

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

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

Pursuant to 16 C.F.R. § 3.38(a), Complaint Counsel move for an order compelling Respondents Albertsons Companies, Inc. (“Albertsons”) and The Kroger Company (“Kroger”), proposed divestiture buyer C&S Wholesale Grocers LLC (“C&S”), and C&S chairman Richard Cohen to produce documents relating to negotiation of the April 22, 2024 divestiture asset purchase agreement and all exhibits, schedules and attachments to it, including the transition service agreement (the “New Divestiture Agreements”). Specifically, Complaint Counsel seek (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 New Divestiture Agreements 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, the “Negotiation Documents”). Complaint Counsel are not seeking Respondents’ and C&S’s discussions about how the divestiture furthers their litigation strategy.

PUBLIC

Respondents claim that the New Divestiture Agreements remedy the anticompetitive effects of their proposed merger. But Respondents—and C&S and Cohen at Respondents’ direction—are withholding evidence of their negotiation of the New Divestiture Agreements on the grounds that the “common interest privilege” and attorney work product doctrine shield those documents from discovery. Respondents told another court considering a challenge to their proposed merger that the New Divestiture Agreements resulted from arms-length negotiation between competitors. Such arms-length negotiations do not fall within the scope of the common interest doctrine, and the attorney work product doctrine does not independently justify shielding them from disclosure. Therefore, Complaint Counsel respectfully moves the Court to order production of such documents and evidence.

BACKGROUND

I. RESPONDENTS’ PROPOSED TRANSACTION AND PROPOSED DIVESTITURES

On October 13, 2022, Kroger agreed to acquire Albertsons for approximately \$24.6 billion, the largest supermarket merger in U.S. history. Respondents’ combined footprint encompasses approximately 5,000 stores and 700,000 employees across 48 states. As alleged in the Complaint, in many hundreds of local supermarket and labor markets, the proposed acquisition would increase Kroger’s market shares to presumptively unlawful levels. Complaint ¶ 3.

Recognizing these problems with their proposed acquisition, on September 8, 2023, Kroger and Albertsons executed an asset purchase agreement and transition services agreement with C&S pursuant to which C&S was to acquire 413 stores and other assets, with the possibility for 237 more stores to be added. { [REDACTED]

[REDACTED] }

The proposed divestiture is a central element of Respondents' defense. Respondents claim that the divestiture pursuant to the September 2023 agreements, "and the possibility of additional divestments . . . will . . . address any competitive concerns raised by the Merger." Albertsons Answer at 3. Respondents also assert that "C&S will receive the assets necessary to ensure its success, including physical stores, distribution centers to supply the divested stores, store and management personnel, banner rights, popular private label brands and critical transition services." *Id.*; *see also* Kroger Answer at 3.

On April 22, 2024, Respondents and C&S announced the execution of the New Divestiture Agreements (attached as Ex. A) and produced them to Complaint Counsel. The New Divestiture Agreements include a new list of 579 stores, a dairy plant, and a different set of distribution centers; and contain licenses to C&S for store banners and temporary access to certain private label products. Ex. A at 34, Exs. I & J, Schedule 2.1; *see also* Ex. B (Apr. 22, 2024, Kroger press release). Some issues remain subject to further negotiation. *See, e.g., id.* at CS-0000461 (Transition Services Agreement § 2.10) (§ [REDACTED] [REDACTED]). On the same day, Respondents and C&S argued in Colorado state court that, with respect to the New Divestiture Agreements, Respondents and C&S "nonetheless remain competitors with their own interests and expectations." Ex. C (Defs.' Opp. to State's Mot. in Limine, *Colorado v. The Kroger Co.*, Case No. 2024CV30459 (Colo. Dist. Ct. Apr. 22, 2024)).

II. RESPONDENTS, C&S, AND COHEN REFUSE TO PRODUCE EVIDENCE OF THE NEGOTIATION OF THE NEW DIVESTITURE AGREEMENTS

Complaint Counsel served requests for production on Respondents and subpoenas on C&S and Cohen seeking the Negotiation Documents. *See* Ex. D (RFPs to Kroger) Requests 1,

PUBLIC

19, 29, 30; Ex. E (RFPs to Albertsons) Requests 1, 3, 12; Ex. F (subpoena to C&S) Requests 12, 15, 20, 24; Ex. G (subpoena to Cohen) Requests 1, 2, 4, 7.

Counsel for C&S and Cohen informed Complaint Counsel that they would not be producing documents { [REDACTED] } because { [REDACTED] } Ex. H at 1-2 (April 11, 2024 letter from S. Holley to K. Drummonds). { [REDACTED] } *Id.*

The letter neither identified specific document requests to which the “common interest” exception to waiver of privilege applied nor stated whether the same limitations would apply to Cohen’s documents. Notably, C&S confirmed { [REDACTED] } { [REDACTED] } *Id.* at 1-2.

Complaint Counsel then met and conferred with Respondents’ counsel about the asserted “common interest.” Respondents’ counsel refused to specify the contours of their claim other than to say that communications between non-lawyer businesspeople negotiating the content of the divestiture package would be withheld. Respondents also contended that the asserted common interest attached upon the execution of the September 2023 divestiture agreements. On April 26, 2024, Complaint Counsel sent a list of follow-up questions to Respondents and C&S to understand whether privilege was being claimed over particular categories of documents. Ex. I (April 26, 2024 email from L. Hall to S. Pfaffenroth).

PUBLIC

On May 2, 2024, Respondents served their Responses and Objections to Complaint Counsel's First Requests for Production. Kroger and Albertsons invoked { [REDACTED] } in response to requests seeking Negotiation Documents. Ex. J (Kroger R&Os) Requests 1, 19, 29, 30; *see also* Ex. K (Albertsons R&Os) Requests 1, 3, 12. On May 3, 2024, Complaint Counsel again raised, *inter alia*, Respondents' common interest assertions. Ex. L (May 3, 2024 email from L. Hall to M. Cardenas).

On May 6, at the start of a scheduled meet-and-confer, Kroger sent a letter to Complaint Counsel (attached as Ex. M) declining to answer the questions posed on April 26, 2024, but suggesting that substantially all divestiture-related documents are attorney work product because, “[b]ut 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.” Ex. M at 2. Kroger proposes to delay further engagement on the issue until after its production of documents and a privilege log, but Kroger has not yet produced a single document in this case, so any privilege log is likely weeks away. The letter cites the production of documents in the pre-complaint investigation (*id.* at 3), but those relate to the now-superseded September 2023 agreements. During the meet-and-confer, Kroger likewise refused to answer questions about the scope of their privilege claims. As fact discovery closes June 11, Complaint Counsel has to bring the issue to the Court now to be able to obtain the Negotiation Documents and question witnesses on them.

LEGAL STANDARD

“A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery.” 16 CFR § 3.38(a). “Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . an answer to any requests for . . . documents . . . be served or disclosure otherwise be made.” *Id.* “Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Daniel Chapter One*, 2009 WL 569694, at *2 (F.T.C. Jan. 9, 2009). The party asserting a protection against production bears a heavy burden because privileges are neither “lightly created nor expansively construed.” *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003).

ARGUMENT

Respondents’ Answers make clear that whether the divestiture to C&S can restore competition lost due to the proposed merger will be a key issue in this case. Respondents’ and C&S’s internal evaluations and arms-length negotiations of the stores and assets being divested contained in the Negotiation Documents constitute important evidence for evaluating the merits of the divestiture. Despite this, Respondents and C&S appear to be withholding from discovery substantially all evidence of their negotiations. Respondents’ withholding of these materials will unfairly prejudice both Complaint Counsel’s ability to test and the Court’s ability to assess the sufficiency of the proposed divestiture. Respondents’ assertions of “common interest privilege” and attorney work product fail to justify withholding this evidence from discovery.

I. RESPONDENTS’ AND C&S’S ARMS-LENGTH NEGOTIATIONS OF THE NEW DIVESTITURE AGREEMENTS ARE NOT PRIVILEGED.

Respondents rely on the common interest doctrine, but it does not shield arms-length negotiations from discovery. The common interest doctrine is not itself a privilege, but a narrow

exception to the rule that disclosing information to a third party constitutes waiver of a privilege. *Rodriguez v. Seabreeze Jetlev LLC*, 620 F. Supp. 3d 1009, 1019 (N.D. Cal. 2022). Accordingly, the party withholding materials must first show that the underlying documents are privileged. *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007).

A. The Common Interest Doctrine Does Not Apply

Respondents' arms-length negotiations with C&S and Cohen are not privileged in the first instance. Even if they were, the common interest doctrine does not apply because they have no common interest with respect to those negotiations.

First, the attorney-client privilege does not apply to the Respondents' arms-length negotiations with C&S because that privilege attaches only to communications made for the purpose of securing legal advice. *Chabot v. Walgreens Boots Alliance, Inc.*, No. 1:18-CV-2118, 2020 WL 3410638, at *3 (M.D. Pa. June 11, 2020). For example, Respondents' and C&S's communications proposing or rejecting terms in the New Divestiture Agreements were not made to obtain legal advice from each other. "Any adversarial communications with . . . third parties relating to negotiations between themselves, or any subject other than FTC approval of the merger, IS NOT protected." *Id.* (emphasis in original).

Second, any attorney-client privilege was waived when Respondents and C&S communicated with each other, because the common interest does not apply to arms-length negotiations. Parties negotiating a transaction do not share a common interest prior to executing a binding agreement. *Nidec*, 249 F.R.D. at 579. The mere desire to "remov[e] barriers to business deals" is not a common legal interest that justifies restriction of disclosure of relevant evidence. *Id.* (joining a number of courts in rejecting the approach in *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987), "to the extent it suggests that the common interest

PUBLIC

privilege extends generally to disclosures made in connection with the prospective purchase of a business”). { [REDACTED] }, but “the vast majority of the courts that have been asked to follow *Hewlett-Packard* have declined to do so.” *10x Genomics, Inc. v. Celsee, Inc.*, 505 F. Supp. 3d 334, 339 (D. Del. 2020) (collecting cases).

Third, an asserted “common interest” in winning FTC clearance of merger does not suffice to withhold the Negotiation Documents from discovery. *Chabot*, 2020 WL 3410638, at *10, is on point: “Any adversarial communications with these third parties relating to negotiations between themselves, or any subject other than FTC approval of the merger, IS NOT protected.”

Fourth, Respondents and C&S emphasized to another court that in negotiating the New Divestiture Agreements, “they nonetheless remain[ed] competitors with their own interests and expectations.” Ex. C. Respondents and C&S cannot walk away from that advocacy and argue now before this Court that they actually share a common interest sufficient to shield their negotiations from discovery.

Finally, even if the common interest doctrine could apply here, it is limited to communications to or from attorneys on matters of litigation strategy. *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364-65 (3d Cir. 2007). Respondents’ invocation of “common interest” is unavailing with respect both to communications between businesspeople and to communications between attorneys about a business transaction.

B. Attorney Work Product Does Not Apply because the Negotiation Documents Were Created for Business Purposes

Respondents also claim attorney work product protection over the Negotiation Documents. Their claim fails for several reasons. First, their claim of work product protection, which applies to documents created for the purpose of litigation, contradicts their contention in

the Colorado court that the divestiture is the product of business negotiations, not legal maneuvering. Second, attorney work product protection is intended to “establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary’s preparation,” *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995).

Disclosing the Negotiation Documents, consisting of the proposals and draft agreements they exchanged and each party’s assessment of the business impact of acquiring or divesting a particular asset, does not reveal a litigation strategy.

II. EVEN IF WORK PRODUCT PROTECTION APPLIED, THE PROTECTION FROM DISCLOSURE IS OVERCOME HERE.

To the extent that any attorney work product attached to Negotiation Documents, the Court should order production of those documents pursuant to 16 CFR § 3.31(c)(5). Complaint Counsel has “substantial need of the materials” to test Respondents’ claim that “C&S will receive the assets necessary to ensure its success,” Albertsons Answer at 3, and no way to obtain “the substantial equivalent of the materials by other means.” Respondents have put the divestiture to C&S squarely at issue before this Court. They claim the particular components of the divestiture package are “all the assets C&S will need to compete” with the merged entity. Kroger Answer at 3. Discovery into the circumstances that produced the New Divestiture Agreements is therefore “relevant . . . to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). Comparing what C&S believed it needed, as shown in its internal analyses and proposals to Respondents, to what it actually ended up with and seeing Respondents’ own evaluation of those assets, will help the Court assess the credibility of Respondents’ claims about C&S’s post-merger operations.

Respondents, C&S, and Cohen are the only source for the Negotiation Documents.

CONCLUSION

Complaint Counsel respectfully request that Respondents, C&S, and Cohen be ordered to produce the Negotiation Documents within five business days of the Court's order.

Dated: May 13, 2024

Respectfully submitted,

By: s/ Laura R. Hall

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

Counsel Supporting the Complaint

Ex. A

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. B

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

NEWS PROVIDED BY

The Kroger Co. →

Apr 22, 2024, 08:30 ET

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

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

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

"We have reached an agreement with C&S for an updated divestiture package that maintains Kroger's commitments to customers, associates and communities, addresses concerns raised by regulators, and will further ensure that C&S can successfully operate the divested stores as

PUBLIC

they are operated today," said Rodney McMullen, Kroger's Chairman and CEO. "Importantly, the updated divestiture plan continues to ensure no stores will close as a result of the merger and that all frontline associates will remain employed, all existing collective bargaining agreements will continue, and associates will continue to receive industry-leading health care and pension benefits alongside bargained-for wages. Our proposed merger with Albertsons will bring lower prices and more choices to more customers and secure the long-term future of unionized grocery jobs."

The proposed merger will create meaningful and measurable benefits for America's consumers, Kroger and Albertsons Cos. associates, and communities that both Kroger and Albertsons Cos. serve by expanding access to fresh, affordable food and establishing a more compelling alternative to large, non-union retailers. This updated divestiture plan marks another next step toward the completion of the merger by adding a well-capitalized competitor into new geographies.

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

Transaction Details

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

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

PUBLIC

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

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

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

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

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

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

PUBLIC

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

The updated plan will:

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

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

Merger creates meaningful benefits for customers, associates and communities

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

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

This commitment builds on Kroger's long track record of reducing prices every year, with \$5 billion invested to lower prices since 2003. Customers will also have access to more favorite items from their own communities, as Kroger committed to increasing the number of local

PUBLIC

products in its stores by 10 percent post-close. This merger creates more opportunities for families to access the fresh, affordable foods they love.

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

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

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

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

About Kroger

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

This press release contains certain statements that constitute "forward-looking statements" within the meaning of federal securities laws, including statements regarding the effects of the proposed transaction and updated divestiture plan. These statements are based on the assumptions and beliefs of Kroger and Albertsons management in light of the information



PUBLIC

currently available to them. Such statements are indicated by words or phrases such as "create," "committed," "expand," "establish," "ensure," "enhance," "extend," "completion," "continue," and "will." Various uncertainties and other factors could cause actual results to differ materially from those contained in the forward-looking statements. These include the specific risk factors identified in "Risk Factors" in each of Kroger's and Albertsons' annual report on Form 10-K for the last fiscal year and any subsequent filings, as well as the following: the expected timing and likelihood of completion of the proposed transaction and updated divestiture plan, including the timing, receipt and terms and conditions of any required governmental and regulatory clearance of the proposed transaction and updated divestiture plan and/or resolution of pending litigation challenging the merger; the impact of the proposed updated divestiture plan; the occurrence of any event, change or other circumstances that could give rise to the termination of the updated divestiture agreement; the outcome of any legal proceedings that may be instituted against the parties and others following announcement of the merger agreement and proposed transaction or updated divestiture plan; the inability to consummate the proposed transaction or updated divestiture plan due to the failure to satisfy other conditions to complete the proposed transaction or updated divestiture plan; risks that the proposed transaction disrupts current plans and operations of Kroger and Albertsons Cos.; the ability to identify and recognize the anticipated benefits of the updated divestiture plan, including but not limited to the ability to enhance competition in overlap geographies and to address regulator concerns, create meaningful and measurable benefits for America's consumers, Kroger and Albertsons associates, and communities that both Kroger and Albertsons serve, expand access to fresh, affordable food and establish a more compelling alternative to large, non-union retailers, and commitment that all frontline associates will remain employed, all existing collective bargaining agreements will continue, and associates will continue to receive industry-leading health care and pension benefits alongside bargained-for wages; the ability of the combined company to achieve its commitment that no stores, distribution centers or manufacturing facilities will close as a result of the proposed transaction, to invest \$500 million to begin lowering prices post-close, and an additional \$1.3 billion to improve Albertsons Cos.' stores; the amount of the costs, fees, expenses and charges related to the proposed transaction or updated divestiture plan; and the ability of Kroger and Albertsons Cos. to successfully integrate their businesses and related operations; the ability of Kroger to maintain an investment grade credit rating; risks related to the potential impact of general economic, political and market factors on the companies or the proposed

PUBLIC

transaction or updated divestiture plan. The ability of Kroger and Albertsons Cos. to achieve the goals for the proposed transaction may also be affected by their ability to manage the factors identified above.

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

SOURCE The Kroger Co.

Ex. C

PUBLIC

DISTRICT COURT, CITY AND COUNTY OF DENVER,
 COLORADO
 1437 Bannock Street
 Denver, Colorado 80202

STATE OF COLORADO
ex rel. PHILIP J. WEISER, Attorney General,

Plaintiff,

v.

THE KROGER CO.; ALBERTSONS COMPANIES, INC.;
 and C&S WHOLESALE GROCERS, LLC,

Defendants.

Randall H. Miller
 ARNOLD & PORTER KAYE SCHOLER LLP
 1144 Fifteenth Street, Suite 3100,
 Denver, Colorado 80202
 Phone: (303) 863-2363
 Fax: (303) 863-2301
 randy.miller@arnoldporter.com
 Atty. Reg. No. 33694

Matthew M. Wolf (*admitted pro hac vice*)
 Sonia K. Pfaffenroth (*admitted pro hac vice*)
 Jason Ewart (*admitted pro hac vice*)
 Kolya D. Glick (*admitted pro hac vice*)
 Joshua M. Davis (*admitted pro hac vice*)
 ARNOLD & PORTER KAYE SCHOLER LLP
 601 Massachusetts Avenue NW
 Washington, DC 20001
 Phone: (202) 942-5462
 Fax: (202) 942-5999
 matthew.wolf@arnoldporter.com
 sonia.pfaffenroth@arnoldporter.com
 jason.ewart@arnoldporter.com
 kolya.glick@arnoldporter.com
 joshua.davis@arnoldporter.com

John Holler (*admitted pro hac vice*)
 ARNOLD & PORTER KAYE SCHOLER LLP
 250 West 55th Street
 New York, NY 10019

▲ COURT USE ONLY ▲

Case Number: 2024CV30459

Div.: 414

Phone: (212) 836-7739
Fax: (212) 836-8689
john.holler@arnoldporter.com

Mark A. Perry (admitted *pro hac vice*)
Luke Sullivan (admitted *pro hac vice*)
Jason Kleinwaks (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW, Suite 600
Washington, D.C. 20036
Phone: (202) 682-7511
Fax: (202) 857-0940
Mark.Perry@weil.com
Luke.Sullivan@weil.com
Jason.Kleinwaks@weil.com

Luna Ngan Barrington (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
767 5th Avenue,
New York, New York 10153
Phone: (212) 310-8421
luna.barrington@weil.com

Bambo Obaro (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway,
Redwood Shores, California 94065
Phone: (650) 802-3083
bambo.obaro@weil.com

Sarah Sternlieb (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
700 Louisiana St, Suite 3700
Houston, Texas 77002
Phone: (212) 310-8785
sarah.sternlieb@weil.com

Counsel for Defendant The Kroger Co.

Christopher H. Toll, #15388
Maureen R. Witt, #10665
Alexander D. White, #48767
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
Phone: (303) 295-8000

Email: ctoll@hollandhart.com
mwitt@hollandhart.com
adwhite@hollandhart.com

Enu Mainigi (admitted *pro hac vice*)
Jonathan Pitt (*pro hac vice* pending)
A. Joshua Podoll (admitted *pro hac vice*)
WILLIAMS & CONNOLLY LLP
680 Maine Ave., S.W.
Washington, D.C. 20024
Phone: (202) 434-5000
Email: emainigi@wc.com
jpitt@wc.com
jpodoll@wc.com

Edward D. Hassi (admitted *pro hac vice*)
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 383-8000
Email: thassi@debevoise.com

Michael Schaper (admitted *pro hac vice*)
Shannon Rose Selden (admitted *pro hac vice*)
J. Robert Abraham (admitted *pro hac vice*)
Natascha Born (admitted *pro hac vice*)
Marieugenia Cardenas (admitted *pro hac vice*)
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001
Phone: (212) 909-6000
Email: mschaper@debevoise.com
srselden@debevoise.com
jrabraham@debevoise.com
nborn@debevoise.com
mcardenas@debevoise.com

Michael G. Cowie (admitted *pro hac vice*)
James A. Fishkin (admitted *pro hac vice*)
DECHERT LLP
1900 K Street N.W.
Washington, DC 20006
Phone: (202) 261-3339
Email: mike.cowie@dechert.com
james.fishkin@dechert.com

Counsel for Defendant Albertsons Companies, Inc.

Kathryn A. Reilly, #37331
Jennifer J. Oxley, #51587
WHEELER TRIGG O'DONNELL LLP
370 17th Street, Suite 4500
Denver, CO 80202
Phone: (303) 244-1800
Email: reilly@wtotrial.com
oxley@wtotrial.com

Steven L. Holley (admitted *pro hac vice*)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
Phone: (212) 558-4000
Email: holleys@sullcrom.com

Counsel for Defendant C&S Wholesale Grocers, LLC

**DEFENDANTS' OPPOSITION TO THE STATE'S MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF DEFENDANTS' DIVESTITURE REMEDY FROM HEARING ON
PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND..... 4

 A. Divestiture Is An Integral Component Of The Transaction..... 4

 B. Continuing Negotiations with C&S Regarding Divestiture..... 5

 C. Updated C&S Divestiture Package..... 6

ARGUMENT 7

I. A CONTRACTED-FOR DIVESTITURE IS RELEVANT TO ANTITRUST LIABILITY 7

II. THE STATE’S PROCEDURAL ARGUMENTS ARE PREMATURE AND INAPPOSITE 12

III. THIS COURT SHOULD DENY THE STATE’S ALTERNATIVE REQUESTS FOR PROCEDURAL HANDICAPS ON THE DEFENSE PRESENTATION 16

CONCLUSION 18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>California v. Am. Stores Co.</i> , 495 U.S. 271 (1990).....	10
<i>Cline v. Frink Dairy Co.</i> , 274 U.S. 445 (1927).....	11
<i>FTC v. Microsoft Corp.</i> , No. 23-CV-02880, 2023 WL 4443412 (N.D. Cal. July 10, 2023).....	10
<i>FTC v. Arch Coal, Inc.</i> , No. 04-CV-0534, 2004 WL 7389952 (D.D.C. July 7, 2004)	1, 2, 8, 17
<i>FTC v. Ardagh</i> , No. 13-CV-1021 (D.D.C. Sept. 24, 2013)	14
<i>FTC v. Kroger Co.</i> , No. 24-CV-347 (D. Or. Feb. 26, 2024).....	6
<i>FTC v. Libbey</i> , 211 F. Supp. 2d 34 (D.D.C. 2002).....	8
<i>Illumina, Inc. v. FTC</i> , 88 F.4th 1036 (5th Cir. 2023)	<i>passim</i>
<i>People v. N. Ave. Furniture & Appliance, Inc.</i> , 645 P.2d 1291 (Colo. 1982).....	1, 11
<i>State v. Shaw</i> , 847 S.W.2d 768 (Mo. 1993)	11
<i>Tesmer v. Colo. High Sch. Activities Ass’n</i> , 140 P.3d 249 (Colo. App. 2006).....	3, 12
<i>United States v. AT&T Inc.</i> , 310 F. Supp. 3d 161 (D.D.C. 2018).....	1, 8
<i>United States v. Baker Hughes Inc.</i> , 908 F.2d 981 (D.C. Cir. 1990).....	17, 18
<i>United States v. E.I. du Pont de Nemours & Co.</i> , 366 U.S. 316 (1961).....	10

United States v. UnitedHealth Grp. Inc.,
630 F. Supp. 3d 118 (D.D.C. 2022).....1, 8, 9, 17

W. Distrib. Co. v. Diodosio,
841 P.2d 1053 (Colo. 1992).....3

Whalen v. Kroger,
No. 23-CV-459 (N.D. Cal. Dec. 20, 2023).....5, 12

Statutes

C.R.S. § 6-4-1071,12

C.R.S. § 6-4-11910

Other Authorities

Dechert LLP, *DAMITT Q3 2023: Merger Control Is a Marathon, Not a Sprint*
(Oct. 30, 2023),13

Kroger Press Release (Sept. 8, 2023), <https://bitly.ws/WuvK>.....4

Matt Reilly *et al.*, *Merger Remedy Divestitures: the Agencies Zig and the Courts*
Zag, 37 *Antitrust* 1 (Summer 2023).....15

Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 *Fla. St.*
U. L. Rev. 709 (2018).....11

Remedy, *Black’s Law Dictionary* (11th ed. 2019).....10

Steven C. Salop & Jennifer E. Sturiale, *Fixing “Litigating the Fix”*, 85 *Antitrust*
Law Journal 3 (2024).....16

Defendants The Kroger Co. (“Kroger”), Albertsons Companies, Inc. (“Albertsons”), and C&S Wholesale Grocers (“C&S”) respectfully submit this Opposition to the State of Colorado’s (“the State”) Motion in Limine to Exclude Evidence of Defendants’ Divestiture Remedy from Hearing on Preliminary Injunction (“Mot.”).

INTRODUCTION

In this merger challenge under the Colorado Antitrust Act, the State, as the plaintiff, bears the burden of *proving* that Kroger’s proposed merger with Albertsons (the “Transaction”) “may substantially lessen competition” in Colorado. C.R.S. § 6-4-107.¹ Because the Transaction has not yet closed, the Court must “mak[e] a prediction about the future,’ and that prediction must be informed by ‘record evidence’ and a ‘fact-specific showing’ as to the proposed merger’s likely effect on competition.” *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 141 (D.D.C. 2022) (quoting *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 192 (D.D.C. 2018)). Here, the Transaction consists of two parts: (1) Kroger’s acquisition of Albertsons and (2) the concurrent divestiture of hundreds of stores and other assets to a well-established grocery operator, C&S. One will not happen without the other. To predict the future impact of the Transaction, the Court must consider *all* components of the Transaction.

The State, however, asks this Court to ignore the divestiture to C&S and the commercial reality of the Transaction and instead evaluate the future impact of a fictitious transaction without a divestiture. But as courts addressing identical motions have repeatedly held, “excluding evidence and argument regarding the [divestiture] would be tantamount to turning a blind eye to the elephant in the room.” *FTC v. Arch Coal, Inc.*, No. 04-CV-0534, 2004 WL 7389952, at *3 (D.D.C. July 7,

¹ The standards under the Colorado Antitrust Act and the federal Clayton Act are materially the same, and thus federal decisions are persuasive in interpreting the Colorado Antitrust Act. *People v. N. Ave. Furniture & Appliance, Inc.*, 645 P.2d 1291, 1295–96 (Colo. 1982).

2004); *see also Illumina, Inc. v. FTC*, 88 F.4th 1036, 1057 (5th Cir. 2023). Indeed, the State concedes it is asking the Court to “depart from” the uniform body of federal law, Mot. 11, which “requires the Court to review the entire transaction in question,” *Arch Coal*, 2004 WL 7389952, at *3 (emphasis in original). Although the State insists that the existing federal caselaw is “misguided,” Mot. 11, law and logic refute the State’s self-serving position that divestiture evidence is irrelevant. This Court should reject it and deny the Motion.

A divestiture has been a part of the Transaction since the start: Kroger and Albertsons’ Merger Agreement contemplates the divestiture of hundreds of stores, and Kroger and Albertsons executed a divestiture agreement with C&S pursuant to that Merger Agreement. The initial divestiture agreement provided for divestment of nearly half of Albertsons’ store locations in Colorado. As of March 25, 2024—and as disclosed to the Court—the parties had reached a “handshake agreement” to amend the divestiture agreement in response to feedback from regulators, including the Colorado Attorney General. And since the State filed its motion—making *ad hominem* accusations that Defendants are engaged in litigation “gamesmanship,” Mot. 2—the parties have executed (and disclosed to the State) a formal amendment to the divestiture agreement, which now provides for the divestiture of 91 out of the 105 Albertsons stores in Colorado as well as two distribution facilities in Colorado (among other assets). *See Ex. A* (Kroger 8-K (Apr. 22, 2024)).

Unsurprisingly, given the importance of the divestiture to properly evaluating the competitive effects of the Transaction, the State’s Complaint and preliminary injunction briefing focus heavily on the divestiture. Compl. ¶¶ 173–85; Pl.’s Mot. for Prelim. Inj. at 49–64. But despite its own pleadings and in tacit recognition that the divestiture addresses any Colorado-specific issues, the State asks that this Court exclude divestiture evidence at the

preliminary injunction hearing. The State’s request would allow the State to shirk its burden of showing a “reasonable probability” of success on the merits that the *actual transaction at issue* may substantially lessen competition in Colorado. *Tesmer v. Colo. High Sch. Activities Ass’n*, 140 P.3d 249, 252 (Colo. App. 2006).

Recognizing the obvious flaws in its position, the State falls back on procedural arguments. It contends it will not have time to analyze the C&S divestiture prior to the preliminary injunction hearing scheduled *four months from now*, even though Defendants have already provided significant discovery on this aspect of the Transaction—with many details of the divestiture remaining unchanged—and even though merger litigation is, by necessity, expedited. The State also makes a vague request for “limits and guardrails” on the presentation of divestiture evidence, asking the Court to relieve the State of its burden to show that the Transaction may harm competition. Mot. 16. Given the executed amendment to the divestiture agreement and the Court’s order of April 22, the State’s request for a disclosure deadline is now moot. And the State’s request that the divestiture be considered part of Defendants’ “rebuttal burden,” rather than the State’s initial burden to establish a prima facie case of competitive harm, Mot. 17, is a backdoor attempt to relieve the State of its burden of proof by mischaracterizing the actual transaction at issue. In antitrust law, as in other areas of the law, “the burden of proof or persuasion on the essential elements of the claim remains with the plaintiff.” *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1057–58 (Colo. 1992). This Court should reject the State’s efforts to obtain an injunction through rhetoric and counterfactuals instead of carrying its burden to *prove* likely harm to competition through *evidence* based on commercial reality.

BACKGROUND

A. Divestiture Is An Integral Component Of The Transaction

A divestiture of stores is—and always has been—a key component of the Transaction. From the outset, Kroger and Albertsons contemplated that Kroger would divest hundreds of stores and related assets to a third-party buyer in connection with the proposed merger. Indeed, the Merger Agreement, signed on October 13, 2022 and made public the following day, explicitly provided that the merger would be accompanied by a divestiture of up to 650 stores and additional supporting assets. Pl.’s Mot. for Prelim. Inj. at 3, 14.

Immediately after announcing the merger, Kroger and Albertsons began a dialogue with the Federal Trade Commission (“FTC”) and a coordinated group of state regulators (which at the time included Colorado) regarding the competitive effects of the proposed merger and ways to resolve any potential competitive concerns. In this case, as in prior retail grocery mergers, a proposed divestiture was the targeted mechanism to address these potential concerns. Many consumers shop for groceries near where they live, Compl. ¶ 94, and in localities served by both Kroger and Albertsons stores, a well-designed divestiture will resolve any conceivable competitive concerns about the Transaction.

On September 8, 2023, Kroger and Albertsons announced they had entered into an agreement with C&S to divest 413 stores, eight distribution centers, two regional offices, various grocery store banners, a license to the Albertsons banner in four states, and certain private label brands (“Initial C&S Divestiture”). See Compl. ¶¶ 173–85; Kroger Press Release (Sept. 8, 2023), <https://bitly.ws/WuvK>. The agreement also allowed Kroger to increase the size of the divestiture package by up to 237 additional stores. Kroger Press Release (Sept. 8, 2023), <https://bitly.ws/WuvK>. After announcing the divestiture agreement, Kroger and Albertsons continued discussions with the FTC and state attorneys general (including the Colorado Attorney

General) about the scope of the divestiture, which included a revised proposal that would have resulted in the divestment of additional Albertsons stores in Colorado. During those continued discussions, a private action seeking to enjoin the merger was dismissed for impermissibly failing to “account for the fact that up to 650 stores may be divested before the merger” and “continu[ing] to insist (erroneously) that the divestiture is simply not relevant.” Order Granting Mot. to Dismiss First Am. Compl. at 3, *Whalen v. Kroger*, No. 23-CV-459, ECF No. 120 (N.D. Cal. Dec. 20, 2023).

On February 14, 2024, the State broke from the FTC and other states and filed this go-it-alone Complaint. By the time it did so, the State had collected extensive discovery from Defendants, including a “stack of hard drives in [counsel’s] office with terabytes of data that were produced” long before discovery even began in this lawsuit. Status Conf. Tr. at 34 (Mar. 25, 2024) (A. Biller). That discovery included information about C&S’s experience in the grocery business, its plans to operate the divested stores, and the leadership team put in place to do so. The State knew then that Defendants were negotiating amendments to their divestiture package to address regulators’ concerns, including the State’s Colorado-specific concerns, yet it chose to file suit anyway.

B. Continuing Negotiations with C&S Regarding Divestiture

After reviewing the Initial C&S Divestiture, the FTC, the State, and others continued to insist that the Transaction would be anticompetitive, notwithstanding the transfer of hundreds of stores and supporting assets to C&S. Accordingly, in order to dispel any doubt about the competitive benefits of the Transaction, Kroger continued to negotiate with C&S on a revised divestiture package. As counsel for Kroger informed this Court on March 25, 2024, Kroger reached a “handshake” deal with C&S on a revised divestiture package to enhance the deal previously announced in September 2023.

Even after the “handshake” deal, Defendants’ efforts to finalize that deal involved sophisticated parties with sophisticated counsel negotiating over a multi-billion dollar contract that is part of an even larger multi-billion dollar merger. The State’s lone-wolf approach to merger enforcement and the uncertainty regarding the legal challenges to the merger have not made things easier. Indeed, the State’s lawsuit here appears to be a naked attempt to procure a second bite at the apple in the event the federal lawsuit filed by the FTC, eight other states, and the District of Columbia fails. Compl., *FTC v. Kroger Co.*, No. 24-CV-347, ECF No. 1 (D. Or. Feb. 26, 2024). No State in history has attempted a similar tactic prior to this merger, and structuring a deal around such contingencies requires deliberation and compromise. The time needed for the parties to finalize the divestiture proposal was not, as the State suggests, an effort to sandbag regulators, but rather an effort to carefully address concerns raised by the FTC, the State, and other regulators in a context made all the more difficult by the State’s litigation strategy.

C. Updated C&S Divestiture Package

On April 22, 2024, Kroger announced an updated, binding divestiture agreement with C&S, which it promptly disclosed to the State. *See* Ex. A (Kroger 8-K (Apr. 22, 2024)). The amended divestiture package should put to rest any competitive concerns raised by the FTC and other regulators, including the State. Under the updated agreement, Kroger will divest 579 grocery stores in eighteen states and Washington, D.C.; four banners with significant brand equity, as well as a licensing of two additional banners in certain states; and five popular private-label brands with perpetual licenses to product recipes and formulations, as well as long-term supply arrangements for two of those private-label brands (O Organics and Signature). Most relevant here, Kroger will divest 91 of Albertsons’ 105 stores in Colorado (~87%) and two distribution facilities, along with other non-store assets, and also will provide C&S a royalty-free license to use the Safeway banner in Colorado in perpetuity.

ARGUMENT

At the upcoming preliminary injunction hearing, this Court will be asked to predict the likely competitive effects of the proposed Transaction in Colorado. That Transaction includes not just Kroger’s purchase of Albertsons, but also the concurrent divestiture of hundreds of stores and other assets to C&S, including *nearly all* of Albertsons’ Colorado store locations. As a matter of law and common sense, the Court cannot evaluate the Transaction’s likely competitive effects in Colorado without considering *all* elements of the Transaction, including the robust, Colorado-specific divestitures, which will allow C&S to preserve the existing competition in the state. To allow otherwise would call upon this Court to analyze—and potentially enjoin—a commercial transaction that simply does not exist.

The State’s Motion presents three arguments about evidence related to the C&S divestiture: (1) divestiture evidence is relevant only to the question of “remedy,” and therefore should be excluded from the preliminary injunction hearing; (2) the Court should exclude divestiture evidence at the preliminary injunction hearing because Defendants allegedly delayed producing a revised divestiture agreement; and (3) if the Court decides to allow evidence of the proposed divestiture, the Court should establish “guardrails” for the presentation of evidence, including setting a date for the disclosure of a supplemental divestiture agreement and absolving the State of its burden to prove a substantial lessening of competition. None of these arguments holds water.

I. A CONTRACTED-FOR DIVESTITURE IS RELEVANT TO ANTITRUST LIABILITY

In moving to exclude divestiture evidence from the preliminary injunction hearing, the State asks this Court to evaluate and preliminarily enjoin a fictitious merger. The C&S divestiture is a core component of this Transaction; the merger will not proceed without the divestiture. As such, evaluating whether *this* Transaction may “substantially lessen competition” in the future

requires considering the anticipated effects of both the merger *and* the divestiture on the competitive landscape in Colorado. Thus, in evaluating a motion for a preliminary injunction—which is predicated on the State’s ability to establish a probability of success on the merits—the Court *must* account for the proposed divestiture. The State’s efforts to artificially cabin the scope of this proceeding have no legal merit.

First, federal courts have repeatedly held that a divestiture agreed upon by the parties in connection with a merger under review is relevant to the overall competitive effects of the proposed merger at the *liability* stage. Most on point, in *Arch Coal*, the court denied the FTC’s request to exclude evidence of the parties’ proposed divestiture. *See Arch Coal*, 2004 WL 7389952, at *1. The court reasoned that “determining the likelihood of the FTC’s success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the entire transaction in question.” *Id.* at 3. The court was therefore “unwilling simply to ignore the fact of the divestiture,” and rejected many of the arguments the State offers here, including that the preliminary injunction stage was intended to preserve the status quo; the divestiture package was not part of the original transaction; the divestiture deal was not final or concrete; and the defendants were seeking to evade or manipulate antitrust review. *Id.* at *1.

Other courts have reached this commonsense conclusion. *See, e.g., UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 at 137 (finding evidence at trial established that the scope of the divestiture was sufficient to preserve competition); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 307 (D.D.C. 2020) (evaluating divestiture agreement and denying injunctive relief); *AT&T Inc.*, 310 F. Supp. 3d at 217 n.30 (D.D.C. 2018) (considering effect of parties’ post-merger contract at the liability stage due to its “real-world effect” on the competitive landscape); *FTC v. Libbey*, 211

F. Supp. 2d 34, 46 (D.D.C. 2002) (requiring evaluation of parties' new agreement in deciding whether an injunction should be issued).

Just last year, the United States Court of Appeals for the Fifth Circuit held that so-called “remedial” contract offers designed to address concerns from antitrust regulators “should be addressed at the liability—not remedy—stage of the Section 7 proceedings.” *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1057 (5th Cir. 2023). The Fifth Circuit reasoned that such offers were “different in kind from a Commission-or-court-ordered remedy, which . . . can be imposed only on the basis of a violation of the law, *i.e.*, after a finding of liability.” *Id.* at 1056. Similar reasoning applies here to a divestiture package agreed to by merging parties pursuant to a binding contract entered before the merger’s consummation.

The divestiture of hundreds of stores and other assets to C&S is not a proposed “remedy” after a judicial ruling that the merger will likely have anticompetitive effects; rather, it is a voluntary, pre-judgment effort to structure the Transaction in a way that eliminates any anticompetitive effects in Colorado that may result from the merger. The Court must consider the effect of the divestiture on the post-merger landscape when assessing whether the Transaction “may substantially lessen competition.” For instance, the State alleges that “in Gunnison, the only Supermarkets are City Market [Kroger] and Safeway [Albertsons],” asserting that “[t]he merger would result in a monopoly for Kroger in this market.” Compl. ¶ 141. But once Kroger divests the Gunnison Safeway (as provided by the revised divestiture package), there will be no alleged monopoly in Gunnison, and the State’s arguments related to that alleged market will crumble. *See UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 137 (“The evidence at trial established that the scope of the divestiture is also sufficient to preserve competition”). And as noted above, Kroger is set to divest the vast majority (~87%) of Albertsons stores in Colorado.

To be sure, divestiture does sometimes arise in the context of post-liability remedies, when the *plaintiff* requests a divestiture of assets as a remedy after a finding of liability or where a court orders divestiture. *See, e.g., California v. Am. Stores Co.*, 495 U.S. 271, 281 (1990); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329–31 (1961). In those cases, divestiture is appropriately termed a “remedy,” because it is a “means of . . . redressing a wrong” found by a court to arise from the parties’ proposed transaction. *Remedy*, Black’s Law Dictionary (11th ed. 2019). But as one court remarked, the Supreme Court’s use of the term “remedy” when discussing divestiture in *that* context “says nothing about whether the merger-challenging plaintiff must address offered and executed agreements made before any liability trial, let alone liability finding; that is, whether [regulators] must address the circumstances surrounding the merger as they actually exist.” *FTC v. Microsoft Corp.*, No. 23-CV-2880, 2023 WL 4443412, at *15 (N.D. Cal. July 10, 2023). Accordingly, the State’s “reliance on cases like . . . *du Pont*—which concerned *court-ordered* divestitures *after* a finding of Section 7 liability—to support its position that the [divestiture] is a remedy is misplaced.” *Illumina*, 88 F.4th at 1056. Notably, the State has not requested divestiture as a “remedy” here.

The State admits, as it must, that federal law is squarely against it. Mot. 10. Yet it argues that “this [issue] is a good place to depart from misguided district court interpretations of federal law,” opining that “this Court is authorized to interpret the Antitrust Act independently of any federal antitrust legal precedent” and citing the legislature’s deletion of a predecessor provision in the Colorado Antitrust Act of 1992 instructing courts to “use as a guide interpretations given by the federal courts to comparable federal antitrust laws.” Mot. 10–11 (citing former C.R.S. § 6-4-119). But the Colorado Supreme Court has made clear—long before the Colorado Antitrust Act of 1992 instructed Colorado courts to consider federal-court interpretations of federal law—that

“federal decisions construing the Sherman and Clayton Acts, although not necessarily controlling on our interpretation of the Colorado law, are nevertheless *entitled to careful scrutiny* in determining the scope of the state antitrust statute,” *N. Ave. Furniture & Appliance, Inc.*, 645 P.2d at 1295–96 (emphasis added). Tellingly, the State relied on this very authority in its preliminary injunction motion, urging that federal decisions “may be ‘helpful to an understanding’ of issues raised under Colorado antitrust law.” Mot. for Prelim. Inj. at 20–21. The State cannot cherry-pick which federal decisions the Court should follow and which it should disregard. In any event, none of the State’s policy arguments alter the fact that the proposed divestiture is part of the Transaction under review and must be considered in order to assess the Transaction’s likely competitive effects.²

Second, the State’s position that divestiture should be excluded from the preliminary injunction hearing is without any legal support and runs counter to the text of the antitrust statute the State seeks to enforce. The State’s argument rests on its contention that the proposed divestiture is a “putative remed[y],” Mot. 9, but as discussed above, the divestiture is an integral part of the Transaction that bears on the question of liability, not a “remedy” to be considered only

² If federal precedent were irrelevant to interpreting the Colorado Antitrust Act, the statute likely would be unconstitutionally vague. *See, e.g., Cline v. Frink Dairy Co.*, 274 U.S. 445, 454–55 (1927) (holding prior Colorado antitrust law was unconstitutionally vague). The phrase “may substantially lessen competition” is inherently vague and constitutionally adequate only insofar as it incorporates the large body of antitrust common law, giving fair notice to merging parties and preventing arbitrary enforcement. *See State v. Shaw*, 847 S.W.2d 768, 775 (Mo. 1993) (“Thus, were we forced to address the constitutionality of the phrase ‘unfair practices’ in isolation, we might be hard-pressed to hold that that phrase is sufficiently definite to meet the demands of the constitution.”); Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 Fla. St. U. L. Rev. 709 (2018). If, as the State suggests, the Colorado Antitrust Act does not incorporate that body of common law, it is unconstitutionally vague and subject to the kind of arbitrary interpretation and enforcement the State advocates for here. This Court should not adopt an interpretation of the statute that would raise such concerns.

after a court finds liability. If the Transaction—including the divestiture—will not substantially lessen competition in Colorado, then the State cannot prevail in this litigation.

Because the divestiture goes to the merits, it *must* be considered at the preliminary injunction stage. “A preliminary injunction is an extraordinary remedy, and, therefore, a court may deny a motion for preliminary injunction solely on the ground that the plaintiff did not show a probability of success on the merits.” *Tesmer*, 140 P.3d at 252. Accordingly, the State bears the burden of showing a “reasonable probability” of success on the merits. *Id.* The “merits” in this case include whether the State can meet its burden to *prove* that “the effect of the acquisition may substantially lessen competition.” C.R.S. § 6-4-107(1). Considering the effect of the entire Transaction in this context is neither speculative nor premature; it is required.

A preliminary injunction proceeding that fails to account for the full Transaction at issue would be illogical and inefficient. The purpose of the divestiture is to address the competitive concerns raised by the State and others; the State cannot blind itself to the actual Transaction before the Court. This Court should reject the State’s position, which “continue[s] to insist (erroneously) that the divestiture is simply not relevant.” Order Granting Mot. to Dismiss First Am. Compl. at 3, *Whalen v. Kroger*, No. 23-CV-459, ECF No. 120 (N.D. Cal. Dec. 20, 2023).

II. THE STATE’S PROCEDURAL ARGUMENTS ARE PREMATURE AND INAPPOSITE

Recognizing the mountain of directly on-point and persuasive case law rejecting its exact legal position, Mot. 10, the State suggests there is a procedural reason to exclude divestiture evidence from the preliminary injunction hearing: The four months before the preliminary injunction hearing in August supposedly do not give the State sufficient time to analyze the proposed divestiture. Mot. 13–16. That argument is essentially moot now that Kroger has agreed

to make discovery regarding the divestiture available by May 17, 2024, but to the extent the State continues to press this argument, it fails for at least three reasons.

First, the State has no support for its extraordinary request to prevent the Court from assessing the actual Transaction before the Court. As noted above, if the divestiture is excluded, the Court would be left to analyze a hypothetical transaction that the parties *could* have pursued but did not. An assessment of whether *that* transaction should be preliminarily enjoined says nothing about the likely competitive effects of the *actual* Transaction that Kroger and Albertsons pursued. Simply put, the preliminary injunction hearing *cannot be conducted* without taking the divestiture into account.

Second, there is no basis for the State's contention that four months is insufficient time to prepare for trial. Merger litigation is fast work: Since 2015, the average time from a complaint filed by the FTC to a *decision* was just 5.9 months. Dechert LLP, *DAMITT Q3 2023: Merger Control Is a Marathon, Not a Sprint*, (Oct. 30, 2023), <https://bit.ly/4dbSoEz>. All parties face time pressure in preparing for trial, but in merger litigation, it is the *defendants* that are most disadvantaged, because they have had no prior opportunity for discovery (unlike the FTC and the state attorneys general, who often conduct years' long investigations). But defendants manage and work through those time pressures, like all other litigants. Especially now that the proposed divestiture has been signed and disclosed, the State cannot credibly claim that the amount of time in which Defendants must complete *all* discovery for the preliminary injunction hearing is insufficient for the State to take discovery on one specific issue.

Notably, any burden imposed on the State by the schedule is a problem of its own making, since it was the State that insisted on the earliest hearing date of all the pending litigations against the Transaction. The State also rejected Defendants' request for a single permanent injunction

hearing, instead fighting to have separate preliminary and permanent injunction hearings. Second Status Report and Hearing to Set Prelim. Inj. Hearing at 2. And the State has refused to join the FTC's action or to coordinate efforts with the other attorneys general challenging this Transaction, even though doing so would conserve party and judicial resources and save taxpayers millions of dollars in the process. *See* Ex. B (Mar. 29, 2024 Letter to Colo. Att'y Gen.). Having pressed for this schedule—with full knowledge that the parties were negotiating a revised divestiture proposal—the State cannot now complain that it is too abbreviated.

The lone authority the State cites in support of its request—*FTC v. Ardagh*—underscores the weakness of the State's position. In *Ardagh*, the FTC learned about a proposed divestiture for the first time the night before the deposition of a defendant's CEO. Tr. of Prehearing Conference at 27–35, *FTC v. Ardagh*, No. 13-CV-1021 (D.D.C. Sept. 24, 2013), <https://bit.ly/49J8RNt>. Just *three* weeks before the preliminary injunction hearing, the merging parties advised the court that they were “still in negotiations,” and had no binding contract or even a divestiture buyer. *Id.* at 21, 28–29. In those circumstances, the FTC's claims of prejudice were concrete and ripe. But even there, the court expressed concerns that excluding the divestiture evidence would result in an “advisory opinion,” *id.* at 36, and the parties settled once the divestiture package was finalized, *Ardagh*, ECF No. 151.

The circumstances in *Ardagh* could not be more different from those here. The divestiture of up to 650 stores was written into the Merger Agreement, the initial divestiture package and divestiture buyer were disclosed in September 2023 (more than seven months ago), the State was a party to continuing investigation and negotiations with regulators as to the divestiture in the five months prior to filing this lawsuit, an amended divestiture package has been agreed to and disclosed to the State, and the preliminary injunction hearing is approximately four months away.

Indeed, while the State makes vague claims of prejudice, it never actually articulates *how* or why it will be unable to address the divestiture at the upcoming preliminary injunction hearing.

Third, the State accuses Defendants of “hoping to win by ambush” and lying in wait to “spring their ‘real’ divestiture remedy plan on the Attorney General as late in the process as possible.” Mot. 13, 15. That accusation is unmoored from reality. Kroger and Albertsons are parties to a multi-billion-dollar merger and, with C&S, an accompanying divestiture package likewise worth several billion dollars. Although the parties are endeavoring to work collaboratively, they nonetheless remain *competitors* with their own interests and expectations. Many terms of the proposed divestiture had to be negotiated with C&S even after the “handshake” deal reached before March 25, 2024. The parties are not sandbagging the State or the Court—they have been working vigorously to negotiate a revised divestiture package that addresses the State’s competitive concerns with the merger, with the hope of making this proceeding unnecessary. These concerns were raised by the FTC and various state regulators, *including* the Colorado Attorney General; the State cannot now complain about Kroger and Albertsons taking sufficient time to craft a revised divestiture package that responds to their regulatory concerns. The amended divestiture agreement was signed in the early morning hours of April 22, and the Colorado Attorney General was apprised of this development fewer than four hours later. There is no ambush here.

The State’s appeal to academic sources (but no facts) is equally unpersuasive.³ As the law review article cited by the State acknowledges, “Courts generally have denied agency motions in

³ For every law review article proposing restrictions on the consideration of divestiture evidence in merger trials, there is another article explaining that such an approach runs contrary to longstanding practice and precedent. Matt Reilly et al., *Merger Remedy Divestitures: the Agencies Zig and the Courts Zag*, 37 *Antitrust* 1, 15–16 (Summer 2023), <https://bit.ly/3JbtyqB> (explaining

limine to exclude consideration of these remedies, at least where the merging parties have offered a definite remedy with sufficient time for the reviewing agency to investigate.” Steven C. Salop & Jennifer E. Sturiale, *Fixing “Litigating the Fix”*, 85 Antitrust Law Journal No. 3, at 622 (2024). Despite the State’s attempts to mischaracterize the history of the divestiture, this is simply not the sort of “late-stage” proposal offered to take regulators by surprise. All parties have understood from the outset that the Transaction included a divestiture component, and there is more than sufficient time for the State to evaluate the proposed divestiture.

III. THIS COURT SHOULD DENY THE STATE’S ALTERNATIVE REQUESTS FOR PROCEDURAL HANDICAPS ON THE DEFENSE PRESENTATION

Finally, the State’s alternative arguments requesting two “limits” and “guardrails” on Defendants’ ability to present evidence at the preliminary injunction are either moot or legally foreclosed.

First, the State’s request for a deadline to produce any revised divestiture package is now moot, given the parties’ revised agreement and the Court’s order at today’s hearing.

Second, the State suggests it should not bear the burden of addressing the divestiture package as part of its “prima facie case showing that the merger is illegal,” and that “the presentation of the remedy plan” should instead be a part of Defendants’ “rebuttal burden.” Mot. 17. This argument is just another iteration of the State’s debunked theory that the proposed divestiture is irrelevant to liability.

A challenge to a merger is evaluated under a three-part burden-shifting framework. First, the plaintiff must show “that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area,” giving rise to a “presumption that the

that courts permit parties to litigate the fix and are questioning the agencies’ preferred standard for evaluating divestitures, which breaks from prior agency practice).

transaction will substantially lessen competition.” *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). Next, “[t]he burden of *producing* evidence to rebut this presumption then shifts to the defendant.” *Id.* (emphasis added). Finally, “[i]f the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, *which remains with the government at all times.*” *Id.* at 983 (emphasis added). The typical way for a plaintiff to establish a prima facie case in a horizontal merger case (like this one)—and indeed, the *only* basis on which any horizontal merger has been enjoined—is by showing that the merger will result in market concentration in properly defined relevant markets that exceeds certain economic thresholds. *See id.* at 982–83.

Here, to meet its initial burden and make a prima facie showing that the Transaction will lead to undue concentration, the State must demonstrate that post-Transaction, the market concentration will exceed these thresholds in appropriately defined markets. And to do that, it must evaluate the market shares that will *actually* result from the Transaction, which requires consideration of the effect of the divestiture. *See Arch Coal*, 2004 WL 7389952, at *3. To hold otherwise would allow the State to “meet its prima facie burden with market-share statistics that have no connection to the post-acquisition world.” *UnitedHealth Grp.*, 630 F. Supp. 3d at 133. The State’s request that the “burden” of presenting divestiture evidence shift to Defendants thus improperly seeks to diminish the State’s burden in establishing a prima facie case of competitive harm.

Illumina—cited by the State—is not to the contrary. Mot. 17 (citing *Illumina*, 88 F.4th at 1058). There, the court assessed the significance of the defendants’ “Open Offer,” a long-term contract that the acquiring party offered to its customers (and soon-to-be business rivals) to

alleviate the government's competitive concerns, opining that the "Open Offer" was properly considered as part of the defendants' rebuttal case. 88 F.4th at 1057. The court there, however, was evaluating an open promise to customers that represented a "post-signing, pre-closing adjustment to the status quo," not a divestiture of assets conveyed as part of the primary transaction. *Id.* at 1056. That is different from the proposed divestiture here, which has always been contemplated as part of the merger and which, when executed contemporaneously with the merger, would alter the market concentration statistics the State must analyze to make its prima facie showing. Put otherwise, the proposed divestiture is part of the Transaction under review, while the Open Offer in *Illumina* was a standalone promise to enter into *future* contracts with customers. And notably, even in *Illumina*, the government addressed the Open Offer in its case-in-chief. *Id.* at 1057. Here, because the divestiture is part of the Transaction, the State must consider the effect of the divestiture to meet its initial burden of production and, ultimately, its burden of persuasion.

In any event, the court in *Illumina* expressly declined to shift to the defendants the burden of *persuasion*, which at all times remains with the plaintiff. 88 F.4th at 1058. The burden-shifting framework never relieves the plaintiff of its ultimate burden of persuasion and never puts the onus of proving the adequacy of the divestiture on the defendants as, for example, an affirmative defense does. *See Baker Hughes*, 908 F.2d at 991–92. It is the State's burden at all times to persuade the Court that the Transaction, as a whole and including the divestiture, may substantially lessen competition. The State cannot shift that burden onto Defendants.

CONCLUSION

For these reasons, this Court should deny the Motion in full.

DATED this 22nd day of April, 2024.

Respectfully submitted,

/s/ Randall H. Miller

Randall H. Miller
Atty Reg. No. 33694
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street, Suite 3100
Denver, Colorado 80202
Phone: (303) 863-2363
randall.miller@arnoldporter.com

Matthew M. Wolf (admitted *pro hac vice*)
Sonia K. Pfaffenroth (admitted *pro hac vice*)
Joshua M. Davis (admitted *pro hac vice*)
Jason Ewart (admitted *pro hac vice*)
Kolya D. Glick (admitted *pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001
Phone: (202) 942-5462
Fax: (202) 942-5999
matthew.wolf@arnoldporter.com
sonia.pfaffenroth@arnoldporter.com
joshua.davis@arnoldporter.com
jason.ewart@arnoldporter.com
kolya.glick@arnoldporter.com

John Holler (admitted *pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
Phone: (212) 836-7739
Fax: (212) 836-8689
john.holler@arnoldporter.com

Mark A. Perry (admitted *pro hac vice*)
Luke Sullivan (admitted *pro hac vice*)
Jason Kleinwaks (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW, Suite 600
Washington, D.C. 20036
Phone: (202) 682-7511
Fax: (202) 857-0940

PUBLIC

Mark.Perry@weil.com
Luke.Sullivan@weil.com
Jason.Kleinwaks@weil.com

Luna N. Barrington (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
767 5th Avenue,
New York, New York 10153
Phone: (212) 310-8421
luna.barrington@weil.com

Bambo Obaro (admitted *pro hac vice*)
CA Bar No. 267683
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway,
Redwood Shores, California 94065
Phone: (650) 802-3083
bambo.obaro@weil.com

Sarah Sternlieb (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
700 Louisiana St, Suite 3700
Houston, Texas 77002
Phone: (212) 310-8785
sarah.sternlieb@weil.com

Counsel for Defendant The Kroger Co.

/s/ Christopher H. Toll
Christopher H. Toll, #15388
Maureen R. Witt, #10665
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
Phone: (303) 295-8000
Email: ctoll@hollandhart.com
mwitt@hollandhart.com

Enu Mainigi (admitted *pro hac vice*)
Jonathan Pitt (*pro hac vice* pending)
A. Joshua Podoll (admitted *pro hac vice*)
WILLIAMS & CONNOLLY LLP
680 Maine Ave., S.W.
Washington, D.C. 20024
Phone: (202) 434-5000
Email: emainigi@wc.com

PUBLIC

jpitt@wc.com
jpodoll@wc.com

Edward D. Hassi (admitted *pro hac vice*)
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 383-8000
Email: thassi@debevoise.com

Michael Schaper (admitted *pro hac vice*)
Shannon Rose Selden (admitted *pro hac vice*)
J. Robert Abraham (admitted *pro hac vice*)
Natascha Born (admitted *pro hac vice*)
Marieugenia Cardenas (admitted *pro hac vice*)
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001
Phone: (212) 909-6000
Email: mschaper@debevoise.com
srselden@debevoise.com
jrabraham@debevoise.com
nborn@debevoise.com
mcardenas@debevoise.com

Michael G. Cowie (admitted *pro hac vice*)
James A. Fishkin (admitted *pro hac vice*)
DECHERT LLP
1900 K Street N.W.
Washington, DC 20006
Phone: (202) 261-3339
Email: mike.cowie@dechert.com
james.fishkin@dechert.com

Counsel for Defendant Albertsons Companies, Inc.

/s/ Kathryn A. Reilly
Kathryn A. Reilly, #37331
Jennifer J. Oxley, #51587
WHEELER TRIGG O'DONNELL LLP
370 17th Street, Suite 4500
Denver, CO 80202
Phone: (303) 244-1800
Email: reilly@wtotrial.com
oxley@wtotrial.com

PUBLIC

Steven L. Holley (admitted *pro hac vice*)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
Phone: (212) 558-4000
Email: holleys@sullcrom.com

*Counsel for Defendant C&S Wholesale Grocers,
LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been served on all counsel who have entered an appearance in this matter through Colorado Courts E-Filing, on April 22, 2024, including the following:

State of Colorado:

Steven M. Kaufmann
Bryn A. Williams
Arthur Biller
Ian L. Papendick
Robin E. Alexander
Aric J. Smith
Conor J. May
Elizabeth W. Hereford
Jason Slothouber
Office of the Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6000

/s/ Christina Cleveland _____
Christina Cleveland

Ex. D

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

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

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

REQUESTS FOR DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. All Documents prepared for or used in any Stores as an Asset training sessions, including (a) all operational "See and Act Guides" distributed to Company employees as a part of the Stores as an Asset program, and associated communications, including but not limited to the "Premium Operational Segment See & Act Guide," "Competitive Operational Segment See &

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC

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

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

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

PUBLIC

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

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

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

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

PUBLIC

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

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

with the following information:

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

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

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

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

d) Produce electronic file and image submissions as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC

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

Dated: April 2, 2024

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

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

PUBLIC

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

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

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

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

Counsel for Albertsons Companies, Inc.

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

Counsel Supporting the Complaint

Ex. E

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

**COMPLAINT COUNSEL'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
RESPONDENT ALBERTSONS COMPANIES, INC.**

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

REQUEST FOR DOCUMENTS

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

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

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

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

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

8. For the following Persons, all performance evaluations, including self-evaluations:

(a) Persons who are or who at any time between January 1, 2022 and the present have been Corporate Leadership team members, including: Vivek Sankaran, Susan Morris, Jennifer Saenz, Anuj Dhanda, Fernando Silva, Sharon McCollam, Evan Rainwater, Kelly Griffith, Mike Theilmann, Michelle Larson, Tom Moriarty, and Omer Gajial;

(b) Persons who are or who have at any time between January 1, 2022 and the present have been Division Leadership, including: Mike Withers (Jewel-Osco), Wes Jackson (Southern), Rob Backus (Shaw's/Star Market), Jim Perkins (formerly ACME), Sidney Hopper (United), John Colgrove (Intermountain), Brad Street (Seattle), Kevin Curry (Southern California), Karl Schroeder (Northern California), John Clougher (formerly Haggen), Carl Huntington (Southwest), Todd Broderick (Denver), Tom Lofland (Mid Atlantic), Kelly Mullin (Portland), and Michelle Larson (East); and

PUBLIC

(c) Dan Dosenbach (Senior Vice President of Labor Relations), Brent Bohn (Vice President of Labor Relations), and persons who are or who have at any time between January 1, 2022 and the present have been Labor Relations directors, including: Frank Jorgensen, Shaylon Lovell, Stefanie Gusha, Bob McLauchlin, and Andrew Lukes.

9. All Document retention policies and protocols applicable to or implemented with regard to the Proposed Transaction, the Investigation, the Litigation, and any other anticipated review of the Proposed Transaction.

10. All advocacy Documents from January 1, 2019, to the present, including letters from Company counsel, presentations, and white papers, submitted to the Federal Trade Commission or any other governmental agency for regulatory, antitrust, or any review purpose relating to any acquisition, merger, or purchase of any store, including but not limited to the Commission's review of the Company's acquisition of Kings and Balducci's stores from KB US Holdings, Inc.

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

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

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

14. All Documents from January 1, 2019, to the present concerning multi-employer or coordinated bargaining with Kroger or any other unionized employer in the context of

collective bargaining with Unions, including, but not limited to, Documents discussing wages, benefits, pension, or health and welfare issues.

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

16. All Documents, from January 1, 2019, to the present summarizing any Company improvement initiatives and their results, including but not limited to the following:

(a) sourcing cost reduction initiative Plans, including but not limited to Project Edison, Winning Model, and any other Company initiative to reduce sourcing costs;

(b) “productivity initiatives” as defined by the Company in the ordinary course of business (*e.g.*, ACI2R-0004474602), including, but not limited to, strategic sourcing, Own Brands strategies, capital excellence, ways of working, SC transformation, and Winning Model; and

(c) price investment Plans.

17. All Board Documents, Corporate Leadership Documents, and Division Leadership Documents identifying initiatives to grow Albertsons’s revenue, market share, or any margin and/or the estimated impact of such initiatives on revenue, market share, or margin, including initiatives relating to price investment strategies, fresh products, private label, health and wellness, personalization and digital capabilities.

18. Documents sufficient to show all Competitor Price Index (“CPI”) reports from January 1, 2022 to the present.

19. Documents from January 1, 2015 to the present sufficient to show Albertsons's price investments, pricing strategy changes, or pricing changes at legacy Safeway, Inc. stores following the Company's acquisition of Safeway, Inc.

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

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

22. All annual operating plans from January 1, 2022, to the present for the following Company divisions: Denver, Intermountain, Jewel-Osco, Mid Atlantic, Portland, Seattle, Southern California, Southwest, United, and Haggen.

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

24. For the following Second Request specifications, all Documents (including data) responsive to the specification, including all Documents that are responsive to a given Second Request specification and that postdate the most recent Documents submitted in the Company's response to that Second Request specification: 17, 22, 38, 39, 51, and 54(e).

25. Store characteristics data for 2023 responsive to Specification 2 the Second Request.
26. Store transactional data for 2023 responsive to Specification 3 of the Second Request.
27. Store revenue, cost, financial, and operational data for 2023 responsive to Specification 4 of the Second Request.
28. Store income statements for 2023 responsive to Specification 5(a) of the Second Request.
29. Customer loyalty data for 2023 responsive to Specification 12 of the Second Request.
30. Price zone Documents sufficient to show and explain each and every retail Price Area of the Company, including the Company trade name (*e.g.*, Safeway) and store number for each Company store in the Price Area; and for each Price Area established, deleted, enlarged, decreased, or consolidated in any way since the Company responded to Specification 11 of the Second Request, Documents sufficient to show the change and the rationale for such changes. This request includes, but is not limited to:
- (a) Documents that provide new or updated information to the information contained in “HIGHLY CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023, and
 - (b) Documents that provide the store numbers of the Company stores in each and every Price Area, including, for example, the stores referenced in Column H of “HIGHLY

PUBLIC

CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023.

31. The residential address, ZIP code, latitude, longitude, and the 2020 Census block group number (inclusive of state, county, and other related geographic information) for each:

(a) Credit card holder identified in the field, *PRIMARY_ACCOUNT_NBR*, for the files “*HIGHLY CONFIDENTIAL ACI2R_Appendix 13-0000001.csv – HIGHLY CONFIDENTIAL ACI2R_Appendix 13-0000010.csv.*”

(b) Credit card holder identified in the field, *CUST_ACCT*, for the file “*HIGHLY CONFIDENTIAL ACI2R_Appendix 13-0000011.csv.*”

32. For each competitor as a whole and each competitor location listed by the Company in its response to Specification 6 of the Second Request, price-checking Documents and data responsive to Specification 24(c)(i)-(ii), (c)(v), and (d) of the Second Request, including, but not limited to, any updates to the following exhibits to the Company’s Aug. 31, 2023 narrative response to Second Request Specification 24: *ACI2R_Appendix 24-000002 – ACI2R_Appendix 24-000126.*

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

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

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

DEFINITIONS

For the purposes of this request, the following definitions apply:

D1. The term “the Company” or “Albertsons” means Albertsons Companies, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

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

D3. The terms “and” and “or” have both conjunctive and disjunctive meanings.

D4. The term “Board” means the Board of Directors of the Company collectively, and any and all of the members of the Company’s Board of Directors individually.

D5. The term “C&S” means C&S Wholesale Grocers, LLC., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

D6. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access Documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, Document management systems (*e.g.*, iManage), intranets, web content management systems (“CMS”) (*e.g.*, Drupal), wikis (*e.g.*, Confluence), work tracking software (*e.g.*, Jira), and blogs.

D7. The term “Communication” means any and all written, oral, telephonic, or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any person(s), including but not limited to any statements, inquiries, discussions, conversations, dialogues, correspondence, consultations, negotiations, agreements, understandings, meetings, letters, emails, faxes, notations, telegrams, advertisements, interviews, and all other Documents as herein defined. The phrase “Communication between” includes instances where one party addresses a communication to the other party but the other party does not respond, as well as instances in which the other party responds.

D8. The term “Corporate Leadership” includes both current and former employees the Company describes or has described as being part of the corporate leadership including but not limited to Vivek Sankaran, Susan Morris, Jennifer Saenz, Anuj Dhanda, Fernando Silva, Sharon McCollam, Evan Rainwater, Kelly Griffith, Mike Theilmann, Michelle Larson, Tom Moriarty, and Omer Gajjal.

D9. The term “Division Leadership” refers to the current and former leaders of the following Company divisions: Denver, Intermountain, Jewel-Osco, Mid Atlantic, Portland, Seattle, Southern California, Southwest, United, and Haggen.

D10. The term “Documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in the possession, custody, or control of the Company, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including Documents contained in Collaborative Work Environments and other Document databases as well as copies of Documents that are not identical duplicates of the originals in a person’s files;

and copies of Documents the originals of which are not in the possession, custody, or control of the Company. Employee-Owned Devices used to store or transmit Documents responsive to this Request are considered in the possession, custody, or control of the Company. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any Document. Unless otherwise specified, “Documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; architectural plans and engineering blueprints; and Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

D11. The terms “each,” “any,” and “all” mean “each and every.”

D12. The term “Employee-Owned Device” means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.

D13. The term “Entity” means any natural Person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural Person, foundation, fund, institution, facility, division, department, unit, society, Union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

D14. The term “Grocery Retailer” means a self-service retail food store with food (*e.g.*, fresh meat and seafood, dairy products, frozen foods, beverages, bakery goods, dry groceries, etc.) and non-food (*e.g.*, soaps, detergents, health and beauty aids) products that households consume, or any Entity that operates such stores.

D15. The term “including” means “including, but not limited to.”

D16. The term “Investigation” means the Federal Trade Commission’s investigative review of the Proposed Transaction, File No. 231-0004, including but not limited to, the Litigation.

D17. The term “Kroger” means The Kroger Co., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25 percent or more) or total ownership or control between Kroger and any other Person.

D18. The term “Litigation” means this proceeding, In the Matter of The Kroger Co. and Albertsons Companies, Inc., FTC Docket No. D-9428, and the case *Federal Trade Commission, et al. v. Kroger Company, et al.*, No. 3:24-cv-00347-AN (D. Or.), including any subsequent change in court venue for purposes of those proceedings.

D19. The term “Messaging Application” refers to any electronic method that has ever been used by the Company and its employees to communicate with each other or entities outside the Company for any business purposes. “Messaging Application” includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (*e.g.*, Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”

D20. The term “operate” with reference to any Entity means to directly or indirectly own or lease the Entity, manage Entity’s operations on behalf of another Person, have the power to appoint the majority of the Entity’s governing board or body, or otherwise directly or indirectly control the Entity, including through employment.

D21. The term “Person” includes the Company and means any natural person, corporate Entity, partnership, association, joint venture, government Entity, or trust.

D22. The terms “Plan,” “Plans,” or “Planned” refer to tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

D23. The term “Price Area” means all geographic areas defined by the Company in the ordinary course in which the Company’s stores share base pricing, even if those areas or the assignment of stores to those areas vary over time. Examples of Price Areas include, but are not limited to, the Price Areas referenced and stated in “HIGHLY CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023.

D24. The term “Proposed Divestiture” means any transaction or series or combination of transactions whereby, directly or indirectly, any assets being divested in connection with the Proposed Transaction are transferred to or acquired, directly or indirectly, including a divestiture of the assets identified in Appendix C to the Subscription Agreement by and between C&S Wholesale Grocers, LLC and Synergy Investment Corp. dated as of September 8, 2023, but also any other divestiture of assets in connection with the Proposed Transaction, including any potential divestitures that were considered but rejected.

D25. The term “Proposed Transaction” means Kroger’s proposed acquisition of Albertsons as described in the Agreement and Plan of Merger By and Among Albertsons Companies, Inc., The Kroger Co., and Kettle Merger Sub, Inc. dated October 13, 2022, or any other proposed, contemplated, discussed, or related transaction between Kroger and Albertsons.

D26. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

D27. The term “Relevant Product” as used herein means retail sales by Grocery Retailer stores.

D28. The term “sales” means net sales, *i.e.*, total sales after deducting discounts, returns, allowances and excise taxes. “Sales” includes sales of the Relevant Product, whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.

D29. The term “Second Request” means the Request for Additional Information and Documentary Materials issued to the Company by the Federal Trade Commission on December 5, 2022.

D30. The term “Union” means any organized association of workers, regardless of whether the workers are covered by a collective bargaining agreement.

D31. Any word or term that the Company considers vague or insufficiently defined has the meaning most frequently assigned to it by the Company in the ordinary course of business.

INSTRUCTIONS

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

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

12. Unless modified by agreement with Complaint Counsel, these Requests require a complete search of all the files of the Company. The Company shall produce all responsive Documents, wherever located, that are in the actual or constructive possession, custody, or control of the Company and its representatives, attorneys, and other agents, including, consultants, accountants, lawyers, or any other person retained by, consulted by, or working on behalf or under the direction of the Company.

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

14. The Company does not need to provide Documents that the Company previously provided to the Federal Trade Commission.

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

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

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

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

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

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

- date of birth,
- driver's license number or other state identification number, or a foreign country

equivalent,

- passport number,
- financial account number, and
- credit or debit card number.

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

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

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

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

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

PUBLIC

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

PUBLIC

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

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

(iv) Submit all other electronic Documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the Document.

PUBLIC

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

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

with the following information:

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

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

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

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

(d) Produce electronic file and image submissions as follows:

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

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

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

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

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

19. If any Documents are withheld or redacted from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes each Document's authors, addresses, date, a description of each Document, and all recipients of the original and any copies. Attachments to a Document should be identified as such and entered separately on the log. For each author, addressee, and recipient; state the person's full name, title, and employer or firm; and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each Document in a manner that, though not revealing information itself privileged, provides sufficiently detailed

information to enable Complaint Counsel or a court to assess the applicability of the privilege claimed under 16 CFR § 3.38A. For each Document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the Document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive Document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this instruction), noting where redactions in the Document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third-party, such as internal firm memoranda, may be omitted from the log.

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

I11. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by 16 C.F.R. § 3.37(b), or any extension thereof, shall be

waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.

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

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

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

other events, locations, or matters.

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

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

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

I17. For productions larger than 10 GB, the Company shall submit its response to this RFP through IDE, EIDE, or SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure. These should be addressed to the attention of Donald King, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day. A transmittal cover letter for a mailed production shall still be sent via electronic mail to: Charles Dickinson at cdickinson@ftc.gov.

PUBLIC

Dated: April 2, 2024

By: *s/ Joshua Smith*
Joshua Smith
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3018
Email: jsmith3@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

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

PUBLIC

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

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

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

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

Counsel for Albertsons Companies, Inc.

s/ Joshua Smith
Joshua Smith
Federal Trade Commission
Bureau of Competition
600 Pennsylvania, Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3018
Email: jsmith3@ftc.gov

Counsel Supporting the Complaint

Ex. F

PUBLIC



Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
 Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO
 C&S Wholesale Grocers
 c/o Renata B. Hesse, Esq.
 Sullivan & Cromwell LLP
 1700 New York Avenue, N.W. Suite 700
 Washington, DC 20006

2. FROM

 UNITED STATES OF AMERICA
 FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

 Federal Trade Commission
 600 Pennsylvania Avenue, NW
 Washington, DC 20580

4. MATERIAL WILL BE PRODUCED TO
 James H. Weingarten, Esq., or designee

5. DATE AND TIME OF PRODUCTION
 April 11, 2024 @ 10:00 a.m.

6. SUBJECT OF PROCEEDING

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

7. MATERIAL TO BE PRODUCED

 See Attached Requests and Specifications

8. ADMINISTRATIVE LAW JUDGE

 The Honorable D. Michael Chappell

 Federal Trade Commission
 Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA
 James H. Weingarten or designee
 Federal Trade Commission
 600 Pennsylvania Avenue, NW
 Washington, DC 20580
 (202) 326-3570

DATE SIGNED
 Mar 21, 2024

SIGNATURE OF COUNSEL ISSUING SUBPOENA
 s/ James H. Weingarten

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Via FedEx

on the person named herein on:

March 21, 2024

(Month, day, and year)

James H. Weingarten

(Name of person making service)

Attorney

(Official title)

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

In the Matter of

The Kroger Company
a corporation,

and

Albertsons Companies Inc.
a corporation,

Respondents

Docket No. 9428

**ATTACHMENT A TO SUBPOENA TO PRODUCE DOCUMENTS
ISSUED TO C&S WHOLESALE GROCERS**

1. All quarterly and annual reports for the Company, including for the Company's retail operations.
2. Audited annual and quarterly financial statements (or the equivalent) for the Company as a whole and separately for each business unit. If the business unit that will operate the Proposed Divestiture has its own financial statements and profit and loss statements, provide those along with the statements for the overall Company.
3. Annual and monthly financial statements for the Company as a whole and separately for each business unit. If the business unit that will operate the Proposed Divestiture has its own financial statements and profit and loss statements, provide those along with the statements for the overall Company.
4. Documents sufficient to show all financial projections for (a) the Company as a whole; (b) the Company's retail businesses prepared in the ordinary course of business (absent the Proposed Divestiture); and (c) the Company's retail businesses including financial projections for the assets acquired in the Proposed Divestiture.
5. Documents, including but not limited to membership agreements, limited liability company agreements, corporate structure charts, corporate charters and bylaws, and other similar Documents, sufficient to show the organizational structure, equity ownership, officers, directors, and management structure of the Entity or Entities that will own and/or

operate the assets acquired in the Proposed Divestiture, as well as the Company as a whole, and how, if at all, the Divested Assets will be integrated with the Company.

6. For each debt or other obligation of the Company, Documents sufficient to show (a) all terms and conditions of that debt or obligation (including any modifications), (b) repayment schedule, (c) explanation of debt covenants that need to be maintained, and (d) all calculations of the debt covenants.
7. All reports received from credit rating agencies relating to the Company.
8. Documents sufficient to show any actual, potential, or anticipated loss of any of the Company's top 50 (by revenue) wholesale customers, and the financial impact of any such loss.
9. Resumes of all current Company leadership and management team and the proposed leadership and management team for the Entity or Entities that will own and/or operate the assets acquired in the Proposed Divestiture.
10. All Documents from September 1, 2023 to present relating to changes in the Company's proposed retail management team, including the departures of any members of the retail management team (*e.g.*, Brett Wing and Everett Boutwell).
11. Documents sufficient to show the current ownership and organizational structure for the Company and its subsidiaries and affiliates.
12. All Documents analyzing or evaluating the Proposed Divestiture, including:
 - (a) All board Documents relating to the Proposed Divestiture;
 - (b) All Documents analyzing the value of the assets included in the Proposed Divestiture;
 - (c) Documents sufficient to show how the Company determined the offered purchase price of the Divested Assets and any modifications to that price;
 - (d) Documents sufficient to show the Financing for the Proposed Divestiture, including the Planned capital structure, covenants in the Financing arrangements that could trigger default or a significant change in the lending terms, agreed upon borrower liquidity and performance ratios, actual or proposed financial partners, communications with those Entities, proposals or analyses, and showing the terms of those relationships, and borrower transactions that require prior lender approval;

- (e) Documents regarding any Plans (whether realized or not) to change the Financing structure of the Proposed Divestiture
 - (f) Documents sufficient to show the itemized costs associated with the acquisition of assets in the Proposed Divestiture, including purchase price, Financing costs, and costs to transfer the assets and integrate them into the Company's business (including physical and IT conversion, necessary upgrades, and investments in additional assets or resources, such as IT systems, distribution systems, support services, human capital, etc.);
 - (g) Documents sufficient to show the anticipated sources and uses of Financing relating to the Proposed Divestiture;
 - (h) Documents sufficient to show how the Company Plans to maintain required liquidity and performance ratios;
 - (i) Documents sufficient to show how the profitability or performance of the new business will relate to or affect the compensation of the Company's management team;
 - (j) Documents sufficient to show short-term and long-term financial projections for the Proposed Divestiture, including any projected earnings and cash flows for each store and distribution center, and the facts and assumptions underlying those projections.
13. All Documents constituting or reflecting the Company's business Plans for the Proposed Divestiture, including all Plans for:
- (a) Re-bannering stores, including but not limited to:
 - (i) Which banner each store will operate under;
 - (ii) Each store that will be converted to a new banner;
 - (iii) The timeline for each conversion and banner conversion; and
 - (iv) The projected sales impact from each banner conversion;
 - (v) The projected costs of each banner conversion, including but not limited to downtime, grand opening expenses, banner launch, signage, décor, tech, and systems expenses;
 - (vi) Plans for operating format;

- (b) Private label strategy, including but not limited to:
 - (i) The costs of developing new private label products;
 - (ii) The value of the private label brands acquired in the Proposed Divestiture;
 - (iii) The cost of procuring private label products from suppliers;
 - (iv) Any communications with private label product consultants, suppliers, manufacturers, or partners, including Topco or any marketing agencies;
- (c) Customer loyalty programs, including but not limited to:
 - (i) Any analysis of the value of customer data acquired in the Proposed Divestiture;
 - (ii) Analysis of the cost of retaining any third-party firms to assist in developing customer loyalty programs, and any communications with such firms;
 - (iii) Analysis of the cost of hiring employees necessary to build and operate customer loyalty programs;
- (d) E-commerce programs, including but not limited to:
 - (i) Any analysis of the cost of developing e-commerce programs relating to the Proposed Divestiture;
 - (ii) Any communications with third parties relating to developing e-commerce programs relating to the Proposed Divestiture;
- (e) Pricing and promotional strategies;
- (f) Procurement of produce, meat, and dairy products;
- (g) Distribution centers;
- (h) Operation of store pharmacies, including but not limited to:
 - (i) Contracts with each pharmacy benefit manager (“PBM”) with which the Company has contracted for inclusion in any pharmacy network;
 - (ii) All Documents relating to the Company’s negotiation of contracts (including contract renewals) for the Company’s participation in any pharmacy network relating to the Proposed Divestiture, including

negotiations conducted through or involving pharmacy services administration organizations, and including Documents discussing the Company's negotiating position, leverage, advantages, weaknesses, goals, or strategies with respect to such negotiations;

(iii) Any analysis of the profitability of store pharmacies included in the Proposed Divestiture; and

(i) Documents sufficient to show all employees to whom C&S intends to offer employment as part of the Proposed Divestiture.

14. All Documents constituting or reflecting the Company's current marketing or advertising expenses and all Documents constituting or reflecting the Company's Planned marketing and advertising expenses for the Proposed Divestiture.

15. All Documents regarding discussions with Kroger or Albertsons, a previous divestiture buyer, or any other Person, regarding the successes, failures, or outcomes of prior divestiture transactions or sales of Grocery Retailers involving Kroger or Albertsons pursuant to a settlement or consent order with any government Entity.

16. All Documents related to the Company's Plans to assume the CBAs covering employees working at Kroger or Albertsons stores included in the Proposed Divestiture, including:

(a) The Company's Plans to negotiate or implement the CBAs that the Company will assume in connection with the Proposed Divestiture, including any Plans to modify existing CBAs or to hire and onboard Grocery Retailer associates, or any analysis of the effects of collective bargaining provisions that allow Grocery Retailer associates to exercise their right to elect to remain employed at Kroger or Albertsons instead of transferring to the Company;

(b) The Company's Plans to contribute to or assume liabilities related to multi-employer pension and health and welfare funds or other pension and health and welfare funds;

(c) The Company's commitments to or understandings or agreements with Kroger or Albertsons or any Unions relating to assuming the CBAs, including relating to the statements that "no stores will close as a result of the merger" and "frontline associates [will] remain employed"; the duration of those commitments; and who is considered a "frontline associate[]";

(d) The Company's Plans or commitments to negotiate CBAs after the expiration of the Defendants' existing CBAs that the Company will assume in connection with the Proposed Divestiture; and

(e) The Company's Plans to address Union organizing efforts at non-Union stores.

17. Documents sufficient to show the Company's Plans for distribution centers included in the Proposed Divestiture, and Plans for the Company's existing distribution centers that will service stores acquired in the Proposed Divestiture, including:
 - (a) Documents sufficient to show how each distribution center's capacity utilization and cost structure will change after the Proposed Divestiture;
 - (b) Documents sufficient to show the address of the distribution centers that will service each acquired store from the Proposed Divestiture; the portion of the store's volume that will be sourced from each of these distribution centers; and the distance from the distribution center to the store (including an explanation for how the distance was calculated); and
 - (c) Documents sufficient to show the capabilities of each distribution center (*e.g.*, temperature control, technology integration, safety and compliance).
18. All Documents relating to efforts by the Company to respond to Union organizing efforts since January 1, 2019.
19. All Documents relating to efforts by the Company to replace Union labor with non-Union labor since January 1, 2019, including all Documents discussing the Company's strategies, rationales, or Plans for closing unionized Company facilities and transferring employees at those facilities to non-Unionized Company facilities.
20. All Documents created by and all communications with the Company's consultants or bankers, including, but not limited to, Bain, KPMG, and Centerview Partners, in connection with the Proposed Divestiture and any Plans for operating the Divested Assets.
21. All Documents from January 1, 2021 to present relating to the Company's current private label brands, including:
 - (a) All Documents analyzing or evaluating the Company's private label offerings, or comparing the Company's private label offerings to national brand equivalents, Kroger's or Albertsons' private label offerings, including, but not limited to, Documents discussing quality, freshness, assortment, innovation, pricing, sales trends, profitability, cost to produce, brand equity, advertising, marketing, or consumer preference; and
 - (b) Documents sufficient to show the Company's current costs of goods sold for its private label products offered in its retail stores, including contracts with third-party suppliers, including Topco, and the sales volumes of those private label products from January 1, 2021 to present.

22. All Documents concerning the Company's contemplated or actual acquisition (other than the Proposed Divestiture), sale, divestiture, franchising, or closure of any Grocery Retailer since January 1, 2021 and all business Plans relating to those assets.
23. Documents sufficient to show the organizational structure and management of the Company's retail business, including the current retail business and any Planned changes.
24. All communications with Kroger or Albertsons, or their representatives, about the Proposed Divestiture or the Proposed Transaction.
25. All Documents from September 1, 2023 to present relating to responses provided by C&S to any questions posed by governmental Entities investigating the Proposed Transaction or Proposed Divestiture.
26. All communications with C&S customers or prospective customers concerning the Proposed Divestiture or the Proposed Transaction.
27. All communications about or relating to the Proposed Divestiture between the Company and SoftBank, Richard Cohen, Symbotic, or any other Person providing Financing or requested to provide Financing relating to the Proposed Divestiture or the Proposed Transaction.
28. All communications with labor Unions related to the Proposed Divestiture, including any local or international representatives of the United Food and Commercial Workers ("UFCW") or International Brotherhood of Teamsters ("Teamsters").
29. All Documents concerning transition services and reverse transition services in connection with the Proposed Divestiture, including:
 - (a) Transition service agreements;
 - (b) Supply agreements with Kroger or Albertsons to provide inputs, semi-finished or finished products to the Company;
 - (c) Documents sufficient to show the personnel the Company, Kroger, and Albertsons will use to Plan for the transfer of Divested Assets and who will oversee the transfer and ongoing transition services or interim sales between the Company and Kroger and Albertsons; and
 - (d) Transition Plans describing the process for transferring the Divested Assets and providing needed transition services.
30. A full privilege log per Instruction 9 of the civil investigative demand issued to the Company on October 10, 2023 to replace the metadata privilege log submitted to the

Commission during the Investigation, as agreed in the December 5, 2023 Statement re: Limited Metadata Privilege Log submitted by Bill Boyd.

31. All Documents produced in response to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
32. All Documents responsive to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
33. All Documents produced in response to any subpoena issued to you by any defendant in the Litigation or the Administrative Proceeding.
34. All Documents responsive to any subpoena issued to you by any defendant in the Litigation or the Administrative Proceeding.

DEFINITIONS

For the purposes of this subpoena, the following definitions apply:

1. The term “the Company” or “C&S” means C&S Wholesale Grocers, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
2. The terms “subsidiary,” “affiliate,” and “joint venture,” when used in reference to any Entity, refer to any Person in which the Entity has partial (10 percent or more) or total ownership or control.
3. The term “Kroger” means The Kroger Co., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
4. The term “Albertsons” means Albertsons Companies, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
5. The term “Administrative Proceeding” means the Federal Trade Commission adjudicative proceeding relating to the Proposed Transaction captioned *In the Matter of The Kroger Co. and Albertsons Companies, Inc.*, FTC Docket No. D-9428.
6. The terms “and” and “or” have both conjunctive and disjunctive meanings.
7. The term “Bain” means Bain & Company, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
8. The term “CBA” means a collective bargaining agreement.
9. The term “Centerview Partners” means Centerview Partners Holdings LP, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
10. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access Documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms,

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

11. The terms “communication” and “communications” mean any and all written, oral, telephonic, or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any Person(s), including but not limited to any statements, inquiries, discussions, conversations, dialogues, correspondence, consultations, negotiations, agreements, understandings, meetings, letters, emails, faxes, notations, telegrams, advertisements, interviews, and all other Documents as herein defined. The phrase “communication between” is defined to include instances where one party addresses a communication to the other party but the other party does not respond, as well as instances in which the other party responds.
12. The term “Divested Assets” means any assets that would be acquired by the Company in the Proposed Divestiture.
13. The term “Documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in the possession, custody, or control of the Company, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including Documents contained in Collaborative Work Environments and other Document databases as well as copies of Documents that are not identical duplicates of the originals in a Person’s files; and copies of Documents the originals of which are not in the possession, custody, or control of the Company. Employee-Owned Devices used to store or transmit Documents responsive to this request are considered in the possession, custody, or control of the Company. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any Document. Unless otherwise specified, “Documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; architectural plans and engineering blueprints; and Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.
14. The terms “each,” “any,” and “all” mean “each and every.”
15. The term “Employee-Owned Device” means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.
16. The term “Entity” means any Person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, facility, division, department, unit, society, Union, or club, whether

incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

17. The term “Financing” means every form of contribution of value or financial accommodation, including but not limited to debt, equity, guarantees, letters of credit, and any other financial instrument.
18. “The term “Grocery Retailer” means a self-service retail food store with food (e.g., fresh meat and seafood, dairy products, frozen foods, beverages, bakery goods, dry groceries, etc.) and non-food (e.g., soaps, detergents, health and beauty aids) products that households consume, or any Entity that operates such stores.
19. The term “Investigation” means the Federal Trade Commission’s investigative review of the Proposed Transaction, File No. 231-0004, including but not limited to, the Litigation and the Administrative Proceeding.
20. The term “KPMG” means KPMG International, Limited, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
21. The term “Litigation” means the case captioned *Federal Trade Commission, et al. v. Kroger Company, et al.*, No. 3:24-cv-00347-AN (D. Or.), filed in the U.S. District Court for the District of Oregon, including any subsequent change in court venue for purposes of these proceedings.
22. The term “Messaging Application” refers to any electronic method that has ever been used by the Company and its employees to communicate with each other or Entities outside the Company for any business purposes. “Messaging Application” includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”
23. The term “Person” includes the Company and means any natural person, corporate Entity, partnership, association, joint venture, government Entity, or trust.
24. The terms “Plan,” “Plans,” or “Planned” refer to tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
25. The term “Proposed Divestiture” means any actual, proposed, or Planned sale or transfer of stores or other assets from Kroger and/or Albertsons to C&S or any other potential

buyer of assets divested by Kroger or Albertsons in connection with the Proposed Transaction, the Investigation, the Litigation, or the Administrative Proceeding.

26. The term “Proposed Transaction” means Kroger’s proposed acquisition of Albertsons as described in the Agreement and Plan of Merger By and Among Albertsons Companies, Inc., The Kroger Co., and Kettle Merger Sub, Inc. dated October 13, 2022, or any other proposed, contemplated, discussed, or related transaction between Kroger and Albertsons.
27. The term “operate” with reference to any Entity means to directly or indirectly own or lease the Entity, manage the Entity’s operations on behalf of another Person, have the power to appoint the majority of the Entity’s governing board or body, or otherwise directly or indirectly control the Entity, including through employment.
28. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
29. The term “SoftBank” means SoftBank Group Corp., SVF II Strategic Investments AIV LLC, SB Investment Advisers (UK) Limited, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
30. The term “Symbotic” means Symbotic Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
31. The term “Topco” means Topco Associates LLC, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
32. The term “Union” means any organized association of workers, regardless of whether the workers are covered by a collective bargaining agreement.
33. Any word or term that the Company considers vague or insufficiently defined has the meaning most frequently assigned to it by the Company in the ordinary course of business.

INSTRUCTIONS

For the purposes of this subpoena, the following instructions apply:

1. Unless otherwise indicated, these requests cover any and all Documents and information generated, prepared, created, modified, sent, or received during the period from October 1, 2023 to the present.
2. Documents or data requested are those in actual or constructive possession, custody, or control of the Company, or its representatives, attorneys, or other agents, including without limitation consultants, accountants, lawyers, or any other persons retained by, consulted by, or working on behalf or under the direction of the Company, wherever they may be located.
3. This subpoena shall be deemed continuing in nature and shall be supplemented in the event that additional Documents responsive to this request are created, prepared, or received between the time of the Company's initial response and the date established by the Administrative Law Judge for the evidentiary hearing in the Administrative Proceeding.
4. The Company does not need to reproduce Documents that the Company previously provided to the Commission in the Investigation.
5. All Documents responsive to these Document requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:
 - (a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files;
 - (b) Shall be marked on each page with corporate identification and consecutive Document control numbers. None of the numbers should be identical to control numbers on Documents previously submitted to the FTC in the course of the Investigation. The prefixes used for the corporate custodian identification shall not include the words "FTC" or "Kroger" or "Albertsons;"
 - (c) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language Document;
 - (d) Shall be produced in color where necessary to interpret the Document (if the coloring of any Document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any Document (e.g., a chart or graph), makes any substantive information contained in the Document unintelligible, the Company must submit the original Document, a like-colored photocopy, or a like-colored JPEG format image;

- (e) Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original Documents; and
 - (f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive Documents are submitted; and (ii) the corresponding consecutive Document control number(s) used to identify that person's Documents, and if submitted in paper form, the box number containing such Documents. The FTC will provide a sample index upon request.
6. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any Document responsive to a particular request contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the Document.
- (a) The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address or phone number in combination with one or more of the following:
 - date of birth,
 - driver's license number or other state identification number, or a foreign country equivalent,
 - passport number,
 - financial account number, and
 - credit or debit card number.
 - (b) The term "Sensitive Health Information" includes medical records and other individually identifiable health information, whether on paper, in electronic form or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. Forms of Production: The Company shall submit all Documents as instructed below absent written consent signed by Complaint Counsel.
- (a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original Documents:

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

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

PUBLIC

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

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

- (iv) Submit all other electronic Documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
--------------------------------------	--------------------

PUBLIC

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

- (v) Submit Documents stored in hard copy in image format accompanied by OCR with the following information:

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

- (vi) Submit redacted Documents in PDF format accompanied by OCR with the metadata and information required by relevant Document type described in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above.
- (b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- (c) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in its computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact the Complaint Counsel to determine, with the assistance of the appropriate Complaint Counsel, whether and in what manner the Company may use such software or services when producing materials in response to these Document requests.
- (d) Produce electronic file and image submissions as follows:
 - (i) For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - (ii) For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats;
 - (iii) All Documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Company's compliance with these Document requests; and
 - (iv) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
 - (v) Each production shall be submitted with a transmittal letter that includes the case name and docket no. 9428; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and Document identification number range for each; total

number of Documents; and a list of load-file fields in the order in which they are organized in the load file.

8. Each Document requested herein must be produced in its entirety and without deletion, abbreviation, redaction, expurgation, or excisions, regardless of whether the Company considers the entire Document to be relevant or responsive to these requests. If the Company has redacted any portion of a Document for privilege, stamp the words “redacted - privilege” where the redacted material originally appeared, on each page of the Document that the Company has redacted. Privileged redactions must be included in a privilege log prepared pursuant to Instruction 9 below. If the Company has redacted Documents for any other reason, describe the reason for the redaction: for instance, if the Company redacts a Document to comply with privacy laws in other jurisdictions, stamp the words “redacted - privacy” where the material originally appeared, on each page of the Document that the Company has redacted. Redactions made on a basis other than privilege must be included in a log prepared pursuant to Instruction 9, below and the reason clearly stated.
9. If any Document or tangible thing is produced in a redacted form or withheld, the Company shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed, in a manner that will enable Complaint Counsel to assess the claim of privilege. The schedule shall be in Microsoft Excel format, and shall include, for each Document withheld or redacted, at least the following: (i) the specific grounds for withholding or redacting the Document including any claim of privilege; (ii) the title of the Document; (iii) the date of the Document; (iv) the author of the Document; (v) the addressees and recipients of the Document or any copy thereof (including persons “cc’d” or “bcc’d” or “blind cc’d”); (vi) a description of the subject matter of the Document in sufficient detail to assess the reasons for withholding or redacting the Document including any claim of privilege; and (vii) in separate Excel columns, the beginning Bates number of the Document, and the ending Bates number of the Document. Additionally, for each Document withheld under the attorney work product doctrine, state whether the Document was prepared in anticipation of litigation or for trial, and, if so, identify the anticipated litigation or trial upon which the assertion is based. Any attachment to a Document withheld under a claim of privilege or immunity shall be produced unless the attachment is also subject to a claim of privilege or immunity and the basis for such claim is described in a privilege schedule.
10. Complaint Counsel does not concede the appropriateness of redacting or withholding information on a basis other than privilege and expressly reserves all rights to challenge the redacting or withholding of Documents or information.
11. If Documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company’s Document retention policy, but the Company has reason to believe such Documents have been in

existence, state the circumstances under which they were lost or destroyed, describe the Documents to the fullest extent possible, state the request(s) to which they are responsive, and identify persons having knowledge of the content of such Documents.

12. The Company must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the Company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and:
 - (a) if the Company utilized keyword search terms to identify Documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - (b) if the Company utilized Technology Assisted Review software;
 - (i) describe the collection methodology, including: how the software was utilized to identify responsive Documents; the process the Company utilized to identify and validate the seed set Documents subject to manual review; the total number of Documents reviewed manually; the total number of Documents determined nonresponsive without manual review; the process the Company used to determine and validate the accuracy of the automatic determinations of responsiveness and non-responsiveness; how the Company handled exceptions (“uncategorized Documents”); and if the Company’s Documents include foreign language Documents, whether reviewed manually or by some technology-assisted method; and
 - (ii) provide all statistical analyses utilized or generated by the Company or its agents related to the precision, recall, accuracy, validation, or quality of its Document production in response to this subpoena; and identify the Person(s) able to testify on behalf of the Company about information known or reasonably available to the Company, relating to its response to this specification.
 - (c) if the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company’s computer systems or electronic storage media in response to this subpoena, or if the Company’s computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.

13. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by 16 C.F.R. § 3.34, or any extension thereof, shall be waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.
14. All objections must state with particularity whether and in what manner the objection is being relied upon as a basis for limiting the scope of any search for Documents or withholding any responsive Documents. If you are withholding responsive information pursuant to any general objection, you should so expressly indicate. If, in responding to any request, you claim any ambiguity in interpreting either the request or a definition or instruction applicably thereto, set forth as part of your response the language deemed to be ambiguous and the interpretation used in responding to the request, and produce all Documents that are responsive to the request as you interpret it.
15. Whenever necessary to bring within the scope of a request a response that might otherwise be construed to be outside its scope, the following construction should be applied:
 - (a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;
 - (b) Construing the singular form of any word to include the plural and plural form to include the singular;
 - (c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;
 - (d) Construing the masculine form to include the feminine form and vice versa; and
 - (e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters.
16. Unless otherwise stated, construe each request independently and without reference to any other request.
17. Produce entire Documents, including all attachments, hyperlinked attachments (e.g., attachments stored on Box or Google Drive), cover letters, memoranda, and appendices, as well as the file, folder tabs, and labels appended to or containing any Documents. Copies which differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) should be produced separately.

18. Any questions you have relating to the scope or meaning of anything in this subpoena should be directed to the attorney who executed the subpoena to which these instructions are attached.
19. For productions smaller than 10 GB, the Company's response to this subpoena shall be submitted to Complaint Counsel through email and using secure file transfer protocols ("FTP"). For instructions on submitting through FTP, please contact Corene Wint (cwint@ftc.gov), Rachel Ma (rma@ftc.gov), Amare Ashmeade (aashmeade@ftc.gov), Jacob Warren (jwarren1@ftc.gov), John Yoon (jyoon2@ftc.gov), Kayla Willey (kwilley@ftc.gov). For productions larger than 10 GB, the Company shall submit its response to this subpoena through IDE, EIDE, or SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure. These should be addressed to the attention of Donald King, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day. A transmittal cover letter for a mailed production shall still be sent via electronic mail to Katie Drummonds, kdrummonds@ftc.gov.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2024, I caused the foregoing document to be served via email to:

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

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

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

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

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

Counsel for The Kroger Company

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

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

PUBLIC

Email: msventim@debevoise.com

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

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

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

Counsel for Albertsons Companies, Inc.

s/ James H. Weingarten
James H. Weingarten
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3570
Email: jweingarten@ftc.gov

Counsel Supporting the Complaint

PUBLIC

PUBLIC

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

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

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 27, 2024

PUBLIC
PUBLIC

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the

PUBLIC
PUBLIC

designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with

PUBLIC
PUBLIC

the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Ex. G

PUBLIC



Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
 Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

<p>1. TO</p> <p>Richard Cohen c/o Renata B. Hesse, Esq. Sullivan & Cromwell LLP 1700 New York Avenue, N.W. Suite 700 Washington, DC 20006</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
---	--

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION</p> <p>Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>James H. Weingarten, Esq., or designee</p> <hr/> <p>5. DATE AND TIME OF PRODUCTION</p> <p>April 12, 2024 @ 10:00 a.m.</p>
--	---

6. SUBJECT OF PROCEEDING

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

7. MATERIAL TO BE PRODUCED

See Attached Requests and Specifications

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>James H. Weingarten or designee Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 (202) 326-3570</p>
---	--

<p>DATE SIGNED</p> <p>Mar 22, 2024</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> <p>s/ James H. Weingarten</p>
--	--

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Via FedEx

on the person named herein on:

March 22, 2024

(Month, day, and year)

James H. Weingarten

(Name of person making service)

Attorney

(Official title)

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

In the Matter of

The Kroger Company
a corporation,

and

Albertsons Companies Inc.
a corporation,

Respondents

Docket No. 9428

ATTACHMENT A TO SUBPOENA TO PRODUCE DOCUMENTS
ISSUED TO RICHARD COHEN

1. All Documents relating to the Divestiture Acquisition, including, but not limited to Documents relating to:
 - (a) Analysis of the Divestiture Acquisition (*e.g.*, financial projections, deal models, competitive analyses, assessments of the attractiveness of the assets, risks associated with the Divestiture Acquisition, Documents prepared by consultants, valuation analyses, labor relations analyses, and results of C&S's due diligence);
 - (b) Plans for the assets (and associated labor) included in the Divestiture Acquisition, including the corporate governance thereof;
 - (c) Plans to close, sell, franchise, license, lease, or sell and lease back, under any circumstances, any asset that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition;
 - (d) Benefits, costs, and risks associated with the Divestiture Acquisition and the transitioning of the assets comprising the Divestiture Acquisition;
 - (e) Impacts of the Divestiture Acquisition on any other of your or C&S's interests;

- (f) The determination and negotiation of the purchase price of the Divestiture Acquisition; and
 - (g) Any participation in the Financing of the Divestiture Acquisition, including, but not limited to, all term sheets for any Person's Financing contribution, as well as any Documents discussing the amount, form (*e.g.*, debt or equity), terms (*e.g.*, whether any debt Financing is recourse or non-recourse debt), return on investment, risks of any actual, Planned, or considered contribution any Person towards the Financing of the Divestiture Acquisition.
2. All Documents relating to the Proposed Transaction or the Investigation.
 3. All Documents relating to any Person's Financing commitments or obligations supporting the Divestiture Acquisition or C&S's operation of the assets (and associated labor) included in the Divestiture Acquisition, including any limits to any such Financing commitment or obligation.
 4. All communications and other Documents transmitted between or among you, the Company, Defendants, C&S, SoftBank, Symbotic, and/or any other Entity relating to the Proposed Transaction, the Investigation, this Litigation, or the Divestiture Acquisition.
 5. Documents sufficient to show any obligation on any Person to extend any further Financing to C&S under any circumstances or conditions following the Divestiture Acquisition.
 6. All Documents analyzing or discussing C&S's capabilities, strengths, or weaknesses with respect to the operation of stores currently operated by the Defendants, or retail stores in general.
 7. All Documents relating to transition services provided by Kroger, Albertsons, or other Entities for the assets in the Divestiture Acquisition.
 8. All Documents relating to any opportunities for Symbotic to provide services to assets that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition, including all Documents quantifying or predicting the value or impact of such services.
 9. All Documents relating to any opportunities for GreenBox LLC to provide services to assets that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition, including all Documents quantifying or predicting the value or impact of such services.
 10. Documents sufficient to show any Person's expected involvement in management and/or operations of the assets that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition.

PUBLIC

11. All Documents relating to assets, resources, services, and intellectual property used in, or provided to, the acquired assets by Kroger or Albertsons that are not included with the Divestiture Acquisition or will not transfer to C&S at closing, and C&S's Plans to obtain such assets, resources, services, and intellectual property.
12. All Documents relating to C&S's statements that "no stores will close as a result of the merger," that "frontline associates [will] remain employed," and any other claims made by C&S in connection with the Divestiture Acquisition.
13. All Documents, dating back to January 1, 2019, relating to claims or complaints relating to Union avoidance, unfair labor practices, or labor and employment law violations by C&S in any retail or non-retail setting.
14. All Documents relating to your and/or C&S's decision to close, sell, divest, or franchise any Grocery Retailer stores, or reflecting discussion of whether to close, sell, divest, or franchise any Grocery Retailer stores, dating back to January 1, 2011, including, but not limited to (a) Bruno's Supermarkets / Southern Family Markets stores; (b) Grand Union stores; (c) Piggly Wiggly stores; (d) Nell's Shurfine Market stores; and (e) Tops Friendly Markets stores.
15. All Documents produced in response to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
16. All Documents responsive to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
17. All Documents produced in response to any subpoena issued to you by any defendant or respondent in the Litigation or the Administrative Proceeding.
18. All Documents responsive to any subpoena issued to you by any defendant or respondent in the Litigation or the Administrative Proceeding.

DEFINITIONS

For the purposes of this subpoena, the following definitions apply:

1. The term “the Company” or “RJJRP” means RJJRP Property Holdings, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing, as well as Richard Cohen.
2. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person that has in which there is partial (10 percent or more) or total ownership or control of the Entity in question.
3. The term “C&S” means C&S Wholesale Grocers, LLC, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing, as well as Richard Cohen.
4. The term “Kroger” means The Kroger Co., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
5. The term “Albertsons” means Albertsons Companies, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
6. The term “Administrative Proceeding” means the Federal Trade Commission Adjudicative Proceeding, *In the Matter of The Kroger Co. and Albertsons Companies, Inc.*, FTC Docket No. 9428.
7. The terms “and” and “or” have both conjunctive and disjunctive meanings.
8. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access Documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, Document management systems (*e.g.*, iManage), intranets, web content management systems (“CMS”) (*e.g.*, Drupal), wikis (*e.g.*, Confluence), work tracking software (*e.g.*, Jira), and blogs.
9. The terms “communication” and “communications” mean any and all written, oral, telephonic, or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any Person(s), including but not limited to any statements, inquiries, discussions, conversations, dialogues, correspondence,

consultations, negotiations, agreements, understandings, meetings, letters, emails, faxes, notations, telegrams, advertisements, interviews, and all other Documents as herein defined. The phrase “communication between” is defined to include instances where one party addresses a communication to the other party but the other party does not respond, as well as instances in which the other party responds.

10. The term “Defendants” means Kroger and Albertsons.
11. The term “Divestiture Acquisition” means any transaction or series or combination of transactions whereby, directly or indirectly, any assets being divested in connection with the Proposed Transaction are transferred to or acquired, directly or indirectly, including a transfer of the assets identified in Appendix C to the Subscription Agreement by and between C&S Wholesale Grocers, LLC and Synergy Investment Corp. dated as of September 8, 2023, but also any other divestiture of assets in connection with the Proposed Transaction, including any potential or Planned divestitures that were considered but rejected.
12. The term “Documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in your possession, custody, or control, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including Documents contained in Collaborative Work Environments and other Document databases as well as copies of Documents that are not identical duplicates of the originals in a person’s files; and copies of Documents the originals of which are not in your possession, custody, or control. Employee-Owned Devices used to store or transmit Documents responsive to this request are considered in your possession, custody, or control. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any Document. Unless otherwise specified, “Documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; architectural plans and engineering blueprints; and Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.
13. The terms “each,” “any,” and “all” mean “each and every.”
14. The term “Employee-Owned Device” means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.
15. The term “Entity” means any Person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, facility, division, department, unit, society, Union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

16. The term “Financing” means every form of contribution of value or financial accommodation, including but not limited to debt, equity, guarantees, letters of credit, and any other financial instrument.
17. The term “Grocery Retailer” means a self-service retail food store with food (e.g., fresh meat and seafood, dairy products, frozen foods, beverages, bakery goods, dry groceries, etc.) and non-food (e.g., soaps, detergents, health and beauty aids) products that households consume, or any Entity that operates such stores.
18. The term “including” means “including, but not limited to.”
19. The term “Investigation” means the Federal Trade Commission’s investigative review of the Proposed Transaction, File No. 231-0004, including but not limited to, the Litigation and the Administrative Proceeding.
20. The term “Litigation” means the case captioned *Federal Trade Commission, et al. v. Kroger Company, et al.*, No. 3:24-cv-00347-AN (D. Or.), including any subsequent change in court venue for purposes of these proceedings.
21. The term “Messaging Application” refers to any electronic method that has ever been used by you, the Company, C&S, or Symbotic, and employees of any of the foregoing, to communicate for any business purposes. “Messaging Application” includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”
22. The term “operate” with reference to any Entity means to directly or indirectly own or lease the Entity, manage the Entity’s operations on behalf of another Person, have the power to appoint the majority of the Entity’s governing board or body, or otherwise directly or indirectly control the Entity, including through employment.
23. The term “Person” includes Richard Cohen and the Company, and means any natural person, corporate Entity, partnership, association, joint venture, government Entity, or trust.
24. The terms “Plan,” “Plans,” or “Planned” refer to tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
25. The term “Proposed Transaction” means Kroger’s proposed acquisition of Albertsons as described in the Agreement and Plan of Merger By and Among Albertsons Companies, Inc., The Kroger Co., and Kettle Merger Sub, Inc. dated October 13, 2022, or any other proposed, contemplated, discussed, or related transaction between Kroger and Albertsons.
26. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

PUBLIC

27. The term “SoftBank” means SoftBank Group Corp., SVF II Strategic Investments AIV LLC, SB Investment Advisers (UK) Limited, their domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
28. The term “Symbotic” means Symbotic Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
29. The term “Technology Assisted Review” means any process that utilizes a computer algorithm to limit the number of potentially responsive Documents subject to a manual review. A keyword search of Documents with no further automated processing is not a Technology Assisted Review.
30. The term “Union” means any organized association of workers, regardless of whether the workers are covered by a collective bargaining agreement.
31. Any word or term that you consider vague or insufficiently defined has the meaning most frequently assigned to it by C&S in the ordinary course of business.

INSTRUCTIONS

For the purposes of this subpoena, the following instructions apply:

1. Unless otherwise indicated, these requests cover any and all Documents and information generated, prepared, created, modified, sent, or received during the period from January 1, 2022 to the present.
2. Documents or data requested are those in actual or constructive possession, custody, or control of Richard Cohen, C&S, Symbotic, or the Company, or their representatives, attorneys, or other agents, including without limitation consultants, accountants, lawyers, or any other persons retained by, consulted by, or working on behalf or under the direction of Richard Cohen, C&S, Symbotic, or the Company, wherever they may be located.
3. This subpoena shall be deemed continuing in nature and shall be supplemented in the event that additional Documents responsive to this request are created, prepared, or received between the time of your initial response and the date established by the Administrative Law Judge for the evidentiary hearing in the Administrative Proceeding.
4. You do not need to reproduce Documents that C&S previously provided to the Commission in the Investigation.
5. All Documents responsive to these Document requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:
 - (a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in your files;
 - (b) Shall be marked on each page with corporate identification and consecutive Document control numbers. None of the numbers should be identical to control numbers on Documents previously submitted to the FTC in the course of the Investigation. The prefixes used for the corporate custodian identification shall not include the words “FTC” or “Kroger” or “Albertsons;”
 - (c) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language Document;
 - (d) Shall be produced in color where necessary to interpret the Document (if the coloring of any Document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any Document (*e.g.*, a chart or graph), makes any substantive information contained in the Document unintelligible, you must submit the original Document, a like-colored photocopy, or a like-colored JPEG format image;
 - (e) Shall be accompanied by an affidavit of Richard Cohen stating that the copies are true, correct, and complete copies of the original Documents; and

- (f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive Documents are submitted; and (ii) the corresponding consecutive Document control number(s) used to identify that person's Documents, and if submitted in paper form, the box number containing such Documents. The FTC will provide a sample index upon request.
6. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any Document responsive to a particular request contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the Document.
- (a) The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address or phone number in combination with one or more of the following:
- date of birth,
 - driver's license number or other state identification number, or a foreign country equivalent,
 - passport number,
 - financial account number, and
 - credit or debit card number.
- (b) The term "Sensitive Health Information" includes medical records and other individually identifiable health information, whether on paper, in electronic form or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. Forms of Production: You shall submit all Documents as instructed below absent written consent signed by Complaint Counsel.
- (a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original Documents:
- (i) Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(ii), (a)(iii) and (a)(iv).

PUBLIC

- (ii) Submit emails in image format with extracted text and the following metadata and information:

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

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

PUBLIC

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

- (iv) Submit all other electronic Documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

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

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

- (v) Submit Documents stored in hard copy in image format accompanied by OCR with the following information:

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

- (vi) Submit redacted Documents in PDF format accompanied by OCR with the metadata and information required by relevant Document type described in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above.
- (b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.

PUBLIC

- (c) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your or the Company's computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact Complaint Counsel to determine, with the assistance of the appropriate Complaint Counsel representative, whether and in what manner you may use such software or services when producing materials in response to these Document requests.
- (d) Produce electronic file and image submissions as follows:
- (i) For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - (ii) For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats;
 - (iii) All Documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of your compliance with these Document requests; and
 - (iv) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
 - (v) Each production shall be submitted with a transmittal letter that includes the case name and docket no. 9428; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and Document identification number range for each; total number of Documents; and a list of load-file fields in the order in which they are organized in the load file.
8. Each Document requested herein must be produced in its entirety and without deletion, abbreviation, redaction, expurgation, or excisions, regardless of whether you consider the entire Document to be relevant or responsive to these requests. If you have redacted any portion of a Document for privilege, stamp the words "redacted - privilege" where the redacted material originally appeared, on each page of the Document that you have redacted. Privileged redactions must be included in a privilege log prepared pursuant to Instruction 9 below. If you have redacted Documents for any other reason, describe the reason for the redaction: for instance, if you redact a Document to comply with privacy laws in other jurisdictions, stamp the words "redacted - privacy" where the material originally appeared, on each page of the Document that you have redacted. Redactions

made on a basis other than privilege must be included in a log prepared pursuant to Instruction 9, below and the reason clearly stated.

9. If any Document or tangible thing is produced in a redacted form or withheld, you shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed, in a manner that will enable Complaint Counsel to assess the claim of privilege. The schedule shall be in Microsoft Excel format, and shall include, for each Document withheld or redacted, at least the following: (i) the specific grounds for withholding or redacting the Document including any claim of privilege; (ii) the title of the Document; (iii) the date of the Document; (iv) the author of the Document; (v) the addressees and recipients of the Document or any copy thereof (including persons “cc’d” or “bcc’d” or “blind cc’d”); (vi) a description of the subject matter of the Document in sufficient detail to assess the reasons for withholding or redacting the Document including any claim of privilege; and (vii) in separate Excel columns, the beginning Bates number of the Document, and the ending Bates number of the Document. Additionally, for each Document withheld under the attorney work product doctrine, state whether the Document was prepared in anticipation of litigation or for trial, and, if so, identify the anticipated litigation or trial upon which the assertion is based. Any attachment to a Document withheld under a claim of privilege or immunity shall be produced unless the attachment is also subject to a claim of privilege or immunity and the basis for such claim is described in a privilege schedule.
10. Complaint Counsel does not concede the appropriateness of redacting or withholding information on a basis other than privilege and expressly reserves all rights to challenge the redacting or withholding of Documents or information.
11. If Documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of any Entity’s Document retention policy, but you have reason to believe such Documents have been in existence, state the circumstances under which they were lost or destroyed, describe the Documents to the fullest extent possible, state the request(s) to which they are responsive, and identify persons having knowledge of the content of such Documents.
12. You must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. You must also provide a statement identifying any electronic production tools or software packages utilized in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and:
 - (a) if you utilized keyword search terms to identify Documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;

- (b) if you utilized Technology Assisted Review software;
 - (i) describe the collection methodology, including: how the software was utilized to identify responsive Documents; the process you utilized to identify and validate the seed set Documents subject to manual review; the total number of Documents reviewed manually; the total number of Documents determined nonresponsive without manual review; the process you used to determine and validate the accuracy of the automatic determinations of responsiveness and non-responsiveness; how you handled exceptions (“uncategorized Documents”); and if your Documents include foreign language Documents, whether reviewed manually or by some technology-assisted method; and
 - (ii) provide all statistical analyses utilized or generated by you or your agents related to the precision, recall, accuracy, validation, or quality of your Document production in response to this subpoena; and identify the Person(s) able to testify on your behalf about information known or reasonably available to you, relating to your response to this specification.
 - (c) if you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your or the Company’s computer systems or electronic storage media in response to this subpoena, or if your or the Company’s computer systems contain or utilize such software, you must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner you may use such software or services when producing materials in response to this subpoena.
13. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by 16 C.F.R. § 3.34, or any extension thereof, shall be waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.
14. All objections must state with particularity whether and in what manner the objection is being relied upon as a basis for limiting the scope of any search for Documents or withholding any responsive Documents. If you are withholding responsive information pursuant to any general objection, you should so expressly indicate. If, in responding to any request, you claim any ambiguity in interpreting either the request or a definition or instruction applicably thereto, set forth as part of your response the language deemed to be ambiguous and the interpretation used in responding to the request, and produce all Documents that are responsive to the request as you interpret it.
15. Whenever necessary to bring within the scope of a request a response that might otherwise be construed to be outside its scope, the following construction should be applied:

- (a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;
 - (b) Construing the singular form of any word to include the plural and plural form to include the singular;
 - (c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;
 - (d) Construing the masculine form to include the feminine form and vice versa; and
 - (e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters.
16. Unless otherwise stated, construe each request independently and without reference to any other request.
17. Produce entire Documents, including all attachments, hyperlinked attachments (*e.g.*, attachments stored on Box or Google Drive), cover letters, memoranda, and appendices, as well as the file, folder tabs, and labels appended to or containing any Documents. Copies which differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) should be produced separately.
18. Any questions you have relating to the scope or meaning of anything in this subpoena should be directed to the attorney who executed the subpoena to which these instructions are attached.
19. For productions smaller than 10 GB, your response to this subpoena shall be submitted to Complaint Counsel through email and using secure file transfer protocols (“FTP”). For instructions on submitting through FTP, please contact Corene Wint (cwint@ftc.gov), Rachel Ma (rma@ftc.gov), Amare Ashmeade (aashmeade@ftc.gov), Jacob Warren (jwarren1@ftc.gov), John Yoon (jyoon2@ftc.gov), Kayla Willey (kwilley@ftc.gov). For productions larger than 10 GB, you shall submit your response to this subpoena through IDE, EIDE, or SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure. These should be addressed to the attention of Donald King, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day. A transmittal cover letter for a mailed production shall still be sent via electronic mail to Harris Rothman (hrothman@ftc.gov).

PUBLIC

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2024, I caused the foregoing document to be served via email to:

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

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

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

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

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

Counsel for The Kroger Company

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

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

Email: msventim@debevoise.com

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

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

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

Counsel for Albertsons Companies, Inc.

s/ James H. Weingarten
James H. Weingarten
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3570
Email: jweingarten@ftc.gov

Counsel Supporting the Complaint

PUBLIC

PUBLIC

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

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

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: “In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section.” Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 27, 2024

PUBLIC
PUBLIC

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.
6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the

PUBLIC
PUBLIC

designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with

PUBLIC
PUBLIC

the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Ex. H

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. I

PUBLIC

From: Hall, Laura
Sent: Friday, April 26, 2024 5:19 PM
To: Sonia Pfaffenroth
Cc: Holler, John; Dickinson, Charles; Wolf, Matthew M.; Shultz, Matthew M.; Yasmine Harik -contact; Kientzle, Michael; Davis, Joshua M.; Pfaffenroth, Sonia Kuester; Glick, Kolya; Cleveland, Christina; jmfried@debevoise.com; Luna.Barrington@weil.com; Luke.Sullivan@weil.com; Jason.Kleinwaks@weil.com; nborn@debevoise.com; thassi@debevoise.com; mcardena@debevoise.com; srselden@debevoise.com; james.fishkin@dechert.com; mschaper@debevoise.com; jrabraham@debevoise.com; mike.cowie@dechert.com; mark.perry@weil.com; Sarah.Sternlieb@weil.com; Bambo.Obaro@weil.com; jpitt@wc.com; msventim@debevoise.com; emainigi@wc.com; apodoll@wc.com; tebuckley@debevoise.com; htmehler@debevoise.com; thomas.miller@dechert.com; Bergman, David B.; Reagan, Austin; Marra, Bryan M.; Camilla.Brandfield-Harvey@weil.com; Nicole.Zelada@weil.com; Pai, Rohan; Weingarten, James; RobertBernheim-contact; BrianYost-contact; SchonetteWalker-contact; NicoleGordon-contact; JuliaMeade-contact; Ma, Rachel; ShiraHoffman-contact; AmandaHamilton-contact; CherylHiemstra-contact; WillMargrabe-contact; JeffHerrera-contact; WilliamYoung-contact; LucusTucker-contact; ChristineCortez-contact; PaulHarper-contct; Wint, Corene; GaryHonick-contact; JaymeWeber-contact; AngieMilligan-contact; SamanthaFeeley-contact; Holley, Steven L.; Kelly, Stephanie M.; Richardson, Daniel J.; Bock, Karl L.; Hesse, Renata; Keeley, Julian M.
Subject: FTC v. Kroger - invocation of common interest doctrine

Dear Sonia,

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

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

PUBLIC

8. Is privilege and/or attorney work product being claimed over otherwise non-privileged communications involving only one of the parties to the Joint Defense and Common Interest Agreement regarding formulation of negotiating position and/or discussing another party's negotiating position with respect to the divestiture and/or transition services? E.g., if two businesspeople at C&S are discussing that a particular asset is important to have in the divestiture package for their post-divestiture operations, is privilege and/or attorney work product being claimed over such a communication?
9. Is privilege and/or attorney work product being claimed over otherwise non-privileged communications between a party to the Joint Defense and Common Interest Agreement and its non-attorney advisors (e.g., Boston Consulting Group) regarding the composition of the divestiture package or the transition services agreement?
10. Are there any communications between C&S and Kroger and/or Albertsons subsequent to the signing of the initial divestiture-related agreements in September 2023 as to which privilege and/or attorney work product is not claimed? What are the subjects of those communications?
11. Are there any documents in the possession of C&S, Kroger or Albertsons relating to post-September 2023 negotiations over the divestiture and the transition services agreement as to which privilege and/or attorney work product is not claimed?

Best,

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

Ex. J

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. K

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. L

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. M

PUBLIC

Arnold & Porter

Sonia Kuester Pfaffenroth
+1 202.942.6831 Direct
Sonia.Pfaffenroth@arnoldporter.com

May 6, 2024

VIA EMAIL

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

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

Dear Laura:

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

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

Arnold & Porter

May 6, 2024

Page 2

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

Arnold & Porter

May 6, 2024

Page 3

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.

PUBLIC

Arnold & Porter

May 6, 2024
Page 4

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

Sincerely,

A handwritten signature in cursive script that reads "Sonia K. Pfaffenroth".

Sonia Kuester Pfaffenroth

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

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

Complaint Counsel respectfully submits this Statement, pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice and Provision 4 of this Court's Scheduling Order. Complaint Counsel has attempted to confer in good faith with counsel for Respondents The Kroger Company ("Kroger") and Albertsons Companies, Inc. ("Albertsons") and non-parties C&S Wholesale Grocers LLC ("C&S") and Richard Cohen to obtain the documents requested in Complaint Counsel's Requests for Production (the "RFPs") and subpoenas on a timely basis without the Court's intervention.

On March 21 and 22, 2024, Complaint Counsel issued subpoenas to C&S and Cohen, respectively. Exs. A, B.

On April 2, 2024, Complaint Counsel had an initial meet and confer with counsel for C&S and Cohen (who have the same counsel) by videoconference at 4:30 p.m. to discuss the subpoenas.

Complaint Counsel issued RFPs to Respondents on April 2, 2024. Exs. C, D.

PUBLIC

Complaint Counsel had a second meet and confer with counsel for C&S and Cohen by videoconference at 1:30 p.m. on April 8, 2024. Complaint Counsel sent an email the same day memorializing the discussion and asking further questions about the scope of the common interest claim. Ex. E. Counsel for C&S and Cohen responded by letter on April 11, 2024, stating that { [REDACTED] } Ex. F at 2.

Complaint Counsel held a meet and confer with Respondents' counsel on April 26, 2024 at 1 p.m. via videoconference. Respondents' counsel did not provide substantive responses on this call. Following the meet and confer, Complaint Counsel sent its questions about the scope of the common interest and attorney work product protections being claimed by email. Ex. G.

Respondents served Responses and Objections to the RFPs on May 2, 2024. Ex. H, I. On May 3, 2024, Complaint Counsel sent Respondents' counsel a list of questions about the Responses and Objections, including the claim of common interest protection, to be discussed on the parties' upcoming meet and confer. Ex. J.

On May 6, 2024, Complaint Counsel and Respondents' Counsel held a meet and confer at 10 a.m. via videoconference. At 10:02 a.m. on May 6, 2024, counsel for Kroger sent a letter purporting to respond to the questions raised on April 26, 2024, but refusing to provide specifics about what was being withheld. Ex. K. The letter proposes that further discussion of the issue await Respondents' production of documents and privilege log. During the meet and confer, counsel for Kroger likewise refused to answer questions about whether common interest doctrine was claimed for particular types of communications, such as those between businesspeople, calling the question "hypothetical." During the meet and confer, counsel for Albertsons represented that the negotiations over the divestiture had occurred primarily between Kroger and

PUBLIC

C&S, but could not exclude the possibility that it participated in some divestiture-related communications.

Dated: May 13, 2024

Respectfully submitted,

By: s/ Laura R. Hall

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

Counsel Supporting the Complaint

Ex. A

PUBLIC



Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
 Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

<p>1. TO C&S Wholesale Grocers c/o Renata B. Hesse, Esq. Sullivan & Cromwell LLP 1700 New York Avenue, N.W. Suite 700 Washington, DC 20006</p>	<p>2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
---	---

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580</p>	<p>4. MATERIAL WILL BE PRODUCED TO James H. Weingarten, Esq., or designee</p> <hr/> <p>5. DATE AND TIME OF PRODUCTION April 11, 2024 @ 10:00 a.m.</p>
---	---

6. SUBJECT OF PROCEEDING

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

7. MATERIAL TO BE PRODUCED

 See Attached Requests and Specifications

<p>8. ADMINISTRATIVE LAW JUDGE The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA James H. Weingarten or designee Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 (202) 326-3570</p>
---	--

<p>DATE SIGNED Mar 21, 2024</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA s/ James H. Weingarten</p>
---	---

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Via FedEx

on the person named herein on:

March 21, 2024

(Month, day, and year)

James H. Weingarten

(Name of person making service)

Attorney

(Official title)

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

In the Matter of

The Kroger Company
a corporation,

and

Albertsons Companies Inc.
a corporation,

Respondents

Docket No. 9428

**ATTACHMENT A TO SUBPOENA TO PRODUCE DOCUMENTS
ISSUED TO C&S WHOLESALE GROCERS**

1. All quarterly and annual reports for the Company, including for the Company's retail operations.
2. Audited annual and quarterly financial statements (or the equivalent) for the Company as a whole and separately for each business unit. If the business unit that will operate the Proposed Divestiture has its own financial statements and profit and loss statements, provide those along with the statements for the overall Company.
3. Annual and monthly financial statements for the Company as a whole and separately for each business unit. If the business unit that will operate the Proposed Divestiture has its own financial statements and profit and loss statements, provide those along with the statements for the overall Company.
4. Documents sufficient to show all financial projections for (a) the Company as a whole; (b) the Company's retail businesses prepared in the ordinary course of business (absent the Proposed Divestiture); and (c) the Company's retail businesses including financial projections for the assets acquired in the Proposed Divestiture.
5. Documents, including but not limited to membership agreements, limited liability company agreements, corporate structure charts, corporate charters and bylaws, and other similar Documents, sufficient to show the organizational structure, equity ownership, officers, directors, and management structure of the Entity or Entities that will own and/or

operate the assets acquired in the Proposed Divestiture, as well as the Company as a whole, and how, if at all, the Divested Assets will be integrated with the Company.

6. For each debt or other obligation of the Company, Documents sufficient to show (a) all terms and conditions of that debt or obligation (including any modifications), (b) repayment schedule, (c) explanation of debt covenants that need to be maintained, and (d) all calculations of the debt covenants.
7. All reports received from credit rating agencies relating to the Company.
8. Documents sufficient to show any actual, potential, or anticipated loss of any of the Company's top 50 (by revenue) wholesale customers, and the financial impact of any such loss.
9. Resumes of all current Company leadership and management team and the proposed leadership and management team for the Entity or Entities that will own and/or operate the assets acquired in the Proposed Divestiture.
10. All Documents from September 1, 2023 to present relating to changes in the Company's proposed retail management team, including the departures of any members of the retail management team (*e.g.*, Brett Wing and Everett Boutwell).
11. Documents sufficient to show the current ownership and organizational structure for the Company and its subsidiaries and affiliates.
12. All Documents analyzing or evaluating the Proposed Divestiture, including:
 - (a) All board Documents relating to the Proposed Divestiture;
 - (b) All Documents analyzing the value of the assets included in the Proposed Divestiture;
 - (c) Documents sufficient to show how the Company determined the offered purchase price of the Divested Assets and any modifications to that price;
 - (d) Documents sufficient to show the Financing for the Proposed Divestiture, including the Planned capital structure, covenants in the Financing arrangements that could trigger default or a significant change in the lending terms, agreed upon borrower liquidity and performance ratios, actual or proposed financial partners, communications with those Entities, proposals or analyses, and showing the terms of those relationships, and borrower transactions that require prior lender approval;

- (e) Documents regarding any Plans (whether realized or not) to change the Financing structure of the Proposed Divestiture
 - (f) Documents sufficient to show the itemized costs associated with the acquisition of assets in the Proposed Divestiture, including purchase price, Financing costs, and costs to transfer the assets and integrate them into the Company's business (including physical and IT conversion, necessary upgrades, and investments in additional assets or resources, such as IT systems, distribution systems, support services, human capital, etc.);
 - (g) Documents sufficient to show the anticipated sources and uses of Financing relating to the Proposed Divestiture;
 - (h) Documents sufficient to show how the Company Plans to maintain required liquidity and performance ratios;
 - (i) Documents sufficient to show how the profitability or performance of the new business will relate to or affect the compensation of the Company's management team;
 - (j) Documents sufficient to show short-term and long-term financial projections for the Proposed Divestiture, including any projected earnings and cash flows for each store and distribution center, and the facts and assumptions underlying those projections.
13. All Documents constituting or reflecting the Company's business Plans for the Proposed Divestiture, including all Plans for:
- (a) Re-bannering stores, including but not limited to:
 - (i) Which banner each store will operate under;
 - (ii) Each store that will be converted to a new banner;
 - (iii) The timeline for each conversion and banner conversion; and
 - (iv) The projected sales impact from each banner conversion;
 - (v) The projected costs of each banner conversion, including but not limited to downtime, grand opening expenses, banner launch, signage, décor, tech, and systems expenses;
 - (vi) Plans for operating format;

- (b) Private label strategy, including but not limited to:
 - (i) The costs of developing new private label products;
 - (ii) The value of the private label brands acquired in the Proposed Divestiture;
 - (iii) The cost of procuring private label products from suppliers;
 - (iv) Any communications with private label product consultants, suppliers, manufacturers, or partners, including Topco or any marketing agencies;
- (c) Customer loyalty programs, including but not limited to:
 - (i) Any analysis of the value of customer data acquired in the Proposed Divestiture;
 - (ii) Analysis of the cost of retaining any third-party firms to assist in developing customer loyalty programs, and any communications with such firms;
 - (iii) Analysis of the cost of hiring employees necessary to build and operate customer loyalty programs;
- (d) E-commerce programs, including but not limited to:
 - (i) Any analysis of the cost of developing e-commerce programs relating to the Proposed Divestiture;
 - (ii) Any communications with third parties relating to developing e-commerce programs relating to the Proposed Divestiture;
- (e) Pricing and promotional strategies;
- (f) Procurement of produce, meat, and dairy products;
- (g) Distribution centers;
- (h) Operation of store pharmacies, including but not limited to:
 - (i) Contracts with each pharmacy benefit manager (“PBM”) with which the Company has contracted for inclusion in any pharmacy network;
 - (ii) All Documents relating to the Company’s negotiation of contracts (including contract renewals) for the Company’s participation in any pharmacy network relating to the Proposed Divestiture, including

negotiations conducted through or involving pharmacy services administration organizations, and including Documents discussing the Company's negotiating position, leverage, advantages, weaknesses, goals, or strategies with respect to such negotiations;

(iii) Any analysis of the profitability of store pharmacies included in the Proposed Divestiture; and

- (i) Documents sufficient to show all employees to whom C&S intends to offer employment as part of the Proposed Divestiture.
14. All Documents constituting or reflecting the Company's current marketing or advertising expenses and all Documents constituting or reflecting the Company's Planned marketing and advertising expenses for the Proposed Divestiture.
15. All Documents regarding discussions with Kroger or Albertsons, a previous divestiture buyer, or any other Person, regarding the successes, failures, or outcomes of prior divestiture transactions or sales of Grocery Retailers involving Kroger or Albertsons pursuant to a settlement or consent order with any government Entity.
16. All Documents related to the Company's Plans to assume the CBAs covering employees working at Kroger or Albertsons stores included in the Proposed Divestiture, including:
- (a) The Company's Plans to negotiate or implement the CBAs that the Company will assume in connection with the Proposed Divestiture, including any Plans to modify existing CBAs or to hire and onboard Grocery Retailer associates, or any analysis of the effects of collective bargaining provisions that allow Grocery Retailer associates to exercise their right to elect to remain employed at Kroger or Albertsons instead of transferring to the Company;
 - (b) The Company's Plans to contribute to or assume liabilities related to multi-employer pension and health and welfare funds or other pension and health and welfare funds;
 - (c) The Company's commitments to or understandings or agreements with Kroger or Albertsons or any Unions relating to assuming the CBAs, including relating to the statements that "no stores will close as a result of the merger" and "frontline associates [will] remain employed"; the duration of those commitments; and who is considered a "frontline associate[]";
 - (d) The Company's Plans or commitments to negotiate CBAs after the expiration of the Defendants' existing CBAs that the Company will assume in connection with the Proposed Divestiture; and
 - (e) The Company's Plans to address Union organizing efforts at non-Union stores.

17. Documents sufficient to show the Company's Plans for distribution centers included in the Proposed Divestiture, and Plans for the Company's existing distribution centers that will service stores acquired in the Proposed Divestiture, including:
 - (a) Documents sufficient to show how each distribution center's capacity utilization and cost structure will change after the Proposed Divestiture;
 - (b) Documents sufficient to show the address of the distribution centers that will service each acquired store from the Proposed Divestiture; the portion of the store's volume that will be sourced from each of these distribution centers; and the distance from the distribution center to the store (including an explanation for how the distance was calculated); and
 - (c) Documents sufficient to show the capabilities of each distribution center (*e.g.*, temperature control, technology integration, safety and compliance).
18. All Documents relating to efforts by the Company to respond to Union organizing efforts since January 1, 2019.
19. All Documents relating to efforts by the Company to replace Union labor with non-Union labor since January 1, 2019, including all Documents discussing the Company's strategies, rationales, or Plans for closing unionized Company facilities and transferring employees at those facilities to non-Unionized Company facilities.
20. All Documents created by and all communications with the Company's consultants or bankers, including, but not limited to, Bain, KPMG, and Centerview Partners, in connection with the Proposed Divestiture and any Plans for operating the Divested Assets.
21. All Documents from January 1, 2021 to present relating to the Company's current private label brands, including:
 - (a) All Documents analyzing or evaluating the Company's private label offerings, or comparing the Company's private label offerings to national brand equivalents, Kroger's or Albertsons' private label offerings, including, but not limited to, Documents discussing quality, freshness, assortment, innovation, pricing, sales trends, profitability, cost to produce, brand equity, advertising, marketing, or consumer preference; and
 - (b) Documents sufficient to show the Company's current costs of goods sold for its private label products offered in its retail stores, including contracts with third-party suppliers, including Topco, and the sales volumes of those private label products from January 1, 2021 to present.

22. All Documents concerning the Company's contemplated or actual acquisition (other than the Proposed Divestiture), sale, divestiture, franchising, or closure of any Grocery Retailer since January 1, 2021 and all business Plans relating to those assets.
23. Documents sufficient to show the organizational structure and management of the Company's retail business, including the current retail business and any Planned changes.
24. All communications with Kroger or Albertsons, or their representatives, about the Proposed Divestiture or the Proposed Transaction.
25. All Documents from September 1, 2023 to present relating to responses provided by C&S to any questions posed by governmental Entities investigating the Proposed Transaction or Proposed Divestiture.
26. All communications with C&S customers or prospective customers concerning the Proposed Divestiture or the Proposed Transaction.
27. All communications about or relating to the Proposed Divestiture between the Company and SoftBank, Richard Cohen, Symbotic, or any other Person providing Financing or requested to provide Financing relating to the Proposed Divestiture or the Proposed Transaction.
28. All communications with labor Unions related to the Proposed Divestiture, including any local or international representatives of the United Food and Commercial Workers ("UFCW") or International Brotherhood of Teamsters ("Teamsters").
29. All Documents concerning transition services and reverse transition services in connection with the Proposed Divestiture, including:
 - (a) Transition service agreements;
 - (b) Supply agreements with Kroger or Albertsons to provide inputs, semi-finished or finished products to the Company;
 - (c) Documents sufficient to show the personnel the Company, Kroger, and Albertsons will use to Plan for the transfer of Divested Assets and who will oversee the transfer and ongoing transition services or interim sales between the Company and Kroger and Albertsons; and
 - (d) Transition Plans describing the process for transferring the Divested Assets and providing needed transition services.
30. A full privilege log per Instruction 9 of the civil investigative demand issued to the Company on October 10, 2023 to replace the metadata privilege log submitted to the

PUBLIC

Commission during the Investigation, as agreed in the December 5, 2023 Statement re: Limited Metadata Privilege Log submitted by Bill Boyd.

31. All Documents produced in response to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
32. All Documents responsive to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
33. All Documents produced in response to any subpoena issued to you by any defendant in the Litigation or the Administrative Proceeding.
34. All Documents responsive to any subpoena issued to you by any defendant in the Litigation or the Administrative Proceeding.

DEFINITIONS

For the purposes of this subpoena, the following definitions apply:

1. The term “the Company” or “C&S” means C&S Wholesale Grocers, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
2. The terms “subsidiary,” “affiliate,” and “joint venture,” when used in reference to any Entity, refer to any Person in which the Entity has partial (10 percent or more) or total ownership or control.
3. The term “Kroger” means The Kroger Co., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
4. The term “Albertsons” means Albertsons Companies, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
5. The term “Administrative Proceeding” means the Federal Trade Commission adjudicative proceeding relating to the Proposed Transaction captioned *In the Matter of The Kroger Co. and Albertsons Companies, Inc.*, FTC Docket No. D-9428.
6. The terms “and” and “or” have both conjunctive and disjunctive meanings.
7. The term “Bain” means Bain & Company, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
8. The term “CBA” means a collective bargaining agreement.
9. The term “Centerview Partners” means Centerview Partners Holdings LP, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
10. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access Documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms,

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

11. The terms “communication” and “communications” mean any and all written, oral, telephonic, or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any Person(s), including but not limited to any statements, inquiries, discussions, conversations, dialogues, correspondence, consultations, negotiations, agreements, understandings, meetings, letters, emails, faxes, notations, telegrams, advertisements, interviews, and all other Documents as herein defined. The phrase “communication between” is defined to include instances where one party addresses a communication to the other party but the other party does not respond, as well as instances in which the other party responds.
12. The term “Divested Assets” means any assets that would be acquired by the Company in the Proposed Divestiture.
13. The term “Documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in the possession, custody, or control of the Company, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including Documents contained in Collaborative Work Environments and other Document databases as well as copies of Documents that are not identical duplicates of the originals in a Person’s files; and copies of Documents the originals of which are not in the possession, custody, or control of the Company. Employee-Owned Devices used to store or transmit Documents responsive to this request are considered in the possession, custody, or control of the Company. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any Document. Unless otherwise specified, “Documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; architectural plans and engineering blueprints; and Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.
14. The terms “each,” “any,” and “all” mean “each and every.”
15. The term “Employee-Owned Device” means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.
16. The term “Entity” means any Person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, facility, division, department, unit, society, Union, or club, whether

incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

17. The term “Financing” means every form of contribution of value or financial accommodation, including but not limited to debt, equity, guarantees, letters of credit, and any other financial instrument.
18. “The term “Grocery Retailer” means a self-service retail food store with food (e.g., fresh meat and seafood, dairy products, frozen foods, beverages, bakery goods, dry groceries, etc.) and non-food (e.g., soaps, detergents, health and beauty aids) products that households consume, or any Entity that operates such stores.
19. The term “Investigation” means the Federal Trade Commission’s investigative review of the Proposed Transaction, File No. 231-0004, including but not limited to, the Litigation and the Administrative Proceeding.
20. The term “KPMG” means KPMG International, Limited, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
21. The term “Litigation” means the case captioned *Federal Trade Commission, et al. v. Kroger Company, et al.*, No. 3:24-cv-00347-AN (D. Or.), filed in the U.S. District Court for the District of Oregon, including any subsequent change in court venue for purposes of these proceedings.
22. The term “Messaging Application” refers to any electronic method that has ever been used by the Company and its employees to communicate with each other or Entities outside the Company for any business purposes. “Messaging Application” includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”
23. The term “Person” includes the Company and means any natural person, corporate Entity, partnership, association, joint venture, government Entity, or trust.
24. The terms “Plan,” “Plans,” or “Planned” refer to tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
25. The term “Proposed Divestiture” means any actual, proposed, or Planned sale or transfer of stores or other assets from Kroger and/or Albertsons to C&S or any other potential

buyer of assets divested by Kroger or Albertsons in connection with the Proposed Transaction, the Investigation, the Litigation, or the Administrative Proceeding.

26. The term “Proposed Transaction” means Kroger’s proposed acquisition of Albertsons as described in the Agreement and Plan of Merger By and Among Albertsons Companies, Inc., The Kroger Co., and Kettle Merger Sub, Inc. dated October 13, 2022, or any other proposed, contemplated, discussed, or related transaction between Kroger and Albertsons.
27. The term “operate” with reference to any Entity means to directly or indirectly own or lease the Entity, manage the Entity’s operations on behalf of another Person, have the power to appoint the majority of the Entity’s governing board or body, or otherwise directly or indirectly control the Entity, including through employment.
28. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
29. The term “SoftBank” means SoftBank Group Corp., SVF II Strategic Investments AIV LLC, SB Investment Advisers (UK) Limited, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
30. The term “Symbotic” means Symbotic Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
31. The term “Topco” means Topco Associates LLC, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
32. The term “Union” means any organized association of workers, regardless of whether the workers are covered by a collective bargaining agreement.
33. Any word or term that the Company considers vague or insufficiently defined has the meaning most frequently assigned to it by the Company in the ordinary course of business.

INSTRUCTIONS

For the purposes of this subpoena, the following instructions apply:

1. Unless otherwise indicated, these requests cover any and all Documents and information generated, prepared, created, modified, sent, or received during the period from October 1, 2023 to the present.
2. Documents or data requested are those in actual or constructive possession, custody, or control of the Company, or its representatives, attorneys, or other agents, including without limitation consultants, accountants, lawyers, or any other persons retained by, consulted by, or working on behalf or under the direction of the Company, wherever they may be located.
3. This subpoena shall be deemed continuing in nature and shall be supplemented in the event that additional Documents responsive to this request are created, prepared, or received between the time of the Company's initial response and the date established by the Administrative Law Judge for the evidentiary hearing in the Administrative Proceeding.
4. The Company does not need to reproduce Documents that the Company previously provided to the Commission in the Investigation.
5. All Documents responsive to these Document requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:
 - (a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files;
 - (b) Shall be marked on each page with corporate identification and consecutive Document control numbers. None of the numbers should be identical to control numbers on Documents previously submitted to the FTC in the course of the Investigation. The prefixes used for the corporate custodian identification shall not include the words "FTC" or "Kroger" or "Albertsons;"
 - (c) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language Document;
 - (d) Shall be produced in color where necessary to interpret the Document (if the coloring of any Document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any Document (*e.g.*, a chart or graph), makes any substantive information contained in the Document unintelligible, the Company must submit the original Document, a like-colored photocopy, or a like-colored JPEG format image;

- (e) Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original Documents; and
 - (f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive Documents are submitted; and (ii) the corresponding consecutive Document control number(s) used to identify that person's Documents, and if submitted in paper form, the box number containing such Documents. The FTC will provide a sample index upon request.
6. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any Document responsive to a particular request contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the Document.
- (a) The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address or phone number in combination with one or more of the following:
 - date of birth,
 - driver's license number or other state identification number, or a foreign country equivalent,
 - passport number,
 - financial account number, and
 - credit or debit card number.
 - (b) The term "Sensitive Health Information" includes medical records and other individually identifiable health information, whether on paper, in electronic form or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. Forms of Production: The Company shall submit all Documents as instructed below absent written consent signed by Complaint Counsel.
- (a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original Documents:

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

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

PUBLIC

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

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

- (iv) Submit all other electronic Documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
--------------------------------------	--------------------

PUBLIC

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

- (v) Submit Documents stored in hard copy in image format accompanied by OCR with the following information:

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

- (vi) Submit redacted Documents in PDF format accompanied by OCR with the metadata and information required by relevant Document type described in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above.
- (b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- (c) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in its computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact the Complaint Counsel to determine, with the assistance of the appropriate Complaint Counsel, whether and in what manner the Company may use such software or services when producing materials in response to these Document requests.
- (d) Produce electronic file and image submissions as follows:
 - (i) For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - (ii) For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats;
 - (iii) All Documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Company's compliance with these Document requests; and
 - (iv) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
 - (v) Each production shall be submitted with a transmittal letter that includes the case name and docket no. 9428; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and Document identification number range for each; total

number of Documents; and a list of load-file fields in the order in which they are organized in the load file.

8. Each Document requested herein must be produced in its entirety and without deletion, abbreviation, redaction, expurgation, or excisions, regardless of whether the Company considers the entire Document to be relevant or responsive to these requests. If the Company has redacted any portion of a Document for privilege, stamp the words “redacted - privilege” where the redacted material originally appeared, on each page of the Document that the Company has redacted. Privileged redactions must be included in a privilege log prepared pursuant to Instruction 9 below. If the Company has redacted Documents for any other reason, describe the reason for the redaction: for instance, if the Company redacts a Document to comply with privacy laws in other jurisdictions, stamp the words “redacted - privacy” where the material originally appeared, on each page of the Document that the Company has redacted. Redactions made on a basis other than privilege must be included in a log prepared pursuant to Instruction 9, below and the reason clearly stated.
9. If any Document or tangible thing is produced in a redacted form or withheld, the Company shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed, in a manner that will enable Complaint Counsel to assess the claim of privilege. The schedule shall be in Microsoft Excel format, and shall include, for each Document withheld or redacted, at least the following: (i) the specific grounds for withholding or redacting the Document including any claim of privilege; (ii) the title of the Document; (iii) the date of the Document; (iv) the author of the Document; (v) the addressees and recipients of the Document or any copy thereof (including persons “cc’d” or “bcc’d” or “blind cc’d”); (vi) a description of the subject matter of the Document in sufficient detail to assess the reasons for withholding or redacting the Document including any claim of privilege; and (vii) in separate Excel columns, the beginning Bates number of the Document, and the ending Bates number of the Document. Additionally, for each Document withheld under the attorney work product doctrine, state whether the Document was prepared in anticipation of litigation or for trial, and, if so, identify the anticipated litigation or trial upon which the assertion is based. Any attachment to a Document withheld under a claim of privilege or immunity shall be produced unless the attachment is also subject to a claim of privilege or immunity and the basis for such claim is described in a privilege schedule.
10. Complaint Counsel does not concede the appropriateness of redacting or withholding information on a basis other than privilege and expressly reserves all rights to challenge the redacting or withholding of Documents or information.
11. If Documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company’s Document retention policy, but the Company has reason to believe such Documents have been in

existence, state the circumstances under which they were lost or destroyed, describe the Documents to the fullest extent possible, state the request(s) to which they are responsive, and identify persons having knowledge of the content of such Documents.

12. The Company must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the Company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and:
 - (a) if the Company utilized keyword search terms to identify Documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - (b) if the Company utilized Technology Assisted Review software;
 - (i) describe the collection methodology, including: how the software was utilized to identify responsive Documents; the process the Company utilized to identify and validate the seed set Documents subject to manual review; the total number of Documents reviewed manually; the total number of Documents determined nonresponsive without manual review; the process the Company used to determine and validate the accuracy of the automatic determinations of responsiveness and non-responsiveness; how the Company handled exceptions (“uncategorized Documents”); and if the Company’s Documents include foreign language Documents, whether reviewed manually or by some technology-assisted method; and
 - (ii) provide all statistical analyses utilized or generated by the Company or its agents related to the precision, recall, accuracy, validation, or quality of its Document production in response to this subpoena; and identify the Person(s) able to testify on behalf of the Company about information known or reasonably available to the Company, relating to its response to this specification.
 - (c) if the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company’s computer systems or electronic storage media in response to this subpoena, or if the Company’s computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.

13. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by 16 C.F.R. § 3.34, or any extension thereof, shall be waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.
14. All objections must state with particularity whether and in what manner the objection is being relied upon as a basis for limiting the scope of any search for Documents or withholding any responsive Documents. If you are withholding responsive information pursuant to any general objection, you should so expressly indicate. If, in responding to any request, you claim any ambiguity in interpreting either the request or a definition or instruction applicably thereto, set forth as part of your response the language deemed to be ambiguous and the interpretation used in responding to the request, and produce all Documents that are responsive to the request as you interpret it.
15. Whenever necessary to bring within the scope of a request a response that might otherwise be construed to be outside its scope, the following construction should be applied:
 - (a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;
 - (b) Construing the singular form of any word to include the plural and plural form to include the singular;
 - (c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;
 - (d) Construing the masculine form to include the feminine form and vice versa; and
 - (e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters.
16. Unless otherwise stated, construe each request independently and without reference to any other request.
17. Produce entire Documents, including all attachments, hyperlinked attachments (e.g., attachments stored on Box or Google Drive), cover letters, memoranda, and appendices, as well as the file, folder tabs, and labels appended to or containing any Documents. Copies which differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) should be produced separately.

PUBLIC

18. Any questions you have relating to the scope or meaning of anything in this subpoena should be directed to the attorney who executed the subpoena to which these instructions are attached.
19. For productions smaller than 10 GB, the Company's response to this subpoena shall be submitted to Complaint Counsel through email and using secure file transfer protocols ("FTP"). For instructions on submitting through FTP, please contact Corene Wint (cwint@ftc.gov), Rachel Ma (rma@ftc.gov), Amare Ashmeade (aashmeade@ftc.gov), Jacob Warren (jwarren1@ftc.gov), John Yoon (jyoon2@ftc.gov), Kayla Willey (kwilley@ftc.gov). For productions larger than 10 GB, the Company shall submit its response to this subpoena through IDE, EIDE, or SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure. These should be addressed to the attention of Donald King, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day. A transmittal cover letter for a mailed production shall still be sent via electronic mail to Katie Drummonds, kdrummonds@ftc.gov.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2024, I caused the foregoing document to be served via email to:

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

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

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

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

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

Counsel for The Kroger Company

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

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

Email: msventim@debevoise.com

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

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

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

Counsel for Albertsons Companies, Inc.

s/ James H. Weingarten
James H. Weingarten
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3570
Email: jweingarten@ftc.gov

Counsel Supporting the Complaint

PUBLIC

PUBLIC

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

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

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: “In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section.” Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 27, 2024

PUBLIC
PUBLIC

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.
6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the

PUBLIC
PUBLIC

designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with

PUBLIC
PUBLIC

the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Ex. B

PUBLIC



Subpoena for Production of Documentary Material

Provided by the Secretary of the Federal Trade Commission, and
 Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

<p>1. TO</p> <p>Richard Cohen c/o Renata B. Hesse, Esq. Sullivan & Cromwell LLP 1700 New York Avenue, N.W. Suite 700 Washington, DC 20006</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
---	--

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION</p> <p>Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>James H. Weingarten, Esq., or designee</p> <hr/> <p>5. DATE AND TIME OF PRODUCTION</p> <p>April 12, 2024 @ 10:00 a.m.</p>
--	---

6. SUBJECT OF PROCEEDING

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

7. MATERIAL TO BE PRODUCED

See Attached Requests and Specifications

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>James H. Weingarten or designee Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 (202) 326-3570</p>
---	--

<p>DATE SIGNED</p> <p>Mar 22, 2024</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> <p>s/ James H. Weingarten</p>
--	--

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within the earlier of ten days after service thereof or the time for compliance therewith. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 9.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel. Witness travelers can contact the FTC travel office for guidance at (202) 326-3299 or travel@ftc.gov. PLEASE NOTE: Reimbursement for necessary transportation, lodging, and per diem expenses cannot exceed the maximum allowed for such expenses by an employee of the federal government.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Via FedEx

on the person named herein on:

March 22, 2024

(Month, day, and year)

James H. Weingarten

(Name of person making service)

Attorney

(Official title)

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

In the Matter of

The Kroger Company
a corporation,

and

Albertsons Companies Inc.
a corporation,

Respondents

Docket No. 9428

**ATTACHMENT A TO SUBPOENA TO PRODUCE DOCUMENTS
ISSUED TO RICHARD COHEN**

1. All Documents relating to the Divestiture Acquisition, including, but not limited to Documents relating to:
 - (a) Analysis of the Divestiture Acquisition (*e.g.*, financial projections, deal models, competitive analyses, assessments of the attractiveness of the assets, risks associated with the Divestiture Acquisition, Documents prepared by consultants, valuation analyses, labor relations analyses, and results of C&S's due diligence);
 - (b) Plans for the assets (and associated labor) included in the Divestiture Acquisition, including the corporate governance thereof;
 - (c) Plans to close, sell, franchise, license, lease, or sell and lease back, under any circumstances, any asset that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition;
 - (d) Benefits, costs, and risks associated with the Divestiture Acquisition and the transitioning of the assets comprising the Divestiture Acquisition;
 - (e) Impacts of the Divestiture Acquisition on any other of your or C&S's interests;

PUBLIC

- (f) The determination and negotiation of the purchase price of the Divestiture Acquisition; and
 - (g) Any participation in the Financing of the Divestiture Acquisition, including, but not limited to, all term sheets for any Person's Financing contribution, as well as any Documents discussing the amount, form (*e.g.*, debt or equity), terms (*e.g.*, whether any debt Financing is recourse or non-recourse debt), return on investment, risks of any actual, Planned, or considered contribution any Person towards the Financing of the Divestiture Acquisition.
2. All Documents relating to the Proposed Transaction or the Investigation.
 3. All Documents relating to any Person's Financing commitments or obligations supporting the Divestiture Acquisition or C&S's operation of the assets (and associated labor) included in the Divestiture Acquisition, including any limits to any such Financing commitment or obligation.
 4. All communications and other Documents transmitted between or among you, the Company, Defendants, C&S, SoftBank, Symbotic, and/or any other Entity relating to the Proposed Transaction, the Investigation, this Litigation, or the Divestiture Acquisition.
 5. Documents sufficient to show any obligation on any Person to extend any further Financing to C&S under any circumstances or conditions following the Divestiture Acquisition.
 6. All Documents analyzing or discussing C&S's capabilities, strengths, or weaknesses with respect to the operation of stores currently operated by the Defendants, or retail stores in general.
 7. All Documents relating to transition services provided by Kroger, Albertsons, or other Entities for the assets in the Divestiture Acquisition.
 8. All Documents relating to any opportunities for Symbotic to provide services to assets that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition, including all Documents quantifying or predicting the value or impact of such services.
 9. All Documents relating to any opportunities for GreenBox LLC to provide services to assets that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition, including all Documents quantifying or predicting the value or impact of such services.
 10. Documents sufficient to show any Person's expected involvement in management and/or operations of the assets that C&S acquires from Kroger and Albertsons in connection with the Divestiture Acquisition.

PUBLIC

11. All Documents relating to assets, resources, services, and intellectual property used in, or provided to, the acquired assets by Kroger or Albertsons that are not included with the Divestiture Acquisition or will not transfer to C&S at closing, and C&S's Plans to obtain such assets, resources, services, and intellectual property.
12. All Documents relating to C&S's statements that "no stores will close as a result of the merger," that "frontline associates [will] remain employed," and any other claims made by C&S in connection with the Divestiture Acquisition.
13. All Documents, dating back to January 1, 2019, relating to claims or complaints relating to Union avoidance, unfair labor practices, or labor and employment law violations by C&S in any retail or non-retail setting.
14. All Documents relating to your and/or C&S's decision to close, sell, divest, or franchise any Grocery Retailer stores, or reflecting discussion of whether to close, sell, divest, or franchise any Grocery Retailer stores, dating back to January 1, 2011, including, but not limited to (a) Bruno's Supermarkets / Southern Family Markets stores; (b) Grand Union stores; (c) Piggly Wiggly stores; (d) Nell's Shurfine Market stores; and (e) Tops Friendly Markets stores.
15. All Documents produced in response to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
16. All Documents responsive to any subpoena issued to the Company in any other litigation or government investigation relating to the Proposed Transaction, including in *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.), *Colorado v. Kroger Co.*, No. 2024-CV-30459 (Colo. Dist. Ct.), and *Whalen v. Albertsons Companies Inc.*, No. 3:23-CV-459 (N.D. Cal.).
17. All Documents produced in response to any subpoena issued to you by any defendant or respondent in the Litigation or the Administrative Proceeding.
18. All Documents responsive to any subpoena issued to you by any defendant or respondent in the Litigation or the Administrative Proceeding.

DEFINITIONS

For the purposes of this subpoena, the following definitions apply:

1. The term “the Company” or “RJJRP” means RJJRP Property Holdings, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing, as well as Richard Cohen.
2. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person that has in which there is partial (10 percent or more) or total ownership or control of the Entity in question.
3. The term “C&S” means C&S Wholesale Grocers, LLC, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing, as well as Richard Cohen.
4. The term “Kroger” means The Kroger Co., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
5. The term “Albertsons” means Albertsons Companies, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
6. The term “Administrative Proceeding” means the Federal Trade Commission Adjudicative Proceeding, *In the Matter of The Kroger Co. and Albertsons Companies, Inc.*, FTC Docket No. 9428.
7. The terms “and” and “or” have both conjunctive and disjunctive meanings.
8. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access Documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, Document management systems (*e.g.*, iManage), intranets, web content management systems (“CMS”) (*e.g.*, Drupal), wikis (*e.g.*, Confluence), work tracking software (*e.g.*, Jira), and blogs.
9. The terms “communication” and “communications” mean any and all written, oral, telephonic, or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any Person(s), including but not limited to any statements, inquiries, discussions, conversations, dialogues, correspondence,

consultations, negotiations, agreements, understandings, meetings, letters, emails, faxes, notations, telegrams, advertisements, interviews, and all other Documents as herein defined. The phrase “communication between” is defined to include instances where one party addresses a communication to the other party but the other party does not respond, as well as instances in which the other party responds.

10. The term “Defendants” means Kroger and Albertsons.
11. The term “Divestiture Acquisition” means any transaction or series or combination of transactions whereby, directly or indirectly, any assets being divested in connection with the Proposed Transaction are transferred to or acquired, directly or indirectly, including a transfer of the assets identified in Appendix C to the Subscription Agreement by and between C&S Wholesale Grocers, LLC and Synergy Investment Corp. dated as of September 8, 2023, but also any other divestiture of assets in connection with the Proposed Transaction, including any potential or Planned divestitures that were considered but rejected.
12. The term “Documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in your possession, custody, or control, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including Documents contained in Collaborative Work Environments and other Document databases as well as copies of Documents that are not identical duplicates of the originals in a person’s files; and copies of Documents the originals of which are not in your possession, custody, or control. Employee-Owned Devices used to store or transmit Documents responsive to this request are considered in your possession, custody, or control. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any Document. Unless otherwise specified, “Documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; architectural plans and engineering blueprints; and Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.
13. The terms “each,” “any,” and “all” mean “each and every.”
14. The term “Employee-Owned Device” means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.
15. The term “Entity” means any Person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, facility, division, department, unit, society, Union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

16. The term “Financing” means every form of contribution of value or financial accommodation, including but not limited to debt, equity, guarantees, letters of credit, and any other financial instrument.
17. The term “Grocery Retailer” means a self-service retail food store with food (e.g., fresh meat and seafood, dairy products, frozen foods, beverages, bakery goods, dry groceries, etc.) and non-food (e.g., soaps, detergents, health and beauty aids) products that households consume, or any Entity that operates such stores.
18. The term “including” means “including, but not limited to.”
19. The term “Investigation” means the Federal Trade Commission’s investigative review of the Proposed Transaction, File No. 231-0004, including but not limited to, the Litigation and the Administrative Proceeding.
20. The term “Litigation” means the case captioned *Federal Trade Commission, et al. v. Kroger Company, et al.*, No. 3:24-cv-00347-AN (D. Or.), including any subsequent change in court venue for purposes of these proceedings.
21. The term “Messaging Application” refers to any electronic method that has ever been used by you, the Company, C&S, or Symbotic, and employees of any of the foregoing, to communicate for any business purposes. “Messaging Application” includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”
22. The term “operate” with reference to any Entity means to directly or indirectly own or lease the Entity, manage the Entity’s operations on behalf of another Person, have the power to appoint the majority of the Entity’s governing board or body, or otherwise directly or indirectly control the Entity, including through employment.
23. The term “Person” includes Richard Cohen and the Company, and means any natural person, corporate Entity, partnership, association, joint venture, government Entity, or trust.
24. The terms “Plan,” “Plans,” or “Planned” refer to tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
25. The term “Proposed Transaction” means Kroger’s proposed acquisition of Albertsons as described in the Agreement and Plan of Merger By and Among Albertsons Companies, Inc., The Kroger Co., and Kettle Merger Sub, Inc. dated October 13, 2022, or any other proposed, contemplated, discussed, or related transaction between Kroger and Albertsons.
26. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

PUBLIC

27. The term “SoftBank” means SoftBank Group Corp., SVF II Strategic Investments AIV LLC, SB Investment Advisers (UK) Limited, their domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
28. The term “Symbotic” means Symbotic Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
29. The term “Technology Assisted Review” means any process that utilizes a computer algorithm to limit the number of potentially responsive Documents subject to a manual review. A keyword search of Documents with no further automated processing is not a Technology Assisted Review.
30. The term “Union” means any organized association of workers, regardless of whether the workers are covered by a collective bargaining agreement.
31. Any word or term that you consider vague or insufficiently defined has the meaning most frequently assigned to it by C&S in the ordinary course of business.

INSTRUCTIONS

For the purposes of this subpoena, the following instructions apply:

1. Unless otherwise indicated, these requests cover any and all Documents and information generated, prepared, created, modified, sent, or received during the period from January 1, 2022 to the present.
2. Documents or data requested are those in actual or constructive possession, custody, or control of Richard Cohen, C&S, Symbotic, or the Company, or their representatives, attorneys, or other agents, including without limitation consultants, accountants, lawyers, or any other persons retained by, consulted by, or working on behalf or under the direction of Richard Cohen, C&S, Symbotic, or the Company, wherever they may be located.
3. This subpoena shall be deemed continuing in nature and shall be supplemented in the event that additional Documents responsive to this request are created, prepared, or received between the time of your initial response and the date established by the Administrative Law Judge for the evidentiary hearing in the Administrative Proceeding.
4. You do not need to reproduce Documents that C&S previously provided to the Commission in the Investigation.
5. All Documents responsive to these Document requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:
 - (a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in your files;
 - (b) Shall be marked on each page with corporate identification and consecutive Document control numbers. None of the numbers should be identical to control numbers on Documents previously submitted to the FTC in the course of the Investigation. The prefixes used for the corporate custodian identification shall not include the words “FTC” or “Kroger” or “Albertsons;”
 - (c) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language Document;
 - (d) Shall be produced in color where necessary to interpret the Document (if the coloring of any Document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any Document (*e.g.*, a chart or graph), makes any substantive information contained in the Document unintelligible, you must submit the original Document, a like-colored photocopy, or a like-colored JPEG format image;
 - (e) Shall be accompanied by an affidavit of Richard Cohen stating that the copies are true, correct, and complete copies of the original Documents; and

- (f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive Documents are submitted; and (ii) the corresponding consecutive Document control number(s) used to identify that person's Documents, and if submitted in paper form, the box number containing such Documents. The FTC will provide a sample index upon request.
6. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any Document responsive to a particular request contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the Document.
- (a) The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address or phone number in combination with one or more of the following:
- date of birth,
 - driver's license number or other state identification number, or a foreign country equivalent,
 - passport number,
 - financial account number, and
 - credit or debit card number.
- (b) The term "Sensitive Health Information" includes medical records and other individually identifiable health information, whether on paper, in electronic form or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. Forms of Production: You shall submit all Documents as instructed below absent written consent signed by Complaint Counsel.
- (a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original Documents:
- (i) Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(ii), (a)(iii) and (a)(iv).

- (ii) Submit emails in image format with extracted text and the following metadata and information:

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

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

PUBLIC

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

- (iv) Submit all other electronic Documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

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

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

- (v) Submit Documents stored in hard copy in image format accompanied by OCR with the following information:

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

- (vi) Submit redacted Documents in PDF format accompanied by OCR with the metadata and information required by relevant Document type described in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above.
- (b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.

- (c) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your or the Company's computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact Complaint Counsel to determine, with the assistance of the appropriate Complaint Counsel representative, whether and in what manner you may use such software or services when producing materials in response to these Document requests.
- (d) Produce electronic file and image submissions as follows:
- (i) For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - (ii) For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats;
 - (iii) All Documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of your compliance with these Document requests; and
 - (iv) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
 - (v) Each production shall be submitted with a transmittal letter that includes the case name and docket no. 9428; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and Document identification number range for each; total number of Documents; and a list of load-file fields in the order in which they are organized in the load file.
8. Each Document requested herein must be produced in its entirety and without deletion, abbreviation, redaction, expurgation, or excisions, regardless of whether you consider the entire Document to be relevant or responsive to these requests. If you have redacted any portion of a Document for privilege, stamp the words "redacted - privilege" where the redacted material originally appeared, on each page of the Document that you have redacted. Privileged redactions must be included in a privilege log prepared pursuant to Instruction 9 below. If you have redacted Documents for any other reason, describe the reason for the redaction: for instance, if you redact a Document to comply with privacy laws in other jurisdictions, stamp the words "redacted - privacy" where the material originally appeared, on each page of the Document that you have redacted. Redactions

PUBLIC

made on a basis other than privilege must be included in a log prepared pursuant to Instruction 9, below and the reason clearly stated.

9. If any Document or tangible thing is produced in a redacted form or withheld, you shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed, in a manner that will enable Complaint Counsel to assess the claim of privilege. The schedule shall be in Microsoft Excel format, and shall include, for each Document withheld or redacted, at least the following: (i) the specific grounds for withholding or redacting the Document including any claim of privilege; (ii) the title of the Document; (iii) the date of the Document; (iv) the author of the Document; (v) the addressees and recipients of the Document or any copy thereof (including persons “cc’d” or “bcc’d” or “blind cc’d”); (vi) a description of the subject matter of the Document in sufficient detail to assess the reasons for withholding or redacting the Document including any claim of privilege; and (vii) in separate Excel columns, the beginning Bates number of the Document, and the ending Bates number of the Document. Additionally, for each Document withheld under the attorney work product doctrine, state whether the Document was prepared in anticipation of litigation or for trial, and, if so, identify the anticipated litigation or trial upon which the assertion is based. Any attachment to a Document withheld under a claim of privilege or immunity shall be produced unless the attachment is also subject to a claim of privilege or immunity and the basis for such claim is described in a privilege schedule.
10. Complaint Counsel does not concede the appropriateness of redacting or withholding information on a basis other than privilege and expressly reserves all rights to challenge the redacting or withholding of Documents or information.
11. If Documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of any Entity’s Document retention policy, but you have reason to believe such Documents have been in existence, state the circumstances under which they were lost or destroyed, describe the Documents to the fullest extent possible, state the request(s) to which they are responsive, and identify persons having knowledge of the content of such Documents.
12. You must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. You must also provide a statement identifying any electronic production tools or software packages utilized in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and:
 - (a) if you utilized keyword search terms to identify Documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;

- (b) if you utilized Technology Assisted Review software;
 - (i) describe the collection methodology, including: how the software was utilized to identify responsive Documents; the process you utilized to identify and validate the seed set Documents subject to manual review; the total number of Documents reviewed manually; the total number of Documents determined nonresponsive without manual review; the process you used to determine and validate the accuracy of the automatic determinations of responsiveness and non-responsiveness; how you handled exceptions (“uncategorized Documents”); and if your Documents include foreign language Documents, whether reviewed manually or by some technology-assisted method; and
 - (ii) provide all statistical analyses utilized or generated by you or your agents related to the precision, recall, accuracy, validation, or quality of your Document production in response to this subpoena; and identify the Person(s) able to testify on your behalf about information known or reasonably available to you, relating to your response to this specification.
 - (c) if you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your or the Company’s computer systems or electronic storage media in response to this subpoena, or if your or the Company’s computer systems contain or utilize such software, you must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner you may use such software or services when producing materials in response to this subpoena.
13. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by 16 C.F.R. § 3.34, or any extension thereof, shall be waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.
14. All objections must state with particularity whether and in what manner the objection is being relied upon as a basis for limiting the scope of any search for Documents or withholding any responsive Documents. If you are withholding responsive information pursuant to any general objection, you should so expressly indicate. If, in responding to any request, you claim any ambiguity in interpreting either the request or a definition or instruction applicably thereto, set forth as part of your response the language deemed to be ambiguous and the interpretation used in responding to the request, and produce all Documents that are responsive to the request as you interpret it.
15. Whenever necessary to bring within the scope of a request a response that might otherwise be construed to be outside its scope, the following construction should be applied:

- (a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;
 - (b) Construing the singular form of any word to include the plural and plural form to include the singular;
 - (c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;
 - (d) Construing the masculine form to include the feminine form and vice versa; and
 - (e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters.
16. Unless otherwise stated, construe each request independently and without reference to any other request.
17. Produce entire Documents, including all attachments, hyperlinked attachments (*e.g.*, attachments stored on Box or Google Drive), cover letters, memoranda, and appendices, as well as the file, folder tabs, and labels appended to or containing any Documents. Copies which differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) should be produced separately.
18. Any questions you have relating to the scope or meaning of anything in this subpoena should be directed to the attorney who executed the subpoena to which these instructions are attached.
19. For productions smaller than 10 GB, your response to this subpoena shall be submitted to Complaint Counsel through email and using secure file transfer protocols (“FTP”). For instructions on submitting through FTP, please contact Corene Wint (cwint@ftc.gov), Rachel Ma (rma@ftc.gov), Amare Ashmeade (aashmeade@ftc.gov), Jacob Warren (jwarren1@ftc.gov), John Yoon (jyoon2@ftc.gov), Kayla Willey (kwilley@ftc.gov). For productions larger than 10 GB, you shall submit your response to this subpoena through IDE, EIDE, or SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure. These should be addressed to the attention of Donald King, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day. A transmittal cover letter for a mailed production shall still be sent via electronic mail to Harris Rothman (hrothman@ftc.gov).

PUBLIC

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2024, I caused the foregoing document to be served via email to:

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

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

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

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

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

Counsel for The Kroger Company

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

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

Email: msventim@debevoise.com

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

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

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

Counsel for Albertsons Companies, Inc.

s/ James H. Weingarten
James H. Weingarten
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3570
Email: jweingarten@ftc.gov

Counsel Supporting the Complaint

PUBLIC

PUBLIC

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

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

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 27, 2024

PUBLIC
PUBLIC

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the

PUBLIC
PUBLIC

designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9428” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with

PUBLIC
PUBLIC

the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Ex. C

PUBLIC

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

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

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

REQUESTS FOR DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. All Documents prepared for or used in any Stores as an Asset training sessions, including (a) all operational "See and Act Guides" distributed to Company employees as a part of the Stores as an Asset program, and associated communications, including but not limited to the "Premium Operational Segment See & Act Guide," "Competitive Operational Segment See &

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC

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

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

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

PUBLIC

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

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

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

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

PUBLIC

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

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

with the following information:

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

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

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

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

d) Produce electronic file and image submissions as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC

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

Dated: April 2, 2024

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

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

PUBLIC

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

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

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

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

Counsel for Albertsons Companies, Inc.

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

Counsel Supporting the Complaint

Ex. D

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

**COMPLAINT COUNSEL'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
RESPONDENT ALBERTSONS COMPANIES, INC.**

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

REQUEST FOR DOCUMENTS

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

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

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

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

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

8. For the following Persons, all performance evaluations, including self-evaluations:

(a) Persons who are or who at any time between January 1, 2022 and the present have been Corporate Leadership team members, including: Vivek Sankaran, Susan Morris, Jennifer Saenz, Anuj Dhanda, Fernando Silva, Sharon McCollam, Evan Rainwater, Kelly Griffith, Mike Theilmann, Michelle Larson, Tom Moriarty, and Omer Gajial;

(b) Persons who are or who have at any time between January 1, 2022 and the present have been Division Leadership, including: Mike Withers (Jewel-Osco), Wes Jackson (Southern), Rob Backus (Shaw's/Star Market), Jim Perkins (formerly ACME), Sidney Hopper (United), John Colgrove (Intermountain), Brad Street (Seattle), Kevin Curry (Southern California), Karl Schroeder (Northern California), John Clougher (formerly Haggen), Carl Huntington (Southwest), Todd Broderick (Denver), Tom Lofland (Mid Atlantic), Kelly Mullin (Portland), and Michelle Larson (East); and

PUBLIC

(c) Dan Dosenbach (Senior Vice President of Labor Relations), Brent Bohn (Vice President of Labor Relations), and persons who are or who have at any time between January 1, 2022 and the present have been Labor Relations directors, including: Frank Jorgensen, Shaylon Lovell, Stefanie Gusha, Bob McLauchlin, and Andrew Lukes.

9. All Document retention policies and protocols applicable to or implemented with regard to the Proposed Transaction, the Investigation, the Litigation, and any other anticipated review of the Proposed Transaction.

10. All advocacy Documents from January 1, 2019, to the present, including letters from Company counsel, presentations, and white papers, submitted to the Federal Trade Commission or any other governmental agency for regulatory, antitrust, or any review purpose relating to any acquisition, merger, or purchase of any store, including but not limited to the Commission's review of the Company's acquisition of Kings and Balducci's stores from KB US Holdings, Inc.

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

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

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

14. All Documents from January 1, 2019, to the present concerning multi-employer or coordinated bargaining with Kroger or any other unionized employer in the context of

collective bargaining with Unions, including, but not limited to, Documents discussing wages, benefits, pension, or health and welfare issues.

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

16. All Documents, from January 1, 2019, to the present summarizing any Company improvement initiatives and their results, including but not limited to the following:

(a) sourcing cost reduction initiative Plans, including but not limited to Project Edison, Winning Model, and any other Company initiative to reduce sourcing costs;

(b) “productivity initiatives” as defined by the Company in the ordinary course of business (*e.g.*, ACI2R-0004474602), including, but not limited to, strategic sourcing, Own Brands strategies, capital excellence, ways of working, SC transformation, and Winning Model; and

(c) price investment Plans.

17. All Board Documents, Corporate Leadership Documents, and Division Leadership Documents identifying initiatives to grow Albertsons’s revenue, market share, or any margin and/or the estimated impact of such initiatives on revenue, market share, or margin, including initiatives relating to price investment strategies, fresh products, private label, health and wellness, personalization and digital capabilities.

18. Documents sufficient to show all Competitor Price Index (“CPI”) reports from January 1, 2022 to the present.

19. Documents from January 1, 2015 to the present sufficient to show Albertsons's price investments, pricing strategy changes, or pricing changes at legacy Safeway, Inc. stores following the Company's acquisition of Safeway, Inc.

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

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

22. All annual operating plans from January 1, 2022, to the present for the following Company divisions: Denver, Intermountain, Jewel-Osco, Mid Atlantic, Portland, Seattle, Southern California, Southwest, United, and Haggen.

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

24. For the following Second Request specifications, all Documents (including data) responsive to the specification, including all Documents that are responsive to a given Second Request specification and that postdate the most recent Documents submitted in the Company's response to that Second Request specification: 17, 22, 38, 39, 51, and 54(e).

25. Store characteristics data for 2023 responsive to Specification 2 the Second Request.
26. Store transactional data for 2023 responsive to Specification 3 of the Second Request.
27. Store revenue, cost, financial, and operational data for 2023 responsive to Specification 4 of the Second Request.
28. Store income statements for 2023 responsive to Specification 5(a) of the Second Request.
29. Customer loyalty data for 2023 responsive to Specification 12 of the Second Request.
30. Price zone Documents sufficient to show and explain each and every retail Price Area of the Company, including the Company trade name (*e.g.*, Safeway) and store number for each Company store in the Price Area; and for each Price Area established, deleted, enlarged, decreased, or consolidated in any way since the Company responded to Specification 11 of the Second Request, Documents sufficient to show the change and the rationale for such changes. This request includes, but is not limited to:
- (a) Documents that provide new or updated information to the information contained in “HIGHLY CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023, and
 - (b) Documents that provide the store numbers of the Company stores in each and every Price Area, including, for example, the stores referenced in Column H of “HIGHLY

PUBLIC

CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023.

31. The residential address, ZIP code, latitude, longitude, and the 2020 Census block group number (inclusive of state, county, and other related geographic information) for each:

(a) Credit card holder identified in the field, *PRIMARY_ACCOUNT_NBR*, for the files “*HIGHLY CONFIDENTIAL ACI2R_Appendix 13-0000001.csv – HIGHLY CONFIDENTIAL ACI2R_Appendix 13-0000010.csv.*”

(b) Credit card holder identified in the field, *CUST_ACCT*, for the file “*HIGHLY CONFIDENTIAL ACI2R_Appendix 13-0000011.csv.*”

32. For each competitor as a whole and each competitor location listed by the Company in its response to Specification 6 of the Second Request, price-checking Documents and data responsive to Specification 24(c)(i)-(ii), (c)(v), and (d) of the Second Request, including, but not limited to, any updates to the following exhibits to the Company’s Aug. 31, 2023 narrative response to Second Request Specification 24: *ACI2R_Appendix 24-000002 – ACI2R_Appendix 24-000126.*

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

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

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

DEFINITIONS

For the purposes of this request, the following definitions apply:

D1. The term “the Company” or “Albertsons” means Albertsons Companies, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

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

D3. The terms “and” and “or” have both conjunctive and disjunctive meanings.

D4. The term “Board” means the Board of Directors of the Company collectively, and any and all of the members of the Company’s Board of Directors individually.

D5. The term “C&S” means C&S Wholesale Grocers, LLC., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

D6. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access Documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, Document management systems (*e.g.*, iManage), intranets, web content management systems (“CMS”) (*e.g.*, Drupal), wikis (*e.g.*, Confluence), work tracking software (*e.g.*, Jira), and blogs.

D7. The term “Communication” means any and all written, oral, telephonic, or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any person(s), including but not limited to any statements, inquiries, discussions, conversations, dialogues, correspondence, consultations, negotiations, agreements, understandings, meetings, letters, emails, faxes, notations, telegrams, advertisements, interviews, and all other Documents as herein defined. The phrase “Communication between” includes instances where one party addresses a communication to the other party but the other party does not respond, as well as instances in which the other party responds.

D8. The term “Corporate Leadership” includes both current and former employees the Company describes or has described as being part of the corporate leadership including but not limited to Vivek Sankaran, Susan Morris, Jennifer Saenz, Anuj Dhanda, Fernando Silva, Sharon McCollam, Evan Rainwater, Kelly Griffith, Mike Theilmann, Michelle Larson, Tom Moriarty, and Omer Gajjal.

D9. The term “Division Leadership” refers to the current and former leaders of the following Company divisions: Denver, Intermountain, Jewel-Osco, Mid Atlantic, Portland, Seattle, Southern California, Southwest, United, and Haggen.

D10. The term “Documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in the possession, custody, or control of the Company, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including Documents contained in Collaborative Work Environments and other Document databases as well as copies of Documents that are not identical duplicates of the originals in a person’s files;

and copies of Documents the originals of which are not in the possession, custody, or control of the Company. Employee-Owned Devices used to store or transmit Documents responsive to this Request are considered in the possession, custody, or control of the Company. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any Document. Unless otherwise specified, “Documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar Documents of a purely transactional nature; architectural plans and engineering blueprints; and Documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

D11. The terms “each,” “any,” and “all” mean “each and every.”

D12. The term “Employee-Owned Device” means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.

D13. The term “Entity” means any natural Person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural Person, foundation, fund, institution, facility, division, department, unit, society, Union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

D14. The term “Grocery Retailer” means a self-service retail food store with food (*e.g.*, fresh meat and seafood, dairy products, frozen foods, beverages, bakery goods, dry groceries, etc.) and non-food (*e.g.*, soaps, detergents, health and beauty aids) products that households consume, or any Entity that operates such stores.

D15. The term “including” means “including, but not limited to.”

D16. The term “Investigation” means the Federal Trade Commission’s investigative review of the Proposed Transaction, File No. 231-0004, including but not limited to, the Litigation.

D17. The term “Kroger” means The Kroger Co., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25 percent or more) or total ownership or control between Kroger and any other Person.

D18. The term “Litigation” means this proceeding, In the Matter of The Kroger Co. and Albertsons Companies, Inc., FTC Docket No. D-9428, and the case *Federal Trade Commission, et al. v. Kroger Company, et al.*, No. 3:24-cv-00347-AN (D. Or.), including any subsequent change in court venue for purposes of those proceedings.

D19. The term “Messaging Application” refers to any electronic method that has ever been used by the Company and its employees to communicate with each other or entities outside the Company for any business purposes. “Messaging Application” includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (*e.g.*, Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”

D20. The term “operate” with reference to any Entity means to directly or indirectly own or lease the Entity, manage Entity’s operations on behalf of another Person, have the power to appoint the majority of the Entity’s governing board or body, or otherwise directly or indirectly control the Entity, including through employment.

D21. The term “Person” includes the Company and means any natural person, corporate Entity, partnership, association, joint venture, government Entity, or trust.

D22. The terms “Plan,” “Plans,” or “Planned” refer to tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

D23. The term “Price Area” means all geographic areas defined by the Company in the ordinary course in which the Company’s stores share base pricing, even if those areas or the assignment of stores to those areas vary over time. Examples of Price Areas include, but are not limited to, the Price Areas referenced and stated in “HIGHLY CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023.

D24. The term “Proposed Divestiture” means any transaction or series or combination of transactions whereby, directly or indirectly, any assets being divested in connection with the Proposed Transaction are transferred to or acquired, directly or indirectly, including a divestiture of the assets identified in Appendix C to the Subscription Agreement by and between C&S Wholesale Grocers, LLC and Synergy Investment Corp. dated as of September 8, 2023, but also any other divestiture of assets in connection with the Proposed Transaction, including any potential divestitures that were considered but rejected.

D25. The term “Proposed Transaction” means Kroger’s proposed acquisition of Albertsons as described in the Agreement and Plan of Merger By and Among Albertsons Companies, Inc., The Kroger Co., and Kettle Merger Sub, Inc. dated October 13, 2022, or any other proposed, contemplated, discussed, or related transaction between Kroger and Albertsons.

D26. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

D27. The term “Relevant Product” as used herein means retail sales by Grocery Retailer stores.

D28. The term “sales” means net sales, *i.e.*, total sales after deducting discounts, returns, allowances and excise taxes. “Sales” includes sales of the Relevant Product, whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.

D29. The term “Second Request” means the Request for Additional Information and Documentary Materials issued to the Company by the Federal Trade Commission on December 5, 2022.

D30. The term “Union” means any organized association of workers, regardless of whether the workers are covered by a collective bargaining agreement.

D31. Any word or term that the Company considers vague or insufficiently defined has the meaning most frequently assigned to it by the Company in the ordinary course of business.

INSTRUCTIONS

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

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

12. Unless modified by agreement with Complaint Counsel, these Requests require a complete search of all the files of the Company. The Company shall produce all responsive Documents, wherever located, that are in the actual or constructive possession, custody, or control of the Company and its representatives, attorneys, and other agents, including, consultants, accountants, lawyers, or any other person retained by, consulted by, or working on behalf or under the direction of the Company.

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

14. The Company does not need to provide Documents that the Company previously provided to the Federal Trade Commission.

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC

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

PUBLIC

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

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

(iv) Submit all other electronic Documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the Document.

PUBLIC

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

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

with the following information:

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

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

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

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

(d) Produce electronic file and image submissions as follows:

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

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

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

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

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

19. If any Documents are withheld or redacted from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes each Document's authors, addresses, date, a description of each Document, and all recipients of the original and any copies. Attachments to a Document should be identified as such and entered separately on the log. For each author, addressee, and recipient; state the person's full name, title, and employer or firm; and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each Document in a manner that, though not revealing information itself privileged, provides sufficiently detailed

information to enable Complaint Counsel or a court to assess the applicability of the privilege claimed under 16 CFR § 3.38A. For each Document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the Document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive Document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this instruction), noting where redactions in the Document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third-party, such as internal firm memoranda, may be omitted from the log.

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

I11. If you object to any part of a request, set forth the basis for your objection and respond to all parts of the request to which you do not object. Any ground not stated in an objection within the time provided by 16 C.F.R. § 3.37(b), or any extension thereof, shall be

waived. All objections must be made with particularity and must set forth all the information upon which you intend to rely in response to any motion to compel.

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

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

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

other events, locations, or matters.

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

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

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

I17. For productions larger than 10 GB, the Company shall submit its response to this RFP through IDE, EIDE, or SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure. These should be addressed to the attention of Donald King, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day. A transmittal cover letter for a mailed production shall still be sent via electronic mail to: Charles Dickinson at cdickinson@ftc.gov.

PUBLIC

Dated: April 2, 2024

By: *s/ Joshua Smith*
Joshua Smith
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3018
Email: jsmith3@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

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

PUBLIC

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

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

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

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

Counsel for Albertsons Companies, Inc.

s/ Joshua Smith
Joshua Smith
Federal Trade Commission
Bureau of Competition
600 Pennsylvania, Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3018
Email: jsmith3@ftc.gov

Counsel Supporting the Complaint

Ex. E

PUBLIC

From: [Drummonds, Katherine](#)
To: [Richardson, Daniel J.](#); [Holley, Steven L.](#); [Hesse, Renata](#); [Bock, Karl L.](#); [Kelly, Stephanie M.](#); [Keeley, Julian M.](#)
Cc: [Teng, Albert](#); [Hall, Laura](#); [Rothman, Harris](#)
Subject: RE: Kroger/Albertsons: Call with FTC to discuss subpoena
Date: Monday, April 8, 2024 6:16:06 PM

Counsel –

Thank you for touching base again today relating to the C&S subpoena. Below is a summary of the items we discussed as well as those requiring follow-up.

- **Common interest agreement:** In your April 4 letter, counsel confirmed that C&S has a written common interest agreement with Kroger and Albertsons. In our call today, counsel stated that Kroger’s position, which C&S will adopt, is that C&S will withhold certain “documents” responsive to the Subpoena relating to the Proposed Divestiture on the basis of common interest privilege. Counsel did not take a position on the scope of such privilege. We ask that counsel confirm the scope of the common interest privilege C&S will be claiming and share the written common interest agreement referenced in counsel’s letter. Please clarify whether C&S will claim common interest privilege over the following categories of documents and outline any other categories of documents over which C&S will be claiming common interest privilege.
 - Communications relating to negotiations between C&S and Respondents, or each other’s agents or representatives, relating to any proposed divestiture packages or transition services agreements.
 - Documents created by or for C&S analyzing any proposed divestiture packages and/or transition services agreements.
 - Plans for operating any divested assets, including post-acquisition strategy plans and plans relating to any transition services agreements.
- **Production timing:**
 - Counsel noted you were making progress on gathering materials for an initial production this week, including some documents responsive to Specifications 1-3, 5, 10, and 23. Please confirm what you believe you will be able to provide by the initial Subpoena deadline, April 11. As noted, we are happy to discuss a reasonable extension for further productions.
 - We raised that a top initial priority for us is receiving a refresh of the CID custodial files relating to Specifications 4, 12-13, 17, 20, and 24. Counsel noted they would circle back with us with a sense of proposed timing for this production.
- **Search terms:** Counsel agreed to provide us with a list of proposed search terms to utilize for each Subpoena specification. We noted that for specifications requesting documents relating to C&S ordinary course business operations, *e.g.*, 14, 18, 19, 21, 22, we would ask that the search terms not be tied to party names or deal code names.
- **Custodians:**
 - As discussed, in addition to the C&S custodians from the CID process, we believe the below executives C&S hired to run the future retail organization should also be custodians for the Subpoena. To the extent these individuals were consultants for C&S prior to their hire as an employee, we would ask that responsive documents be produced from both their time as a consultant and as an employee.
 - Suzanne Monford (Chief Operating Officer)
 - Mark Messier (Chief Merchandising Officer)

PUBLIC

- Eric Keptner (Chief Marketing Officer)
- Roxanne Schwans (Head of Pharmacy)
- Brett Wing (former executive previously hired to be Chief Operating Officer)
- Everett Boutwell (former executive previously hired to be Head of Supply Chain)
- We also asked counsel to provide more information about the scope of the below individuals' responsibilities with respect to evaluating any divestiture, as well as preparing to operate the new retail organization.
 - Kathy Russello (head of retail Human Resources): Specifically, could counsel please confirm whether she has responsibility for labor relations?
 - Paul Scorza (head of IT)
 - Grant Steadman (head of digital and loyalty)
- Finally, we asked you to provide a list of the individuals responsible for negotiating any divestiture proposal and/or transition services agreements on behalf of C&S, including C&S employees, consultants, and/or outside counsel.

Finally, please copy Respondents with any future productions you make going forward. We will share your production dated April 4 with them.

Best,

Katie Drummonds
Attorney
Federal Trade Commission | Bureau of Competition
Mergers IV
202-368-7217
kdrummonds@ftc.gov

From: Richardson, Daniel J. <richardsond@sullcrom.com>

Sent: Friday, April 5, 2024 11:14 AM

To: Drummonds, Katherine <kdrummonds@ftc.gov>; Holley, Steven L. <holleyS@sullcrom.com>; Hesse, Renata <hesser@sullcrom.com>; Bock, Karl L. <bockk@sullcrom.com>; Kelly, Stephanie M. <kellys@sullcrom.com>; Keeley, Julian M. <keeleyj@sullcrom.com>

Cc: Teng, Albert <ateng@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Rothman, Harris <hrothman@ftc.gov>

Subject: RE: Kroger/Albertsons: Call with FTC to discuss subpoena

Katie,

Our team could meet from 1:30 to 3:00 on Monday. Happy to find some additional windows if that is not good for you.

Best,
Dan

From: Drummonds, Katherine <kdrummonds@ftc.gov>

Sent: Thursday, April 4, 2024 4:50 PM

PUBLIC

To: Richardson, Daniel J. <richardsond@sullcrom.com>; Holley, Steven L. <holleyS@sullcrom.com>; Hesse, Renata <hesser@sullcrom.com>; Bock, Karl L. <bockk@sullcrom.com>; Kelly, Stephanie M. <kellys@sullcrom.com>; Keeley, Julian M. <keeleyj@sullcrom.com>
Cc: Teng, Albert <ateng@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Rothman, Harris <hrothman@ftc.gov>
Subject: [EXTERNAL] RE: Kroger/Albertsons: Call with FTC to discuss subpoena

All –

Are there times that would work well for your team to schedule a second meet-and-confer tomorrow or Monday?

Thank you,

Katie Drummonds
Attorney
Federal Trade Commission | Bureau of Competition
Mergers IV
202-368-7217
kdrummonds@ftc.gov

From: Drummonds, Katherine
Sent: Monday, April 1, 2024 1:04 PM
To: Richardson, Daniel J. <richardsond@sullcrom.com>; Holley, Steven L. <holleyS@sullcrom.com>; Hesse, Renata <hesser@sullcrom.com>; Bock, Karl L. <bockk@sullcrom.com>; Kelly, Stephanie M. <kellys@sullcrom.com>; Keeley, Julian M. <keeleyj@sullcrom.com>
Cc: Teng, Albert <ateng@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Rothman, Harris <hrothman@ftc.gov>
Subject: RE: Kroger/Albertsons: Call with FTC to discuss subpoena

Great – thank you, Dan. Could you send an invitation including whomever needs to join from your team?

Katie Drummonds
Attorney
Federal Trade Commission | Bureau of Competition
Mergers IV
202-368-7217
kdrummonds@ftc.gov

From: Richardson, Daniel J. <richardsond@sullcrom.com>
Sent: Monday, April 1, 2024 12:27 PM
To: Drummonds, Katherine <kdrummonds@ftc.gov>; Holley, Steven L. <holleyS@sullcrom.com>; Hesse, Renata <hesser@sullcrom.com>; Bock, Karl L. <bockk@sullcrom.com>; Kelly, Stephanie M. <kellys@sullcrom.com>; Keeley, Julian M. <keeleyj@sullcrom.com>
Cc: Teng, Albert <ateng@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Rothman, Harris <hrothman@ftc.gov>
Subject: RE: Kroger/Albertsons: Call with FTC to discuss subpoena

PUBLIC

Thank you, Katie. Tomorrow at 4:30 works for us.

From: Drummonds, Katherine <kdrummonds@ftc.gov>
Sent: Monday, April 1, 2024 12:20 PM
To: Richardson, Daniel J. <richardsond@sullcrom.com>; Holley, Steven L. <holleyS@sullcrom.com>; Hesse, Renata <hesser@sullcrom.com>; Bock, Karl L. <bockk@sullcrom.com>; Kelly, Stephanie M. <kellys@sullcrom.com>; Keeley, Julian M. <keeleyj@sullcrom.com>
Cc: Teng, Albert <ateng@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Rothman, Harris <hrothman@ftc.gov>
Subject: [EXTERNAL] RE: Kroger/Albertsons: Call with FTC to discuss subpoena

Dan-

Hope you had a wonderful weekend as well.

Looping in my colleagues – we are available at 4:30 EST tomorrow if that works for your team?
Note that Harris and Laura will be the points of contact for the Cohen subpoena.

Thanks,

Katie Drummonds
Attorney
Federal Trade Commission | Bureau of Competition
Mergers IV
202-368-7217
kdrummonds@ftc.gov

From: Richardson, Daniel J. <richardsond@sullcrom.com>
Sent: Monday, April 1, 2024 10:33 AM
To: Drummonds, Katherine <kdrummonds@ftc.gov>
Cc: Holley, Steven L. <holleyS@sullcrom.com>; Hesse, Renata <hesser@sullcrom.com>; Bock, Karl L. <bockk@sullcrom.com>; Kelly, Stephanie M. <kellys@sullcrom.com>; Keeley, Julian M. <keeleyj@sullcrom.com>
Subject: Kroger/Albertsons: Call with FTC to discuss subpoena

Katie,

I hope you had a nice weekend. Any chance you have some time tomorrow to discuss the subpoenas to C&S and Mr. Cohen?

Best,
Dan

Daniel J. Richardson
Sullivan & Cromwell LLP
1700 New York Avenue, NW | Suite 700 | Washington, D.C. 20006-5215
[+1 202 956 7024](tel:+12029567024) (T) | [+1 703 477 1844](tel:+17034771844) (M)

PUBLIC

richardsond@sullcrom.com | www.sullcrom.com

This e-mail is sent by a law firm and contains information that may be privileged and confidential. If you are not the intended recipient, please delete the e-mail and notify us immediately.

****This is an external message from: kdrummonds@ftc.gov ****

Ex. F

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. G

PUBLIC

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

Dear Sonia,

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

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

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

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

Best,

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

Ex. H

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. I

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. J

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. K

PUBLIC

Arnold & Porter

Sonia Kuester Pfaffenroth
+1 202.942.6831 Direct
Sonia.Pfaffenroth@arnoldporter.com

May 6, 2024

VIA EMAIL

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

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

Dear Laura:

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

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

Arnold & Porter

May 6, 2024

Page 2

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

Arnold & Porter

May 6, 2024

Page 3

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.

PUBLIC

Arnold & Porter

May 6, 2024
Page 4

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

Sincerely,

A handwritten signature in cursive script that reads "Sonia K. Pfaffenroth".

Sonia Kuester Pfaffenroth

PUBLIC

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

[PROPOSED] ORDER

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

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

IT IS FURTHER ORDERED that Respondents and non-parties C&S Wholesale Grocers LLC and Richard Cohen shall produce the Negotiation Documents, as defined in Complaint Counsel's Motion, within five business days of the date of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

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

Email: john.holler@arnoldporter.com

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

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

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

Counsel for The Kroger Company

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

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

PUBLIC

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

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

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

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

Counsel for Albertsons Companies, Inc.

PUBLIC

s/ Laura R. Hall

Laura R. Hall

Federal Trade Commission

Bureau of Competition

600 Pennsylvania Avenue, NW

Washington, DC 20580

Telephone: (202) 326-3282

Email: lhall1@ftc.gov

Counsel Supporting the Complaint