



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

In the Matter of The Kroger Company and Albertsons Companies, Inc.

Today the Commission denies a motion by Complaint Counsel to strike divestiture-related defenses asserted by Respondents, The Kroger Company and Albertsons Companies, Inc., without prejudice to Complaint Counsel's ability to seek relief from the Administrative Law Judge ("ALJ").

The ALJ had previously ruled on Respondents' claims that certain divestiture-related information is privileged. Rather than appeal those rulings to the Commission

evidence of divestiture negotiations can be particularly probative in assessing whether the divested assets would adequately restore competition.¹ This evidence is especially valuable to the extent that it contradicts made-for-litigation narratives. Given that the sufficiency of the proposed divestiture can be central to the overarching inquiry, an ALJ should take special care to review privilege disputes concerning divestiture-related evidence with rigor and precision.

In responding to compulsory process during investigations, or to document requests or subpoenas during administrative adjudication, the withholding party bears the burden of showing that the elements of the attorney-client privilege or work-product doctrine are met,

Applying these legal principles carefully and faithfully will protect parties' rights while safeguarding the public's interest in a fair and just resolution of the underlying dispute.

introduction of Mr. Galante's opinions in evidence or seek other relief, then the ALJ should decide whether Complaint Counsel can fairly and adequately dispute the opinions without access to information that Respondents have withheld.