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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**RESPONDENTS' MOTION FOR LEAVE TO CALL ONE ADDITIONAL EXPERT TO
TESTIFY AT THE EVIDENTIARY HEARING**

Respondents respectfully seek leave to call one additional expert witness to testify at the evidentiary hearing beyond the five that are permitted as of right under FTC Rule 3.31A. Extraordinary circumstances justify this relief because Complaint Counsel has alleged two independent and distinct theories of harm, adding complexity and nuance to this case that warrant one additional expert. This Court has routinely granted such relief in similar cases. Complaint Counsel will suffer no prejudice if this motion is granted because they chose to bring these two distinct theories and, in the federal court proceeding where there are no limits on testifying experts, Respondents have retained the same six experts they seek to designate here. The Court should grant the motion.

BACKGROUND

I. Complaint Counsel's Two Distinct Theories of Harm

This case arises out of Kroger's proposed acquisition of Albertsons, an agreement the parties entered into to keep pace with an expanding set of competitors, increase operating efficiency, lower prices for consumers, and invest in its associates. Complaint Counsel seeks to block the transaction based on two independent and factually distinct theories.

Complaint Counsel's first theory is that the proposed transaction may substantially lessen competition in a narrowly defined, alleged "supermarket" product market comprised of "traditional supermarkets and supercenters"—but apparently excluding many key grocery retailers, including club stores like Costco, so-called "premium natural and organic" grocery stores like Whole Foods, discount grocery stores such as Aldi, and e-commerce retailers like Amazon. Compl. ¶¶ 19–31. According to Complaint Counsel, the relevant geographic markets are allegedly "localized areas around each store," but they offer no more color on which specific geographies are covered by each such market. *Id.* ¶¶ 32–38.

Complaint Counsel's second theory rests not on competition between sellers of groceries but, rather, on competition between employers for labor. This "monopsony" theory of harm addresses alleged "market power on the buy side of the market." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007). Complaint Counsel contends that the proposed transaction may substantially lessen competition in an alleged product market for "union grocery labor" (i.e., grocery store employees who are members of a union). Compl. ¶¶ 57–67.

Complaint Counsel's alleged labor market is also extremely narrow, limited to unionized grocery workers. Unionized workers in other industries and non-union workers, including entry-level employees in retail, are expressly excluded. *Id.* Complaint Counsel draw this distinction based on allegedly unique aspects of union negotiations and labor law. These include the fact that unions negotiate collective bargaining agreements, which "determine each union worker's wages, health and pension benefits, scheduling, leave, and myriad other workplace conditions." *Id.* ¶ 63. The complaint also includes specific allegations about labor law issues, such as when "grocery worker pensions vest." *Id.* ¶ 64. In addition, the complaint contains many allegations on bargaining dynamics between unions and Kroger and Albertsons during collective bargaining

negotiations, *id.* ¶ 70, including the actual or potential use of union strikes as a negotiation tactic, *id.* ¶¶ 73–82. Simply put, Complaint Counsel’s union grocery labor product market rests on these labor-law nuances.

Another significant issue in the litigation is the enormous efficiencies the proposed transaction will generate. Kroger has publicly stated that it is “committed to investing \$500 million to begin lowering prices day one post-close, and an additional \$1.3 billion to improve Albertsons Cos.’ stores.”¹ Kroger has also publicly stated that, post-closing, it is “committed to investing \$1 billion to raise wages and comprehensive benefits” for its associates.²

II. Kroger’s Proposed Divestiture to C&S

While Complaint Counsel’s two theories of antitrust harm are distinct, a central issue cuts across both of them: the sufficiency of Kroger’s proposed divestiture to C&S Wholesale Grocers, LLC (“C&S”). To address concerns raised by antitrust regulators, Kroger has agreed to divest 579 stores and a number of other assets (including distribution centers, a milk plant, banner rights, private label rights, and others) to C&S, the nation’s leading grocery wholesaler—an increase from the initial divestiture package under which Kroger would have divested 413 stores and a different set of additional assets.

The complaint addresses the divestiture at length (albeit the earlier 413-store package), contending it is insufficient to mitigate any potential anticompetitive effects from the transaction. Compl. ¶¶ 86–98. The complaint goes into granular detail about the divestiture, criticizing, among

¹ Press Release, The Kroger Co., *Kroger, Albertsons Companies and C&S Wholesale Grocers, LLC Announce an Updated and Expanded Divestiture Plan* (Apr. 22, 2024), <https://www.prnewswire.com/news-releases/kroger-albertsons-companies-and-cs-wholesale-grocers-llc-announce-an-updated-and-expanded-divestiture-plan-302123299.html>.

² *Id.*

other things: the “transition period” while the stores are being divested, *id.* ¶ 91; C&S’s prior experience running grocery retail businesses, *id.* ¶ 92; and Albertsons’ prior divestitures in separate transactions, *id.* ¶ 96. Respondents, in contrast, will present evidence that the divestiture package resolves any competitive concerns with respect to both theories of harm.

III. The Parties’ Expert Disclosures

Under the Scheduling Order, both parties were required to disclose a preliminary list of expert witnesses well before trial. Complaint Counsel disclosed three experts: (1) Nicholas Hill, Ph.D., who will address antitrust economics and industrial organization; (2) Edward Fox, Ph.D., who will address marketing and retailing; and (3) Aaron Yeater, who will address financial and managerial accounting. Complaint Counsel also reserved the right to modify its expert disclosures.

To address Complaint Counsel’s two theories and the many issues in this case, Respondents disclosed six expert witnesses. While expert discovery is still ongoing, and Respondents do not know the precise contours of each expert’s testimony, a description of each expert’s anticipated testimony is below.

Dr. Mark Israel is an antitrust economist. Respondents expect he will provide testimony on antitrust economics issues related to Complaint Counsel’s retail grocery competition claim, including on issues such as market definition and anticompetitive effects. Dr. Israel currently serves as President of Compass Lexecon and has a Ph.D. in Economics from Stanford University.

Rajiv Gokhale has deep experience in business valuation issues. Respondents expect that he will testify on the efficiencies of the proposed transaction, including issues such as the method for calculating those efficiencies. Mr. Gokhale is an Executive Vice President at Compass Lexecon and has an MBA from the University of Chicago.

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Daniel Galante is a Certified Public Accountant with experience advising and counseling on hundreds of transactions, including many with similar attributes to the proposed divestiture here. Respondents expect Mr. Galante will provide testimony on the adequacy and sufficiency of the divestiture buyer, assets, and services. Mr. Galante currently serves as Managing Director at Berkeley Research Group, LLC.

Herbert J. Kleinberger is a retail grocery industry expert with more than 25 years of experience consulting retailers, including in the grocery business. Respondents expect he will testify on the evolution of the grocery industry, including changes in the industry in recent decades—particularly during and after the COVID-19 pandemic. Mr. Kleinberger has an M.B.A. in finance from the University of Pennsylvania and currently teaches at the Wharton School.

Dr. Justin McCrary is an economist who has focused on antitrust and labor issues. Respondents expect he will provide testimony on economic issues related to Complaint Counsel's labor claim, including on issues such as market definition, anticompetitive effects, and bargaining. Dr. McCrary has a Ph.D. in Economics from the University of California, Berkeley and has both published and taught courses in labor economics.

G. Roger King is an expert in labor relations issues, including labor law. Respondents expect he will testify about the labor-related issues implicated by Complaint Counsel's labor claim, including labor law around collective bargaining negotiations and the transferability of union benefits. He is currently a senior labor and employment consultant at Big Sky Labor and Employment Institute, and he previously was as a partner at Jones Day.

Because expert discovery is ongoing and Complaint Counsel has not yet served expert reports, Respondents do not yet know whether they will in fact call each of these experts to testify at the evidentiary hearing.

IV. Complaint Counsel Motion to Limit Respondents' Expert Disclosures

Shortly after Respondents served their expert disclosures, Complaint Counsel filed a “Motion to Require Respondents to Comply with FTC Rule 3.31A(b) and Identify No More than Five Expert Witnesses.” Despite the fact that FTC Rule 3.31A(b) expressly applies to experts “call[ed] at the evidentiary hearing”—not disclosed experts—Complaint Counsel took the position that Respondents can only disclose five experts absent leave from the Court. Accordingly, to avoid dispute and seek early resolution on this issue, Respondents file this motion. Complaint Counsel opposes the motion.

ARGUMENT

A. Extraordinary Circumstances Warrant One Additional Testifying Expert

FTC Rule 3.31A has an express “safety valve that allows a party to seek leave to call additional expert witnesses in extraordinary circumstances.” *In re 1-800 Contacts, Inc.*, Dkt. No. 9372, 2017 WL 781385, at *3 (F.T.C. Feb. 22, 2017). This Court has routinely permitted parties to call more than five testifying experts. *See, e.g., In re Illumina, Inc., et al.*, Dkt. No. 9401, 2022 WL 4199859, at *1–*145 (F.T.C. Sept. 9, 2022) (seven); *1-800 Contacts, Inc.*, 2017 WL 781385, at *2–4 (six); *In re POM Wonderful LLC*, Dkt. No. 9344, 2011 WL 734462, at *4–6 (F.T.C. Feb. 23, 2011) (eight). Such relief is appropriate where additional experts are necessary given the “complexity of the [] issues presented,” including “technical issues.” *1-800 Contacts*, 2017 WL 781385, at *3–4 (allowing an additional expert because the allegations implicated “technical issues . . . and extensive related data”). The Court has also granted leave when additional experts are required so that respondents can mount a “broad and comprehensive defense.” *In re POM Wonderful*, 2011 WL 734462, at *4–6.

These well-reasoned decisions control here. As explained above, this case involves two distinct theories of harm related to retail grocery competition and labor competition, each of which

could be a separate case. Under this Court's precedent, exceptional circumstances are present where, as here, Complaint Counsel elect to bring two distinct theories that implicate different legal and factual issues. *See 1-800 Contacts*, 2017 WL 781385, at *3 (permitting an additional expert witness in part because the case implicated "both antitrust law and trademark law").

Respondents' experts are also necessary to mount a "broad and comprehensive defense." *POM Wonderful*, 2011 WL 734462, at *4–6. Each expert's likely testimony is specifically tailored to allegations and issues that will be central in this litigation. Dr. Israel will likely testify on core antitrust economic issues related to the retail grocery competition claim; Mr. Gokhale will testify on efficiencies—an issue central to undermining Complaint Counsel's theory of retail grocery harm and tied to Kroger's public commitment to invest hundreds of millions of dollars into lower prices post-closing; Mr. Galante will specifically rebut Complaint Counsel's allegations about the alleged insufficiency of the divestiture; Mr. Kleinberger will provide critical context on the grocery industry and the changes it has undergone in recent years (changes that Complaint Counsel's outdated portrait of grocery competition ignore); Dr. McCrary will address core labor antitrust issues; and Mr. King will address the labor relations issues raised by Complaint Counsel, including the validity of the legal and factual premises that undergird their labor theory. "Having brought broad and comprehensive charges against Respondents, Complaint Counsel cannot in fairness claim it is prejudiced when faced with a broad and comprehensive defense." *Id.* at *4.

Similarly, this Court has recognized that, "[a]t a minimum, Respondents are entitled to proffer expert testimony in opposition to Complaint Counsel's experts." *POM Wonderful*, 2011 WL 734462, at *5. Respondents expect that many and potentially all of their experts will respond to opinions submitted by Complaint Counsel's experts.

B. Complaint Counsel Cannot Show Prejudice

Permitting Respondents to designate a single additional expert will cause Complaint Counsel no prejudice. Respondents have designated the same six experts in the parallel federal court proceeding, in which there are no limits on the number of experts that may serve reports or testify. Complaint Counsel therefore will already have to respond to all six experts in federal court. Moreover, Respondents expect their experts will serve highly similar reports in this Part 3 proceeding and the parallel federal court proceeding (the complaints are nearly identical). Thus, in this proceeding, Complaint Counsel will likely only need to make minimal modifications, if any, to its federal court expert reports. That will impose little if any burden on Complaint Counsel and will not prejudice Complaint Counsel.

C. Complaint Counsel's Arguments Lack Merit

Complaint Counsel may argue that Respondents' experts will provide duplicative or cumulative testimony. This argument would be both premature and meritless. As this Court ruled when denying a similar motion, early in the litigation "there is insufficient basis . . . to conclude that Respondents' expert testimony at trial will be cumulative or duplicative." *POM Wonderful*, 2011 WL 734462, at *5. Moreover, there are also other safeguards at trial to prevent duplicative or cumulative testimony. *See id.* (citing FTC Rule 3.43(b) (barring cumulative evidence) and FTC Rule 3.41(b) (hearing time limits)). And in any event, each of the six experts Respondents have disclosed will address distinct issues raised by Complaint Counsel's dual theories of harm and will not offer duplicative or cumulative expert testimony.

Complaint Counsel also may argue that Respondents' disclosure of six experts before seeking leave is a procedural violation that warrants denial of this motion. This argument would be inconsistent with this Court's precedent. *See POM Wonderful*, 2011 WL 734462, at *3 n.4

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(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)”).

CONCLUSION

The Court should grant Respondents’ motion and permit them to call one additional expert at the evidentiary hearing.

May 28, 2024

Respectfully submitted,

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Docket No. 9428

**[Proposed] Order Granting Respondents' Motion For Leave To Call One
Additional Expert To Testify At The Evidentiary Hearing**

Having considered the Respondents' motion for leave to call one additional expert to testify at the evidentiary hearing, the motion is hereby GRANTED.

ISSUED:

Chief Administrative Law Judge Chappell

Date: _____, 2024

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STATEMENT REGARDING CONFERRAL WITH COMPLAINT COUNSEL

Pursuant to paragraph 4 of the Scheduling Order, Respondents submit this statement representing that Counsel for Respondents have conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion. Complaint Counsel oppose this motion.

/s/ *Luke Sullivan*
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CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 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:

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