

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’

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

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,

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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,

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**[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:

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:

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

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