

**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

**ALBERTSONS COMPANIES, INC.'S OPPOSITION TO
COMPLAINT COUNSEL'S MOTION TO COMPEL**

Respondent Albertsons Companies, Inc. (“Albertsons”), by and through undersigned counsel, hereby opposes Complaint Counsel’s Motion to Compel Production of Witnesses’ Text Messages and Handwritten Notes (“Motion” or “Mot.”). Complaint Counsel’s Motion ignores the extraordinary amounts of discovery – totaling over *17 million documents* – that Albertsons has already provided over the course of the Federal Trade Commission’s (“FTC”) lengthy investigation of the proposed merger with The Kroger Co. (“Kroger”) and is providing in response to requests for production in this administrative proceeding. Complaint Counsel’s demand that Albertsons manually collect and review additional text messages and hard-copy documents – which at most will be cumulative and duplicative of other discovery that has been produced or is in the process of production from more readily available sources – will impose undue burden and expense on Albertsons and potentially delay these time-sensitive proceedings. The potential benefit (if any) of such additional discovery is far outweighed by the attendant burden. The Motion should be denied.

BACKGROUND

I. Albertsons Has Already Provided Extensive Discovery in Connection with a Wide-Ranging FTC Investigation

Albertsons has produced a staggering amount of information since the FTC issued its Request for Additional Information and Documentary Material (“Second Request”) to Albertsons on December 5, 2022. Over the course of an almost eighteen-month investigation, Albertsons produced *over 13.6 million documents* from more than 127 custodians. Albertsons’ narrative responses to the FTC’s 91 specifications were detailed and fulsome, and they ultimately spanned *over 400 pages*. Albertsons also produced enormous amounts of quantitative data that required compiling, reconciling, and validating material from multiple sources and generating bespoke data files responsive to the FTC’s requests. Moreover, the FTC conducted lengthy

investigational hearings with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

In order to respond to the FTC’s requests for its documents, Albertsons collected and produced material from a wide variety of sources, including Microsoft Outlook, OneDrive, and Teams accounts (the “Microsoft 365” documents), as well as mobile devices, local computers, and hard copies. Albertsons generally produced documents from January 1, 2020, through early 2023 (although Albertsons produced documents that went as far back as 2013). At the FTC’s request, Albertsons later collected additional documents through August 29, 2023, from ten key custodians to account for documents that were generated as the FTC’s investigation continued.¹ In light of the significant burden and marginal value of collecting anything beyond Microsoft 365 documents, Albertsons proposed [REDACTED]
[REDACTED]. (Mot. Ex. E, Albertsons’ May 8, 2024 Letter (“May 8 Ltr.”) at 3.)

The vast majority of the over 13.6 million documents that Albertsons produced in response to the Second Request consisted of Microsoft 365 documents, including emails, Microsoft Teams “chats” (or instant messages), and Excel, Word, and PDF files. Only a tiny fraction of the documents that Albertsons produced were text messages and hard copies, *0.19 percent* and *0.01 percent*, respectively.

Yet the burden of collecting those text messages and hard copies far outstripped the burden of collecting Microsoft 365 documents. As a technical matter, Albertsons’ e-discovery

¹ These custodians were [REDACTED].

vendor can collect Microsoft 365 documents with minimal assistance from Albertsons and with zero input from the individual custodians whose documents are being collected. By contrast, collecting text messages from a mobile device generally requires shipping collection kits to custodians, scheduling time to facilitate a collection guided by the vendor, and then shipping the kit back to the vendor in order to download, process, and prepare the data for review. Similarly, individual custodians must gather hard-copy documents for the vendor to scan and prepare for review. Moreover, each text message and hard copy must be reviewed manually by attorneys, rather than by the document review software (technology assisted review or “TAR”) that enables parties to quickly produce many millions of responsive Microsoft 365 documents.

II. Albertsons Has Already Agreed to and Made Significant Additional Productions in Connection with This Proceeding

Albertsons has agreed to very significant productions of both documents and data in response to Complaint Counsel’s First Set of Requests for Production (“RFPs”) dated April 2, 2024. Specifically, among other things, [REDACTED]

[REDACTED]

[REDACTED]. (Statement Regarding Meet and Confer Pursuant to 16 C.F.R. § 3.22(g) (“Statement”) Ex. C, R&Os; *id.* Ex. E, May 2, 2024 Letter (“May 2 Ltr.”) at 2-3; May 8 Ltr. at 1-2, App’x A.) Albertsons’ vendor currently estimates that Albertsons will produce over 3.5 million documents in response to Complaint Counsel’s RFPs before the close of fact discovery on June 11. Albertsons already produced over 900,000 documents last week and over a million documents this week.

However, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (May 2 Ltr. at 2.) [REDACTED]

(Statement Ex. F, FTC's May 3, 2024 Email at 1.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(May 8 Ltr. at 3.) Contrary to Complaint Counsel's suggestion in its Motion, [REDACTED]

[REDACTED]

[REDACTED]. (*Id.* at 3; Mot. at 5.)

III. Albertsons' Document Preservation Efforts

Since the FTC first notified Albertsons of its intent to investigate the merger on November 7, 2022, Albertsons has taken prompt, comprehensive, and reasonable steps to ensure that its employees were informed about their document retention obligations and to identify and collect potentially responsive documents from agreed-upon custodians. As noted above, the initial collection and production in response to the Second Request included text messages. Although a few of Albertsons' Second Request custodians inadvertently did not preserve some text messages, Complaint Counsel's suggestion that Albertsons has not diligently and thoroughly investigated these issues is inaccurate. As Complaint Counsel is well aware, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. There is no evidence that

Albertsons did not take reasonable efforts to preserve documents or that its employees intentionally sought to destroy relevant evidence, nor is there any reason to believe that any of the potentially missing texts could be dispositive or material to Complaint Counsel’s claims in this administrative proceeding. Notably, Complaint Counsel seeks no relief in this motion with respect to Albertsons’ preservation of documents, yet nevertheless attempts to conflate those issues. The mere fact that [REDACTED] [REDACTED] simply has no bearing on the issues raised in *this* motion – *i.e.* whether the *additional* discovery sought is appropriate in light of the massive amount of discovery already provided, the limited import of such additional documents, the undue burden of collecting and producing such documents, and the expedited litigation schedule. It is not for the reasons below.

LEGAL STANDARD

Commission Rule of Practice 3.31(c)(1) permits “discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). An Administrative Law Judge (“ALJ”) “*shall*” limit discovery if it is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive” or if “the burden and expense of the proposed discovery . . . outweigh its likely benefit.” *Id.* § 3.31(c)(2)(i), (iii). In addition, an ALJ may “deny discovery . . . to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.” *Id.* § 3.31(d).

[REDACTED], and does not suggest that Albertsons' documents are "likely to be adverse to Respondents." (Mot. at 9.)

Albertsons' efforts are more than sufficient – particularly in light of the massive scale of prior productions – to fully and comprehensively litigate this action. Any further collection and production of text messages and hard-copy documents would at most yield cumulative discovery that is duplicative of the material that either has already been produced or is currently in the process of being produced. Requiring Albertsons to engage in such duplicative efforts is unreasonable in these circumstances. *See, e.g., Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 107 (S.D.N.Y. 2013) (denying discovery when plaintiffs cannot "demonstrate that the additional requested custodians would provide *unique* relevant information not already obtained").

B. The Burden and Expense of the Additional Discovery Sought Would Outweigh Any Likely Benefit.

Collecting and reviewing the additional documents that Complaint Counsel seeks would be highly burdensome, time-consuming, and expensive, and is not warranted given the tiny fraction of text messages and hard copies – *0.19 percent and 0.01 percent*, respectively – in Albertsons' prior productions. Unlike Microsoft 365 collections, text messages and hard-copy documents must be manually collected and reviewed on a document-by-document basis. They cannot be reviewed by TAR. As a result, production of such materials will necessarily be time-consuming and involve extensive efforts by counsel (with attendant costs) and disruption to the individual custodians, and thus is unduly burdensome. *See Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 306 (6th Cir. 2007) (limiting discovery where "compliance would

prove unduly burdensome” since production “would entail significant added cost and labor, including individual review of potentially responsive documents”); *Shackleford v. Vivint Solar Dev., LLC*, 2020 WL 6273892, at *5 (D. Md. Oct. 26, 2020) (production of text messages not “proportional” when defendant “would have to ask former and current members of its Senior Management to allow” “[a] vendor access to [their] cell phone[s] in order to search”).

Particularly in light of the cumulative and duplicative nature of the additional discovery sought, the “burden and expense of the proposed discovery . . . outweigh its likely benefit,” 16 C.F.R. § 3.31(c)(2)(iii), and the Motion must be denied on that basis, *see, e.g., United States ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235, 241 (D.D.C. 2011) (denying additional discovery where defendants “already spent a king’s ransom on discovery in this case” and “have produced more than two million paper documents, thousands of spreadsheets, and over a half a million e-mails”); *Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp.*, 328 F.R.D. 450, 452 (S.D.N.Y. 2018) (declining to reopen discovery when “the marginal utility of the documents requested, if any, is outweighed by the burdens”). Contrary to Complaint Counsel’s unsupported assertions, (Mot. at 8), the volume of the text messages and hard copies relative to the other documents that Albertsons has produced and to the burden of collection is plainly relevant.

II. Albertsons Should Be Protected From Undue Burden or Delay Under Rule 3.31(d).

Even if Rule 3.31(c) does not *require* denial of the Motion, respectfully, the ALJ should nonetheless deny the Motion to protect Albertsons from undue burden and delay to these time-sensitive proceedings. As explained above, manual collection and review of text messages and hard-copy documents constitutes an undue burden that is unreasonable in these circumstances.

It is also a time-consuming process. An Oregon federal court will hear the FTC’s motion for preliminary injunction on August 26, and has set a fact discovery deadline to align with this proceeding – June 11. Adherence to this schedule is crucial to ensure the preliminary injunction

motion – which in all likelihood will decide the fate of the merger – is decided in advance of the October 9, 2024 outside date for the merger. At a minimum, any order compelling production of additional text messages and hard-copy documents at Complaint Counsel’s insistence should make clear Complaint Counsel cannot use any delays in production of such documents as a predicate to delay fact discovery or the preliminary injunction hearing in the federal action. *See, e.g., TriZetto*, 328 F.R.D. at 452 (declining to re-open discovery given “marginal utility” of additional discovery” outweighed by “burden and delays”).

CONCLUSION

For the reasons set forth herein, the Court should deny Complaint Counsel’s Motion to Compel.

Dated: May 17, 2024

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 21, 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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