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**

ORDER DENYING MOTION TO STRIKE

Complaint Counsel have moved the Commission to strike certain affirmative defenses and denials of liability asserted by Respondents, The Kroger Company ("Kroger") and Albertsons Companies, Inc. ("Albertsons"), in their Answers. Complaint Counsel contend that Respondents have claimed privilege over evidence necessary to rebut these defenses and denials, "unfairly wield[ing] privilege as a sword and shield." Compl. Counsel's Mot. to Strike Kroger's Sixth and Albertsons' Ninth Affirmative Defenses at 2 (July 15, 2024) ("Motion to Strike"). For the reasons explained below, Complaint Counsel's Motion to Strike is denied.

In October 2022, Respondents Kroger and Albertsons, two large supermarket chains, entered into a merger agreement. Respondent Albertsons later acknowledged that [redacted] and that [redacted] Albertsons Cos., Inc.'s Opp'n to Compl. Counsel's Mot. to Compel at 6 (May 17. 2024). In September 2023, Respondents agreed to divest some of their stores and other assets to third-party C&S Wholesale Grocers, Inc. ("C&S") in the hope that this would resolve anticipated concerns about the merger. *See* Respts' Opp'n to Compl. Counsel's Mot. to Strike at 2 (July 29, 2024) ("Opposition"). Respondents submitted their divestiture proposal to Commission staff and certain state enforcers. *See id.*, Ex. A ¶ 6. Commission staff and state enforcers, however, raised concerns about the adequacy of the proposed divestiture. *Id.* at 2. According to Complaint Counsel, C&S itself expressed concern about the adequacy of the divestiture proposal to Respondents, the FTC, and state attorneys general. Motion to Strike at 3.

On February 26, 2024, the Commission issued a Complaint against Respondents charging that their proposed merger violated Section 7 of the Clayton Act and Section 5 of the FTC Act. The Complaint alleged, among other things, that the contemplated divestiture to C&S would be inadequate to mitigate the harm from the lost competition between Respondents, forcing the American public to bear the costs of any failure. *E.g.*, Compl. ¶¶ 11, 86–98.

In March 2024, Respondents submitted their Answers to the Complaint. Kroger's Sixth and Albertsons' Ninth affirmative defenses asserted that the Commission's claims are barred "because divestitures will eliminate any purported anticompetitive effects." Respondents' Answers elsewhere made claims about the efficacy of the proposed divestiture to C&S. *See, e.g.*, Albertsons Answer at 3; Kroger Answer at 2–3. Although Respondents in their Answers denied that the divestiture to C&S as originally proposed was inadequate, on April 22, 2024, they amended their divestiture agreement with C&S, increasing the number of divested stores and adding other assets. According to Respondents, the primary goal of the revised divestiture package was to respond to arguments raised by the Commission and state attorneys general in litigation. Opposition at 3.

In discovery, Complaint Counsel sought documents concerning the negotiation and development of the revised divestiture package. Respondents produced some requested documents but asserted privilege over many others. Complaint Counsel moved to compel Respondents' production of various categories of documents related to the negotiation of the revised divestiture agreement, including communications between non-lawyer executives of Respondents and C&S. Chief Administrative Law Judge Chappell (the "ALJ") denied the motion. In a June 11, 2024 order, the ALJ ruled that Respondents sufficiently demonstrated that the withheld negotiation documents were "protected by the attorney-client privilege, the attorney work product doctrine, and/or the common interest doctrine." Order Den. Compl. Counsel's Mot. to Compel Production of Docs. and Revised Privilege Log at 5. Observing that the purpose of the renewed negotiation was to "structure a transaction that could be defended against the pending litigation and could be consummated," the ALJ found that the parties "shared the common goal of executing a divestiture package that would enable the parties to prevail in litigation and close the transaction." *Id.* at 4–5 (quotation omitted).

Complaint Counsel did not seek interlocutory review by the Commission of the ALJ's privilege ruling but, on July 15, 2024, filed the present Motion to Strike. Complaint Counsel's motion argues that, given Respondents' privilege claims and the ALJ's ruling, they are unfairly precluded from testing Respondents' defenses. Complaint Counsel invoke the so-called sword-and-shield doctrine, asserting that "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." Motion to Strike at 8 (quoting *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)). Complaint Counsel point out that Respondents' Answers state that the divestiture "would eliminate any purported anticompetitive effects" of the merger and "address any competitive concerns" and that C&S would "receive the assets necessary to ensure its success." *Id.* at 3 (quoting Kroger Answer at 27 and Albertsons Answer at 3). However, citing privilege, Respondents withheld thousands of documents concerning the negotiation of the amended divestiture agreement and instructed deposition witnesses not to answer questions about, among other things, asset selection, C&S's requests, analyses of the proposed packages, whether the

assets would allow C&S to adequately compete, and areas of dispute in the negotiation. *Id.* at 4–5. Moreover, Complaint Counsel say they are unable to test the premises of Respondents' expert report, which states that C&S [redacted] *Id.* at 6 (quotations omitted). Complaint Counsel state that allowing Respondents "to curate a universe of favorable, non-privileged evidence and expert opinion" about the amended divestiture agreement "would unfairly deprive Complaint Counsel of an adequate opportunity to dispute" Respondents' defenses. *Id.* at 9. Complaint Counsel argue that, having allowed Respondents to deploy the shield, it would not be proper to allow them to use the sword. *Id.* at 2.

Complaint Counsel request that, if Respondents continue to maintain their defenses and privilege claims, the Commission strike the affirmative defenses and liability denials based on the divestiture..[1] As an alternative form of relief, Complaint Counsel ask the Commission to preclude Respondents from (1) offering evidence or testimony concerning their negotiations or subjective assessments of the amended divestiture's alleged efficacy, (2) proffering any expert opinion relying on such evidence or testimony, or (3) asserting any argument at trial concerning the foregoing topics. Motion to Strike at 2, 9 & Proposed Order at 1–2. Under the latter proposal, Respondents could avoid preclusion of their evidence and argument by opting to waive their privilege claims, at which point discovery would reopen to permit Complaint Counsel to seek additional evidence and testimony regarding the proposed divestiture. Motion to Strike at 2, 9 & Proposed Order at 2.

At the outset, it is important to note that the question of whether the attorney-client privilege and/or the attorney work product doctrine protect the withheld information at issue, or whether the common interest doctrine was properly applied, is not before the Commission. Complaint Counsel have not sought interlocutory review of the ALJ's order on their motion to compel production of negotiation documents, *see* 16 C.F.R. § 3.23(b). The motion to compel did not address Respondents' privilege claims with respect to deposition testimony, and we decline to assess those claims in the first instance here. For purposes of this Motion to Strike, we therefore assume, without deciding, that Respondents have not improperly withheld the information at issue. *But see Chabot v. Walgreens Boots All., Inc.*, No. 1:18-CV-2118, 2020 WL 3410638, at *8–10 (M.D. Pa. June 11, 2020) (discussing limitations of the common interest doctrine in the context of divestiture negotiations).

We now turn to Complaint Counsel's request to strike the divestiture defenses. Motions to strike an opponent's defenses are generally disfavored and rarely granted. *See, e.g.*, *Stanbury Law Firm, P.A. v. IRS*, 221 F.3d 1059, 1063 (8th Cir. 2000); *E.S. v. Best Western Int'l, Inc.*, 510 F. Supp. 3d 420, 425–26 (N.D. Tex. 2021); *Blount v. Johnson Controls, Inc.*, 328 F.R.D. 146,

[1] In addition to seeking to strike Kroger's Sixth and Albertsons' Ninth affirmative defenses, described above, Complaint Counsel also ask the Commission to strike the denials of liability involving the divestiture in Kroger's Third and Albertsons' Sixth, Seventh, and Eighth affirmative defenses (which state that the claims are barred "particularly when accounting for the proposed divestitures"), as well as paragraphs 10 and 86–98 of the Respondents' Answers (which respond to the Complaint's allegations that the divestiture is inadequate).

148 (S.D. Miss. 2018); *see also* 2 James Wm. Moore et al., Moore's Federal Practice § 12.37[1] (3d ed. 2020) (motion disfavored). A motion to strike, however, may be appropriate when a defense is legally insufficient[2] or would fail on any set of facts that Respondents could realistically prove. *See Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991). Moreover, the Commission will grant a motion to strike defenses or portions of an answer 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, by requiring lengthy discovery, or by imposing an undue burden on Complaint Counsel. Order on Compl. Counsel's Mot. to Strike, *In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 WL 33944047, at *1 (F.T.C. Sept. 14, 2000) (ALJ).

Respondents argue that the proposed divestiture will affect competitive conditions and is therefore material. Complaint Counsel do not appear to dispute that, if the divestiture were to prevent a substantial lessening of competition, it would be material to the claims under the Clayton Act and the FTC Act. *See FTC v. Kroger Co.* No. 3:24-cv-00347-AN, slip op. at p. 3 (D. Or. Aug. 25, 2024) (denying motion to exclude evidence or argument regarding defendants' proposed divestiture, which is "central to the action"). Nor have Complaint Counsel shown that the defense is facially insufficient or would fail on any set of facts that Respondents could realistically prove.

Rather than invoking the more traditional bases for striking a defense, Complaint Counsel rely on the sword-and-shield doctrine, sometimes called implied waiver. At its most general level, the doctrine holds that a party's factual assertions can, in some circumstances, result in involuntary forfeiture of privilege for matters pertinent to the facts asserted, out of fairness to the opposing party who seeks to rebut those assertions. *John Doe Co. v. United States,* 350 F.3d 299, 302 (2d Cir. 2003) (discussing the doctrine under its alternate names). Courts have not always been consistent in their description of the circumstances that trigger the doctrine. *Compare In re Cnty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008) ("The key to a finding of implied waiver . . . is some showing by the party arguing for a waiver that the opposing party *relies* on the privileged communication as a claim or defense or as an element of a claim or defense.") (emphasis original), *with Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (requiring that "the asserting party put the protected information at issue by making it relevant to the case"). Besides forfeiture of privilege, the doctrine may also result in the preclusion of a party's evidence or argument, *see Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001), or in striking of a defense, such as where a party withholds the evidence on which the defense can succeed, *see SEC v. Honig*, No. 18 CIV. 8175 (ER), 2021 WL 5630804, at *9 (S.D.N.Y. Nov. 30, 2021).

[2] *See, e.g.*, *GEOMC Co. v. Calmare Therapeutics, Inc.*, 918 F.3d 92, 98 (2d Cir. 2019); Op. and Order of the Commission, *Otto Bock HealthCare N. Am., Inc.*, 165 F.T.C. 1463, 1464 (Apr. 18, 2018) (quoting Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense . . . .")); 2 James Wm. Moore et al., Moore's Federal Practice § 12.37[4] (3d ed. 2023).

Here, Respondents could still rely on other, non-privileged evidence to attempt to establish the defense; indeed, they have emphasized that they are not relying on the disputed material for any part of their case. Opposition at 7–8. On the record before us, we find that Complaint Counsel have failed to demonstrate that Respondents placed privileged material in issue simply by asserting the divestiture defense. Should Respondents transgress their commitment not to use the privileged material, or otherwise call privileged information into issue in an unfair manner, Complaint Counsel may seek appropriate relief from the ALJ as discussed below. We therefore decline to strike Respondents' divestiture-related affirmative defenses.

As an alternative to striking the defenses, Complaint Counsel ask us either to preclude Respondents from proffering evidence or arguments about their negotiations or subjective assessments of the amended divestiture package or, if Respondents withdraw their privilege claims, to reopen discovery. *See* Motion to Strike at 9. Recognizing the "gravity" of their request to strike Respondents' affirmative defenses, Complaint Counsel state that, where a party raises a claim that in fairness requires disclosure of the protected communication, the privilege may be implicitly waived, and the court may either preclude the party's proffered evidence or order it to produce the withheld information. *Id.* at 9 (quoting *Columbia Pictures Television*, 259 F.3d at 1196 and citing *Honig*, 2021 WL 5630804, at *8–10).

We are not in a position to grant the preclusion or waiver remedies that Complaint Counsel seek. Complaint Counsel ask us to rule on evidentiary issues in the abstract, without considering the specific proffered evidence or evaluating it within the give-and-take of the parties' arguments at the administrative hearing. Ultimately, these rulings are appropriately made based on specific evidence in a specific context. *See In re Grand Jury Proc.*, 219 F.3d 175, 183 (2d Cir. 2000); *Honig*, 2021 WL 5630804, at *10. Accordingly, any such ruling should be made by the ALJ in the first instance. *See* 16 C.F.R. § 3.22(a). For example, if Respondents place withheld information at issue by relying upon it (despite their commitment not to), or by pointing to the conduct of the parties or C&S during divestiture negotiations to argue for the proposed divestiture's viability,[3] Complaint Counsel can seek relief by motion to the ALJ or by objection at trial when that evidence is offered. *See, e.g.*, *Kroger*, slip op. at p. 3 (permitting plaintiffs to raise objections during and after the evidentiary hearing if they believe the divestiture was not properly disclosed or if plaintiffs believe they cannot adequately dispute an assertion without access to the privileged material). The ALJ can rule on motions to preclude arguments, witnesses, or testimony, requests for waivers of privilege and for associated additional discovery, and the like.

[3] This enumeration of potentially unfair uses of privilege is not intended to be exhaustive.

Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's Motion to Strike Kroger's Sixth and Albertsons' Ninth Affirmative Defenses is **DENIED**, without prejudice to Complaint Counsel's ability to seek relief from the Administrative Law Judge for any unfairness that may result from Respondents' relying upon, or placing at issue, privileged information related to the divestiture negotiations.

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: September 9, 2024