

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

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

**ORDER ON COMPLAINT COUNSEL’S MOTION TO COMPEL:
(1) PRODUCTION OF DOCUMENTS FROM RESPONDENTS AND
(2) COMPLIANCE WITH SUBPOENA BY NON-PARTIES
C&S GROCERS, LLC AND RICHARD COHEN**

I.

On May 6, 2024, Federal Trade Commission (“FTC”) Complaint Counsel filed a motion to compel pursuant to 16 C.F.R. § 3.38(a) (“Motion”). The Motion requests an order: (1) compelling Respondents Albertsons Companies, Inc. (“Albertsons”) and The Kroger Company (“Kroger”) to produce documents relating to the negotiation of an amended divestiture agreement between Respondents and C&S Wholesale Grocers LLC (“C&S”), as requested by Complaint Counsel’s First Request for Production of Documents issued to each Respondent; and (2) compelling C&S and its chairman Richard Cohen (collectively, the “Non-parties”) to comply with subpoenas issued by Complaint Counsel that demanded production of similar negotiation-related documents. The Respondents and the Non-parties filed oppositions to the Motion.

For the reasons set forth below, Complaint Counsel’s Motion is (1) DENIED WITHOUT PREJUDICE as to Respondents; and (2) DENIED as to the Non-parties.

II.

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

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Complaint Counsel describes the documents at issue as (1) communications between Respondents and C&S, whether through businesspeople or counsel, in which the composition of the divestiture asset package was negotiated; (2) drafts of the Amended Divestiture Agreement exchanged between the negotiating parties; and (3) each of Respondents' and C&S's internal analyses of the strengths and weaknesses of potential divestiture packages with respect to post-transaction operation of their respective businesses (collectively, "Negotiation Documents"). In their responses to Complaint Counsel's requests for production, Respondents objected to producing some of the Negotiation Documents, on the basis of various privileges, including the attorney-client privilege, the attorney work product doctrine, or the common-interest and joint-defense privileges. The Non-parties lodged similar objections in their responses to Complaint Counsel's subpoenas seeking similar documents.

Complaint Counsel argues that Respondents and the Non-parties cannot properly withhold any of the requested Negotiation Documents and that none of the asserted privileges apply. Complaint Counsel acknowledges that Kroger proposes to produce documents, together with a privilege log, but contends that such production is "likely weeks away" and therefore Complaint Counsel must obtain a ruling on the asserted privileges now, in order to obtain and use the disputed documents before the close of fact discovery on June 11, 2024.

Respondents assert that they are in the process of reviewing responsive documents and will produce all non-privileged documents by May 17, 2024, and will also produce a privilege log listing any withheld materials. While Respondents maintain that their asserted privileges are valid, they argue that a ruling on the issue is premature, and that Complaint Counsel's motion should be denied pending production of non-privileged documents and Respondents' privilege log. The Non-parties state that they join in the relief sought by Respondents.

III.

A. Motion to Compel Production of Documents Pursuant to Subpoena to Non-parties

Complaint Counsel's subpoena for documents from the Non-parties was issued under Rule 3.34. Complaint Counsel's motion to compel production of documents subpoenaed from the Non-parties pursuant to Rule 3.38(a) is procedurally improper and must be denied on that basis. Rule 3.38(a) governs a party's alleged failure to comply with party discovery, such as requests for production of documents or interrogatories. 16 C.F.R. § 3.38(a) ("A party may apply by motion to the Administrative Law Judge ["ALJ"] for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37."). Rule 3.38(a) may not be used to compel compliance with a subpoena issued to a non-party under § 3.34. *In re Traffic Jam Events, LLC*, No. 9395, 2020 WL 6938319, *1-2 (F.T.C. Nov. 20, 2020). Rather, pursuant to Rule 3.38(c) the proper procedure for addressing alleged non-compliance with a subpoena issued to a non-party is a motion to the ALJ to "certify to the Commission a request that court enforcement of the subpoena or order be sought." 16 C.F.R. § 3.38(c).

As explained in *Traffic Jam Events*, *supra*:

The requirement in Rule 3.38(c) that a party seek court enforcement of a nonparty subpoena in the event of noncompliance, through the process of certification from the ALJ and authorization from the Commission, derives from the FTC's authorizing statute. As set forth in Section 9 of the FTC Act:

[I]n case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena ... issue an order requiring such person, partnership, or corporation to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with this Act or any order of the commission made in pursuance thereof.

15 U.S.C. § 49.

Traffic Jam Events, 2020 WL 6938319, at *2. See *In re Market Dev. Corp.*, No. 9067, 1980 FTC LEXIS 162, at *245-46 (Jan. 15, 1980) (stating that “the Commission’s organic statute prescribes that the enforcement of a subpoena must be undertaken in Federal District Court”); *In re Cowles Communications, Inc.*, No. 8831, 1972 FTC LEXIS 251, at *4 (Mar. 2, 1972) (noting that “the Commission cannot itself enforce [a] subpoena[]”). See also *Traffic Jam Events*, 2020 WL 6938319, at *3 n.3 (citing ALJ cases denying motions under Rule 3.38(a) to compel nonparty compliance with a subpoena as procedurally improper).

B. Motion to Compel Production of Documents from Respondents

Rule 3.31(c)(1) states that, as a general rule, “[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” Respondents do not dispute Complaint Counsel’s assertions that the Negotiation Documents are relevant to the issues presented in this case. However, the rules limit the general scope of permissible discovery, *inter alia*, when appropriate to protect privileged information. 16 C.F.R. § 3.31(c)(4) (“Discovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.”).

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Rule 3.38A(a) provides the proper procedure for resisting disclosure of privileged material in discovery, stating, in pertinent part:

Any person withholding material responsive to a subpoena issued pursuant to § 3.34 or . . . a request for production or access pursuant to § 3.37 . . . shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in § 3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

16 C.F.R. § 3.38A(a).¹

Complaint Counsel's contention that discovery must be compelled because none of the Negotiation Documents qualify for privilege protection is premature. Respondents' arguments as to the validity of various potentially applicable privileges cannot be evaluated in a vacuum, without knowledge of the substance of any individual documents. A privilege log is designed to avoid this result. Respondents represent in their opposition to the motion that they will produce all non-privileged documents by May 17, 2024, and that they will also produce a privilege log listing any withheld materials. While Complaint Counsel's motion as to Respondents must be denied at this time as premature, Respondents will be held to their representations.

IV.

For the reasons set forth above, Complaint Counsel's Motion to Compel production of documents from the Non-parties under Rule 3.38(a) is DENIED. Complaint Counsel's Motion to Compel production of Negotiation Documents from Respondents is DENIED WITHOUT PREJUDICE. Respondents shall produce responsive non-privileged Negotiation Documents, together with a privilege log in compliance with Instruction I9 of Complaint Counsel's First Request for Production of Documents to Kroger and to Albertsons and Rule 3.38A(a), no later than May 17, 2024.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 16, 2024

¹ Complaint Counsel's First Request for Production of Documents directed submittal of a privilege log, as contemplated by Rule 3.38A(a). Motion Exs. D, E, Instruction I9 ("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 . . .").