

**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 OPPOSITION TO RESPONDENTS' MOTION
TO MODIFY IN PART THIS COURT'S MAY 16 ORDER**

This Court's May 16, 2024, Order recognized that Complaint Counsel sought relief on May 6, 2024, based on its fear that Respondents' privilege log was "weeks away." Order at 2. Had Complaint Counsel been informed of Respondents' plans to produce a privilege log on May 28, 2024, it would have included this fact in its motion to compel, as indeed the privilege log was more than three weeks away. Significantly, Respondents did not inform this Court of their intentions with respect to the privilege log in opposing the Motion to Compel, despite the timing of the privilege log having been put at issue by Complaint Counsel. Respondents seek to turn Complaint Counsel's concerns on their head, arguing that they should be relieved of the Court's order of an earlier delivery because Complaint Counsel's fears were well-founded. Respondents' Mot. to Modify at 3.

Respondents entered into a Common Interest Agreement with the divestiture buyer in August 2023 (Opp. to Mot. to Compel at 8), and directed it to claim common interest with respect to the Negotiation Materials in response to Complaint Counsel's March 21 and 22, 2024, subpoenas. *See* May 6, 2024, Mot. to Compel Meet and Confer Statement at 1-2. They cannot

credibly be surprised that they are expected to particularize these claims now. That they would have waited until even later in this brief fact discovery period to produce any Negotiation Documents, had they not been ordered by another court to produce them sooner, Mot. to Modify at 2, is hardly to their credit.

Complaint Counsel met and conferred with Respondents' Counsel at 5 p.m. on May 16, 2024. Complaint Counsel expected, and was prepared to consent to, a request for an extension of time to produce the privilege log to May 20, 2024, as a professional courtesy. Complaint Counsel also stated during the meet and confer that they understood the Court's order to apply only to claims of privilege over Negotiation Documents, as defined in the Motion to Compel, and therefore the task of finalizing the privilege log should be less burdensome. For their part, Respondents' Counsel could not estimate the volume of privilege log entries at all, though one would expect them to have a count based on the number of documents excluded from production, and claimed to have no means for identifying Negotiation Documents specifically within those documents. The Motion to Modify is likewise devoid of specifics about the claimed burden of complying with the Court's Order. *Cf. 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.").

Complaint Counsel is concerned that the promised privilege log will be voluminous and will not contain sufficient detail to identify documents as Negotiation Documents. If so, the process of identifying improper claims of common interest and meeting and conferring with Respondents regarding them will be protracted and further jeopardize Complaint Counsel's ability to challenge such claims before this Court and receive effective relief.

Respondents request the Court modify its Order and permit them to produce a privilege log on Friday, May 24, 2024. If the parties meet and confer on Monday May 27, 2024, Respondents are likely to want additional time to consider their position after the meet and confer. Even if impasse is reached on May 28, 2024, and Complaint Counsel files a renewed motion to compel on that date, the earliest Complaint Counsel could expect the Court to rule on a renewed motion to compel would be June 7, 2024, just four calendar days, and two business days, before the close of discovery. Assuming Respondents' production of documents would not be instantaneous, Complaint Counsel would not be able to examine any witnesses on the documents. This timing would severely prejudice Complaint Counsel's ability to test Respondents' primary defense, that the divestiture "will . . . address any competitive concerns raised by the Merger" because "C&S will receive the assets necessary to ensure its success." Albertsons Answer at 3; *see also* Kroger Answer at 3.

For the foregoing reasons, Complaint Counsel consent, as a matter of professional courtesy, to a modification of the Court's Order to require production of the privilege log on Monday, May 20, 2024, but respectfully request that the Court deny the Motion to Modify as to any later date.

Dated: May 17, 2024

Respectfully submitted,

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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:

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

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