PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of **The Kroger Company** **and** **Albertsons Companies, Inc.**	**Docket No. 9428**

COMPLAINT COUNSEL'S MOTION TO STRIKE KROGER'S SIXTH AND ALBERTSONS' NINTH AFFIRMATIVE DEFENSES

Complaint Counsel challenges the proposed merger ("Merger") between The Kroger Company ("Kroger") and Albertsons Companies, Inc. ("Albertsons") under Section 7 of the Clayton Act and Section 5 of the FTC Act. Respondents' primary defense is that a proposed divestiture to C&S Wholesale Grocers LLC ("C&S") pursuant to an April 22, 2024 agreement ("New Divestiture") would eliminate the Merger's anticompetitive effects. While the New Divestiture is inadequate on its face, Complaint Counsel is entitled to discovery into the parties' negotiations and assessments of the New Divestiture ("New Divestiture Negotiations"). Yet Complaint Counsel has been unable to obtain this crucial evidence because Respondents and C&S have claimed privilege and attorney work product protections over thousands of documents and instructed 16 witnesses not to answer questions even tangentially touching on the negotiations. Chief Administrative Judge Chappell sustained Respondents' privilege claims, concluding the negotiations were "to structure a transaction that could be defended against the

pending litigation" and Kroger, Albertsons, and C&S shared this interest even when negotiating as counterparties. June 11, 2024 Order at 4-5.

Given Judge Chappell's ruling, Complaint Counsel moves to strike Respondents' affirmative defenses and denials of liability arising from the New Divestiture—specifically, Kroger's Sixth and Albertsons' Ninth Affirmative Defenses and related denials of liability in Kroger's Third and Albertsons' Sixth, Seventh, and Eighth Affirmative Defenses, as well as Paragraphs 10 and 86-98 of each Answer ("Divestiture Defenses")—pursuant to 16 C.F.R. § 3.22(a). By asserting the Divestiture Defenses, Respondents put their crafted-for-litigation New Divestiture squarely at issue. Respondents would unfairly wield privilege as a sword and shield if allowed to present their hand-picked evidence on the New Divestiture's purported efficacy while using privilege to bar Complaint Counsel from obtaining contradictory evidence. Because Respondents already deployed the shield, the proper recourse is to strike the sword—the Divestiture Defenses. Short of that, either Respondents should be precluded from proffering evidence or argument of their subjective assessments of the New Divestiture's alleged efficacy or, if Respondents waive their privilege claims, Complaint Counsel should be permitted to reopen discovery into the New Divestiture Negotiations.

BACKGROUND

I. THE MERGER AND PROPOSED DIVESTITURES

Kroger's $25 billion acquisition of Albertsons—if allowed to close—would be the largest supermarket deal in history. The companies' combined footprint would encompass approximately 5,000 stores and 700,000 employees in 48 states and increase Kroger's market shares to presumptively unlawful levels in hundreds of markets across the country. Complaint ¶ 3. As Respondents admit, "there is no dispute that {[redacted]

[redacted] May 17, 2024 Albertsons' Opp. to Motion to Compel at 6. Respondents' first attempt to "fix" the Merger's problems was the proposed divestiture dated September 8, 2023, under which C&S would acquire 413 stores and other assets ("Original Divestiture").

Divestiture is Respondents' principal defense. Their Answers allege that the Original Divestiture would "eliminate any purported anticompetitive effects," Kroger Answer at 27, "and the possibility of additional divestments . . . will . . . address any competitive concerns raised by the Merger," Albertsons Answer at 3. They also claimed that "C&S will receive the assets necessary to ensure its success, including physical stores, distribution centers to supply the divested stores, store and management personnel, banner rights, popular private label brands and critical transition services." *Id.* But C&S expressed concerns about the Original Divestiture's inadequacies to Respondents, the FTC, and numerous state Attorneys General. Ex. 1 (PX3068).

On April 22, 2024, Respondents and C&S announced the New Divestiture, which changed the divested assets and added over 160 stores, a dairy plant, and licenses to selected store banners and private-label brands. Ex. 2 (PX6253). Respondents alleged in the District of Oregon preliminary injunction proceedings that the New Divestiture would resolve the Merger's anticompetitive effects. *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, Dkt. Nos. 90-91 (D. Or. Apr. 29, 2024).

II. RESPONDENTS AND C&S BLOCK DISCOVERY INTO THE NEW DIVESTITURE NEGOTIATIONS

Complaint Counsel has been trying for months to obtain discovery into the New Divestiture Negotiations, including assets, services, and contract terms C&S requested but did not receive. This material would *inter alia* reveal the parties' true assessment of what C&S needs to operate the acquired stores. Respondents and C&S blocked these inquires by asserting

attorney-client privilege, attorney work product, and the common interest doctrine, arguing that "[l]awyers were highly involved in the negotiations, and the negotiation strategy was also a litigation strategy." Kroger Opp. to Renewed Mot. to Compel at 1. Respondents and C&S used privilege to (1) withhold documents, (2) block witness testimony, and (3) shape expert opinions.

(1) Documents – Complaint Counsel sought documents concerning the New Divestiture Negotiations from Respondents and C&S, but each withheld thousands of responsive documents on privilege grounds and refused to log negotiations between outside counsel. Ex. 3 (Kroger R&Os) Requests 1, 19, 29, 30; Ex. 4 (May 24, 2024 Kroger privilege log); Ex. 5 (Albertsons R&Os) Requests 1, 3, 12; Ex. 6 (May 24, 2024 Albertsons privilege log); Ex. 7 at 1-2 (April 11, 2024 letter from S. Holley to K. Drummonds) (asserting privileges for C&S).

Complaint Counsel moved to compel, arguing that "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." May 29, 2024 Renewed Motion to Compel at 5. Complaint Counsel also contended it was in "substantial need of the materials" "to test Respondents' claim that the divestiture includes 'all the asserts and personnel C&S will need to compete.'" *Id.* at 9 (quoting Kroger Answer at 3 and 16 C.F.R. § 3.31(c)(5)).

Kroger defended its broad privilege claims because "[l]awyers were highly involved in the expanded divestiture package negotiations, setting the negotiating priorities and strategy." June 5, 2024 Kroger Opp. to Renewed Mot. to Compel at 2. Kroger attached a declaration from Yael Cosset, "the chief business negotiator for Kroger." *Id.* Ex. A ¶ 3. Mr. Cosset (who is not a lawyer) admitted "the parties at times had disagreements on various issues in the negotiations that had to be resolved—including, for example, transition timing, which specific private label

and other assets would transfer to C&S, and so forth"—but stated those disagreements occurred within "the parties' shared goal of executing a divestiture package that would facilitate the consummation of the transaction." *Id.* ¶ 19.

On June 11, 2024, Judge Chappell denied Complaint Counsel's motion and found "even though there may have been disagreements over particular issues during the negotiations," Respondents' and C&S "share[d] a common goal of satisfying regulators and closing a divestment deal." June 11, 2024 Order at 5. Judge Chappell therefore barred discovery into the New Divestiture Negotiations *regardless* of whether attorneys were directly involved.

(2) Depositions – Complaint Counsel deposed 53 Respondent executives and seven C&S executives. Throughout these depositions, Respondents and C&S asserted the same privileges and instructed 16 witnesses—including key negotiators and corporate designees on divestiture-related topics—not to answer questions regarding the New Divestiture Negotiations.

Appendix A compiles a non-exhaustive list of questions that witnesses were prohibited from answering, including about (a) asset selection; (b) C&S's requests; (c) analyses of proposed divestiture packages; (d) whether the assets would allow C&S to adequately compete; and (e) areas of dispute in the negotiations. For example, Mr. Cosset—Kroger's designee on divestiture-related topics—was instructed not to answer *inter alia* {[redacted]} Ex. 8 (PX4105) 379:1-21, or {[redacted]} Ex. 9 (PX4094) at 156:8-158:3. And Eric Winn—C&S's CEO, {[redacted]}, and designee on divestiture-related topics—was instructed not to disclose key facts such as {[redacted]} or whether C&S {[redacted]}

Ex. 10 (PX4060) at 241:13-16; 254:2-257:5. He also declined to answer whether {[redacted]} and {[redacted]} *Id.* at 216:12-218:13; 245:22-247:15.

(3) Experts – In a report served July 1, 2024, Respondents' expert Daniel Galante opined on {[redacted]} and {[redacted]} Ex. 11 ¶ 11. Mr. Galante asserted he reviewed {[redacted]} determining it {[redacted]} and {[redacted]} *Id.* ¶ 12(c)-(d). He even opined that C&S {[redacted]} *Id.* ¶ 12(d); *see also id.* ¶ 188 ({[redacted]}. Complaint Counsel cannot appropriately test these opinions because Respondents and C&S asserted privilege over the New Divestiture Negotiations.

LEGAL STANDARD

"[A] motion to strike portions of an answer is a long established practice in FTC proceedings and well comports with the important objectives of economy and efficiency of administrative adjudications." *In re The Kroger Co.*, 1977 FTC LEXIS 70, *1 (FTC Oct. 18, 1977). Motions to strike a defense "will be granted" when the defense "is unmistakably unrelated or so immaterial as to have no bearing on the issues" and "prejudices Complaint Counsel by threatening an undue broadening of the issues, by requiring lengthy discovery, or by imposing an undue burden on Complaint Counsel." *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 137, at *1 (Sept. 14, 2000).

ARGUMENT

Respondents impermissibly wield their privilege claims as both sword and shield, prejudicing Complaint Counsel's ability to dispute the Divestiture Defenses. No litigant should be permitted to use privilege to block critical discovery into a key defense and then assert that self-serving defense at trial. If allowed to stand, Respondents' actions threaten to turn the Commission's adjudication from an analysis of the Merger's merits into a trial by ambush, where Respondents present a made-for-litigation defense while withholding evidence Complaint Counsel would use to challenge their allegations and the Commission will need to judge their purported "fix." The Commission should not allow it.[1]

Evidence about the New Divestiture Negotiations is crucial to an accurate and complete understanding of Respondents' alleged "fix." Courts routinely analyze parties' contemporaneous assessments of a proposed remedy and credit them over in-court arguments. In *Federal Trade Commission v. Sysco*, the court rejected a defense premised on a "divestiture of 11 'strategically located' [] distribution centers," which defendants argued would "'replace [any] competitive intensity lost as a result of the merger.'" 113 F. Supp. 3d 1, 73 (D.D.C. 2015). The court instead "credit[ed]" evidence showing the buyer believed 13 distribution centers, not 11, was "'the bare minimum'" to "'compete effectively for national business.'" *Id.* at 75-76; *see also United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 68–71 (D.D.C. 2017) (rejecting defendants' argument that buyer could "successfully operate the divestiture plans" because court "was more persuaded" by "statements made by [the buyer's] board members and executives prior to litigation [that] undermine the in-court claims about [the buyer's] capabilities"). Here, Respondents have

[1] This motion is timely because it was filed two weeks after the Galante report was served, which is a "reasonable time in the circumstances of this case." *Kroger*, 1977 FTC LEXIS 70, at *2.

blocked discovery into the type of evidence the *Sysco* and *Aetna* courts found compelling.

"The privilege which protects attorney-client communications may not be used both as a sword and shield." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). Under the sword/shield doctrine, "parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). Courts grant motions to strike affirmative defenses when a defendant "routinely withheld documents and deposition testimony on the basis of attorney-client privilege" critical to challenging those defenses. *SEC v. Honig*, 2021 WL 5630804, at *14 (S.D.N.Y. Nov. 30, 2021).

The Divestiture Defenses cannot be properly understood without evidence concerning the New Divestiture Negotiations that Respondents claim is privileged, as Mr. Galante's report makes plain. Respondents nonetheless asserted privilege over this crucial material, even where it involves non-lawyers. The Divestiture Defenses are thus akin to an "advice of counsel" defense, "where a defendant asserts reliance on counsel as a defense." *Klemp v. Columbia Collection Serv., Inc.*, 2014 WL 204013, at *3 (D. Or. Jan. 17, 2014). Courts preclude such defenses when the asserting party withholds critical evidence that could be used to dispute them. *Columbia Pictures*, 259 F.3d at 1196 (preclusion proper when party argued he acted "on the advice of his attorney, while at the same time refusing to answer questions regarding [that advice]"); *Vital Pharms. v. PhD Mktg., Inc.*, 2022 WL 2284544, at *3 (C.D. Cal. Apr. 15, 2022) (preclusion appropriate where "assertions of privilege . . . thwarted Plaintiffs' attempts to fully investigate the advice Defendant had received").

SEC v. Honig is on all fours. That court rejected defendant's attempt "to support his good faith defense by relying solely on non-privileged evidence," reasoning that his defense "can only

be assessed by examination of the privileged communications." 2021 WL 5630804, at *8, 14. "[I]t would be unfair for him to assert good faith and to then rely on privilege to deprive the SEC of access to material that might disprove or undermine his contentions." *Id.* at *14. Just so here: allowing Respondents to curate a universe of favorable, non-privileged evidence and expert opinion about the New Divestiture would unfairly deprive Complaint Counsel of an adequate opportunity to dispute the Divestiture Defenses.

With fact discovery concluded on June 11 and trial beginning on July 31, 2024, the correct course is to strike the Divestiture Defenses. *Columbia Pictures*, 259 F.3d at 1196 (preclusion of defense was not abuse of discretion when party asserted privilege "until the 'eleventh hour'"); *Honig*, 2021 WL 5630804 (reopening discovery immediately before trial was "unfair to the SEC and inefficient").

Complaint Counsel understands the gravity of its request, and thus seeks to strike the Divestiture Defenses *only if* Respondents maintain the Defenses *and* their privilege claims. Under the sword/shield doctrine, "[w]here a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Columbia Pictures*, 259 F.3d at 1196. In such situations, a court may preclude the party's claim or order it to produce the privileged information. *Honig*, 2021 WL 5630804, at *8-10. Therefore, as an alternative to striking the Divestiture Defenses, the Commission may either (1) preclude Respondents from proffering evidence or argument about their negotiations or subjective assessments of the New Divestiture's efficacy or, (2) if Respondents withdraw their privilege claims over the New Divestiture Negotiations, reopen discovery accordingly.

CONCLUSION

Complaint Counsel respectfully requests the Commission grant this motion.

Dated: July 16, 2024

Respectfully submitted,

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STATEMENT REGARDING MEET AND CONFER

Complaint Counsel respectfully submits this Statement, pursuant to Provision 4 of this Court's Scheduling Order. Complaint Counsel has attempted to confer in good faith with counsel for Respondents The Kroger Company ("Kroger") and Albertsons Companies, Inc. ("Albertsons") to resolve the issues with Respondents' affirmative defenses arising from the proposed divestiture between Respondents and C&S Wholesale Grocers LLC, as contained in the April 22, 2024 agreement between Respondents and C&S ("New Divestiture"), on a timely basis without the Court's intervention.

On July 14, 2024, Complaint Counsel wrote to Respondents' counsel to request that, given Respondents' assertion of privilege claims over evidence and testimony related to the creation and negotiation of the New Divestiture, they withdraw the report submitted by Daniel Galante dated July 1, 2024 with opinions concerning the New Divestiture, and withdraw

Respondents' affirmative defenses and related factual allegations and denials of liability arising from the New Divestiture ("Divestiture Defenses").

On July 15, 2024, Complaint Counsel and Respondents' counsel met and conferred regarding Complaint Counsel's requests at 10:30 a.m. via videoconference. After discussion, Respondents' counsel declined to withdraw the Galante report or the Divestiture Defenses.

Dated: July 16, 2024

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of Complaint Counsel's Motion to Strike Kroger's Sixth and Albertsons' Ninth Affirmative Defenses, and any opposition to that motion:

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

IT IS FURTHER ORDERED that the Sixth Affirmative Defense in the Answer filed by Respondent The Kroger Company ("Kroger") and the Ninth Affirmative Defense in the Answer filed by Respondent Albertsons Companies, Inc. ("Albertsons"), as well as the denials of liability involving the "divestiture" as alleged in Kroger's Third Affirmative Defense, Albertsons' Sixth, Seventh, and Eighth Affirmative Defenses, and Paragraphs 10 and 86-98 of each Respondents' Answer ("the Divestiture Defenses"), shall be stricken from this action five days after the date of this Order.

[OR AS AN ALTERNATIVE TO THE PRIOR PARAGRAPH STRIKING THE DEFENSES] IT IS FURTHER ORDERED that the Respondents are precluded from offering any

evidence or testimony concerning their negotiations or subjective assessments of the New Divestiture's alleged efficacy, precluded from proffering any expert opinion relying on such evidence or testimony, and precluded from asserting any argument at trial concerning their negotiations or subjective assessments of the New Divestiture's alleged efficacy.

IT IS FURTHER ORDERED that Respondents may instead opt to waive the privilege claims they have asserted and maintained over evidence and testimony related to the negotiations and subjective assessments of the proposed divestiture to C&S Wholesale Grocers LLC ("C&S"), as contained in the April 22, 2024 agreement between Respondents and C&S ("New Divestiture"). Respondents must affirmatively choose this option within five days of the date of this Order by communicating their decision to Complaint Counsel, after which the parties shall file a joint notice in this action of Respondents' choice. In the event that Respondents choose this option, the preceding paragraph of this Order shall not take effect and Complaint Counsel is granted permission to seek additional evidence and testimony related to the New Divestiture. Any reopened discovery shall proceed concurrently with, and otherwise not displace or delay, the trial dates scheduled in this action.

By the Commission.

Date: _____

APPENDIX A

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. 1

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. 2

News Details

VIEW ALL NEWS

Kroger, Albertsons Companies and C&S Wholesale Grocers, LLC Announce an Updated and Expanded Divestiture Plan

April 22, 2024

Amended Divestiture Plan Adds Stores, Facilities and Banner Names to Enhance Competition in Overlap Geographies and to Address Regulator Concerns

CINCINNATI, April 22, 2024 /PRNewswire/ -- The Kroger Co. (NYSE: KR) and Albertsons Companies Inc. (NYSE: ACI) announced today that they have amended their definitive agreement with C&S Wholesale Grocers, LLC (C&S) for the sale of assets in connection with their proposed merger previously announced on October 14, 2022. This amended package modifies and builds on the initial divestiture package that was announced on September 8, 2023.

The amended divestiture package responds to concerns raised by federal and state antitrust regulators regarding the original agreement. The enhanced divestiture package includes a modified and expanded store set and additional non-store assets to further enable C&S to operate competitively following the completion of the proposed merger. The companies believe the amended divestiture package will bolster their position in regulatory challenges to the proposed merger, including pending court proceedings.

"We have reached an agreement with C&S for an updated divestiture package that maintains Kroger's commitments to customers, associates and communities, addresses concerns raised by regulators, and will further ensure that C&S can successfully operate the divested stores as they are operated today," said Rodney McMullen, Kroger's Chairman and CEO. "Importantly, the updated divestiture plan continues to ensure no stores will close as a result of the merger and that all frontline associates will remain employed, all existing collective bargaining agreements will continue, and associates will continue to receive industry-leading health care and pension benefits alongside bargained-for wages. Our proposed merger with Albertsons will bring lower prices and more choices to more customers and secure the long-term future of unionized grocery jobs."

The proposed merger will create meaningful and measurable benefits for America's consumers, Kroger and Albertsons Cos. associates, and communities that both Kroger and Albertsons Cos. serve by expanding access to fresh,

affordable food and establishing a more compelling alternative to large, non-union retailers. This updated divestiture plan marks another next step toward the completion of the merger by adding a well-capitalized competitor into new geographies.

"We are confident this expanded divestiture package will provide the stores, supporting assets and expert operators needed to ensure these stores continue to successfully serve their communities for many generations to come," said Eric Winn, CEO of C&S. "C&S is a leader in the grocery industry, and we are excited for this expansion of our current retail business, which is a key part of our long-term growth strategy. We look forward to welcoming storied banners, quality private label brands, and a team of experienced retail associates into the C&S family. This amended agreement enables C&S's heritage of selection, value and customer service to continue our legacy of ***braggingly happy customers***."

Transaction Details
The updated divestiture package increases the total store count by 166 to include 579 stores that will be sold to, and continue operating as they do today by the new owner, C&S.

It maintains the sale to C&S of the QFC, Mariano's and Carrs banner names. Under the amended agreement, Kroger will also sell the Haggen banner to C&S. Stores currently under these banners that are retained by Kroger will be re-bannered into one of the retained Kroger or Albertsons Cos. banners following the close of the transaction with C&S.

Under the amended agreement, C&S will license the Albertsons banner in California and Wyoming and the Safeway banner in Arizona and Colorado. In these states, Kroger will re-banner the retained Albertsons and Safeway bannered stores following the closing of the merger. Kroger will maintain the Albertsons and Safeway banners in the remaining states.

The number of stores contained in the divestiture plan by geography is as follows:

- WA: 124 Albertsons Cos. and Kroger stores
- CA: 63 Albertsons Cos. stores
- CO: 91 Albertsons Cos. stores
- OR: 62 Albertsons Cos. and Kroger stores
- TX/LA: 30 Albertsons Cos. stores
- AZ: 101 Albertsons Cos. stores
- NV: 16 Albertsons Cos. stores
- IL: 35 Albertsons Cos. and Kroger stores
- AK: 18 Albertsons Cos. stores
- ID: 10 Albertsons Cos. stores
- NM: 9 Albertsons Cos. stores
- MT/UT/WY: 11 Albertsons Cos. stores
- DC/MD/VA/DE: 9 Harris Teeter stores

The above stores (regardless of banner) will be sold by Kroger to C&S following the closing of the merger with Albertsons Cos.

In connection with the additional stores being conveyed to C&S, the updated divestiture package includes increased distribution capacity through a combination of different and larger facilities as well as expanded transition services agreements to support C&S and the addition of one dairy facility.

The amended divestiture package also expands the corporate and office infrastructure provided to C&S given the increased store set to ensure C&S can continue to operate the divested stores competitively and cohesively. All fuel centers and pharmacies associated with the divested stores will remain with the stores and continue to operate.

The amended agreement maintains the divestiture of private label brands Debi Lilly Design, Primo Taglio, Open Nature, ReadyMeals and Waterfront Bistro to C&S. The revised agreement also provides C&S with access to the Signature and O Organics private label brands.

The updated plan will:

- Extend a competitor to new geographies through the sale of stores to a well-capitalized buyer that is led by seasoned operators with a strong balance sheet and a sound business plan;
- Ensure that no stores will close as a result of the merger;
- Maintain all current collective bargaining agreements, which include industry-leading healthcare and pension benefits, bargained-for wages, and ensuring frontline associates remain employed; and

- Commit to invest in associates and stores for the long term.

Subject to fulfillment of customary closing conditions, including Federal Trade Commission and/or other governmental clearance, and the completion of the Kroger-Albertsons merger, C&S will pay Kroger an all-cash consideration of approximately $2.9 billion, including customary adjustments.

Merger creates meaningful benefits for customers, associates and communities
The proposed merger with Albertsons Cos. will produce meaningful and measurable benefits for customers, associates and communities across the country. The combined company committed that no stores, distribution centers or manufacturing facilities will close as a result of the merger.

Customers will benefit from lower prices and more choices following the merger close. Kroger committed to investing $500 million to begin lowering prices day one post-close, and an additional $1.3 billion to improve Albertsons Cos.' stores.

This commitment builds on Kroger's long track record of reducing prices every year, with $5 billion invested to lower prices since 2003. Customers will also have access to more favorite items from their own communities, as Kroger committed to increasing the number of local products in its stores by 10 percent post-close. This merger creates more opportunities for families to access the fresh, affordable foods they love.

As a combined company, Kroger committed to investing $1 billion to raise wages and comprehensive benefits. This builds on the incremental $2.4 billion Kroger invested to improve wages and comprehensive benefits since 2018. To provide the best holistic support for each associate, the company will also extend continuing education and financial literacy benefits to all associates following the merger close. As union membership continues to decline nationwide, especially in the grocery industry, this merger is the best way to secure union jobs. Kroger has added more than 100,000 good-paying union jobs since 2012.

The proposed merger will allow the combined company to invest more deeply to end hunger in communities across America. In 2023, Kroger committed to donating 10 billion meals to families across the U.S. by 2030. Bringing these companies together provides one more step toward achieving communities that are free from hunger and food waste.

Kroger and Albertsons Cos. remain committed to defending the merger in court and unlocking the many benefits it offers.

Read more about the combined company's commitment to customers, associates and communities at www.krogeralbertsons.com

About Kroger
At The Kroger Co. (NYSE: KR), we are dedicated to our Purpose: To Feed the Human Spirit™. We are, across our family of companies nearly half a million associates who serve over 11 million customers daily through a seamless digital shopping experience and retail food stores under a variety of banner names, serving America through food inspiration and uplift, and creating #ZeroHungerZeroWaste communities by 2025. To learn more about us, visit our newsroom and investor relations site.

This press release contains certain statements that constitute "forward-looking statements" within the meaning of federal securities laws, including statements regarding the effects of the proposed transaction and updated divestiture plan. These statements are based on the assumptions and beliefs of Kroger and Albertsons management in light of the information currently available to them. Such statements are indicated by words or phrases such as "create," "committed," "expand," "establish," "ensure," "enhance," "extend," "completion," "continue," and "will." Various uncertainties and other factors could cause actual results to differ materially from those contained in the forward-looking statements. These include the specific risk factors identified in "Risk Factors" in each of Kroger's and Albertsons' annual report on Form 10-K for the last fiscal year and any subsequent filings, as well as the following: the expected timing and likelihood of completion of the proposed transaction and updated divestiture plan, including the timing, receipt and terms and conditions of any required governmental and regulatory clearance of the proposed transaction and updated divestiture plan and/or resolution of pending litigation challenging the merger; the impact of the proposed updated divestiture plan; the occurrence of any event, change or other circumstances that could give rise to the termination of the updated divestiture agreement; the outcome of any legal proceedings that may be instituted against the parties and others following announcement of the merger agreement and proposed transaction or updated divestiture plan; the inability to consummate the proposed transaction or updated divestiture plan due to the failure to satisfy other conditions to complete the proposed transaction or updated divestiture plan; risks that the proposed transaction disrupts current plans and operations of Kroger and Albertsons Cos.; the ability to identify and recognize the anticipated benefits of the updated divestiture plan, including but not limited to the ability to enhance competition in overlap geographies and to address regulator concerns, create meaningful and measurable benefits for America's

consumers, Kroger and Albertsons associates, and communities that both Kroger and Albertsons serve, expand access to fresh, affordable food and establish a more compelling alternative to large, non-union retailers, and commitment that all frontline associates will remain employed, all existing collective bargaining agreements will continue, and associates will continue to receive industry-leading health care and pension benefits alongside bargained-for wages; the ability of the combined company to achieve its commitment that no stores, distribution centers or manufacturing facilities will close as a result of the proposed transaction, to invest $500 million to begin lowering prices post-close, and an additional $1.3 billion to improve Albertsons Cos.' stores; the amount of the costs, fees, expenses and charges related to the proposed transaction or updated divestiture plan; and the ability of Kroger and Albertsons Cos. to successfully integrate their businesses and related operations; the ability of Kroger to maintain an investment grade credit rating; risks related to the potential impact of general economic, political and market factors on the companies or the proposed transaction or updated divestiture plan. The ability of Kroger and Albertsons Cos. to achieve the goals for the proposed transaction may also be affected by their ability to manage the factors identified above.

The forward-looking statements by Kroger and Albertsons included in this press release speak only as of the date the statements were made. Neither Kroger nor Albertsons assumes the obligation to update the information contained herein unless required by applicable law. Please refer to the reports and filings of Kroger and Albertsons with the Securities and Exchange Commission for a further discussion of the risks and uncertainties that affect them and their respective businesses.

View original content:https://www.prnewswire.com/news-releases/kroger-albertsons-companies-and-cs-wholesale-grocers-llc-announce-an-updated-and-expanded-divestiture-plan-302123299.html

SOURCE The Kroger Co.

VIEW ALL NEWS

Ex. 3

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. 4

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Ex. 5

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Ex. 6

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Ex. 9

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Ex. 10

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Ex. 11

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Ex. 12

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Ex. 13

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Ex. 14

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Ex. 15

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CERTIFICATE OF SERVICE

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

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

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