

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**COMPLAINT COUNSEL’S MOTION TO REQUIRE
RESPONDENTS TO COMPLY WITH FTC RULE 3.31A(b) AND
IDENTIFY NO MORE THAN FIVE EXPERT WITNESSES**

Respondents’ expert witness list violates the FTC Rule limiting the number of experts that may be called at the evidentiary hearing. FTC Rule 3.31A(b) provides that “[e]ach side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses.” 16 C.F.R. § 331A(b). “A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.” *Id.* The Court’s Scheduling Order reaffirmed, “The parties are to comply with Rule 3.31A.” Scheduling Order ¶ 21. On May 10, 2024, Respondents served their expert witness list, which identified six experts. Respondents did not move for leave to exceed the five-expert limit. Complaint Counsel respectfully moves for an order requiring Respondents to comply with Rule 3.31A(b) and amend their expert witness list to identify only five experts.

BACKGROUND

On May 3, 2024, Complaint Counsel served its expert witness list, which identified three experts whom the FTC may call at the evidentiary hearing of this matter. Ex. A at 1.

On May 10, 2024, Respondents served their expert witness list. Respondents’ expert

witness list identified six experts. Ex. B at 1. Respondents expressly “reserve[d] the right to call any of these experts or any other expert for rebuttal testimony.” Ex. B. at 1 (emphasis added). At the same time, Respondents served expert materials for their six experts, including thousands of pages of prior testimony and publications.

ARGUMENT

Respondents’ identification of six expert witnesses whom they may call at trial violates Rule 3.31A(b)’s five-expert limit. Respondents failed to move for leave to exceed the limit based on “extraordinary circumstances” and take the position that they need not seek leave until an undefined deadline of their choosing.¹ Respondents’ violation of the Rules is unfairly prejudicing Complaint Counsel, who must waste time and resources reviewing extra materials and preparing to depose an expert whom Respondents are prohibited from calling at trial. Respondents should follow the Rules and identify the five witnesses they may call at the evidentiary hearing.

Rule 3.31A(b), 16 C.F.R. § 331A(b), states:

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.

While the five-expert limit in Rule 3.31A(b) “refers to the number of experts that may be called at trial . . . an expert must first be designated and provide an expert report, in order to be allowed to testify.” *In re Pom Wonderful LLC*, No. 9344, 2011 WL 734462, at *2 n.2 (FTC Feb. 23, 2011). Rule 3.31A(b), therefore, “indirectly affects the number of experts that may be

¹ Respondents should not be permitted to seek leave as part of any opposition to this motion. That would directly contravene the procedure set forth in Rule 3.31A(b). If Respondents are permitted to file a motion for leave, Complaint Counsel reserves its right to file an opposition to any such motion.

designated.” *Id.* This Court, accordingly, enforces Rule 3.31A(b) when parties serve expert witness lists with more than five experts. *See, e.g., In re 1-800 Contacts, Inc.*, No. 9372, 2017 WL 781384, at *1 (FTC Feb. 17, 2017).

It is undisputed that Respondents’ expert witness list violates Rule 3.31A(b)’s five-expert limit. Respondents did not move for leave to exceed the limit. They also did not notify Complaint Counsel that they would be serving an expert witness list that violated the Rule.

After Complaint Counsel raised this issue with Respondents, Respondents responded that Rule 3.31A(b) applies only to limit how many witnesses may be called at the evidentiary hearing. *See* Ex. C (Email from L. Sullivan to C. Dickinson (May 13, 2024)). According to Respondents, “if Respondents decide to call six experts to testify at the evidentiary hearing, they will seek relief at the appropriate time consistent with Rule 3.31A(b).” *Id.* Respondents are incorrect. Rule 3.31A(b) “indirectly affects the number of experts that may be designated,” and this Court routinely requires parties to limit disclosures to five experts absent a motion to seek leave. *Pom Wonderful, supra*; *see 1-800 Contacts, supra*. Under Respondents’ reading of the Rule, a party may disclose an unlimited number of experts, impose all the attendant burdens (including depositions) of addressing those experts’ opinions, and then decide later which experts actually will come to trial.

Respondents’ violation of Rule 3.31A(b) is unfairly prejudicing Complaint Counsel, and their position that they need not move for leave until an undefined future deadline of their choosing compounds that prejudice. Respondents served thousands of pages of disclosures for the six experts they identified in violation of the Rules. Complaint Counsel must expend time and resources without knowing which experts may ultimately be called at trial. This includes reviewing expert disclosures, reviewing expert reports, and taking a deposition—all for an expert

who may not be called at trial. This Court should not countenance such dilatory tactics and waste.

CONCLUSION

For the foregoing reasons, the Court should order Respondents to serve an amended expert witness list that identifies no more than five experts.

Dated: May 16, 2024

Respectfully submitted,

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Counsel Supporting the Complaint

Ex. A

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

In the Matter of

The Kroger Company

and

Albertsons Companies Inc.,

Respondents.

Docket No. 9428

COMPLAINT COUNSEL’S EXPERT WITNESS LIST

Pursuant to the Court’s March 20, 2024, Scheduling Order, Complaint Counsel disclose expert witness names, subject matter, and other materials as required. *See* Scheduling Order at p. 1 & ¶ 21(a). Complaint Counsel reserve the right to modify this list. Complaint Counsel also reserve the right:

- A. To call any of these experts or any other expert for rebuttal testimony; and
- B. Not to call at the hearing any of these experts, as circumstances may warrant.

Name	Subject Matter
Edward Fox, Ph.D.	Marketing and retailing.
Nicholas Hill, Ph.D.	Antitrust economics and industrial organization.
Aaron Yeater	Financial and managerial accounting.

The disclosures required by Paragraph 21(a) of the Scheduling Order are being provided concurrently via Secure File Transfer Protocol.

Dated: May 3, 2024

By:

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Ex. B

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

<p>In the Matter of</p> <p>The Kroger Company</p> <p>and</p> <p>Albertsons Companies, Inc.</p>
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Docket No. 9428

RESPONDENTS’ EXPERT WITNESS LIST

Pursuant to the Court’s March 20, 2024 Scheduling Order, Respondents The Kroger Company (“Kroger”) and Albertsons Companies, Inc. (“Albertsons”), by and through their undersigned counsel, provide this list of expert witness names, subject matter, and other materials as required. *See* Scheduling Order at p. 1 & ¶ 21(a). Respondents reserve the right to modify this list. Respondents also reserve the right to call any of these experts or any other expert for rebuttal testimony; and not to call at the hearing any of these experts, as circumstances may warrant.

Name	Subject Matter
Mark Israel	Antitrust economics
Rajiv Gokhale	Efficiencies of the proposed transaction
Dan Galante	Divestiture analysis
Justin McCrary	Labor economics
Roger King	Labor relations
Herbert J. Kleinberger	Retail grocery industry

The disclosures required by Paragraph 21(a) of the Scheduling Order are being provided concurrently.

DATED May 10, 2024

Respectfully submitted,

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Subject: RE: Kroger/Albertsons, FTC Docket No. 9428 - Respondents' Expert Witness List
Date: Monday, May 13, 2024 9:17:15 PM
Attachments: image001.jpg

Counsel –

Thank you for your message. You contend that the disclosure of six expert witnesses violates 16 C.F.R. 3.31A(b). But as your email acknowledges, that rule clearly and unambiguously limits only the number of expert witnesses that may be “call[ed] at the evidentiary hearing.” See 16 C.F.R. 3.31A(b) (“Each side will be **limited to calling at the evidentiary hearing 5 expert witnesses.**”) (emphasis added).

Judge Chappell has recognized that FTC Rule 3.31A(b) does not prohibit the disclosure of more than five experts. In *In re Pom Wonderful, LLC & Roll Int’l Corp.*, Judge Chappell rejected the argument that it was procedurally improper to designate “eight expert witnesses on Respondents’ expert witness list without first obtaining leave pursuant to Rule 3.31A(b).” Dkt. 9344, at 4 n.4 (FTC 2011). Judge Chappell did so because “there is nothing in the language of Rule 3.31A(b) requiring leave in advance of designating experts.” *Id.*

If Respondents decide to call six experts to testify at the evidentiary hearing, they will seek relief at the appropriate time consistent with FTC Rule 3.31A(b). But Respondents’ expert designations are fully consistent with the FTC Rules at this stage.

Best,
 Luke



Luke Sullivan

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Subject: RE: Kroger/Albertsons, FTC Docket No. 9428 - Respondents' Expert Witness List

Dear Counsel,

Respondents have disclosed 6 expert witnesses in violation of 16 C.F.R. 3.31A(b), which states: "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." Please provide an expert witness list in accordance with the Rules by 5pm ET today to avoid the need to seek appropriate relief.

Sincerely,
Charlie

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Sent: Friday, May 10, 2024 6:14 PM

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Subject: Kroger/Albertsons, FTC Docket No. 9428 - Respondents' Expert Witness List



kyle.angelotti@arnoldporter.com sent you a
secure message

Access message

Counsel,

Please find attached Respondents' expert witness list and disclosures
required by Paragraph 21(a) of the Scheduling Order.

Best,
Kyle



Attachments expire on Jun 09, 2024



1 PDF

2024.05.10 - Respondents' Expert Witness List (Part 3).pdf



1 compressed file

2024.05.10 Respondents' Supplemental Expert Material.zip

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

FTC RULE 3.22(g) STATEMENT

Complaint Counsel respectfully submits this Statement, pursuant to Rule 3.22(g) of the Federal Trade Commission’s Rules of Adjudicative Practice, 16 C.F.R. § 3.22(g), and Provision 4 of this Court’s Scheduling Order. Complaint Counsel has attempted to confer in good faith with counsel for Respondents The Kroger Company (“Kroger”) and Albertsons Companies, Inc. (“Albertsons”) to conform their expert witness list to comply with FTC Rule 3.31A(b).

Respondents served their expert witness list on Friday, May 10, 2024.

On Monday, May 13, 2024, Complaint Counsel notified Respondents via email to counsel of record that Respondents’ expert witness list violated FTC Rule 3.31A(b) because it identified six expert witnesses. Complaint Counsel asked Respondents’ counsel to serve a new list that complied with the five-expert limit in Rule 3.31A(b).

That evening, Respondents’ counsel replied via email and declined to amend their expert witness list.

Dated: May 16, 2024

Respectfully submitted,

By: s/ James H. Weingarten
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Counsel Supporting the Complaint

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

[PROPOSED] ORDER

Upon consideration of Complaint Counsel's Motion To Require Respondents To Comply with FTC Rule 3.31A(b) and Identify No More than Five Expert Witnesses and any opposition to that motion:

IT IS HEREBY ORDERED that Complaint Counsel's Motion is GRANTED.

IT IS FURTHER ORDERED that Respondents shall serve on counsel of record in this matter an amended expert witness list that identifies no more than five expert witnesses.

Respondents shall serve their amended expert witness list within two business days of the date of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 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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Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
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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:

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