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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**KROGER’S OPPOSITION TO
COMPLAINT COUNSEL’S RENEWED MOTION TO COMPEL**

In its renewed motion to compel, Complaint Counsel again categorically argue that *no* privilege or protection can apply to many documents related to Kroger’s and C&S’s negotiation of an expanded divestiture package. This sweeping position lacks merit. The declaration of Yael Cosset—Kroger’s Chief Information Officer and primary business negotiator of the expanded divestiture package—establishes that Kroger negotiated the expanded package *because of* threatened and now pending litigation. Lawyers were highly involved in the negotiations, and the negotiation strategy was also a litigation strategy. The attorney-client privilege, the attorney work product doctrine, and the common interest doctrine are each implicated by the parties’ efforts to respond to the FTC’s legal challenges by negotiating a revised divestiture package.

Kroger conducted a careful, document-by-document privilege review and served a privilege log. But instead of challenging specific entries on Kroger’s log—as contemplated by this Court’s order denying Complaint Counsel’s original motion to compel—Complaint

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Counsel rushed to file a repackaged version of its original motion that seeks the wholesale production of many Negotiation Materials. This categorical approach is misguided and should be rejected again.

Complaint Counsel also attack the format of Kroger's privilege log. Complaint Counsel primarily complain that Kroger's log adheres to the case management order from the parallel federal court proceeding—even though Complaint Counsel *expressly requested* that Kroger produce a log in that format. Complaint Counsel also critique Kroger for not adding outside counsel as document custodians, but outside counsel's full inboxes are not subject to party discovery under FTC Rule 3.37.

The Court should deny Complaint Counsel's renewed motion to compel with prejudice.

I. BACKGROUND

A. Kroger Negotiates an Expanded Divestiture Package Due to Threatened—And Then Actual—Litigation

Kroger's opposition to Complaint Counsel's original motion to compel, as well as the declaration of Yael Cosset, set forth the relevant background in detail. Exs. A, B, at 2–3. In short, Complaint Counsel seeks documents regarding the expanded divestiture package. This 579-store package replaced the prior 413-store package. *Id.* Kroger initially negotiated the expanded package under the threat of litigation from the FTC and state attorney generals; the negotiations continued months after *actual* litigation had been filed in four separate cases—including one in which C&S was a named defendant. Ex. A, ¶¶ 8, 12.

In all four suits, federal and state regulators explicitly criticized the original 413-store package. *Id.* ¶ 9. Lawyers were highly involved in the expanded divestiture package negotiations, setting the negotiating priorities and strategy. *Id.* ¶¶ 13–22. Lawyers played this

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role because the common goal in negotiating the expanded divestiture package—shared by Kroger, Albertsons, and C&S—was developing a solution that would enable the parties to prevail in litigation and close the transaction. *Id.* ¶¶ 11–22.

B. This Court Denies Complaint Counsel’s Categorical Motion to Compel

Complaint Counsel previously moved to compel Kroger to produce broad categories of Negotiation Materials. Ex. C, at 1–2. Because Respondents had not yet served a privilege log, the Court denied the motion as “premature.” May 16 Order, at 4. The Court did so because the “validity of various potentially applicable privileges” could not “be evaluated in a vacuum, without knowledge of the substance of any individual documents”—which would be revealed on the privilege log. *Id.* Complaint Counsel’s motion did not raise (a) the format of Kroger’s privilege log (including Instruction I9, discussed further below), or (b) outside counsel being document custodians.

C. Kroger Serves a Privilege Log

Kroger served Responses and Objections to Complaint Counsel’s Requests for Production. Ex. D. Kroger objected in full to Instruction I9, which purported to include requirements for a privilege log that differed from those the parties agreed to in the parallel federal litigation. *Id.* at 7. In response, Complaint Counsel emailed Kroger stating: “Respondents object to Instruction 9 of the Requests for Production; **please explain what information you intend to provide to satisfy your obligations under paragraph 28 of the Case Management and Scheduling Order entered April 12, 2024, in the District of Oregon.**” Ex. F (emphasis added). In other words, Complaint Counsel *specifically requested* that Kroger’s privilege log comply with the federal court case management order (“CMSO”).

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On a meet and confer, Respondents told Complaint Counsel its privilege log would comply with the CMSO's requirements; consistent with its prior email, Complaint Counsel raised no objection. Kroger then served a privilege log consistent with parties' prior conferrals.

D. Kroger Objects to Adding Outside Counsel as Custodians—and Complaint Counsel Never Subpoenas Outside Counsel

Kroger's R&Os identified dozens of custodians from whom they would collect documents. Ex. D. Complaint Counsel stated in an email that Respondents "should include as custodians Respondents' outside counsel involved in" negotiations of the divestiture agreement. Ex. F. Kroger declined to do so on a meet and confer. Complaint Counsel did not follow up before filing its original motion to compel, which did not specifically address this issue. *See* Ex. C. Complaint Counsel never subpoenaed Kroger's outside counsel.

E. Complaint Counsel Files a Renewed Motion to Compel

Complaint Counsel filed a renewed motion to compel just two business days after receiving Kroger's privilege log. Before filing, Complaint Counsel emailed Kroger numerous times, raising categorical challenges to Kroger's privilege assertions and its log. Ex. E. Kroger repeatedly requested that Complaint Counsel identify specific log entries to challenge, but Complaint Counsel largely refused (with a handful of exceptions). *Id.*

Complaint Counsel also rejected Kroger's offers to provide the central privilege-log information that Complaint Counsel had requested—file names and additional information on documents' parent-family relationships—if the parties agreed to resolve their procedural disputes. Ex. E. During a meet and confer, Complaint Counsel said they were conferring on Kroger's privilege log only to "check the box." Not surprisingly given that approach, the meet and confer was not successful. This motion followed.

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II. ARGUMENT

A. Privileges and Protections Apply to the Withheld Negotiation Materials

In its original motion to compel, Complaint Counsel argued that no privilege or protection could apply to *any* Negotiation Materials. Ex. C at 3–9. Respondents demonstrated that this broad assertion is incorrect because many Negotiation Materials are covered by the attorney client privilege, the attorney work product doctrine, and the common interest doctrine. *See* Ex. B at 5–9. Complaint Counsel’s “renewed” motion recycles Complaint Counsel’s prior categorical arguments. *See* Mot. at 474 (proposed order seeking “All Negotiation Documents exchanged between Kroger and C&S during the period January 25, 2024, to April 22, 2024”). This position should be rejected for the reasons outlined in Respondents’ prior opposition. *See* Ex. B at 5–9.

In addition, the declaration of Yael Cosset demonstrates that privileges and protections apply to many Negotiation Materials.

Attorney work product. The attorney work product doctrine covers materials that “can fairly be said to have been prepared or obtained *because of* the prospect of litigation.” *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015) (emphasis added). Mr. Cosset’s declaration establishes that the expanded divestiture package negotiations occurred “because of” threatened and now pending litigations. Ex. A ¶¶ 11–13.

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.’” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (citing *United States v. Chen*, 99 F.3d 1495, 1501

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(9th Cir. 1996)). Mr. Cosset’s declaration establishes that, in connection with negotiations, he sought and received legal advice from counsel. Ex. A ¶ 16.

Common interest doctrine. The common interest doctrine is an exception to the rule that disclosing information to third parties breaks privilege; the doctrine applies to communications made in “pursuit of a joint strategy in accordance with some form of agreement.” *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). Mr. Cosset’s declaration establishes that Kroger, Albertsons, and C&S shared a common interest in executing an expanded divestiture package that would enable the parties to prevail in the litigations and close the transaction. Ex. A ¶¶ 11–22. Indeed, Kroger, Albertsons, and C&S entered into a joint defense agreement precisely because of anticipated (and now actual) litigation. *Id.* ¶ 11.

The Court should thus reject Complaint Counsel’s categorical arguments and conclude the privileges and protections identified above apply to the withheld Negotiation Materials.¹ Complaint Counsel’s counterarguments lack merit.

First, Complaint Counsel says the “best examples of Kroger’s overbroad privilege claims are the draft contracts from which all sections subject to negotiation have been redacted.” Mot. at 6. Complaint Counsel never met and conferred with Kroger about the draft contracts, however, so their attempt to compel these documents is foreclosed by the Scheduling Order and FTC Rule 3.22(g). *See* SO, ¶ 4; 16 C.F.R. § 3.22(g); Ex. E. In any event, Mr. Cosset’s

¹ This Court’s May 16 order contemplates particularized challenges to entries on the privilege log, not a reprise of the categorical challenge that the Court has already rejected. To the extent Complaint Counsel have not forfeited the right to make particularized challenges by electing to proceed categorically, Kroger remains available to meet and confer regarding individual entries.

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declaration explains why the redacted material reflects legal advice by outside counsel. Ex. A, ¶¶ 14–18. The narrowly-tailored redactions thus protect attorney work product.

Relatedly, Complaint Counsel argues that “Kroger produced only one C&S communication with redactions, and its contents do not support the privileges claimed.” Mot. at 6 (citing Exs. C, O). This is wrong. Kroger produced multiple redacted C&S communications (including emails forwarded to Kroger personnel). Kroger has also produced many unredacted Kroger-C&S emails. And the email Complaint Counsel cites (Mot., Ex. O at PRVLIT01943) reflects legal advice on how to structure the divestiture package to position the parties to prevail in litigation and, in turn, reflects attorney work product. Ex. A, ¶¶ 17.

Second, Complaint Counsel says that Kroger “improperly claimed privilege over information solely because it was provided to counsel.” Mot. at 6. This misconstrues Kroger’s position. Kroger is not asserting privileges and protections simply because information from business personnel was provided to counsel. Kroger produced many non-privileged communications between Kroger business personnel that included counsel. Kroger is only withholding documents that, after a careful review, it determined are privileged or otherwise protected from disclosure because, for example, the communications were made at the direction of counsel or reflect counsel’s legal advice.

Third, Complaint Counsel contends the common interest doctrine is inapplicable because the parties were adverse. *See* Mot. at 7–8. But “[t]he weight of case law suggests that, as a general matter, privileged information exchanged during a merger between two unaffiliated business[es] would fall within the common-interest doctrine.” *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 310 (D.N.J. 2008). Complaint Counsel cites an

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internal C&S chat to argue that C&S and Kroger were antagonistic. *See* Mot., Ex. T. But this document is innocuous and largely irrelevant. It is an internal chat in which a C&S communications professional comments on making joint press statements with Kroger; it has nothing to do with negotiating the expanded divestiture package. The record in full demonstrates the strong common interest the parties shared. Ex. A, ¶¶ 11, 19.

Finally, Complaint Counsel says it has a “substantial need” for the withheld materials that justifies overriding the attorney work product protection. *See* Mot. at 9. This boilerplate statement fails to demonstrate any need, much less a substantial one.

B. Complaint Counsel’s Objections to Kroger’s Privilege Log Fail

Rather than identify specific privilege log entries to challenge, Complaint Counsel objects to the format of Kroger’s privilege log. These arguments lack merit.

Complaint Counsel contends that Kroger’s privilege log does not comply “with Instruction I9 of Complaint Counsel’s RFP by May 24, 2024.” Mot. at 5. But after Kroger objected in full to Instruction I9, Complaint Counsel *specifically requested* that Kroger produce a privilege log in compliance with the federal court CMSO—not Instruction I9. *See supra*, § I.C; Ex. F. Kroger also disclosed this to Complaint Counsel, who raised no objection. *Id.*

Complaint Counsel notes that this Court’s May 16 order stated: Respondents “shall produce . . . a privilege log in compliance with Instruction I9 of Complaint Counsel’s First Request for Production of Documents.” May 16 Order, at 4. But that statement must be interpreted in the context of Complaint Counsel’s motion to compel, which did not: (a) cite or describe Instruction I9; (b) explain that Kroger objected to Instruction I9; or (c) describe the parties’ prior conferrals on Instruction I9 and Kroger’s disclosure of its intent to follow the

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CMSO’s logging requirements. Ex. C. Nor did the Court’s holding or reasoning address—much less overrule—Kroger’s objection to Instruction I9. In fact, Complaint Counsel’s first email to Kroger *after* the May 16 order criticized Kroger’s privilege log for allegedly not “comport[ing] with the requirements of the CMSO and the Federal Rules of Civil Procedure.” Ex. E. While Complaint Counsel later claimed this reference to the CMSO “was in error,” it was in fact consistent with all of the parties’ prior negotiations on this issue. Simply put, Complaint Counsel is seeking to leverage an ambiguity in this Court’s order to criticize Kroger for doing exactly what it told Complaint Counsel it would do: produce a log consistent with the CMSO.

Regardless, Kroger’s log fully complies with FTC Rule 3.38A(a), which requires only that a log “describe[] the nature of the document[]” in a way that “will enable other parties to assess the claim.” Kroger’s log meets this standard; it includes the document recipients, a document description, and the specific privilege or protection being asserted. Mot., Ex. C. Kroger also offered to provide Complaint Counsel the central information they now request—the file names and additional information on documents’ parent-family relationships—if Complaint Counsel agreed not to burden this Court with procedural privilege log challenges. Ex. E. Yet Complaint Counsel rejected this offer.

C. The FTC Rules Foreclose Complaint Counsel’s Demand for Outside Counsel Communications

Complaint Counsel sought documents from Kroger under FTC Rule 3.37. Ex. D. That Rule covers materials in the “possession, custody, or control of the party upon whom the request is served.” 16 CFR § 3.37(a). Here, Complaint Counsel seeks all communications “between outside counsel.” Mot. at 8. These outside-counsel-only communications are not in Kroger’s

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possession, custody, and control. They are in the outside counsel's possession, custody, or control. Complaint Counsel's request violates FTC Rule 3.37(a).

Complaint Counsel also suggest that this Court's May 16 order required the production of emails between outside counsel. Not so. Neither the order nor Complaint Counsel's original motion to compel used the term "outside counsel." In any event, courts routinely reject similar requests. *See, e.g., Orchestrate HR, Inc. v. Blue Cross and Blue Shield of Kansas, Inc.*, No. 19-cv-4007-HLT-TJJ, 2022 WL 834066, at *2-*6 (D. Kan. Mar. 21, 2022).

III. CONCLUSION

The Court should deny Complaint Counsel's renewed motion to compel with prejudice.

June 5, 2024

Respectfully submitted,

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PUBLIC**Certificate of Service**

I hereby certify that on June 5, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing documents to be served via email to:

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Exhibit A

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

<p>In the Matter of</p> <p style="text-align: center;">The Kroger Company</p> <p style="text-align: center;">and</p> <p style="text-align: center;">Albertsons Companies, Inc.</p>	<p>Docket No. 9428</p>
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DECLARATION OF Yael Cosset

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

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

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

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

Original Divestiture Package

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

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

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

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

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

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

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

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

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

Expanded Divestiture Package

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

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

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

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

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

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

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

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

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

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

- a. Exhibit O to Complaint Counsel's Renewed Motion to Compel. This is an email between myself and Eric Winn, the CEO of C&S. The redacted material contains discussion of specific elements of the divestiture package being negotiated and reflects the opinions, impressions, and direction of Kroger's lawyers about what elements were necessary to include from a legal perspective.
- b. PRIVLIT00585, cited in Exhibit C of Complaint Counsel's Renewed Motion to Compel, is a document that discusses C&S's views on the propriety of certain elements of the divestiture package under negotiation. I understand that the views of each negotiating party on the proper scope of the divestiture package was influenced by and drawn from the opinions and advice of counsel.

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

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

19. Kroger, Albertsons, and C&S shared the common goal of executing a divestiture package that would enable the parties to prevail in the litigation and close the transaction. As in any business negotiation, the parties at times had disagreements on various issues in the negotiations that had to be resolved—including, for example, transition timing, which specific private label and other assets would transfer to C&S, and so forth. But none of that negotiating diminished the parties' shared goal of executing a divestiture package that would facilitate the consummation of the transaction.

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

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

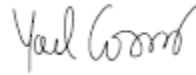
22. The final agreement reflects the parties' joint efforts, informed by litigation counsel, to satisfy the regulatory concerns expressed in the complaints.

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

June 5, 2024

Cincinnati, Ohio

A handwritten signature in black ink, appearing to read "Yael Cosset", written above a horizontal line.

Yael Cosset

PUBLIC

Exhibit B

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**RESPONDENTS' OPPOSITION TO
COMPLAINT COUNSEL'S MOTION TO COMPEL**

Complaint Counsel seeks to compel Kroger and Albertsons ("Respondents") to produce materials related to their negotiation of the expanded divestiture package.¹ This motion is based on the incorrect premise that Respondents are "withholding this evidence from discovery." Mot. at 6. In fact, Respondents are conducting a highly expedited review of negotiation materials related to the amended divestiture agreement that was executed (and provided to Complaint Counsel) on April 22, 2024. And Respondents will produce thousands of pages of non-privileged documents on this subject by May 17, 2024.

Nevertheless, Complaint Counsel seeks to compel the categorical production of materials related to the negotiation of the expanded divestiture package. Complaint Counsel's position is that *none* of these documents could be covered by *any* privilege or protection. This sweeping assertion lacks merit. Certain negotiation-related documents will reflect litigation

¹ Complaint Counsel also moved to compel C&S Wholesale Grocers and C&S Chairman Richard Cohen to produce these same materials. Those entities are filing a separate opposition.

considerations and, in turn, will be covered by the attorney-client privilege, the attorney work product doctrine, and/or the common interest doctrine. After all, the expanded divestiture package was entered into during pending litigation to address concerns raised by regulators.

Complaint Counsel's motion is also procedurally improper. Complaint Counsel asks this Court to compel the production of entire categories of information that Respondents have not categorically refused to provide—before Respondents have even served a privilege log. The prematurity of Complaint Counsel's motion is another independent basis to deny it.

The Court should deny the motion to compel.

BACKGROUND

I. Respondents Announce an Expanded Divestiture Package

This case is one of four actions brought by federal or state antitrust enforcers in early 2024 challenging Kroger's proposed acquisition of Albertsons. In parallel, the FTC and nine state attorneys general are challenging the transaction in federal court in Oregon; the Washington Attorney General brought suit in Washington state court; and the Colorado Attorney General filed suit in Colorado state court. Kroger and Albertsons are defendants in each of these cases; C&S is a defendant in the Colorado action. The Washington Attorney General filed the first lawsuit in mid-January 2024, and the others followed shortly thereafter.

Prior to this litigation, in September 2023, Kroger entered into a binding agreement to divest at least 413 stores and substantial additional assets to C&S, the nation's leading grocery wholesaler. *See* Compl. ¶ 10. The FTC staff and state regulators raised various concerns with the original divestiture package, which the parties worked in good faith to address. However, rather than wait for a revised divestiture package, the FTC and state attorneys general chose to

file suit. Accordingly, while litigation against the transaction was pending, Kroger and C&S negotiated an expanded divestiture package under which C&S would receive 579 stores (166 more stores than the prior package) and many additional non-store assets. *See* Mot., Ex. B. Because the purpose of the expanded package was to address the concerns raised by regulators *in the pending litigations*, Respondents' litigation counsel were closely involved in negotiating the package.

II. Respondents are Diligently Reviewing Negotiation Materials for Privilege

Kroger produced the updated divestiture agreement to Complaint Counsel on April 22, 2024—the same day it was executed. *See* Mot. at 3. Later that day, in a hearing in the Colorado action, Respondents agreed to produce certain discovery materials related to the amendment by May 17, 2024. Respondents also advised Complaint Counsel that they would produce non-privileged documents related to the expanded divestiture package. Nevertheless, before Respondents could meaningfully begin reviewing those materials (much less produce a privilege log), Complaint Counsel began questioning the privileges and protections at issue. Respondents met and conferred with Complaint Counsel in good faith, answering Complaint Counsel's broad questions as best they could while noting the privilege review was ongoing and would necessarily be document-specific. *See* Mot., Ex. M. And Respondents unequivocally confirmed they were *not* categorically withholding all divestiture-related materials. *Id.* (“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.**”) (emphasis added).

III. Complaint Counsel Moves to Compel

Just hours after receiving Respondents' letter on privilege issues, Complaint Counsel prematurely moved to compel regarding three categories of materials (collectively, the "Negotiation Materials"):

- communications between Respondents and C&S, whether through businesspeople or counsel, in which the composition of the divestiture asset package was negotiated;
- drafts of the New Divestiture Agreements exchanged between the negotiating parties; and
- 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.

Complaint Counsel appears to believe that Respondents will categorically withhold these Negotiation Materials. *See* Mot. at 6 (claiming that Respondents "appear to be withholding from discovery substantially all evidence of their negotiations"). That assumption is incorrect.

Respondents expect to produce non-privileged documents in each category of "Negotiation Materials" identified by Complaint Counsel by May 17.

Specifically, while Respondents' document review is ongoing, they expect to produce documents such as: (a) Kroger and C&S communications exchanging factual information about the divestiture assets in connection with due diligence; (b) drafts of the updated divestiture agreement (with redactions for attorney comments or sections bearing on the sufficiency of the package from a litigation perspective); and (c) internal documents substantively preparing for the divestiture (not the sufficiency of the package from a litigation perspective). Respondents will produce privilege logs listing any withheld materials.

ARGUMENT

I. Complaint Counsel's Categorical Privilege Arguments Lack Merit

Complaint Counsel asserts that *none* of the Negotiation Materials are protected by any privilege or protection. For multiple reasons, this sweeping argument should be rejected.

A. Attorney Work Product Covers Certain Negotiation Materials

The attorney work product doctrine protects from disclosure documents prepared “in anticipation of litigation.” Fed. R. Civ. P. 26(b)(3)(A).² The prevailing rule is the “because of” standard, which asks “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015); *see also* Wright & Miller, Federal Practice and Procedure § 2024 (3d ed).

Many Negotiation Materials will meet this standard. This includes communications between Kroger and C&S on the expanded divestiture package that occurred because of (and during) the merger litigations and reflect litigation-focused considerations on how to structure the divestiture to best position the companies in litigation. The same may be true of comments on or sections of drafts of the amended divestiture agreement, as well as Respondents' internal analyses of the “strengths and weaknesses” of the divestiture package from a regulatory/litigation perspective. Courts have concluded that similar documents constitute attorney work product. *See United States v. Adlman*, 134 F.3d 1194, 1995 (2d Cir. 1998) (work

² This Court has followed federal law when addressing privilege issues. *See, e.g., In re McWane, Inc.*, Dkt. No. 9351, 2012 WL 3057728 (FTC July 12, 2012). Complaint Counsel's motion likewise relies on federal law.

product protection applied to analysis on “preferred methods of structuring [a] transaction” given likely legal challenges).

Complaint Counsel argues that the work product doctrine cannot apply because Respondents told “the Colorado court that the divestiture is the product of business negotiations, not legal maneuvering.” Mot. at 9. This misconstrues the law. It does not matter “whether litigation was a primary or secondary motive behind the creation of a document”; what matters is whether the “because of” test is met. *In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004). For the reasons stated, some Negotiation Materials will necessarily satisfy this test.

Complaint Counsel also argue that the Negotiation Materials do not relate to “litigation planning.” Mot. at 9. This is factually inaccurate. The Negotiation Materials were created *during* ongoing litigation. And litigation counsel were involved in the divestiture negotiations, providing feedback on the structure of the divestiture to address the claims raised in litigation. Certain materials withheld by Respondents will squarely relate to litigation planning. Indeed, the FTC filed this complaint when FTC staff *knew* Respondents were negotiating an amended divestiture package. Complaint Counsel can hardly claim surprise that the amended divestiture package announced after litigation had commenced was prepared with an eye toward litigation.

Finally, Complaint Counsel argues that the work product doctrine can be overcome because Complaint Counsel has a “substantial need” for the Negotiation Materials and cannot obtain “the substantial equivalent of the materials by other means.” *See* Mot. at 9 (quoting FTC Rule 3.31(c)(5)). But Respondents will produce many of the documents that Complaint

Counsel claims to need. Without knowing what documents may be withheld, Complaint Counsel cannot argue in good faith that they have a “substantial need” for them.

B. Attorney-Client Privilege Covers Certain Negotiation Materials

Where a company retains a lawyer, there “is a rebuttable presumption that the lawyer is hired ‘as such’ to give ‘legal advice.’” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020). Some Negotiation Materials may include legal advice and analysis—including on the expanded divestiture package’s sufficiency from an antitrust perspective—and may therefore be covered by attorney-client privilege.

Complaint Counsel does not appear to dispute that *internal* Negotiation Materials could be covered by the attorney-client privilege, *see* Mot. at 7–8—notwithstanding that its motion seems to seek production of such privileged materials, *see* Mot. at 1 (seeking internal analyses). Complaint Counsel instead suggests that the attorney-client privilege cannot apply to arms-length negotiations between Kroger and C&S at all, and in any event correspondence between Respondents would waive the privilege. These arguments ignore the common interest doctrine, which applies to some Negotiation Materials for the reasons explained below.

C. The Common Interest Doctrine Covers Some Negotiation Materials

The common interest doctrine 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). It is an exception to the general rule that disclosing privileged information to a third party waives the relevant privilege or protection. *Id.* To invoke the common-interest exception, “the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement.” *Id.*

In August 2023, Kroger, Albertsons, and C&S entered into a joint defense and common interest agreement “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.” Mot., Ex. M. The parties are now co-defendants in one action and similarly situated in three others. This qualifies as a common interest. *See Ferko v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 219 F.R.D. 396, 401 (E.D. Tex. 2003) (“The common interest doctrine applies to cases involving co-defendants.”). Some Negotiation Materials will therefore properly be protected from disclosure under the common interest exception.

Complaint Counsel’s counterarguments lack merit.

First, Complaint Counsel contends that the common interest doctrine applies only to “communications made for the purpose of securing legal advice”—i.e., attorney-client privilege communications. *See* Mot. at 7. Not so. The common interest doctrine also “applies . . . to communications and documents protected by the work product doctrine.” *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007).

Second, Complaint Counsel argues that “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.” Mot. at 7. But “[t]he weight of case law suggests that, as a general matter, privileged information exchanged during a merger between two unaffiliated business[es] would fall within the common-interest doctrine.” *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 310 (D.N.J. 2008). Complaint Counsel cites *Nidec Corp. v. Victor Company of Japan* to suggest that parties “negotiating a transaction do

not share a common interest prior to executing a binding agreement.” 249 F.R.D. 575, 579 (N.D. Cal. 2007) (cited Mot. at 7). But a common interest was lacking there because nothing indicated the parties would “ever engage in joint litigation.” *Id.* The opposite is true here; indeed, Respondents are already co-defendants in Colorado. And even in this proceeding (where C&S is not a party), C&S is a material player on the other side of the “v.” from Complaint Counsel.

Third, Complaint Counsel contends that “adversarial communications” are not protected by the common interest doctrine. *See* Mot. at 8. But even negotiating counterparties can have an overarching common interest that falls under the doctrine. *See, e.g., In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, 85 F.4th 1070, 1096 (11th Cir. 2023) (concluding an “adverse position” between parties during settlement negotiations “d[id] not undermine” their “broader mutual interest”); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987) (concluding the common interest doctrine covered disclosures during an “attempt[] to negotiate the sale of a business”); *Rayman v. Am. Charter Fed. Sav. & Loan Ass’n*, 148 F.R.D. 647, 655 (D. Neb. 1993) (similar). Here, Kroger and C&S had an overarching common interest to negotiate a divestiture package that would respond to regulators’ concerns raised in the litigations.

II. Complaint Counsel’s Motion is Premature

In any event, Complaint Counsel’s motion should be rejected as premature. Respondents are not categorically withholding the Negotiation Materials and will produce a privilege log of any withheld documents. Complaint Counsel can evaluate that privilege log, confer with Respondents about it, and raise any disputes with the Court thereafter. That is the

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proper and ordinary process for litigating privilege challenges. Complaint Counsel's attempt to compel production of entire categories of documents turns this orderly process on its head.

Courts routinely deny motions to compel on privilege issues where, as here, the motion was filed before service of a privilege log. *See, e.g., McNeil v. Mount Carmel Health Sys.*, No. 2:20-cv-258, 2021 WL 422689, at *4 (S.D. Ohio Feb. 8, 2021) (concluding "a ruling on the privileged nature on the documents at issue would be premature" because "Defendants have not completed or produced a privilege log"); *Lee v. Dennison*, No. 2:19-cv-1332-KJD-DJA, 2020 WL 4809430, at *4 (D. Nev. Aug. 18, 2020) ("Given that the Court does not have the privilege log to review, it finds the dispute regarding compelling the claims file to be premature."); *Micromet AG v. Cell Therapeutics, Inc.*, No. CV04-0290RSM, 2005 WL 8172238, at *2 (W.D. Wash. Dec. 13, 2005) (similar). And for good reason. "Neither the Court, nor [Complaint Counsel] for that matter, can ascertain whether any of the documents withheld [] are privileged without the benefit [of] a privilege log." *Midwest Feeders, Inc. v. Bank of Franklin*, No. 5:14cv78-DCB-MTP, 2015 WL 11117899, at *3 (Nov. 19, 2015 S.D. Miss.). These common-sense decisions squarely apply here.

CONCLUSION

The Court should deny Complaint Counsel's motion to compel.

May 13, 2024

Respectfully submitted,

By: 

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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
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Washington, D.C. 20580
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The Honorable D. Michael Chappell
Chief Administrative Law Judge
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Washington, D.C. 20580

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

Charles Dickinson
James H. Weingarten
Emily Blackburn
Paul Frangie
Laura Hall
Janet Kim
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*Counsel for Respondent The Kroger
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Exhibit C

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Document Produced in Camera

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Exhibit D

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Document Produced in Camera

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Exhibit E

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From: [Sullivan, Luke](#)
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Cc: jweingarten@ftc.gov; [Dickinson, Charles](#); [Pai, Rohan](#); [Bies, Katherine](#); [Hough, Lily](#); [Wint, Corene](#); [Drummonds, Katherine](#); [Ashmeade, Amare](#); [Ma, Rachel](#); [Warren, Jacob](#); [Willey, Kayla](#); [Yoon, John](#); [JaymeWeber-contact](#); [VinnyVenkat-contact](#); [ConnorNolan-contact](#); [NicoleGordon-contact](#); [ShiraHoffman-contact](#); [AmandaHamilton-contact](#); [WillMargrave-contact](#); [BrianYost-contact](#); [PaulHarper-contact](#); [AliceRiechers-contact](#); [SchonetteWalker-contact](#); [GaryHonick-contact](#); [ByronWarren-contact](#); [LucusTucker-contact](#); [SamanthaFeeley-contact](#); [JuliaMeade-contact](#); [JeffHerrera-contact](#); [CherylHiemstra-contact](#); [TimNord-contact](#); [ChristopherKayser-contact](#); [TaniaManners-contact](#); [WilliamYoung-contact](#); [RobertBernheim-contact](#); [AngieMilligan-contact](#); [ChristineCortez-contact](#); bryan.marra@arnoldporter.com
Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428
Date: Wednesday, June 5, 2024 7:11:54 PM
Attachments: [image002.png](#)

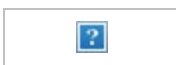
Laura –

Thank you for your email. Kroger is disappointed that Complaint Counsel has rejected another reasonable compromise offer that would have avoided burdening Judge Chappell with motions practice.

Your email contends that the parties are at impasse on the issues listed in your email that were discussed on the meet and confer. However, the parties were still negotiating the format of Kroger's log when Complaint Counsel filed its renewed motion to compel. As your email acknowledges, Kroger was going to take back the issue of whether to provide file names and email subjects, but you filed your motion to compel before Kroger responded.

Your email also does not list Kroger's tailored redactions on drafts of the expanded divestiture agreement as an issue on which the parties are at impasse. That is because the parties never conferred about this issue before Complaint Counsel filed its renewed motion to compel. Kroger reserves all rights given Complaint Counsel's failure to confer on this issue in violation of the Scheduling Order and the FTC Rules.

Best,
Luke



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From: Hall, Laura <lhall1@ftc.gov>**Sent:** Friday, May 31, 2024 11:59 AM

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 bryan.marra@arnoldporter.com

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Dear Luke,

During our call on May 28, 2024, the only issue that counsel for Kroger agreed to consider was whether to provide file names and email subjects notwithstanding that we would not agree not to object to Kroger's privilege log. I confirmed with you and Mr. Marra at the conclusion of our call that that was the only issue you were taking back. Therefore, we were at impasse on other issues relating to the format of Kroger's privilege log, including:

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- Kroger directing us to an index of over 5,000 people that was produced during the Second Request phase to identify third parties in the log, even though Mr. Marra acknowledged that many of the people in that index were not relevant to the present log. You did not offer to provide an index limited to the people named in the present log.
- Attachments not being separately logged. For example, with respect to a February 9, 2024, email, your privilege log did not disclose that the email attached a letter that was also being withheld; I was able to determine this only because Albertsons produced a redacted version of a related email which revealed that there had been an attachment—a letter from Albertsons’ Board to Kroger’s Board. Your response was to point me to an entry for a document dated March 19, 2024, on which counsel for C&S were copied, but nothing about this entry, including the date and the parties to the communication, provided notice that this was the withheld attachment from the February email. Moreover, the inclusion of C&S on the March communication at a time when it was adverse to Kroger in negotiating the divestiture waived the privilege over the underlying document. You did not agree to consider producing this document as we requested, nor offer to consider identifying attachments as such in the log.
- Failure to log communications by outside counsel involved in negotiations of the divestiture. You did not offer to reconsider this decision.
- Failure to accurately describe documents. For example, we asked you with respect to two specific entries, one of which we included as Exhibit O to our motion and one of which related to the issue of PR consultants (which we also note in our motion as a deficiency of the privilege log), whether the descriptions fairly described the content of the documents in question. You insisted that the descriptions were adequate and did not offer to make any changes.
- You rejected any attempt to raise what you termed “categorical” issues with your privilege log, insisting we could only proceed by addressing one entry at a time, notwithstanding our position that we lack sufficient information to do so.

While we appreciate your new proposal to provide additional information (to which we believe we were entitled on May 24, 2024), we do not believe it addresses all of the issues outlined above, and therefore cannot be a basis for withdrawing our motion as to these deficiencies.

Moreover, your request that we withdraw our motion ignores the primary relief sought in the motion—the production of Negotiation Documents that we contend are not properly withheld as privileged. As you know, we have been seeking to resolve the question of Kroger’s claims of privilege with respect to negotiation of the April 22, 2024 divestiture for months, and fact discovery closes in less than two weeks. We cannot further delay judicial consideration of this issue.

Best,
Laura

From: Sullivan, Luke <Luke.Sullivan@weil.com>

Sent: Thursday, May 30, 2024 11:01 PM

To: Hall, Laura <lhall1@ftc.gov>; matthew.shultz@arnoldporter.com;
Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com;

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contact [<Robert.Bernheim@azag.gov>](mailto:Robert.Bernheim@azag.gov); AngieMilligan-contact [<amilligan@lvklaw.com>](mailto:amilligan@lvklaw.com);
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Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Laura –

We are disappointed that Complaint Counsel filed a renewed motion to compel yesterday—which addresses some issues the FTC never raised before filing its motion—before Kroger had a chance to follow up on the issues we discussed on Tuesday’s call.

Kroger had been considering these issues and had an update to share related to the FTC’s contention that Kroger’s privilege log should have separately logged attachments to emails.

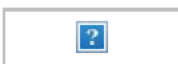
As we explained on the call, Kroger did log attachments separately, so the FTC’s position remains unclear to us. Nevertheless, Kroger was prepared to propose another compromise on this issue: If the FTC would agree to not challenge the sufficiency of Kroger’s privilege log, both informally and through a motion to compel, Kroger would produce a supplemental log with (1) all file names, and (2) a field that identifies the family bates range, which would facilitate identifying parent-attachment relationships on the log.

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In the hopes of not burdening Judge Chappell with additional motions practice, Kroger is still willing to provide this supplemental log on the condition that the FTC (a) withdraws its renewed motion to compel and (b) agrees to not further challenge the sufficiency of Kroger's privilege log (but the FTC would retain the right to challenge Kroger's substantive assertions of privilege). Please let us know the FTC's position on this.

In any event, as with file names, Kroger will consider in good faith any request by the FTC for additional information on the parent-attachment relationship for specific entries on Kroger's privilege log.

Best,
Luke



Luke Sullivan

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From: Hall, Laura <lhall1@ftc.gov>

Sent: Tuesday, May 28, 2024 1:52 PM

To: Sullivan, Luke <Luke.Sullivan@weil.com>; matthew.shultz@arnoldporter.com;
Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com;
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Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Let's talk at 2. Can you please circulate a dial-in? I'm having issues with Teams today.

Thanks,
Laura

From: Sullivan, Luke <Luke.Sullivan@weil.com>

Sent: Tuesday, May 28, 2024 1:41 PM

To: Hall, Laura <llhall1@ftc.gov>; matthew.shultz@arnoldporter.com; Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; joshua.davis@arnoldporter.com; michael.kientzle@arnoldporter.com; jason.ewart@arnoldporter.com; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; john.holler@arnoldporter.com; christina.cleveland@arnoldporter.com; Perry, Mark <Mark.Perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; thassi@debevoise.com; mschaper@debevoise.com; srselden@debevoise.com; jrabraham@debevoise.com; nborn@debevoise.com; jmfried@debevoise.com; mcardena@debevoise.com; tebuckley@debevoise.com; msventim@debevoise.com; mike.cowie@dechert.com; james.fishkin@dechert.com; Fuller, Deidre <Deidre.Fuller@weil.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; Yoda, Kristine <Kristine.yoda@weil.com>; APodoll@wc.com; emainigi@wc.com; tinfinger@wc.com; tryan@wc.com; jpitt@wc.com

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 contact <Robert.Bernheim@azag.gov>; AngieMilligan-contact <amilligan@lvklaw.com>;
 ChristineCortez-contact <cortez@lvklaw.com>; bryan.marra@arnoldporter.com

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Laura –

Thank you for your email. Kroger is available to meet and confer today from 2 – 4 PM, or tomorrow morning from 10 – 12 AM. If those windows work for you, please send a calendar invitation.

As for your email, it doubles down on Complaint Counsel’s categorical approach to privilege objections, which is improper and inconsistent with Judge Chappell’s order for all the reasons Kroger previously explained. Kroger also disagrees with many of the statements in the email, but we do not comprehensively list all of these disagreements here; we will be prepared to discuss these issues on the meet and confer.

That said, one comment in particular warrants responding now. Your original email stated that Kroger’s log “fail[ed] to comport with the requirements of the CMSO and the Federal Rules of Civil Procedure.” Your first email cited the CMSO’s requirements because, during a meet and confer on May 6, Kroger informed Complaint Counsel that its log would follow the CMSO’s requirements—and Complaint Counsel raised no objection. Indeed, Complaint Counsel’s May 3 email addressing Kroger’s privilege log expressly noted that “Respondents object to Instruction 9 of the Requests for Production” and asked Respondents to “please explain what information you intend to provide to satisfy your obligations under paragraph 28 of the Case Management and Scheduling Order entered April 12, 2024, in the District of Oregon.” All along, Complaint Counsel has understood that Kroger’s privilege log would adhere to the CMSO’s logging provisions. Kroger served a log under these acknowledged parameters, and Complaint Counsel’s 180-degree pivot in the midst of discovery emails lacks merit.

Nevertheless, Complaint Counsel has specifically requested that Kroger produce the “filenames and email subjects” for its privilege log. Kroger already agreed to consider requests to provide this information in good faith based on challenges to specific log entries. Even so, as a compromise and in order to resolve procedural disagreements so the parties can focus on the merits of any privilege dispute, Kroger will agree to produce a supplemental log with this information—but only on the condition that Complaint Counsel agree to not challenge the sufficiency of Kroger’s privilege log, both informally and through a motion to compel. Complaint Counsel would still be able to challenge the merits of Kroger’s assertions of privilege through a motion to compel; this agreement would only limit challenges to the form and format of the log itself. If Complaint Counsel will agree to this compromise, Kroger

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will produce a supplemental privilege log with the requested information.

Best,
Luke



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From: Hall, Laura <lhall1@ftc.gov>

Sent: Tuesday, May 28, 2024 1:23 PM

To: Sullivan, Luke <Luke.Sullivan@weil.com>; matthew.shultz@arnoldporter.com;
Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com;
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contact <bwarren@oag.state.md.us>; LucusTucker-contact <LTucker@ag.nv.gov>; SamanthaFeeley-
contact <SFeeley@ag.nv.gov>; JuliaMeade-contact <jmeade@nmag.gov>; JeffHerrera-contact

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Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Dear counsel,

We have not heard from counsel for either Respondent to schedule a meet and confer on these issues, despite counsel for Kroger representing that they were available to meet today. Please provide your earliest availability for a meet and confer, and we are prepared to meet with you separately to simplify scheduling.

Thank you,
Laura

From: Hall, Laura

Sent: Monday, May 27, 2024 3:11 PM

To: Sullivan, Luke <Luke.Sullivan@weil.com>; matthew.shultz@arnoldporter.com; Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; joshua.davis@arnoldporter.com; michael.kientzle@arnoldporter.com; jason.ewart@arnoldporter.com; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; john.holler@arnoldporter.com; christina.cleveland@arnoldporter.com; Perry, Mark <Mark.Perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; thassi@debevoise.com; mschaper@debevoise.com; srselden@debevoise.com; jrabraham@debevoise.com; nborn@debevoise.com; jmfried@debevoise.com; mcardena@debevoise.com; tebuckley@debevoise.com; msventim@debevoise.com; mike.cowie@dechert.com; james.fishkin@dechert.com; Fuller, Deidre <Deidre.Fuller@weil.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; Yoda, Kristine <Kristine.yoda@weil.com>; APodoll@wc.com; emainigi@wc.com; tinfinger@wc.com; tryan@wc.com; jpitt@wc.com

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Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Dear Luke,

Please see responses below in red. As before, our requests are **bolded** for ease of reading. We can be available for a call anytime tomorrow, with a preference for speaking earlier in the day.

Best,
Laura

Kroger is disappointed that, rather than carefully examine Kroger's privilege log and raise questions about specific log entries, the FTC has reverted back to its original, categorical approach of simply demanding the production of entire categories of materials. That approach is not only counterproductive, but it is inconsistent with Judge Chappell's May 16 order. And Kroger's privilege log fully complies with the CMSO and provides the FTC with sufficient information to make specific, document-by-document challenges to the log.

My prior email referencing the CMSO was in error. Judge Chappell's May 16 order specifically requires that the privilege logs provided on May 24 comply with Instruction I9 of our RFPs and 16 C.F.R. § 3.38A. Kroger's log manifestly does not comply (nor does Albertsons', though less egregiously). At this time, we are raising categorical issues that are preventing us from making a meaningful assessment of individual entries.

Nevertheless, Kroger has provided specific responses to your questions below—and we are doing so over the holiday weekend as a courtesy to the FTC given its request to promptly address these issues. Kroger's expeditious response to the FTC stands in contrast to the FTC's approach over its assertion of common interest privilege and law enforcement investigatory privilege. Kroger and Albertsons requested more detail on the basis for the FTC's privilege assertions on May 6; it has been nearly 3 weeks and the FTC *still* has not provided sufficient detail to support those claims. Even so, Defendants gave the FTC until May 30 to respond as a courtesy in light of the holiday weekend.

Thank you for responding on a holiday weekend. We are analyzing these issues on a holiday weekend because of the short time remaining in fact discovery and the importance of obtaining these documents.

- Your email stated that Kroger's log "fails to comport with the requirements of the CMSO and the Federal Rules of Civil Procedure" because it "includes communications with numerous third parties without identifying them as such, requiring Complaint

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Counsel to google dozens of people to attempt to discern their roles.” But your email identified no specific provision in the CMSO or FRCs that Kroger’s log violated. Nor could it have: Kroger’s log was fully consistent with both. As for your request for an index of individuals on the log, during the Second Request process Kroger provided an index that includes *5,403 names*—which covers most names on the privilege log. Nevertheless, to aid the FTC’s review, we have attached a supplemental index with the name, title, and affiliation of the 202 names on Kroger’s privilege log that are not on the original index.

We will review this additional information, but do not believe that referring to an index of thousands of names that may not be this privilege log is a reasonable means of providing the information requested. As noted above, Kroger was required by Judge Chappell’s order to comply with Instruction I9 of our RFPs, which include the requirement: “For each author, addressee, and recipient: state the person’s full name, title, and employer or firm; and denote all attorneys with an asterisk.”

- Your email also requested that Kroger re-produce its log to “include[] file names for each document, as Albertsons’ does.” However, your email cited nothing in the CMSO or federal rules that requires this field to be included on privilege logs. If the FTC raises challenges to specific log entries and believes the file name is required to evaluate the assertion of privilege, Kroger will consider a request to provide that information in good faith.

Both Instruction I9 and 16 C.F.R. § 3.38A require: “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.” Wholesale omitting filenames and email subjects, which cannot all disclose privileged matter, is inappropriate and deprives Complaint Counsel of any information other than counsel’s own description of the documents. For example, **please explain how “Email containing information necessary for counsel to render legal advice regarding selection and structure of assets to be divested to C&S Wholesale Grocers in order to secure antitrust approval for proposed transaction with Albertsons” relates to the content of KRPROD-CO-LIT-000044187 and claims of Attorney Client, Joint Defense, Work Product.**

We believe it would be easier for Kroger to produce all filenames as an output of the privilege process in its document review program, but if Kroger insists that we request filenames for specific entries, **we request that filenames and email subject lines be provided for all communications between Kroger and C&S where the To: and From: fields only contain non-attorneys, even if attorneys are copied.**

- Your email requests the production of “a February 9, 2024 letter from Albertsons to the Kroger board,” which it says was not logged. However, this document was logged at entry PRIVLIT00909. The log entry states: “Letter reflecting legal advice regarding selection and structure of assets to be divested to C&S Wholesale Grocers in order to secure antitrust approval for proposed transaction with Albertsons.” The document was

withheld based on attorney-client, work product, and joint defense claims.

The document at PRIVLIT909 is dated March 19, 2024, and therefore would not appear to be the February 9, 2024 letter in question. Moreover, this correspondence includes outside counsel for C&S, whereas the February 9 letter was stated to be from Albertsons' board to Kroger's board. This relates to another failure to follow Judge Chappell's order and Instruction I9: attachments to correspondence were to be separately logged. Failure to do so, as seen here, is inhibiting our ability to analyze these entries. We were only able to figure out what the February 9 letter was about because Albertsons produced a redacted version of the covering email while wholly redacting the attachment. Albertsons' log also did not separately log the attachment, so the only entry we can see relating to this letter is the withholding of the covering emails purely on the basis of Attorney Client Privilege. To the extent that the document was provided to C&S's counsel in March 2024, which there was no binding divestiture agreement, any privilege has been waived. **We maintain our request for this document.**

- Your email states that communications between Kroger and C&S around the New Divestiture Agreement negotiations cannot be privileged as a categorical matter because "C&S and Kroger were not contractually bound to execute any transaction" during the negotiation period "and therefore did not share a common legal interest." This is at core the same categorical argument the FTC presented to Judge Chappell, which was rejected given the need to analyze specific privilege log entries. If the FTC identifies specific log entries it wishes to challenge, Kroger will evaluate those challenges in good faith.

We believe that any communications between businesspeople at C&S and Kroger prior to the execution of the April 22 New Divestiture Agreements are likely to be non-privileged Negotiation Documents. As noted above, we have requested additional information to evaluate these claims.

- Your email requests that Respondents produce Negotiation Documents from outside counsel. But Respondents never agreed to do this, nor did Judge Chappell's order address it or require it.

The term Negotiation Documents, as defined by the Motion to Compel and as adopted by Judge Chappell, includes "communications between Respondents and C&S, whether through businesspeople or counsel," and Judge Chappell directed Respondents to either produce or log all Negotiation Documents. In addition, Judge Chappell's order requires Respondents to comply with Instruction I9 of our RFPs, which only exclude outside counsel documents from logging if they are not shared with the client or any third party. And to the extent that Respondents rely on the CMSO, notwithstanding Judge Chappell's order, it too only exempts from logging communications between Respondents, not between Respondents and third-parties such as C&S. **Please advise whether you will stand on your refusal to produce Negotiation Documents exchanged between outside counsel.**

- Finally, your email lists third parties and states that the "disclosure of attorney client privileged material with third parties waives the privilege unless the inclusion of the third party is essential for the attorney to be able to provide its advice. Please explain how each of these third parties, and any other that may included in the privilege log,

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satisfies this requirement.” Again, this is another categorical privilege argument similar to the FTC’s prior position before Judge Chappell. Nor does the FTC identify specific log entries to challenge. Nevertheless, Kroger will be prepared to address this issue on our meet and confer at a high level with respect to the third parties identified in your email. Kroger also previously explained the role of a number of these third parties to the FTC on December 8, 2023, including Bain, Wells Fargo, Citibank, Deloitte, and BCG, in response to questions the FTC raised with respect to Kroger’s privilege log during the Second Request process.

Thank you, we look forward to discussing. In particular, **we would appreciate your explanation of the redactions to KRPROD-CO-LIT-000243298** to understand how Kroger can describe emails about its public relations campaign (which were less redacted in KRPROD-CO-LIT-000175718 and show that Mr. Flickinger’s email was, at least in part, about already aired radio broadcasts), as “Email containing information necessary for counsel to render legal advice regarding sale of assets by Kroger to C&S Wholesale Grocers” invoke attorney-client privilege.

Laura R. Hall
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 Federal Trade Commission
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From: Sullivan, Luke <Luke.Sullivan@weil.com>

Sent: Sunday, May 26, 2024 10:50 PM

To: Hall, Laura <lhall1@ftc.gov>; matthew.shultz@arnoldporter.com;
Michael.B.Bernstein@arnoldporter.com; matthew.wolf@arnoldporter.com;
sonia.pfaffenroth@arnoldporter.com; joshua.davis@arnoldporter.com;
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james.fishkin@dechert.com; Fuller, Deidre <Deidre.Fuller@weil.com>; Gilchrist, Roy
 <Roy.Gilchrist@weil.com>; Yoda, Kristine <Kristine.yoda@weil.com>; APodoll@wc.com;
emainigi@wc.com; tinfinger@wc.com; tryan@wc.com; jpitt@wc.com

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Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Laura –

On Friday, Kroger served its privilege log. This responds to your three emails – two on Saturday, and one today – raising questions about the log.

Kroger is disappointed that, rather than carefully examine Kroger’s privilege log and raise questions about specific log entries, the FTC has reverted back to its original, categorical approach of simply demanding the production of entire categories of materials. That approach is not only counterproductive, but it is inconsistent with Judge Chappell’s May 16 order. And Kroger’s privilege log fully complies with the CMSO and provides the FTC with sufficient information to make specific, document-by-document challenges to the log.

Nevertheless, Kroger has provided specific responses to your questions below—and we are doing so over the holiday weekend as a courtesy to the FTC given its request to promptly address these issues. Kroger’s expeditious response to the FTC stands in contrast to the FTC’s approach over its assertion of common interest privilege and law enforcement investigatory privilege. Kroger and Albertsons requested more detail on the basis for the FTC’s privilege assertions on May 6; it has been nearly 3 weeks and the FTC *still* has not provided sufficient detail to support those claims. Even so, Defendants gave the FTC until May 30 to respond as a courtesy in light of the holiday weekend.

- Your email stated that Kroger’s log “fails to comport with the requirements of the CMSO and the Federal Rules of Civil Procedure” because it “includes communications with numerous third parties without identifying them as such, requiring Complaint Counsel to google dozens of people to attempt to discern their roles.” But your email identified no specific provision in the CMSO or FRCPs that Kroger’s log violated. Nor could it have: Kroger’s log was fully consistent with both. As for your request for an index of individuals on the log, during the Second Request process Kroger provided an

index that includes *5,403 names*—which covers most names on the privilege log. Nevertheless, to aid the FTC’s review, we have attached a supplemental index with the name, title, and affiliation of the 202 names on Kroger’s privilege log that are not on the original index.

- Your email also requested that Kroger re-produce its log to “include[] file names for each document, as Albertsons’ does.” However, your email cited nothing in the CMSO or federal rules that requires this field to be included on privilege logs. If the FTC raises challenges to specific log entries and believes the file name is required to evaluate the assertion of privilege, Kroger will consider a request to provide that information in good faith.
- Your email requests the production of “a February 9, 2024 letter from Albertsons to the Kroger board,” which it says was not logged. However, this document was logged at entry PRIVLIT00909. The log entry states: “Letter reflecting legal advice regarding selection and structure of assets to be divested to C&S Wholesale Grocers in order to secure antitrust approval for proposed transaction with Albertsons.” The document was withheld based on attorney-client, work product, and joint defense claims.
- Your email states that communications between Kroger and C&S around the New Divestiture Agreement negotiations cannot be privileged as a categorical matter because “C&S and Kroger were not contractually bound to execute any transaction” during the negotiation period “and therefore did not share a common legal interest.” This is at core the same categorical argument the FTC presented to Judge Chappell, which was rejected given the need to analyze specific privilege log entries. If the FTC identifies specific log entries it wishes to challenge, Kroger will evaluate those challenges in good faith.
- Your email requests that Respondents produce Negotiation Documents from outside counsel. But Respondents never agreed to do this, nor did Judge Chappell’s order address it or require it.
- Finally, your email lists third parties and states that the “disclosure of attorney client privileged material with third parties waives the privilege unless the inclusion of the third party is essential for the attorney to be able to provide its advice. Please explain how each of these third parties, and any other that may included in the privilege log, satisfies this requirement.” Again, this is another categorical privilege argument similar to the FTC’s prior position before Judge Chappell. Nor does the FTC identify specific log entries to challenge. Nevertheless, Kroger will be prepared to address this issue on our meet and confer at a high level with respect to the third parties identified in your email. Kroger also previously explained the role of a number of these third parties to the FTC on December 8, 2023, including Bain, Wells Fargo, Citibank, Deloitte, and BCG, in response to questions the FTC raised with respect to Kroger’s privilege log during the Second Request process.

We are not available to confer today or tomorrow given the holiday weekend and travel schedules. Please provide windows that work for the FTC on Tuesday or Wednesday.

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Best,
Luke



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From: Hall, Laura <lhall1@ftc.gov>

Sent: Sunday, May 26, 2024 9:17 AM

To: matthew.shultz@arnoldporter.com; Michael.B.Bernstein@arnoldporter.com;
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Cc: jweingarten@ftc.gov; Dickinson, Charles <cdickinson@ftc.gov>; Pai, Rohan <rpai@ftc.gov>; Bies, Katherine <kbies@ftc.gov>; Hough, Lily <lhough@ftc.gov>; Wint, Corene <cwint@ftc.gov>;
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<vinny.venkat@azag.gov>; ConnorNolan-contact <connor.nolan@azag.gov>; NicoleGordon-contact
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<Paul.Harper@ilag.gov>; AliceRiechers-contact <alice.riechers@ilag.gov>; SchonetteWalker-contact
<swalker@oag.state.md.us>; GaryHonick-contact <ghonick@oag.state.md.us>; ByronWarren-
contact <bwarren@oag.state.md.us>; LucasTucker-contact <LTucker@ag.nv.gov>; SamanthaFeeley-
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Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Dear counsel,

This email will address both Respondents' privilege logs, without waiver of the issues raised in prior correspondence and other issues that may arise in our continuing review of the over-8000 entries in the two logs. For ease of reading, I have bolded our specific requests.

Both Respondents have withheld, under claim of attorney-client privilege, emails from senior executives at each company to board members at their respective companies, attaching a February 9, 2024 letter from Albertsons to the Kroger board. That letter is not separately logged so far as we can see. **We request the production of this letter.** In the absence of any claim of work product or joint defense/common interest, and based on the context, the letter appears to be an adversarial communication not entitled to protection.

Despite numerous requests by Complaint Counsel, Respondents refused to state who negotiated the New Divestiture Agreements. Due to the deficiencies of the Kroger log, it is difficult to be certain, but it appears that correspondence between Yael Cosset and Eric Winn, with counsel usually, but not always, in copy, are likely to contain negotiations over assets to be included in the divestiture package. Likewise, the emails involving Alona Florenz, which even more rarely copy counsel, are likely to qualify as Negotiation Documents as defined in our motion to compel. The privilege claim with respect to these documents is that these provided information for "counsel to render legal advice regarding selection and structure of assets to be divested to C&S Wholesale Grocers in order to secure antitrust approval for proposed transaction with Albertsons." While Kroger's counsel may well have provided legal advice to Kroger on the basis of the information provided, C&S and Kroger were not contractually bound to execute any transaction at that time, and therefore did not share a common legal interest. **Please confirm that you will produce all documents for which the sender and recipient are non-attorney employees of C&S or Kroger, and the sender and recipient employed by different companies.**

These documents, however, are sparse compared to the intensity of negotiations that must have been occurring leading up to the April 22, 2024 execution of the new Divestiture Agreements. And it is not the case that the log is sparse because of the volume of such communications that has been produced. Kroger has produced no emails between Yael Cosset and Eric Winn, and only one email between Cosset and Alona Florenz.

The obvious conclusion, supported by documents produced by C&S, is that negotiations principally occurred between Sullivan & Cromwell on behalf of C&S and Weil Gotshal on behalf of Kroger, though there could well be additional firms involved that are unknown to us. We specifically requested that Respondents search the files of outside counsel for Negotiation Documents and received a categorical no, despite offers to limit the scope of the search to a couple custodians for each party. It now appears that Respondents have likewise chosen to limit their privilege logs to their document production custodians, therefore omitting the Negotiation Documents Complaint

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Counsel are seeking. Respondents cannot unilaterally choose not to search custodians known to have relevant documents, particularly where the documents are not available from any of the custodians they have agreed to search. **Please provide a date certain on which Respondents will produce Negotiation Documents from outside counsel.**

With respect to Albertsons' log, as with Kroger's, it is evident that numerous third parties received or even sent documents over which privilege is claimed. **Please explain for each third party how their inclusion on the communication was necessary for the provision of legal advice.** We have particular skepticism about the claims of privilege with respect to communications with Brunswick, a communications firm, and Jolene Frank, an investor relations firm, but would also appreciate an explanation of the inclusion of Citibank, Wells Fargo, Charles River Associates, Compass Lexecon, and someone whose email address is chris@stclairs.net, and any others we have failed to enumerate.

Albertsons also claims privilege, work product, and joint defense/common interest as a basis for withholding communications with Symbotic, Inc. concerning "vendor or customer negotiation matters" and "general business strategy issues." Communications with a non-party to this case, which is a current vendor to both Albertsons and C&S, and therefore an adversary with respect to vendor or customer issues, do not satisfy the legal requirements of the cited privileges. **Please confirm you will produce these documents.**

Notwithstanding this being a holiday weekend, we are prepared to meet and confer today or tomorrow in light of the importance of these documents and the imminent close of fact discovery. **Please advise when you are available**, and we can meet and confer with Respondents separately if that is easier to coordinate with people's schedules.

Sincerely,

Laura

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From: Hall, Laura

Sent: Sunday, May 26, 2024 9:13 AM

To: 'Shultz, Matthew M.' <Matthew.Shultz@arnoldporter.com>;
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 <john.holler@arnoldporter.com>; 'christina.cleveland@arnoldporter.com'
 <christina.cleveland@arnoldporter.com>; 'mark.perry@weil.com' <mark.perry@weil.com>;
 'luna.barrington@weil.com' <luna.barrington@weil.com>; 'bambo.obaro@weil.com'
 <bambo.obaro@weil.com>; 'luke.sullivan@weil.com' <luke.sullivan@weil.com>;
 'thassi@debevoise.com' <thassi@debevoise.com>; 'mschaper@debevoise.com'
 <mschaper@debevoise.com>; 'srselden@debevoise.com' <srselden@debevoise.com>;
 'jrabraham@debevoise.com' <jrabraham@debevoise.com>; 'nborn@debevoise.com'
 <nborn@debevoise.com>; 'jmfried@debevoise.com' <jmfried@debevoise.com>;
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 'msventim@debevoise.com' <msventim@debevoise.com>; 'mike.cowie@dechert.com'
 <mike.cowie@dechert.com>; 'james.fishkin@dechert.com' <james.fishkin@dechert.com>;
 'deidre.fuller@weil.com' <deidre.fuller@weil.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>;
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 'emainigi@wc.com' <emainigi@wc.com>; 'tinfinger@wc.com' <tinfinger@wc.com>; 'tryan@wc.com'
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 <cwint@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Drummonds, Katherine <kdrummonds@ftc.gov>;
 Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob
 <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Yoon, John <jyoon2@ftc.gov>; 'JaymeWeber-
 contact'; 'Vinny.Venkat@azag.gov' <Vinny.Venkat@azag.gov>; 'Connor.Nolan@azag.gov'
 <Connor.Nolan@azag.gov>; 'NicoleGordon-contact'; 'ShiraHoffman-contact'; 'AmandaHamilton-
 contact'; 'WillMargrave-contact'; 'BrianYost-contact'; 'PaulHarper-contct'; 'Alice.Riechers@ilag.gov'
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 contact'; 'JuliaMeade-contact'; 'JeffHerrera-contact'; 'Cheryl.Hiemstra@doj.state.or.us'
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 'cjkayser@lvklaw.com' <cjkayser@lvklaw.com>; 'TaniaManners-contact'; 'WilliamYoung-contact';
 'RobertBernheim-contact'; 'AngieMilligan-contact'; 'ChristineCortez-contact'

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Dear Kroger counsel, please see below which appears to have only gone to Mr. Shultz.

From: Hall, Laura

Sent: Saturday, May 25, 2024 10:25 AM

To: Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

PUBLIC

Dear Kroger counsel,

The privilege log provided yesterday fails to comport with the requirements of the CMSO and the Federal Rules of Civil Procedure, as it fails to provide essential information necessary to evaluate the claimed privileges. It also fails to comport with Kroger's claim to Judge Chappell that the privilege log would permit Complaint Counsel to evaluate its claims with respect to the common interest doctrine. The log claims the joint defense doctrine, but does not indicate whether the people on the communication or document are employees or representatives of Kroger, Albertsons, C&S, or third parties. Indeed, the log includes communications with numerous third parties without identifying them as such, requiring Complaint Counsel to google dozens of people to attempt to discern their roles. Please provide an index connecting each person in the privilege log to their organization and, if not an employee of Kroger, Albertsons or C&S, indicate by whom their employer is retained and for what purpose. We reserve all rights with respect to whether Kroger's production of a privilege log without this information complied with the orders of Judge Nelson and Judge Chappell.

From the laborious process of googling individuals, we have been able to determine that, at a minimum, Kroger is claiming attorney client privilege (not work product) over communications including the following third parties:

- Wells Fargo
- Citibank
- Joele Frank
- Deloitte
- BCG
- RBC Capital Markets
- PwC
- Bain
- Compass Lexecon

As you know, disclosure of attorney client privileged material with third parties waives the privilege unless the inclusion of the third party is essential for the attorney to be able to provide its advice. Please explain how each of these third parties, and any other that may included in the privilege log, satisfies this requirement.

These initial issues are precluding our ability to meaningfully assess Kroger's privilege claims and are raised without prejudice to or waiver of the additional issues with the privilege log.

Sincerely,
Laura

From: Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>

Sent: Friday, May 24, 2024 8:10 PM

To: Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; nborn@debevoise.com; thassi@debevoise.com;

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rselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; Bambo.Obaro@weil.com; Luna.Barrington@weil.com; Luke.Sullivan@weil.com; Lisa.Pieters@weil.com; Sarah.Sternlieb@weil.com; Jason.Kleinwaks@weil.com; james.fishkin@dechert.com

Cc: Weingarten, James <jweingarten@ftc.gov>; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Some people who received this message don't often get email from matthew.shultz@arnoldporter.com. [Learn why this is important](#)

Charlie,

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

Thanks,
Matt

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>
Sent: Tuesday, May 21, 2024 8:38 PM
To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; rselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>

Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

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On behalf of Kroger, we have sent additional productions responsive to Complaint Counsel's First Set of Requests for Production ("RFPs"), which are copies of productions submitted today to the State of Washington in parallel litigation. The productions are on an encrypted hard drive sent to your e-discovery host vendor, as requested.

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

- [REDACTED]
- [REDACTED]
- [REDACTED]

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

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>

Sent: Tuesday, May 21, 2024 7:26 PM

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

Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

On behalf of Kroger, we have sent an additional production responsive to Complaint Counsel's First Set of Requests for Production ("RFPs"), which is a copy of a production submitted to the State of

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Washington in parallel litigation, via secure file transfer. We also are attaching here Kroger's corresponding Responses & Objections to the State's First Set of Interrogatories (and certification) in the Washington action.

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

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>

Sent: Friday, May 17, 2024 7:18 PM

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

Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

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

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

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

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

A transmittal letter describing the materials contained in these productions, and accompanying submission index, are attached.

Thanks,
Yasmine

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

Charlie,

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

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

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>

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Sent: Monday, May 13, 2024 9:36 PM

To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

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

The passcode for the hard drive is [REDACTED]

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

Thanks,
Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>

Sent: Thursday, May 9, 2024 2:09 PM

To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>;

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Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com; zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>; zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>; zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>
Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>

Subject: RE: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

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

The passcode for the hard drive is [REDACTED]

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

Thanks,
 Yasmine

From: Harik, Yasmine <Yasmine.Harik@arnoldporter.com>

Sent: Tuesday, May 7, 2024 11:22 PM

To: Dickinson, Charles <cdickinson@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Holler, John <John.Holler@arnoldporter.com>; jrabraham@debevoise.com; zzz.External.mike.cowie@dechert.com; mschaper@debevoise.com; jmfried@debevoise.com; gpaul@whitecase.com; zzz.External.nborn@debevoise.com <nborn@debevoise.com>; thassi@debevoise.com; srselden@debevoise.com; mcardena@debevoise.com; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Bernstein, Michael B. <Michael.B.Bernstein@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Shultz, Matthew M. <Matthew.Shultz@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; mark.perry@weil.com; zzz.External.Bambo.Obaro@weil.com <Bambo.Obaro@weil.com>; zzz.External.Luna.Barrington@weil.com <Luna.Barrington@weil.com>; zzz.External.Luke.Sullivan@weil.com <Luke.Sullivan@weil.com>; zzz.External.Lisa.Pieters@weil.com;

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zzz.External.Sarah.Sternlieb@weil.com <Sarah.Sternlieb@weil.com>;
zzz.External.Jason.Kleinwaks@weil.com <Jason.Kleinwaks@weil.com>;
zzz.External.james.fishkin@dechert.com <james.fishkin@dechert.com>

Cc: jweingarten@ftc.gov; Pai, Rohan <rpai@ftc.gov>; Ashmeade, Amare <aashmeade@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Warren, Jacob <jwarren1@ftc.gov>; Willey, Kayla <kwilley@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Yoon, John <jyoon2@ftc.gov>

Subject: In the Matter of The Kroger Company/Albertsons Companies, Inc. - Docket No. 9428

Charlie,

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

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

- [REDACTED]
- [REDACTED]
- [REDACTED]

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

Thanks,
Yasmine

Yasmine Harik

Senior Associate | [Bio](#)



601 Massachusetts Ave., NW

Washington, DC 20001-3743

T: +1 202.942.6625

Yasmine.Harik@arnoldporter.com

www.arnoldporter.com | [LinkedIn](#)

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For more information about Arnold & Porter, click here:

<http://www.arnoldporter.com>

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Exhibit F

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Sullivan, Luke

From: Hall, Laura <lhall1@ftc.gov>
Sent: Friday, May 3, 2024 1:29 PM
To: zzz.External.mcardenas@debevoise.com; Angelotti, Kyle;
matthew.wolf@arnoldporter.com; Michael.B.Bernstein@arnoldporter.com;
jason.ewart@arnoldporter.com; matthew.shultz@arnoldporter.com;
yasmine.harik@arnoldporter.com; joshua.davis@arnoldporter.com;
sonia.pfaffenroth@arnoldporter.com; john.holler@arnoldporter.com;
jmfried@debevoise.com; Sullivan, Luke; Dickinson, Charles; Kleinwaks, Jason; Teng,
Albert; Kim, Janet; Smith, Joshua; zzz.External.nborn@debevoise.com; Bies, Katherine;
Arens, Elizabeth; thassi@debevoise.com; Hough, Lily; Olson, Eric;
mcardena@debevoise.com; srselden@debevoise.com; Libby, Kenneth A.; Rothman,
Harris; zzz.External.james.fishkin@dechert.com; Drummonds, Katherine; Pai, Rohan;
gpaul@whitecase.com; jweingarten@ftc.gov; Frangie, Paul; mschaper@debevoise.com;
Hamburger, Jacob; Blackburn, Emily; jrabraham@debevoise.com;
zzz.External.mike.cowie@dechert.com; Perry, Mark; Pieters, Lisa; Sternlieb, Sarah;
Obaro, Bambo; jpitt@wc.com; zzz.External.emainigi@wc.com;
zzz.External.apodoll@wc.com; zzz.External.Ross.Ufberg@dechert.com;
zzz.External.Yosi.Weitzman@dechert.com; Tyree, Leo; Dixon, Guia; Barrington, Luna;
zzz.External.Elena.Kamenir@dechert.com; Grant, Trisha; Sarmiento, Anjelica; Bryson,
Alexander James; zzz.External.Howard.Ullman@dechert.com; Zang, Theodore;
Anderson, Barrett
Cc: matthew.wolf@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com;
joshua.davis@arnoldporter.com; michael.kientzle@arnoldporter.com;
jason.ewart@arnoldporter.com; yasmine.harik@arnoldporter.com;
john.holler@arnoldporter.com; Cleveland, Christina;
Michael.B.Bernstein@arnoldporter.com; matthew.shultz@arnoldporter.com; Perry,
Mark; Barrington, Luna; Obaro, Bambo; Sullivan, Luke; Pieters, Lisa; Sternlieb, Sarah;
Kleinwaks, Jason; zzz.External.james.fishkin@dechert.com;
zzz.External.mike.cowie@dechert.com; zzz.External.Howard.Ullman@dechert.com;
zzz.External.Elena.Kamenir@dechert.com; zzz.External.Ross.Ufberg@dechert.com;
zzz.External.Yosi.Weitzman@dechert.com; Hassi, Ted; Schaper, Michael; Selden,
Shannon R.; Abraham, J. Robert; zzz.External.nborn@debevoise.com; Strong, Ardis
Subject: RE: Docket No. 9428 - Albertsons Companies, Inc.'s Responses and Objections to
Complaint Counsel's First Set of RFPs and Related Correspondence

External E-mail

Dear counsel,

To ensure that our Monday, April 6, 2024, meet and confer on Respondents' responses and objections to Complaint Counsel's Requests for Production is as productive as possible, I write to set out a number of topics for discussion, without prejudice to additional questions we may have after further review. I have bolded the highest priority issues in case we do not have sufficient time Monday to get through all of them.

Issues Common to Respondents

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1. **Claim of Common Interest:** Respondents claim “common interest” and other privileges with respect to communications with C&S Wholesale Grocers LLC and perhaps others – if others, please identify. We have received no response to our questions from a week ago about the contours of this claim, despite Respondents claiming that the common interest has been in effect since September 2023. Please be prepared to address them Monday. We also question how common interest doctrine can apply to a party’s own analysis of the divestiture (Kroger Request 30).
2. **Scope of Collection:** Parties should collect text messages and hard copy notes from all custodians. The proposed exclusion of text messages is especially troubling in light of the Albertsons failure to preserve text messages sent by three of its senior executives, including the CEO, and testimony establishing that executives from both companies regularly used text messages for business communications. Regarding locally saved documents, please advise how many locally saved documents were produced by each Respondent in the course of the pre-complaint investigation and what burden each Respondent faces in collecting them as part of responding to discovery.
3. **Information About Deleted Documents:** Respondents object to Instruction 10 of the Requests for Production; please explain what information you intend to provide about the deletion or other loss of potentially relevant documents.
4. **Custodians:**
 - a. Respondents’ collection of documents responsive to our requests relating to negotiation of the April 2024 divestiture agreements should include as custodians Respondents’ outside counsel involved in those negotiations.
 - b. Both Respondents have identified as custodians multiple individuals who were not included in their Initial Disclosures, as supplemented, in Part 3 or the District of Oregon proceeding, even though the District of Oregon Initial Disclosures and the Second Supplemental Part 3 Initial Disclosures were served over two weeks after Respondents received our Requests for Production. Please explain the basis for failing to include Eric Hymas, Suzanne Long, and Duane Macey on Albertsons’ Initial Disclosures, and Todd Foley, Aaron Dresdow, Aaron Mann, James (Jim) Clendenen, Chadd St. Clair, and Tammy Bottcher on Kroger’s Initial Disclosures.
 - c. Albertsons states in footnote 1 of its cover letter that it will be collecting documents from “10 additional district managers in Washington and other local custodians” in the Washington action; please identify these custodians. Please also explain why five Denver district managers appear on Albertsons’ April 19, 2024, Second Supplemental Initial Disclosures in Part 3 but are not proposed as custodians for Albertsons’ production of documents.
 - d. Please explain why Respondents’ Witness List includes four Kroger employees who are not proposed custodians: Todd Kammeyer, Joseph Kelley, Colleen Lindholz, and Brent Stewart (other than perhaps with respect to performance reviews for Kammeyer and Kelley). Please also explain

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why Stewart was not included in Kroger's Initial Disclosures, as supplemented, in Part 3 or the District of Oregon proceeding until today.

5. **Timing of Production:** Respondents' statements that they will produce all responsive documents, and particularly documents responsive to the requests for documents on which Respondents intend to rely at trial (Albertsons Request 4; Kroger Request 5), by the end of fact discovery is too late to permit Complaint Counsel to question witnesses on the documents. Production should be substantially complete by mid-May and entirely complete by May 30.
6. **Date Range of Production:** Respondents state that they are collecting documents through March 20, 2024 (Kroger) or April 2, 2024 (Albertsons). Please confirm that documents will be collected through the April 22, 2024 date of execution of the new divestiture agreement.
7. **Claims of Privilege:**
 - a. Please explain on what basis any claim of privilege can be made over documents on which Respondents intend to rely at trial (Albertsons Request 4; Kroger Request 5).
 - b. Please identify what "other applicable privileges or protections" or "other privilege recognized by applicable law" Respondents claim over documents relating to the proposed divestiture (Albertsons Requests 3 & 12; Kroger Requests 29 & 30).
8. **Privilege Logs:** Respondents object to Instruction 9 of the Requests for Production; please explain what information you intend to provide to satisfy your obligations under paragraph 28 of the Case Management and Scheduling Order entered April 12, 2024, in the District of Oregon.

Issues for Albertsons

10. **Request 9:** Please describe the scope of the documents you propose to produce. In particular, are you offering to produce documents showing each person who received a litigation hold notice, the date on which it was received, and the content each person received; any subsequent communications related to the subject of document retention (including those identified in your April 9, 2024 letter); and Albertson's document retention and Bring Your Own Device policies?
11. **Custodian Date Ranges:** Please explain how the date ranges for the new custodians were selected.
12. **General Objection 10:** Is anything being withheld on the basis of this objection?
13. **General Objection 13:** If only a single version of a document is produced, will the metadata indicate all custodians in whose files the document was found?
14. **Request 8:** Please identify which people named in Request 8 are no longer employed by Albertsons and state for each whether their performance reviews have been retained.
15. **Request 10:** We do not believe a custodial search is the appropriate way to collect Albertsons' advocacy to regulators. Please confirm you will search central files, such as those of Albertsons' general counsel or outside counsel, to collect these documents.

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Issues for Kroger

16. **Data Productions to Washington:** Please explain why data responsive to Requests 31-36 and 38 has not been produced to Complaint Counsel in light of your statement that this data has already been produced to Washington State.
17. **Employee Titles:** To assist us in evaluating the appropriateness of the custodians Kroger proposes, please provide more detail about the responsibilities of Valerie Jabbar and Kenneth Kimball, given that, according to your May 3, 2024 Supplemental Initial Disclosures in the District of Oregon proceeding, they have the same title.
18. **Request 8:** The communications around drafting of the Fact Books contain highly relevant information, and we therefore request that custodians involved in drafting each year's Fact Book be searched for relevant documents. Please advise whether you will agree to include such custodians for each year.
19. Please explain how common interest doctrine, attorney work product doctrine, and joint defense privileges are applicable to documents relating to union activity, multiemployer or coordinated bargaining, and labor relations strategy, including identifying with whom the common interest is asserted and when and on what basis litigation was anticipated with request to bargaining with each union (Kroger Requests 20-22).

Best,
Laura

From: Cardenas, Marieugenia <mcardenas@debevoise.com>

Sent: Thursday, May 2, 2024 8:50 PM

To: Weingarten, James <jweingarten@ftc.gov>; Dickinson, Charles <cdickinson@ftc.gov>; Pai, Rohan <rpai@ftc.gov>; Rothman, Harris <hrothman@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Blackburn, Emily <elblackburn@ftc.gov>; Libby, Kenneth A. <KLIBBY@ftc.gov>; Olson, Eric <eolson@ftc.gov>; Kim, Janet <jkim3@ftc.gov>; Frangie, Paul <pfrangie@ftc.gov>; Drummonds, Katherine <kdrummonds@ftc.gov>; Arens, Elizabeth <earens@ftc.gov>; Bies, Katherine <kbies@ftc.gov>; Hamburger, Jacob <jhamburger1@ftc.gov>; Hough, Lily <lthough@ftc.gov>; Smith, Joshua <jsmith3@ftc.gov>; Teng, Albert <ateng@ftc.gov>; Balbach, Jeanine <JBALBACH@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Wint, Corene <cwint@ftc.gov>; Bryson, Alexander James <abryson@ftc.gov>; Dixon, Guia <gdixon@ftc.gov>; Sarmiento, Anjelica <asarmiento@ftc.gov>; Zang, Theodore <TZANG@ftc.gov>; Grant, Trisha <tgrant1@ftc.gov>; Tyree, Leo <ltyree@ftc.gov>

Cc: Matt Wolf <Matthew.Wolf@arnoldporter.com>; Sonia Pfaffenroth <Sonia.Pfaffenroth@arnoldporter.com>; 'joshua.davis@arnoldporter.com' <joshua.davis@arnoldporter.com>; 'michael.kientzle@arnoldporter.com' <michael.kientzle@arnoldporter.com>; Jason Ewart <Jason.Ewart@arnoldporter.com>; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; 'john.holler@arnoldporter.com' <john.holler@arnoldporter.com>; 'christina.cleveland@arnoldporter.com' <christina.cleveland@arnoldporter.com>; Michael Bernstein <Michael.B.Bernstein@arnoldporter.com>; 'matthew.shultz@arnoldporter.com' <matthew.shultz@arnoldporter.com>; Mark Perry <mark.perry@weil.com>; 'luna.barrington@weil.com' <luna.barrington@weil.com>; 'bambo.obaro@weil.com' <bambo.obaro@weil.com>; 'luke.sullivan@weil.com' <luke.sullivan@weil.com>; 'Lisa.Pieters@weil.com' <Lisa.Pieters@weil.com>; 'Sarah.Sternlieb@weil.com' <Sarah.Sternlieb@weil.com>; 'Jason.Kleinwaks@weil.com' <Jason.Kleinwaks@weil.com>; 'james.fishkin@dechert.com' <james.fishkin@dechert.com>; 'mike.cowie@dechert.com' <mike.cowie@dechert.com>; 'howard.ullman@dechert.com' <howard.ullman@dechert.com>; 'elena.kamenir@dechert.com' <elena.kamenir@dechert.com>; 'ross.ufberg@dechert.com' <ross.ufberg@dechert.com>; 'yosi.weitzman@dechert.com' <yosi.weitzman@dechert.com>; Hassi, Ted <thassi@debevoise.com>; Schaper, Michael <mschaper@debevoise.com>; Selden, Shannon R. <srselden@debevoise.com>; Abraham, J. Robert <jrabraham@debevoise.com>; Born, Natascha <nborn@debevoise.com>; Strong, Ardis <astrong@debevoise.com>

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Subject: Docket No. 9428 - Albertsons Companies, Inc.'s Responses and Objections to Complaint Counsel's First Set of RFPs and Related Correspondence

Counsel,

Attached please find Respondent Albertsons Companies, Inc.'s Responses and Objections to Complaint Counsel's First Set of RFPs, and related correspondence. These documents have been marked "Confidential."

The password for both documents will follow separately.

Best,

Mari

**Debevoise
& Plimpton**

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