UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
In the Matter of The Kroger Company and Albertsons Companies, Inc.
Docket No. 9428

September 9, 2024

Today the Commission denies a motion by Complaint Counsel to strike divestiture-related defenses asserted by Respondents, The Kroger Company and Albertsons Companies, Inc., without prejudice to Complaint Counsel's ability to seek relief from the Administrative Law Judge ("ALJ").

The ALJ had previously ruled on Respondents' claims that certain divestiture-related information is privileged. Rather than appeal those rulings to the Commission, Complaint Counsel moved to seek that the Commission preclude Respondents from asserting their proposed divestiture as a defense. Complaint Counsel argued that Respondents were unfairly invoking privilege as both a sword and a shield, selectively placing at issue favorable information about the proposed divestiture while withholding putatively privileged information. On this limited record and at this pretrial stage, and taking the ALJ's rulings as given, it would not be appropriate for the Commission to grant Complaint Counsel's request to limit the arguments or evidence that Respondents may present at the administrative hearing. But the procedural history does raise questions about whether Respondents' underlying privilege claims were validly asserted and correctly analyzed. I therefore concur in the Commission's Order denying the motion to strike and write separately to clarify the legal principles that should govern evaluation of privilege claims and application of the sword-and-shield doctrine, in this and future matters.

When merging parties propose divesting assets to cure the illegality of their deal, the contemporaneous views and communications of the businesspeople involved in negotiations can provide uniquely valuable insight into whether the divestiture is likely to succeed or fail. But because divestiture negotiations often involve lawyers, merging parties and divestiture buyers may seek to withhold divestiture-related evidence and claim that it is protected from disclosure under the attorney-client privilege, the work-product doctrine, or both. These privilege claims must be evaluated through a close review of the relevant communications and a rigorous application of the relevant legal frameworks, as well as an appreciation of the salience of the evidence being withheld.

The Commission has a strong interest in the proper adjudication of privilege disputes, especially when merging parties are seeking to withhold information relating to a proposed divestiture. Whether a divestiture would resolve concerns that a deal may substantially lessen competition is an extraordinarily important question. Getting it wrong can mean either that market participants and the public suffer serious harms resulting from the merger, or that a merger is blocked in its entirety even if another legal path were available. Ordinary-course

evidence of divestiture negotiations can be particularly probative in assessing whether the divested assets would adequately restore competition.[1] This evidence is especially valuable to the extent that it contradicts made-for-litigation narratives. Given that the sufficiency of the proposed divestiture can be central to the overarching inquiry, an ALJ should take special care to review privilege disputes concerning divestiture-related evidence with rigor and precision.

In responding to compulsory process during investigations, or to document requests or subpoenas during administrative adjudication, the withholding party bears the burden of showing that the elements of the attorney-client privilege or work-product doctrine are met as to all communications or other information withheld. *See FTC v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018) ("The burden is on the proponent of the privilege to demonstrate that it applies."). A relevant consideration is whether upholding the privilege claim would serve the purpose of the privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (the attorney-client privilege's purpose is to "encourage full and frank communication between attorneys and their clients"); *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (the work-product doctrine's purpose is to allow lawyers to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel"). The existence of a common interest among parties to a communication does not establish a valid privilege claim, as the common-interest doctrine is an exception to waiver, not a freestanding protection from disclosure. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (*citing In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)). Where privilege disputes are presented to the ALJ or the Commission, the privilege claims at issue should be scrutinized separately for each separately identifiable category of withheld information, if not separately for each withheld communication where appropriate. To the extent that a privilege claim cannot be assessed without the withheld information itself, submission of the information for *in camera* inspection may be needed.

In ruling on any objection or request for relief under the sword-and-shield doctrine, an adjudicator should assess whether a party has made a claim "which in fairness requires disclosure of the protected communication." *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001). The adjudicator should recognize that the sword-and-shield doctrine can apply where a party has advanced a claim that cannot be adequately addressed without access to withheld information, even if no such information was relied on. *See Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003).[2]

---

[1] The Supreme Court has analyzed the adequacy of proposed divestitures by assessing them as remedies that follow a finding of liability. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331–32 (1961); *see also Ford Motor Co. v. United States*, 405 U.S. 562, 574–77 (1972) (evaluating court-ordered divestiture). Other courts have analyzed the adequacy of proposed divestitures as part of the merging parties' rebuttal case. *See, e.g.*, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 72–78 (D.D.C. 2015) (citing *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990)); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017). Respondents go so far as to argue that their proposed divestiture should be accounted for in Complaint Counsel's affirmative case. Resp'ts' Pretrial Br. at 17 (Aug 1, 2024).

[2] The parties' dispute related to opinions of Respondents' expert witness Daniel Galante is illustrative. Complaint Counsel argue that Mr. Galante has opined on issues as to which Respondents have withheld relevant evidence. Compl. Counsel's Mot. to Strike Kroger's Sixth and Albertsons' Ninth Affirmative Defenses at 6 (July 15, 2024). Respondents maintain that Mr. Galante did not rely on privileged information, Resp'ts' Opp'n to Compl. Counsel's Mot. to Strike at 7 (July 29, 2024), but that does not end the inquiry. Rather, if Complaint Counsel object to the

Applying these legal principles carefully and faithfully will protect parties' rights while safeguarding the public's interest in a fair and just resolution of the underlying dispute.

***

introduction of Mr. Galante's opinions in evidence or seek other relief, then the ALJ should decide whether Complaint Counsel can fairly and adequately dispute the opinions without access to information that Respondents have withheld.