PUBLIC

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

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

RESPONDENTS' OPPOSITION TO
COMPLAINT COUNSEL'S MOTION TO COMPEL

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

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

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

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

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

The Court should deny the motion to compel.

BACKGROUND

I. Respondents Announce an Expanded Divestiture Package

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

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

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

II. Respondents are Diligently Reviewing Negotiation Materials for Privilege

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

III. Complaint Counsel Moves to Compel

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

- communications between Respondents and C&S, whether through businesspeople or counsel, in which the composition of the divestiture asset package was negotiated;
- drafts of the New Divestiture Agreements exchanged between the negotiating parties; and
- each of Respondents' and C&S's internal analyses of the strengths and weaknesses of potential divestiture packages with respect to post-transaction operation of their respective businesses.

Complaint Counsel appears to believe that Respondents will categorically withhold these Negotiation Materials. *See* Mot. at 6 (claiming that Respondents "appear to be withholding from discovery substantially all evidence of their negotiations"). That assumption is incorrect. **Respondents expect to produce non-privileged documents in each category of "Negotiation Materials" identified by Complaint Counsel by May 17**.

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

ARGUMENT

I. Complaint Counsel's Categorical Privilege Arguments Lack Merit

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

A. Attorney Work Product Covers Certain Negotiation Materials

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

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

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

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

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

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

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

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

B. Attorney-Client Privilege Covers Certain Negotiation Materials

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

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

C. The Common Interest Doctrine Covers Some Negotiation Materials

The common interest doctrine allows "attorneys for different clients pursuing a common legal strategy to communicate with each other." *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). It is an exception to the general rule that disclosing privileged information to a third party waives the relevant privilege or protection. *Id.* To invoke the common-interest exception, "the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement." *Id.*

In August 2023, Kroger, Albertsons, and C&S entered into a joint defense and common interest agreement "for the purpose of obtaining regulatory approvals and defending any challenge to the Transaction and/or the Divestiture Transaction that might arise in any administrative or judicial proceeding." Mot., Ex. M. The parties are now co-defendants in one action and similarly situated in three others. This qualifies as a common interest. *See Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 219 F.R.D. 396, 401 (E.D. Tex. 2003) ("The common interest doctrine applies to cases involving co-defendants."). Some Negotiation Materials will therefore properly be protected from disclosure under the common interest exception.

Complaint Counsel's counterarguments lack merit.

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

Second, Complaint Counsel argues that "any attorney-client privilege was waived when Respondents and C&S communicated with each other, because the common interest does not apply to arms-length negotiations." Mot. at 7. But "[t]he weight of case law suggests that, as a general matter, privileged information exchanged during a merger between two unaffiliated business[es] would fall within the common-interest doctrine." *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 310 (D.N.J. 2008). Complaint Counsel cites *Nidec Corp. v. Victor Company of Japan* to suggest that parties "negotiating a transaction do

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

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

II. Complaint Counsel's Motion is Premature

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

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

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

CONCLUSION

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

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Respectfully submitted,

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