

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO REQUIRE RESPONDENTS TO IDENTIFY
NO MORE THAN FIVE EXPERT WITNESSES**

Complaint Counsel argues that Respondents' expert witness list violated FTC Rule 3.31A(b) by designating six experts. But FTC Rule 3.31A(b) only limits experts that may be "call[ed] at the evidentiary hearing" to testify; it does not expressly limit the number of experts that may be *disclosed*. Respondents have made clear to Complaint Counsel that they may not ultimately call six experts to testify at the evidentiary hearing, but if they elect to do so, Respondents would seek leave under FTC Rule 3.31A(b). *See* Mot. at 3. Simply put, there is nothing in the language of Rule 3.31A(b) requiring leave to disclose more than five experts, and Respondents' expert disclosures are fully consistent with the clear, unambiguous language of that Rule. *See In re POM Wonderful, LLC*, Dkt. 9401, 2011 WL 734462, at *2 n.2 (F.T.C. 2011).

Nevertheless, to avoid dispute, Respondents will file by Tuesday, May 28, 2024, a motion for leave to call six experts to testify at the evidentiary hearing under Rule 3.31A(b). The Court will either grant this relief or deny it and require Respondents to designate only five experts, which is the same relief Complaint Counsel seeks here. *See* Mot. at 1. Respondents' forthcoming motion for leave to call an additional expert under FTC Rule 3.31A(b) therefore obviates the need for a

ruling on this motion. Indeed, Complaint Counsel’s motion contemplated Respondents filing such a motion. *See* Mot. at 2 n.2 (reserving rights to oppose Respondents moving for leave to call an additional expert under FTC Rule 3.31A(b)). And to the extent Complaint Counsel argues that Respondents should be precluded from receiving leave to call six experts due to their initial disclosures, that result would be inconsistent with this Court’s precedent. *See In re POM Wonderful, LLC*, Dkt. 9401, 2011 WL 734462, at *2 n.2 (F.T.C. 2011) (rejecting argument that it “violated procedural requirements” to “designat[e] eight expert witnesses on Respondents’ expert witness list without first obtaining leave pursuant to Rule 3.31A(b)”).

Accordingly, given Respondents’ forthcoming motion for leave to call an additional expert witness under FTC Rule 3.31A(b), the Court should deny Complaint Counsel’s motion.

May 23, 2024

Respectfully submitted,

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

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

*Counsel for Respondent The Kroger
Company*

/s/ Edward D. Hassi

Edward D. Hassi
Debevoise & Plimpton LLP
801 Pennsylvania Ave. N.W.
Washington D.C. 20004

Telephone: 202 383 8203
thassi@debevoise.com

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

*Counsel for Respondent Albertsons
Companies, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that, on May 23, 2024, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

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

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

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

Charles Dickinson	eblackburn@ftc.gov
James H. Weingarten	pfrangie@ftc.gov
Emily Blackburn	lhall1@ftc.gov
Paul Frangie	jkim3@ftc.gov
Laura Hall	klibby@ftc.gov
Janet Kim	eolson@ftc.gov
Kenneth A. Libby	rpai@ftc.gov
Eric Olson	hrothman@ftc.gov
Rohan Pai	ateng@ftc.gov
Harris Rothman	earens@ftc.gov
Albert Teng	jhamburger1@ftc.gov
Elizabeth Arens	jsmith3@ftc.gov
Jacob Hamburger	kbies@ftc.gov
Joshua Smith	kdrummonds@ftc.gov
Katherine Bies	lthough@ftc.gov
Katherine Drummonds	smusser@ftc.gov

Lily Hough
Susan A. Musser
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Telephone: 202 326 2617
cdickinson@ftc.gov
jweingarten@ftc.gov

Complaint Counsel

Enu Mainigi
Jonathan Pitt
A. Joshua Podoll
William Ashworth
Thomas Ryan
Tyler Infinger
Williams & Connolly LLP
680 Maine Ave SW
Washington, D.C. 20024
Telephone: 202-434-5000
emainigi@wc.com
jpitt@wc.com
apodoll@wc.com
washworth@wc.com
tryan@wc.com
tinfinger@wc.com

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

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

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

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

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

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

Rebecca Sivitz
Weil, Gotshal & Manges LLP
100 Federal Street
Floor 34, Boston, MA 02110
Telephone: (617) 772-8300
rebecca.sivitz@weil.com

Camilla Brandfield-Harvey
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
camilla.brandfield-harvey@weil.com

*Counsel for Respondent
Albertsons Companies, Inc.*

*Counsel for Respondent The Kroger
Company*

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

*Counsel for Respondent The Kroger
Company*