Id.*

On May 26, 2024, counsel for Kroger responded to Complaint Counsel's three emails, and offered to meet and confer on May 28 or 29, 2024. Ex. G.

On May 27, 2024, Complaint Counsel responded to Kroger's May 26, 2024, email, pointed out that the Court's May 16 Order specified the form of privilege log to be produced, and offered to make itself available for a meet and confer at any time on May 28, 2024. Ex. H.

On May 28, 2024, at 1:22 p.m., Complaint Counsel followed up its prior email to request that Kroger schedule a meet and confer. Ex. I. At 1:41 p.m., counsel for Kroger offered to meet and confer between 2 and 4 p.m., and, in response to Complaint Counsel's reference to the privilege log format specified in the Court's May 16 Order, offered to "produce a supplemental log" with the filenames and email subjects Complaint Counsel requested, "only on the condition that Complaint Counsel agree to not challenge the sufficiency of Kroger's privilege log, both informally and through a motion to compel." Ex. J.

Complaint Counsel met and conferred with counsel for Kroger at 2:30 p.m. on May 28, 2024 via Zoom conference. Complaint Counsel declined to forego its challenge to Kroger's privilege log, and Kroger's counsel said they would consider whether they would provide filenames and email subjects given the rejection of their offer. Even if Kroger did so, that would not resolve this dispute. Kroger's counsel refused each of Complaint Counsel's requests for production or further information, and reiterated that they would provide information only on individual privilege log entries.

Dated: June 4, 2024

Respectfully submitted,

By: s/ Laura R. Hall
Laura R. Hall
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Telephone: (202) 326- 3282
Email: lhall1@ftc.gov

Counsel Supporting the Complaint

Ex. A

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. B

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. C

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. D

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. E

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. F

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. G

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. H

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. I

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. J

CONFIDENTIAL - REDACTED IN ENTIRETY

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

[PROPOSED] ORDER

Upon consideration of Complaint Counsel’s Renewed Motion to Compel Kroger’s Production of Documents Relating to Negotiation of New Divestiture Agreements and any opposition to that motion:

IT IS HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED.

IT IS FURTHER ORDERED that Respondent The Kroger Company (“Kroger”) shall produce Negotiation Documents within three business days of this Order, including:

- All Negotiation Documents exchanged between Kroger’s outside counsel and C&S without redaction;
- Documents logged as { [REDACTED] } without an attorney in the To: or From: field; and
- All Negotiation Documents exchanged between Kroger and C&S during the period January 25, 2024, to April 22, 2024.

IT IS FURTHER ORDERED that Kroger shall produce a privilege log that complies with this Court’s May 16 Order within 3 business days of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

Michael B. Bernstein
Matthew Wolf
Sonia Pfaffenroth
Joshua Davis
Michael Kientzle
Jason Ewart
Yasmine Harik
Christina Cleveland
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Telephone: (202) 942-5227
Email: michael.b.bernstein@arnoldporter.com
Email: matthew.wolf@arnoldporter.com
Email: sonia.pfaffenroth@arnoldporter.com
Email: joshua.davis@arnoldporter.com
Email: michael.kientzle@arnoldporter.com
Email: jason.ewart@arnoldporter.com
Email: yasmine.harik@arnoldporter.com

John Holler
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019
Telephone: (212) 836-7739

Email: john.holler@arnoldporter.com

Mark Perry
Luke Sullivan
Weil, Gotshal & Manges LLP
2001 M Street, NW, Suite 600
Washington, DC 20036
Telephone: (202) 682-7511
Email: mark.perry@weil.com
Email: luke.sullivan@weil.com

Luna Barrington
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8421
Email: luna.barrington@weil.com

Bambo Obaro
Weil, Gotshal & Manges LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3083
Email: bambo.obaro@weil.com

Counsel for The Kroger Company

Edward Hassi
Debevoise & Plimpton LLP
801 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 383-8135
Email: thassi@debevoise.com

Michael Schaper
Shannon R. Selden
J. Robert Abraham
Natascha Born
Jaime Freilich-Fried
Marieugenia Cardenas
Tom E. Buckley
Heather T. Mehler
Marie Ventimiglia
Debevoise & Plimpton LLP

66 Hudson Boulevard
New York, NY 10001
Telephone: (212) 909-6737
Email: mschaper@debevoise.com
Email: srselden@debevoise.com
Email: jrabraham@debevoise.com
Email: nborn@debevoise.com
Email: jmfried@debevoise.com
Email: mcardena@debevoise.com
Email: tebuckley@debevoise.com
Email: htmehler@debevoise.com
Email: msventim@debevoise.com

Mike Cowie
James Fishkin
Dechert LLP
1900 K Street, NW
Washington, DC 20006
Telephone: (202) 261-3339
Email: mike.cowie@dechert.com
Email: james.fishkin@dechert.com

Thomas Miller
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
Telephone: (215) 994-2906
Email: thomas.miller@dechert.com

Counsel for Albertsons Companies, Inc.

s/ Laura R. Hall
Laura R. Hall
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3282
Email: lhall1@ftc.gov

Counsel Supporting the Complaint