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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

**RESPONDENT THE KROGER CO.'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF WITNESSES' TEXT MESSAGES AND
HANDWRITTEN NOTES**

Respondent The Kroger Co. ("Kroger") respectfully submits this Memorandum of Law in Opposition to Complaint Counsel's Motion to Compel Production of Witnesses' Text Messages and Handwritten Notes ("Mot.").

PRELIMINARY STATEMENT

Despite having received over 30 million pages of documents in response to the Federal Trade Commission's ("FTC's") Request for Additional Information and Documentary Material issued to Kroger on December 5, 2022 ("Second Request"), and from the ongoing, rolling productions of materials in response to its discovery requests in this administrative action, Complaint Counsel now seeks to compel Kroger to undertake an extraordinarily burdensome and unnecessary production of text messages and handwritten notes. Complaint Counsel's arguments in support of its Motion rest largely on a handful of text messages and handwritten notes and a mischaracterization of which custodians Kroger agreed to refresh in this action. Neither of these reasons is sufficient to compel production under the Part 3 Rules of Practice. As explained below, the discovery Complaint Counsel seeks is cumulative and duplicative of materials Kroger has already produced. Moreover, the collection, review, and production of text messages and

handwritten notes for all preliminary fact witnesses identified by Kroger and Complaint Counsel would impose significant undue burden and cost on Kroger, particularly given the fast-approaching fact discovery deadline—June 11, 2024—that far outweigh any limited relevance the text and handwritten messages may have to this action.

LEGAL STANDARD

Complaint Counsel may obtain discovery to the extent that it may “reasonably” be expected to yield information relevant to the claims made in the complaint, the proposed relief, or the defenses asserted. 16 C.F.R. § 3.31(c)(1). However, “[a] party or third party need not provide discovery of electronically stored information from sources that the party or third party identifies as not reasonably accessible because of undue burden or cost.” *Id.* § 3.31(c)(3). “On a motion to compel discovery, the party or third party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.” *Id.* “[D]iscovery methods” that are otherwise permitted under the Rules of Practice “shall be limited by the Administrative Law Judge if [it is] determine[d]” that the discovery sought “is unreasonably cumulative or duplicative” or “[t]he burden and expense of the proposed discovery on a party . . . outweigh[s] its likely benefit.” *Id.* § 3.31(c)(2)(i), (iii). That is the case here.

ARGUMENT

I. The Text Messages and Handwritten Notes Complaint Counsel Seeks to Compel Are Cumulative and Duplicative

The Motion should be denied because Complaint Counsel fails to identify any reason the additional discovery sought would not be unnecessarily cumulative or duplicative of materials Kroger has already produced. Indeed, Kroger’s productions to date are voluminous: approximately 30 million pages of documents have been produced in response to the Second Request, and approximately 1.1 million pages have been produced in this action, with more in the

pipeline. The text messages and handwritten notes Complaint Counsel now seeks to compel in its Motion are cumulative, duplicative of, and/or have no probative value beyond already-produced documents discussing the same topics. Complaint Counsel contends that text messages or handwritten notes will purportedly “show competition,” “analyses of [the] merger,” and support Complaint Counsel’s view that “Respondents view each other as primary competition.” Mot. at 6-7. But the voluminous already-produced documents discuss these topics in great detail ({}

_____}).

Complaint Counsel has failed to identify any category of information that is unique from the materials already produced.

At bottom, Complaint Counsel’s argument is that it is entitled to text messages and notes discussing precisely the same subjects as already-produced material. This is plainly insufficient. *See Fort Worth Employees’ Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 107 (S.D.N.Y. 2013) (denying discovery request for additional custodians where plaintiffs failed to demonstrate that the additional discovery would “provide *unique* relevant information not already obtained”); *Novartis Pharms. Corp. v. Abbott Lab’ys*, 203 F.R.D. 159, 164 (D. Del. 2001) (denying motion to compel where “further production would be duplicative and cumulative of what [defendant] has already produced and further production would be burdensome”); *Jones v. Sunbelt Rentals, Inc.*, No. 22CV05954AMOPHK, 2023 WL 10691302, at *9 (N.D. Cal. Nov. 16, 2023) (materials on cell phone would be cumulative of existing discovery and not proportional to the needs of the case). The Motion should be denied as unnecessarily cumulative and duplicative.

II. The Additional Discovery Sought Imposes Undue Burden and Cost on Kroger

Complaint Counsel claims that the text messages and handwritten notes sought in its Motion to Compel are “reasonably accessible” because Kroger is “well-resourced, [its] merger is

valued in excess of \$26 billion, and . . . has multiple law firms litigating this matter.” Mot. at 9. Complaint Counsel’s argument ignores the burden of collecting, processing, and reviewing text messages—a multi-step process that is particularly burdensome given the June 11, 2024 fact discovery deadline:

- First, remote mobile device collection (“RMDC”) kits must be shipped to the Kroger custodians.¹
- Second, e-discovery personnel must schedule a date and time, accounting for travel or other conflicts, for a videoconference with each custodian to facilitate the proper use of the RMDC in order to result in a collection that is forensically sound.
- Third, the custodian ships the collection kit back to Kroger’s e-discovery vendor.
- Fourth, the collected data is downloaded, processed, and prepared for review. Text messages require special processing to prepare for review in an adequate and readable format.
- Fifth, due to the unique attributes of text message (and handwritten notes), the collected data is reviewed manually by attorneys, as opposed to technology-assisted review (“TAR”), which has been used for review of other source data.

Similarly, the burden to find and collect handwritten notes is very high. Most of the hard-copy documents Kroger collected for its Second Request response were binders of hard-copy presentations and other printed materials in custodians’ offices that did not contain handwritten notes but that Kroger collected and scanned in an abundance of caution. Collecting, scanning, and undertaking a manual review of additional hard copy documents to identify documents with

¹ If the collection is not conducted remotely, e-discovery personnel would be required to fly to the location of the custodian and meet with the custodian at a mutually agreeable date and time.

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handwritten notes will be time-consuming and costly. Complaint Counsel is asking Kroger to search for a very small needle in a very large haystack. The abbreviated discovery timeline in this case further amplifies the burden and cost, as productions would need to be completed in less than a month, along with all of the other discovery requests to which Kroger is responding.

Courts have found that production of text messages and handwritten notes create undue burden in precisely these circumstances. In *Shackleford v. Vivint Solar Dev., LLC*, No. CV ELH-19-954, 2020 WL 6273892, at *5 (D. Md. Oct. 26, 2020), for example, the court held plaintiff's request for production seeking "[a]ll emails, text messages, and other written or electronic communications" to be "overbroad," concluding that "[i]f the [c]ourt were to order the production of responsive text messages" of the defendant company's senior management, "the burden and expense for the [defendant company] would be substantial," as such a process would be "expensive and time-consuming." *Id.* Even if a search "result[ed] in some relevant information," the court concluded that "its likely benefit [was] outweighed by the burden and expense of obtaining it." *Id.* The court accordingly limited the document requests to emails on company accounts and other written or electronic communications within company's possession, custody or control. *Id.*; see also *Jones v. Varsity Brands, LLC*, No. 20-CV-02892-SHL-TMP, 2021 WL 5889984, at *3 & n.6 (W.D. Tenn. Dec. 13, 2021) (finding search of additional custodians' phones was overly burdensome and invasive and limiting searching to the "central figure" of the litigation given his role, the lower burden, and the greater likelihood of locating discoverable material); *H & L Assocs. of Kansas City, LLC v. Midwestern Indem. Co.*, No. 12-2713-EFM-DJW, 2013 WL 5774844, at *12 (D. Kan. Oct. 25, 2013) (denying motion to compel documents beyond a certain date where defendant would have had to "search every piece of paper" and conduct a "burdensome manual search" because "the time or expense involved in conducting" such a search would be

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“unreasonable under the circumstances in light of the marginal benefits to be secured by [the requested] discovery”).

Complaint Counsel speculates that “Respondents’ resistance to collecting any new documents at all from [Kroger’s] Preliminary Witnesses ({ [REDACTED] [REDACTED] }) . . . suggests that their real reason is that the texts and notes are likely to be adverse to Respondents.” Mot. at 9. This is a baseless accusation. Contrary to Complaint Counsel’s representations, *see* Mot. at 4, Kroger *has* agreed to collect documents from { [REDACTED] } as part of its productions in response to Complaint Counsel’s discovery requests. During the meet and confer on May 6, Kroger told Complaint Counsel that { [REDACTED] } were already refresh custodians as part of its production of materials in a parallel state litigation concerning the proposed merger, and that the refreshed productions of these three custodians would be provided to Complaint Counsel. Kroger confirmed this in an email dated May 7. Ex. S to Mot. In addition, the index of produced documents sent to Complaint Counsel on May 7 reflected that documents from { [REDACTED] } were indeed included in the refreshed production to Complaint Counsel. On May 7, Kroger also confirmed that it would add { [REDACTED] } as a custodian. Ex. S. to Mot. Thus, Complaint Counsel’s representation that Kroger is refusing to produce *any* documents from these custodians—and its request that the Court draw adverse inferences on that basis—is wrong as a factual matter.

III. Complaint Counsel Has Failed to Show That the Likely Benefit of Text Messages and Handwritten Notes Outweighs the Costs and Burdens of Their Production

Complaint Counsel has failed to show that compelling production of texts and handwritten

² Complaint Counsel agreed to remove { [REDACTED] }. Mot. at 4. The other custodians Complaint Counsel references in this sentence that are omitted here are Albertsons custodians. Similarly, the { [REDACTED] } pertains to Albertsons only.

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notes is justified in these circumstances. The substantial cost and burden of collecting these materials far outweighs their potential relevance. In light of the same proportionality concerns, Kroger proposed to exclude collecting certain sources, including text messages, for a “refresh” production during the Second Request. Ex. 1. The FTC agreed to exclude [REDACTED]

Ex. H to Mot.


The vast majority of texts Kroger did search during the Second Request were non-responsive. Complaint Counsel’s argument that text messages are likely to be “highly relevant,” Mot. at 6, is supported by only four Kroger text message exchanges cited in the Motion. Mot. at 6-7. Complaint Counsel’s only argument for the relevance of the handwritten notes are two notes from a single Kroger employee. Mot. at 1-2, 7-8. In fact, the vast majority of “highly relevant” documents are not texts or handwritten notes, but emails, presentations, and other documents that Kroger has produced.

CONCLUSION

For the foregoing reasons, Kroger respectfully requests that the Court deny Complaint Counsel’s Motion to Compel Production of Text Messages and Handwritten Notes.

DATED: May 17, 2024

Respectfully submitted,

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Ex. 1

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, I caused the foregoing document to be electronically filed using the FTC's E-Filing System, which will send notification of such filing to:

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

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