PUBLIC

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 FOR LEAVE TO ALLOW ONE ADDITIONAL TESTIFYING EXPERT

Complaint Counsel opposes the motion of Respondents The Kroger Company ("Kroger") and Albertsons Companies, Inc. ("Albertsons") (collectively, "Respondents") to exceed the five-expert limit under Rule 3.31A(b) of the Commission Rules of Practice, 16 C.F.R. § 3.31A(b).

This case presents a straightforward, horizontal merger between the two largest traditional supermarket chains in the country. Respondents acknowledge the simplicity of the matter before this Court, conceding that {[redacted]}[1] And Respondents concession is unsurprising; their documents are riddled with confirmation of Respondents' current vigorous head-to-head competition. Regarding this proposed merger, one Albertsons executive explicitly acknowledged the anticompetitive effect of this transaction: {[redacted]}

[1] Albertson's Opp to Complaint Counsel's Mot. to Compel at 7, *In re Kroger Co. & Albertsons Cos.*, Dkt. No. 9428 (May 21, 2024).

[redacted]}[2] And Kroger executives have similarly confirmed that they view Albertsons banners as "our #1 direct competitor"[3] and {[redacted]}[4]

With such straightforward facts, this case does not present the "extraordinary circumstances" that in other contexts may warrant additional experts under Rule 3.31A(b). The issues raised here are, as Respondents acknowledge, relatively uncomplicated. Far from a highly technical case that involves "multiple areas of science"[5] or implicates domains of expertise beyond antitrust,[6] the present case can and should proceed efficiently as intended by the Commission when it promulgated a rule limiting the standard number of expert witnesses.

Respondents claims of extraordinary circumstances are unfounded, and ring particularly hollow considering the specific experts designated. For example, one expert will apparently offer improper legal argument relating to labor law under the guise of an expert opinion."[7]

The Court should deny Respondent's motion.

BACKGROUND

On February 26, 2024, a unanimous Commission issued a Complaint charging that Kroger's proposed acquisition of Albertsons would violate federal antitrust law by substantially

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[2] Ex. A at 001.
[3] Ex. B at 001.
[4] Ex. C at 001.
[5] Order on Cross-Motions Regarding Limitation on Number of Expert Witnesses Designated by Respondents, *In re POM Wonderful LLC*, FTC Dkt. No. 9344 (Feb. 23, 2011), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110223aljordoncrossmo.pdf ("POM Wonderful Order"); *see also* Order Granting Respondents' Motion for Leave to Allow Additional Expert Witnesses, *In re Illumina, Inc. & Grail, Inc.*, FTC Dkt. No. 9401 (July 28, 2021) ("Illumina Order").
[6] Order Granting Respondent's Motion, *In re 1-800 Contacts, Inc.*, FTC Dkt. No. 9372 (Feb. 22, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/d09372_order_6expert_witnesses.pdf ("1-800 Contacts Order")
[7] Mot. at 5 (describing G. Roger King—labor law attorney—and Herbert J. Kleinberger—a "retail grocery industry expert").

lessening competition in local markets for the sale of food and grocery products at supermarkets and for union grocery labor.[8] Specifically, the Complaint alleges—and discovery has confirmed—that the proposed acquisition will eliminate substantial head-to-head competition between Kroger and Albertsons, which risks higher prices and lower quality for American consumers who rely on traditional supermarkets and may also lead to lower wages and worsening of employment conditions for thousands of Respondents' employees.[9] The Complaint further alleges that Respondents cannot show "merger-specific, verifiable, and cognizable efficiencies sufficient to rebut the presumption of harm" or that "the proposed divestiture will prevent a substantial lessening of competition."[10]

On May 10, 2024, Respondents disclosed their expert witness list, designating six experts.[11] By contrast, and even with the ultimate burden of proof, Complaint Counsel has designated only three expert witnesses.[12] Complaint Counsel noted that Respondents had exceeded Rule 3.31A(b)'s limitation on expert witnesses and requested a revised, compliant expert witness list.[13] Respondents initially demurred, claiming there is no limit to the number of experts they can include on an expert witness list.[14] With Respondents unwilling to acknowledge Rule 3.31A(b)'s mandate, Complaint Counsel moved to require Respondents' compliance.[15] Only then, in response to Complaint Counsel's motion, did Respondents at last

[8] *See generally* Complaint, *In re Kroger Co. & Albertsons Cos.*, Dkt. No. 9428 (Feb. 26, 2024).
[9] *Id.* ¶¶ 19, 62.
[10] *Id.* ¶¶ 85, 87.
[11] Ex. D at 1.
[12] Ex. E at 1.
[13] Ex. F at 2.
[14] *Id.* at 1.
[15] *See generally* Complaint Counsel's Motion to Require Respondents to Comply With FTC Rule 3.31A(b) and Identify No More Than Five Expert Witnesses, *In re Kroger Co. & Albertsons Cos.*, Dkt. No. 9428 (May 16, 2024).

reveal their intention to seek an exception to the Commission's limitations,[16] now asking that the Court permit an additional expert witness.

ARGUMENT

Respondents cannot call more than five experts at the hearing unless the Court orders otherwise. Rule 3.31A(b) of the Commission's Rules of Practice provides that each side in an evidentiary hearing "will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses," and exceptions may be granted only "due to extraordinary circumstances." 16 C.F.R. § 3.31A(b). The Commission promulgated this rule to streamline proceedings, recognizing that "five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases." 74 Fed. Reg. 1803, 1813 (Jan. 13, 2009) (interim final rulemaking). The instant action does not warrant deviation from the Commission's reasoned limitations.

Since the FTC promulgated Rule 3.31A(b) in 2009, this Court has granted leave for Respondents to call more than five experts in only three cases.[17] These three opinions illuminate the contrast between the present case and the "extraordinary circumstances" that merit leave to call an additional expert.

In *POM Wonderful*, this Court focused on the varied nature of complaint counsel's claims and the technical medical nature of the subject matter underlying the claims.[18] Because

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[16] Respondents' Opposition to Complaint Counsel's Motion to Require Respondents to Identify No More Than Five Expert Witnesses, *In re Kroger Co. & Albertsons Cos.*, Dkt. No. 9428 (May 23, 2024).

[17] POM Wonderful Order; 1-800 Contacts Order; Illumina Order.

[18] POM Wonderful Order at 6 ("Complaint Counsel contends that, in up to 20 different advertisements, Respondents made express and/or implied claims that the Challenged Products: (1) prevent, reduce the risk of, or treat heart disease by improving blood flow to the heart; and have been clinically proven to do so; (2) prevent, reduce the risk of, or treat heart disease by decreasing arterial plaque; and have been clinically proven to do so; (3)

complaint counsel's claims involved "multiple products, multiple advertisements, and multiple areas of science," this Court granted respondents leave to call additional experts.[19] The complaint in *1-800 Contacts* involved agreements that were "broadly challenged as both unjustified under trademark law and anticompetitive," and thus involved "technical areas of both antitrust law and trademark law."[20] And *Illumina* involved "numerous, complex issues and technical areas" including "private payor and Medicare reimbursement," "cancer screening test development," and "clinical diagnostic platforms" that were experiencing "rapid technological innovation and investment."[21]

The contrast between the technical nature of these past cases and the present case is stark. Unlike *POM Wonderful* and *Illumina*, this matter does not present highly specialized or scientific questions, and it does not implicate complex medical conditions or highly advanced and rapidly evolving technology. And unlike *1-800 Contacts*, the Complaint here does not require this Court to assess whether Respondents behavior is lawful under anything but antitrust law. By contrast, in *1-800 Contacts* a core allegation was that respondent's challenged agreements were "unjustified under trademark law."[22] The conduct at issue in this case does not implicate trademark, labor, or any other area of law; it fits squarely within the bounds of antitrust law.

Unlike prior cases in which this Court has determined that "extraordinary circumstances" are present, the parties *agree* that "{[redacted]}" and "{[redacted]

prevent or reduce the risk of prostate cancer, and have been clinically proven to do so; (4) treat prostate cancer, including by prolonging prostate-specific antigen doubling time ("PSADT"), and have been clinically proven to do so; and (5) treat erectile dysfunction, and have been clinically proven to do so.").

[19] *Id.* at 3.

[20] *Id.*

[21] Illumina Order at 3.

[22] 1-800 Contacts Order at 4.

[redacted]"[23] The fact of this agreement paints a clear picture of the nature of this case. This is not a case where market definition or competitive effects comes down to a highly technical analysis of an arcane subject; this is a case where everyone agrees that Respondents compete, and thus the elimination of that competition would harm consumers and workers.

Moreover, Respondents cannot justify special accommodations in this instance. One of Respondents' designated experts, Mr. Roger King, is a lawyer whom Respondents expect to testify about "labor relations issues, including labor law."[24] But this Court does not need expert testimony from a practicing attorney to understand labor law; courts generally—and appropriately—rely on argument and briefing from the parties' counsel to address questions of law. Further, the Complaint does not implicate questions of labor law, and Respondents desire to expand the scope of relevant issues does not justify departure from the Commission's considered limit on experts.

CONCLUSION

For the reasons stated above, Complaint Counsel respectfully requests that the Court deny Respondents' Motion.

[23] Albertson's Opp to Complaint Counsel's Mot. to Compel at 7, *In re Kroger Co. & Albertsons Cos.*, Dkt. No. 9428 (May 21, 2024).
[24] Mot. at 5.

Dated: June 14, 2024

Respectfully submitted,

By: s/ Rohan Pai

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CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. B

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Ex. C

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. D

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. E

CONFIDENTIAL - REDACTED IN ENTIRETY

Ex. F

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[PROPOSED] ORDER DENYING RESPONDENTS' MOTION FOR LEAVE TO ALLOW ONE ADDITIONAL TESTIFYING EXPERT

Upon consideration of Respondent's Motion to Call Six (6) Expert Witnesses at Trial, and Complaint Counsel's Opposition to Respondent's Motion and Cross-Motion to Limit Respondents to Five Designated Experts, it is hereby ORDERED that Respondent's Motion is DENIED. It is further ordered that Respondent shall serve its amended expert designation on Complaint Counsel no later than one business day following the date of this order.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 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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