

PUBLIC

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

_____)	
In the Matter of)	
)	
The Kroger Company,)	
)	Docket No. 9428
and)	
)	
Albertsons Companies, Inc.,)	
)	
Respondents.)	
_____)	

**ORDER (1) DENYING COMPLAINT COUNSEL’S MOTION TO REQUIRE
RESPONDENTS TO IDENTIFY ONLY FIVE EXPERT WITNESSES
AND (2) GRANTING RESPONDENTS’ MOTION FOR LEAVE TO CALL
ONE ADDITIONAL EXPERT WITNESS**

I.

On May 16, 2024, Complaint Counsel filed a motion seeking to require Respondents to comply with Federal Trade Commission (“FTC”) Rule 3.31A(b) by amending their expert witness list to identify only five expert witnesses (“May 16 Motion”). That rule sets forth:

No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section. Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

16 C.F.R. § 3.31A(b).

Respondents’ expert witness list identified six expert witnesses. Complaint Counsel argued that Respondents’ identification of six expert witnesses violates Rule 3.31A(b)’s five expert witness limit and that Respondents were required to move for leave to call an additional expert witness.

In their opposition, filed May 23, 2024, Respondents argued that while Rule 3.31A(b) limits the number of experts that may be “call[ed] at the evidentiary hearing” to testify, it does not limit the number of experts that may be identified on an expert witness list. Respondents stated that they intended to file a motion for leave to call one additional expert witness.

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Pursuant to Rule 3.31A(b), a party is limited to calling five expert witnesses to testify at the hearing, unless the party obtains leave to allow calling additional expert witnesses, based upon a motion demonstrating extraordinary circumstances. *In re POM Wonderful LLC*, 2011 FTC LEXIS 25, at *10-11 (Feb. 23, 2011). Respondents have since filed a motion for leave to call one additional expert witness. As explained below, Respondents have demonstrated extraordinary circumstances to justify calling one additional expert witness. Accordingly, whether the rule prohibits Respondents from listing (as opposed to calling) more than five expert witnesses is immaterial. For the reasons stated above and below, Complaint Counsel’s May 16 Motion is DENIED AS MOOT.

II.

On May 28, 2024, Respondents filed a motion for leave to call one additional expert witness to testify at the evidentiary hearing pursuant to Rule 3.31A(b) (“May 28 Motion”). Complaint Counsel filed its opposition on June 7, 2024.

A.

Respondents assert that extraordinary circumstances justify their request to call one additional expert witness beyond the five that are permitted under FTC Rule 3.31A(b). Specifically, Respondents assert that: (1) Complaint Counsel has alleged two independent and distinct theories of harm;¹ (2) the allegations on the bargaining dynamics between unions and Kroger and Albertsons and the alleged union grocery labor product market rest on labor-law nuances; and (3) the proposed divestiture package addresses competitive concerns with respect to both competition between sellers of groceries and competition between employers for labor. Respondents argue that because Complaint Counsel has asserted two distinct theories that implicate different legal and factual issues, extraordinary circumstances warrant one additional testifying expert.

Complaint Counsel argues that the challenged transaction does not implicate any area of law other than antitrust and that the case presented fits squarely within the bounds of antitrust law. Complaint Counsel further asserts that because this case presents a straightforward, horizontal merger between the two largest traditional supermarket chains, it does not present “extraordinary circumstances” that may warrant an additional expert witness under Rule 3.31A(b).

B.

Rule 3.31A(b) was added because “[i]t has been the Commission’s experience . . . that five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases. [However, t]he Rule also has a safety valve that allows a party to seek leave to call

¹ According to Respondents, the Complaint alleges: (1) that the proposed transaction may substantially lessen competition in the alleged relevant product market of supermarkets and the alleged relevant geographic markets of “localized areas around each store”; and (2) that the proposed transaction may substantially lessen competition in an alleged product market for “union grocery labor.”

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additional expert witnesses in extraordinary circumstances.” 74 Fed. Reg. 1804, 1813 (FTC Interim final rules with request for comment) (Jan. 13, 2009). Employing the safety valve is justified in this case where the Complaint involves two distinct theories that implicate different legal and factual issues. Further, each of Respondents’ proffered expert witnesses offers a distinct area of expertise and distinct opinions. Moreover, permitting Respondents to designate one additional expert witness will impose little, if any, burden on Complaint Counsel since, according to Respondents, Respondents designated the same six expert witnesses in the parallel federal court proceeding and Complaint Counsel is already required to respond to all six experts in federal court.

C.

For the above stated reasons, the May 28 Motion is GRANTED. This Order does not constitute a ruling that any particular expert, or particular testimony, will be admissible at the evidentiary hearing on this matter.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: June 12, 2024