

**PUBLIC**

**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**

**EXPEDITED JOINT MOTION TO CLARIFY THE RECESS OF THE EVIDENTIARY  
PORTION OF THE PART 3 ADMINISTRATIVE HEARING**

Pursuant to 16 C.F.R. § 3.41(b), Complaint Counsel and Respondents The Kroger Company and Albertsons Companies, Inc. (“Respondents” and together with Complaint Counsel, “the Parties”) jointly move to clarify the current recess in this case. On September 25, the Court ordered that the evidentiary portion of the Part 3 administrative hearing shall be recessed until 21 days after the final resolution of the related federal preliminary injunction case captioned *FTC, et al. v. Kroger Co. & The Albertsons Cos.*, No 3:24-cv-00347-AN (D. Or.). See September 25 Order. The Parties now seek clarification that the recess will extend until December 18, 2024, at the earliest. In other words, the Part 3 administrative hearing would not resume until December 18, at the earliest, and no sooner than 21 days after the final resolution of the related federal preliminary injunction case in the U.S. District Court for the District of Oregon.

By clarifying the earliest date on which the evidentiary hearing may resume, the Parties and non-parties may plan accordingly to ensure availability for the eventual hearing and to provide certainty for courts in related proceedings. Further, as addressed in the Parties’

**PUBLIC**

September 24 motion to recess, continuing the present recess will not prejudice this Court's ability to discharge its duties for several reasons. First, the federal court informed the Parties that it would act expeditiously to issue its ruling on the motion for preliminary injunction, and thus a continued recess would be of reasonable duration and would not unduly delay resolution of this case. Second, a continued recess would allow the Parties to react as appropriate to the federal court's ruling, and thus facilitate significant streamlining and allow for a more orderly hearing in this proceeding, as well as minimize the expense and burden on both the Parties and non-parties.

**ARGUMENT**

The Parties jointly request expedited consideration of this Motion because clarification that the evidentiary hearing will not resume until no earlier than December 18 has time-sensitive implications for a related proceeding. Respondent Kroger has filed a constitutional challenge of the Commission's administrative proceeding in the U.S. District Court for the Southern District of Ohio and seeks to preliminarily enjoin these proceedings before they resume. *See The Kroger Co. v. FTC*, No. 1:24-cv-00438-DRC (S.D. Ohio). That court wishes to hear oral argument and rule on Kroger's motion before the administrative proceeding begins again. Accordingly, the Southern District of Ohio has requested certainty about how early the administrative proceeding could resume. *See Minute Entry, The Kroger Co. v. FTC*, No. 1:24-cv-00438-DRC (S.D. Ohio) (Sept. 27, 2024) (directing Complaint Counsel to "reach out to the ALJ to request a clarification that the hearing will not be set prior to 11/18/24 or thereafter").

Providing clarification of the term for this short continuance will offer this district court certainty that it need not rule on Kroger's motion for a preliminary injunction urgently. As noted in the Parties September 24 motion, this short continuance will also allow both the Parties and non-parties—who have been diligently preparing for and presenting evidence at the federal

**PUBLIC**

hearing and are now preparing post-hearing filings to file in that court—to prepare for the Part 3 hearing in this Court in a more orderly fashion, as well as to react as appropriate to any implications of the federal court’s forthcoming ruling that may be relevant to this proceeding.

Such a continued recess is appropriate under 16 C.F.R. § 3.41(b) because it would be only a “brief interval[] of the sort normally involved in judicial proceedings”; namely, a short pause to await the federal court’s pending ruling, which may narrow—or even entirely resolve—the dispute between the Parties. Clarifying the present recess would also conserve this Court’s—and the Parties’—time and resources by providing the Parties the opportunity to streamline and focus their arguments and thus avoid any inefficiencies, such as proffering testimony or evidence that may be rendered irrelevant or duplicative by the federal court’s forthcoming ruling. This outcome also would reduce the burden on non-parties who may otherwise be compelled to provide testimony in the Part 3 hearing before this Court.

### **CONCLUSION**

For the foregoing reasons, the Parties respectfully and jointly request that the Court exercise its discretion under 16 C.F.R. § 3.41(b) to clarify that the recess in this administrative hearing, including all related pre-hearing deadlines, shall continue until 21 days after the final resolution of the federal proceeding, and shall extend at least until December 18, 2024.

Dated: September 27, 2024

Respectfully submitted,

*s/ Barrett J. Anderson*

Barrett J. Anderson  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Telephone: (202) 326-2237  
Email: banderson1@ftc.gov

*Counsel Supporting the Complaint*

**PUBLIC**s/ Mark A. Perry

Mark A. Perry  
Luke Sullivan  
Weil Gotshal & Manges LLP  
2001 M Street NW, Suite 600  
Washington, DC 20036  
Telephone: (202) 682-7511  
Email: mark.perry@weil.com

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

Matthew M. Wolf  
Sonia K. Pfaffenroth  
Arnold & Porter Kaye Scholer LLP  
601 Massachusetts Avenue, NW  
Washington, DC 20001  
Telephone: (202) 94-6831

*Counsel for Respondent The Kroger  
Company*

s/ Enu A. Mainigi

Enu A. Mainigi  
Jonathan B. Pitt  
Beth A. Stewart  
A. Joshua Podoll  
Williams & Connolly LLP  
680 Maine Avenue SW  
Washington, DC 20024  
Telephone: (202) 434-5000

Michael G. Cowie  
Dechert LLP  
1900 K Street, NW  
Washington, DC 20006  
Telephone: (202) 261-3300  
Email: mike.cowie@dechert.com

*Counsel for Respondent Albertsons  
Companies, Inc.*

**PUBLIC**

**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**

**STATEMENT OF CONFERENCE PURSUANT TO PROVISION 4 OF THE  
SCHEDULING ORDER**

Pursuant to Provision 4 of the Scheduling Order, Complaint Counsel and Respondents submit this statement in support of their Expedited Joint Motion to Clarify the Recess of the Evidentiary Portion of the Part 3 Administrative Hearing. The parties conferred in good faith and file this motion jointly.

Dated: September 27, 2024

Respectfully submitted,

s/ Barrett J. Anderson

Barrett J. Anderson  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Telephone: (202) 326-2237  
Email: banderson1@ftc.gov

*Counsel Supporting the Complaint*

s/ Mark A. Perry

Mark A. Perry  
Luke Sullivan  
Weil Gotshal & Manges LLP  
2001 M Street NW, Suite 600  
Washington, DC 20036  
Telephone: (202) 682-7511  
Email: mark.perry@weil.com

**PUBLIC**

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

Matthew M. Wolf  
Sonia K. Pfaffenroth  
Arnold & Porter Kaye Scholer LLP  
601 Massachusetts Avenue, NW  
Washington, DC 20001  
Telephone: (202) 94-6831

*Counsel for Respondent The Kroger  
Company*

s/ Enu A. Mainigi  
Enu A. Mainigi  
Jonathan B. Pitt  
Beth A. Stewart  
A. Joshua Podoll  
Williams & Connolly LLP  
680 Maine Avenue SW  
Washington, DC 20024  
Telephone: (202) 434-5000

Michael G. Cowie  
Dechert LLP  
1900 K Street, NW  
Washington, DC 20006  
Telephone: (202) 261-3300  
Email: mike.cowie@dechert.com

*Counsel for Respondent Albertsons  
Companies, Inc.*

**PUBLIC**

**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**

**[PROPOSED] ORDER ON EXPEDITED JOINT MOTION TO CLARIFY THE RECESS  
OF THE EVIDENTIARY PORTION  
OF THE PART 3 ADMINISTRATIVE HEARING**

Upon consideration of the Expedited Joint Motion to Clarify the Recess of the  
Evidentiary Portion of the Part 3 Administrative Hearing, it is hereby

ORDERED that the Motion is GRANTED.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date:

**PUBLIC****CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580  
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

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

Michael B. Bernstein  
Matthew Wolf  
Sonia Pfaffenroth  
Joshua Davis  
Michael Kientzle  
Jason Ewart  
Yasmine Harik  
Christina Cleveland  
Arnold & Porter Kaye Scholer LLP  
601 Massachusetts Ave, NW  
Washington, DC 20001  
Telephone: (202) 942-5227  
Email: michael.b.bernstein@arnoldporter.com  
Email: matthew.wolf@arnoldporter.com  
Email: sonia.pfaffenroth@arnoldporter.com  
Email: joshua.davis@arnoldporter.com  
Email: michael.kientzle@arnoldporter.com  
Email: jason.ewart@arnoldporter.com  
Email: yasmine.harik@arnoldporter.com

John Holler  
Arnold & Porter Kaye Scholer LLP  
250 West 55<sup>th</sup> Street  
New York, NY 10019  
Telephone: (212) 836-7739



**PUBLIC**

Email: john.holler@arnoldporter.com

Mark Perry

Luke Sullivan

Weil, Gotshal & Manges LLP

2001 M Street, NW, Suite 600

Washington, DC 20036

Telephone: (202) 682-7511

Email: mark.perry@weil.com

Email: luke.sullivan@weil.com

Luna Barrington

Weil, Gotshal & Manges LLP

767 Fifth Avenue

New York, NY 10153

Telephone: (212) 310-8421

Email: luna.barrington@weil.com

Bambo Obaro

Weil, Gotshal & Manges LLP

201 Redwood Shores Parkway

Redwood Shores, CA 94065

Telephone: (650) 802-3083

Email: bambo.obaro@weil.com

*Counsel for The Kroger Company*

Enu A. Mainigi

Tyler Infinger

Adam J. Podoll

Thomas Ryan

Williams and Connolly LLP

680 Maine Avenue SW

Washington, DC 20024

Telephone: (202) 434-5000

Email: emainigi@wc.com

Email: tinfinger@wc.com

Email: apodoll@wc.com

Email: tryan@wc.com

Edward Hassi

Debevoise & Plimpton LLP

801 Pennsylvania Avenue, NW

Washington, DC 20004

**PUBLIC**

Telephone: (202) 383-8135  
Email: thassi@debevoise.com

Michael Schaper  
Shannon R. Selden  
J. Robert Abraham  
Natascha Born  
Jaime Freilich-Fried  
Tom E. Buckley  
Marie Ventimiglia  
Debevoise & Plimpton LLP

66 Hudson Boulevard  
New York, NY 10001  
Telephone: (212) 909-6737  
Email: mschaper@debevoise.com  
Email: srselden@debevoise.com  
Email: jrabraham@debevoise.com  
Email: nborn@debevoise.com  
Email: jmfried@debevoise.com  
Email: tebuckley@debevoise.com  
Email: msventim@debevoise.com

Mike Cowie  
James Fishkin  
Dechert LLP  
1900 K Street, NW  
Washington, DC 20006  
Telephone: (202) 261-3339  
Email: mike.cowie@dechert.com  
Email: james.fishkin@dechert.com

*Counsel for Albertsons Companies, Inc.*

s/ Barrett J. Anderson  
Barrett J. Anderson  
Federal Trade Commission  
Bureau of Competition  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Telephone: (202) 326-2237  
Email: banderson1@ftc.gov

*Counsel Supporting the Complaint*