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

RESPONDENTS' OPPOSITION TO
COMPLAINT COUNSEL'S MOTION TO STRIKE

Chief Judge Chappell twice rejected Complaint Counsel's efforts to obtain privileged information regarding the divestiture of assets from Respondents The Kroger Co. and Albertsons Companies, Inc. to C&S Wholesale Grocers, Inc. as part of the challenged transaction. Chief Judge Chappell relied on undisputed evidence to find that "legal advice, attorney work product, and the common interest of C&S, Kroger, and Albertson's [*sic*] in meeting the concerns of regulators necessarily shaped" the withheld divestiture-related materials. To end-run those unappealable discovery rulings, Complaint Counsel now move to strike Respondents' divestiture-related responses and defenses—unless Respondents waive the very privileges that Chief Judge Chappell upheld.

Complaint Counsel do not argue that the defenses are immaterial or threaten an undue burden, instead relying entirely on a "sword/shield' argument that is without merit. A party is not required to disclose properly withheld privileged materials that may be relevant to a claim or defense, so long as it does not rely on privileged information in making its arguments. Precisely

so here. The divestiture must be considered when assessing the competitive effects (or lack thereof) of the challenged transaction. Respondents have not relied on any privileged information for their divestiture-related arguments. There is, therefore, no basis to strike divestiture-related defenses in these circumstances, and no court ever has.

Complaint Counsel's motion should be denied.

I. BACKGROUND

A. The Amended Divestiture Package Was Negotiated In Response To Litigation

Kroger and Albertsons entered into a merger agreement in October 2022, [redacted] In September 2023, Kroger and Albertsons entered into a binding agreement to divest at least 413 stores (and potentially more), as well as substantial additional assets, to third-party C&S, the nation's leading grocery wholesaler. Ex. A ("Cosset Decl.") ¶ 5. As the prospective buyer, C&S shared Respondents' interest in reaching a divestiture agreement that would resolve anticipated concerns that may (and did) arise in litigation, and Respondents and C&S memorialized a joint defense agreement in August 2023. *Id.* ¶ 11. Because of threatened—and later actual—litigation, legal counsel "was involved at every step of the negotiations and provided advice regarding the effect of the proposed revisions on the anticipated and actual litigation." *Id.* ¶ 13.

In late 2023, Commission staff and state regulators raised concerns with the divestiture package. *Id.* ¶¶ 7–8. Before the parties had time to address those regulatory concerns with a revised divestiture package, Complaint Counsel filed this lawsuit in early 2024. The complaint challenges, in part, the sufficiency of the September 2023 divestiture package. *See* Compl. ¶¶ 108, 110.

While this litigation—and two parallel cases brought by individual state attorneys general—has been pending, Respondents and C&S negotiated and reached agreement on an

expanded divestiture package. Pursuant to the terms of the amended agreement, executed on April 22, 2024, C&S will receive 579 stores (an increase of 166 stores) and many additional non-store assets. A primary goal of the revised divestiture package was to respond to arguments raised in the pending litigations. Cosset Decl. ¶ 11.

B. Chief Judge Chappell Twice Rejected Complaint Counsel's Discovery Requests

In discovery, Complaint Counsel sought documents related to the negotiation and development of the revised divestiture package. In response, Respondents produced thousands of non-privileged documents—including all documents related to diligence and the assets being conveyed. Based on a careful, document-by-document review, however, Respondents and C&S asserted (and properly logged) attorney-client privilege, work-product protections, and the common-interest doctrine over certain documents, such as draft proposals for the divestiture package and communications reflecting legal advice on how best to structure the package in light of the pending challenges. Respondents and C&S also asserted these privileges and protections in response to certain questions at depositions. Witnesses, however, answered a host of other questions regarding the divestiture. *See* Ex. B.

Complaint Counsel twice moved to compel production of privileged information. In its first motion, Complaint Counsel sought a categorical ruling that documents and communications exchanged between Respondents and C&S regarding the divestiture package were not privileged. *See* Mot. to Compel Prod. (May 6, 2024) ("1st MTC"). Chief Judge Chappell denied the motion as premature with respect to Respondents and as procedurally improper with respect to C&S. *See* Ex. C, Order on Mot. to Compel (May 16, 2024) ("1st MTC Order"). Respondents subsequently produced detailed privilege logs. Shortly thereafter, Complaint Counsel filed a renewed motion to compel production of divestiture-related privileged materials from Respondents (but not C&S). *See* Renewed Mot. to Compel Prod. (May 29, 2024) ("2nd MTC"). In opposition, Respondents

submitted a declaration from Yael Cosset, Kroger's chief negotiator for the amended divestiture package.

Chief Judge Chappell denied Complaint Counsel's renewed motion. *See* Ex. D, Order Denying Mot. to Compel Prod. (June 11, 2024) ("2nd MTC Order"). Relying on the undisputed facts set forth in Mr. Cosset's declaration, Chief Judge Chappell observed that the purpose of the negotiations "was to structure a transaction that could be defended against the pending litigation," and that "legal advice, attorney work product, and the common interest of C&S, Kroger, and Albertson's in meeting the concerns of regulators necessarily shaped" the parties' negotiations and communications. *Id.* at 4. Chief Judge Chappell concluded that "Kroger has sufficiently demonstrated that the withheld Negotiation Documents are protected by the attorney-client privilege, the attorney work product doctrine, and/or the common interest doctrine." *Id.* at 5.

C. Complaint Counsel Seeks To Involve The Commission In A Discovery Dispute

Chief Judge Chappell's discovery orders are not appealable under the Part 3 rules. Nevertheless, more than a month after the second ruling, Complaint Counsel filed this "Motion to Strike," in which Complaint Counsel asks the Commission to strike respondents' divestiture-related defenses *unless* they waive the privileges Chief Judge Chappell has already upheld.

II. ARGUMENT

Motions to strike are "generally disfavored." *In the Matter of Basic Rsch., LLC et al*, No. 9318, 2004 WL 2682854, at *1 (F.T.C. Nov. 4, 2004). "[A] motion to strike defenses or portions of an answer will be granted when the answer or defense (1) is unmistakably unrelated or so immaterial as to have no bearing on the issues and (2) prejudices Complaint Counsel by threatening an undue broadening of the issues or by imposing a burden on Complaint Counsel." *Id.* (quotation

marks omitted). Complaint Counsel makes no attempt to satisfy either element, instead attempting to relitigate Judge Chappell's discovery rulings. That effort fails.

A. Complaint Counsel's Motion Is Procedurally Improper

Complaint Counsel filed and lost two motions to compel privileged information. *See* 1st MTC Order; 2nd MTC Order. Those decisions are not appealable. *Cf.* 16 C.F.R. § 3.23. Complaint Counsel now attempts to obtain the same relief under a different name—the Motion even admits that Complaint Counsel seeks to strike the divestiture-related defenses "*only if* Respondents maintain the [divestiture-related] Defenses *and* their privilege claims." Mot. 9. That demand belies any claim that the divestiture-related defenses are "immaterial" or would "undu[ly] broaden[]" the issues.

Complaint Counsel's invocation of the sword/shield doctrine, Mot. 9, confirms its efforts to bypass the non-appealable discovery orders. The sword/shield doctrine generally prohibits a litigant from affirmatively using information previously withheld as privileged. *See Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). As Complaint Counsel admits, *see* Mot. 9, the proper remedy when the sword/shield doctrine applies is to compel production of the withheld documents, *see In re Subpoena Duces Tecum Served on Willkie Farr & Gallagher*, 1997 WL 118369, at *3–4 (S.D.N.Y. Mar. 14, 1997). Complaint Counsel's argument that Respondents have "put their crafted-for-litigation New Divestiture squarely at issue," Mot. 2, is but a rehash of their argument to Chief Judge Chappell that "Respondents have put the divestiture to C&S squarely at issue before this Court," 1st MTC 9. Having raised this argument in a motion to compel (which it lost), Complaint Counsel cannot use a "motion to strike" to relitigate the issue before the Commission.

The motion also is untimely. A motion to strike must be filed within a "reasonable time in the circumstances of this case." *In re The Kroger Co.*, 1977 FTC LEXIS 70 (F.T.C. Oct. 18,

1977). Respondents filed their answers on March 11, advised Complaint Counsel of their intent to assert privilege over negotiation materials on May 6, *see* Ex. E, and served their privilege log on May 24, *see* Ex. F. Chief Judge Chappell denied Complaint Counsel's second motion to compel on June 11. Yet Complaint Counsel waited over a month, until July 16, to file this motion, just over two weeks before Respondents' pretrial brief is due. Complaint Counsel points to the service of the expert report of Daniel Galante (Respondents' expert regarding divestiture) on July 1, 2024 as the relevant date, Mot. 7 n.1, but Mr. Galante did not rely on any privileged materials in forming his opinions (as Complaint Counsel knew before filing the Motion).

At minimum, the Commission should refer Complaint Counsel's motion to Chief Judge Chappell. *See* 16 C.F.R. § 3.22(a). Chief Judge Chappell has already twice examined the privilege arguments raised by Complaint Counsel here, and Complaint Counsel's arguments essentially ask the Commission to adjudicate the consequences of Chief Judge Chappell's discovery orders. Chief Judge Chappell is therefore best suited to decide the motion.

B. Respondents Are Not Using Privileged Materials Offensively

Complaint Counsel's "Motion to Strike" also fails on the merits. Complaint Counsel's motion rests on the premise that Respondents have "put their crafted-for-litigation New Divestiture squarely at issue" and are seeking to use privileged materials regarding that divestiture as both a "sword" and a "shield." Mot. 2. That assertion is both factually unsupported and legally incorrect.

First, where divestiture is contemplated as part of the transaction under review, the analysis of likely competitive effects *must* account for the divestiture. Determining whether a "challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the adjudicator to review the <u>entire</u> transaction in question," including any proposed "divestiture" of assets to a third party. *FTC v. Arch Coal, Inc.*, 2004 WL 7389952, at *1 (D.D.C. July 7, 2004). Respondents listed divestiture "defenses" for purposes of preservation, but even if

the divestiture-related defenses were stricken, that would not relieve Complaint Counsel of their burden to show that "the circumstances surrounding the merger as they actually exist" are likely to result in substantial competitive harm. *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1093 (N.D. Cal. 2023). Complaint Counsel cites no authority holding that a plaintiff may demand that defendants release privileged information in order to prove its own claim. *Contra Richards v. Kallish*, 2023 WL 8111831, at *7 (S.D.N.Y. Nov. 22, 2023) ("*Plaintiff* cannot unilaterally create an at-issue waiver.").

Second, Respondents will not use any privileged materials in support of their divestiture arguments. 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*, 331 F.3d at 719. What this means is that "a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party," such as in an "advice-of-counsel defense." *In re Grand Jury Proceedings*, 219 F.3d 175, 182–83 (2d Cir. 2000).

Respondents are not relying on privileged materials for any part of their case, and Complaint Counsel do not identify a single privileged document or fact relied on by Respondents. Complaint Counsel asserts that "Respondents and C&S used privilege to ... shape expert opinions," Mot. 4, but that is false. Respondents advised Complaint Counsel in advance of the motion that Mr. Galante "did not rely on any privileged material to form the opinions set forth in his report." Ex. G. Mr. Galante confirmed as much in his deposition. Ex. H, at 58:17–59:11.

Complaint Counsel asserts that Respondents' arguments about divestiture are "akin" to an "advice of counsel" defense. Mot. 8. That analogy is nonsensical. Respondents are not relying

on the advice of counsel as a defense to liability, and unlike the defendant in *SEC v. Honig* (*see* Mot. 8), Respondents are not invoking a "good faith belief in the lawfulness of [their] actions" as a defense, *see* 2021 WL 5630804, at *12 (S.D.N.Y. Nov. 30, 2021). Nor would such a defense logically apply, because there is no state of mind element under the Clayton Act. *Cf. In re County of Erie*, 546 F.3d 222, 228–29 (2d Cir. 2008) ("[T]he assertion of a good-faith defense involves an inquiry into state of mind, which typically calls forth the possibility of implied waiver of the attorney-client privilege."). Whether the transaction as a whole may substantially lessen competition in a relevant market does not depend on Respondents' subjective views of the divestiture. Unsurprisingly, Complaint Counsel cites no case that has applied the sword/shield doctrine in these circumstances.

Complaint Counsel's objections are otherwise limited to arguing that the materials to which it seeks access may be *relevant* to the adjudicator's assessment of a proposed divestiture. Mot. 7. Chief Judge Chappell correctly rejected that same argument: A party does not waive privilege "merely by taking a position that the [privileged] evidence might contradict." *United States v. Salerno*, 505 U.S. 317, 323 (1992). Rather, for a party to invoke sword/shield, the opposing party "must *rely* on privileged advice from his counsel to make his claim or defense." *Erie*, 546 F.3d at 229.

Complaint Counsel's contention that it cannot adequately test the divestiture package without the privileged materials is equally unavailing. Mot. 7–8. Notably, Complaint Counsel tried and failed before Chief Judge Chappell to invoke an exception to work product protection on the basis of "substantial need." 2nd MTC Order 5; *see also* 16 C.F.R. § 3.31(c). Complaint Counsel has access to a wide array of resources—including industry expert analysis, documents regarding the terms of divestiture, and information about the assets being divested—that allow it

to litigate the competitive effects of the entire transaction (including the divestiture). Indeed, Complaint Counsel has served expert reports spanning *nearly 200 pages* that solely address the divestiture.

Complaint Counsel cannot ask the Commission to exclude a fundamental feature of the challenged transaction simply because some information related to the divestiture is protected from discovery. Were it otherwise, no party could propose a divestiture to resolve competitive concerns raised in the context of or in anticipation of litigation without waiving privilege. In fact, no party in *any* context could raise a defense without waiving privilege, because the advice of counsel necessarily informs every argument put forward by a party. The Commission should not endorse Complaint Counsel's unprecedented effort to punish Respondents for rightfully asserting privilege.

III. CONCLUSION

For the foregoing reasons, the Commission should deny Complaint Counsel's motion to strike or, in the alternative, refer to the motion to Chief Judge Chappell.

July 26, 2024

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 26, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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EXHIBIT A

PUBLIC

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

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

DECLARATION OF YAEL COSSET

I, Yael Cosset, hereby declare that the following is true and correct to the best of my knowledge, information, and belief:

1. I submit this declaration in support of Kroger's Opposition to Complaint Counsel's Renewed Motion to Compel Production of Documents Relating to Negotiation of New Divestiture Agreements. I base this declaration on either my personal knowledge or on information made available to me in the performance of my duties.

2. I am Kroger's Senior Vice President and Chief Information Officer. I have served in this role since 2019. I lead technology and digital capabilities for Kroger, redefining the customer experience through our seamless ecosystem, and making the lives of our associates easier through innovative and intuitive data and technology enabled solutions. Prior to my current position, I served as the Group Vice President and Chief Digital Officer, where I led the company's overall digital growth strategy, e-commerce expansion and Vitacost business. I was responsible for shaping the technology and digital landscape at Kroger. I also served as Chief Commercial Officer and Chief Information Officer of 84.51°.

3. Around early February 2024, I began serving as the chief business negotiator for Kroger in working with C&S (and Albertsons) to reach agreement on the expanded divestiture package that was executed on April 22, 2024. I was also aware of the process leading to the original divestiture package that was executed on September 8, 2023, though I was not the chief business negotiator at that stage. I am also currently the lead businessperson at Kroger with responsibilities for integration management and technology in the proposed transaction with Albertsons, including the integration and efficiency plans for technology, alternative profit business, and ecommerce.

Original Divestiture Package

4. On October 14, 2022, Kroger and Albertsons agreed to merge. The merger agreement recognizes that several hundred stores would have to be divested in connection with the proposed transaction.

5. On September 8, 2023, Kroger, Albertsons, and C&S entered into the Asset Purchase Agreement ("APA"). Under the APA, C&S agreed to purchase 413 identified stores on specified terms.

6. Kroger submitted the divestiture package to regulators during the second request process. These regulators included not only the Federal Trade Commission, but also the Attorneys General of Washington and Colorado (as well as other states).

7. Regulators provided informal feedback in which they expressed various concerns about the adequacy of the package. Kroger agreed to consider the regulators' concerns and ways in which the divestiture package could be modified to address them.

8. While Kroger was considering the regulators' informal feedback on the 413-store divestiture package and how to modify the package to address this feedback, three

regulators filed lawsuits challenging the Kroger-Albertsons merger. First, the Washington Attorney General sued Kroger and Albertsons on January 15, 2024. The Colorado Attorney General sued Kroger, Albertsons, and C&S on February 14, 2024, also seeking to block the transaction. The Federal Trade Commission then sued Kroger on February 26, 2024, filing an administrative complaint as well as a preliminary injunction motion in federal district court in Oregon.

9. Each complaint explicitly criticized the 413-store divestiture package and alleged it was insufficient to resolve competitive concerns in connection with the transaction.

FTC Complaint	**Colorado Complaint**	**Washington Complaint**
"[T]he proposed divestiture lacks the scale and necessary assets—including banners, distribution centers, information technology, corporate contracts, loyalty programs, manufacturing assets, pharmacy resources, data analytics and e-commerce tools, employees, and others." ¶ 108.	"The Number and Quality of Divested Stores Fails to Address the Anticompetitive Effects of the Merger." ¶ 189.	"C&S lacks the sophisticated analytics and IT systems of Albertsons and Kroger." ¶ 140.
"Defendants will not be providing some of Albertsons's most popular private label brands, certain self-manufacturing facilities, established data-analytics capabilities, and experienced regional and corporate support teams." ¶ 108.	"[T]here is a significant re-bannering risk." ¶ 196.	"C&S does not possess a robust array of private brands to sell in the divested stores." ¶ 144.
"The proposed divestiture does not provide any meaningful relief during a lengthy transition period, as the combined	"[T]here is significant risk to C&S lacking a strong private label offering." ¶ 203.	"C&S Lacks the Expertise and Infrastructure Necessary to Operate the Non-Grocery Assets it Hopes to Acquire in the Divestiture." ¶ 148.

Kroger/Albertsons and C&S will extensively coordinate on competitively relevant services—including pricing and promotional activities—for a set transition period." ¶ 110.	"[T]here is integration risk because C&S is not acquiring a standalone business." ¶ 212.	"C&S Is Unlikely to Be Able to Successfully Rebanner the Divested Stores." ¶ 149.
	"C&S does not have enough employees to run the business." ¶ 217.	
	"C&S is not getting sufficient distribution assets across the country to support the retail stores." ¶ 219.	
	"C&S faces significant risk on loyalty card data, both in terms of what is in the divestiture package and what Kroger will retain." ¶ 222.	
	"C&S lack experience in retail and is ill-equipped to take on a divestiture of this size." ¶ 225.	

Expanded Divestiture Package

10. I was the primary business lead negotiating the expanded divestiture package for Kroger, and the information below reflects my understanding of the negotiation process based on my experience and conversations with Kroger's outside and in-house counsel.

11. While negotiating the expanded divestiture package, the parties aimed to execute a package that would prevail in any litigation so they could consummate the transaction. In fact, Kroger, Albertsons, and C&S entered a joint defense agreement on August 30, 2023—well before the expanded divestiture package negotiations—precisely because all of the parties understood that it was highly possible there could be litigation over the transaction. I understand that, throughout the negotiations, Kroger, C&S, and Albertsons all understood that they were taking actions pursuant to their joint defense agreement as well as their common interest in closing the transaction.

12. The expanded divestiture package negotiations began under the threat of litigation from the FTC and state attorney generals—and the negotiations continued for months

after four lawsuits were actually filed against the parties seeking to block the acquisition. The negotiations therefore occurred because of anticipated—and then actual—litigation. The expanded divestiture package would not have been negotiated in its final form and substance but-for the actual litigation filed against Kroger, Albertsons, and C&S.

13. Because the expanded divestiture package negotiations occurred during threatened and actual litigation, the process was nothing like any other negotiation in which I have been involved in my nearly 30-year career. While business personnel typically drive the negotiation process, for the expanded divestiture package, Kroger's lawyers—both outside and in-house counsel—were involved at every step of the negotiations and provided advice regarding the effect of the proposed revisions on the anticipated and actual litigation.

14. Without revealing the substance of the legal advice they provided, lawyers were involved throughout the negotiations because Kroger's goal was to execute an expanded divestiture package that, while making business sense for Kroger, would satisfy the regulators' concerns about the 413-store package—as set forth in court complaints—and enable the parties to consummate the transaction.

15. My primary point of business contact during the negotiations was Eric Winn, C&S's Chief Executive Officer. Even when I negotiated directly with Mr. Winn, I was working closely with—and at the direction of—Kroger's outside and in-house counsel. Those lawyers provided specific guidance on the negotiation positions I should take, even when they were not present during conversations. The positions I took in those negotiations were informed by legal advice I received from counsel about the propriety of different elements of the package from an antitrust perspective. I relayed all material information about the negotiations to Kroger's lawyers for their feedback and input for future negotiations. For this reason, my communications

with Eric Winn and other C&S executives and stakeholders during the negotiations directly reflected the views of Kroger's lawyers on the proper scope of the divestiture package given regulators' concerns.

16. Given the litigation-focus of the negotiations, I often emailed Kroger's in-house or outside counsel to seek legal advice in connection with the divestiture negotiations.

17. In addition, emails that I did not directly send to lawyers—including emails I sent to C&S and third parties—often reflected the opinions and analyses I had received from lawyers. Examples of these documents include:

a. Exhibit O to Complaint Counsel's Renewed Motion to Compel. This is an email between myself and Eric Winn, the CEO of C&S. The redacted material contains discussion of specific elements of the divestiture package being negotiated and reflects the opinions, impressions, and direction of Kroger's lawyers about what elements were necessary to include from a legal perspective.

b. PRIVLIT00585, cited in Exhibit C of Complaint Counsel's Renewed Motion to Compel, is a document that discusses C&S's views on the propriety of certain elements of the divestiture package under negotiation. I understand that the views of each negotiating party on the proper scope of the divestiture package was influenced by and drawn from the opinions and advice of counsel.

18. Kroger also engaged a number of outside companies in connection with the negotiation of the expanded divestiture package, including investment banks and consulting firms. Those outside companies were acting at the direction of Kroger's counsel; their analysis reflected

guidance provided by Kroger's counsel; and they provided information that facilitated Kroger's counsel in providing legal advice and opinions on how to craft a divestiture package that would prevail in any litigation.

19. Kroger, Albertsons, and C&S shared the common goal of executing a divestiture package that would enable the parties to prevail in the litigation and close the transaction. As in any business negotiation, 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 none of that negotiating diminished the parties' shared goal of executing a divestiture package that would facilitate the consummation of the transaction.

20. The expanded divestiture package was executed on April 22, 2024. Under that agreement, C&S will receive additional stores, distribution capabilities, technological support, banners, banner licensing, perimeter office leases, and technology stack, among other things.

21. All of the divestiture proposals were reviewed by litigation counsel, including communications between Kroger and C&S regarding various issues.

22. The final agreement reflects the parties' joint efforts, informed by litigation counsel, to satisfy the regulatory concerns expressed in the complaints.

I declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

June 5, 2024

Cincinnati, Ohio

Yael Cosset

EXHIBIT B

UNDER SEAL - REDACTED IN ENTIRETY

EXHIBIT C

PUBLIC

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

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

ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL: (1) PRODUCTION OF DOCUMENTS FROM RESPONDENTS AND (2) COMPLIANCE WITH SUBPOENA BY NON-PARTIES C&S GROCERS, LLC AND RICHARD COHEN

I.

On May 6, 2024, Federal Trade Commission ("FTC") Complaint Counsel filed a motion to compel pursuant to 16 C.F.R. § 3.38(a) ("Motion"). The Motion requests an order: (1) compelling Respondents Albertsons Companies, Inc. ("Albertsons") and The Kroger Company ("Kroger") to produce documents relating to the negotiation of an amended divestiture agreement between Respondents and C&S Wholesale Grocers LLC ("C&S"), as requested by Complaint Counsel's First Request for Production of Documents issued to each Respondent; and (2) compelling C&S and its chairman Richard Cohen (collectively, the "Non-parties") to comply with subpoenas issued by Complaint Counsel that demanded production of similar negotiation-related documents. The Respondents and the Non-parties filed oppositions to the Motion.

For the reasons set forth below, Complaint Counsel's Motion is (1) DENIED WITHOUT PREJUDICE as to Respondents; and (2) DENIED as to the Non-parties.

II.

The Complaint in this matter, issued on February 26, 2024, challenges a proposed merger between Kroger and Albertsons under Section 7 of the Clayton Act and Section 5 of the FTC Act. On September 8, 2023, prior to the issuance of the Complaint, Respondents announced an agreement to divest certain assets to C&S. On April 22, 2024, Respondents and C&S signed an amended divestiture agreement ("Amended Divestiture Agreement").

Complaint Counsel describes the documents at issue as (1) communications between Respondents and C&S, whether through businesspeople or counsel, in which the composition of the divestiture asset package was negotiated; (2) drafts of the Amended Divestiture Agreement exchanged between the negotiating parties; and (3) each of Respondents' and C&S's internal analyses of the strengths and weaknesses of potential divestiture packages with respect to post-transaction operation of their respective businesses (collectively, "Negotiation Documents"). In their responses to Complaint Counsel's requests for production, Respondents objected to producing some of the Negotiation Documents, on the basis of various privileges, including the attorney-client privilege, the attorney work product doctrine, or the common-interest and joint-defense privileges. The Non-parties lodged similar objections in their responses to Complaint Counsel's subpoenas seeking similar documents.

Complaint Counsel argues that Respondents and the Non-parties cannot properly withhold any of the requested Negotiation Documents and that none of the asserted privileges apply. Complaint Counsel acknowledges that Kroger proposes to produce documents, together with a privilege log, but contends that such production is "likely weeks away" and therefore Complaint Counsel must obtain a ruling on the asserted privileges now, in order to obtain and use the disputed documents before the close of fact discovery on June 11, 2024.

Respondents assert that they are in the process of reviewing responsive documents and will produce all non-privileged documents by May 17, 2024, and will also produce a privilege log listing any withheld materials. While Respondents maintain that their asserted privileges are valid, they argue that a ruling on the issue is premature, and that Complaint Counsel's motion should be denied pending production of non-privileged documents and Respondents' privilege log. The Non-parties state that they join in the relief sought by Respondents.

III.

A. Motion to Compel Production of Documents Pursuant to Subpoena to Non-parties

Complaint Counsel's subpoena for documents from the Non-parties was issued under Rule 3.34. Complaint Counsel's motion to compel production of documents subpoenaed from the Non-parties pursuant to Rule 3.38(a) is procedurally improper and must be denied on that basis. Rule 3.38(a) governs a party's alleged failure to comply with party discovery, such as requests for production of documents or interrogatories. 16 C.F.R. § 3.38(a) ("A party may apply by motion to the Administrative Law Judge [("ALJ")] for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37."). Rule 3.38(a) may not be used to compel compliance with a subpoena issued to a non-party under § 3.34. *In re Traffic Jam Events*, *LLC*, No. 9395, 2020 WL 6938319, *1-2 (F.T.C. Nov. 20, 2020). Rather, pursuant to Rule 3.38(c) the proper procedure for addressing alleged non-compliance with a subpoena issued to a non-party is a motion to the ALJ to "certify to the Commission a request that court enforcement of the subpoena or order be sought." 16 C.F.R. § 3.38(c).

As explained in *Traffic Jam Events*, *supra*:

> The requirement in Rule 3.38(c) that a party seek court enforcement of a nonparty subpoena in the event of noncompliance, through the process of certification from the ALJ and authorization from the Commission, derives from the FTC's authorizing statute. As set forth in Section 9 of the FTC Act:
>
> > [I]n case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
> >
> > Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena ... issue an order requiring such person, partnership, or corporation to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.
> >
> > Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with this Act or any order of the commission made in pursuance thereof.
>
> 15 U.S.C. § 49.

Traffic Jam Events, 2020 WL 6938319, at *2. *See In re Market Dev. Corp.*, No. 9067, 1980 FTC LEXIS 162, at *245-46 (Jan. 15, 1980) (stating that "the Commission's organic statute prescribes that the enforcement of a subpoena must be undertaken in Federal District Court"); *In re Cowles Communications, Inc.*, No. 8831, 1972 FTC LEXIS 251, at *4 (Mar. 2, 1972) (noting that "the Commission cannot itself enforce [a] subpoena[]"). *See also Traffic Jam Events*, 2020 WL 6938319, at *3 n.3 (citing ALJ cases denying motions under Rule 3.38(a) to compel nonparty compliance with a subpoena as procedurally improper).

B. Motion to Compel Production of Documents from Respondents

Rule 3.31(c)(1) states that, as a general rule, "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." Respondents do not dispute Complaint Counsel's assertions that the Negotiation Documents are relevant to the issues presented in this case. However, the rules limit the general scope of permissible discovery, *inter alia*, when appropriate to protect privileged information. 16 C.F.R. § 3.31(c)(4) ("Discovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.").

Rule 3.38A(a) provides the proper procedure for resisting disclosure of privileged material in discovery, stating, in pertinent part:

> Any person withholding material responsive to a subpoena issued pursuant to § 3.34 or . . . a request for production or access pursuant to § 3.37 . . . shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in § 3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

16 C.F.R. § 3.38A(a).[1]

Complaint Counsel's contention that discovery must be compelled because none of the Negotiation Documents qualify for privilege protection is premature. Respondents' arguments as to the validity of various potentially applicable privileges cannot be evaluated in a vacuum, without knowledge of the substance of any individual documents. A privilege log is designed to avoid this result. Respondents represent in their opposition to the motion that they will produce all non-privileged documents by May 17, 2024, and that they will also produce a privilege log listing any withheld materials. While Complaint Counsel's motion as to Respondents must be denied at this time as premature, Respondents will be held to their representations.

IV.

For the reasons set forth above, Complaint Counsel's Motion to Compel production of documents from the Non-parties under Rule 3.38(a) is DENIED. Complaint Counsel's Motion to Compel production of Negotiation Documents from Respondents is DENIED WITHOUT PREJUDICE. Respondents shall produce responsive non-privileged Negotiation Documents, together with a privilege log in compliance with Instruction I9 of Complaint Counsel's First Request for Production of Documents to Kroger and to Albertsons and Rule 3.38A(a), no later than May 17, 2024.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 16, 2024

[1] Complaint Counsel's First Request for Production of Documents directed submittal of a privilege log, as contemplated by Rule 3.38A(a). Motion Exs. D, E, Instruction I9 ("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 . . . .").

EXHIBIT D

PUBLIC

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

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

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND REVISED PRIVILEGE LOG

I.

On May 29, 2024, Federal Trade Commission ("FTC") Complaint Counsel filed a renewed motion to compel Respondent The Kroger Company ("Respondent" or "Kroger") to produce documents and to provide a revised privilege log ("Motion"). Kroger filed an opposition to the Motion on June 5, 2024 ("Opposition"). As set forth below, the Motion is DENIED.

II.

The Complaint in this matter, issued on February 26, 2024, challenges a proposed merger between Kroger and Albertsons under Section 7 of the Clayton Act and Section 5 of the FTC Act. On September 8, 2023, prior to the issuance of the Complaint, Respondents announced an agreement to divest certain assets to C&S Wholesale Grocers, LLC ("C&S"). On April 22, 2024, Respondents and C&S signed an amended divestiture agreement ("Amended Divestiture Agreement").

On May 6, 2024, Complaint Counsel filed a motion to compel, *inter alia*, production of documents from Respondents in response to Complaint Counsel's first request for production of documents, served April 2, 2024. Specifically, Complaint Counsel sought to compel production of various categories of documents related to the negotiation of the Amended Divestiture Agreement ("Negotiation Documents").[1] Kroger responded that it would produce non-privileged

[1] Complaint Counsel defined the requested "Negotiation Documents" as (1) communications between Respondents and C&S, whether through businesspeople or counsel, in which the composition of the divestiture asset package was

Negotiation Documents, objected to producing some of the requested Negotiation Documents on the basis of various privileges and asserted it would produce a privilege log listing any withheld materials. On May 16, 2024, an order was issued denying the motion to compel without prejudice, directing Respondents to produce non-privileged Negotiation Documents and to identify any withheld Negotiation Documents on a privilege log "in compliance with" Instruction I9 of Complaint Counsel's First Request for Production of Documents ("Instruction I9") and Rule 3.38A(a). Order of May 16, 2024 at 4 ("May 16 Order").

In the current Motion, Complaint Counsel asserts that Kroger's document production in response to the May 16 Order failed to include certain categories of Negotiation Documents and/or failed to properly log withheld documents on its privilege log. In particular, Complaint Counsel contends: (1) Kroger failed to produce or log any Negotiation Documents exchanged between Kroger's outside counsel and counsel for C&S, and failed to search outside counsel's files; (2) Kroger's privilege log failed to comply with Instruction I9 of Complaint Counsel's request for production and with Rule 3.38A(a) by failing to: log attachments to emails, identify individuals named, and include file names and email subjects; (3) Kroger improperly redacted portions of drafts of the Amended Divestiture Agreement that it produced; (4) Kroger failed to produce or clearly log Kroger's communications with C&S about the composition of the divestiture packages or Kroger's commercial analyses of potential divestiture packages; and (5) Kroger failed to produce correspondence by or between businesspeople at C&S and Kroger that were copied to counsel.

Kroger maintains that the Negotiation Documents that it has withheld are protected by the attorney-client privilege; the attorney work product doctrine; and/or the joint defense (also known as "common interest") privilege. To support its claims, Kroger submits a declaration from Yael Cosset, its Senior Vice President and Chief Information Officer and the principal negotiator for Kroger ("Cosset Decl.") on the Amended Divestiture Agreement, who describes the regulatory and litigation concerns informing the negotiation of the Amended Divestiture Agreement package, and the role of in-house and outside counsel in advising Kroger in the negotiation. In addition, Kroger argues that Complaint Counsel may not compel Kroger to produce communications between its counsel and counsel for C&S because such documents are outside Kroger's possession or control.

Kroger defends its privilege log as complying with the requirements for a privilege log that the FTC and Kroger agreed to in the case management and scheduling order ("CMSO") entered in the parallel injunction proceeding pending in federal court and asserts that Complaint Counsel did not object to applying the CMSO's requirements during the parties' meet and confer discussions regarding Kroger's objections to the additional requirements in Complaint Counsel's instruction 9. Kroger argues further that its privilege log complies with Rule 3.38A(a) because it describes the nature of each document sufficiently to enable assessment of the privilege claims raised.

negotiated; (2) drafts of the Amended Divestiture Agreement exchanged between the negotiating parties; and (3) each of Respondents' and C&S's internal analyses of the strengths and weaknesses of potential divestiture packages with respect to post-transaction operation of their respective businesses.

III.

Rule 3.31(c)(1) states that, as a general rule, "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." However, discovery of relevant information "shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency . . . ." 16 C.F.R. § 3.31(c)(4). To properly present a privilege claim, the party resisting discovery must provide a privilege log "which describes the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that" without disclosing protected information "will enable other parties to assess the claim." 16 C.F.R. § 3.38A(a).

A. Adequacy of Kroger's privilege log

Based on a review of Kroger's privilege log, the log is not in strict compliance with the directive of the May 16 Order that the log comply with instruction 9 of Complaint Counsel's first request for production. However, Complaint Counsel did not, in its original motion to compel, call attention to the material facts (1) that it had previously agreed to a considerably narrower privilege log scope in the parallel federal litigation CMSO or (2) that, in meet and confer discussions concerning Kroger's objection to instruction 9, Complaint Counsel appeared to request that Kroger comply with the CMSO in this litigation. Opposition Ex. F at 3 ¶ 8. Moreover, Kroger's privilege log does comply with Rule 3.38A(a) because it is sufficiently detailed to enable assessment of the privilege claims asserted. Rule 3.38A(a) does not require identification of each document's attachments, email subject lines, or file names. Under the totality of the circumstances, the requirements of the Rule must prevail over stricter requirements contained in an instruction in a party's request for production.[2]

B. Applicable privileges

1. Attorney-client privilege

The attorney-client privilege protects confidential communications between attorneys and their clients, which are made for the purpose of obtaining or providing legal advice. *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981); *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). In general, where a lawyer is retained, 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)).

[2] Complaint Counsel's argument that Kroger violated the May 16 Order by failing to include outside counsel as document custodians for purposes of searching for Negotiation Documents is rejected. The discovery rules obligate Kroger to search for, produce, or log, responsive documents in its "possession, custody, or control." 16 C.F.R. § 3.37(a). A demand for documents held in the files of outside counsel constitutes non-party discovery, which requires subpoenas issued pursuant to Rule 3.34. The May 16 Order did not intend to convey otherwise.

2. Attorney work product

The attorney work product doctrine protects materials from disclosure that "can fairly be said to have been prepared or obtained because of the prospect of litigation." *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015); *In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004); *see* 16 C.F.R. § 3.31(c)(5); *see also* Fed. R. Civ. P. 26(b)(3). The United States Supreme Court has recognized the importance of the attorney work product doctrine, noting that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Attorney work product is reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* at 511. A document is prepared because of a party's anticipation of litigation if the anticipated litigation is the "driving force" behind the preparation of the documents, irrespective of whether the document also serves "an ordinary business purpose." *In re Professionals Direct Ins. Co*., 578 F.3d 432, 439 (6th Cir. 2009).

3. Common interest doctrine

The common interest doctrine allows "attorneys for different clients pursuing a common legal strategy to communicate with each other," and serves as an exception to the rule that disclosing information to third parties waives privilege. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). To invoke the common interest exception 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.* Courts have recognized that negotiating counterparties can have an overarching common interest that falls under the doctrine. *See, e.g.*, *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, 85 F.4th 1070, 1096 (11th Cir. 2023) (explaining that an "adverse position" between parties during settlement negotiations "d[id] not undermine" their "broader mutual interest"); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987) (finding that the common interest doctrine protected disclosure of attorney's opinion letter to a non-party during attempted negotiation of the sale of a business); *see Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp*., 253 F.R.D. 300, 310 (D.N.J. 2008) ("The weight of case law suggests that, as a general matter, privileged information exchanged during a merger between two unaffiliated business[es] would fall within the common-interest doctrine.").

4. Conclusion

The contents of the Negotiation Documents cannot properly be assessed without considering their purpose, which was to structure a transaction that could be defended against the pending litigation and could be consummated. Thus, legal advice, attorney work product, and the common interest of C&S, Kroger, and Albertson's in meeting the concerns of regulators necessarily shaped the Negotiation Documents, including the communications and the drafts of the divestiture agreements exchanged between Respondents and C&S, whether exchanged directly or through counsel. As explained in the Cosset Declaration, "lawyers were involved throughout the negotiations because Kroger's goal was to execute an expanded divestiture package that, while making business sense for Kroger, would satisfy the regulators' concerns . . .

and enable the parties to consummate the transaction." Cosset Decl. ¶ 14. Lawyers were providing "specific guidance on the negotiation positions" Kroger was to take and Kroger's negotiating positions "were informed by legal advice [Kroger] received from counsel about the propriety of different elements of the package from an antitrust perspective. [Cosset] relayed all material information about the negotiations to Kroger's lawyers for their feedback and input for future negotiations." Cosset Decl. ¶ 15.

Moreover, "Kroger, Albertsons, and C&S shared the common goal of executing a divestiture package that would enable the parties to prevail in the litigation and close the transaction." Cosset Decl. ¶ 19. Complaint Counsel contends that, at a minimum, Kroger should be required to produce all Negotiation Documents exchanged between C&S and Kroger in the period from January 25, 2024 to April 22, 2024 (Proposed Order at 1) because C&S and Kroger were adversaries during this period. Complaint Counsel bases this assertion on (1) a February 8, 2024 email in which C&S's Chairman denied telling Kroger that C&S was "committed to completing" a prior offer that was then withdrawn by Kroger and wrote that C&S had no obligation to "move forward with that new proposal" (Motion Ex. R); and (2) an email between employees of a current vendor to both Albertsons and C&S referencing a call at which a "response to Kroger put notice" would be discussed (Motion Ex. S). These out of context, unexplained messages do not demonstrate or prove that C&S and Kroger ceased to share a common goal of satisfying regulators and closing a divestment deal, even though there may have been disagreements over particular issues during the negotiations.

Complaint Counsel argues that Kroger is withholding documents exchanged between businesspeople simply because the documents were also provided to counsel. Motion at 2, 6, citing Exs. C, O. Kroger denies that it is withholding documents merely because they were provided to counsel and represents that, in fact, it produced numerous "communications between Kroger business personnel that included counsel." Opposition at 7. As to Motion Exhibit C, referenced by Complaint Counsel, the Cosset Declaration attests that the redacted material shields the negotiating positions of the parties that reflected the opinions and advice of counsel. Cosset Decl. ¶ 17 b. Motion Exhibit O, according to Cosset, redacted a discussion of specific elements of the divestiture package being negotiated and reflects the opinions, impressions, and direction of Kroger's lawyers about what elements were necessary to include from a legal perspective. *Id.* at ¶ 17 a.

Based on a review of the applicable legal principles, the contents of the privilege log, and the Cosset Declaration, Kroger has sufficiently demonstrated that the withheld Negotiation Documents are protected by the attorney-client privilege, the attorney work product doctrine, and/or the common interest doctrine. Complaint Counsel asserts that, to the extent the work product doctrine applies, it should be overridden because of Complaint Counsel's "substantial need of the materials" and that there is "no way" to obtain "the substantial equivalent of the materials by other means." Motion at 9 (citing 16 C.F.R. § 3.31(c)(5)). However, Complaint Counsel's argument that production of the withheld Negotiation Documents will "test Respondents' claim" in their answer that C&S will have "all the assets and personnel C&S will need to compete" merely restates the potential relevance of the materials and does not establish the requisite "substantial need" for the materials.

IV.

After full consideration of the Motion and Opposition, and as set forth above, Complaint Counsel's Renewed Motion to Compel Kroger's production of Negotiation Documents is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 11, 2024

EXHIBIT E

PUBLIC

Arnold & Porter

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May 6, 2024

VIA EMAIL

Laura Hall
Senior Trial Counsel
Federal Trade Commission
Bureau of Competition
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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

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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

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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.

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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,

Sonia Kuester Pfaffenroth

EXHIBIT F

PUBLIC

From:	Shultz, Matthew M.
To:	yasmine.harik@arnoldporter.com; Dickinson, Charles; Hall, Laura; john.holler@arnoldporter.com; jrabraham@debevoise.com; mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; nborn@debevoise.com; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; matthew.wolf@arnoldporter.com; Michael.B.Bernstein@arnoldporter.com; jason.ewart@arnoldporter.com; joshua.davis@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; Perry, Mark; Obaro, Bambo; Barrington, Luna; Sullivan, Luke; Pieters, Lisa; Sternlieb, Sarah; Kleinwaks, Jason; james.fishkin@dechert.com
Cc:	jweingarten@ftc.gov; Pai, Rohan; Ashmeade, Amare; Ma, Rachel; Warren, Jacob; Willey, Kayla; Wint, Corene; Yoon, John
Subject:	RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428
Date:	Friday, May 24, 2024 8:10:51 PM
Attachments:	image001.png Kroger Priv Log Cover Letter to FTC (5.24.2024) - HIGHLY CONFIDENTIAL(252133918.1).pdf The Kroger Co. Privilege Log 05.24.24 - HIGHLY CONFIDENTIAL.xlsx

Charlie,

On behalf of Kroger, please see the attached correspondence and privilege log.

Thanks,
Matt

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Tuesday, May 21, 2024 8:38 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>
Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we have sent additional productions responsive to Complaint Counsel's First Set of Requests for Production ("RFPs"), which are copies of productions submitted today to the State of

Washington in parallel litigation. The productions are on an encrypted hard drive sent to your e-discovery host vendor, as requested.

Please see the FedEx tracking number, hard drive serial number, and passcode below:

- [redacted]
- [redacted]
- [redacted]

A transmittal letter and accompanying submission index for these productions are attached.

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Tuesday, May 21, 2024 7:26 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>
Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we have sent an additional production responsive to Complaint Counsel's First Set of Requests for Production ("RFPs"), which is a copy of a production submitted to the State of Washington in parallel litigation, via secure file transfer. We also are attaching here Kroger's corresponding Responses & Objections to the State's First Set of Interrogatories (and certification) in the Washington action.

A transmittal letter describing the data contained in this production is attached.

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Friday, May 17, 2024 7:18 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>
Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we have submitted copies of productions responsive to the Colorado court order for divestiture-related materials on two encrypted hard drives (one via courier and one via FedEx), as well as a .zip folder sent via secure file transfer.

The passcode for the hard drive delivered to your Constitution Center offices on May 16, 2024, bearing Bates stamp KR-CO-LIT-000001177, is [redacted]

The passcode for the hard drive delivered to your e-discovery vendor on May 17, 2024, bearing serial number 101300015995, is [redacted]

FedEx tracking for the May 17, 2024 delivery is [redacted].

A transmittal letter describing the materials contained in these productions, and accompanying

submission index, are attached.

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Thursday, May 16, 2024 2:15 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>
Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we have submitted an additional production responsive to Complaint Counsel's First Set of Interrogatories (and First Set of Requests for Production). The production has been sent via secure file transfer.

A transmittal letter describing the data contained in this production is attached.

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Monday, May 13, 2024 9:36 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com;

zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>
Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we have submitted productions responsive to Complaint Counsel's First Set of Interrogatories. The smaller production has been sent via secure file transfer and the larger production on an encrypted hard drive that was delivered today via courier, per your instructions.

The passcode for the hard drive is [redacted]

A transmittal letter describing the data contained in these productions is attached.

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Thursday, May 9, 2024 2:09 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com;

zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>
Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we have sent additional productions responsive to Complaint Counsel's First Set of Requests for Production ("RFPs"), which are copies of productions submitted to the State of Washington in concurrent litigation. The productions on today's encrypted hard drive account for all refreshed data that has previously been submitted (or is being submitted today) to Washington. We have sent the hard drive via courier, as agreed in our separate correspondence.

The passcode for the hard drive is [redacted]

A transmittal letter describing the data contained in these productions is attached.

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Tuesday, May 7, 2024 11:22 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>

Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>
Subject: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we are sending three productions responsive to Complaint Counsel's First Set of Requests for Production ("RFPs"), which are copies of productions submitted to the State of Washington in concurrent litigation. We are sending the smaller production via secure file transfer, as instructed, and we are sending the larger two productions on an encrypted hard drive to your e-discovery host vendor, also as instructed.

Please see the FedEx tracking number, hard drive serial number, and passcode below:

- [redacted]
- [redacted]
- [redacted]

A transmittal letter and accompanying submission index for these productions are attached. We are preparing copies of additional refresh data responsive to Complaint Counsel's RFPs and will submit those shortly.

Thanks,
Yasmine

Yasmine Harik
Senior Associate | Bio

Arnold & Porter
601 Massachusetts Ave., NW
Washington, DC 20001-3743
T: +1 202.942.6625
Yasmine.Harik@arnoldporter.com
www.arnoldporter.com | LinkedIn

EXHIBIT G

PUBLIC

From:	Sullivan, Luke
To:	Anderson, Barrett; Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; joshua.davis@arnoldporter.com; michael.kientzle@arnoldporter.com; jason.ewart@arnoldporter.com; yasmine.harik@arnoldporter.com; john.holler@arnoldporter.com; christina.cleveland@arnoldporter.com; Perry, Mark; Barrington, Luna; Obaro, Bambo; thassi@debevoise.com; mschaper@debevoise.com; srselden@debevoise.com; jrabraham@debevoise.com; nborn@debevoise.com; jmfried@debevoise.com; mcardena@debevoise.com; tebuckley@debevoise.com; htmehler@debevoise.com; msventim@debevoise.com; mike.cowie@dechert.com; james.fishkin@dechert.com; Fuller, Deidre; Gilchrist, Roy; Yoda, Kristine; APodoll@wc.com; emainigi@wc.com; tinfinger@wc.com; tryan@wc.com; jpitt@wc.com
Cc:	Dickinson, Charles; Pai, Rohan; Hough, Lily; Wint, Corene; Hall, Laura; Drummonds, Katherine; Ashmeade, Amare; Ma, Rachel; Warren, Jacob; Willey, Kayla; Yoon, John; JaymeWeber-contact; VinnyVenkat-contact; ConnorNolan-contact; NicoleGordon-contact; ShiraHoffman-contact; AmandaHamilton-contact; WillMargrabe-contact; BrianYost-contact; PaulHarper-contct; AliceRiechers-contact; SchonetteWalker-contact; GaryHonick-contact; ByronWarren-contact; LucusTucker-contact; SamanthaFeeley-contact; JuliaMeade-contact; JeffHerrera-contact; CherylHiemstra-contact; TimNord-contact; ChristopherKayser-contact; TaniaManners-contact; WilliamYoung-contact; RobertBernheim-contact; AngieMilligan-contact; ChristineCortez-contact; Musser, Susan; kyle.angelotti@arnoldporter.com
Subject:	RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al.
Date:	Monday, July 15, 2024 4:59:42 PM

Counsel –

On Sunday, July 14, the FTC requested for the first time that Defendants withdraw the expert report of Mr. Galante and certain affirmative defenses related to the divestiture package "due to the invocation of common interest and joint defense privilege by Kroger, Albertsons and C&S."

As explained on our meet-and-confer call earlier today, Defendants will not withdraw Mr. Galante's report or any affirmative defenses. The divestiture package is a central part of the transaction the FTC seeks to enjoin—there is no merger without the divestiture, and therefore the FTC cannot meet its burden of establishing the transaction will substantially reduce competition without taking into account the divestiture.

On the call, the FTC initially took the position that Mr. Galante relied on privileged information, although the FTC had no basis for that assertion. Defendants explained that Mr. Galante did not rely on any privileged material to form the opinions set forth in his report. In response, the FTC took the position that, even if Mr. Galante relied on no privileged information, his opinions were "infected" by the fact that certain materials related to the amended divestiture agreement were withheld as privileged. However, Defendants are aware of no authority that supports this position and the FTC provided none on the call. Nor did the FTC explain how Mr. Galante's opinion could have been "infected" by information he did not review or rely on.

On the call, the FTC took the position that the "sword and shield" doctrine somehow applies to Mr. Galante's report and opinions even though he did not rely on any privileged information in forming his opinions. The FTC was unable, however, to explain this position beyond vague references to "subjective understandings." Nor was the FTC able to articulate any comprehensible objection to the affirmative defenses related to the divestiture.

On the call, the FTC expressed its continued disagreement with Defendants' assertions of privilege (and, by extension, Judge Chappell's ruling rejecting the FTC's position on that subject). Given that the FTC never challenged the privilege assertions in Oregon during the fact discovery period, it cannot do so at this time. The FTC also cannot seek to re-litigate Judge Chappell's decision in Part 3 on these privilege issues through an objection to Mr. Galante's expert report or certain affirmative defenses.

The FTC bears the burden of proving that the proposed transaction—*including* the divestiture—may substantially lessen competition. The FTC has all the information it needs to litigate that issue at the hearing that will commence on August 26. We look forward to presenting our positions to the Court on the merits.

Best,
Luke

Weil

Luke Sullivan

Weil, Gotshal & Manges LLP
2001 M Street NW, Suite 600
Washington, DC 20036
Luke.Sullivan@weil.com
+1 202 682 7006 Direct
+1 202 857 0940 Fax

From: Anderson, Barrett <banderson1@ftc.gov>
Sent: Sunday, July 14, 2024 9:18 PM
To: Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; joshua.davis@arnoldporter.com; michael.kientzle@arnoldporter.com; jason.ewart@arnoldporter.com; yasmine.harik@arnoldporter.com; john.holler@arnoldporter.com; christina.cleveland@arnoldporter.com; Perry, Mark <Mark.Perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; Sullivan, Luke <Luke.Sullivan@weil.com>; thassi@debevoise.com; mschaper@debevoise.com; srselden@debevoise.com; jrabraham@debevoise.com; nborn@debevoise.com; jmfried@debevoise.com; mcardena@debevoise.com; tebuckley@debevoise.com; htmehler@debevoise.com; msventim@debevoise.com; mike.cowie@dechert.com; james.fishkin@dechert.com; Fuller, Deidre <Deidre.Fuller@weil.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; Yoda, Kristine <Kristine.yoda@weil.com>; APodoll@wc.com; emainigi@wc.com; tinfinger@wc.com; tryan@wc.com; jpitt@wc.com
Cc: Dickinson, Charles <cdickinson@ftc.gov>; Pai, Rohan <rpai@ftc.gov>; Hough, Lily <lhough@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Drummonds, Katherine <kdrummonds@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Yoon, John <jyoon2@ftc.gov>; JaymeWeber-contact <Jayme.Weber@azag.gov>; VinnyVenkat-contact <vinny.venkat@azag.gov>; ConnorNolan-contact <connor.nolan@azag.gov>; NicoleGordon-contact <Nicole.Gordon@doj.ca.gov>; ShiraHoffman-contact <Shira.Hoffman@doj.ca.gov>; AmandaHamilton-contact <Amanda.Hamilton@dc.gov>; WillMargrabe-contact <will.margrabe@dc.gov>; BrianYost-contact <Brian.Yost@ilag.gov>; PaulHarper-contct <Paul.Harper@ilag.gov>; AliceRiechers-contact <alice.riechers@ilag.gov>; SchonetteWalker-contact

<swalker@oag.state.md.us>; GaryHonick-contact <ghonick@oag.state.md.us>; ByronWarren-contact <bwarren@oag.state.md.us>; LucusTucker-contact <LTucker@ag.nv.gov>; SamanthaFeeley-contact <SFeeley@ag.nv.gov>; JuliaMeade-contact <jmeade@nmag.gov>; JeffHerrera-contact <jherrera@nmag.gov>; CherylHiemstra-contact <Cheryl.Hiemstra@doj.state.or.us>; TimNord-contact <tim.d.nord@doj.state.or.us>; ChristopherKayser-contact <cjkayser@lvklaw.com>; TaniaManners-contact <tmanners@lvklaw.com>; WilliamYoung-contact <william.young@wyo.gov>; RobertBernheim-contact <Robert.Bernheim@azag.gov>; AngieMilligan-contact <amilligan@lvklaw.com>; ChristineCortez-contact <cortez@lvklaw.com>; Musser, Susan <smusser@ftc.gov>
Subject: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al.

Counsel:

We write to raise an urgent issue. Each of the opinions in Mr. Galante's report rests on statements about the April 22, 2024, divestiture package and TSA services that Complaint Counsel has been unable to meaningfully test due to the invocation of common interest and joint defense privilege by Kroger, Albertsons and C&S.

This concern is particularly acute with respect to Mr. Galante's opinions that [redacted] (¶¶ 12(b), 12(d), 13.) We therefore request that Respondents withdraw the Galante Report.

Moreover, we infer from the content of Mr. Galante's report that Respondents' defenses in this action will rest upon similar assertions about the divestiture. We therefore request that Respondents withdraw their defenses based on the divestiture. We believe these to be Kroger's Sixth Affirmative Defense and Albertsons' Ninth Affirmative Defense, though for completeness we would also request that Respondents withdraw their denials of liability based on the divestiture in Kroger's Third Affirmative Defense, Albertsons' Sixth, Seventh , and Eighth Affirmative Defenses, and paragraphs 10 and 86-98 of each Answer.

Given Mr. Galante's deposition is scheduled for Tuesday, July 16, we request your response to these requests no later than 5 p.m. tomorrow, Monday, July 15. We are available to meet and confer tomorrow between 10:30 a.m. and 1 p.m.

Sincerely,
Barrett

Barrett Anderson

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Pronouns: he, him, his

EXHIBIT H

UNDER SEAL - REDACTED IN ENTIRETY