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

Respondents make an end run around the Commission’s Order denying their request to stay the administrative hearing by asking this Court to stay the hearing until mid-October in contravention of the very purpose of the Part 3 Rules. *See* 16 C.F.R. § 3.11(b)(4) (providing that hearings in merger cases “shall be” held five months after the complaint is filed). While Respondents contend that their position is necessary to avoid trying “multiple cases (with many of the same witnesses) at the same time in different tribunals located thousands of miles apart,” Mot. at 2, Respondents summarily rejected Complaint Counsel’s proposals to accommodate scheduling conflicts. *See* Ex. C; Ex. D.

Respondents now appear before this Court seeking to prevent Complaint Counsel from presenting evidence of the illegality of their merger in the timely manner mandated by the FTC’s Rules or, in the alternative, to prejudice Complaint Counsel’s presentation of evidence.

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Respondents' scheduling issues, however, are a result of both the problematic nature of their merger and their own strategic litigation choices. Respondents should not be allowed to reject Complaint Counsel's overtures to minimize conflicts and instead weaponize self-created scheduling issues to frustrate the intent of Congress and hamper Complaint Counsel's ability to present evidence in the merits proceeding.

Complaint Counsel respectfully asks this Court to deny Respondents' motion to recess the administrative proceeding. Alternatively, Complaint Counsel asks this Court to adjourn only during the Colorado proceeding. Complaint Counsel joins in Respondents' request for a virtual hearing and remains willing to coordinate around witnesses' scheduling conflicts.

BACKGROUND

On February 26, 2024, the Commission voted unanimously to issue an administrative complaint challenging the Respondents' merger and scheduled the administrative hearing to commence on July 31, 2024, as required by regulation. *See* 16 C.F.R. § 3.11(b)(4). That same day, staff filed a collateral action in federal district court under Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b), seeking a preliminary injunction to maintain the status quo during the Commission's administrative adjudication. *See FTC v. Kroger Co.*, No. 3:24-cv-00347-AN (D. Or.).

Judge Adrienne Nelson—the judge presiding over the district court proceeding—held a status conference in March and gave Respondents a choice of starting the preliminary injunction hearing either in May or August, providing dates in late August expressly to avoid substantial overlap with the administrative hearing. *See* Ex. A at 29:11-30:6. Respondents chose to begin the district court preliminary injunction hearing in late August, telling Judge Nelson that “there’s

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an awful lot of lawyers. If we need to go simultaneously, we'll go simultaneously.” Ex. A at 21:11-13; 32:23-33:14.

Separately, Washington and Colorado filed state court suits challenging Respondents' merger on January 15 and February 14, 2024, respectively. Washington sought a permanent injunction, and the Washington state court set a hearing for September 16. Colorado sought both preliminary and permanent injunctions. During a March 25, 2024 status conference in Colorado state court, Respondents' counsel represented that an August 12, 2024 start date for the preliminary injunction hearing “resolves or goes a long way towards resolving the administrative coordination issues.” Ex. B at 38:8-20. The Colorado court set hearings for preliminary and permanent injunctive relief on August 12 and September 30, respectively.

Respondents then moved the Commission to stay the administrative hearing. *See* March 26 Mot. for Continuance. The Commission denied Respondents' request. *See* Order at 3. Respondents then asked Complaint Counsel to agree to adjourn the administrative hearing. While Complaint Counsel did not agree to adjourn the hearing fully, it did offer to adjourn during the Colorado preliminary injunction proceeding, to coordinate witness scheduling around any conflicts, and to present witness testimony remotely. Ex. C. During a July 5 meet and confer, Complaint Counsel asked Respondents whether they have considered agreeing to a stay pending trial on the merits in Colorado. Respondents refused to answer. Complaint Counsel also asked Respondents whether they would abandon the transaction if the district court granted a preliminary injunction. Respondents again refused to answer.

ARGUMENT

I. Proceeding with the Administrative Hearing Is Consistent with the Letter and Spirit of the Commission's Rules

In 2009, the Commission amended its Part 3 Rules, expressly committing itself to expedited administrative litigation. The 2009 Amendments included a new rule providing that an administrative hearing in a merger case “shall be” held five months after the complaint is filed. *See* 16 C.F.R. § 3.11(b)(4). The Amendments also deleted an existing rule that had endorsed the stay of a Part 3 lawsuit pending a decision in a collateral preliminary injunction case. Since 2009, administrative proceedings are stayed only for “good cause.”¹ The Commission adopted these and other measures in response to criticism that the Commission's Part 3 proceedings were “too protracted.”²

Here, the Commission scheduled the administrative hearing to begin within the five-month timeline set by regulation. The Rules require that the hearing “proceed with all reasonable expedition” on that date. 16 C.F.R. § 3.41(b). The Rules further provide that the hearing “shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded.” *Id.*

The existence of a collateral federal court action does not provide a basis to contravene the FTC's Rules and recess the administrative hearing for nearly three months after the date the

¹ The FTC Rules provide that “[t]he pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding,” but that “upon a showing of good cause” the Commission “may order a later date for the evidentiary hearing to commence.” 16 C.F.R. § 3.41(f). As discussed above, Respondents already moved the Commission for a continuance, and the Commission already determined that Respondents failed to demonstrate good cause to do so.

² *See* 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules).

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Commission set. As the Commission explained in its decision denying Respondents' motion for a continuance, the administrative process can proceed on its current schedule, because any potential overlap between the administrative hearing and the federal court hearing would occur at different stages for each (as Complaint Counsel will have already rested its case-in-chief in the administrative hearing well before starting its case-in-chief in the federal court hearing).³ *See* Order at 2. Further, as the Commission observed, this Court can avoid any overlap in the proceedings by recessing the administrative hearing briefly during the federal court hearing. *See id.* The same is true for the Colorado preliminary injunction proceeding.

II. Proceeding with the Administrative Hearing Ensures Efficient Resolution of This Case

Contrary to Respondents' assertions that it would promote efficiency to recess the administrative hearing, Mot. at 5, there are efficiencies to be gained from the current schedule. First, as Respondents acknowledged to the Commission, discovery for both proceedings is already "synchronized" to "simplify logistics between the two proceedings." Mot. for Continuance at 5. Second, the present schedule may streamline the district court and state court proceedings. For example, the courts could receive the administrative record, necessitating less hearing time in those proceedings. In *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018), the district court held a three-day evidentiary hearing on the Commission's preliminary

³ Respondents claim that Complaint Counsel's position is inconsistent with prior statements on the unfairness of litigating multiple proceedings simultaneously. Mot. at 2. But the Commission already considered and rejected this argument, observing: "Complaint Counsel's statement that it would be 'quite a burden and indeed an unfair one to force the FTC to litigate simultaneously' was responding to a proposal that would have required litigating Complaint Counsel's case-in-chief in two places at once, which is not an issue with the current schedule." *See* Order at 3 n.3.

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injunction motion following a month-long administrative hearing. Each side was permitted “to present live testimony from three witnesses,” and the parties submitted “the complete administrative record before the ALJ.” *Id.* at 196. Third, Respondents will suffer less delay before obtaining a decision on the merits after the resolution of the federal court preliminary injunction.

Despite the efficiencies that can be gained from the current schedule, Respondents have made clear that they prefer to litigate the merits of their merger in other courts. During a status conference in the district court, Respondents represented that the preliminary injunction proceeding was “the whole ballgame” and “the whole ball of wax.” *See, e.g.*, Ex. A at 18:1, 23:10. During a Colorado status conference, Respondents called the administrative hearing “a fiction.” Ex. B at 37:18-22. Indeed, Respondents go so far as to argue that evidence from other proceedings (including the state proceedings) will alleviate or even eliminate the need for a proceeding in this Court. *See* Ex. C; Mot. at 2.

But there is no reason to assume that the administrative adjudication will depend on the outcome of either the district court or state court proceedings. While respondents in merger litigations often commit to abandon their proposed transactions if a district court preliminarily enjoins the merger,⁴ Respondents in this case make no such commitment. Instead, Respondents vaguely assert that other proceedings “will likely narrow and possibly eliminate the need for

⁴ *See, e.g., In re Thomas Jefferson Univ.*, Dkt. 9392, 2020 WL7237952 at *1 (FTC Nov. 6, 2020); *In re RAG-Stiftung*, Dkt. 9384, 2020 WL 91294 at *1 (FTC Jan. 2, 2020); *In re Sanford Health*, Dkt. 9376, 2017 WL 6604532 at *1 (FTC Dec. 21, 2017); *In re The Penn State Hershey Med. Ctr.*, Dkt. 9368, 2016 WL 3345405 at *1 (FTC June 10, 2016); *In re Advocate Health Care Network*, 2016 WL 2997850 at *1 (FTC May 6, 2016).

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some or all of the Part 3 proceeding,” Mot. at 2, but Complaint Counsel is not bound by the state courts’ orders, and Complaint Counsel has recently proceeded with an administrative adjudication even after an adverse decision in a preliminary injunction.⁵

Given these facts, moving forward with the administrative hearing is necessary to ensure an efficient resolution of this case.⁶

III. Complaint Counsel Has Already Agreed to Steps to Avoid Undue Burden

Respondents assert that the current schedule is unduly burdensome because it may require witnesses to testify more than once and may require witnesses to travel to different forums. Mot. at 5-6. But Complaint Counsel has already agreed to practical steps to address those concerns. First, Complaint Counsel agreed to request a virtual hearing, or to allow witnesses to participate virtually as needed. Ex. C. Second, Complaint Counsel agreed to coordinate scheduling around appearances in Colorado and Washington. Ex. C. Third, Complaint Counsel offered to stipulate to delay the start of the federal court proceeding until the parallel hearings have concluded. Ex. D. This agreement, in combination with Complaint Counsel’s offer to recess during the Colorado preliminary injunction proceeding (in the event Defendants continue to refuse to moot it), would ensure Defendants have no overlaps in trial dates.

⁵ In *In re Microsoft Corp.*, the Commission returned a matter to adjudication after a district court denied a request for a § 13(b) preliminary injunction. Dkt. 9412, 2023 WL 6389836 at *1 (FTC Sept. 26, 2023). The Commission’s decision to proceed with the administrative adjudication was not perfunctory: discovery reopened, new party and third-party discovery was obtained, and depositions were taken. *See* 2024 WL 659875 at *1, 4 (FTC Jan. 31, 2024).

⁶ Putting aside the outcome of the preliminary injunction, evidence obtained in other proceedings does not eliminate the need to present evidence in the administrative hearing. *See infra* § IV.

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To the extent overlaps cannot be resolved by agreement, Respondents have offered no reason why the parties could not finish the administrative hearing while the district court and Colorado hearings begin. Respondents have retained at least ten law firms to represent them in these matters. And as they told the district court, “there’s an awful lot of lawyers. If we need to go simultaneously, we’ll go simultaneously.” Ex. A at 21:10-13. Respondents also have not explained why their position has changed after the conferences setting schedules in the federal and state proceedings (when the administrative hearing date was already set). By contrast, Complaint Counsel is prepared to move forward as scheduled.

IV. Respondents’ Proposal to Rewrite the Part 3 Rules Would Be Highly Prejudicial to Complaint Counsel

As an alternative to recessing the hearing, Respondents request a cobbled together series of restrictions on Complaint Counsel’s case-in-chief, claiming that these restrictions would promote efficiency. *See* Mot. at 8-9. But this attempt to rewrite the FTC’s Rules would be highly prejudicial to Complaint Counsel. Rule 3.41(c) provides that parties have all rights essential to a fair hearing, including the rights to present evidence and cross examine witnesses. Respondents’ proposed restrictions would deprive Complaint Counsel of these basic rights by imposing severe limits on the categories of witnesses Complaint Counsel could call for live testimony.

As an example, one of Respondents’ proposals requires Complaint Counsel to present third-party testimony by video deposition. While Respondents have been on notice of the schedules at issue for months, they allowed third party *discovery* depositions to proceed, and only now propose that those depositions be retroactively converted to trial depositions. Indeed,

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Complaint Counsel has relied on the ability to call witnesses live and did not videotape depositions.

Respondents also propose barring Complaint Counsel from calling party witnesses, reasoning that those witnesses will testify live “in the parallel proceedings.” *See Mot.* at 8. While trial transcripts from the federal hearing could be submitted to the Court under Rule 3.43(b), relying on transcripts from the state court proceedings plainly violates Complaint Counsel’s right to cross examine witnesses.⁷ The Commission is not a party to the state court proceedings, and Complaint Counsel only has limited access to the records in those cases under their respective protective orders.⁸ Further, those proceedings involve different laws and different local and regional markets. While Complaint Counsel’s case-in-chief will address the impact of the proposed transaction in Colorado and Washington under federal law, it will also address harm to consumers and workers nationwide. By contrast, witnesses that testify about the competitive effects of the merger in one of the state court proceedings will only be examined about the effects in that state. Such transcripts are both not admissible and also cannot serve as a substantive substitute for a record in the administrative proceeding.

⁷ Respondents’ proposal to rely on transcripts from the state court proceedings is also procedurally improper under FTC Rule 3.43(b), which requires: “the Administrative Law Judge must make a finding upon the motion of a party seeking the admission of such evidence that the prior testimony would not be duplicative, would not present unnecessary hardship to a party or delay to the proceedings, and would aid in the determination of the matter.”

⁸ Respondents’ request to rely on those transcripts here is in marked contrast to their position in prior meet and confers, during which they have not consented to Complaint Counsel having access to state court trial transcripts for the purpose of impeachment.

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CONCLUSION

For the foregoing reasons, the Court should deny Respondents' motion and proceed with the administrative hearing on its current schedule.

Dated: July 11, 2024

Respectfully submitted,

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Ex. A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION, et)	
al,)	
)	
Plaintiffs,)	Case No. 3:24-cv-00347-AN
)	
v.)	
)	
THE KROGER COMPANY and)	March 11, 2024
ALBERTSONS COMPANIES, INC.,)	
)	
Defendants.)	Portland, Oregon
)	

Telephone Status Conference

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ADRIENNE NELSON

UNITED STATES DISTRICT COURT JUDGE

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1 (P R O C E E D I N G S)

2 (March 11, 2024; 1:31 p.m.)

3 * * * * *

4 THE COURT: Please be seated.

5 Good afternoon. We're here in the matter of the
6 Federal Trade Commission, et al. versus the Kroger Company and
7 Albertsons Companies, Incorporated. It's Case
8 No. 3:24-cv-00347. This is the time and place set for a status
9 conference on the case.

10 In a moment I'm going to go through the plaintiffs
11 and the defendants, and attorneys can -- the attorneys can
12 place their appearances on the record, but I want to remind
13 everyone that recording of this proceeding is prohibited, that
14 there can be no audio, video, or photo still images in the
15 District of Oregon courthouse. You're clearly in the District
16 of Oregon courthouse, and it extends to judicial proceedings.

17 I also want to say that the Court has placed the
18 Albertsons' proposed redacted complaint, ECF 71-1, under seal
19 because it contains information from the unredacted complaint
20 that has not yet been unsealed by the Court so that we can have
21 all of those in place.

22 So what I want to do is see who is present for the
23 Federal Trade Commission.

24 MR. WEINGARTEN: Good afternoon, Your Honor. Thank
25 you for your time today. This is James Weingarten with the

1 Federal Trade Commission.

2 THE COURT: All right. Is there anyone else from
3 your team here today?

4 MR. WEINGARTEN: Mr. Charles Dickinson is on the line
5 and perhaps a few others, but I believe I will be the primary,
6 if not sole speaker for the FTC today.

7 THE COURT: All right. Do we have anyone from the
8 State of Arizona?

9 MS. WEBER: Yes, Your Honor. This is Jayme Weber on
10 behalf of the State of Arizona.

11 THE COURT: I thought I heard someone else. It's
12 hard to tell. Is there someone else from the State of Arizona?

13 MR. BERNHEIM: Yes, Your Honor. This is Robert
14 Bernheim from the State of Arizona as well.

15 THE COURT: Thank you.

16 Anyone from the State of California?

17 MR. GORDON: Nicole Gordon for the State of
18 California.

19 THE COURT: The District of Columbia?

20 MS. HAMILTON: Yes. Amanda Hamilton for the District
21 of Columbia.

22 THE COURT: The State of Illinois?

23 MR. HARPER: Good afternoon, Your Honor. Paul Harper
24 for the State of Illinois.

25 THE COURT: The State of Maryland?

1 MR. WARREN: Good afternoon, Your Honor. Byron
2 Warren for the State of Maryland.

3 THE COURT: The State of Nevada?

4 MS. FEELEY: Good afternoon, Your Honor. Samantha
5 Feeley for the State of Nevada.

6 THE COURT: I see that we don't have plaintiff on the
7 record -- anyone from the state of New Mexico, because I'll
8 just say that because it says State of New Mexico.

9 (No response.)

10 THE COURT: I didn't think so.

11 State of Oregon?

12 MR. KAYSER: Good afternoon, Your Honor. Chris
13 Kayser on behalf of the State of Oregon. And on the telephone
14 with me today is Tania Manners as well.

15 THE COURT: All right. Ms. Manners, can we at least
16 hear your voice?

17 MS. MANNERS: Good afternoon, Your Honor. Tania
18 Manners on behalf of the State of Oregon.

19 THE COURT: All right. Anyone from the State of
20 Wyoming?

21 (No response.)

22 THE COURT: Anyone from the State of Wyoming?

23 (No response.)

24 THE COURT: All right. Now we'll go to the
25 defendants.

1 For the Kroger Company?

2 MR. CASEY: Good afternoon, Your Honor. John Casey
3 on behalf of the Kroger Company. And I'm happy to introduce my
4 co-counsel.

5 THE COURT: Go ahead.

6 MR. CASEY: Sure. From Arnold & Porter, we have
7 Matthew Wolf.

8 MR. WOLF: Good afternoon, Your Honor.

9 MR. CASEY: We have Sonia Pfaffenroth.

10 MS. PFAFFENROTH: Good afternoon, Your Honor.

11 MR. CASEY: Kolya Glick.

12 MR. GLICK: Good afternoon, Your Honor.

13 MR. CASEY: And from Weil Gotshal, we have Mark
14 Perry.

15 MR. PERRY: Good afternoon, Your Honor.

16 MR. CASEY: And Luna Barrington.

17 MS. BARRINGTON: Good afternoon, Your Honor.

18 THE COURT: Thank you.

19 And for Albertsons?

20 MR. ANGELI: Good afternoon, Your Honor. David
21 Angeli for Albertsons. I believe a number of my colleagues are
22 on the line, including Enu Mainigi and Ted Hassi, who will be
23 speaking primarily.

24 MS. MAINIGI: Good afternoon, Your Honor.

25 MR. HASSI: Good afternoon, Your Honor.

1 THE COURT: Good afternoon.

2 So I just want to make sure that I am clear about
3 what we need to address today. I do understand that there have
4 been redacted complaints submitted by both Kroger and
5 Albertsons, and I understand that you indicated they were
6 unopposed, but they're not the exact same. So I was wondering
7 had there been any discussion among all of the parties whether
8 there would be a joint redacted complaint submitted. And we
9 can discuss that during today's hearing but not necessarily
10 right now.

11 So the Court's first question is, in light of the
12 administrative hearings that are scheduled to begin in July,
13 have the parties contemplated having a hearing on the
14 preliminary injunction or was there going to be a stipulated
15 preliminary injunction submitted? And whoever would like to
16 start.

17 MR. WEINGARTEN: Good afternoon, Your Honor.

18 THE COURT: Go ahead, yes.

19 MR. WEINGARTEN: My apologies for interrupting. Good
20 afternoon, Your Honor. It's James Weingarten from Plaintiff
21 Federal Trade Commission.

22 THE COURT: Yes.

23 MR. WEINGARTEN: The parties have been in discussions
24 about the form of the hearing. I believe that the parties all
25 anticipate some kind of an evidentiary hearing in front of the

1 Court.

2 THE COURT: Okay.

3 MR. WEINGARTEN: And, Your Honor, we have been
4 discussing the parameters of that hearing, including if there's
5 a possibility of coming to agreement on length of hearing, how
6 to proceed with the hearing. But one of the gaining issues,
7 and the reason the parties reached out to the Court, is when
8 will the hearing take place and how much time does the Court
9 have.

10 If I might please have just a moment to provide just
11 a little bit of context about how this proceeding in front of
12 Your Honor will play and interplays with the administrative
13 proceeding, I think that will be helpful. It will shed light
14 on what the parties are contemplating, and certainly what the
15 government is contemplating with respect to a hearing on the
16 preliminary injunction.

17 THE COURT: Go ahead and provide that information.

18 MR. WEINGARTEN: Thank you, Your Honor.

19 So the FTC has authority under the Federal Trade
20 Commission Act to adjudicate the lawfulness of this merger,
21 does it violate the antitrust law. The commission voted to
22 initiate an administrative proceeding that will be the merits
23 trial. That will -- is designed and will determine whether
24 this merger violates the antitrust laws. The merits hearing is
25 scheduled to start in front of an administrative law judge on

1 July 31st. The FTC's rules provide that each side then have up
2 to 210 hours in front of that administrative law judge to
3 present its case, and it provides -- the rules provide for the
4 full scope of discovery, depositions, interrogatories, requests
5 for admissions, third-party discovery, and party discovery.

6 The FTC is proceeding here under another part of the
7 FTC Act, Section 13(b). That's at 15 U.S.C. 53(b), which
8 provides a special claim for the FTC to go to court in federal
9 court and seek a preliminary injunction in aid of the
10 administrative proceeding. The statute provides for a lighter
11 burden for the FTC to win preliminary relief so that the status
12 quo can be maintained while the administrative merits
13 proceeding is pending.

14 And I will recommend respectfully to Your Honor a
15 Ninth Circuit case that is the controlling case on Section
16 13(b) FTC hearings. It's *FTC v. Warner Communications*, 742
17 F.2d 1156. In that case the Ninth Circuit instructed very
18 clearly that the preliminary injunction proceeding is a chance
19 for the FTC to raise substantial and serious questions about
20 the merger, and if it does so, that suffices to grant the
21 preliminary injunction for the duration of the actual merits
22 proceeding in the FTC administrative trial.

23 The role of the district court is to not just
24 receive, of course, the FTC's evidence but also receive
25 evidence from the defense to ensure and satisfy itself of its

1 own independent judgment that the FTC has raised substantial
2 and serious questions about the merger.

3 Now, in this case, of course, the scope of the merger
4 is quite substantial. It's a \$25 billion merger. It involves
5 thousands of stores. As the complaint makes clear, it involves
6 alleged harms in hundreds and hundreds of local communities.
7 There is claims about a supermarket, product market, there are
8 claims about labor and the harms that the merger will inflict
9 on labor.

10 From the government's perspective, Your Honor, we
11 want to take whatever time the Court needs to receive evidence,
12 apply the standard under Section 13(b) and the standard that
13 the Ninth Circuit articulated in *Warner*, to be sure that we
14 bring to Your Honor the evidence that will show there's a
15 substantial and serious question about this merger. We do not
16 expect to have 210 hours in front of Your Honor. We expect to
17 present a small slice of the total evidence gathered and that
18 we will gather to Your Honor. I think, as the complaint shows,
19 the government has gathered substantial evidence from the
20 defendants in terms of their own in-house and party admission
21 testimony. We expect to gather more evidence as we prepare for
22 the July 31st merits trial. But from the government's
23 perspective, we want to be as helpful to the Court as possible
24 in putting forward the evidence that will let the Court
25 determine that the FTC and the government have raised a

1 substantial and serious question about the merger.

2 So, in practical terms, a hearing before the
3 July 31st administrative trial makes sense. We welcome the
4 Court's guidance on what works for the Court. We could do it
5 over a series of days. We just want to make sure, candidly,
6 Judge, that we have the opportunity to present our evidence,
7 but it's understood it's going to be a piece of the evidence,
8 not the whole thing, because that's what the merits trial with
9 the FTC is for. But we have our opportunity to present the
10 evidence, and we are quite confident that Your Honor will see
11 it raises substantial and serious questions about the merger.
12 But we want to do it the most helpful for the Court.

13 So one option is a hearing over a series of days. We
14 would respectfully suggest no later than June so that Your
15 Honor has a chance to receive the evidence, digest it, and even
16 render a decision in advance of the July date.

17 We could also, frankly, Your Honor, as been done in
18 the past where a district court in my experience has waited
19 until after the evidence is introduced in the administrative
20 proceeding. There is a case, *FTC v. Tronox*, T-r-o-n-o-x. In
21 that case the district court waited to receive the evidence
22 until after the hearing, and said, great, I'll take the paper
23 record, I'll take whatever -- a few witnesses from each side,
24 and then I will really be able to adduce whether the FTC can
25 raise substantial questions about the merger, because I'll have

1 the actual hearing record, and then the district court ruled
2 and extended a preliminary injunction.

3 So the short of it is, Judge, we don't want to waste
4 the Court's time, but we certainly welcome whatever opportunity
5 fits within the Court's schedule to present our case, and it
6 could be a matter of days, and we respectfully suggest it be
7 not more than a week per side, because after all, this again is
8 not the merits hearing.

9 But we're open to the Court's guidance and we want to
10 be as helpful to the Court as possible.

11 THE COURT: Well, I appreciate that information that
12 you provided. I did wonder if it would be before or after the
13 merits trial in preparation.

14 I'd like to hear from other counsel. I could tell
15 you that the Court does have availability in early May for a
16 preliminary injunction hearing that would meet the parties'
17 schedule as has been explained, and then we would have other
18 availability, clearly, if it's beyond July.

19 So I don't know who would like -- it's hard because I
20 have some people present in person and some people on the
21 phone. So what I would say is are there any other plaintiffs
22 that would like to weigh in on what has just been shared by the
23 FTC?

24 MR. KAYSER: Your Honor, on behalf of State of
25 Oregon, we would just concur with the FTC's approach.

1 THE COURT: Fair enough.

2 So we'll hear first from Kroger and then from
3 Albertsons, unless you want to jointly address it.

4 MR. CASEY: No, Your Honor. I believe Mr. Wolf will
5 be speaking.

6 THE COURT: Okay.

7 MR. WOLF: Good afternoon, Your Honor. This is Matt
8 Wolf for Kroger.

9 What the FTC terms traditional American grocery
10 stores are under relentless and ever-growing pressure from
11 global behemoths like Walmart, Amazon, and Costco, Target.
12 Walmart's grocery sales alone dwarf the combined sales of
13 Kroger and Albertsons. A merged Kroger and Albertsons, though,
14 would be well positioned to compete in the intensely and
15 increasingly competitive grocery market.

16 In order to challenge this merger, the FTC ignores
17 these realities and turns a blind eye to how consumers actually
18 purchase groceries today. The proposed merger would not only
19 be good for competition, it would be great for consumers,
20 critical for workers. Indeed, it is important for the future
21 of the American corner grocery store.

22 We will prove all of that to you, Your Honor, in the
23 anticipated preliminary injunction proceeding, and the
24 government fears it. And let's all be perfectly clear about
25 this. Your Honor's preliminary injunction order is not only

1 critical, it is likely the decision that decides whether this
2 merger happens.

3 As the government well knows, they've come here today
4 with a scheduling proposal designed to short circuit a fair
5 consideration of the proposed transaction. The difference
6 between the June proposal they make and the July proposal we do
7 is the difference between an extraordinarily expedited but fair
8 process and a fundamental denial of the public's right to a
9 reasonable adjudication of the benefits of the proposed merger.

10 To understand why this is, we need to take a quick
11 step back. To start with, in all but a tiny fraction, a tiny
12 fraction of cases over the last 30 years of FTC challenges, the
13 preliminary injunction decision is dispositive. It is the
14 whole ballgame, Your Honor. If the defendants win, the merger
15 closes. If the government wins, the merger dies. No
16 administrative trial ever happens.

17 In this case the government has spent nearly 18
18 months investigating the merger. They have a massive head
19 start and a massive head start on discovery. They've obtained
20 millions of documents and deposed or gotten declarations from
21 dozens of people. My client, Kroger and Albertsons, on the
22 other hand, have not even had a chance to start issuing
23 discovery because discovery has not opened yet from perspective
24 of the defendants.

25 And to give you just two examples why a July date --

1 THE COURT: So Mr. Wolf, Mr. Wolf, Mr. Wolf.
2 Mr. Wolf, I don't want you to make an argument. I want to know
3 some more about the dates. You'll have an opportunity to
4 present all of your information at a later date, but this is a
5 scheduling conference. I understand what we need to do, and so
6 what I'm trying to understand is are you wanting a preliminary
7 injunction around the May date or are you wanting it at a
8 different date?

9 MR. WOLF: Your Honor, we would like it in July,
10 ideally mid July.

11 THE COURT: I don't know if that would fit the
12 Court's calendar. The Court has other matters that are already
13 scheduled. That's why I was trying to work things out, and
14 quite frankly, July would not work for the Court.

15 MR. WOLF: How does August work, Your Honor?

16 THE COURT: August is not the best. There are some
17 times that are available. So am I hearing from you that you
18 don't want anything before the merits hearing that's scheduled
19 in July -- to begin at the end of July?

20 MR. WOLF: Your Honor, to be clear, the merits
21 scheduled deadline is an artificial one. It's routinely the
22 case that the merits hearing is gaveled in and then stayed
23 during a preliminary injunction. The merits hearing is going
24 to last, if it happens, until mid 2025 at the earliest. By
25 that point, the merger will be dead and gone. So this

1 preliminary injunction, as I said, is the whole ballgame, and
2 so we would request that at the Court's convenience, after
3 we've had a couple months, which is what it's going to take to
4 get discovery from Walmart and Amazon and Costco and others,
5 and get the experts in order, as soon as we get that done, we
6 believe we'll be prepared to have a preliminary injunction
7 proceeding with Your Honor at Your Honor's scheduled
8 convenience.

9 THE COURT: So what you're saying to me, it could be
10 as early as June, but July is preferred, if I'm understanding
11 correctly.

12 MR. WOLF: It would be very challenging to have it in
13 June just because of the simple matter of we're going to serve
14 discovery on Walmart, and Walmart is going to inevitably
15 challenge that discovery in one way or the other. We may have
16 to move to compel. I'm just picking Walmart out of the air,
17 Your Honor. I don't have a specific understanding of the
18 situation because we haven't had a chance to serve discovery
19 yet. So we need to get that discovery integrated into expert
20 reports and then present it to Your Honor.

21 THE COURT: Understood.

22 MR. WOLF: And that takes a period of months.

23 THE COURT: Mr. Weingarten, how do you feel about an
24 August start? I'm trying to look at my calendar. I have a
25 five-week trial that's scheduled that's much of June and a

1 portion of July. So I don't see how that's going to happen.
2 We're having to look at some August dates.

3 MR. WEINGARTEN: Yes, Your Honor. Thank you. It's
4 James Weingarten again from the FTC.

5 With respect to August, the government's respectful
6 suggestion would be we would be in the middle of the July 30 --
7 the administrative hearing that starts on July 31st. It would
8 seem inefficient to have two simultaneous proceedings in
9 August. Therefore, the government's -- the government's
10 respectful suggestion would be do as the *Tronox* court did and
11 receive into evidence after the administrative hearing, that
12 record.

13 THE COURT: Okay.

14 MR. WEINGARTEN: The Court in *Tronox* gave each side
15 two or three live witnesses, and said, please bring them if you
16 want me to hear live testimony, and then the Court was able to
17 decide.

18 I won't respond to all the things counsel
19 suggested -- I disagree with them -- but the July -- one thing
20 I want to emphasize, the commission has set the July 31st date.
21 It can only be moved upon motion of a party to that proceeding
22 and if the commission agrees, and the commission has expressed
23 as a matter of policy and of regulation the government's
24 disdain of the need for expedition because, of course, the
25 parties would like to merge, always say we need to merge

1 quickly and we don't want to wait. That's why the July 31st
2 date is so quick, why it's only five months from the time the
3 FTC initiates a proceeding to the time of the administrative
4 hearing. But after that hearing, the evidence will come in.
5 Your Honor would have the advantage of being able to look at
6 that record. If the endgame here in Section 13(b) is predict
7 the likelihood of success in the admin proceeding, Your Honor,
8 the Court would have the record from the admin proceeding,
9 could review it, hear such additional witnesses as Your Honor
10 would like or feels the need, the Court needs, and then decide,
11 and a preliminary injunction can issue for the rest of the
12 duration of the admin proceeding or not.

13 MS. MAINIGI: Your Honor, this is Enu Mainigi for
14 Albertsons.

15 THE COURT: Yes.

16 MS. MAINIGI: May I have an opportunity to be heard?

17 THE COURT: Yes.

18 MS. MAINIGI: Your Honor, I recognize that the Court
19 obviously has a very busy trial schedule or other hearings
20 scheduled for the summer. I'm wondering whether the Court
21 could enlighten us on what pockets of time the Court might
22 actually have available. So, for example, is the Court
23 available in the late part of June?

24 THE COURT: No.

25 MS. MAINIGI: And are there any dates in July?

1 THE COURT: The Court is not available in June. I
2 have matters scheduled from June 4th through the rest of that
3 entire month. The earliest the Court has available in July is
4 the 18th, and it's just a two-day pocket. There is some
5 availability the week of the 29th of July through the 13th of
6 August. Then the rest of the month is already scheduled.

7 MR. WOLF: Your Honor, this is Matt Wolf following up
8 on Ms. Mainigi's comment. We would respectfully request if we
9 could take those windows that you just outlined and one of two
10 things: either we move and we succeed in getting the FTC
11 proceeding pushed back a couple weeks or there's an awful lot
12 of lawyers. If we need to go simultaneously, we'll go
13 simultaneously. But those windows that you just laid out in
14 July and early August would allow for the incredibly expedited
15 but essential discovery, and then it would also allow for Your
16 Honor to get a reasonable sense of what the issues are in this
17 case for this critical preliminary injunction proceeding. So
18 we would be happy to take the dates you just referenced.

19 MR. WEINGARTEN: Your Honor, this is James
20 Weingarten. May I please be heard?

21 THE COURT: Yes.

22 MR. WEINGARTEN: Thank you, Your Honor.

23 The problem with the suggestion from counsel is maybe
24 a lot of lawyers have entered pro hac vices on behalf of the
25 defendants. I respectfully tender it will be quite a burden

1 and indeed an unfair one to force the FTC to litigate
2 simultaneously. But even putting aside the burden on the FTC,
3 we will do whatever the Court needs to be done. You can only
4 imagine the burden on the party witnesses, the defense
5 witnesses, and even to third parties if again you're having
6 simultaneous cross-country trials, where some will appear in
7 Portland on a Monday and potentially in Washington, D.C. in the
8 FTC courtroom on a Tuesday. So I respectfully suggest that is
9 suboptimal, and if the Court is busy, the *Tronox* solution may
10 be the best available solution.

11 THE COURT: It sounds like --

12 MR. HASSI: Your Honor --

13 THE COURT: Go right ahead. And if you'll identify
14 yourself.

15 MR. HASSI: I'm sorry, Your Honor. This is Ted Hassi
16 for Albertsons.

17 The *Tronox* case is an outlier here, and I don't think
18 we should pretend that it is the normal procedure. In that
19 case, the FTC chose not to seek an injunction and relied
20 instead on the fact that the Tronox merger could not close
21 because they required approval in Europe. And so they waited
22 while the administrative proceeding headed towards a trial and
23 sought just prior to that trial, once the events in Europe
24 suggested that the parties were going to get clearance there,
25 at that point they sought a preliminary injunction. But I

1 don't think we should pretend that that's the normal procedure
2 here. It's the only time that has been done, and I would not
3 suggest that it's necessary.

4 Furthermore, based on my experience, being in Judge
5 Chappell's courtroom, the administrative court, as Mr. Wolf
6 said, the first question he will ask on scheduling is are
7 there -- is there a preliminary injunction proceeding out
8 there, and he'll want to know, because he doesn't want to have
9 a trial if he doesn't need to, because, as Mr. Wolf has said,
10 this case is the whole ball of wax. Other than the *Tronox*
11 case, he has never heard an unconsummated merger, and I don't
12 think he can expect to hear this one if Your Honor gives us
13 those dates in July.

14 MR. WEINGARTEN: Your Honor, if I may. This is James
15 Weingarten again.

16 The reason I raised *Tronox* is we are trying to work
17 constructively with the Court to find dates that work.
18 Mr. Wolf suggested perhaps later in July or August. The point
19 of the *Tronox* precedent is that it shows that a Court can hear
20 the evidence from the administrative hearing after the
21 administrative hearing and render a decision. Whether it the
22 was Europeans in that case or here, where the parties have
23 stipulated to a temporary restraining order, the parties are
24 blocked, the defendants are blocked from merging while the
25 matter is pending before this Court and Your Honor. So there

1 is no need to rush precipitously and step over or on top of the
2 administrative hearing, just as in *Tronox*.

3 I'm trying to think about the administratability of
4 the matter. We can hear the evidence where it is frankly meant
5 to be heard, with all due respect, in the administrative
6 proceeding. That's not the statute, the FTC Act, step one.
7 That's where the merits trial is intended to be. The Ninth
8 Circuit in *Warner* could not be more clear about that, and then
9 Your Honor can receive it. But if Your Honor -- if the defense
10 doesn't like that and Your Honor is inclined to offer dates in
11 May, we can try to work with that as well. The government,
12 again, simply wants the opportunity to the meet the *Warner*
13 standard. We're very confident we can meet it. We will take
14 whatever time Your Honor has and use it wisely, but we will get
15 to you the evidence to show that this merger -- Well, strike
16 that. We don't have to show the merger is unlawful, simply to
17 show there are substantial questions about the merger.

18 THE COURT: Well, the Court understands that there
19 needs to be a hearing, and the Court has given its flexibility
20 in May and in August. I also understand that the decision made
21 around the preliminary judgment -- injunction is the decision
22 that will be the one that has the most weight in all of these
23 proceedings. I understand all of that.

24 I want to make sure that all parties feel that they
25 have the time that they need to present the evidence that they

1 would like, and I understand that we may not be in agreement,
2 because clearly there is a perspective it could happen in May,
3 when I'm hearing others say no way because we'll still be in
4 the middle of trying to gather evidence. So it seems to me we
5 need to look for something later in August, unless somehow the
6 defendants feel they can do an expedited discovery process. Is
7 what I'm hearing.

8 MS. MAINIGI: Your Honor, Enu Mainigi again.

9 THE COURT: Hold on, hold on.

10 MS. MAINIGI: Sure.

11 THE COURT: Let me -- okay. I heard one voice. So
12 I'll have that first voice start.

13 MS. MAINIGI: Your Honor, Enu Mainigi for Albertsons
14 again.

15 THE COURT: Yes.

16 MS. MAINIGI: Coming back on your point on August,
17 just as Your Honor was going over the schedule of what was
18 available earlier, could you just remind us what your available
19 dates are in August?

20 THE COURT: Yes. I'm so glad that I brought all of
21 these various forms of calendars that I have so that I could
22 answer you without having to look through my stack, because
23 that can be so difficult for them.

24 So it's a short week, but I could be available the
25 8th of August through the 19th of August, and then the 26th of

1 August through the rest of the month. Yeah, this is right I'm
2 looking at. And then my clerks and everyone are checking me.
3 And then I have availability in September until the 16th.

4 MR. WOLF: Your Honor --

5 MS. MAINIGI: September what through the 16th, Your
6 Honor?

7 THE COURT: September 2nd -- well, September 3rd,
8 because the 2nd is Labor Day, through the 16th.

9 And I heard another voice.

10 MS. MAINIGI: Thank you.

11 MR. WOLF: Your Honor, this is Matt Wolf for Kroger.
12 From our perspective, those August dates should be sufficient
13 both from a length perspective and from a timing perspective.
14 So we would gladly accept those. And we could perhaps use one
15 of the open July dates as a pretrial or prehearing proceeding.

16 MS. MAINIGI: And Your Honor, from Albertsons'
17 perspective, we concur. We can work certainly within the
18 August dates that Your Honor has offered.

19 THE COURT: So you're talking about the early part of
20 August? I'm just trying to make sure that I understand.

21 MS. MAINIGI: I think, Your Honor, that you indicated
22 the dates through the 19th might be available, and I think we
23 can make that pocket work for sure. And then if there is
24 spillover, which there may well be, because I think we're
25 looking at a -- when all is said and done, a two- to three-week

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1 hearing, we could pick back up on the 26th then at that point.

2 THE COURT: Can you give me an idea, Mr. Weingarten,
3 how long you anticipate -- I heard you say the 210 hours, but I
4 want to know generally how long are those merit hearings.

5 MR. WEINGARTEN: Generally, Your Honor -- this is
6 James Weingarten again. Generally those merit hearings run for
7 five weeks. Now, this case, this has a particularly large
8 scope to it because of the number of communities affected, and
9 it's got two components, the supermarkets component and the
10 labor component, so it would be, I think, at a minimum of four
11 to five weeks. That would be my best guess at this point.

12 I will say I have some concern about the proposition
13 from the defense that we have a three-week hearing in front of
14 Your Honor, and I want to circle back, if I may, on the
15 proposition that the preliminary injunction hearing before this
16 Court is the whole ball of wax. The defense or the parties to
17 the merger may decide not to wait or not to, you know, be the
18 chief reason that this Court moves heaven and earth to make a
19 hearing happen. All of the parties, in my experience, say that
20 they will abandon the merger or that the PI hearing, the
21 preliminary hearing is the whole ball of wax, and then
22 frequently they extend the merger agreement as needed if that's
23 what is required for the preliminary injunction hearing to
24 happen.

25 And I am reminded of -- I believe it was the D.C.

1 Circuit in the *Whole Foods* case potentially where they noted
2 the economic -- if the economics for a deal make sense today,
3 they'll make sense later, and that's true here in particular.
4 If Mr. Wolf were correct, this is all about combining to be
5 more competitive, the combination will make just as much sense
6 in the future as it will today. And the FTC has held -- has
7 continued to move forward with administrative proceedings after
8 a loss in the district court. We are doing that currently in
9 the Microsoft merger. It's on appeal with the Ninth Circuit,
10 proceeding, we're waiting for the Ninth Circuit to rule, but
11 while it's up on appeal after the FTC lost in the district
12 court and the preliminary injunction was denied, discovery
13 continued in the administrative proceeding, and we're just
14 waiting for the outcome of that appeal.

15 So I just want to be very clear. And the standard
16 under *Warner* from the Ninth Circuit is emphatic that the
17 hearing before this Court is not the merits proceeding. I just
18 wanted to make sure that was correct, with all due respect to
19 the Court, we understand the procedure we are working under.
20 We will bring the evidence, Judge, I am very confident.

21 MR. WOLF: Your Honor, this is Matt Wolf.

22 I can respond point by point, but I think at this
23 point we have dates that seem to make sense. We can get this
24 done in roughly two weeks of court dates in August, and I think
25 if we can just lock those down, we can get the parties

1 negotiating in the interim dates, we can get to work on the
2 discovery and we can plan to see you for a, as I said, perhaps
3 a prehearing session in July, the hearing in August, and we
4 will get this on and off promptly and fair.

5 THE COURT: Well --

6 MR. WEINGARTEN: Your Honor --

7 THE COURT: Go ahead. Someone else was saying
8 something.

9 MR. WEINGARTEN: I apologize, Your Honor. This is
10 James Weingarten.

11 Just on the August date, again it doesn't resolve the
12 issue of having a simultaneous proceeding.

13 THE COURT: That's what I was going to say. To me, I
14 would prefer to start the preliminary injunction the week of
15 August 6th, and that way we could just go into September. And
16 that way there's a full three-week time frame but for the
17 holiday.

18 MR. WOLF: That certainly works for Kroger, Your
19 Honor.

20 MS. MAINIGI: Your Honor, would you repeat that? I'm
21 sorry, I missed that.

22 THE COURT: I understand. Starting the preliminary
23 injunction the week of August 26th, and but for the Labor Day
24 holiday of September 2nd, continuing until the 16th of
25 September.

1 MS. MAINIGI: Thank you, Your Honor. And that would
2 also work for Albertsons.

3 THE COURT: Now, I'm trying to also understand what
4 would happen if we did it in May. Because if you issue -- if
5 you start your discovery process, say, tomorrow, that gives you
6 60 days. Is that not enough time, which is about two months?

7 MS. MAINIGI: Your Honor, if I may address this.
8 Again, this is Enu Mainigi for Albertsons.

9 That is just really not enough time, with all due
10 respect. I mean, the FTC here, as Mr. Wolf indicated, has had
11 18 months to do extensive discovery, and a significant part of
12 that discovery is third-party discovery. If this was a case
13 where really the discovery was just going to be of two parties
14 to the action without the need to involve third parties, then I
15 think something like May could be feasible. But in the
16 circumstance like this, when there are third parties involved,
17 the number of counsel involved, the tremendous amounts of
18 documents that have to be reviewed -- just to pause there for a
19 minute, Your Honor. The FTC has produced their investigative
20 file, are in the process of finalizing the production of their
21 investigative file, but there's just a tremendous amount of
22 information in there that needs to be digested by us before we
23 move forward. So I think the August dates will work very well.
24 I just think May would be an impossibility and would really put
25 the parties on our side at a tremendous, tremendous

1 disadvantage, given the fact that FTC has 18 months of
2 discovery on us and has produced tens of -- I think in the
3 order of 13 million documents from 93 separate custodians. So
4 there's -- I could provide more details if the Court was
5 interested, but it's a tremendous amount of information and it
6 is just not possible for us to get that review completed and
7 third parties deposed by a May hearing.

8 MR. WOLF: And then, Your Honor, this is Matt Wolf.
9 Just to add to that -- I agree with everything counsel
10 suggested. After we get the third-party discovery, we then
11 need to take the fruits of that and incorporate that and the
12 experts. Obviously, a big part of this case will be experts'
13 discussion of the relevant market, definition of that market,
14 impacts on that market, and the experts can't write their
15 reports, or at least their useful reports, until they get the
16 actual evidence from Walmart, Costco, Target, Amazon, and all
17 the others that play in this space. So we're talking about one
18 cycle of getting the raw data from the third parties, and then
19 the next cycle of expert discovery, expert reports, expert
20 depositions, then we're ready to present to Your Honor for Your
21 Honor's adjudication.

22 MR. WEINGARTEN: If I may, Your Honor, James
23 Weingarten again.

24 THE COURT: Yes.

25 MR. WEINGARTEN: The -- I want to be very clear about

1 the investigation and the discovery. The vast majority of
2 discovery from the investigation was discovery from Kroger and
3 Albertsons. Kroger produced 7 million documents, Albertsons
4 produced 13 million documents. The defendants, I think, are
5 fairly charged with knowledge of the material they produced to
6 the government over the last 18 months. We have -- the FTC has
7 produced the third-party documents it received. That's 300,000
8 documents. The one wrinkle on that on numbers of the case are
9 the third-party documents, and we have voluntarily begun and
10 completed production of all of those third-party productions to
11 us, so the defendants have them. So I think the situation is
12 more akin to what Ms. Mainigi was talking about. This is a
13 case about competition between Kroger and Albertsons. The vast
14 majority of the evidence will be evidence from Kroger and
15 Albertsons. This is a preliminary injunction hearing under a
16 special standard. The defendants can seek discovery, bring it
17 to the Court, do what they need to do, and they will continue
18 to be able to have discovery as part of the administrative
19 proceeding. So we are comfortable with the May date, and it
20 avoids having to step on top of the administrative proceeding.

21 MS. MAINIGI: Your Honor, again, Enu Mainigi for
22 Albertsons, if I may.

23 It certainly seems that the date that Your Honor has
24 suggested of August 26th would accommodate whatever
25 Mr. Weingarten chooses to do with the administrative hearing,

1 but a May date would not be able to accommodate what we need to
2 do, which a substantial portion of which relates to receiving
3 the testimony of third parties and then preparing expert
4 witness reports, as well as preparing expert witnesses. It
5 certainly seems that the August date that Your Honor has
6 offered that go into September accommodate everyone's concerns,
7 and it is the FTC that chose not to sue in the District of
8 Columbia or any other location that they might normally sue,
9 but the FTC has chosen to come file their request for
10 preliminary injunction in Oregon, and so they've got to work
11 with the availability of the Oregon court, and I do believe
12 that the August 25th forward date accommodates everybody's
13 concerns.

14 MR. WOLF: Kroger certainly agrees with that.

15 THE COURT: Well, those are the dates that we're
16 going to put in place. I need to talk to you, though, about
17 the other dates. We will have motions, the response and the
18 replies, and once we do that, we need to talk about the
19 proposed redacted complaint that we haven't addressed yet.

20 MR. WOLF: Your Honor, this is Matt Wolf. With the
21 hearing date set, might I suggest that the parties meet and
22 confer and offer you a proposal? My guess is we're going to be
23 able to agree on most, if not all, of the interim dates.

24 THE COURT: That's fine.

25 MR. WOLF: If there are a handful of dates we

1 disagree about, we can submit them to you, but I suspect we can
2 be efficient with the Court's time if you just give us a couple
3 days to come up with a stipulated plan with that date in mind.

4 THE COURT: The Court is more than willing to let the
5 parties confer with one another. We definitely encourage any
6 need for conferral at any stage of the litigation.

7 Let's talk about the proposed redacted complaint.
8 Clearly a new redacted copy of the complaint needs to be
9 submitted to the Court because it's not in agreement. I would
10 hope that counsel, based on how you've presented yourselves
11 today, can confer and come up with a proposed redacted
12 complaint that is a joint one, based on what was submitted to
13 the Court sometime this week.

14 MS. PFAFFENROTH: Your Honor, this is Sonia
15 Pfaffenroth for Kroger. We are happy to work together with the
16 parties to put together a single complaint that we can submit
17 to the Court this week.

18 THE COURT: Okay. Do you want to give yourself an
19 internal deadline? Because it sounds like you're all very
20 busy, but I also know that attorneys move their calendars
21 around based on dates.

22 MS. PFAFFENROTH: If the parties could have until
23 Friday to work together to put that together for Your Honor,
24 that would work for Kroger.

25 THE COURT: That would work for the Court if it works

1 for Albertsons.

2 MR. ANGELI: Yes, Your Honor.

3 THE COURT: I see local counsel say yes.

4 MS. MAINIGI: Yes, Your Honor.

5 THE COURT: Since we have a preliminary hearing date,
6 the temporary restraining order will remain in place because it
7 was stipulated. That was the Court's assumption, and I wanted
8 to verify that while I have all counsel present.

9 MALE SPEAKER: Yes.

10 MR. WOLF: Kroger understands, Your Honor.

11 MS. MAINIGI: And for Albertsons, Your Honor.

12 THE COURT: All right. Is there anything else we
13 should do today?

14 MR. WOLF: Not from Kroger's perspective, Your Honor.

15 MS. MAINIGI: No, Your Honor. But we do very much
16 thank you for your time?

17 THE COURT: I think I heard Mr. Weingarten.

18 MR. WEINGARTEN: Yes. I was going to say nothing
19 further, Your Honor. Thank you for the Court's time.

20 THE COURT: Absolutely. Hopefully the Court has
21 indicated its availability and willingness to work with counsel
22 on dates, but if you didn't get that impression, I am saying
23 that. I do understand what an important issue this is, how
24 important it is, it's of national interest and importance, and
25 the Court will be as flexible as the Court can be in light of

1 the other matters that it has before it.

2 And with that, Court is adjourned.

3 MR. WOLF: We appreciate that, Your Honor.

4 MS. MAINIGI: Thank you, Your Honor.

5 MR. WEINGARTEN: Thank you, Your Honor.

6 (Proceedings concluded at 2:20 p.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

March 11, 2024

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

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<p>Denver District Court Court address: 1437 Bannock Street Denver, CO 80202 Phone Number: (303) 606-2300</p>	
<p>IN RE INJUNCTIVE RELIEF: THE PEOPLE OF THE STATE OF COLORADO, <p style="text-align: right;">Petitioner</p> <p>v.</p> KROGER CO ET AL, ALBERTSONS, C&S WHOLESALE GROCERS, <p style="text-align: right;">Defendants</p></p>	<p>Court Use Only</p>
<p>Attorney or Party without Attorney</p> <p>Arthur Biller, Esq. Eric Smith, Esq. Robin Alexander, Esq. Attorneys for Petitioner</p> <p>Randall Miller, Esq. Matthew Wolf, Esq. Sonia Pfaffenroth, Esq. Kathryn Reilly, Esq. Steve Holley, Esq. Christopher Toll, Esq. Michael Cowie, Esq. Attorneys for Defendants</p>	<p>Case Number: 24CV30459</p> <p>Division: 414</p>
<p>TRANSCRIPTIONIST'S TRANSCRIPT/FTR PROCEEDINGS</p>	

The following hearing was held on March 25th, 2024, before The Honorable Andrew J. Luxen, Judge of the Denver District Court.

This transcript is the Arraignment in its entirety as requested by Jeni Murphy, Colorado Attorney General.

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Preliminary Matters

003-048

Transcription Certificate

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1 **(case called at 12:16:27 p.m. FTR recording time)**

2 THE COURT: Here on 24CV30459. State of Colorado versus Albertsons, C&S
3 Wholesale -- sale Grocers, and Kroger Company. Entries, please.

4 MR. BILLER: Good morning, Your Honor. Arthur Biller from the Attorney
5 General's office on behalf of the State of Colorado. And with me at counsel table
6 are Eric Smith and Robin Alexander.

7 THE COURT: Good afternoon.

8 MR. MILLER: Good morning, Your Honor. Randy Miller on be -- uh, Arnold &
9 Porter on behalf of Kroger. I'm joined here by my colleagues, Matt Wolf and Sonia
10 Pfaffenroth.

11 MR. WOLF: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 MS. REILLY: Good afternoon, Your Honor. Katie Reilly with Wheeler Trigg
14 O'Donnell, um, on behalf of C&S and with me is Steve Holley at the end of the
15 table from Sullivan & Cromwell.

16 THE COURT: Good afternoon.

17 MR. TOLL: Good afternoon, Your Honor. Christopher Toll of Holland & Hart on
18 behalf of defendant Albertsons, also appearing today for Albertsons in making any
19 argument is Mike Cowie of Dechert, LLP.

20 THE COURT: Good afternoon. Thank you for coming in. And then there are quite
21 a few people on the computer. Does anyone need to enter who's online? For the
22 Attorney General?

23 MR. BILLER: No, Your Honor.

24 MR. WOLF: Not for defendants, Your Honor.

1 THE COURT: Thank you. And then, um, okay. Here on the issue of setting the
2 preliminary slash permanent injunction hearing and other things that have
3 happened since we came together last. I, um, am aware of the filings from both
4 parties on March 13th, 2024, plaintiff filed a second status report and request
5 to set preliminary injunction hearing. Defendants filed a combined motion for
6 permanent injunction hearing date, incorporating the events from Portland and
7 Washington State. Does it make sense to start with the Attorney General's office?

8 MR. BILLER: Yes, Your Honor. Thank you.

9 THE COURT: You're welcome.

10 MR. BILLER: Um, so Your Honor, I'd like to go through the points that, um,
11 were in the court's order on March 14th. Um, but first just a brief overview. We
12 filed a preliminary injunction motion to preserve the status quo in this case and
13 prevent the defendants, uh, from consummating their merger before a final
14 decision is reached on the merits in this case. We still don't have that relief.
15 Defendants have not agreed to give us that relief here, and their stipulations or
16 agreements in other cases do not offer that relief either. So we still have no
17 assurance that they won't close on the merger before we get a decision on the
18 merits here. Now, last time we were before Your Honor on March 11th, defendants
19 were perfectly agreeable to having a hearing on the preliminary injunction in
20 either July or August on dates that the court had available. Now, they don't want
21 to have a preliminary injunction hearing at all. And through these scheduling
22 maneuvers, they're trying to essentially get a de facto denial of our preliminary
23 injunction motion without ever having to respond to our brief. Their proposal
24 could allow them to close while we're in the middle of trial here, before the
25 court ever reaches a decision. Not only that, they're trying to cram a full trial

1 on the merits into a tiny window in between the end of the FTC case in Oregon and
2 their outside date of October 9th, all at the same time that they're also going
3 to be going to trial in Washington State Court. Now, their proposal isn't even
4 possible due to the court's availability. Earliest availability is September
5 30th, as we understand, but it's also not required by the law, and it's in
6 contravention of Rule 65 and the very nature -- the emergency nature of the
7 preliminary injunction motion that we filed. And it's all a problem of their own
8 making, Your Honor. It took them almost a year after announcing the merger to
9 come up with their proposed divestiture remedy. Now it's taking them several more
10 months to make changes to that divestiture remedy. What's gonna happen here is
11 they're gonna try to drop a new divestiture remedy proposal on us at some
12 unspecified time, more than over a year and a half since announcing their merger,
13 and expect us to just have a couple of short months with it to analyze it,
14 conduct discovery on it, ask questions about it, and do all the other things we
15 have to do to prepare for trial. Simply unworkable. And the whole point of the
16 preliminary injunction is to avoid that kind of situation and preserve the status
17 quo while this case proceeds to trial. So I know one of the points in Your
18 Honor's, uh, order was, um, about, uh, whether we're getting our requested
19 relief. So as I said, we're not. In the Washington case, the defendants have
20 promised not to close before, uh, September 26th. That does us no good because
21 the court's not available for a proposed trial until September 30th, anyway. In
22 the FTC case in Oregon, there's a, uh, temporary restraining order in effect
23 pending a final decision on the FTC's preliminary injunction motion. But there
24 are a couple problems with that. One, the FTC could lose that preliminary
25 injunction motion before we ever get a decision on the merits here or before we

1 even start trial here, or the FTC could settle that case on terms that are
2 unfavorable to Colorado. And that's happened before, Your Honor. In 2019. The FTC
3 let a merger go through between United Health and DaVita, uh, without taking into
4 account the harm that it would have in Colorado where the parties would've had a
5 -- a essentially a monopoly in the Colorado Springs area. So the Colorado
6 Attorney General took action separately and reached a settlement by consent
7 decree, uh, to provide protection for Colorado consumers. And one that hits
8 really close to home in this case, in 2015, Albertsons bought Safeway, FTC let
9 that one go through without taking into account any markets in Colorado. They
10 didn't mention any relevant markets in Colorado in their complaint. They let a
11 divestiture remedy go through that did not address Colorado at all. And within
12 two years, 20 stores in Colorado closed resulting in lost jobs, communities
13 losing their supermarkets. And a lot of those lots, as we've pointed out in our
14 preliminary injunction motion are still, uh, don't have supermarkets today. A lot
15 of them are still vacant. They have gyms, various other things, but not
16 supermarkets. So the point is we can't rely on the FTC and we can't rely on
17 promises that they've made in other cases that don't provide us the relief that
18 we're requesting in our preliminary injunction motion, which is to prevent the
19 parties from merging before we get a final decision on the merits here. Now
20 second, uh, Your Honor asked, uh, why a preliminary injunction hearing here has
21 to proceed before the FTC case in Oregon? Well, for the reasons I mentioned, Your
22 Honor, we're not getting the relief that we've requested and whatever protection
23 there is from the other cases could evaporate before we ever get to a trial here.
24 Meaning a decision here could be meaningless if we go last. Nothing requires a
25 state case to be subordinate as defendants have put it to a federal case. State

1 antitrust law, for one thing, actually predates federal antitrust law. In
2 Congress in passing federal antitrust laws made it clear that it intended to
3 supplement not supplant state antitrust law. There's plenty of cases on that, but
4 Your Honor, the US Supreme Court in California versus a RC America Corp, which
5 was reported at 490 US 93, quote, Congress intended the federal antitrust laws to
6 supplement not displace state antitrust remedies. And there's a citation of
7 legislative history and the court goes on, and on several prior occasions, the
8 court has recognized that the federal antitrust laws do not preempt state law.
9 Now, that's true even if there's interstate commerce where national issues
10 implicated. Again, the US Supreme Court's Standard Oil Company of Kentucky versus
11 Tennessee reported at 217 US 413. The mere fact of state law may also impact
12 interstate commerce, quote, does not invalidate it. Ninth Circuit in Redwood
13 Theaters versus Festival Enterprises at 908 F Second 477. State antitrust laws
14 retain vitality in dealing with matters which significantly affect local
15 interests, even if they also have interstate aspects. And just one more from the
16 Fifth Circuit, Your Honor, Pounds Photographic labs versus Noritsu America Corp
17 at 818 F second 1219, a state is not generally prohibited from giving effect to
18 its antitrust laws because the regulation affects interstate commerce. So the
19 point, Your Honor, is we are co-equal enforcers with the federal government, and
20 Congress recently reaffirmed that role through the State Antitrust Enforcement
21 Venue Act whereby they ensure that State attorneys general, uh, get to litigate
22 and form their choice and are exempt from multi-district litigation and being
23 consolidated with other cases. So state -- uh, state antitrust cases and federal
24 antitrust cases can proceed in parallel together. One doesn't take precedent over
25 the other. Now, defendants also mentioned some efficiencies that they think, uh,

1 would come out of waiting for the Oregon case to go first. Um, there's really no
2 efficiencies that would require waiting for one thing. There's no preclusion from
3 the Oregon case on this case. Defendants say they may be stipulations that could
4 be reached based on witness testimony in the Oregon case. That's all really
5 speculative at this point, at best. It probably won't save significant time. A
6 factual record still has to be established here and whatever efficiencies there
7 may be, go both ways. If this case goes first, they may get some efficiencies in
8 terms of what they have to talk about with Colorado markets in the Oregon case.
9 So any -- any efficiencies, don't counsel one case going in front of the other.
10 And none of that is caused to let them potentially close on their merger before
11 we get a decision on the merits in this case. And the real issue for them is not
12 about sequencing, it's that they just don't want a preliminary injunction
13 hearing. They said it in their submission. Defendants object to any request by
14 the Colorado Attorney General to hold only a preliminary injunction hearing.
15 That's in the last paragraph of their submission. So they don't wanna respond to
16 their PI, uh, they don't wanna have the PI hearing, they just want to push this
17 off as far as they can and hope that they'll be free to close by the -- before
18 this court ends up doing anything. We need to preserve the status quo, and the
19 only way to do that is to hold the preliminary injunction hearing here first. As
20 the court in Rathke said, uh, Colorado Supreme Court 648 P second 648,
21 preliminary injunctive relief is designed, quote, to preserve the power of the
22 district court to render a meaningful decision following a trial on the merits.
23 We can't have a meaningful decision here if they're allowed to close before we
24 ever get there. Now, last, uh, Your Honor, asked about differences between the
25 preliminary injunction motion and the permanent injunction hearing, essentially a

1 trial on the merits, um, and whether there are reasons not to consolidate at this
2 point. First of all, Your Honor, standard procedure to have a preliminary
3 injunction hearing followed by a trial on the merits. Uh, as the Colorado Supreme
4 Court has said *Graham v Hoyl* -- uh, *Hoyl* at 157 Colorado 338. We have
5 consistently held that the matter of a preliminary injunction is to prevent
6 further harm where harm is alleged or otherwise grant emergency relief and that a
7 hearing on the merits is contemplated at a later date. Colorado Court of Appeals
8 similar, *Litinsky versus Querard* 683 P second 816. In granting a preliminary
9 injunction, the court should not attempt to do what can be done only after a full
10 hearing and final decree. Uh, the US Supreme Court has also talked about this in
11 terms of the federal, uh, preliminary injunction standard, uh, in *University of*
12 *Texas versus Camenisch* at 451 US 390. The purpose of a preliminary injunction is
13 merely to preserve the relative positions of the parties until a trial on the
14 merits can be held. Given this limited purpose and given the haste that is often
15 necessary if those positions are to be preserved, a preliminary injunction is
16 customarily granted on the basis of procedures that are less formal and evidence
17 that is less complete than the trial on the merits. A party thus is not required
18 to prove his case in full at a preliminary injunction hearing. The rule -- excuse
19 me, the rule -- the standard on Rule 65 is in line with this procedure. Uh, the
20 rule says the court may order the trial of the action on the merits to be
21 advanced and consolidated with the hearing of the application for a PI. One
22 important thing to note there, in contrary, um, to what these cases all lay out,
23 defendants have it backwards. They wanna delay the preliminary injunction hearing
24 into a trial on the merits where the only thing the rule allows is you have a
25 preliminary injunction hearing and you decide whether you should advance a trial

1 on the merits into that. Um, but the only circumstances where such consolidation
2 is appropriate, uh, is where either you have no dispute on material facts or the
3 identical evidence is gonna be presented at a preliminary injunction hearing as
4 at a trial on the merits. And, um, here obviously we've got material facts and
5 dispute, and the evidence is not going to be identical. Uh, and the main issue
6 there is with the divestiture remedy. First of all, as we've argued in our
7 preliminary injunction motion, divestiture remedy is not a proper topic for a
8 preliminary injunction hearing. Uh, it's a remedy. And the question of remedies
9 are to be considered at a trial after determination of liability. Under this
10 approach, Your Honor, and upon further consideration, we actually think the
11 preliminary injunction could be held in less than two weeks. We think we could do
12 it in a week, um, as long as the divestiture remedy is not part of the scope. And
13 I'll just point out that defendants also characterize divestiture as a remedy. In
14 the motion to dismiss they just filed last week, no fewer than six times they
15 refer to the divestiture as a remedy. Even on their introduction on page 2,
16 Colorado specific equitable relief, i.e divestitures would be the remedy. So even
17 if, um, you do hear a -- a divestiture remedy at the preliminary injunction
18 hearing, um, it's not gonna be the same divestiture remedy at trial more so --
19 uh, most likely. They've already shown us that they wanna move the goalposts on
20 the divestiture remedy. They made their proposal back in September. They've been
21 working on changing it. We don't know when it's gonna be changed or what those
22 changes are gonna be look like -- are gonna look like, but it's gonna come at
23 some point in the future. And whatever divestiture remedy exists now is not the
24 one that we're gonna have at trial. So trial's gonna look a lot different than a
25 preliminary injunction hearing either way. The divestiture remedy also is

1 unprecedented in its complexity. Typically in these -- in these -- in merger
2 cases, you're looking at divestiture of a standalone business line. You've got
3 one market or maybe a couple big markets that you're looking at, and you've got
4 an established competitor who's coming in as a divestiture buyer, uh, who needs
5 very little transition assistance. We've got the complete opposite here, which
6 makes it incredibly difficult to evaluate and requires a lot of time. They're
7 transferring a hodgepodge of assets from both sides of the transaction in various
8 places. We've got highly localized markets that we need to look at. And we've got
9 a new competitor in C&S that's got none of the established infrastructure that
10 national grocery chains like Kroger and Albertsons have. That means you've got
11 ana -- analyze every single local market to understand the effect of the
12 divestiture on those local markets. You've got to understand how all the pieces
13 fit together that they're trying to give to C&S. And overall, you got to see if
14 C&S can replace the competition that's gonna be lost from, uh, Albertsons merging
15 into Kroger -- Kroger. And it all gets harder when you have a moving target. So
16 just to put that in perspective, they've been working on this for over a year-
17 and-a-half and counting, and they want to give us just a couple short months with
18 whatever divestiture remedy they come up with and expect us to be ready for
19 trial. It's just unworkable. Couple other key differences between a preliminary
20 injunction hearing and trial on the merits, Your Honor, the evidentiary standards
21 are different. They're relaxed at a preliminary injunction hearing, and on a
22 preliminary injunction, we only need to show a reasonable probability of success
23 pursuant to the wrath beef factors, uh, whereas at trial we'll have to obviously
24 meet our burden. Rule 65 nevertheless does provide for efficiencies. Uh, the rule
25 says even when consolidation is not ordered, any evidence received upon an

1 application for a preliminary injunction would be admissible upon a trial on the
2 merits, uh, and becomes part of the record on the trial and need not be repeated
3 upon the trial. So any evidence that's entered at the preliminary injunction
4 hearing as long as it's admissible at trial, becomes part of the trial record. So
5 there's still efficiencies in having the preliminary injunction hearing first.
6 Couple last words on defendant's proposal, Your Honor. Their proposal still has
7 us going to trial twice because what they wanna do is they want to bifurcate
8 Count I, which is the claim against the merger, uh, and Count II, the claim on
9 the no poach non-solicitation agreements. So they wanna go to trial on the
10 merger, uh, in September or some early time, and then they wanna have a second
11 trial on Count II at some point thereafter. Again, we just want a preliminary
12 injunction hearing and a trial on both claims. That's it. Which is standard
13 procedure. And there's also no reason to bifurcate, uh, the claims in this case
14 anyway. Uh, because, uh, the no poaching non-solicitation agreement is relevant,
15 uh, to, uh, the merger claim. It's evidence of coordinated effects. Um, so
16 there's really no reason to split those up and have two trials. The only reason
17 the parties are arguing for all this, Your Honor, is because they're
18 contractually required to do so. Merger agreement Section 6.3 E basically says
19 that if any proceeding is instituted challenging the merger as violating any
20 antitrust law, uh, Kroger has to, among other things, uh, take all actions to
21 eliminate each and every impediment under any antitrust law to close the
22 transaction prior to the outside date. So the only reason they're making this
23 argument, which doesn't make any sense, is because they're contractually required
24 to do it. Nevertheless, they can still modify their contract, they can extend the
25 outside date. It's not uncommon to do that in merger cases. We cited an example

1 in our submission from the AT&T Time Warner merger, where the court made it clear
2 that there wasn't gonna be a decision on the merits before the outside date. So
3 the court extended the outside date, provided several months more time, trial was
4 completed, a decision, uh, was rendered before that extended outside date.
5 Actually, had a happy ending for those parties because they ended up merging. Um,
6 and if -- if the parties, uh, can't -- it's on the parties to explain why they
7 can't go beyond their outside date. Uh, as the DC Circuit said in FTC versus H.J.
8 Hinez 246 F Third 708, if the merger makes economic sense now, the appellees have
9 offered no reason why it would not do so later. Meaning if they think the merger
10 makes sense today, they should explain why it doesn't make sense to on October
11 10th or November 1st or December 30th or some other date. So what we're proposing
12 is that we have a preliminary injunction hearing in July or earlier, followed by
13 a trial on the merits, standard procedure. And, uh, we can figure out a trial
14 schedule later. But the most important thing is to preserve the status quo and
15 make sure that the parties don't merge so that we can have a meaningful decision
16 in this case, Your Honor.

17 THE COURT: Before you --

18 MR. BILLER: Answer any questions, or --

19 THE COURT: Thank you.

20 MR. BILLER: -- I'd also like to reserve some time after defendants.

21 THE COURT: We -- we have plenty of time. I -- I don't have anything else
22 this afternoon. Couldn't the State join the FTC action in Oregon?

23 MR. BILLER: We could have, Your Honor, but there was no requirement on us to
24 do that.

25 THE COURT: If -- if the state were, could you -- could the state do it now?

1 Is it too late?

2 MR. BILLER: I don't know what the deadline is in that case for an amended
3 complaint. Um, so I -- I don't know whether procedurally that's still possible
4 there. Um, but again, Your Honor, we are co-equal enforcers with the federal
5 government. We have every right to enforce our own state antitrust laws, and the
6 defendants, uh, have to comply with the antitrust laws in every state as well as
7 the federal antitrust laws.

8 THE COURT: Your position on five days now, is that -- you -- you think the
9 entire both sides can present their evidence in -- in five days?

10 MR. BILLER: On a preliminary injunction hearing, yes.

11 THE COURT: On the preliminary injunction hearing,

12 MR. BILLER: Yes, we think we can do it in a week, uh, provided that the
13 divestiture remedy is not within the scope of that hearing, which we think it
14 should not be.

15 THE COURT: Is that five days estimate based on conferral or is that Your
16 independent estimate?

17 MR. BILLER: Independent, Your Honor.

18 THE COURT: Thank you.

19 MR. BILLER: Thank you.

20 THE COURT: For the defendants.

21 MR. WOLF: Thank you, Your Honor. Matthew Wolf, Arnold & Porter, for Kroger,
22 to -- to begin with to answer Your Honor's question about Oregon. Uh, not only
23 are they free to join Oregon, we're intending as part of another process to
24 actually formally invite them to join the Oregon proceeding. Uh, we will have no
25 objection and we think it would, uh, ensure, uh, consistency and -- and allow for

1 a number of efficiencies.

2 THE COURT: Do you believe they -- they're going to be forced to accept that
3 invitation?

4 MR. WOLF: It's an interesting question, Your Honor. There -- there are -- as
5 presented in the motion to dismiss, there are significant dormant Commerce Clause
6 issues. Uh, and there is a bit of a disconnect between the statements of
7 liability in, uh, the AG's complaint and the remedy they seek. And bit of a
8 disconnect might be a bit of an understatement on my part. Uh, and depending on
9 what the remedy they're actually seeking, uh, I'm not sure if they're correct
10 when they say there's no collateral estoppel effect, I'm not sure they're -- uh,
11 that they're not gonna be -- there isn't gonna be a authority that suggests they
12 should and perhaps must join an Oregon depending upon the relief they seek. Um,
13 at the moment, they're seeking an injunction against the merger as a whole,
14 including as to the other 49 states. And we think that that is impermissible. But
15 if they're gonna stick to their guns, uh, that -- and they're not gonna amend
16 their complaint to make it clear that they're only focusing on a Cal -- Colorado
17 based remedy, uh, that not only should the complaint be dismissed, but if they
18 want to, uh, seek relief, they should do it, they have to do it in the context of
19 a federal i.e. national proceeding.

20 THE COURT: Thank you.

21 MR. WOLF: Um, so, Your Honor, I -- I -- I have to confess, I'm a bit
22 perplexed, uh, as to where counsel my friend started. We have made it clear that
23 we are willing, uh, to enter a stipulated TRO similar to the one we agreed to
24 with Washington State in the context of this proceeding. And let me, before I get
25 into argument, just lay our proposal on the table. We propose a September 9th

1 permanent injunction trial date, and we would agree not to close pending the
2 start of that hearing. Uh, that's not a trick, Your Honor. It's just that once
3 we're in front of you, if anything changes, you can argue -- enter a TRO from the
4 bench if something happens. Uh, so we would propose that we start on September
5 9th, we believe with a Colorado focused inquiry if we are there, and I'll talk
6 about in a moment why I think this is all moot. Uh, but with a Colorado focused
7 inquiry, we are confident that we can do the trial as a -- as a whole in Your
8 Honor's permitted trial dates. We do not think this is gonna be terribly
9 complicated or terribly long focusing on Colorado conduct, Colorado impact,
10 Colorado law. So let's next turn to the divestiture proposal. We -- we heard a
11 lot about divestitures. At the heart of this deal is a proposal to our friends at
12 C&S. I will tell you, Your Honor, that we have reached a handshake deal with C&S
13 for an enhanced divestiture package. Now, had Colorado not decided to go it
14 alone, to break off from the other nine states and file suit on their own, they
15 would already have great insight into that package because the FTC already knows
16 a substantial part of that package. But nonetheless, we hope in the coming days
17 that we will be presenting to the AG and to Your Honor, uh, a -- uh, in writing a
18 new divestiture proposal based on the old one, but enhanced that we believe will
19 obviate all of the Colorado Attorney General's concerns. We would be surprised,
20 although never shocked, uh, we would be surprised if in light of that new
21 divestiture proposal Colorado maintains the suit at all. We believe that all of
22 their stated concerns will be addressed. If they aren't, if they still maintain a
23 suit, however, that suit would be substantially narrower and that suit could
24 certainly be resolved in the time allotted by Your Honor, beginning on September
25 9th. Uh, we were suggested that we've moved the goalposts. Uh, another way to

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1 read that is we've listened to the regulators. We put forward a proposal
2 originally that we believed would solve all of the antitrust concerns that the
3 federal and state regulators would have. Well, not surprisingly, but
4 unfortunately, they presented additional concerns to the parties during the
5 negotiation process. The divestiture package addresses those concerns. So it's
6 not moving goalposts, it's responding to authorities. That's what we're supposed
7 to do. That's what we've done. And we believe that this package will make this
8 merger not only lawful, but much more than that essential, entirely beneficial to
9 customers, to the labor unions, to the states, to the federal government, to the
10 community at large. This will be a positive, not only a net positive, but an
11 overwhelmingly beneficial transaction for those that shop in the neighborhood
12 grocery stores around this country. And that's in part because of this improved
13 divestiture package we've been talking about. I'm gonna talk briefly because I'm
14 sure Your Honor has questions about some of the individual points that counsel
15 made. Uh, first of all, the -- the -- the topic of efficiencies. If Your Honor
16 remembers, I barely remember from high school geometry, but Venn diagrams. The
17 Colorado action is a lesser included -- uh, Colorado claims are a lesser included
18 part of the Oregon claims of the federal claims. Colorado is addressed. It's part
19 of the Oregon complaint. Of course, the opposite is not and cannot be true. Any
20 issues as to the 49 states other than, uh, Colorado will not be tried, cannot be
21 tried, should not be tried in this courtroom. So efficiencies are a one-way
22 street. Whatever happens in Oregon will benefit us here, uh, but -- but not in a
23 material way, uh, vice versa. So why are we having this discussion today? And I -
24 - I'm gonna end on this and -- and then take Your Honor's questions. The state
25 has told us multiple times today, and I'll -- I'm use -- as best I could, write

1 this down quickly, quote, we are not required to pro -- prove our case in full at
2 a preliminary injunction proceeding. And that's the point of state's argument. At
3 a PI hearing, a preliminary injunction hearing, you're gonna hear a lot from the
4 state about lesser burdens, about not needing to put on their entire case, about
5 forgiving evidentiary problems, about looking the other way to loopholes in gaps
6 in their evidence, in their proof. Because in all -- in all, Your Honor, all
7 we're trying to do is maintain the status quo. But as his -- as counsel
8 suggested, if they can quote, maintain the status quo, end quote, pass the
9 October end date, they've killed the deal. And that's the purpose here. They
10 haven't even proposed a permanent injunction trial date. They haven't even
11 suggested when that would be. Well, they can fully prepare for a September 9th
12 trial date, a permanent injunction trial date on the merits with -- with the 18
13 month head start they had when they were coordinating with the federal
14 government. We -- we need to only do this once, and then the lower standard will
15 not be used as a cudgel against my client and my colleagues' clients to kill the
16 deal on a, quote, less than proving this case in full, end quote, standard. Uh,
17 and -- and that's the -- that's -- that's the -- that's what's happening here. We
18 want this court if it's going to consider the issues, if it's not obviated by
19 happened -- what happened in Oregon, if it ever has to get to the issues in play
20 after the state reviews the divestiture package in total, we want this court to
21 review it based on a full, fair and complete record to decide what is best for
22 Oregon consumers, what is -- excuse me, Colorado consumers, what is best for
23 Colorado laborers, not based on an incomplete, lower standard threshold for
24 preliminary injunctive relief. With that, Your Honor, unless you have questions,
25 I will relinquish.

1 THE COURT: I -- I do. Uh, what's special about October 9th? As in, why --
2 why does that become sacrosanct in a way when other courts in this court are
3 trying to figure out how to set these hearings and resolve the complaints that
4 have been raised?

5 MR. WOLF: I -- I -- I understand Your question, Your Honor, and obviously at
6 the end of the day, Your Honor, drives the train on his schedule. Uh, there are,
7 just to give some practical considerations, the outside date is the date that,
8 for example, the creditors for C&S have committed, and I -- I -- I don't wanna
9 get into too much specific, Steven, please jump up if I'm saying something I
10 shouldn't be saying. But the folks that have lined up to finance the deal have
11 made commitments up to and including, but that end, on that date. There are
12 shareholder votes that have contemplated up to including that date. So it is --
13 it is not to say that that date can never be moved, but to say that it is not a
14 material, a -- a -- a significant, a very high hurdle to clear to get the date
15 moved would be untrue. There are real world implications, real world challenges
16 to moving that date. If Your Honor told us we had no choice, we'd figure it out.
17 Um, but -- but it would not be trivial. It would not be difficult. It would not
18 be cheap. It would not be free. It would not be pain free.

19 THE COURT: And the Federal District court matter is set from, for three
20 weeks, from August 26th through September 13th?

21 MR. WOLF: Your Honor, that's how much time she's allotted. We suspect it
22 will be materially less than that. Um, that was -- I -- I would hope we'd get
23 that done in 10 days, maybe less. That's how much time she booked though.

24 THE COURT: Your idea is that we would start here on September 9th, and then
25 Washington State starts the following Monday on September 16th?

1 MR. WOLF: That's what -- what we're proposing, Your Honor. That's correct.

2 THE COURT: How long for the entire thing, from Your perspective, both the --
3 and -- and is it correct that this would be the preliminary permanent injunction
4 and claim 2, the competition issue?

5 MR. WOLF: Your Honor, claim 2, we believe, and -- and as laid out in motion
6 to dismiss is, uh, facially, uh, not a viable claim under the statute that was
7 cited. It just doesn't carry water. The other thing about Claim 2 is it's about
8 past events. So there's no injunction component to that. Um, there's no reason we
9 would have to address it concurrently. They're free to, if they want to cite
10 evidence from the activities, as, you know, if they want to paint my, uh, client
11 with a brush, they're free to do that to Your Honor. We think it will suggest
12 what -- what they think of the merits issues. But -- but as to the actual remedy,
13 we don't think the law provides for it. We think it'll be disposed of in the
14 motion to dismiss. And it certainly is the tip of the tail of the dog in this
15 dispute and shouldn't guide our consideration of when we should try the -- the --
16 the merger issues in play. Did that answer Your Honor's question?

17 THE COURT: There's nothing about claim 2 from Your client's perspective that
18 says it has to go at the same time as --

19 MR. WOLF: Absolutely not.

20 THE COURT: -- either of the injunct -- potential injunctive reliefs, and it
21 -- it's a separate issue based on the allegations that I understand, or --

22 MR. WOLF: It could be tried in 2025, Your Honor, if a trial's necessary. But
23 let me assure you, if that's the only thing outstanding, I am completely
24 confident that the AG's office and our clients would -- if it survives a motion
25 to dismiss, it would be resolved in 15 minutes.

1 THE COURT: What about the argument from Mr. Biller that the Attorney General
2 has a right and it is proper for the antitrust allegations that have been raised
3 here to be dealt with in Colorado, independently of timelines, et cetera, in
4 other states, in federal district court?

5 MR. WOLF: Your Honor, I -- I -- that is true as far as it goes. Um, now of
6 course, the Colorado, um, statute is modeled, is explicitly based on federal
7 antitrust law. It's largely, if not entirely of coextensive, um, with -- with
8 federal antitrust law. But in any event, uh, there is no doubt that the FTC has a
9 nationwide purview. And when the remedy they currently seek is a nationwide
10 remedy as a matter of comedy, as a matter of the dormant Commerce Clause, as a
11 matter of common sense, the discussion about whether a decision about whether
12 this deal goes through in total should be made at the national level. If there
13 are Colorado unique issues, uh, then Colorado can uniquely, uh, address them and
14 it's fair for them to do so. But obviously that's a much narrower set of issues
15 than will be tried in Oregon that will -- and not co-extensive with what will be
16 tried in Washington. And so I -- I -- I'm not suggesting that Colorado doesn't
17 have an important role to play, I'm just saying it's a much narrower role.

18 THE COURT: Couldn't the district court judge in Oregon say, I'm going to
19 address -- her order, could address every state involved in this merger except
20 for Colorado? Could -- is that a possible outcome from her decisions?

21 MR. WOLF: That's an interesting question, Your Honor. I -- I -- first of
22 all, I don't believe the FTC would agree to that because the FTC has a nationwide
23 mandate, so I can't imagine they would skive that off, um, and I can't imagine
24 the judge would do so without the FTCs approval, uh, because the FTC has co-
25 extensive national -- coextensive right to police antitrust law in Colorado. So I

1 -- I don't envision that as a practical matter happening. I don't know as a legal
2 matter whether that's possible, and I just can't answer that standing here today,
3 Your Honor,

4 THE COURT: What prejudice does Your client and the other defendants suffer
5 by a preliminary injunction hearing starting on July 19th in this courtroom?

6 MR. WOLF: The prejudice -- um, there's some practical prejudice, which I'll
7 get into in a moment. The primary prejudice though, arises from the maintenance
8 of the preliminary injunction until the permanent injunction. Right. We -- we
9 haven't yet heard when -- if you were to tell me a preliminary injunction enters
10 on July 19th and a permanent injunction -- we -- we'll stipulate to that if we
11 have a permanent injunction hearing starting on September 9th. Um, the point is,
12 when is -- when is that if under this lower threshold, this lesser standard, they
13 win, where they couldn't win under the ultimate standard, when is that yoke off
14 our back? When do we get to prove under the -- the real standard, the full
15 standard, when do we get to prove that this merger is good for the American
16 people and therefore we can close? Uh, what we've heard for that from them the
17 only -- the inclination like late fall, well, that's too late. Uh, the -- the
18 merger has died at that point without ever having put their proof to the paces,
19 paces to the proof. I'm not sure how that phrase goes, but I think you get --
20 Your Honor understands my point. So it's -- it's not -- the -- the PI is
21 inconvenient in a way we can deal with, but it's inconvenient in the midst of all
22 these other proceedings. The problem is having the preliminary injunction hanging
23 over us, preventing the deal closing even after we win in Oregon, even after we
24 win in Washington, just waiting for a trial on the merits here, uh, to pass a
25 point where the deal could die, uh, uh, because of outside date issues. And

1 otherwise, as we await a trial that now suddenly the AG is no longer motivated to
2 have on an expedited basis. They've got what they want, then the longer they
3 delay the -- the permanent injunction, the more likely they kill the deal without
4 having to -- ever having to prove the deal was unlawful.

5 THE COURT: Thank you.

6 MR. WOLF: Thank you, Your Honor.

7 THE COURT: Since we have the time, I'm gonna let everyone say everything
8 they wanna say today. So reply.

9 MR. BILLER: Thank you, Your Honor. Um, let me address the points that, uh,
10 Mr. Wolf made. Um, so, uh, first of all, uh, in terms of whether we would join
11 the Oregon case, we're not gonna join the Oregon case. We filed this case under
12 the Colorado State Antitrust Laws. Um, we think they -- that, you know, as I
13 said, the merger has to be legal under federal and state antitrust laws. Um, and,
14 uh, this goes back to some of the points that I was making, but for example, the
15 -- the Redwood Theaters case from the Ninth Circuit that I cited, uh, that
16 similar argument was made there. It's a nationwide industry. It should be
17 governed by federal laws. Court rejected that argument and said that the state
18 antitrust laws still apply. They're not preempted. Um, and I don't want to put
19 the cart before the horse too much here, but the motion to dismiss that they
20 filed raising the dormant Commerce Clause arguments. I think the cases that we've
21 laid out show that those arguments have no merit. Um, but we look forward to
22 briefing that in full. There's no -- there's no constitutional bar, uh, to us
23 bringing our own claim under our own state laws, uh, for conduct that they're
24 doing in the state of Colorado, they're trying to merge in this state, and they
25 have to comply with our laws. Uh, in terms of the divestiture remedy, Your Honor,

1 um, this is the first that we've heard of a -- of a handshake deal as -- as Mr.
2 Wolf put it. We appreciate that they, you know, their position that they're
3 listening to the regulators. But forgive me if I feel like Charlie Brown kicking
4 the football here, because we've heard that before. We heard that the remedy that
5 they were proposing in September was gonna address all our concerns. After that
6 there was a lot of discussions over the course of the next five months. We laid
7 out our concerns. They said they were hearing our concerns. They proposed certain
8 modifications. Uh, I think there were two or three additional modifications that
9 were being negotiated. Uh, none of those addressed our concerns. Um, and, uh,
10 just to set the record straight, Your Honor, the FTC terminated discussions, uh,
11 with the parties at the end of January. It wasn't that we went off on our own.
12 Uh, we were very much part of the group investigating this the whole time. The
13 FTC sent them a notice under their timing agreement that they had, which
14 basically triggered a 28 day period in which the FTC either had to file a case
15 where the defendants would be free to close. But that notice was basically the
16 FTC telling them, we don't think more discussions about the divestiture remedy
17 would be, uh, productive at this time. So we're triggering that timing under the
18 agreement. Um, so there were no more discussions being had at the time that we
19 filed our suit and the FTC filed their suit just two weeks after us. Um, in terms
20 of a trial date, Your Honor, um, you know, we think this should really start from
21 the proposition that this is a highly complex case. As I mentioned, it's got an
22 incredibly complicated divestiture remedy that is unprecedented. Uh, and starting
23 from that point, you know, the normal procedure here would be to have a trial
24 within a year of filing. We are willing to move faster. We understand there are
25 concerns about, you know, holding this deal up for too long. We'd be willing to

1 go towards the end of the year, maybe even November, which is just a couple of
2 months more than what they're asking for. But in the meantime, we need to have an
3 assurance that they're not gonna close. And even when Mr. Wolf was up here, he
4 didn't give that assurance. He's saying, well, we're willing not to close up to a
5 certain day. And, you know, he accuses us of using the preliminary injunction
6 motion as a cudgel. They're trying to use the outside date as a cudgel on us and
7 on the court system because they're saying everything's got to be done before
8 October 9th. Never mind that we're taking a year and a half to try to figure this
9 thing out. You guys now all have to hurry up and get this thing done before
10 October 9th. And as -- you know, as to the financing and the shareholder votes
11 and all those kinds of things, you know, uh, they may be carry some weight. But,
12 uh, those are private equities as -- as courts have filed, including the, uh, FTC
13 versus H.J. Heinz case that I referred to earlier. Um, you know, the parties
14 there made similar arguments about a preliminary injunction, and the court said
15 those are private equities. They don't outweigh the public interest in making
16 sure that Colorado consumers are protected, uh, and that they don't close the
17 merger before we get a decision on the merits in this case. Um, and I think I've
18 addressed the points that I wanted to, uh, address for Mr. Wolf. So if, Your
19 Honor, has any other questions.

20 THE COURT: Mr. Wolf's proposal about it stipulating to a preliminary
21 injunction until a September trial on the merits, what are Your thoughts about
22 that?

23 MR. BILLER: Again, he's not stipulating to a preliminary injunction. He's --
24 he's -- he's stipulating to it on the condition that everything gets done before
25 a certain date. And, uh, you know, we frankly disagree that we could get it all

1 done before October 9th. Uh, if -- even if we start on September 9th, uh, it's a
2 complex trial, it's gonna take more time than, um, you know, a preliminary
3 injunction hearing would take, obviously. Um, we don't think there's as -- as
4 many efficiencies, um, as they do. We think a trial on the merits would probably
5 be something more like three weeks in this case. Um, and so to get the trial
6 done, and for, Your Honor, to enter a decision all before October 9th, we think
7 is incredibly impractical. Not to mention the burden that it puts on the
8 government, uh, on the front end. They say they've got a handshake deal, sounds
9 like something's not signed yet, so they're still working things out. We don't
10 know when we're going to get that, uh, revised, uh, remedy proposal. And once we
11 get it, if you're talking about a September 9th trial date, that means you have
12 to close fact discovery July, maybe early August at the very latest, and then do
13 expert discovery. So they're only giving us a couple months with something that
14 they've now been trying to figure out for over a year and a half. It's just
15 unworkable. And -- and again, it's -- it's on them to show why they can't wait
16 just a couple more months to give the government more time to evaluate their
17 divestiture remedy and get prepared, uh, for a full trial so everybody can put
18 all their evidence on the record. Uh, we can do this in a thorough way, we can do
19 it the right way, and we can make sure we get the right decision.

20 THE COURT: Your proposal for trial on the merits is October, November, is
21 that correct?

22 MR. BILLER: We'd be prepared to go in November, Your Honor.

23 THE COURT: Three weeks all in is Your estimate?

24 MR. BILLER: We think so, yes, Your Honor.

25 THE COURT: There had been some discussion about a stipulated temporary

1 restraining order when we were here last, if I remember correctly. Let me look at
2 my notes. Uh, I'm sorry. A protective order, not a temporary restraining order.
3 Protective order. Has there been any progress on that or anything --

4 MR. BILLER: Yes, Your Honor.

5 THE COURT: -- I need to do about that?

6 MR. BILLER: There is -- I think we're down to one final issue. Uh, we sent
7 them some comments back on Friday afternoon. Um, so, uh, we're hopeful that we
8 can work out that last piece, um, and get something in the court very soon.

9 THE COURT: I just didn't wanna leave that out there and -- and not address
10 it. If there was something I needed to do from Your perspective, is whatever
11 discovery that needs to occur possible before a potential start day of July 19th?

12 MR. BILLER: Yes, Your Honor. We -- for a preliminary injunction hearing, I -
13 - we think we just need some limited expedited discovery, uh, and we think we
14 could do that in the time that we have. Uh, and again, a -- a question is gonna
15 be whether the divestiture remedy is within the scope of that hearing. Uh, we --
16 as, as I've said, we think it's not in the scope of a preliminary injunction
17 hearing, and that significantly, uh, streamlines the case because of how
18 complicated the divestiture remedy proposal is. Um, so we think we could
19 absolutely be prepared for a PI hearing in July.

20 THE COURT: Thank you. Mr. Wolf.

21 MR. WOLF: Yes, Your Honor. Um, first of all, on the last point, divestiture
22 will absolutely be part of whatever hearing or hearings we have. It's part of the
23 federal preliminary injunction hearing in August. Uh, it is as the fed -- the
24 Supreme Court has told us the preferred approach, uh, the preferred analysis in
25 cases like this. And Your Honor, we've -- we've heard about burden and why

1 November is so important. Let's just focus on the fact for the moment that the
2 federal government and nine states have told the judge in Oregon that they're
3 gonna be prepared to go to a hearing in late August on nationwide issues on the
4 entirety of the merger. All discovery will be completed by then. Orders of
5 magnitude larger than the discovery that will be required for the permanent
6 injunction case here. Uh, so there is no reason why the state with its resources
7 can't be ready for a September 9th trial on the Colorado specific issues. It --
8 it's -- it's -- it's all gonna be concurrent anyway. We're gonna be coordinating
9 among the three cases so that depositions don't get taken three times so that
10 documents produced in one case can be used in the other case. They're all gonna
11 be coordinated. And so for discovery to be complete in time for an August -- late
12 August PI proceeding, clearly it will need to be done in time for us September
13 proceeding in this court. Uh, so the burden issue rings hollow in light of the
14 circumstances. There is no way, no reason to believe, no logical, uh, basis to
15 say that it's too burdensome or not practical to be ready for a September trial
16 on the merits on Colorado specific issues. Uh, unless Your Honor has further
17 questions, uh, I -- I -- I believe I've addressed everything that counsel just
18 addressed you.

19 THE COURT: You mentioned when I asked you about the prejudice question with
20 respect to starting on July 19th, are there other things that you haven't brought
21 up about why Your clients wouldn't be able to proceed with preliminary injunction
22 on the 19th?

23 MR. WOLF: Your Honor, the primary reason is the risk of the preliminary
24 injunction staying open past October 9th. That will be incredibly detrimental,
25 likely fatal to the deal. Putting that aside for the moment I just talked about

1 the coordination of discovery. We're gonna be coordinating discovery with
2 Washington State and with the federal -- uh, federal Trade Commission and nine
3 other states with a target of late August being completed. If we have a
4 preliminary injunction proceeding in mid-July, we're gonna be off track with the
5 other two proceedings. We're gonna have to do things more quickly than the other
6 two proceedings. They're gonna be taking our CEO, we're gonna be taking their
7 expert witnesses. We're gonna have to be getting the expert witness, uh, uh,
8 reports much quicker. We're gonna be having to do the third party discovery much
9 quicker. Third party discovery is gonna be critical in this case, Your Honor,
10 because obviously what -- uh, Amazon and Walmart and Costco and -- and all the
11 other grocery providers, what their business looks like, what their perception of
12 the market and competitors looks like is an essential part of this case. To get
13 that discovery in time for a mid-July hearing will be a herculean challenge. Um,
14 we already have started to see objections to our subpoenas from some of these
15 parties. We're gonna have to throw work through motions to compel process and
16 Bentonville, Arkansas and Seattle, Washington, and -- and the like. And that will
17 be challenging to get done in time. And then we're gonna be right back in the
18 circumstance where plaintiff says, well, Your Honor, that doesn't matter that
19 they don't have Amazon's discovery or Walmart's discovery 'cause we don't need a
20 complete record. We can do this by the seat of our pants. Just enter the PI and
21 let the chips fall where they may. Well, we know what that will mean for the
22 deal. It will mean it's evaluated on a far less than complete record, and it
23 threatens to be killed when it shouldn't.

24 THE COURT: What as to Mr. Biller's thought that a full trial on the merits
25 would require three weeks?

1 MR. WOLF: That is an astounding estimate from our perspective, Your Honor.
2 We're gonna do, ideally two thirds of that in Oregon, where the judge has
3 acknowledged it's the whole ball of wax. I mean, there's no illusion that it will
4 be a partial proceeding for a nationwide consideration of the merger. We're gonna
5 do that in two to three weeks. If -- if -- if we can do 50 states in two to three
6 weeks, we can do one state in a lot less than that.

7 THE COURT: Doesn't the Attorney General here get to develop his factual
8 record and -- and ask witnesses, Your experts, have their witnesses come in and
9 say consumer behavior competition, all of this stuff?

10 MR. WOLF: Uh, absolutely. But it will be limited to that -- the -- within
11 the -- the boundaries of the state. So the question is, what does the market look
12 like in Denver? What does it look like in Colorado Springs? We don't need to
13 worry about what the market looks like in Southern Los Angeles or -- or Austin,
14 Texas. All that testimony that will be relevant potentially in Oregon will be
15 utterly unnecessary here. So counsel absolutely has a right to put on his case
16 and to fully try the case, but to try it limited to the state of Colorado. And
17 that takes a lot less time

18 THE COURT: Because the scale is smaller?

19 MR. WOLF: Right. Because we're talking about one -- and this is not right,
20 it's probably more like one 30th of the markets, but we -- we'll just call it
21 that because one 30th of the markets, based on my back of the envelope math will
22 be in play in this case as opposed to in Oregon.

23 THE COURT: Your proposal of September 9th for two weeks say, because it
24 sounds like you think it's less than three. The original asks have been two --
25 one week, two weeks.

1 MR. WOLF: I -- I would -- I -- yes, for sure. One week. We -- we believe we
2 could do it in one week if that's what Your Honor's schedule requires. If you had
3 a little more time, we could probably benefit from it, but there's also things we
4 can do in advance of it, pretrial and all that we can get an awful lot done in
5 advance.

6 THE COURT: Which leaves one to three potential weeks to make a decision and
7 issue an order. Two of those weeks, I'm not in the country, the 16th through the
8 27th, which creates a logistical challenge on contemplating and issuing an order,
9 not to mention the opportunity for the parties to issue -- uh, submit proposed
10 findings. Other things, I imagine, uh, there would be a request for proposed
11 findings because, um, that's just a hunch.

12 MR. WOLF: Yeah --- yeah.

13 THE COURT: But that's my expectation, which would severely limit the amount
14 of time there is for not only those proposed findings to be prepared and consider
15 -- or considered and prepared, but also then for me to do something by Thursday,
16 October 10th. Let me put that out there. Let me -- Mr. Biller, do you have
17 anything further?

18 MR. BILLER: A couple of things really quick, Your Honor.

19 THE COURT: And -- and -- and let me say this before that, if any of Your
20 colleagues, since I know Your interests are aligned, but there's a lot of folks
21 over here, if anyone else wants to say anything, I'm happy to hear it as well as
22 those that are online.

23 MR. WOLF: It would only be those in the courtroom, but I'd leave it to them
24 whether they have anything to add.

25 THE COURT: Thank you. Mr. Biller.

1 MR. BILLER: Thank you, Your Honor. Just, uh, really quickly to add some --

2 THE COURT: Same is true for Your colleagues as well. So --

3 MR. BILLER: Yes, thank you, Your Honor.

4 THE COURT: -- I'm trying to restrict you here.

5 MR. BILLER: Um, just to add some context to a few things that Mr. Wolf was
6 pointing out. Um, first of all, he kind of makes this point about, well, the
7 other ones are -- the other cases are gonna be ready, why can't you be ready?
8 Well, they've got a head start on us because they've already started discovery in
9 those cases. Uh, Washington filed a month before we did. They've now been
10 litigating that case for two months. They've started discovery. FTC likewise has
11 already started discovery. Um, we haven't yet because we've been dealing with
12 these scheduling issues, uh, and everything else. So we're a little behind the
13 eight ball in terms of those other cases. Uh, number two, uh, the Oregon
14 proceeding, again, is a preliminary injunction proceeding. It's -- it's not a
15 full trial. The FTC administrative proceeding, uh, which is the equivalent of the
16 trial and the merits, uh, in -- in the FTC, each side gets 240 hours to present
17 their case. Okay. So it's not quite as simple as -- as, uh, Mr. Wolf would like,
18 uh, the court to believe as -- once you get into an actual trial on the merits.

19 THE COURT: When is that set? Has that not been set?

20 MR. BILLER: The -- the part 3, I believe is -- or the administrative
21 proceeding is going kind of in parallel with the, uh, proceeding in Oregon. And
22 then it's gonna last obviously a lot longer after the Oregon proceeding is
23 concluded because of how much time is allotted to each side.

24 THE COURT: The -- so the -- the federal judge does whatever she does, and
25 then there's this administrative law hearing in front of an FTC, ALJ or the

1 commissioner, whatever it is. That's concur -- happening -- happening
2 concurrently?

3 MR. BILLER: Yes, Your Honor. So the -- the -- the point of the Oregon
4 proceeding is it's a preliminary injunction to stay -- to -- to prevent the
5 parties from closing, pending a decision on the merits in the administrative
6 proceeding. So the administrative proceeding, I believe, is starting on July
7 31st. And then because of how much time there is, it's gonna extend sometime into
8 the fall. Obviously, if the FTC loses the preliminary injunction hearing, the
9 parties will be free to close, notwithstanding that the administrative proceeding
10 is ongoing. Um, but the point there, Your Honor, is that that's how long it takes
11 to try one of these complex merger cases. And yes, we're not gonna have as many
12 issues here as they're gonna have in the FTC case, which is looking at, uh,
13 markets all across the nation. But there's gonna be a lot more overlap than just
14 the markets in Colorado because there are national issues with respect to the
15 divestiture remedy that are relevant here, because the question is whether C&S
16 can survive as -- and be a viable competitor to Kroger in the way that Albertsons
17 is today. And to evaluate that, you have to look at the nationwide assets that
18 they're getting. And we've made arguments about the problems with the current
19 remedy proposal in terms of the national infrastructure that C&S does not have
20 and won't be getting. Um, so it's not just quite so simple as that. We're just
21 gonna be looking at Colorado here. There's gonna be a lot more over -- uh,
22 there's gonna be a lot more that needs to be looked at in this case than just
23 that. Also, Your Honor, just -- just for some further context, um, during the
24 investigation, the FTC issued what are called second requests to the parties,
25 which is basically their subpoena to get more information about the merger. There

1 was incredible amount of information produced, uh, in response to those second
2 requests. We got over 20 million documents from the parties, but we also issued
3 our own, uh, investigative subpoenas to both Kroger and Albertsons and C&S. And I
4 don't have the numbers in front of me, Your Honor, but I can tell you I have a
5 stack of hard drives in my office with terabytes of data that were produced just
6 in response to our Colorado subpoenas. So there's -- there's a lot of
7 information, uh, and discovery that's relevant to Colorado that the FTC isn't
8 necessarily covering, even though they're also doing a very thorough job. And
9 that goes into why we think that a trial here is gonna take more time than --
10 than defendants do. Um, and -- and just, uh, one last thing, uh, or two last
11 things, Your Honor. Your Honor pointed out that we'd be asking for proposed
12 findings and conclusions of law. Absolutely, yeah. We would be. We think that
13 would be very helpful to the court, and some time needs to be built in to that as
14 well. So again, even under their proposal, it's impossible to get this done
15 before October 9th. You know, and just, you know, Your Honor, this is a \$24
16 billion merger. Kroger has been touting, publicly, how great this is gonna be for
17 everybody. If it's gonna be so great, they should be willing to extend the
18 outside date, because if it's great today, it's still gonna be great after
19 October 9th. And I'm sure they can figure that out.

20 THE COURT: Could the permanent injunction hearing begin on September 30th,
21 go through October 18, from your perspective?

22 MR. BILLER: That'd be very difficult to accomplish, Your Honor. Um, and
23 again, that'd be with the -- with the caveat that we would have protection that
24 they wouldn't close, uh, before a decision is rendered here. But assuming they
25 wouldn't close before a -- a decision is rendered here, um, you know, as I said,

1 we'd be thinking more about starting in November. We can, maybe, look at October.
2 I just think September is -- is really difficult, given where we are. Again,
3 we're a couple months behind where the other cases are, because we haven't
4 started discovery yet.

5 THE COURT: Could the Attorney General have, uh, are you available for the
6 preliminary injunction hearing only August 12 through 16?

7 MR. BILLER: Yes, Your Honor. We could do that.

8 THE COURT: Let me hear from Mr. Wolf, as to both of those time suggestions.
9 Your -- I -- I appreciate that the September 30th date pushes past October 10th.
10 But that aside, would the defendants be available for those three weeks? And if
11 we don't use all three, we don't use all three.

12 MR. WOLF: Your Honor, I'll -- could I, uh, have your forbearance for a
13 moment, before I answer your question, just to --

14 THE COURT: Sure.

15 MR. WOLF: -- make one comment? I be --

16 THE COURT: Yes.

17 MR. WOLF: -- I began by talking about, uh, being a little perplexed that
18 the one comment counsel had made. I am now a little perplex as to a second column
19 -- comment, excuse me. Uh, we were told that they're behind on discovery. And I
20 would just note, by the way, and digression footnote pin.

21 THE COURT: Of course.

22 MR. WOLF: The parties have agreed, subject to Your Honor, that we can
23 begin discovery, notwithstanding, not every T is crossed and I dotted in the
24 protective order. Can we get Your Honor's blessing on that joint agreement?

25 THE COURT: Mr. Biller?

1 MR. BILLER: Yes, Your Honor. This is something that we just discussed
2 over the weekend --

3 MR. WOLF: Yeah.

4 MR. BILLER: -- uh, with the parties, and reached the agreement
5 yesterday, that, uh, we'd be able to start discovery now, finally.

6 THE COURT: Fine with me. If you need me to sign a -- a protective order or
7 you wanna enter into a stipulated protective order, and then you wanna modify it
8 later, because things unfold, just send it over. I'm happy to, to sign it, no
9 problem.

10 MR. WOLF: Thank you, Your Honor. And I wasn't intending to suggest that
11 counsel was delaying at all. I mean, it literally -- it did just happen over the
12 weekend. I just wanted to call attention to it.

13 THE COURT: Okay.

14 MR. WOLF: But the perplexity, if that were a word, is we're told that
15 they're behind on discovery. Yet, Mr. Biller has terabytes of data and hard
16 drives from the subpoenas they issued. Uh, that is the discovery they need,
17 They've already gotten in the context of the investigation, at least the vast
18 majority of it. We're the ones that haven't gotten discovery. So there is -- in --
19 - in theory, we should be the ones asking for more time, not the government. But
20 we're sufficiently interested in expedition, that we're willing to do everything
21 we can, um, to -- to get things done in the timeframe we've suggested. The
22 government already has the discovery, because they serve -- they have the right,
23 as a -- a -- an administrative body, to serve the subpoenas and gotten the
24 discovery. Now to answer your question, Your Honor -- um, the October 9th date is
25 a creature of contract. So we are not in -- at -- in this position -- I cannot,

1 standing here right at this moment, say yes or no, because other parties have to
2 say yes. What I can tell you is, that Kroger, for a limited time, contemplated,
3 if we started September 30 -- and so we're talking about a roughly 30 day
4 extension. Roughly, Your Honor. I'm not trying to pinch you too much. But I
5 gather that's the kind of timeframe you're contemplating. Uh, Kroger would be
6 willing to do that. But obviously, we have to -- to discuss that with our
7 contracting parties. And we could get back to you promptly on that, if you gave
8 us a timeframe to get back to you. Um, in terms of the preliminary injunction
9 proceeding in August, we would be available, but it wouldn't -- it would solve
10 some of the logistical problems, but it would not solve the problem of trying
11 this on a lower standard. Again, if -- if counsel agreed that the preliminary
12 hearing would be to the same standard as a permanent injunction hearing, we're
13 all for it. If they agree that they're not gonna say, well, we don't have -- we
14 don't have this proof, but we don't need to have this proof, 'cause all we're
15 trying to do is maintain the status quo for some indeterminate period of time and
16 kill the deal that way -- if that's not what they're doing, we're fine with it,
17 then. I mean, that's essentially what's happening in Oregon. And by the way, Your
18 Honor, just to talk about this part three proceeding, just to an -- you -- outta
19 curiosity -- in the last 30 years of FTC, uh, jurisprudence, the number of times
20 that a part three trial has actually occurred, when there's been a prior
21 preliminary injunction proceeding, can be counted on one hand. That part three
22 trial us a fiction, as the judge in Oregon acknowledged, as the FTC essentially
23 acknowledged. The whole ballgame's the PI. If we win, the deal closes. If we lose
24 it assuredly -- nearly assuredly won't. Historically, that's the way it's
25 happened, again, all but a half dozen times in 30 years. So the part three trial,

1 the chances, I mean, I turned to my more learned colleagues at counsel table --
2 but the chances that a trial actually happens in the FTC -- 1%, 2%, 3%, that
3 might be generous. I'm getting a nod. So my nods, uh, my -- my colleagues who've
4 spent time there agree. So --

5 THE COURT: But -- but it could.

6 MR. WOLF: It -- it --

7 THE COURT: It could get to that point.

8 MR. WOLF: Yeah, in -- in theory, we could be starting on July 31st. But the
9 administrative law judge from the FTC -- we had a hearing last week -- already
10 asked both parties to agree to continue the trial till after the PI, in
11 recognition that the PI is the dispositive issue in this case. So, although in
12 theory, it could con -- occur concurrently, that's certainly not the
13 administrative law judge's preference. Um, so I -- did I answer Your questions,
14 Your Honor?

15 THE COURT: You did. Uh, so the reason I'm -- I'm suggesting August 12, is
16 to accommodate what I heard I think you say, is that July 19 is aggressive and
17 was gonna conflict, or -- or whatever, mess up, your -- your carefully planned
18 discovery program, with respect to discovery in other cases, too.

19 MR. WOLF: It resolves or goes a long way towards resolving the
20 administrative coordination issues. There's no doubt. And we appreciate that,
21 Your Honor. What it doesn't do, is resolve the lower burden of proof argument the
22 government's gonna make to try to squash the deal, um, on the purported, let's
23 just maintain the status quo, um, in -- in -- in favor of a trial that will
24 happen too late, under this schedule.

25 THE COURT: Anything else?

1 MR. WOLF: No, Your Honor. If you wanted to address the, uh, anymore on
2 that -- the topic of, if we started September 9, how that would work logistically
3 with Your Honor's schedule, there are a couple approaches that other judges have
4 taken in similar circumstances I can talk to you about. But if that's not a
5 concern, I won't take Your -- Your Honor's time.

6 THE COURT: Go ahead.

7 MR. WOLF: Your Honor, let's say we conclude on, um, September -- pick your
8 date -- mid-September sometime. Uh, and Your Honor is concerned that you need
9 more time, uh, to issue an order. You don't know which way you're gonna come
10 down. Your Honor, obviously, has the liberty to enter a TRO for a week, a two
11 weeks, three weeks pending, uh, Your -- Your, Your Honor's ruling. Um,
12 alternatively, if Your Honor is confident that we're gonna win, uh, but you --
13 you, um, need more time to write the opinion, you can say that, or vice versa. So
14 Your Honor has the discretion, using temporary injunction tools, that if you find
15 -- you may find after the evidence, you're sure one way or the other, and you
16 don't need the time. Or you may find that a one pager solves the problem. But if
17 that's not the case, you have -- you have, obviously, absolute right. Never want
18 to tell a judge what right he or she has. But you obviously have the right to
19 say, I need two more weeks, I need three more weeks, and I'm gonna enter this
20 order to make sure I have those two or three more weeks.

21 THE COURT: It doesn't strike me that this is something where I'm gonna be
22 able to rule from the bench and then supplement with a brief written order. Is --
23 is that a -- is that a fair --

24 MR. WOLF: That's probably true, Your Honor.

25 THE COURT: Okay. All right. Thank you. Anything further, Mr. Biller?

1 MR. BILLER: Uh, Your Honor, just very briefly. Um, he, uh, Mr. Wolf,
2 uh, keeps talking about the -- the lower burden of proof, um, that they're gonna
3 be, uh, subject to. Two weeks ago, when we were before Your Honor, nobody had an
4 issue with holding a preliminary injunction hearing in this case. Uh, this whole
5 thing is about the, uh, again, they wanna push this thing off until after, uh,
6 the federal proceeding, uh, in Oregon. And they're hoping they're gonna get a
7 good decision there, and they're gonna be free to close, and everything here is -
8 - is gonna be moot. And, you know, the preliminary injunction motion has a -- a -
9 - a lower form, uh, lower burden, because it's a temporary form of relief. They
10 can, you know, uh, present their full defenses at a hearing. And we're not trying
11 to put it off indefinitely. As we've talked about, we're just trying to get a
12 little bit of extra time, and an assurance that they're not gonna close. Um,
13 because of the complex nature of this and truly the divestiture remedy here is
14 unprecedented. And it's incredibly difficult to analyze. And we just want to make
15 sure that we have, uh, sufficient time after they've had a year and a half to try
16 to figure it out, that we can also, uh, investigate it, get our discovery on it,
17 which by the way, we don't have any discovery on the new divestiture remedy,
18 because we don't know what it is. Um, so, uh, that's really the purpose of the
19 motion.

20 THE COURT: Thank you. I'm gonna take 10 minutes and I'll come back out. Be
21 in recess till then. Just take one second. Back on in 24CV30459, State of
22 Colorado versus Albertsons CNS Wholesale Grocers and Kroger. Did you have
23 something else, Mr. Wolf?

24 MR. WOLF: Your -- Your Honor, just logistically, and you may have this --
25 the -- the horse may be out of the barn, or cow might be out of the shed, or

1 whatever. Um, but we were spending time with the calendar during the break. And
2 in theory, Your Honor -- and I don't know whether this is available -- if we did
3 longer trial days, 9 to 13, to accommodate the government's concern that a -- a
4 week won't be enough, um, we could get it all -- we believe we could get a trial
5 done 9 to 13. And then we could spend the subsequent two weeks preparing fact --
6 findings of fact, conclusions of law. And then, Your Honor either would or
7 wouldn't have sufficient time before the 9th. But if you don't have the time, then
8 you can take whatever steps you need, uh, to give yourself the time to -- to
9 rule, subsequent. But at least then, the two weeks of -- from roughly September
10 15 to 28, would be the parties -- the -- would be -- have laboring, or, uh, and
11 when you returned, you would have fresh and clean smelling stacks of findings and
12 conclusions.

13 THE COURT: This is based on conferral, or this is the defendant's
14 (inaudible) --

15 MR. WOLF: No, I'm sorry. This -- this is actually local counsel looking at
16 a calendar, uh, and coming up with a really good idea that she said, go -- go
17 flag it. And so I'm giving credit where it is appropriately due?

18 THE COURT: Thank -- thank you. Mr. Biller? That -- that, again, would be
19 one hearing, as to claim one, preliminary and permanent. Claim two goes
20 elsewhere.

21 MR. WOLF: Yeah, we could do that whenever Your Honor -- we could do it a
22 month later, whatever -- whatever works.

23 THE COURT: Thank you. I should say, counsel and, uh, all counsel are --
24 have returned. Go ahead.

25 MR. BILLER: Your Honor, that -- that doesn't work, for the reasons that

1 we've been talking about today.

2 THE COURT: This is what I would like to do. I'd like to set this for
3 preliminary injunction hearing, to begin on August 12, 2024, through August 22nd,
4 2024. And the reason nine days, at this point, is I'm going to invite briefing on
5 the divestiture issue and whether or not that's appropriate within the scope of
6 preliminary injunction. It -- I just don't know enough about it. and I've -- I've
7 heard the brief comments here today. But I -- I do think it makes sense for me to
8 spend some time with that concept. If that is not part of the preliminary
9 injunction hearing, how long do you think the preliminary injunction hearing
10 would take -- Mr. Biller?

11 MR. BILLER: If the divestiture remedy is not in the scope, Your Honor, we
12 think we could do it in a week.

13 THE COURT: Week.

14 MR. BILLER: Five days.

15 THE COURT: Mr. Wolf?

16 MR. WOLF: I -- I -- I don't wish to be overly dramatic, but we are both
17 sufficiently confident in our position. And, um, it's sufficiently important to
18 the deal that we will not have a preliminary injunction hearing, if -- if
19 divestiture is not part of it. There -- it will -- there'll be no point, I think,
20 is my point.

21 THE COURT: Will not have the hearing if divestiture is not part of it?

22 MR. WOLF: Correct.

23 THE COURT: I understand -- I understand what you're saying. You're --
24 you're not asking for anything at this point. You're just saying, depending on
25 how the Court -- how that -- the scope of the preliminary injunction hearing

1 plays out, then that may mean something else.

2 MR. WOLF: That's right, Your Honor.

3 THE COURT: All right. If, um, regardless, any -- anything else you'd like
4 to say about August 12 through 22nd?

5 MR. WOLF: Uh, no, Your Honor, except that, um, depending on how discovery
6 plays out, depending on where we are and things we make -- may -- may make a run
7 at Your Honor to turn that into a permanent injunction hearing, uh, and I don't
8 think it'll make a difference for anybody's preparation -- but I think it's
9 entirely possible that we will be presenting to Your Honor the case that, given
10 the divestiture package, given the scope of discovery completed, that there's no
11 reason that we can't do a permanent injunction hearing then, if -- if -- if the
12 court desires. But -- but we don't need to decide anything now. I'm just flagging
13 the issue that that may come down the pike.

14 THE COURT: Thank you. Mr. Biller, does it make sense for 14 days for your
15 motion or position on divestiture? Is that enough time?

16 MR. BILLER: Two weeks from today, Your Honor? Yes, we could do that.

17 THE COURT: Does that work, two --

18 MR. BILLER: Yeah.

19 THE COURT: -- weeks for response?

20 MR. WOLF: Your Honor, it would be helpful if we did motion opposition
21 reply approach --

22 THE COURT: That's my thought.

23 MR. WOLF: -- so that, um, so two weeks -- so four weeks from today, for
24 our opposition.

25 THE COURT: Right.

1 MR. WOLF: Roughly.

2 THE COURT: Two weeks from whenever it's filed, so.

3 MR. WOLF: Yeah. That's -- that works well with us. Yes, Your Honor.

4 THE COURT: And then, one week for reply?

5 MR. BILLER: That works, Your Honor. Thank you.

6 THE COURT: That'll be the briefing schedule on that issue.

7 MR. WOLF: Thank you, Your Honor.

8 THE COURT: Do I need to say anything about page limits?

9 MR. WOLF: Your Honor, that -- this is a purely legal argument. So I would
10 assume that this could be done in 20-ish pages.

11 MR. BILLER: Twenty sounds good.

12 THE COURT: Thank you. I appreciate that. That'll be the Court's order on
13 page limits. And then, what I would like to do, is set the prelim -- uh,
14 permanent injunction hearing to begin on September 30th, 2024. And I'm gonna put
15 it on my calendar for three weeks right now. Uh, we do not have court on Monday,
16 October 7. That's Mother Cabrini Day, Colorado State Holiday. We do have court on
17 Columbus Day, which is not a state holiday. And then, we will end at 4 o'clock --
18 I'm sorry, at noon on Friday, October 4th. So that first week will end Friday,
19 October 4th at noon, no hearing on Monday, October 7. As things move forward, if
20 it becomes clear that we don't need that much time, it's much easier to take it
21 off than it is to add things on. Um, my goal here is to strike a compromise
22 between the request of the Attorney General and what I think Rule 65 says, which
23 is I'm to decide the issue of whether there should be a preliminary injunction,
24 based on claim 1, with the need for the defendants to complete discovery in
25 multiple different matters and multiple different jurisdictions in a reasonable

1 amount of time, by not going as early as July 19th, but essentially going four
2 weeks later, with the prelim -- preliminary injunction hearing on August 12. Um,
3 I -- in saying all of this, I make no promises about when my orders will be out.
4 I do not anticipate ruling from the bench, with respect to the preliminary
5 injunction matter or the permanent injunction matter. I can assure you that all
6 resources that I can marshal to get a order out quickly are being marshaled. But
7 I -- but again, I -- I'm not going to make any promises. So, we'll -- we'll see
8 how things play out. I have a few other things here. My suggestion would be that
9 we set a pre-hearing conference sometime in mid-July, to see where things are. So
10 we probably could go later in July. How does July 26? Actually, let -- lemme put
11 two things out there. We can do one of two things. We can have one, or we could
12 set two, about a month out -- about two weeks out. We end up not needing the
13 second one -- easy to take off the calendar. But I -- I don't know how
14 complicated logistics and other things are gonna be, how much we'll need to talk
15 about in advance. I'm happy to do it either way. Do you have a preference. Mr.
16 Biller?

17 MR. BILLER: I'm just looking at the calendar, Your Honor. Uh, July
18 26th, uh, seems fairly re -- I -- I would maybe suggest the week before. Um, the
19 week of July 15th, maybe, for that conference?

20 THE COURT: Would you like to set a second one, the week of August 12th, and
21 have it just in case we need to talk again?

22 MR. BILLER: That makes sense.

23 MR. WOLF: Your Honor, both makes sense. Just for those of us from the East
24 Coast, could we do tr -- could we do the hearings in the morning, just so we can
25 return?

1 THE COURT: Of -- of course. And since everyone came -- so many people came
2 today, we can do this virtually, too. You would --

3 MR. WOLF: Oh, well, then.

4 THE COURT: -- wouldn't have to come -- I -- I'd like to have at least one
5 hearing so people can see what this looks like and --

6 MR. WOLF: Yeah. Understood, Your Honor.

7 THE COURT: -- the lay of the land. But I'm happy for you to appear on the
8 computer. It's fine.

9 MR. WOLF: Understood, Your Honor. And --

10 THE COURT: Yeah.

11 MR. WOLF: -- I -- I believe I speak for all of us when we say thank you
12 for your time and your -- your, uh, due consideration to all this.

13 THE COURT: Why don't we set, uh, what did I say? July -- did I say July
14 19th or did I say 26th?

15 MR. BILLER: I believe we were talking about the week of July 15th.

16 THE COURT: July 15th. How does July 19, at 12:15 look?

17 MR. WOLF: That's good, Your Honor, from my perspective. Any other
18 defendant's comments? We're good, Your Honor, from the defendant's side.

19 MR. BILLER: Should be fine for us, as well. Thank you, Your Honor.

20 THE COURT: 12:15, July 19, 2024 for pre-hearing conference. Everyone's free
21 to appear in person. The courtroom will be open, or you can appear remotely.
22 We'll set a second pre-hearing conference on Friday, August 2nd, 12:15. If it
23 turns out we don't need it, because the lay of the land is such, it's not
24 necessary -- it's easy to vacate. Everyone can appear remotely for that, as well.

25 MR. WOLF: Works for me. Other defendants? works for defendants, Your

1 Honor. Thank you.

2 THE COURT: Thank you, Mr. Wolf.

3 MR. BILLER: Same here, Your Honor. Thank you.

4 THE COURT: Thank you. The, oh, um, we'll start at 8:00 AM each day, go till
5 5. I will -- although we have the FTR, I do not have access to real time on the
6 FTR. There's no way to get dailies, based on the FTR. So if you want a transcript
7 of the proceedings, you'll have to work together, or make a decision about having
8 a court reporter, just so you know that's how the system works.

9 MR. WOLF: And we can deal with this at pretrial, uh, pre-hearings. But,
10 Your Honor, if you have any technology you'd like the parties, particularly
11 defendants, to -- to -- to bring to the courtroom to assist all involved, we're
12 happy to do so -- extra monitors or anything like that. Just, if you guys have
13 requests or if you have requests, Your Honor, just let us know, and we'll be
14 happy to outfit the, uh, courtroom, however you prefer.

15 THE COURT: Thank you. We -- we have the TV, which you're welcome to use.
16 And that's it. So, if there's a power there, there's a power in the back, and
17 there's a plug over here. But that's about all we have. Just so you know, that's
18 --

19 MR. WOLF: You've got easel and butcher paper. That's all I need, Your
20 Honor.

21 THE COURT: I've got some Sharpies, too. Okay. The motion to seal -- it --
22 do I need to do anything else with that?

23 MR. BILLER: Last time we were here, Your Honor, we -- we thought we'd
24 have the protective order worked out. Um, I think that's still the case. But, uh,
25 given where we are, it might make sense for Your Honor to grant that order, so

1 that we can file unredacted copies of, uh, the complaint and the preliminary
2 injunction papers, for the Court's benefit. Counsel already has the unredacted
3 copies, under a -- an agreement to maintain them as outside counsel eyes only,
4 for the time being. And once the protective order is entered, uh, there are --
5 there will be provisions there for what can be shared with their clients and --
6 et cetera.

7 MR. WOLF: That's, uh, that's fine with them. That's fine, Your Honor.

8 THE COURT: Grant the -- orderly grant the motion to seal. I'll do that on
9 paper once we're finished. What else can we talk about?

10 MR. BILLER: That's all, Your Honor. Uh, we, again, as Mr. Wolf said, we
11 very much appreciate the Court's time today. Um, and, uh, we should have a
12 stipulated protective order ready for the Court very soon.

13 MR. WOLF: Yes, Your Honor. And thank you. And I also would like to
14 comment, just on the record, how, um, productive and civil the conversations have
15 been with the AG's office. We very much appreciate the professional tone of
16 everything that's gone on, to date.

17 THE COURT: As do I. Your courtesy to each other and the court's very
18 helpful. If there's nothing else, we'll be in recess. Have a good afternoon.

19 MR. WOLF: Thank you, Your Honor.

20 MR. BILLER: Thank you, Your Honor.

21 **(case ends at 1:55:52 p.m. FTR recording time)**

22

23

24

25

TRANSCRIPTIONIST'S CERTIFICATE

The above and foregoing is a true transcript of the hearing in proceedings taken in the above-entitled case, which was audio recorded in the Denver District Court at the time and place set forth above, which was listened to and transcribed to the best of my ability.

Done this 28th day of March, 2024.

/s/ Yukal Calvin
Transcriptionist

/s/ Heather Olsen
Dictate Express
P.O. Box 8543
Rancho Santa Fe, CA 92067

Ex. C

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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 4:24:01 PM
Attachments: [image001.jpg](#)
[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>; Obaro, Bambo <Bambo.Obaro@weil.com>; emainigi@wc.com;

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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

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.,

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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 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

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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

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Subject: RE: Part 3

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

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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' 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

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Subject: Re: FTC et al. v. Kroger et al. - District of Oregon
Date: Wednesday, July 10, 2024 2:05:37 PM
Attachments: [image001.jpg](#)

Counsel,

If the FTC wishes to dismiss its federal court complaint with prejudice, or, alternatively, lift the stipulated injunction currently in place in Oregon, Respondents would have no objection. Otherwise your proposal is a transparent effort to extend the injunction without having proven anything to anyone on the merits, and we are prepared to proceed on August 26 so that the transaction may be consummated—for the benefit of shareholders, associates, and consumers. We will not agree to delay the start of the Oregon proceeding, as you suggested for the first time on July 9. Moreover, given that Complaint Counsel waited until after we filed our motion with Judge Chappell to raise this new (and unacceptable) proposal, we ask that if you include this new proposal in your response to Judge Chappell you also include our position on it.

Thanks.

MAP



Mark A. Perry
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Subject: FTC et al. v. Kroger et al. - District of Oregon

Counsel,

To further address your concern about potential overlaps in the lawsuits seeking to enjoin the proposed transaction, the FTC would agree to stipulate to delaying the start of the preliminary injunction proceeding in the District of Oregon until the hearings in the other cases have concluded. Given that we have already offered to adjourn during the Colorado preliminary injunction proceeding (in the event Defendants continue to refuse to moot it) and work around any true scheduling conflicts (notwithstanding Defendants commitment to Judge Nelson to “go simultaneously”), among other efforts to coordinate the proceedings, this solution would ensure Defendants have no overlaps in trial dates. It would also preserve the resources of Judge Nelson and staff, third parties, and the parties.

Will Defendants agree to join such a stipulation in the District of Oregon?

Please provide Defendants’ position by EOD Wednesday, July 10, 2024.

Sincerely,
Charlie

Charles E. Dickinson

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 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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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing document to be served via email to:

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