UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of	
The Kroger Company, Company	**DOCKET NO. 9428**
and	
Albertsons Companies, Inc.	

ORDER DENYING MOTION TO STRIKE

Complaint Counsel have moved the Commission to strike certain affirmative defenses and denials of liability asserted by Respondents. The Kroger Company ("Kroger") and Albertsons Companies, Inc. ("Albertsons") (collectively, "Respondents") assert that Respondents have claimed privilege over evidence necessary to rebut these defenses and denials, "unfairly wield[ing] privilege as a sword and shield." Compl. Counsel's Mot. to Strike Sixth and Albertsons' Ninth Affirmative Defenses at 2 (July 15, 2024) ("Motion to Strike"). For the reasons explained below, Complaint Counsel's Motion to Strike is denied.

In October 2022, Respondents Kroger and Albertsons, two large supermarket chains, entered into a merger agreement. Respondent Albertsons [redacted] and that [redacted] Albertsons Cos., Inc.'s [redacted]. Compl. Counsel's Mot. to Compel at 6 (May 17, 2024). In September 2023, Respondents agreed to divest some or all of their store [redacted] in the hope that this would resolve anticipated concerns about the merger. See Resps.' Opp'n to Compl. Counsel's Mot. to Strike at 2 (July 29, 2024) ("Opposition"). Respondents submitted their divestiture proposal to Commission staff and state enforcers, however, raised concerns about the adequacy of the proposed divestiture. *Id.* at 2. According to Complaint Counsel, CCs first expressed concern about the adequacy of the divestiture proposal to Respondents, the FTC, and state attorneys general. Motion to Strike at 3.

On February 26, 2024, the Commission issued a Complaint against Respondents charging that their proposed merger violated Section 7 of the Clayton Act and Section 5 of the FTC Act. The Complaint alleged, among other things, that the contemplated divestiture to C&S would be inadequate to mitigate the harm from the lost competition between Respondents, forcing the American public to bear the costs of any failure. *E.g.*, Compl. ¶¶ 11, 86–98.

In March 2024, Respondents submitted their Answers to the Complaint. Kroger's Sixth and Albertsons' Ninth affirmative defenses asserted that the Commission's claims are barred "because divestitures will eliminate any purported anticompetitive effects." Respondents' Answers elsewhere made claims about the efficacy of the proposed divestiture to C&S. *See, e.g.*, Albertsons Answer at 3; Kroger Answer at 2–3. Although Respondents in their Answers denied that the divestiture to C&S as originally proposed was inadequate, on April 22, 2024, they amended their divestiture agreement with C&S, increasing the number of divested stores and adding other assets. According to Respondents, the primary goal of the revised divestiture package was to respond to arguments raised by the Commission and state attorneys general in litigation. Opposition at 3.

In discovery, Complaint Counsel sought documents concerning the negotiation and development of the revised divestiture package. Respondents produced some requested documents but asserted privilege over many others. Complaint Counsel moved to compel Respondents' production of various categories of documents related to the negotiation of the revised divestiture agreement, including communications between non-lawyer executives of Respondents and C&S. Chief Administrative Law Judge Chappell ("ALJ") denied the motion. In a June 11, 2024 order, the ALJ ruled that Respondents sufficiently demonstrated that the withheld negotiation documents were "protected by the attorney-client privilege, the attorney work product doctrine, and/or the common interest doctrine." Order Den. Compl. Counsel's Mot. to Compel Production of Docs. and Revised Privilege Log at 5. Observing that the purpose of renewed negotiation was to "structure a transaction that could be defended against the pending litigation and could be consummated," the ALJ found that the parties "shared the common goal of executing a divestiture package that would enable the parties to prevail in litigation and close the transaction." *Id.* at 4–5 (quotation omitted).

Complaint Counsel did not seek interlocutory review by the Commission of the ALJ's privilege ruling but, on July 15, 2024, filed the present Motion to Strike. Complaint Counsel's motion argues that, given Respondents' privilege claims and the ALJ's ruling, they are unfairly precluded from testing Respondents' defenses. Complaint Counsel invokes the so-called sword-and-shield doctrine, asserting that "parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." Motion to Strike at 8 (quoting *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)). Complaint Counsel point out that Respondents' Answers state that the divestiture "would eliminate any purported anticompetitive effects" of the merger and "address any competitive concerns," and that C&S would "receive the assets necessary to ensure its success." *Id.* at 3 (quoting Kroger Answer at 27 and Albertsons Answer at 3). However, citing privilege, Respondents withheld thousands of documents concerning the negotiation of the amended divestiture agreement and instructed deposition witnesses not to answer questions about, among other things, asset selection, C&S's requests, analyses of the proposed packages, whether the

assets would allow C&S to adequately compete, and areas of [illegible] in the negotiation. *Id.* at 4–5. Moreover, Complaint Counsel say they are unable to test the premises of Respondents' expert report, which states that C&S [redacted] *Id.* at 6 (quotations omitted). Com[illegible] privileged evidence and expert opini[illegible] unfairly deprive Complaint Counsel of an adequate opportunity to [illegible]spondents' defenses. *Id.* at 9. Complaint Counsel argue that, having allowed Respondents to deploy the shield, [illegible]ld not [illegible] proper to allow them to use the sword. *Id.* at 2.

Complaint Counsel request that, if Respondents cont[illegible] maintain their [illegible]s and privilege claims, the Commission strike the [illegible]ive defenses and liability denials based on the divestiture.[1] A[illegible] Complaint Counsel ask the Commission [illegible] preclude Respondents from (1) offering evidence or testimony concerning their [illegible]gotiations or subjective assessments of the amended divestiture's alleged efficacy, (2) proffering any expert opinion relying on such evidence or testimony, or (3) asserting any argument at trial concerning the foregoing topics. Motion [illegible] 9 & Proposed Order at 1–2. Under the latter [illegible] Respondents could avoid preclusion of their evidence and argument by opting to waive their privilege claims, at which point discovery would reopen to per[illegible] Complaint Counsel to seek additional evidence and testimony regard[illegible] the proposed divestiture. Motion to Strike at [illegible] & Proposed Order at 2.

At the outset, it is important to note that the question of whether the attorney-client privilege and/or the attorney work product doctrine protect the withheld in[illegible] whether the common interest doctrine was properly applied, is not before the Commission. Complaint Counsel have not sought interlocutory review of the ALJ's order on [illegible] compel production of negotiation documents, *see* 16 C.F.R. § 3.23(b). The [illegible] not address Respondents' privilege cla[illegible] respect to depos[illegible] to assess those claims in the first instance here. For purposes of this Motion to Strike, we therefore assume, without deciding, that Respondents have not improperly withheld the information at issue. *But see* [illegible] *Sts All., Inc.*, N[illegible]CV-2118, 20[illegible] 3410638, at *8–10 (M.D. Pa. June 11, 2020) (discussing limitations of the common interest doctrine in the context of divestiture negotiations).

We now turn to Complaint Counsel's request to strike the divestitu[illegible] to strike an opponent's def[illegible] *Law Firm, P.A. v. IPS*, 221 F.3d 1059, 1063 (8th Cir. 2000); *F.S.S. v. Best W*[illegible] F. Supp. 3d 42[illegible] (N.D. Tex. 2021); *Blum v. Johnson Controls, Inc.*, 328 F.R.D. 146,

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[1] In addition to [illegible] above, Complaint Counsel also ask the Commission to strike the denials of liability involving the divestiture in Kroger's Third and Albertsons' Sixth, Seventh, and Eighth affirmative defenses (which state th[illegible] paragraphs 10 and 86–98 of the Respondents' Answers (which respond to the Complaint's allegations that the divestiture is inadequate).

Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's Motion to Strike Kroger's Sixth and Albertsons' Ninth Affirmative Defenses is DENIED, without prejudice to Complaint Counsel's ability to seek relief from the Administrative Law Judge any unfairness that