PUBLIC

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

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

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

I.

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

II.

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

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

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

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

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

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

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

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

III.

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

A. Adequacy of Kroger's privilege log

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

B. Applicable privileges

1. Attorney-client privilege

The attorney-client privilege protects confidential communications between attorneys and their clients, which are made for the purpose of obtaining or providing legal advice. *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981); *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). In general, where a lawyer is retained, there "is a rebuttable presumption that the lawyer is hired 'as such' to give 'legal advice,' whether the subject of the advice is criminal or civil, business, tort, domestic relations, or anything else." *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (quoting *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)).

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

2. Attorney work product

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

3. Common interest doctrine

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

4. Conclusion

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

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

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

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

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

IV.

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

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 11, 2024