

choice to seek identical relief from an Article III court while its motion before the Commission remained pending. The pending motion should be dismissed or denied.

August 30, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

FEDERAL TRADE COMMISSION,
STATE OF ARIZONA,
STATE OF CALIFORNIA,
DISTRICT OF COLUMBIA,
STATE OF ILLINOIS,
STATE OF MARYLAND,
STATE OF NEVADA,
STATE OF NEW MEXICO,
STATE OF OREGON, and
STATE OF WYOMING,

Plaintiffs,

v.

THE KROGER COMPANY and

Case No.: 3:24-cv-00347-AN

**PLAINTIFFS' MOTION *IN LIMINE* TO
EXCLUDE EVIDENCE OR
ARGUMENT RELATING TO
DEFENDANTS' PROPOSED
DIVESTITURE**

REDACTED VERSION

MOTION

Plaintiffs respectfully move *in limine* to exclude evidence and preclude argument relating to the proposed divestiture by Defendants The Kroger Company (“Kroger”) and Albertsons Companies, Inc. (“Albertsons” and, together with Kroger, “Defendants”) to C&S Wholesale Grocers LLC (“C&S”).

Plaintiffs from obtaining discovery about Divestiture Negotiations. And yet Defendants have put forth an expert who opines that [REDACTED]

[REDACTED]” and [REDACTED]

[REDACTED] Musser Dec., Ex. D ¶¶ 20, 188.

Plaintiffs therefore move to exclude evidence and argument about the New Divestiture. Defendants would unfairly wield privilege as both sword and shield if allowed to proffer their hand-picked evidence and curated expert opinion while barring Plaintiffs from obtaining contradictory proof. Because Defendants already deployed the shield, the proper recourse is to sheath the sword—barring the New Divestiture defense. Short of that, the Court should preclude Defendants from proffering evidence or argument about Divestiture Negotiations or subjective assessments of the New Divestiture, which would present a lopsided view of the alleged “fix.

Defendants and C&S, but each withheld thousands of responsive documents on privilege grounds and refused to log negotiations between outside counsel. Musser Dec., Ex. J Requests 1, 19, 29, 30; Ex. K; Ex. L Requests 1, 3, 12; Ex. M; Ex. N at 1-2.

FTC moved to compel in the Administrative Adjudication, arguing that “Kroger is withholding relevant documents without logging them, baselessly claiming privilege over communications between businesspeople, and withholding documents without providing sufficient information to permit [FTC] to analyze privilege claims.” Musser Dec., Ex. O at 5. FTC also contended it was in “‘substantial need of the materials’ to test [Defendants’] claim that the divestiture includes ‘all the asserts and personnel C&S will need to compete.’” *Id.* at 9 (quoting Kroger Answer at 3 and 16 C.F.R. § 3.31(c)(5)).

In response, Kroger claimed that “[l]awyers were highly involved in the expanded divestiture package negotiations, setting the negotiating priorities and strategy.” Musser Dec., Ex. B at 2. In a declaration, Yael Cosset (Kroger’s “chief business negotiator” and a non-lawyer) admitted “the parties at times had disagreements on various issues in the negotiations that had to be resolved—including, for example, transition timing, which specific private label

(2) *Depositions* – FTC deposed 53 Defendant executives and seven C&S executives.

Defendants and C&S asserted the privileges and instructed 16 witnesses—including key negotiators and 30(b)(6) designees on divestiture-related topics—not to answer questions regarding Divestiture Negotiations.

Appendix A compiles a non-exhaustive list of questions witnesses were prohibited from answering, including about asset selection, C&S’s requests, divestiture proposal analyses, and areas of dispute. For example, Mr. Cosset—Kroger’s designee on divestiture-related td(s)-1 (i)- (r)-21 (v)1 (i)-M

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dated: August 14, 2024

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION, STATE OF ARIZONA, STATE OF CALIFORNIA, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF OREGON, and STATE OF WYOMING,

Plaintiffs,

v.

KROGER COMPANY and ALBERTSONS COMPANIES, INC.,

Defendants.

Case No.: 3:24-cv-00347-AN

OPINION AND ORDER

A preliminary injunction hearing is set to begin on August 26, 2024. Before this Court are several pre-hearing motions. For the reasons stated on the record at the August 23, 2024 pre-hearing conference, the Court grants in part and denies in part plaintiffs' motion in limine, ECF [265], and denies the remainder of the parties' motions.

A. Defendants' Motions in Limine

1. Defendants' Motion to Partially Exclude the Testimony of Dr. Nicholas Hill, ECF [244]

DENIED.

Under Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and *Daubert*' progeny, the court must find that the expert testimony "both rests on a reliable foundation and is relevant to the task at hand." *Primiano v. Cook*, 598 F.3d 558 (9th Cir. 2010), *as amended* (Apr. 27, 2010) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) and citing *Kumho Tire Co. v.*

examine in depth the four witnesses practice of deleting text messages and will treat with skepticism claims regarding those texts.

2.

C. Additional Matters