

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' MOTION
TO RECESS THE EVIDENTIARY PORTION
OF THE PART 3 ADMINISTRATIVE HEARING**

Kroger and Albertsons face an extraordinary and unprecedented litigation schedule in connection with their proposed merger. Three separate regulators have initiated four separate proceedings challenging the transaction, and there are five separate hearings currently scheduled in those cases over a 12-week period in different locations around the country. Some of these hearings are currently scheduled to overlap—including the Part 3 hearing (scheduled to begin on July 31); the preliminary injunction hearing in Colorado (scheduled to begin on August 12); and the FTC's federal court lawsuit seeking to enjoin the transaction (scheduled to begin on August 26).

Although the Part 3 proceeding must be formally gaveled in on July 31 under the Commission's May 29 Order, that same order recognized that this Court has discretion over the hearing schedule—including the authority to recess the evidentiary portion of the proceeding. Respondents respectfully request that the Court exercise its scheduling discretion to recess the evidentiary portion of the hearing after it commences on July 31 and resume the hearing once the hearings in the various parallel litigations are complete. This approach is efficient and will

PUBLIC

conserve the resources of the Court, third parties, and the parties, in part because the parallel proceedings will likely narrow and possibly eliminate the need for some or all of the Part 3 proceeding. It also would avoid piecemeal, disjointed litigation that would hinder the Court's review of the evidence.

Even though the Commission recognized the Court's authority to manage its own docket, Complaint Counsel seeks to force Respondents to try multiple cases (with many of the same witnesses) at the same time in different tribunals located thousands of miles apart. But this approach is unrealistic, unnecessary, and highly prejudicial to Respondents—and, on top of all that, it is inconsistent with Complaint Counsel's prior statement on the unfairness of litigating multiple proceedings simultaneously. Complaint Counsel's insistence that the Part 3 proceeding go forward on its current schedule despite multiple overlapping proceedings should be rejected because it would prejudice Respondents.

The Court should grant Respondents' motion and recess the evidentiary portion of the Part 3 hearing until the trials in the parallel actions are complete. Alternatively, the Court should structure the Part 3 hearing to promote efficiency and avoid unduly burdening third parties, the parties, and the Court, including by conducting a virtual hearing. Complaint Counsel joins in the request for a virtual hearing but opposes the other requested relief.

BACKGROUND

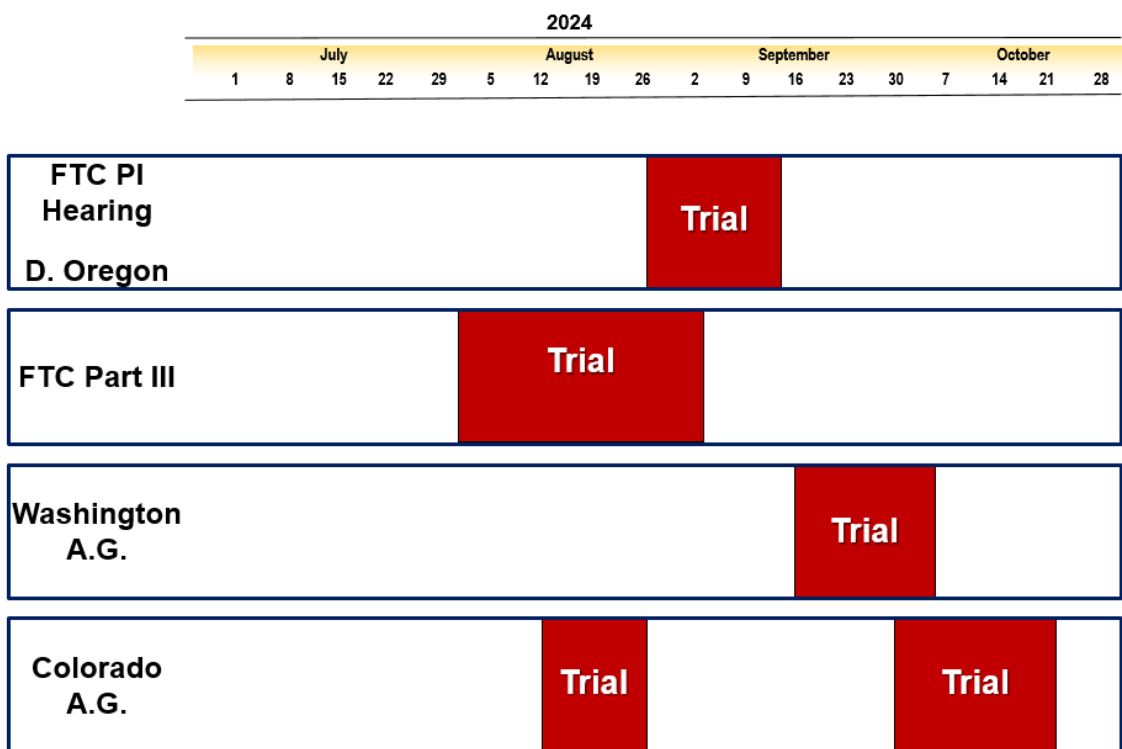
I. Kroger and Albertsons Face Five Partially Overlapping Trials

Below are the current trial dates in the five actions brought by three regulators in four jurisdictions challenging the proposed acquisition:

1. **Part 3 administrative proceeding (Washington, DC):** The hearing will be gaveled in by this Court on July 31. Absent any recesses, the hearing could last until mid-September given the 210 hours of available trial time.

2. **Colorado preliminary injunction proceeding (Denver, CO):** The hearing will begin in state court on August 12 and is scheduled to last until August 22.
3. **FTC preliminary injunction hearing (Portland, OR):** The hearing will begin in federal court on August 26 and is scheduled to last until September 13.
4. **Washington permanent injunction proceeding (Seattle, WA):** The hearing will begin in state court on September 16 and will likely last until early October.
5. **Colorado permanent injunction proceeding (Denver, CO):** The hearing will begin in state court on September 30 and is scheduled to last until October 18.

The chart below depicts these trial dates and shows their overlap.



These overlapping trials involve virtually identical issues.¹ Respondents expect many of the same witnesses to be called in the parallel cases. For example, based on the current witness

¹ Complaint Counsel may attempt to distinguish the parallel cases, but the plaintiffs in the parallel cases agreed to coordinate fact depositions in the parallel cases. The plaintiffs divided responsibilities for depositions, and Complaint Counsel had Washington and Colorado take the lead on certain depositions noticed in this action. This level of coordination would have made no sense if the parallel cases were materially distinct.

lists in Colorado and Part 3, there are at least *17 potentially overlapping witnesses* (13 fact and 4 expert).

II. Complaint Counsel Refuse to Coordinate the Proceedings

Respondents moved to continue the Part 3 hearing, over Complaint Counsel's objection. The Commission denied that motion in a 3-2 decision, but it recognized that the Chief Administrative Law Judge could recess the hearing to account for the parallel proceedings. Commission May 29 Order at 2 ("The ALJ, in consultation with the parties, could avoid any overlap in the proceedings by recessing the administrative hearing during the pendency of the federal court hearing."). The dissent recognized that the "burden and inefficiency of running overlapping trials on opposite sides of the country will be substantial." *Id.*

Judge Chappell subsequently instructed the parties to confer on recessing the hearing. The parties did so but were unable to reach agreement. Respondents proposed the same relief they seek here. Complaint Counsel proposed a contingent counteroffer: "if Defendants will join the FTC's request to have full trial days from July 31 to August 9, the FTC would be willing to agree to a joint motion to adjourn the Part 3 proceedings during the Colorado and Oregon proceedings"; however, if Respondents did not agree, Complaint Counsel would "intend[] to oppose Defendants' motion to adjourn during the Colorado and Washington proceedings in full but will remain willing to coordinate scheduling around appearances in Colorado and Washington as well as consider specific requests for witnesses on Defendants' witness list to appear remotely." Ex. A. Respondents could not agree to this proposal.

Respondents also proposed submitting joint position statements on July 8, but Complaint Counsel rejected this proposal too. Ex. A.

ARGUMENT

I. The Court Should Recess the Evidentiary Portion of the Part 3 Hearing

Given the unprecedented litigation schedule Respondents face, the Court should exercise its discretion to gavel in the Part 3 hearing on July 31 and then recess the evidentiary portion of the hearing (with or without opening statements, as the Court prefers) until the hearings in the other parallel cases have concluded. This approach would promote efficiency and avoid undue burdens for numerous reasons. First, recessing the evidentiary portion of the Part 3 hearing would avoid any overlap in proceedings. Second, it would avoid having a disjointed Part 3 hearing with a gap of many weeks—which could hinder the Court’s review of the evidence. Finally, it could conserve the resources of non-parties, the parties, and this Court. Many witnesses from the parties’ Part 3 final witness lists will also be witnesses in the parallel proceedings; the parties could avoid burdening those witnesses with testifying twice (or more) by relying on their federal court trial transcripts in Part 3. The FTC Rules specifically contemplate submitting trial transcripts as evidence in the Part 3 proceeding. *See* 16 C.F.R. § 3.43(b) (“If otherwise meeting the standards for admissibility . . . prior testimony” in “other proceedings . . . shall be admissible”). Respondents are open to submitting trial transcripts from the federal court preliminary injunction proceeding as evidence in Part 3, rather than having party and non-party witnesses testify live, but this will only be possible if the Part 3 hearing follows the parallel actions.

Moreover, the current schedule is unduly prejudicial to Respondents—who, during the currently-scheduled Part 3 hearing, would simultaneously have to prepare for multiple upcoming trials. Complaint Counsel suggests this would not prejudice Respondents because they “remain willing to coordinate scheduling around appearances in Colorado and Washington as well as consider specific requests for witnesses on Defendants’ witness list to appear remotely.” Ex. A. But Complaint Counsel’s generic offer does not meaningfully address the logistical and practical

PUBLIC

difficulties of multiple trials occurring at the same time. For example, specific teams of lawyers (both outside counsel and in-house attorneys) are working with the same fact and expert witnesses across all of the proceedings. Complaint Counsel's approach would require these attorneys to not only prepare for (and participate in) multiple hearings at the same time, but also travel back-and-forth across the country to appear before different courts. This process would be unwieldy and extremely difficult to coordinate, and Complaint Counsel has made no real effort to do so. And the Commission's decision to file the preliminary injunction action across the country in Oregon (rather than down the street from the Commission in D.C.) only adds to these logistical difficulties.

Complaint Counsel previously agreed that having multiple simultaneous hearings would be unfair and impractical. As Complaint Counsel explained to the federal court in Oregon: "I respectfully tender it will be quite a burden and indeed an unfair one to force the FTC to litigate simultaneously You can only imagine the burden on the party witnesses, the defense witnesses, and even to third parties if again you're having simultaneous cross-country trials, where some will appear in Portland on a Monday and potentially in Washington, D.C. in the FTC courtroom on a Tuesday." May 29 Dissenting Statement of Commissioner Melissa Holyoak, at 2 (quoting D. Or. Status Conf. Tr. at 21:25-22:8). Yet the FTC is now seeking to impose this exact burden on Respondents. The burden would also fall on third parties: There are 20 third parties on the parties' Part 3 final witness lists (excluding duplicates and employees of the divestiture buyer C&S), and Respondents expect many of these third parties will also be witnesses in the parallel cases. This underscores how coordinating simultaneous trials is unworkable and would substantially burden many third parties.

Nor would recessing the evidentiary portion of the Part 3 hearing prejudice Complaint Counsel. The FTC argues the Part 3 proceeding is the "trial on the merits" and "should proceed

as quickly as possible to ensure an expeditious resolution of this case.” Ex. A. But in the other parallel cases—including the FTC’s own case in the District of Oregon—the plaintiffs seek to enjoin the transaction from closing before the contractual outside date. In contrast, any decision by the Commission (and ultimately a decision by a United States Court of Appeals) would occur well *after* the outside date to close the transaction.

Moreover, as this Court knows, the federal court preliminary injunction proceeding typically determines the fate of mergers challenged by the FTC. *See, e.g.*, 16 C.F.R. § 3.26(c) (authorizing Part 3 withdrawal after preliminary injunction denial); Maureen K. Ohlhausen, F.T.C., Remarks to U.S. Chamber of Commerce: A SMARTER Section 5, at 17 (Sept. 25, 2015), https://www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.p (“the Commission has not pursued a Part III proceeding following a PI loss in federal court for twenty years”). That the preliminary injunction proceeding could narrow, or obviate the need for, the Part 3 hearing further demonstrates that granting this motion will not prejudice Complaint Counsel.

FTC Rule 3.41(b) expressly permits this Court to recess a Part 3 proceeding for “brief intervals of the sort normally involved in judicial proceedings.” And in other judicial proceedings, the “scope of the district court’s discretion to manage trials before it is and must be particularly broad.” *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004). Here, the unprecedented overlapping proceedings only magnify the need for the Court to exercise its broad scheduling discretion to ensure the hearing proceeds as efficiently and effectively as possible.

Recessing the Part 3 hearing is particularly appropriate because the overlap in proceedings is due to regulators’ actions (including regulators’ own refusal to coordinate with one another), and not any action by Respondents. Similarly, Complaint Counsel is refusing to coordinate expert

depositions in the parallel actions—even though Respondents will have the same experts across the parallel proceedings—which means that Respondents’ experts will likely be required to sit for depositions in the parallel proceedings in late July or early August, when the Part 3 proceeding is scheduled to occur. This is yet another scheduling conflict, given that Respondents’ experts would likely attend the Part 3 proceeding to listen to fact testimony, and it compounds the prejudice to Respondents of proceeding with Part 3 on the current schedule. That Complaint Counsel’s own conduct exacerbated Respondents’ scheduling conflicts underscores why it is appropriate for this Court to exercise its discretion to recess the Part 3 hearing.

II. Alternatively, and at a Minimum, the Court Should Structure the Part 3 Hearing To Ensure Efficiency

If the Court declines to recess the evidentiary portion of the Part 3 hearing in its entirety after gaveling in the proceeding on July 31, it can and should still structure the hearing in a manner that promotes efficiency and avoids unduly burdening the Court, third parties, and the parties. The Court could achieve these goals in multiple ways, including through one or more of the proposals below.

- Holding opening statements on July 31 and scheduling oral argument on pending motions (e.g., motions in limine, sealing motions) thereafter, and then recessing the evidentiary portion of the hearing.
- Holding some trial days until August 6 (totaling one week), shortly before the start of the Colorado preliminary injunction proceeding, but tailoring those trial days so they are efficient and not unduly burdensome in one or more of the following ways:
 - Requiring the parties to present only third-party testimony by video deposition designation—to avoid unduly burdening party witnesses who will testify live in the parallel proceedings, and whose trial transcripts could be submitted to Judge Chappell under FTC Rule 3.43(b);
 - Requiring the parties to present only either (a) third-party testimony by video deposition designation or (b) testimony from Complaint Counsel’s experts; or

PUBLIC

- Requiring the parties to present testimony only from fact witnesses and Complaint Counsel's expert witnesses who they do not intend to call in the parallel federal court proceeding (if any).
- Holding some trial days until August 6, but limiting the amount of trial time—e.g., conducting half days, or having non-consecutive trial days.
- At a minimum, recessing the hearing after August 6, until the parallel proceedings are complete.
- In all events, having all trial days be virtual given the overlapping parallel proceedings around the country and the associated travel burdens on fact witnesses and experts. Complaint Counsel join Respondents' request for a virtual hearing.

These proposals would enable the Court to hear some trial testimony before the other parallel cases begin, but keep the trial days streamlined.

CONCLUSION

The Court should grant Respondents' motion and recess the evidentiary portion of the Part 3 hearing until after the hearings in Colorado, Oregon, and Washington have concluded.²

July 8, 2024

Respectfully submitted,

By: /s/ Matthew M. Wolf

Matthew M. Wolf
Sonia K. Pfaffenroth
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Telephone: 202 942 6831

Mark A. Perry
Luke Sullivan
Weil, Gotshal & Manges LLP
2001 M Street NW Suite 600
Washington, DC 20036

Luna Barrington
Weil, Gotshal & Manges LLP

² Complaint Counsel has agreed to file its response to this motion by Thursday, July 11. *See* Ex. A.

PUBLIC

767 Fifth Avenue
New York, NY 10053
Telephone: 212 310 8421

*Counsel for Respondent The Kroger
Company*

/s/ Enu A. Mainigi
Enu A. Mainigi
Jonathan B. Pitt
A. Joshua Podoll
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
Telephone: 202.434.5000

Michael G. Cowie
Dechert LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: 202 261 3300
mike.cowie@dechert.com

Edward D. Hassi
Debevoise & Plimpton LLP
801 Pennsylvania Ave. N.W.
Washington D.C. 20004
Telephone: 202 383 8203
thassi@debevoise.com

*Counsel for Respondent Albertsons
Companies, Inc.*

**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

[Proposed] Order Granting Respondents' Motion

Having considered Respondents' motion, the motion is hereby GRANTED.

ORDERED.

Chief Administrative Law Judge Chappell

Date: _____, 2024.

PUBLIC**CERTIFICATE OF CONFERRAL**

Respondents and Complaint Counsel conferred by telephone on July 3, 2024. Counsel on the teleconference included Mark Perry, Luna Barrington, and Susan Musser, among others. The parties also further conferred via email; that correspondence is attached as Exhibit A.

/s/ Luna Barrington
Luna Barrington
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10053

CERTIFICATE OF SERVICE

I hereby certify that, on July 8, 2024, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

April J. Tabor
Secretary of the Federal Trade Commission
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW, Rm. H-113
Washington, D.C. 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW, Rm. H-110
Washington, D.C. 205080
OALJ@ftc.gov

I also certify that I caused the foregoing document to be served via email to:

Charles Dickinson	eblackburn@ftc.gov
Susan Musser	pfrangie@ftc.gov
Emily Blackburn	lhall1@ftc.gov
Paul Frangie	jkim3@ftc.gov
Laura Hall	klibby@ftc.gov
Janet Kim	eolson@ftc.gov
Kenneth A. Libby	rpai@ftc.gov
Eric Olson	hrothman@ftc.gov
Rohan Pai	ateng@ftc.gov
Harris Rothman	earens@ftc.gov
Albert Teng	jhamburger1@ftc.gov
Elizabeth Arens	jsmith3@ftc.gov
Jacob Hamburger	kbies@ftc.gov
Joshua Smith	kdrummonds@ftc.gov
Katherine Bies	lhough@ftc.gov
Katherine Drummonds	
Lily Hough	<i>Complaint Counsel</i>

Federal Trade Commission
600 Pennsylvania Avenue,
N.W.
Washington, D.C. 20580
Telephone: 202 326 2617
cdickinson@ftc.gov
smusser@ftc.gov

PUBLIC

James A. Fishkin
 Michael G. Cowie
 Dechert LLP
 1900 K Street, N.W.
 Washington, D.C. 20006
 Telephone: 202 261 3300
 james.fishkin@dechert.com
 mike.cowie@dechert.com

Edward D. Hassi
 Debevoise & Plimpton LLP
 801 Pennsylvania Ave.
 N.W.
 Washington D.C. 20004
 Telephone: 202 383 8203
 thassi@debevoise.com

Michael Schaper
 Shannon Rose Selden
 J. Robert Abraham
 Natascha Born
 Debevoise & Plimpton LLP
 66 Hudson Boulevard
 New York, NY 10001
 Telephone: 212 909 6000
 mschaper@debevoise.com
 srselden@debevoise.com
 jrabraham@debevoise.com
 nborn@debevoise.com

*Counsel for Respondent
 Albertsons Companies, Inc.*

Matthew M. Wolf
 Michael B. Bernstein
 Jason C. Ewart
 Joshua M. Davis
 Matthew M. Shultz
 Yasmine Harik
 Arnold & Porter Kaye Scholer LLP
 601 Massachusetts Avenue, N.W.
 Washington, D.C. 20001
 Telephone: 202 942 5000
 matthew.wolf@arnoldporter.com
 michael.b.bernstein@arnoldporter.com
 jason.ewart@arnoldporter.com
 joshua.davis@arnoldporter.com
 matthew.shultz@arnoldporter.com
 yasmine.harik@arnoldporter.com

John Holler
 Arnold & Porter Kaye Scholer LLP
 250 W. 55th St.
 New York, NY 10019
 Telephone: 212 836 7739
 john.holler@arnoldporter.com

Mark A. Perry
 Luke Sullivan
 Weil, Gotshal & Manges LLP
 2001 M Street NW Suite 600
 Washington, DC 20036
 Telephone: (202) 682-7000
 mark.perry@weil.com
 luke.sullivan@weil.com

*Counsel for Respondent The Kroger
 Company*

By: /s/ Luna Barrington

Luna Barrington
 Weil, Gotshal & Manges LLP
 767 Fifth Avenue
 New York, NY 10053
 Telephone: 212 310 8421

*Counsel for Respondent The Kroger
 Company*

PUBLIC

EXHIBIT A

PUBLIC

From: [Musser, Susan](#)
To: [Sullivan, Luke](#); sonia.pfaffenroth@arnoldporter.com
Cc: matthew.wolf@arnoldporter.com; michael.kientzle@arnoldporter.com; john.holler@arnoldporter.com; [Perry, Mark](#); [Barrington, Luna](#); [Obaro, Bambo](#); emainigi@wc.com; apodoll@wc.com; mike.cowie@dechert.com; [Hassi, Ted](#); [Hall, Laura](#); [Dickinson, Charles](#); [Pai, Rohan](#); [Callan, Nicole](#)
Subject: RE: Part 3
Date: Monday, July 8, 2024 4:24:06 PM
Attachments: [image002.png](#)

Counsel –

As we have consistently explained, we cannot agree to fully adjourn the administrative hearing – which effectively is what your first proposal suggests. We likewise are disappointed in the substance of your alternative proposal seeking to limit both which witnesses Complaint Counsel can call in its case-in-chief as well as the form of their testimony (i.e., calling third parties by deposition designation only). Respondents’ proposal does not appear designed to lead to an efficient and fair administrative proceeding but rather will only serve to hamper the ability of Complaint Counsel to effectively put on its case in the administrative proceeding. As you are well aware, Complaint Counsel bears the burden of proof in the administrative hearing. Respondents’ proposal uses scheduling issues of its own creation to hamstring both how Complaint Counsel can present its case as well as the extent of the case it can present in the administrative hearing. Moreover, Respondents’ proposal also appears to envision the submission of additional evidence from proceedings which Complaint Counsel has limited-to-no access to. Besides being procedurally improper under Rule 3.43(b), evidence from other proceedings is not a substitute for Complaint Counsel’s ability to try its case in the administrative proceeding.

That being said, we are more than willing to work around true scheduling conflicts (days in which a particular witness has to appear in a separate proceeding or is unavailable for personal reasons) and will do our best to avoid calling Party witnesses in both the administrative and federal proceeding. To that end, we request that you provide dates Party witnesses listed on Complaint Counsel’s witness list are unavailable as soon as possible. Separately, we can agree to join Respondents’ request to the court for a virtual hearing. As far as the briefing schedule goes, we are willing to agree to file our response this Thursday (July 11) if Respondents file today and will file our response Friday (July 12) if Respondents file tomorrow.

Best,

Susan

From: Sullivan, Luke <Luke.Sullivan@weil.com>
Sent: Monday, July 8, 2024 11:22 AM
To: Musser, Susan <smusser@ftc.gov>; sonia.pfaffenroth@arnoldporter.com
Cc: matthew.wolf@arnoldporter.com; michael.kientzle@arnoldporter.com; john.holler@arnoldporter.com; Perry, Mark <Mark.Perry@weil.com>; [Barrington, Luna <Luna.Barrington@weil.com>](mailto:Luna.Barrington@weil.com); Obaro, Bambo <Bambo.Obaro@weil.com>; emainigi@wc.com; apodoll@wc.com; mike.cowie@dechert.com; Hassi, Ted <thassi@debevoise.com>;

PUBLIC

<lhall1@ftc.gov>; Dickinson, Charles <cdickinson@ftc.gov>; Pai, Rohan <rpai@ftc.gov>; Callan, Nicole <ncallan@ftc.gov>

Subject: RE: Part 3

Counsel –

Thank you for your email. Respondents are disappointed that Complaint Counsel has rejected Respondents' proposal to recess the evidentiary portion of the Part 3 hearing until the parallel proceedings are complete, which is the most efficient path forward and would preserve the resources of Judge Chappell and his staff, third parties, and the parties. We are also disappointed that Complaint Counsel has declined to submit competing position statements to Judge Chappell on this issue, which would have accelerated the Court's consideration of this important and time-sensitive issue.

Respondents intend to file a motion today or tomorrow that requests that Judge Chappell recess the evidentiary portion of the hearing (with or without opening statements) until the parallel proceedings are complete. Alternatively, if Judge Chappell declines to grant that relief, Respondents intend to ask Judge Chappell to structure the Part 3 hearing in a manner that promotes efficiency and avoids unduly burdening the Court, third parties, and the parties. Respondents intend to propose multiple ways Judge Chappell could structure the hearing to achieve these goals, including the ones listed below.

- Holding opening statements and oral argument on pending motions on or after July 31 (e.g., motions in limine, sealing motions) and then recessing the evidentiary portion of the hearing.
- Holding some trial days until August 6, shortly before the start of the Colorado preliminary injunction proceeding, but tailoring those trial days so they are efficient and not unduly burdensome in one or more of the following ways:
 - Requiring the parties to present only third-party testimony by video deposition designation—to avoid unduly burdening party witnesses who will testify live in the parallel proceedings, and whose trial transcripts could be submitted to Judge Chappell under FTC Rule 3.43(b);
 - Requiring the parties to present only either (a) third-party testimony by video deposition designation or (b) expert testimony from Complaint Counsel's experts; or
 - Requiring the parties to present testimony only from fact witnesses and Complaint Counsel's expert witnesses who they do not intend to call in the parallel federal court proceeding (if any).
- Holding some trial days until August 6, shortly before the start of the Colorado preliminary injunction proceeding, but limiting the amount of trial time—e.g., conducting half days, or having non-consecutive trial days—given the parties' preparation for the other parallel proceedings and corresponding trial schedules.
- At a minimum, recessing the hearing after August 6, close to when the Colorado preliminary injunction proceeding begins (similar to the FTC's counter-proposal to

PUBLIC

Respondents), until the parallel proceedings are complete.

- In all events, having all trial days be virtual given the overlapping parallel proceedings around the country and the associated travel burdens on fact witnesses and experts (who may be sitting for depositions in parallel actions while the Part 3 hearing is scheduled to occur).

Please let us know by 5:00 PM today whether Complaint Counsel would consent to any of these alternative proposals.

Respondents also intend to request that Judge Chappell order Complaint Counsel to submit an expedited opposition. If Respondents file the motion today, we will request a response by Wednesday, July 10. If Respondents file the motion tomorrow, we will request a response by Thursday, July 11. This expedited schedule is necessary given the need for third parties, the parties, and Judge Chappell to have certainty on the upcoming schedule. Please let us know if Complaint Counsel will consent to these expedited response times.

Finally, as the message above indicates, Respondents cannot accept the FTC's proposal of having "full trial days from July 31 to August 9" and then recessing "the Part 3 proceedings during the Colorado and Oregon proceedings," but not the other parallel proceedings.

Best,
Luke



Luke Sullivan

Weil, Gotshal & Manges LLP
2001 M Street NW, Suite 600
Washington, DC 20036
Luke.Sullivan@weil.com
+1 202 682 7006 Direct
+1 202 857 0940 Fax

From: Musser, Susan <smusser@ftc.gov>

Sent: Friday, July 5, 2024 1:35 PM

To: sonia.pfaffenroth@arnoldporter.com

Cc: matthew.wolf@arnoldporter.com; michael.kientzle@arnoldporter.com; john.holler@arnoldporter.com; Perry, Mark <Mark.Perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; Sullivan, Luke <Luke.Sullivan@weil.com>; emainigi@wc.com; apodoll@wc.com; mike.cowie@dechert.com; Hassi, Ted <thassi@debevoise.com>; Hall, Laura <lhall1@ftc.gov>; Dickinson, Charles <cdickinson@ftc.gov>; Pai, Rohan <rpai@ftc.gov>; Callan, Nicole <nccallan@ftc.gov>

Subject: RE: Part 3

PUBLIC

Counsel --

We write to follow up on our meet and confer from July 3. As we have stated both before Judge Nelson as well as in our opposition to your motion to stay the Part 3 proceeding, the FTC's position remains that as the trial on the merits, the Part 3 hearing should proceed as quickly as possible to ensure an expeditious resolution of this case. That being said, if Defendants will join the FTC's request to have full trial days from July 31 to August 9, the FTC would be willing to agree to a joint motion to adjourn the Part 3 proceedings during the Colorado and Oregon proceedings. If the Parties do not agree with this proposal, the FTC intends to oppose Defendants' motion to adjourn during the Colorado and Washington proceedings in full but will remain willing to coordinate scheduling around appearances in Colorado and Washington as well as consider specific requests for witnesses on Defendants' witness list to appear remotely. We note that Judge Chappell specifically requested the filing of a motion, and therefore believe that, if we do not have agreement on a joint motion, the proper procedure would be for Respondents to file their motion to adjourn and for Complaint Counsel to file its opposition in due course.

Best,

Susan

From: Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>

Sent: Monday, July 1, 2024 5:35 PM

To: Musser, Susan <smusser@ftc.gov>

Cc: Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Kientzle, Michael <Michael.Kientzle@arnoldporter.com>; Holler, John <John.Holler@arnoldporter.com>; Perry, Mark <Mark.Perry@weil.com>; Luna.Barrington@weil.com; Bambo.Obaro@weil.com; Luke.Sullivan@weil.com; emainigi@wc.com; apodoll@wc.com; mike.cowie@dechert.com; Hassi, Ted <thassi@debevoise.com>

Subject: Part 3

Susan,

I'm following up on our discussion of the Part 3 hearing.

Respondents plan to serve their Part 3 final witness list on the morning of July 3. Judge Chappell instructed the parties to confer on recessing the hearing after that. Given the time sensitivity of the issue, we propose that the parties meet and confer in the afternoon on July 3 and, if necessary, on July 5 as well. The parties can then plan to submit briefing on this issue on July 8. If we are unable to reach agreement and submit a joint proposal, we believe that filing joint position statements on July 8 is the most efficient path forward. This process will ensure that the parties have sufficient time to confer on this issue and also can promptly receive guidance from Judge Chappell if necessary.

Please let us know what times the FTC is available on the afternoon of July 3 for a meet and confer. We can send an invitation once we are aligned on a time.

Additionally, to make the discussion more productive on July 3, we're sharing Respondents'

PUBLIC

current position on the Part 3 hearing. In light of the Commission denying Respondents' motion for a continuance, we understand that Judge Chappell will gavel in the hearing on July 31. After that, Judge Chappell has discretion over the trial scheduling. Our position is that, once Judge Chappell has gavelled in the hearing, the most efficient path forward is for Judge Chappell to recess the evidentiary portion of the hearing (with or without opening statements, as the Court prefers) until the other parallel proceedings are complete.

This approach would avoid any overlap in proceedings (which involve many of the same witnesses). It also would avoid having a disjointed Part 3 hearing with breaks for other parallel actions, which could hinder the Court's review of the evidence. Finally, recessing the hearing could conserve the resources of non-parties, the parties, and Judge Chappell and his staff. Many party and non-party witnesses from the FTC's final witness list will likely also be witnesses in the parallel proceedings; as a result, the parties could avoid burdening those non-party and party witnesses with testifying twice (or more) by relying on their other trial transcripts in Part 3, rather than having the witnesses testify live multiple times. This counsels in favor of recessing the evidentiary Part 3 hearing after Judge Chappell has gavelled it in.

Best,
Sonia

Sonia Pfaffenroth

Partner | [Bio](#)

Arnold & Porter

601 Massachusetts Ave., NW

Washington, DC 20001-3743

T: +1 202.942.6831

Sonia.Pfaffenroth@arnoldporter.com

www.arnoldporter.com | [LinkedIn](#)

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

The information contained in this email message is intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by email, postmaster@weil.com, and destroy the original message. Thank you.