

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**COMPLAINT COUNSEL’S MOTION TO COMPEL PRODUCTION
OF WITNESSES’ TEXT MESSAGES AND HANDWRITTEN NOTES**

Pursuant to 16 C.F.R. § 3.38(a), Complaint Counsel move for an order compelling Respondents The Kroger Company (“Kroger”) and Albertsons Companies, Inc. (“Albertsons”) to search for and produce text messages and handwritten notes responsive to Complaint Counsel’s Requests for Productions (“RFPs”) from each of their employees who appears on either side’s preliminary witness list (the “Preliminary Witnesses”) through April 22, 2024, when the second divestiture agreement was executed. Despite producing such materials during the investigation, both Respondents now refuse. These messages are highly probative of the issues in this case. For example, Respondents’ employees regularly use text messages to share photographs taken during visits to each other’s stores and ideas for competitive responses.

Albertsons’ refusal is particularly concerning because at least two Albertsons senior executives deleted work-related text messages for nearly a year after Albertsons was obligated to retain documents. Responses to the missing texts suggest that some questioned the assertions Kroger now makes about consumer benefits from the merger.

As for handwritten notes, during the pre-complaint investigation, Kroger produced hundreds of pages of annotated hard copy documents from meetings Kroger’s Chief Merchant

and Marketing Officer Stuart Aitken attended relating to the proposed merger. Mr. Aitken is on both sides' preliminary witness list, but Kroger is refusing to produce any more handwritten notes from him or any other witnesses. Mr. Aitkens' notes on due diligence, indicating that Albertsons is already doing "all the right things" to reduce costs and lower prices, undercut Kroger's claim that the merger is necessary to improve Albertsons' pricing. Complaint Counsel is entitled to further production of notes to evaluate Respondents' arguments about the proposed merger and divestiture.

BACKGROUND

I. Respondents' Executives Created Relevant Texts and Handwritten Notes about Their Merger and Its Effects.

During the pre-complaint investigation, Respondents produced text messages and handwritten notes from numerous custodians, including the Preliminary Witnesses, for the period January 1, 2020 through May 23, 2023, or August 25, 2023, depending on the custodian.

The investigation established that Respondents employees use text messages regularly. Both produced text messages from numerous Preliminary Witnesses, and Kroger CEO Rodney McMullen testified that { [REDACTED] }. Ex. F (McMullen Tr.) 65:24-66:17.

Respondents also produced handwritten notes during the investigation. For example, Mr. Aitken's documents included a 406-page collection of documents from the period shortly before the merger agreement was signed with handwritten notes, an excerpt of which is attached as Exhibit G. In evaluating { [REDACTED]

[REDACTED]

{ [REDACTED] } *Id.* at 6.

II. Senior Executives Deleted Relevant Texts after Preservation Obligations Attached.

At least two Albertsons senior executives, CEO Vivek Sankaran and Denver Division President Todd Broderick, deleted their text messages following the FTC’s November 7, 2022, Voluntary Access Letter instructing Albertsons to “cease all document destruction activities.”

Ex. A. These executives played key roles in evaluating the proposed merger, and responses from individuals whose texts were not deleted reveal that the deleted texts go directly to the effects of the merger, with Scott Shores writing to Mr. Broderick, { [REDACTED]

{ [REDACTED] } Ex. B at 3.

{ [REDACTED] } Ex. C, 54:18-55:10, 56:13-16. Mr.

Broderick testified on November 17, 2023, that { [REDACTED]

{ [REDACTED] }. Ex. D, 228:19-229:12, 240:5-

12, 230:5-21, 231:6-8. Broderick’s testimony suggests { [REDACTED]

{ [REDACTED] }. *Id.*, 230:5-21, 231:6-8. Despite numerous questions to Albertsons since October

2023, Complaint Counsel have not been able to determine whether other Albertsons employees, including Preliminary Witnesses, may have likewise “lost” texts after Albertsons was required to preserve documents. *See, e.g.*, Ex. E at 3 ({ [REDACTED]

{ [REDACTED] }).

III. Respondents Refuse to Collect and Produce Responsive Texts in Discovery, Even for Preliminary Witnesses.

On April 2, 2024, Complaint Counsel issued its First Set of Requests for Production of Documents to Albertsons and Kroger, seeking all documents and communications relating to the proposed merger and divestiture, competition between Respondents, and labor relations. Ex. K, Ex. L.

On April 24, 2024, Complaint Counsel served its preliminary fact witness list, including as Preliminary Witnesses { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}. Ex. M. Complaint Counsel subsequently agreed to remove { [REDACTED]

[REDACTED]}. On May 1, 2024, Respondents served their preliminary fact witness list,

including as Preliminary Witnesses [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}. Ex. N.

On May 2, 2024, Respondents provided Responses and Objections, stating they { [REDACTED]

[REDACTED]}. Ex. O at

2; Ex. P at 2. They { [REDACTED]

[REDACTED]}. Ex. O at 2-3 ({ [REDACTED]

[REDACTED]); Ex. P ({ [REDACTED]

[REDACTED]). Complaint Counsel raised these issues the following day by email (Ex. Q), and the parties met and conferred on May 6, 2024.

During the meet and confer, { [REDACTED]

[REDACTED]

[REDACTED]}. The “refresh” productions were limited to a small number of custodians shortly before the commencement of investigational hearings. *See* Exs. H (June 27, 2023 Letter to

Kroger), I (June 27, 2023 Letter to Albertsons). { [REDACTED] }

[REDACTED]

[REDACTED] } Ex. J (May 19, 2023 Kroger Letter). That is not true now that a year has passed.

{ [REDACTED] }

[REDACTED] }.

On May 7, 2024, Complaint Counsel wrote to Respondents to memorialize the discussion. Ex. R at 2-4. On the same day, Kroger counsel agreed { [REDACTED] }

[REDACTED] }. Ex. S [Schultz RE Docket No 9428] at 2. On May 8, 2024, counsel for Albertsons wrote that it would { [REDACTED] }

[REDACTED] }

Ex. E [ACI May 8 letter] at 1-2. Complaint Counsel has not received clarification of this condition. Ex. R at 1.

LEGAL STANDARD

“A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery.” 16 C.F.R. § 3.38(a). “Parties 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.” 16 C.F.R. § 3.31(c)(1). “On a motion to compel discovery, the party or third party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost,” and even if it makes such a showing, “the Administrative Law Judge may nonetheless order discovery if the requesting party shows good cause.” 16 C.F.R. § 3.31(c)(3). “The burden of showing that the

request is unreasonable is on the subpoenaed party.” *In re Polypore*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009).

ARGUMENT

I. TEXT MESSAGES AND HANDWRITTEN NOTES ARE REASONABLY EXPECTED TO YIELD RELEVANT INFORMATION

The texts and notes Respondents already produced are highly relevant to the issues in this case, including direct competition between Respondents and whether the transaction would benefit consumers through lower prices. Courts have recognized that, “[i]n the contemporary world of communications,” there is “potential and reality of finding the modern-day litigation equivalent of a ‘smoking gun’ in text messages.” *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226 (D. Minn. 2019). The production of emails does not excuse withholding text messages; both are “internal contemporaneous communications” that are “plainly relevant.” *Sage Prods., LLC v. Chemrite Copac, Inc.*, 2021 WL 5299789, at *4 (N.D. Ill. Nov. 12, 2021). The following exemplars demonstrate the relevance of these kinds of documents in this case.

Head to Head Competition

Kroger asserts that “the Complaint’s view of the relevant market lacks any basis in the real world” and seeks to minimize the importance of Albertsons as a competitor by saying it “price checks.” And is in labor market competition and “promotional pricing competition[,] with many competitors.” Kroger Answer at 2, 3, ¶ 41. By contrast, Respondents’ text messages show that Respondents view each other as primary competition. For example, in discussing

{REDACTED}, Mr. Richard wrote {REDACTED} and Troy Harding responded, {REDACTED} {REDACTED} Ex. T at 2. Likewise, Mr. Kammeyer suggested {REDACTED} {REDACTED} Ex. U at 2.

Respondents' employees visit each other's stores and often document visits in text messages, such as Mr. Kelley's [REDACTED] [REDACTED]}. Ex. V Mr. Kammeyer received text messages with [REDACTED] [REDACTED] } Ex. W. Texts like these show competition happening "in real time."

Text messages also show Respondents' executives real-time analyses of their merger. In an October 13, 2022, text conversation between Ms. Larson and the President of Albertsons' Jewel-Osco division, [REDACTED] [REDACTED] } Ex. X at ACI2R-0014083050.¹ On the same day, Mr. Humayun texted, [REDACTED] [REDACTED] } Ex. Z at 6.

Handwritten notes further demonstrate Respondents' views of each other as significant competitors. For example, Mr. Aitken questioned whether a proposed strategy for [REDACTED] [REDACTED] } Ex. AA. Albertsons CEO Sankaran's notes on a Kroger earnings call transcript give a visceral sense of Respondents' competition, with [REDACTED] [REDACTED] }. Ex. BB at 3.

Post-Merger Prices

Kroger contends it will "reinvest the savings generated by the transaction to lower Albertsons' prices, which will directly benefit consumers across the country." Kroger Answer at 1-2. But Kroger's own Chief Merchant and Marketing Officer [REDACTED]

¹ At Albertsons, [REDACTED]. See Ex. Y [ACI2R-0000433682] at 2.

[REDACTED] }.

Ex. G at 6. Albertsons' texts also undermine the credibility of Kroger's claim. In a November 29, 2022 series of text messages, apparently sent while Kroger CEO McMullen testified before Congress about investing \$500 million post-merger to lower prices (Ex. CC at 2), Mr. Shores writes to Mr. Broderick, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Ex. B.

Respondents' objections to the RFPs [REDACTED]

[REDACTED] }, but

relevance, not volume, is the test. *See* 16 C.F.R. § 3.31(c)(1). Nor is Complaint Counsel's agreement to forgo certain documents in the "refresh" production precedential, as that covered a brief period, and was agreed before Complaint Counsel learned of the ongoing deletion of highly relevant texts. Without the production of text messages and handwritten notes, Complaint Counsel will be deprived of relevant, "internal contemporaneous communications" that bear directly on the facts at issue before the Court. *Sage Prods.*, 2021 WL 5299789, at *4.

Respondents' arguments of irrelevance and cumulativeness are speculative unless they have collected and reviewed the materials in question. *Id.*

II. RESPONDENTS CANNOT DEMONSTRATE THAT THE REQUEST FOR TEXTS AND HANDWRITTEN NOTES IS UNREASONABLE OR UNDULY BURDENSOME, AND GOOD CAUSE EXISTS FOR REQUIRING THEM TO PRODUCE THESE DOCUMENTS

This Court has recognized the relevance of discovery from potential witnesses who may testify at trial suffices to overcome even a demonstrated substantial burden in producing the discovery. *In re Lab. Corp. of Am.*, 2011 WL 822920, at *3 (F.T.C. Feb. 28, 2011). "A movant's

general allegation that a subpoena is unduly burdensome is insufficient to carry its burden of showing that the requested discovery should be denied.” *Id.* Here, the discovery is sought from Respondents, not third parties, and Respondents cannot demonstrate that the request for texts and handwritten notes is unreasonable or unduly burdensome.

The materials are “reasonably accessible,” 16 C.F.R. § 3.31(c)(3), because Respondents collected and produced texts and notes for even more employees during the investigation phase. Respondents are well-resourced, their merger is valued in excess of \$26 billion, and each Respondent has multiple law firms litigating this matter. Respondents’ resistance to collecting *any new documents at all* from Preliminary Witnesses { [REDACTED] [REDACTED] }, and agreeing to collect for certain of them only { [REDACTED] } (Ex. E at 1-2), suggests that their real reason is that the texts and notes are likely to be adverse to Respondents.

Even if the Court accepts Respondents’ contentions regarding burden, it should order collection of texts and notes because Complaint Counsel have established good cause. 16 C.F.R. § 3.31(c)(3). The investigation demonstrates that Respondents’ employees often write more candidly in their texts and notes than in their emails and electronic documents, texts and notes are real time evidence of competition, and they are highly probative of evaluating the anticompetitive effects of this merger. Even if some of this content can be found in other documents, that is not a sufficient basis to deny this Motion, as an overlap in subject matter does not render Complaint Counsel’s request for texts and notes “unreasonably cumulative or duplicative.” 16 C.F.R. § 3.31(c)(2)(iii).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully request that the Court compel Respondents to collect and produce handwritten notes and text messages from Preliminary Witnesses.

Dated: May 17, 2024

Respectfully submitted,

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

Counsel Supporting the Complaint

Ex. A

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. B

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. C

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. D

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. E

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. F

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. G

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. H

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. I

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. J

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. K

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

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

REQUEST FOR DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) price investment Plans.

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

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

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

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

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

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

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

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

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

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

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

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

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

30. Price zone Documents sufficient to show and explain each and every retail Price Area of the Company, including the Company trade name (*e.g.*, Safeway) and store number for each Company store in the Price Area; and for each Price Area established, deleted, enlarged, decreased, or consolidated in any way since the Company responded to Specification 11 of the Second Request, Documents sufficient to show the change and the rationale for such changes. This request includes, but is not limited to:

(a) Documents that provide new or updated information to the information contained in “HIGHLY CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023, and

(b) Documents that provide the store numbers of the Company stores in each and every Price Area, including, for example, the stores referenced in Column H of “HIGHLY

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

I1. Unless otherwise specified, each request calls for Documents received, created, or dated from January 1, 2021, to the present.

I2. Unless modified by agreement with Complaint Counsel, these Requests require a complete search of all the files of the Company. The Company shall produce all responsive Documents, wherever located, that are in the actual or constructive possession, custody, or control of the Company and its representatives, attorneys, and other agents, including, consultants, accountants, lawyers, or any other person retained by, consulted by, or working on behalf or under the direction of the Company.

I3. These Requests shall be deemed continuing in nature and shall be supplemented in the event that additional Documents responsive to this request are created, prepared, or received between the time of the Company's initial response and the date established by the Court for trial in the above-captioned proceeding.

I4. The Company does not need to provide Documents that the Company previously provided to the Federal Trade Commission.

I5. For specifications that request Documents or data responsive to a Second Request specification, the Second Request definitions are incorporated by reference.

I6. All Documents responsive to these Document requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:

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

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

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

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

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

equivalent,

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

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

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

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

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

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

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

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

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

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

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

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

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

with the following information:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;

(b) Construing the singular form of any word to include the plural and plural form to include the singular;

(c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;

(d) Construing the masculine form to include the feminine form and vice versa; and

(e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to

other events, locations, or matters.

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

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

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

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

Dated: April 2, 2024

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

Michael Schaper
 Shannon R. Selden
 J. Robert Abraham
 Natascha Born
 Jaime Freilich-Fried
 Marieeugenia Cardenas
 Tom E. Buckley
 Heather T. Mehler
 Marie Ventimiglia
 Debevoise & Plimpton LLP

Telephone: (212) 909-6737
 Email: mschaper@debevoise.com
 Email: srselden@debevoise.com
 Email: jrabraham@debevoise.com
 Email: nborn@debevoise.com

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

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

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

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

Counsel for Albertsons Companies, Inc.

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

Counsel Supporting the Complaint

Ex. L

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

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

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

REQUESTS FOR DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with the following information:

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

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

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

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

d) Produce electronic file and image submissions as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: April 2, 2024

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

Michael Schaper
 Shannon R. Selden
 J. Robert Abraham
 Natascha Born
 Jaime Freilich-Fried
 Marieugenia Cardenas
 Tom E. Buckley
 Heather T. Mehler
 Marie Ventimiglia
 Debevoise & Plimpton LLP

Telephone: (212) 909-6737
 Email: mschaper@debevoise.com
 Email: srselden@debevoise.com
 Email: jrabraham@debevoise.com
 Email: nborn@debevoise.com
 Email: jmfried@debevoise.com
 Email: mcardena@debevoise.com

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

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

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

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

Counsel for Albertsons Companies, Inc.

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

Counsel Supporting the Complaint

Ex. M

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. N

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. O

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. P

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. Q

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. R

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. S

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. T

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. U

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. V

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. W

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. X

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. Y

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. Z

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. AA

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. BB

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. CC

WRITTEN TESTIMONY OF RODNEY MCMULLEN, CHAIR AND CEO, THE KROGER CO.
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST, COMPETITION
POLICY, AND CONSUMER RIGHTS
NOVEMBER 29, 2022

INTRODUCTION

Thank you, Chair Klobuchar, Ranking Member Lee and members of the Subcommittee on Competition Policy, Antitrust and Consumer Rights. My name is Rodney McMullen. I have served as Chair and Chief Executive Officer of Kroger since 2015. We have a saying at Kroger – ‘come for a job, discover a career.’ I am living proof of that, and I am incredibly proud to have spent my entire career at an organization that serves a fundamental need: Feeding the Human Spirit. I began my career in 1978, serving as a part-time stock clerk and bagger at a store in Lexington, Kentucky. I worked my way through college in various jobs across the store, from dairy to the deli. During my 44-year career with Kroger, I have had the opportunity to play a number of roles within the organization and help lead an incredible transformation at the Company. Today we are proud to provide fresh, accessible food to more than 60 million households across the United States.

I appreciate the opportunity to be here today alongside Vivek Sankaran of Albertsons Cos. to discuss the benefits of the proposed merger of our two companies, which will:

- Bring together two complementary organizations to establish a national footprint, allowing us to expand our customer reach and improve proximity to deliver fresh and affordable food
- Continue a track record of investments across lowering prices, enhancing the customer experience and increasing associate wages and benefits.
- Provide one-of-a-kind benefits by delivering quality, value, convenience and choice to customers nationwide, fostering innovation and securing the future of union jobs
- More effectively compete with larger non-union retailers on a national basis, which in turn will allow us to invest billions of dollars into the company to benefit our customers, associates and communities in a way that neither company can do alone
- And enhance competition in the evolving and highly competitive grocery industry.

Our business model is built around lowering prices to attract more customers, rather than making higher margins on fewer customers. Then we earn our customers’ loyalty daily by providing an

outstanding shopping experience and affordable, high-quality products they love. As America's grocer, we take seriously our responsibility to provide customers with fresh, affordable food, a commitment which is essential today considering the ways in which inflation is impacting our customers' lives. We are always aware customers have endless options when it comes to where they purchase their groceries. If we do not provide value and quality, customers will shop somewhere else.

We help our customers save in a variety of ways — by keeping everyday prices low, by offering personalized promotions and fuel rewards, and by creating a large selection of high-value and high-quality private label products we call *Our Brands*. Together with Albertsons, we will be able to do even more for our customers — including delivering a wider variety of fresh options and offering a broader portfolio of approximately 34,000 total private label products – allowing customers to stretch their grocery budgets without compromise.

As part of this merger, we made an additional commitment to invest \$500 million to lower prices and \$1.3 billion to improve the customer experience. The \$1.3 billion store investment will improve the associate and customer experience, creating a place where associates love to work and customers love to shop. We will begin these investments on day one after the merger closes.

We also committed \$1 billion to continue raising associate wages and comprehensive, industry-leading benefits, including quality and affordable healthcare, continuing education, wellbeing, and financial literacy programs. Kroger employs one of America's largest unionized workforces, and this merger secures the long-term future of union jobs by establishing a more competitive alternative to large, non-union retailers.

Kroger recognizes the important role of this Subcommittee in providing oversight of competition policy and the FTC as it prepares to review our merger with Albertsons; and we are here to answer your questions and clarify our commitments to you and your constituents. We intend for our testimony to plainly articulate the significant benefits this merger will bring to customers, associates and the communities we serve.

SIGNIFICANT SHIFTS MAKING RETAIL INCREASINGLY COMPETITIVE

Grocery is a highly fragmented industry, and the landscape in which Kroger operates has shifted dramatically during the past several decades. We are seeing increased competition with large companies expanding both their brick-and-mortar and online presences. For example, consider that since 2010, online retailers increased their share of all grocery sales by more than 14%. Often, these increases come at the expense of companies like Kroger.

Kroger currently is ranked fourth in total revenue among U.S. grocery retailers behind Walmart, Amazon and Costco. A combined Kroger and Albertsons will remain at number four as we will continue to compete with these companies to sell groceries. Those same three competitors have nearly three times the share of grocery sales of Kroger and Albertsons combined.

We do not expect this merger to have any impact on the strong independent grocery stores that are critical to the industry and vital to communities across the country. According to National Grocers Associations research in 2021, independent grocers accounted for 33% of overall U.S. grocery sales, up from 25% nearly a decade ago. Sales by independent grocers rose almost 94% from 2012 to 2020. These stores will remain formidable competitors.

While we firmly believe Kroger offers the best products at the best prices, we acknowledge both Walmart and Amazon have clear advantages. Our combination with Albertsons will allow us to more effectively compete against non-union retailers, from Amazon and Walmart to Costco and Aldi. The customer reach as well as digital and technology capabilities we expect to gain through this merger will enable us to provide an enhanced seamless shopping experience, both in store and online. We will have an expanded network of stores and distribution centers, and a broader supplier base allowing us to deliver fresher food faster to more customers. Albertsons' portfolio will expand our core supermarket, fuel and pharmacy businesses, bolstering our ability to drive additional traffic into stores and digital channels, which in turn provides even more value to our customers.

KROGER TRANSFORMATION

In my more than four decades at Kroger, I learned that staying ahead of the curve and anticipating customers' needs is critical to surviving in this incredibly competitive industry. Kroger

certainly has evolved through the years. We are constantly innovating and adapting to anticipate and deliver on customers' needs, using technology to enhance the customer experience, responding to an evolving environmental and social issues and, crucially, to new competition.

As an example, several years ago, our leadership team recognized that we had to transform our business to compete and respond to new ways the customers want to shop. We began our journey to create a seamless shopping platform that combines the best experiences of a physical store environment with convenient e-commerce solutions. Through our *Restock Kroger* transformation, we improved processes and freed resources to invest in associates, technology and lower prices. In just three years, we took more than \$3 billion in costs out of the business.

Kroger's innovation at work is reflected in our response to changes in consumer spending at restaurants and demand for organic food. On average, almost half of all consumers' food budgets is spent at restaurants. With customers looking to restaurants for convenience, Kroger responded by adding more ready-to-eat/ready-to-heat options, including through our merger with Home Chef in 2018. Whole Foods became an early natural and organic food innovators, kicking off a national trend in 2016. We responded by launching our Simple Truth brand. This product line offers more affordable natural and organic products, and we have since grown Simple Truth to become a billion-dollar brand.

We invested in all these innovations to better compete – establishing a seamless ecosystem, offering restaurant-style food choices, and creating an affordable natural and organic product line. They each became critical to our business as the COVID-19 pandemic took hold. In the depths of the crisis, we recognized food – and particularly food at home – was more than a necessity; it was a way to spend quality time with family, a way to lead a healthier life, and a reminder that we are more resilient than we realize. The pandemic nearly doubled the number of customers looking for a seamless shopping experience – one that makes it easy to choose whether to shop in store, for pickup or delivery, or even ship-to-home, based on their needs in the moment. We knew we had to deliver for the customers who count on us, and that is exactly what we did and continue to do. We are extremely proud of these efforts, and in 2020, we more than doubled our digital sales and the number of digital households within our network.

We continue to prioritize using our data and technology to enhance the customer experience, our supply chain, our business operations and productivity, and our associates experience — and doing it all in an accessible and seamless way. Our digital investments are focused on growing our Kroger Delivery network. This includes Kroger Delivery Now with Instacart, which established Kroger as the first grocery retailer to directly provide a convenience delivery solution, with deliveries made in as little as 30-minutes. It also includes our collaboration with technology firm Ocado Group to build out e-commerce customer fulfillment centers.

Looking ahead, we will continue to make decisions on a five- to ten-year horizon, focusing on what's right for our customers and our associates — just as we have done for many decades. As we see how the landscape is evolving and what customers want, we know that we need to further develop competitive technology, find creative ways to combat inflation and keep food affordable for America, and continue to deliver quality, value, convenience and choice. Simply stated, to provide customers with fresh and affordable food for years to come, we must continue to invest in lowering prices, enhancing the customer experience and supporting our associates. With Albertsons, we will accelerate that journey.

AS A PREMIER MULTI-CHANNEL GROCERY RETAILER WE WILL BE MORE COMPETITIVE AND WILL LOWER PRICES FOR OUR CUSTOMERS

Our merger is a win for customers, a win for associates and a win for American competition: It will benefit associates and customers, preserve good union jobs and enhance the competitive landscape. We know that groceries are more than just essential to our survival. Food provides us with the nutrients and energy we need to be healthy, to move, to play, to work, to think and to learn. The right ingredients to make an important family recipe transforms a simple meal into a cherished memory. Through this merger, we will invest in lower prices and give customers more choices. With Albertsons, we will be able to compete more effectively with retailers who — today — are the primary grocery provider for 61% of U.S. consumers: Walmart, Target, Ahold, Whole Foods and Aldi.

Customers are looking for unique, high-quality products, and this merger will enable us to offer a broader selection of fresh products and an expanded *Our Brands* portfolio. This means we are both lowering costs for our customers and giving them more options when they shop with us.

We bring to life new items that meet customers' needs today and exceed their expectations with innovative new flavors, products and healthy alternatives. Kroger's *Our Brand* portfolio has been a key growth driver as customers discover Private Selection, Simple Truth, Kroger, Home Chef and Murray's Cheese alongside our expansive banner brands that offer innovative products at a great value. Albertsons has a portfolio of 14,000 owned brands, including O Organics, Open Nature, Lucerne and Signature products. The merger will create a broader portfolio of approximately 34,000 total private label products across premium, natural and organic, and opening price point brands that will allow customers to save without sacrificing quality. Currently, Kroger and Albertsons have a manufacturing footprint of 52 plants, expanding our capacity and providing us with even more ability to assure the quality and supply of *Our Brands* products for years to come.

We will be able to give customers even more of what they want. We aim to provide a deep breadth of assortment as well as a compelling presence on the shelf. In 2021 alone, Kroger launched more than 660 new products. Together, we'll be able to accelerate these new product offerings and give customers more of what they want in one place.

We know this is a critical time in the grocery industry, as inflation is forcing many customers to make difficult choices. Customers look to us to continue delivering high-quality products while keeping food affordable and accessible. This is of crucial importance to us, and we have a long track-record of investing to lower prices. In fact, it is our fundamental go-to-market strategy. You can see the evidence of our investment to lower prices in Kroger's total gross margin, which has declined from 26.43% in Fiscal Year 2006 to 23.27% in Fiscal Year 2021 – a more than 300 basis points decline in the last 15 years. Because of our consistency in executing this strategy, since 2003, customers have seen \$5 billion in lower pricing when they shop with us. As part of this merger, we have committed to invest \$500 million to lower prices even more. Our history of mergers shows we follow through on our commitments. Following our merger with Harris Teeter in 2014, we lowered prices by \$130 million per year. After our merger with Roundy's in 2017, we lowered prices by \$110 million per year.

To provide one recent example, the average cost of turkey rose nearly 17% this year. We decided to absorb that cost and did not pass it on to customers. We invested approximately \$10 million in turkey prices this year to ensure our customers had their favorite protein at the center of their plate

with no price increase. We were proud to feature promotions that meant our customers were able to feed ten people at Thanksgiving dinner for as little as \$5 per person.

The merger creates a broader network of stores and distribution centers, enabling a more efficient, resilient supply chain and resulting in fresher food delivered to our customers faster. By combining our supply chains, we will be able to remove valuable days from the producer or farmer to our customers' tables. This optimized supply chain will ensure products remain fresher longer, both in store and in our customers' homes. It will help us to reduce costs for customers and to reduce waste.

OUR ASSOCIATES ENABLE OUR SUCCESS, AND WE ARE COMMITTED TO INVESTING IN THEIRS, WHILE SECURING UNION JOBS

Being successful starts with our associates. As someone who has worked at all levels of the company, I am personally dedicated to developing our talented team. We have a long history of investing in and supporting our associates in many aspects of their lives from pay and benefits, to training, education assistance, well-being, advancement and work simplification. We are pleased to commit \$1 billion to continue raising associate wages and comprehensive industry-leading benefits as a result of the merger. We expect that by bringing together Kroger and Albertsons, we will create new and exciting career opportunities for associates of both companies.

This is especially important to me as I reflect on my own story. Although my parents did not have the means to pay for my education beyond high school, working at Kroger afforded me the opportunity to earn my degree. I hope that explains why I feel so strongly about the support we provide to our associates and communities. So far in 2022, 20% of our new hires were 18 years old or younger, and for more than 60% of that group, Kroger is their first job. I am incredibly proud that we are able to introduce so many young people to a strong career in the grocery industry.

As the cost of living in the United States has rapidly increased, Kroger has more than kept pace with wages and benefits. Since 2018, Kroger invested an incremental \$1.2 billion in wages and comprehensive benefits. Our commitments to our associates' well-being goes further. At Kroger, we:

- Invest approximately \$1.8 billion annually in quality, affordable healthcare and contributed more than \$2 billion to associate pensions from 2018 to 2021

- Offer up to \$21,000 to both part-time and full-time associates for continued education
- Provide a scholarship fund for children of our associates
- Offer on-demand mental health assistance and free counseling to support emotional wellness
- Gave \$5.5 million to support associates through unexpected hardships and disaster relief with our Helping Hands Fund in 2021
- And invested more than \$140 million in training and development in 2021.

With approximately 420,000 associates, the Kroger team looks like America. In fact, nearly 40% of our workforce is diverse by race or ethnicity and more than 50% of our total workforce are women. Our goal remains for our company to reflect our country, communities and local neighborhoods. In 2021, 18% of the United States population was Hispanic or Latino and represented nearly 14% of our total associates. The Black or African American U.S. population in 2021 was 11.9% and represented 15% of our total associates. And Asian or Asian-Americans represented 5.1% of the country's population and 3.7% of Kroger's total associates. And we are committed to ensuring everyone feels comfortable bringing their whole self to work. We have launched strategic relationships with educational institutions and community organizations to provide regular diversity, equity and inclusion training across the company

Importantly, as I have touched on earlier, this merger secures the long-term future of union jobs. Since 2012, Kroger associate memberships with the United Food and Commercial Workers International Union ("UFCW") has gone from 208,602 members to 327,618 members, an increase of 57%. Combined, Kroger and Albertsons currently employ more than 710,000 associates. Our three largest competitors by revenue are non-union. Our ability to secure union jobs is enhanced by this merger.

I understand The Committee has highlighted the importance of job security, and I want to be very clear on this topic. We will not close any stores, distribution centers or manufacturing facilities as a result of this merger, including stores that may need to be divested to obtain regulatory approval.

BUILDING ON OUR CULTURE OF CONTINUOUS INNOVATION

As I have said before, it is through investments in innovation and technology that we will be able to continue growing our business. By bringing together Kroger and Albertsons, we will be able to use an expanded set of first-party data and stronger customer insights to offer our customers best-in-class personalization. More relevant recommendations and promotions save customers time and money. This means we will be able to help customers save on the products they love whenever and wherever they want to shop.

As the industry continues to evolve and new competition arise, Kroger evolves as well. Our delivery network powered by Instacart, Ocado and others enables Kroger to reach more people with affordable, fresh food. It empowers the company to achieve a reliable experience in current and new geographies. Kroger Delivery and our fulfillment center networks promise an unparalleled shopping and delivery experience, making groceries just one click away at Kroger.com or through the Kroger app. From personalized digital offers to our in-house delivery service, the Kroger seamless ecosystem saves time and money. Kroger Delivery orders are brought to customers in our branded refrigerated trucks and delivered to their doorstep by our trained and uniformed associates, all with zero compromise on quality, selection, convenience and value. We know this is what our customers want.

Underscoring all this work is Kroger's commitment to building a more responsible and inclusive global systems, including data privacy and cybersecurity as well as adopting more responsible marketing practices. We know we must earn our customers' trust. We use data to deliver more value by providing customers with better recommendations and personalized promotions to save on the products they love while ensuring their personal information is secure. We take great pride in safeguarding the information entrusted to us. We have robust cybersecurity practices and policies to prevent the loss or misuse of any data we collect. As part of our integration planning process, we will develop a thoughtful roadmap to bring together Kroger's and Albertsons' cybersecurity and information technology programs to ensure the combined company continues to maintain a high standard of data protection. We will also continue to evaluate and enhance cybersecurity training and policies to strengthen data protection in the future.

COMBINED COMMITMENT TO SUSTAINABILITY AND ENDING HUNGER

As bipartisan federal policies are crafted and put into law to increase access to nutritious foods and eliminate food deserts, Kroger plays an important role in helping make this a reality through our Zero Hunger| Zero Waste social and environmental impact plan.

Throughout our history, Kroger has focused on connecting people with the food and nourishment they need to thrive. We know meals matter. Research shows when families share meals, their children achieve more in all aspects of their lives. And yet, hunger remains a persistent challenge in our communities. In fact, looking at the state of hunger in America, we see a startling absurdity: One in eight people go to bed hungry every night and yet 40% of the food produced in the United States is thrown away every year. In 2017, we made a commitment to change this.

Put simply, our goal is to create a more equitable and sustainable food system ensuring no one in the areas we operate wonders where their next meal will come from. This merger is based in growing our footprint with well-run stores and seamless online options, which will provide fresher food faster to our customers anytime, anywhere.

Our Zero Hunger| Zero Waste social impact plan informs our decision-making to support healthier, more sustainable lifestyles for the customers and the communities we serve. Since we made this commitment in 2017, Kroger directed a total of \$1.65 billion in food and funds to help end hunger, including donating 2.3 billion meals. To put those figures in perspective: We have donated 12 meals every second of every day for five years – right here in America’s communities. We are proud of these achievements and are committed to building on these successes to provide even more support to those who need it most.

The addition of Albertsons’ sustainability program and resources will complement the important work we are doing and will accelerate our progress. I am most passionate about the work we are doing to end hunger in the communities we serve and eliminate waste across the company.

WORKING WITH OUR COMBINED SUPPLIERS – AMERICA’S FOOD PRODUCERS

To win and keep our customers, we need to work with our suppliers. With a broader network and even more customers to serve, we believe the merger will benefit our suppliers as it will allow for a more efficient distribution chain, provide opportunities to grow sales together and reduce waste. With Albertsons, we will optimize our supply chain to deliver fresher food faster, move products from the farm to our stores more efficiently and ensure products stay fresher longer, both in store and in our customers’ homes. With our expanded delivery network, we can bring more products directly to our customers’ doorsteps, which in turn, will expand our suppliers’ reach. For example, we can reduce transportation time and cost through our expanded distribution center network by stocking a Kroger store with products from an Albertsons distribution center located closer to that Kroger store, or vice versa. We can also better utilize local distribution centers versus regional centers, allowing us to facilitate more deliveries per week and keep more items in stock.

Kroger’s commitment to Fresh products is a perfect example. Fresh starts with our farmers. Kroger’s End2End Fresh program demonstrates how we are working with farmers to improve the customer experience and build a deeper, long-term relationship with suppliers. By thinking creatively about how we move products from the farm to our customers’ tables, we are providing a fresher experience, the products are lasting longer and our customers are benefitting. Where we have implemented the End2End Fresh program, we are seeing higher Fresh sales and higher overall identical store sales.

Kroger is deeply committed to supporting and growing diverse suppliers. We are a founding member of the Billion Dollar Roundtable, an organization focused on recognizing corporations that spend at least \$1 billion with minority and women-owned businesses. Today, Kroger spends \$4 billion with diverse suppliers and our commitment is to grow that number to \$10 billion by 2030.

CONCLUSION

As we think about how to best position ourselves to provide fresh, affordable food for America and secure union jobs into the future, we believe in the proposed merger with Albertsons. The merger

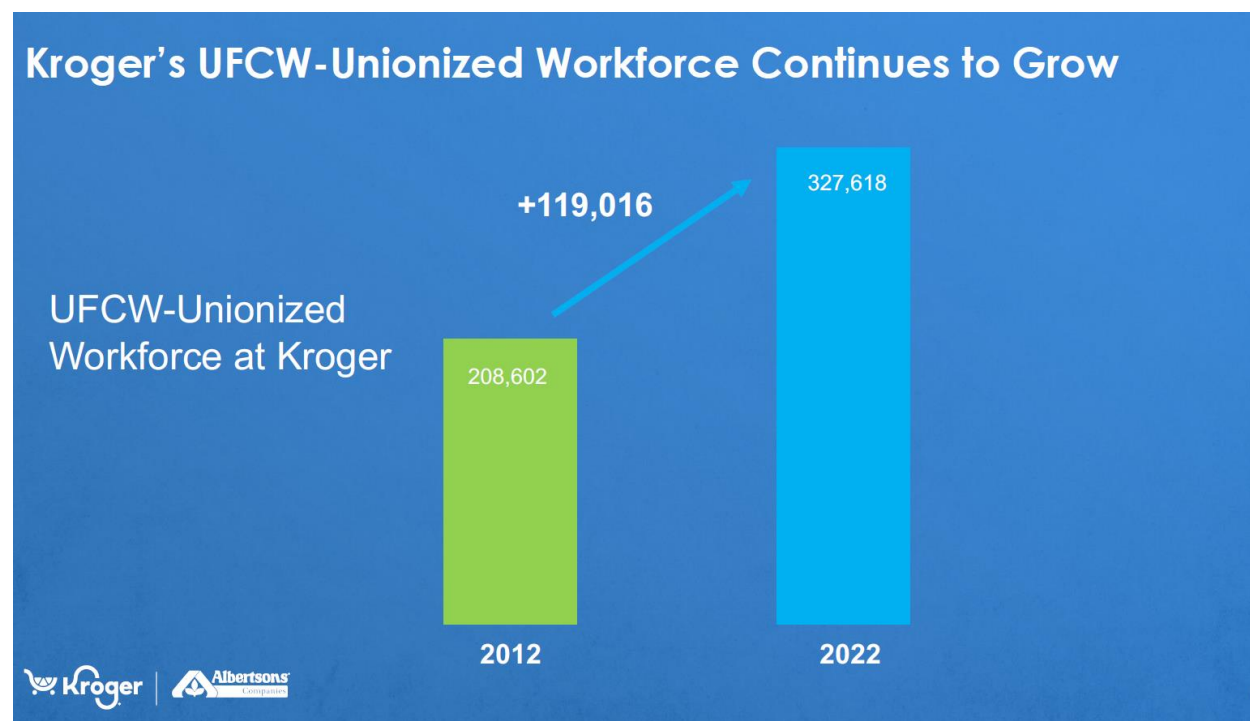
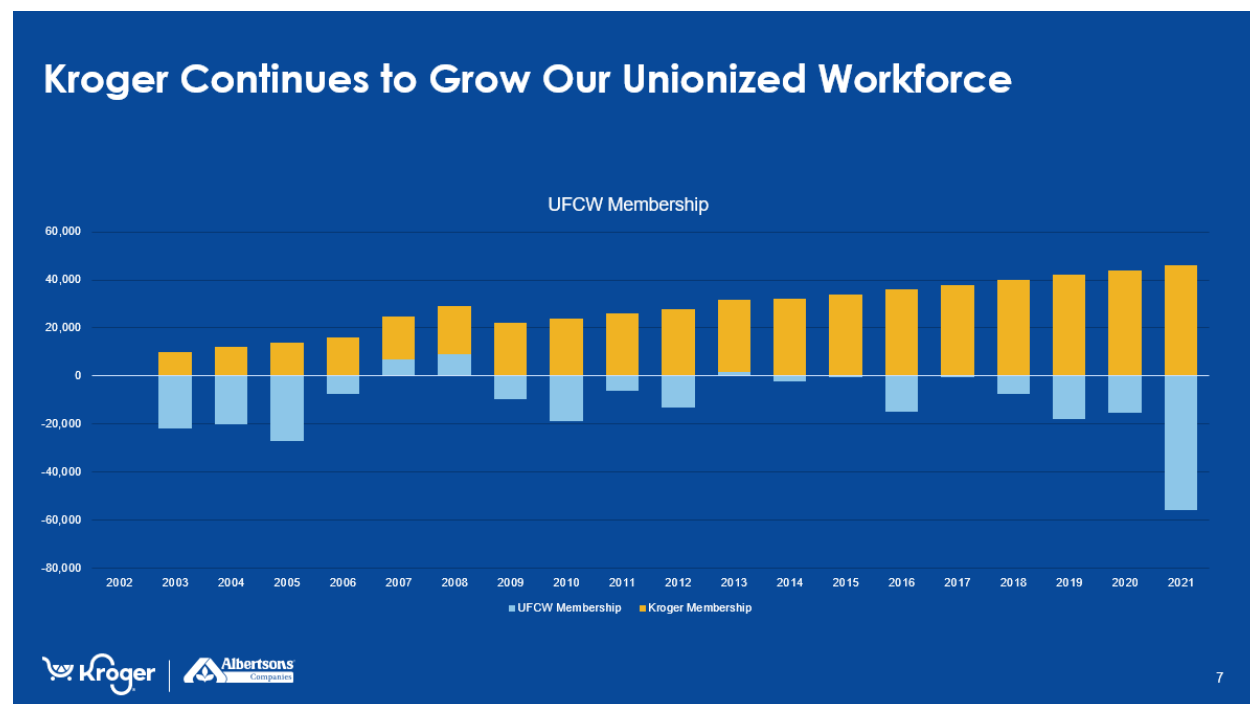
allows us to more effectively operate in the constantly evolving and fiercely competitive grocery landscape. We would not be proposing this merger if we did not truly believe all our stakeholders would benefit. From the outset, we have been candid about our intention to work with the Federal Trade Commission and state Attorneys General to develop a thoughtful divestiture plan - either through divesting stores to strong buyers or creating a standalone independent company.

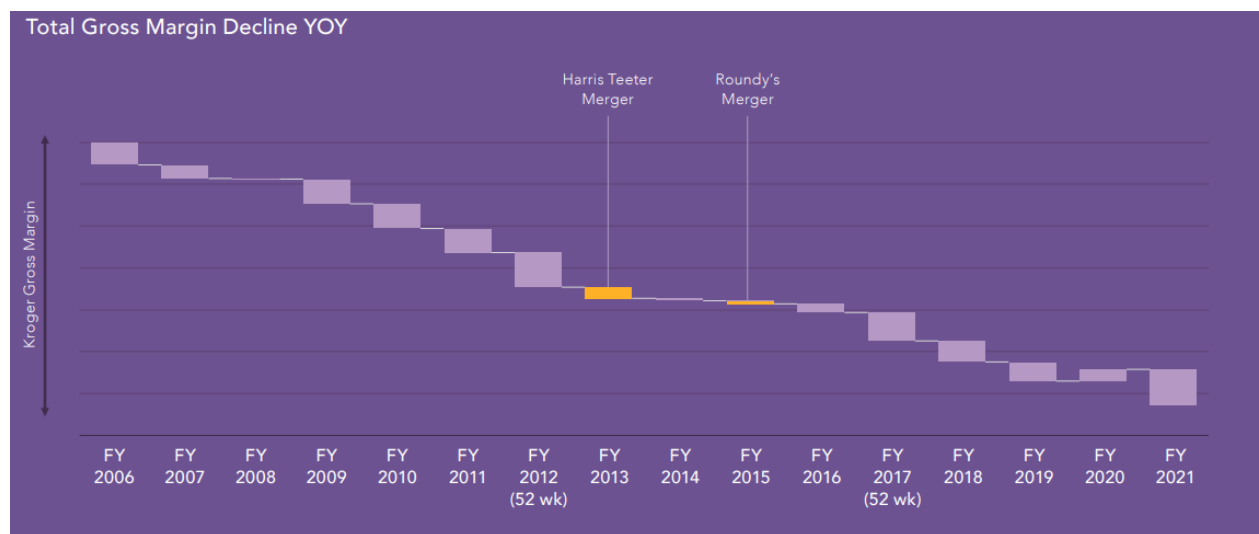
Albertsons chose Kroger because of the benefits only we can provide. Benefits that are backed by our track record of lowering prices for customers, investing in our associates, securing union jobs and making a meaningful difference in our communities.

At Kroger, delivering superior value to our customers has always been the top priority. It is in our nature to continually innovate and find new ways to bring customers more of what they want. We are confident this merger is the best way to continue fulfilling our commitments to our customers, our associate and our communities for years to come.

Thank you for the opportunity to speak today. I welcome any questions you may have.

APPENDIX





2025 Zero Hunger Zero Waste Commitments	Progress (2017 – 2021)
Meals: Direct 3B meals to our communities	2.3B meals
Surplus food: Optimize surplus food recovered through Zero Hunger Waste Food Rescue program	500M pounds
Donations: 100% of stores with regular surplus food pickups	>93%
Nutrition: Increase donations of surplus fresh Produce, Dairy & Deli items to be 45% of total food rescue to improve health	42%
Direct charitable giving to hunger relief: Strategically align giving to nonprofit partners feeding people	\$1B (Total giving: \$1.65B)
Operational waste: Achieve zero-waste of 90%+ waste diversion from landfill company-wide	79%
Food waste reduction: Reduce total food waste generated in retail supermarkets by 50%	19.7%
Food waste diversion: Achieve 95%+ food waste diversion from landfill	49%
Food waste recycling: 95%+ of retail stores have active food waste recycling programs	92% (2,539 stores)

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

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

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

Complaint Counsel issued RFPs to Respondents on April 2, 2024. Exs. A, B.

Respondents served Responses and Objections to the RFPs on May 2, 2024. Exs. C, D. Respondent Albertsons also sent a cover letter for its Responses and Objections that outlined the scope of search it was prepared to make. Ex. E.

On May 3, 2024, Complaint Counsel sent Respondents' counsel a list of questions and comments about the Responses and Objections, including that Complaint Counsel requested the search of text messages and hard copy notes for all custodians. Ex. F [Hall RE Docket].

On May 6, 2024, Complaint Counsel and Respondents' Counsel held a meet and confer at 10 a.m. via videoconference, at which Respondents' Counsel { [REDACTED]

[REDACTED]
[REDACTED] }

On May 7, 2024, Complaint Counsel wrote to Respondents to memorialize the discussion, including with respect to scope of collection. Ex. G [RE May 6 M&C] at 3.

Respondent Albertsons' Counsel responded by letter on May 8, 2024, { [REDACTED]
[REDACTED] }. Ex. H.

Dated: May 17, 2024

Respectfully submitted,

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

Counsel Supporting the Complaint

Ex. A

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

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

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

REQUEST FOR DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) price investment Plans.

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

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

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

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

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

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

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

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

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

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

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

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

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

30. Price zone Documents sufficient to show and explain each and every retail Price Area of the Company, including the Company trade name (*e.g.*, Safeway) and store number for each Company store in the Price Area; and for each Price Area established, deleted, enlarged, decreased, or consolidated in any way since the Company responded to Specification 11 of the Second Request, Documents sufficient to show the change and the rationale for such changes. This request includes, but is not limited to:

(a) Documents that provide new or updated information to the information contained in “HIGHLY CONFIDENTIAL - ACI Primary Food Competitors and Walmarts by Price Area and CPI Target Ranges by Division.xlsx” that the Company provided to the Commission on December 4, 2023, and

(b) Documents that provide the store numbers of the Company stores in each and every Price Area, including, for example, the stores referenced in Column H of “HIGHLY

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

equivalent,

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

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

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

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

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

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

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

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

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

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

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

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

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

with the following information:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

other events, locations, or matters.

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

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

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

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

Dated: April 2, 2024

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

Michael Schaper
Shannon R. Selden
J. Robert Abraham
Natascha Born
Jaime Freilich-Fried
Marieugenia Cardenas
Tom E. Buckley
Heather T. Mehler
Marie Ventimiglia
Debevoise & Plimpton LLP

Telephone: (212) 909-6737
Email: mschaper@debevoise.com
Email: srselden@debevoise.com
Email: jrabraham@debevoise.com
Email: nborn@debevoise.com

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

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

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

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

Counsel for Albertsons Companies, Inc.

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

Counsel Supporting the Complaint

Ex. B

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

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

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

REQUESTS FOR DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with the following information:

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

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

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

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

d) Produce electronic file and image submissions as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: April 2, 2024

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

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

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

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

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

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

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

Counsel for The Kroger Company

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

Michael Schaper
 Shannon R. Selden
 J. Robert Abraham
 Natascha Born
 Jaime Freilich-Fried
 Marieugenia Cardenas
 Tom E. Buckley
 Heather T. Mehler
 Marie Ventimiglia
 Debevoise & Plimpton LLP

Telephone: (212) 909-6737
 Email: mschaper@debevoise.com
 Email: srselden@debevoise.com
 Email: jrabraham@debevoise.com
 Email: nborn@debevoise.com
 Email: jmfried@debevoise.com
 Email: mcardena@debevoise.com

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

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

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

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

Counsel for Albertsons Companies, Inc.

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

Counsel Supporting the Complaint

Ex. C

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. D

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. E

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. F

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. G

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. H

CONFIDENTIAL - REDACTED IN ENTIRETY

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

[PROPOSED] ORDER

Upon consideration of Complaint Counsel's Motion to Compel Production of Potential Witnesses' Text Messages and Handwritten Notes and any opposition to that motion:

IT IS HEREBY ORDERED that Complaint Counsel's Motion is GRANTED.

IT IS FURTHER ORDERED that Respondent The Kroger Company shall collect text messages and handwritten notes from Mary Ellen Adcock, Stuart Aitken, Yael Cosset, Andy Groff, Todd Kammeyer, Joseph Kelley, Colleen Lindholz, Mafaz Maharoof, Tim Massa, Rodney McMullen, Jon McPherson, Megan Shaffer, and Brent Stewart for the period from August 1, 2022, or the date of last collection if collected in response to the Second Request, through April 22, 2024, and shall produce those non-privileged documents that are responsive to Complaint Counsel's Requests for Production of Documents.

IT IS FURTHER ORDERED that Respondent Albertsons Companies, Inc. shall collect text messages and handwritten notes from Todd Broderick, Ryan Cloward, Kevin Curry, Anuj Dhanda, Daniel Dosenbach, Usman Humayun, Carl Huntington, Lisa Kinney, Michelle Larson, Joseph Lask, Susan Morris, Rahul Pinto, Scott Shores, Vivek Sankaran, Tony Silva, Brad Street,

and Teresa Whitney for the period from August 1, 2022, or the date of last collection if collected in response to the Second Request, through April 22, 2024, and shall produce those non-privileged documents that are responsive to Complaint Counsel's Requests for Production of Documents.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

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

John Holler
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019
Telephone: (212) 836-7739

Email: john.holler@arnoldporter.com

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

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

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

Counsel for The Kroger Company

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

Michael Schaper
Shannon R. Selden
J. Robert Abraham
Natascha Born
Jaime Freilich-Fried
Marieugenia Cardenas
Tom E. Buckley
Heather T. Mehler
Marie Ventimiglia
Debevoise & Plimpton LLP

66 Hudson Boulevard
New York, NY 10001
Telephone: (212) 909-6737
Email: mschaper@debevoise.com
Email: srselden@debevoise.com
Email: jrabraham@debevoise.com
Email: nborn@debevoise.com
Email: jmfried@debevoise.com
Email: mcardena@debevoise.com
Email: tebuckley@debevoise.com
Email: htmehler@debevoise.com
Email: msventim@debevoise.com

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

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

Counsel for Albertsons Companies, Inc.

s/ Laura R. Hall
Laura R. Hall
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3282
Email: lhall1@ftc.gov

Counsel Supporting the Complaint