

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya
 Melissa Holyoak

)	
In the Matter of)	
)	
The Kroger Company)	DOCKET NO. D-9428
)	
and)	PUBLIC
)	
Albertsons Companies, Inc.)	
)	
)	

MOTION FOR CONTINUANCE OF EVIDENTIARY HEARING

Pursuant to FTC Rule 3.41, Respondents The Kroger Co.¹ and Albertsons Companies, Inc. move to continue the commencement of the administrative hearing currently scheduled to begin on July 31, 2024 to October 21, 2024—immediately following the conclusion of a preliminary injunction hearing in Colorado, and after a decision is expected to be issued on the FTC’s request for a preliminary injunction in the parallel federal court proceeding in which the hearing is scheduled to begin on August 26, 2024. The requested continuance will not unduly delay resolution of the proceedings in this matter and will avoid needlessly duplicative proceedings in three tribunals at the same time. The Commission has routinely granted continuances under circumstances such as these and should do so again here, notwithstanding Complaint Counsel’s

¹ While the docket and caption refer to “The Kroger Company,” the correct name of the party is “The Kroger Co.”

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inexplicable refusal to join this motion. *See* Part 3 Status Conference Tr. 9:22–24, 10:19–20 (Mar. 20, 2024) (Exhibit A) (recognizing that a continuance would be the “obvious” course and that “the best way to resolve this would be a joint motion by the Government and the Respondents to delay the start of the FTC trial”).

BACKGROUND

On February 26, 2024, the FTC filed a Complaint for a Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Oregon pursuant to Section 13(b) of the Federal Trade Commission Act almost 18 months after the transaction was announced. *See FTC v. The Kroger Co.*, No. 3:24-cv-00347-AN, ECF No. 1 (D. Or. 2024). The parties have until October 9 to consummate the transaction. If the transaction is not complete by that date, either party may terminate the merger agreement.

The federal district court has scheduled an evidentiary hearing to begin on August 26, 2024. *See id.*, ECF No. 74. The parties have also stipulated to a temporary restraining order preventing the consummation of the proposed acquisition until after 11:59 PM EST on the fifth business day after the district court issues its decision on the FTC’s preliminary injunction. *Id.*, ECF No. 14. In addition, Respondents are also anticipating a preliminary injunction hearing in Colorado state court and a permanent injunction hearing in Washington state court relating to the proposed transaction to begin on August 12, 2024 and September 16, 2024, respectively. *See Colorado v. The Kroger Co.*, No. 24-CV_30459 (Colo. Dist. Ct.); *Washington v. The Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct.). Complaint Counsel filed the complaint in this action on February 26, 2024, and the evidentiary hearing is scheduled to begin on July 31, 2024.

DISCUSSION

FTC Rule 3.41(b) authorizes the Commission to “order a later date for the evidentiary hearing” for good cause. The Commission has routinely concluded that good cause exists to continue Part 3 proceedings to allow federal courts to resolve preliminary injunction motions relating to the same acquisition. *See, e.g., In re IQVIA Holdings Inc.*, Dkt. 9416, 2023 WL 8779132, at *1 (F.T.C. Dec. 14, 2023); *In re Hackensack Meridian Health, Inc.*, Dkt. 9399, 2021 WL 2379546, at *2 (F.T.C. May 25, 2021); *In re Thomas Jefferson Univ.*, Dkt. 9392, 2020 WL 7237952, at *2 (F.T.C. Nov. 6, 2020); *In re RAG-Stiftung*, Dkt. 9384, 2020 WL 91294, at *2–3 (F.T.C. Jan. 2, 2020); *In re Sanford Health*, Dkt. 9376, 2017 WL 6604532, at *1–2 (F.T.C. Dec. 21, 2017); *In re The Penn State Hershey Med. Ctr.*, Docket No. 9368, 2016 WL 3345405, at *1 (F.T.C. June 10, 2016); *In re Advocate Health Care Network*, Docket No. 9369, 2016 WL 2997850, at *1 (F.T.C. May 6, 2016).

Consistent with these well-reasoned decisions, good cause supports issuing a continuance here. Complaint Counsel has represented that it expects the Part 3 proceeding to take “a minimum of four to five weeks,” meaning the proceeding would necessarily conflict with the federal court evidentiary hearing scheduled to begin on August 26, 2024. *See* D. Oregon Status Conference Tr. 27:10–11 (Mar. 11, 2024) (Exhibit B). In that event, the Part 3 trial would either overlap with the federal proceeding or would need to be stopped midway through trial and then resumed weeks later. Such a duplicative or staggered proceeding would be highly inefficient and unduly burdensome on Judge Chappell and his staff, third parties required to testify at both proceedings, and the parties. Furthermore, Complaint Counsel has represented that the Part 3 proceeding will serve as the “merits trial” and will be more expansive than the federal court proceeding. *See id.* at

13:5–9. As a result, it would be challenging for the parties to prepare for both hearings simultaneously and to try the Part 3 case in the weeks leading up to the federal hearing.

This challenge is exacerbated by the fact that Respondents are also preparing for the parallel trials in Colorado and Washington state court. The preliminary injunction hearing in Colorado state court is currently anticipated to take place from August 12 to August 22, 2024, and would therefore almost certainly overlap with the Part 3 proceeding. Requiring Respondents to try the Part 3 and Colorado cases in tandem would be extremely burdensome and potentially infeasible from a logistical perspective, as both proceedings will likely involve the same third parties and expert witnesses.

There is no good reason to begin the Part 3 hearing before the federal court proceeding and depart from well-established Commission precedent. The Commission has never proceeded with a Part 3 hearing prior to a *federal court ordered date* for a preliminary injunction hearing precisely because the purpose of the federal court proceeding is to determine whether an injunction should issue during the pendency of the Part 3 proceeding.² It is, therefore, logical (and ordinary practice) for the federal proceeding to occur first. As Judge Chappell noted at the initial scheduling conference, it would be “obvious to anyone” that the Part 3 proceeding should be continued to follow the federal proceeding. *See* Part 3 Status Conference Tr. 9:22–24. Even if the Part 3 hearing were significantly shorter than anticipated, there would not be sufficient time for Judge Chappell to issue a recommended decision prior to the beginning of the federal court preliminary injunction hearing—and certainly not enough time for that decision to be reviewed by the Commission.

² In *FTC v. Tronox Ltd.*, the Commission sought a preliminary injunction only after the Part 3 hearing had already concluded. *See* No. 1:18-cv-01622, ECF No. 1, at 2 (D.D.C. July 10, 2018). That unique fact pattern is inapplicable here, where the FTC sought preliminary injunctive relief in federal court at the same time it initiated this Part 3 proceeding, so *Tronox* in no way supports holding the Part 3 proceeding before the federal court proceeding in this case.

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In addition, the federal court proceeding will likely obviate the need for the Part 3 hearing. As Respondents explained in the federal court proceeding, if the FTC is successful in obtaining a preliminary injunction, the merger will likely not move forward. *See* D. Oregon Status Conference Tr. 16:14–16 (“If the government wins, the merger dies.”). Conversely, should Respondents prevail in the federal court proceeding, the Part 3 proceeding may be withdrawn and dismissed. *See* FTC Rule 3.26. Sequencing the federal court proceeding before the Part 3 proceeding could thus conserve Commission and third-party resources. Indeed, while Complaint Counsel has taken the position in meet-and-confers that the record in the Part 3 proceedings should be the same as in the federal court proceeding, the only way to ensure this will be the case is for the federal proceeding to precede the Part 3 proceeding.

On the other hand, if the federal proceeding does not obviate the need for the administrative proceeding, continuing the evidentiary hearing until October 21, 2024 will not unduly delay resolution of this matter. Indeed, as the Commission has recognized, “a short delay in the start of the administrative hearing w[ill] not harm the Commission or the public interest should it be necessary for the administrative adjudication to go forward.” *In re Advocate Health Care Network*, 2016 WL 2997850 at *1. This is particularly true here because Respondents are prepared to proceed with discovery in Part 3 immediately, on a timeline synchronized with the federal court schedule to simplify logistics between the two proceedings. Accordingly, fact discovery in Part 3 will be complete prior to October 21, 2024, and Respondents would be ready to try this case before Judge Chappell upon the expiration of the continuance.

As Judge Chappell has recognized, in light of “all these Whack-a-Mole proceedings going on around the country,” Part 3 Status Conference Tr. 10:12–13, “the best way to resolve this would be a joint motion by the Government and the Respondents to delay the start of the FTC trial,” *id.*

20:18–21. Nonetheless, Complaint Counsel have refused to join this motion and instead have suggested to Respondents that the federal court hearing could begin on September 3, 2024, or that the federal court and Part 3 proceedings could occur simultaneously. *See* Exhibit C. Neither suggestion is logical. The district court has already ordered time in August for the evidentiary hearing and, as discussed above, the purpose of the federal court proceeding is to determine whether to temporarily enjoin the transaction pending the resolution of this proceeding, so it makes little sense to hold the federal court proceeding after the Part 3 hearing. Further, it would be extremely burdensome to conduct the two proceedings simultaneously when they involve the same parties, third parties, and expert witnesses. Requiring witnesses to participate in two simultaneous proceedings would be very difficult to coordinate and would impose substantial costs on parties and on third parties alike. *See In re Sanford Health*, 2017 WL 6604532, at *1 (“[T]he public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary.”). And while Complaint Counsel has also suggested that the federal court hearing could have started in early May, this would have allowed Respondents only approximately two months to prepare for the hearing after a nearly 18-month investigation, which is far less than the typical time from a complaint to a preliminary injunction hearing and would have unduly prejudiced Respondents’ ability to conduct discovery and adequately defend themselves.

Indeed, Complaint Counsel’s failure to join this motion and insistence that the parties proceed with a duplicative administrative proceeding that may prove unnecessary is particularly troubling in light of the Commission’s representations to Congress that its resources are strained. In its recent budget request to Congress, the Commission requested a 24.4% increase in its annual funding, citing, among other things, the need for additional funding to support expert witness fees, stenographic services, and other “operational expenses,” as well as to reduce “pressure on staffing

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resources.” *See* Federal Trade Commission, Fiscal Year 2025 Congressional Budget Justification – Budget Request dated March 11, 2024 at 11, available at <https://www.ftc.gov/reports/fy-2025-congressional-budget-justification>. It is hard to imagine a less effective use of the Commission’s resources (and taxpayer money) than engaging in a multi-week administrative proceeding—with attendant witness fees, stenographic services, and pressure on staffing resources—that is unnecessary.

For all of these reasons, there is good cause to grant a brief continuance of the Part 3 hearing. Doing so is in the interest of judicial economy and would preserve the resources of Judge Chappell and his staff, third parties, and the parties. It would also ensure an orderly process for the administrative proceeding.

RELIEF REQUESTED

For these reasons, Respondents respectfully request that the Commission grant this motion and continue the Part 3 evidentiary hearing from July 31, 2024 to October 21, 2024.

Dated: March 26, 2024

Respectfully submitted,

/s/ Sonia K. Pfaffenroth

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Inc.***

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak

_____)	
In the Matter of)	
)	
The Kroger Company)	DOCKET NO. D-9428
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and)	PUBLIC
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Albertsons Companies, Inc.)	
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[Proposed] Order Granting the Joint Motion for a Continuance

Having considered the Respondents’ motion for a continuance of the commencement of the administrative hearing currently scheduled to begin on July 31, 2024, the motion is hereby GRANTED. The administrative hearing shall begin on October 21, 2024.

By the Commission.

ISSUED:

April J. Tabor
Secretary

Date: _____, 2024

PUBLIC**STATEMENT REGARDING CONFERRAL WITH COMPLAINT COUNSEL**

Pursuant to paragraph 4 of the Scheduling Order, Respondents submit this statement representing that Counsel for Respondents have conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion. As noted above, Complaint Counsel oppose this motion.

/s/ Sonia K. Pfaffenroth

Sonia K. Pfaffenroth

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CERTIFICATE OF SERVICE

I hereby certify that, on March 26, 2024, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

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The Honorable D. Michael Chappell
Administrative Law Judge
FEDERAL TRADE COMMISSION
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Washington, D.C. 20580

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

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Emily Blackburn
Paul Frangie
Laura Hall
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Kenneth A. Libby
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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the original filing, and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

/s/ Sonia K. Pfaffenroth

Sonia K. Pfaffenroth

EXHIBIT A

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)
THE KROGER COMPANY)
and) Docket No. 9428
ALBERTSONS COMPANIES,)
INC.,)

PREHEARING SCHEDULING CONFERENCE
MARCH 20, 2024

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge

Reported by: Susanne Bergling, RMR-CRR-CLR

Prehearing Scheduling Conference
Kroger and Albertsons

3/20/2024

1 APPEARANCES :

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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5 CHARLIE DICKINSON, ESQ.

6 Federal Trade Commission

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10 ON BEHALF OF RESPONDENT KROGER:

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18 LUNA BARRINGTON, ESQ.

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23

24

25

Prehearing Scheduling Conference
Kroger and Albertsons

3/20/2024

1 ON BEHALF OF ALBERTSONS:
2 TED HASSI, ESQ.
3 Debevoise & Plimpton
4 801 Pennsylvania Avenue, N.W.
5 Washington, D.C. 20004
6 and
7 MIKE COWE, ESQ.
8 JAMES FISHKIN, ESQ.
9 Dechert, LLP
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Prehearing Scheduling Conference
Kroger and Albertsons

3/20/2024

1 P R O C E E D I N G S

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3 THE COURT: Let's go on the record.

4 This is the prehearing scheduling conference in
5 Docket Number 9428, in the matter of the Kroger Company
6 and Albertsons Companies. I'm Judge Chappell.

7 This scheduling conference is being conducted
8 telephonically and is being transcribed by a court
9 reporter who is on the line with us. Will the court
10 reporter please state your name for the record?

11 THE REPORTER: Yes, Susanne Bergling with For The
12 Record, Inc.

13 THE COURT: Thank you.

14 I have chosen to conduct this scheduling
15 conference telephonically. This choice will save time
16 and resources for a short scheduling conference which is
17 merely procedural and is not evidentiary. This also
18 allows access to the public in much larger numbers than
19 could attend in the courtroom.

20 I will need everyone to mute your phones when you
21 are not speaking to prevent feedback and echoes. Also,
22 before you speak on this call, I need you to identify
23 yourself for the court reporter.

24 I will now take appearances of the parties and
25 those designated to speak for the parties, and I need

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Prehearing Scheduling Conference
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1 you to identify also who is on the call or your client
2 or party.

3 I'll start with Complaint Counsel, for the
4 Government.

5 MR. WEINGARTEN: Good afternoon, Your Honor.
6 This is James Weingarten for Complaint Counsel, and I'm
7 joined by Mr. Charlie Dickinson, also with Complaint
8 Counsel.

9 THE COURT: Okay.
10 And for Respondent Kroger?

11 MS. PFAFFENROTH: Thank you, Your Honor. Good
12 afternoon. My name is Sonia Pfaffenroth with Arnold &
13 Porter on behalf of Kroger. With me is my colleague,
14 Matthew Wolf, also from Arnold & Porter, as well as Mark
15 Perry and Luna Barrington from Weil Gotshall.

16 THE COURT: All right.
17 And for Respondent Albertsons?

18 MR. HASSI: Good afternoon, Your Honor. This is
19 Ted Hassi with Debevoise & Plimpton on behalf of
20 Albertsons. I believe that Mike Cowie and Jim Fishkin
21 from the Dechert firm are also on the line.

22 THE COURT: Is that Ted Hassi?

23 MR. HASSI: It is, Your Honor. It's good to be
24 in your courtroom, so to speak.

25 THE COURT: Welcome back. Welcome back.

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Prehearing Scheduling Conference
Kroger and Albertsons

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1 MR. HASSI: Thank you, sir.

2 THE COURT: In addition to the press -- in
3 addition, the press and the public have access to this
4 scheduling conference through a toll-free telephone
5 connection that allows them to listen in. Therefore,
6 you are cautioned not to reveal any confidential
7 information.

8 I don't know if anyone else heard it, I just
9 heard a beep. Susanne, is that any indication of any
10 issue?

11 THE REPORTER: I heard a little noise, but I'm
12 fine. I can hear everything.

13 THE COURT: All right, thank you.

14 Let's talk about the scheduling order. The
15 parties were provided a joint scheduling order in
16 advance of this conference. The parties submitted
17 jointly proposed changes to the scheduling order. All
18 of the proposed changes are acceptable, and I will issue
19 a scheduling order incorporating the parties' proposed
20 changes shortly.

21 What is the status of the parallel federal action
22 in the Federal Court in Oregon? Who wants to give me an
23 update? Why doesn't the Government go first.

24 MR. WEINGARTEN: Thank you, Your Honor. James
25 Weingarten, again, with Complaint Counsel. We had a

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1 status conference before the Federal District Court
2 Judge on March 11. The District Court Judge offered
3 availability for a preliminary injunction hearing in
4 either May or August. The Defendants elected --
5 Respondents here elected for August, and so the judge in
6 the District Court set the preliminary injunction
7 hearing for August 26th.

8 THE COURT: Was that judge aware of our trial
9 date?

10 MR. WEINGARTEN: Yes, Your Honor. She was aware
11 of the July 31st date, and originally when there was a
12 suggestion of an early August hearing in front of the
13 District Court, she switched to later in August after
14 being apprised that that would mean the hearings would
15 run concurrently. So the District Court Judge moved to
16 late August to accommodate the July 31st hearing date in
17 this case.

18 THE COURT: All right. Anything further --

19 MR. WEINGARTEN: Thank you, Your Honor.

20 THE COURT: -- from the Government?

21 Okay. For Respondent, anything to add?

22 MS. PFAFFENROTH: Yes, Your Honor. This is Sonia
23 Pfaffenroth on behalf of Kroger. The Commission is
24 proposing to start the administrative hearing proceeding
25 on July the 31st, notwithstanding the fact that the

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Prehearing Scheduling Conference
Kroger and Albertsons

3/20/2024

1 Federal Court has set the preliminary injunction hearing
2 to begin on August the 26th --

3 THE COURT: Not just proposing. It's actually --
4 a trial date is now set. That's where we are right now,
5 just so you know, just to be clear.

6 MS. PFAFFENROTH: Yes, Your Honor. Yes, Your
7 Honor. Respondents do intend to move the Commission to
8 continue the Part 3 hearing date until October the 1st.
9 We understand that that motion will be over Complaint
10 Counsel's objection.

11 Respondents are certainly open to the Court's
12 guidance on the best way to proceed to ensure that the
13 Part 3 hearing is not unduly burdensome to Your Honor
14 and your staff and to third parties.

15 We would like Your Honor to be aware that there
16 is the Federal District Court proceeding on the
17 Commission's motion for a preliminary injunction that's
18 pending in obviously the Federal District Court in the
19 District of Oregon, and that is set to begin on August
20 the 26th.

21 There is also a proceeding to enjoin the
22 transaction that has been brought by the State of
23 Washington. There is a permanent injunction hearing in
24 that matter that is scheduled to begin on September the
25 16th.

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Prehearing Scheduling Conference
Kroger and Albertsons

3/20/2024

1 The State of Colorado has also brought a separate
2 case in Colorado State Court challenging the
3 transaction. There is a hearing in the Colorado State
4 Court on this coming Monday regarding scheduling of a
5 hearing in that case.

6 And there is a private challenge to the
7 transaction pending in the United States District Court
8 for the Northern District of California. That case has
9 been stayed pending resolution of the FTC's preliminary
10 injunction proceeding in Federal Court.

11 Your Honor, it is Respondent's position that we
12 recognize that this trial is set for July 31st in this
13 proceeding. We do believe that, given the pendency of
14 the Federal District Court preliminary injunction
15 hearing that is set to begin less than a month later,
16 that proceeding with the Part 3 hearing beginning on
17 July 31st, as currently scheduled, would be an
18 inefficient use of this Court's, Your Honor's, and the
19 third parties' time and resources, and that is why
20 Respondent --

21 THE COURT: Well, let me just stop you there.
22 Let me just stop you there. I think that's obvious to
23 anyone, and we don't need actually any type of argument
24 on that motion since it's not filed yet, but I do
25 understand that.

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Prehearing Scheduling Conference
Kroger and Albertsons

3/20/2024

1 I do want to know, do you speak for Respondent
2 Albertsons as well?

3 MS. PFAFFENROTH: I believe I do, but I'll --
4 sorry.

5 MR. HASSI: Sorry, Sonia.

6 Your Honor, Ted Hassi with Debevoise. We share
7 the concerns about the scheduling and intend to join the
8 motion with Kroger with respect to the trial date to
9 start the Part 3.

10 THE COURT: Were you finished, ma'am?

11 MS. PFAFFENROTH: Yes, Your Honor.

12 THE COURT: Are -- with all these Whack-A-Mole
13 proceedings going on around the country, are all the
14 judges in all those cases aware of all the other pending
15 preliminary injunction proceedings?

16 MS. PFAFFENROTH: Yes, Your Honor.

17 THE COURT: All right. Well, I think someone
18 said what would be the best way to resolve this. Well,
19 the best way to resolve this would be a joint motion by
20 the Government and the Respondents to delay the start of
21 the FTC trial.

22 In that regard, let me ask a question of the
23 Respondents. A lot of times Respondents answer this
24 question. If you don't want to answer it, that's fine,
25 because remember, the press, the public, everyone is on

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1 the line.

2 Have you made a decision whether you will walk
3 away if the injunction is granted in Federal Court?

4 MS. PFAFFENROTH: Your Honor, Sonia Pfaffenroth
5 on behalf of Kroger. I don't think that I can speak for
6 the parties definitively on this call with respect to
7 that.

8 THE COURT: All right.

9 MS. PFAFFENROTH: But we did -- we did represent
10 to the Court in the District of Oregon, and I think it
11 is the case, that given the fact of all of these pending
12 cases and the fact that there is an October 9th outside
13 date on the transaction, that it is -- it is, I think --
14 it is likely to be definitive in terms of the rulings in
15 one of these other actions depending on, of course, how
16 they are to ultimately be decided.

17 THE COURT: And does Albertsons' attorney agree
18 or have anything further to add?

19 MR. HASSI: Your Honor, again -- and, again, this
20 is Ted Hassi with Debevoise. I think that outside date
21 is important here. My client has been at this for a
22 long time in the hopes of seeing this merger through to
23 completion. No decision has been made, but our contract
24 expires of its own weight, if you will, on October 9th,
25 which I think would be before we'd have a decision in

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1 the Part 3, but I think we will have decisions from the
2 other courts before then.

3 THE COURT: And just regarding whatever is public
4 information, is there a walk-away fee involved?

5 MR. HASSI: There is, Your Honor.

6 THE COURT: All right.

7 MR. HASSI: There is a reverse termination
8 agreement -- reverse termination fee in the agreement.

9 THE COURT: Okay. I would say that any motion
10 that's filed -- and I'll say this to both parties -- has
11 a decision been made by the merging parties on what will
12 occur if an injunction is, in fact, entered or granted?
13 If an injunction motion is granted, it would help to
14 include that as a definitive statement in any motion
15 that's filed to delay our case.

16 And with that, let's move on to -- anything
17 further to add on the parallel federal actions, either
18 side?

19 (No response).

20 THE COURT: All right. Hearing nothing, we will
21 move on. Let's talk about settlement discussions. I
22 would trust the parties have attempted to settle. Does
23 the Government want to go first and provide the status
24 of any settlement discussions?

25 MR. WEINGARTEN: Yes. Thank you, Your Honor.

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1 James Weingarten again.

2 On September 8, 2023, the Respondents publicly
3 announced a divestiture package with a third-party buyer
4 named C&S. Complaint Counsel vetted that package during
5 the investigation and found it deficient.

6 Since then, Respondents have not presented a
7 revised divestiture agreement that has been agreed to
8 with C&S or any other proposed buyer. If they reach
9 that phase, they are welcome, of course, to present that
10 information to us in time for us to vet it.

11 THE COURT: Okay.

12 For Respondent?

13 MS. PFAFFENROTH: Your Honor, this is Sonia
14 Pfaffenroth for Kroger. I don't have anything to add to
15 Mr. Weingarten's statement.

16 THE COURT: All right. So as we sit here
17 today -- and, again, this is a public call -- no plans
18 to offer any further spinoffs, divestitures, or sales of
19 assets?

20 MS. PFAFFENROTH: Your Honor, I -- I cannot say
21 that there would not potentially be additional
22 discussions with the Government in the future.

23 THE COURT: Well, if the parties don't talk,
24 nothing's going to happen, so I would suggest that you
25 attempt to engage in settlement discussions at some

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1 time. Is that clear?

2 MS. PFAFFENROTH: Yes. Thank you, Your Honor.

3 MR. WEINGARTEN: And for the Government, for
4 Complaint Counsel, this is James Weingarten. Yes, Your
5 Honor, very clear.

6 THE COURT: Do I hear Albertsons?

7 MR. HASSI: Your Honor, we're happy to resolve
8 this anywhere, any time, anyhow.

9 THE COURT: All right, thank you.

10 Is there anything further? That wraps up what
11 I've got on my agenda. Anything further from the
12 Government?

13 MR. WEINGARTEN: James Weingarten again, Your
14 Honor. No, thank you. Thank you for the time.

15 THE COURT: For Respondent Kroger?

16 MS. PFAFFENROTH: Your Honor, Sonia Pfaffenroth
17 again for Kroger. Nothing further from us. Thank you
18 for your time today.

19 THE COURT: And from Respondent Albertsons?

20 MR. HASSI: This is Ted Hassi. Nothing further,
21 Your Honor. Thank you for your time.

22 THE COURT: Okay. Having and hearing nothing
23 further, thanks to everyone for your time as well. We
24 are adjourned.

25 (Whereupon, at 2:17 p.m., the hearing was

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Prehearing Scheduling Conference
Kroger and Albertsons

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CERTIFICATE OF REPORTER

I, Susanne Bergling, do hereby certify that the foregoing proceedings were recorded by me via stenotype and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



SUSANNE BERGLING, RMR-CRR-CLR

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FEDERAL TRADE COMMISSION, et)
al,)

Plaintiffs,)

v.)

THE KROGER COMPANY and)
ALBERTSONS COMPANIES, INC.,)

Defendants.)

Case No. 3:24-cv-00347-AN

March 11, 2024

Portland, Oregon

Telephone Status Conference

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ADRIENNE NELSON

UNITED STATES DISTRICT COURT JUDGE

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1 (P R O C E E D I N G S)

2 (March 11, 2024; 1:31 p.m.)

3 * * * * *

4 THE COURT: Please be seated.

5 Good afternoon. We're here in the matter of the
6 Federal Trade Commission, et al. versus the Kroger Company and
7 Albertsons Companies, Incorporated. It's Case
8 No. 3:24-cv-00347. This is the time and place set for a status
9 conference on the case.

10 In a moment I'm going to go through the plaintiffs
11 and the defendants, and attorneys can -- the attorneys can
12 place their appearances on the record, but I want to remind
13 everyone that recording of this proceeding is prohibited, that
14 there can be no audio, video, or photo still images in the
15 District of Oregon courthouse. You're clearly in the District
16 of Oregon courthouse, and it extends to judicial proceedings.

17 I also want to say that the Court has placed the
18 Albertsons' proposed redacted complaint, ECF 71-1, under seal
19 because it contains information from the unredacted complaint
20 that has not yet been unsealed by the Court so that we can have
21 all of those in place.

22 So what I want to do is see who is present for the
23 Federal Trade Commission.

24 MR. WEINGARTEN: Good afternoon, Your Honor. Thank
25 you for your time today. This is James Weingarten with the

1 Federal Trade Commission.

2 THE COURT: All right. Is there anyone else from
3 your team here today?

4 MR. WEINGARTEN: Mr. Charles Dickinson is on the line
5 and perhaps a few others, but I believe I will be the primary,
6 if not sole speaker for the FTC today.

7 THE COURT: All right. Do we have anyone from the
8 State of Arizona?

9 MS. WEBER: Yes, Your Honor. This is Jayme Weber on
10 behalf of the State of Arizona.

11 THE COURT: I thought I heard someone else. It's
12 hard to tell. Is there someone else from the State of Arizona?

13 MR. BERNHEIM: Yes, Your Honor. This is Robert
14 Bernheim from the State of Arizona as well.

15 THE COURT: Thank you.

16 Anyone from the State of California?

17 MR. GORDON: Nicole Gordon for the State of
18 California.

19 THE COURT: The District of Columbia?

20 MS. HAMILTON: Yes. Amanda Hamilton for the District
21 of Columbia.

22 THE COURT: The State of Illinois?

23 MR. HARPER: Good afternoon, Your Honor. Paul Harper
24 for the State of Illinois.

25 THE COURT: The State of Maryland?

1 MR. WARREN: Good afternoon, Your Honor. Byron
2 Warren for the State of Maryland.

3 THE COURT: The State of Nevada?

4 MS. FEELEY: Good afternoon, Your Honor. Samantha
5 Feeley for the State of Nevada.

6 THE COURT: I see that we don't have plaintiff on the
7 record -- anyone from the state of New Mexico, because I'll
8 just say that because it says State of New Mexico.

9 (No response.)

10 THE COURT: I didn't think so.

11 State of Oregon?

12 MR. KAYSER: Good afternoon, Your Honor. Chris
13 Kayser on behalf of the State of Oregon. And on the telephone
14 with me today is Tania Manners as well.

15 THE COURT: All right. Ms. Manners, can we at least
16 hear your voice?

17 MS. MANNERS: Good afternoon, Your Honor. Tania
18 Manners on behalf of the State of Oregon.

19 THE COURT: All right. Anyone from the State of
20 Wyoming?

21 (No response.)

22 THE COURT: Anyone from the State of Wyoming?

23 (No response.)

24 THE COURT: All right. Now we'll go to the
25 defendants.

1 For the Kroger Company?

2 MR. CASEY: Good afternoon, Your Honor. John Casey
3 on behalf of the Kroger Company. And I'm happy to introduce my
4 co-counsel.

5 THE COURT: Go ahead.

6 MR. CASEY: Sure. From Arnold & Porter, we have
7 Matthew Wolf.

8 MR. WOLF: Good afternoon, Your Honor.

9 MR. CASEY: We have Sonia Pfaffenroth.

10 MS. PFAFFENROTH: Good afternoon, Your Honor.

11 MR. CASEY: Kolya Glick.

12 MR. GLICK: Good afternoon, Your Honor.

13 MR. CASEY: And from Weil Gotshal, we have Mark
14 Perry.

15 MR. PERRY: Good afternoon, Your Honor.

16 MR. CASEY: And Luna Barrington.

17 MS. BARRINGTON: Good afternoon, Your Honor.

18 THE COURT: Thank you.

19 And for Albertsons?

20 MR. ANGELI: Good afternoon, Your Honor. David
21 Angeli for Albertsons. I believe a number of my colleagues are
22 on the line, including Enu Mainigi and Ted Hassi, who will be
23 speaking primarily.

24 MS. MAINIGI: Good afternoon, Your Honor.

25 MR. HASSI: Good afternoon, Your Honor.

1 THE COURT: Good afternoon.

2 So I just want to make sure that I am clear about
3 what we need to address today. I do understand that there have
4 been redacted complaints submitted by both Kroger and
5 Albertsons, and I understand that you indicated they were
6 unopposed, but they're not the exact same. So I was wondering
7 had there been any discussion among all of the parties whether
8 there would be a joint redacted complaint submitted. And we
9 can discuss that during today's hearing but not necessarily
10 right now.

11 So the Court's first question is, in light of the
12 administrative hearings that are scheduled to begin in July,
13 have the parties contemplated having a hearing on the
14 preliminary injunction or was there going to be a stipulated
15 preliminary injunction submitted? And whoever would like to
16 start.

17 MR. WEINGARTEN: Good afternoon, Your Honor.

18 THE COURT: Go ahead, yes.

19 MR. WEINGARTEN: My apologies for interrupting. Good
20 afternoon, Your Honor. It's James Weingarten from Plaintiff
21 Federal Trade Commission.

22 THE COURT: Yes.

23 MR. WEINGARTEN: The parties have been in discussions
24 about the form of the hearing. I believe that the parties all
25 anticipate some kind of an evidentiary hearing in front of the

1 Court.

2 THE COURT: Okay.

3 MR. WEINGARTEN: And, Your Honor, we have been
4 discussing the parameters of that hearing, including if there's
5 a possibility of coming to agreement on length of hearing, how
6 to proceed with the hearing. But one of the gaining issues,
7 and the reason the parties reached out to the Court, is when
8 will the hearing take place and how much time does the Court
9 have.

10 If I might please have just a moment to provide just
11 a little bit of context about how this proceeding in front of
12 Your Honor will play and interplays with the administrative
13 proceeding, I think that will be helpful. It will shed light
14 on what the parties are contemplating, and certainly what the
15 government is contemplating with respect to a hearing on the
16 preliminary injunction.

17 THE COURT: Go ahead and provide that information.

18 MR. WEINGARTEN: Thank you, Your Honor.

19 So the FTC has authority under the Federal Trade
20 Commission Act to adjudicate the lawfulness of this merger,
21 does it violate the antitrust law. The commission voted to
22 initiate an administrative proceeding that will be the merits
23 trial. That will -- is designed and will determine whether
24 this merger violates the antitrust laws. The merits hearing is
25 scheduled to start in front of an administrative law judge on

1 July 31st. The FTC's rules provide that each side then have up
2 to 210 hours in front of that administrative law judge to
3 present its case, and it provides -- the rules provide for the
4 full scope of discovery, depositions, interrogatories, requests
5 for admissions, third-party discovery, and party discovery.

6 The FTC is proceeding here under another part of the
7 FTC Act, Section 13(b). That's at 15 U.S.C. 53(b), which
8 provides a special claim for the FTC to go to court in federal
9 court and seek a preliminary injunction in aid of the
10 administrative proceeding. The statute provides for a lighter
11 burden for the FTC to win preliminary relief so that the status
12 quo can be maintained while the administrative merits
13 proceeding is pending.

14 And I will recommend respectfully to Your Honor a
15 Ninth Circuit case that is the controlling case on Section
16 13(b) FTC hearings. It's *FTC v. Warner Communications*, 742
17 F.2d 1156. In that case the Ninth Circuit instructed very
18 clearly that the preliminary injunction proceeding is a chance
19 for the FTC to raise substantial and serious questions about
20 the merger, and if it does so, that suffices to grant the
21 preliminary injunction for the duration of the actual merits
22 proceeding in the FTC administrative trial.

23 The role of the district court is to not just
24 receive, of course, the FTC's evidence but also receive
25 evidence from the defense to ensure and satisfy itself of its

1 own independent judgment that the FTC has raised substantial
2 and serious questions about the merger.

3 Now, in this case, of course, the scope of the merger
4 is quite substantial. It's a \$25 billion merger. It involves
5 thousands of stores. As the complaint makes clear, it involves
6 alleged harms in hundreds and hundreds of local communities.
7 There is claims about a supermarket, product market, there are
8 claims about labor and the harms that the merger will inflict
9 on labor.

10 From the government's perspective, Your Honor, we
11 want to take whatever time the Court needs to receive evidence,
12 apply the standard under Section 13(b) and the standard that
13 the Ninth Circuit articulated in *Warner*, to be sure that we
14 bring to Your Honor the evidence that will show there's a
15 substantial and serious question about this merger. We do not
16 expect to have 210 hours in front of Your Honor. We expect to
17 present a small slice of the total evidence gathered and that
18 we will gather to Your Honor. I think, as the complaint shows,
19 the government has gathered substantial evidence from the
20 defendants in terms of their own in-house and party admission
21 testimony. We expect to gather more evidence as we prepare for
22 the July 31st merits trial. But from the government's
23 perspective, we want to be as helpful to the Court as possible
24 in putting forward the evidence that will let the Court
25 determine that the FTC and the government have raised a

1 substantial and serious question about the merger.

2 So, in practical terms, a hearing before the
3 July 31st administrative trial makes sense. We welcome the
4 Court's guidance on what works for the Court. We could do it
5 over a series of days. We just want to make sure, candidly,
6 Judge, that we have the opportunity to present our evidence,
7 but it's understood it's going to be a piece of the evidence,
8 not the whole thing, because that's what the merits trial with
9 the FTC is for. But we have our opportunity to present the
10 evidence, and we are quite confident that Your Honor will see
11 it raises substantial and serious questions about the merger.
12 But we want to do it the most helpful for the Court.

13 So one option is a hearing over a series of days. We
14 would respectfully suggest no later than June so that Your
15 Honor has a chance to receive the evidence, digest it, and even
16 render a decision in advance of the July date.

17 We could also, frankly, Your Honor, as been done in
18 the past where a district court in my experience has waited
19 until after the evidence is introduced in the administrative
20 proceeding. There is a case, *FTC v. Tronox*, T-r-o-n-o-x. In
21 that case the district court waited to receive the evidence
22 until after the hearing, and said, great, I'll take the paper
23 record, I'll take whatever -- a few witnesses from each side,
24 and then I will really be able to adduce whether the FTC can
25 raise substantial questions about the merger, because I'll have

1 the actual hearing record, and then the district court ruled
2 and extended a preliminary injunction.

3 So the short of it is, Judge, we don't want to waste
4 the Court's time, but we certainly welcome whatever opportunity
5 fits within the Court's schedule to present our case, and it
6 could be a matter of days, and we respectfully suggest it be
7 not more than a week per side, because after all, this again is
8 not the merits hearing.

9 But we're open to the Court's guidance and we want to
10 be as helpful to the Court as possible.

11 THE COURT: Well, I appreciate that information that
12 you provided. I did wonder if it would be before or after the
13 merits trial in preparation.

14 I'd like to hear from other counsel. I could tell
15 you that the Court does have availability in early May for a
16 preliminary injunction hearing that would meet the parties'
17 schedule as has been explained, and then we would have other
18 availability, clearly, if it's beyond July.

19 So I don't know who would like -- it's hard because I
20 have some people present in person and some people on the
21 phone. So what I would say is are there any other plaintiffs
22 that would like to weigh in on what has just been shared by the
23 FTC?

24 MR. KAYSER: Your Honor, on behalf of State of
25 Oregon, we would just concur with the FTC's approach.

1 THE COURT: Fair enough.

2 So we'll hear first from Kroger and then from
3 Albertsons, unless you want to jointly address it.

4 MR. CASEY: No, Your Honor. I believe Mr. Wolf will
5 be speaking.

6 THE COURT: Okay.

7 MR. WOLF: Good afternoon, Your Honor. This is Matt
8 Wolf for Kroger.

9 What the FTC terms traditional American grocery
10 stores are under relentless and ever-growing pressure from
11 global behemoths like Walmart, Amazon, and Costco, Target.
12 Walmart's grocery sales alone dwarf the combined sales of
13 Kroger and Albertsons. A merged Kroger and Albertsons, though,
14 would be well positioned to compete in the intensely and
15 increasingly competitive grocery market.

16 In order to challenge this merger, the FTC ignores
17 these realities and turns a blind eye to how consumers actually
18 purchase groceries today. The proposed merger would not only
19 be good for competition, it would be great for consumers,
20 critical for workers. Indeed, it is important for the future
21 of the American corner grocery store.

22 We will prove all of that to you, Your Honor, in the
23 anticipated preliminary injunction proceeding, and the
24 government fears it. And let's all be perfectly clear about
25 this. Your Honor's preliminary injunction order is not only

1 critical, it is likely the decision that decides whether this
2 merger happens.

3 As the government well knows, they've come here today
4 with a scheduling proposal designed to short circuit a fair
5 consideration of the proposed transaction. The difference
6 between the June proposal they make and the July proposal we do
7 is the difference between an extraordinarily expedited but fair
8 process and a fundamental denial of the public's right to a
9 reasonable adjudication of the benefits of the proposed merger.

10 To understand why this is, we need to take a quick
11 step back. To start with, in all but a tiny fraction, a tiny
12 fraction of cases over the last 30 years of FTC challenges, the
13 preliminary injunction decision is dispositive. It is the
14 whole ballgame, Your Honor. If the defendants win, the merger
15 closes. If the government wins, the merger dies. No
16 administrative trial ever happens.

17 In this case the government has spent nearly 18
18 months investigating the merger. They have a massive head
19 start and a massive head start on discovery. They've obtained
20 millions of documents and deposed or gotten declarations from
21 dozens of people. My client, Kroger and Albertsons, on the
22 other hand, have not even had a chance to start issuing
23 discovery because discovery has not opened yet from perspective
24 of the defendants.

25 And to give you just two examples why a July date --

1 THE COURT: So Mr. Wolf, Mr. Wolf, Mr. Wolf.
2 Mr. Wolf, I don't want you to make an argument. I want to know
3 some more about the dates. You'll have an opportunity to
4 present all of your information at a later date, but this is a
5 scheduling conference. I understand what we need to do, and so
6 what I'm trying to understand is are you wanting a preliminary
7 injunction around the May date or are you wanting it at a
8 different date?

9 MR. WOLF: Your Honor, we would like it in July,
10 ideally mid July.

11 THE COURT: I don't know if that would fit the
12 Court's calendar. The Court has other matters that are already
13 scheduled. That's why I was trying to work things out, and
14 quite frankly, July would not work for the Court.

15 MR. WOLF: How does August work, Your Honor?

16 THE COURT: August is not the best. There are some
17 times that are available. So am I hearing from you that you
18 don't want anything before the merits hearing that's scheduled
19 in July -- to begin at the end of July?

20 MR. WOLF: Your Honor, to be clear, the merits
21 scheduled deadline is an artificial one. It's routinely the
22 case that the merits hearing is gaveled in and then stayed
23 during a preliminary injunction. The merits hearing is going
24 to last, if it happens, until mid 2025 at the earliest. By
25 that point, the merger will be dead and gone. So this

1 preliminary injunction, as I said, is the whole ballgame, and
2 so we would request that at the Court's convenience, after
3 we've had a couple months, which is what it's going to take to
4 get discovery from Walmart and Amazon and Costco and others,
5 and get the experts in order, as soon as we get that done, we
6 believe we'll be prepared to have a preliminary injunction
7 proceeding with Your Honor at Your Honor's scheduled
8 convenience.

9 THE COURT: So what you're saying to me, it could be
10 as early as June, but July is preferred, if I'm understanding
11 correctly.

12 MR. WOLF: It would be very challenging to have it in
13 June just because of the simple matter of we're going to serve
14 discovery on Walmart, and Walmart is going to inevitably
15 challenge that discovery in one way or the other. We may have
16 to move to compel. I'm just picking Walmart out of the air,
17 Your Honor. I don't have a specific understanding of the
18 situation because we haven't had a chance to serve discovery
19 yet. So we need to get that discovery integrated into expert
20 reports and then present it to Your Honor.

21 THE COURT: Understood.

22 MR. WOLF: And that takes a period of months.

23 THE COURT: Mr. Weingarten, how do you feel about an
24 August start? I'm trying to look at my calendar. I have a
25 five-week trial that's scheduled that's much of June and a

1 portion of July. So I don't see how that's going to happen.
2 We're having to look at some August dates.

3 MR. WEINGARTEN: Yes, Your Honor. Thank you. It's
4 James Weingarten again from the FTC.

5 With respect to August, the government's respectful
6 suggestion would be we would be in the middle of the July 30 --
7 the administrative hearing that starts on July 31st. It would
8 seem inefficient to have two simultaneous proceedings in
9 August. Therefore, the government's -- the government's
10 respectful suggestion would be do as the *Tronox* court did and
11 receive into evidence after the administrative hearing, that
12 record.

13 THE COURT: Okay.

14 MR. WEINGARTEN: The Court in *Tronox* gave each side
15 two or three live witnesses, and said, please bring them if you
16 want me to hear live testimony, and then the Court was able to
17 decide.

18 I won't respond to all the things counsel
19 suggested -- I disagree with them -- but the July -- one thing
20 I want to emphasize, the commission has set the July 31st date.
21 It can only be moved upon motion of a party to that proceeding
22 and if the commission agrees, and the commission has expressed
23 as a matter of policy and of regulation the government's
24 disdain of the need for expedition because, of course, the
25 parties would like to merge, always say we need to merge

1 quickly and we don't want to wait. That's why the July 31st
2 date is so quick, why it's only five months from the time the
3 FTC initiates a proceeding to the time of the administrative
4 hearing. But after that hearing, the evidence will come in.
5 Your Honor would have the advantage of being able to look at
6 that record. If the endgame here in Section 13(b) is predict
7 the likelihood of success in the admin proceeding, Your Honor,
8 the Court would have the record from the admin proceeding,
9 could review it, hear such additional witnesses as Your Honor
10 would like or feels the need, the Court needs, and then decide,
11 and a preliminary injunction can issue for the rest of the
12 duration of the admin proceeding or not.

13 MS. MAINIGI: Your Honor, this is Enu Mainigi for
14 Albertsons.

15 THE COURT: Yes.

16 MS. MAINIGI: May I have an opportunity to be heard?

17 THE COURT: Yes.

18 MS. MAINIGI: Your Honor, I recognize that the Court
19 obviously has a very busy trial schedule or other hearings
20 scheduled for the summer. I'm wondering whether the Court
21 could enlighten us on what pockets of time the Court might
22 actually have available. So, for example, is the Court
23 available in the late part of June?

24 THE COURT: No.

25 MS. MAINIGI: And are there any dates in July?

1 THE COURT: The Court is not available in June. I
2 have matters scheduled from June 4th through the rest of that
3 entire month. The earliest the Court has available in July is
4 the 18th, and it's just a two-day pocket. There is some
5 availability the week of the 29th of July through the 13th of
6 August. Then the rest of the month is already scheduled.

7 MR. WOLF: Your Honor, this is Matt Wolf following up
8 on Ms. Mainigi's comment. We would respectfully request if we
9 could take those windows that you just outlined and one of two
10 things: either we move and we succeed in getting the FTC
11 proceeding pushed back a couple weeks or there's an awful lot
12 of lawyers. If we need to go simultaneously, we'll go
13 simultaneously. But those windows that you just laid out in
14 July and early August would allow for the incredibly expedited
15 but essential discovery, and then it would also allow for Your
16 Honor to get a reasonable sense of what the issues are in this
17 case for this critical preliminary injunction proceeding. So
18 we would be happy to take the dates you just referenced.

19 MR. WEINGARTEN: Your Honor, this is James
20 Weingarten. May I please be heard?

21 THE COURT: Yes.

22 MR. WEINGARTEN: Thank you, Your Honor.

23 The problem with the suggestion from counsel is maybe
24 a lot of lawyers have entered pro hac vices on behalf of the
25 defendants. I respectfully tender it will be quite a burden

1 and indeed an unfair one to force the FTC to litigate
2 simultaneously. But even putting aside the burden on the FTC,
3 we will do whatever the Court needs to be done. You can only
4 imagine the burden on the party witnesses, the defense
5 witnesses, and even to third parties if again you're having
6 simultaneous cross-country trials, where some will appear in
7 Portland on a Monday and potentially in Washington, D.C. in the
8 FTC courtroom on a Tuesday. So I respectfully suggest that is
9 suboptimal, and if the Court is busy, the *Tronox* solution may
10 be the best available solution.

11 THE COURT: It sounds like --

12 MR. HASSI: Your Honor --

13 THE COURT: Go right ahead. And if you'll identify
14 yourself.

15 MR. HASSI: I'm sorry, Your Honor. This is Ted Hassi
16 for Albertsons.

17 The *Tronox* case is an outlier here, and I don't think
18 we should pretend that it is the normal procedure. In that
19 case, the FTC chose not to seek an injunction and relied
20 instead on the fact that the Tronox merger could not close
21 because they required approval in Europe. And so they waited
22 while the administrative proceeding headed towards a trial and
23 sought just prior to that trial, once the events in Europe
24 suggested that the parties were going to get clearance there,
25 at that point they sought a preliminary injunction. But I

1 don't think we should pretend that that's the normal procedure
2 here. It's the only time that has been done, and I would not
3 suggest that it's necessary.

4 Furthermore, based on my experience, being in Judge
5 Chappell's courtroom, the administrative court, as Mr. Wolf
6 said, the first question he will ask on scheduling is are
7 there -- is there a preliminary injunction proceeding out
8 there, and he'll want to know, because he doesn't want to have
9 a trial if he doesn't need to, because, as Mr. Wolf has said,
10 this case is the whole ball of wax. Other than the *Tronox*
11 case, he has never heard an unconsummated merger, and I don't
12 think he can expect to hear this one if Your Honor gives us
13 those dates in July.

14 MR. WEINGARTEN: Your Honor, if I may. This is James
15 Weingarten again.

16 The reason I raised *Tronox* is we are trying to work
17 constructively with the Court to find dates that work.
18 Mr. Wolf suggested perhaps later in July or August. The point
19 of the *Tronox* precedent is that it shows that a Court can hear
20 the evidence from the administrative hearing after the
21 administrative hearing and render a decision. Whether it the
22 was Europeans in that case or here, where the parties have
23 stipulated to a temporary restraining order, the parties are
24 blocked, the defendants are blocked from merging while the
25 matter is pending before this Court and Your Honor. So there

1 is no need to rush precipitously and step over or on top of the
2 administrative hearing, just as in *Tronox*.

3 I'm trying to think about the administratability of
4 the matter. We can hear the evidence where it is frankly meant
5 to be heard, with all due respect, in the administrative
6 proceeding. That's not the statute, the FTC Act, step one.
7 That's where the merits trial is intended to be. The Ninth
8 Circuit in *Warner* could not be more clear about that, and then
9 Your Honor can receive it. But if Your Honor -- if the defense
10 doesn't like that and Your Honor is inclined to offer dates in
11 May, we can try to work with that as well. The government,
12 again, simply wants the opportunity to the meet the *Warner*
13 standard. We're very confident we can meet it. We will take
14 whatever time Your Honor has and use it wisely, but we will get
15 to you the evidence to show that this merger -- Well, strike
16 that. We don't have to show the merger is unlawful, simply to
17 show there are substantial questions about the merger.

18 THE COURT: Well, the Court understands that there
19 needs to be a hearing, and the Court has given its flexibility
20 in May and in August. I also understand that the decision made
21 around the preliminary judgment -- injunction is the decision
22 that will be the one that has the most weight in all of these
23 proceedings. I understand all of that.

24 I want to make sure that all parties feel that they
25 have the time that they need to present the evidence that they

1 would like, and I understand that we may not be in agreement,
2 because clearly there is a perspective it could happen in May,
3 when I'm hearing others say no way because we'll still be in
4 the middle of trying to gather evidence. So it seems to me we
5 need to look for something later in August, unless somehow the
6 defendants feel they can do an expedited discovery process. Is
7 what I'm hearing.

8 MS. MAINIGI: Your Honor, Enu Mainigi again.

9 THE COURT: Hold on, hold on.

10 MS. MAINIGI: Sure.

11 THE COURT: Let me -- okay. I heard one voice. So
12 I'll have that first voice start.

13 MS. MAINIGI: Your Honor, Enu Mainigi for Albertsons
14 again.

15 THE COURT: Yes.

16 MS. MAINIGI: Coming back on your point on August,
17 just as Your Honor was going over the schedule of what was
18 available earlier, could you just remind us what your available
19 dates are in August?

20 THE COURT: Yes. I'm so glad that I brought all of
21 these various forms of calendars that I have so that I could
22 answer you without having to look through my stack, because
23 that can be so difficult for them.

24 So it's a short week, but I could be available the
25 8th of August through the 19th of August, and then the 26th of

1 August through the rest of the month. Yeah, this is right I'm
2 looking at. And then my clerks and everyone are checking me.
3 And then I have availability in September until the 16th.

4 MR. WOLF: Your Honor --

5 MS. MAINIGI: September what through the 16th, Your
6 Honor?

7 THE COURT: September 2nd -- well, September 3rd,
8 because the 2nd is Labor Day, through the 16th.

9 And I heard another voice.

10 MS. MAINIGI: Thank you.

11 MR. WOLF: Your Honor, this is Matt Wolf for Kroger.
12 From our perspective, those August dates should be sufficient
13 both from a length perspective and from a timing perspective.
14 So we would gladly accept those. And we could perhaps use one
15 of the open July dates as a pretrial or prehearing proceeding.

16 MS. MAINIGI: And Your Honor, from Albertsons'
17 perspective, we concur. We can work certainly within the
18 August dates that Your Honor has offered.

19 THE COURT: So you're talking about the early part of
20 August? I'm just trying to make sure that I understand.

21 MS. MAINIGI: I think, Your Honor, that you indicated
22 the dates through the 19th might be available, and I think we
23 can make that pocket work for sure. And then if there is
24 spillover, which there may well be, because I think we're
25 looking at a -- when all is said and done, a two- to three-week

1 hearing, we could pick back up on the 26th then at that point.

2 THE COURT: Can you give me an idea, Mr. Weingarten,
3 how long you anticipate -- I heard you say the 210 hours, but I
4 want to know generally how long are those merit hearings.

5 MR. WEINGARTEN: Generally, Your Honor -- this is
6 James Weingarten again. Generally those merit hearings run for
7 five weeks. Now, this case, this has a particularly large
8 scope to it because of the number of communities affected, and
9 it's got two components, the supermarkets component and the
10 labor component, so it would be, I think, at a minimum of four
11 to five weeks. That would be my best guess at this point.

12 I will say I have some concern about the proposition
13 from the defense that we have a three-week hearing in front of
14 Your Honor, and I want to circle back, if I may, on the
15 proposition that the preliminary injunction hearing before this
16 Court is the whole ball of wax. The defense or the parties to
17 the merger may decide not to wait or not to, you know, be the
18 chief reason that this Court moves heaven and earth to make a
19 hearing happen. All of the parties, in my experience, say that
20 they will abandon the merger or that the PI hearing, the
21 preliminary hearing is the whole ball of wax, and then
22 frequently they extend the merger agreement as needed if that's
23 what is required for the preliminary injunction hearing to
24 happen.

25 And I am reminded of -- I believe it was the D.C.

1 Circuit in the *Whole Foods* case potentially where they noted
2 the economic -- if the economics for a deal make sense today,
3 they'll make sense later, and that's true here in particular.
4 If Mr. Wolf were correct, this is all about combining to be
5 more competitive, the combination will make just as much sense
6 in the future as it will today. And the FTC has held -- has
7 continued to move forward with administrative proceedings after
8 a loss in the district court. We are doing that currently in
9 the Microsoft merger. It's on appeal with the Ninth Circuit,
10 proceeding, we're waiting for the Ninth Circuit to rule, but
11 while it's up on appeal after the FTC lost in the district
12 court and the preliminary injunction was denied, discovery
13 continued in the administrative proceeding, and we're just
14 waiting for the outcome of that appeal.

15 So I just want to be very clear. And the standard
16 under *Warner* from the Ninth Circuit is emphatic that the
17 hearing before this Court is not the merits proceeding. I just
18 wanted to make sure that was correct, with all due respect to
19 the Court, we understand the procedure we are working under.
20 We will bring the evidence, Judge, I am very confident.

21 MR. WOLF: Your Honor, this is Matt Wolf.

22 I can respond point by point, but I think at this
23 point we have dates that seem to make sense. We can get this
24 done in roughly two weeks of court dates in August, and I think
25 if we can just lock those down, we can get the parties

1 negotiating in the interim dates, we can get to work on the
2 discovery and we can plan to see you for a, as I said, perhaps
3 a prehearing session in July, the hearing in August, and we
4 will get this on and off promptly and fair.

5 THE COURT: Well --

6 MR. WEINGARTEN: Your Honor --

7 THE COURT: Go ahead. Someone else was saying
8 something.

9 MR. WEINGARTEN: I apologize, Your Honor. This is
10 James Weingarten.

11 Just on the August date, again it doesn't resolve the
12 issue of having a simultaneous proceeding.

13 THE COURT: That's what I was going to say. To me, I
14 would prefer to start the preliminary injunction the week of
15 August 6th, and that way we could just go into September. And
16 that way there's a full three-week time frame but for the
17 holiday.

18 MR. WOLF: That certainly works for Kroger, Your
19 Honor.

20 MS. MAINIGI: Your Honor, would you repeat that? I'm
21 sorry, I missed that.

22 THE COURT: I understand. Starting the preliminary
23 injunction the week of August 26th, and but for the Labor Day
24 holiday of September 2nd, continuing until the 16th of
25 September.

1 MS. MAINIGI: Thank you, Your Honor. And that would
2 also work for Albertsons.

3 THE COURT: Now, I'm trying to also understand what
4 would happen if we did it in May. Because if you issue -- if
5 you start your discovery process, say, tomorrow, that gives you
6 60 days. Is that not enough time, which is about two months?

7 MS. MAINIGI: Your Honor, if I may address this.
8 Again, this is Enu Mainigi for Albertsons.

9 That is just really not enough time, with all due
10 respect. I mean, the FTC here, as Mr. Wolf indicated, has had
11 18 months to do extensive discovery, and a significant part of
12 that discovery is third-party discovery. If this was a case
13 where really the discovery was just going to be of two parties
14 to the action without the need to involve third parties, then I
15 think something like May could be feasible. But in the
16 circumstance like this, when there are third parties involved,
17 the number of counsel involved, the tremendous amounts of
18 documents that have to be reviewed -- just to pause there for a
19 minute, Your Honor. The FTC has produced their investigative
20 file, are in the process of finalizing the production of their
21 investigative file, but there's just a tremendous amount of
22 information in there that needs to be digested by us before we
23 move forward. So I think the August dates will work very well.
24 I just think May would be an impossibility and would really put
25 the parties on our side at a tremendous, tremendous

1 disadvantage, given the fact that FTC has 18 months of
2 discovery on us and has produced tens of -- I think in the
3 order of 13 million documents from 93 separate custodians. So
4 there's -- I could provide more details if the Court was
5 interested, but it's a tremendous amount of information and it
6 is just not possible for us to get that review completed and
7 third parties deposed by a May hearing.

8 MR. WOLF: And then, Your Honor, this is Matt Wolf.
9 Just to add to that -- I agree with everything counsel
10 suggested. After we get the third-party discovery, we then
11 need to take the fruits of that and incorporate that and the
12 experts. Obviously, a big part of this case will be experts'
13 discussion of the relevant market, definition of that market,
14 impacts on that market, and the experts can't write their
15 reports, or at least their useful reports, until they get the
16 actual evidence from Walmart, Costco, Target, Amazon, and all
17 the others that play in this space. So we're talking about one
18 cycle of getting the raw data from the third parties, and then
19 the next cycle of expert discovery, expert reports, expert
20 depositions, then we're ready to present to Your Honor for Your
21 Honor's adjudication.

22 MR. WEINGARTEN: If I may, Your Honor, James
23 Weingarten again.

24 THE COURT: Yes.

25 MR. WEINGARTEN: The -- I want to be very clear about

1 the investigation and the discovery. The vast majority of
2 discovery from the investigation was discovery from Kroger and
3 Albertsons. Kroger produced 7 million documents, Albertsons
4 produced 13 million documents. The defendants, I think, are
5 fairly charged with knowledge of the material they produced to
6 the government over the last 18 months. We have -- the FTC has
7 produced the third-party documents it received. That's 300,000
8 documents. The one wrinkle on that on numbers of the case are
9 the third-party documents, and we have voluntarily begun and
10 completed production of all of those third-party productions to
11 us, so the defendants have them. So I think the situation is
12 more akin to what Ms. Mainigi was talking about. This is a
13 case about competition between Kroger and Albertsons. The vast
14 majority of the evidence will be evidence from Kroger and
15 Albertsons. This is a preliminary injunction hearing under a
16 special standard. The defendants can seek discovery, bring it
17 to the Court, do what they need to do, and they will continue
18 to be able to have discovery as part of the administrative
19 proceeding. So we are comfortable with the May date, and it
20 avoids having to step on top of the administrative proceeding.

21 MS. MAINIGI: Your Honor, again, Enu Mainigi for
22 Albertsons, if I may.

23 It certainly seems that the date that Your Honor has
24 suggested of August 26th would accommodate whatever
25 Mr. Weingarten chooses to do with the administrative hearing,

1 but a May date would not be able to accommodate what we need to
2 do, which a substantial portion of which relates to receiving
3 the testimony of third parties and then preparing expert
4 witness reports, as well as preparing expert witnesses. It
5 certainly seems that the August date that Your Honor has
6 offered that go into September accommodate everyone's concerns,
7 and it is the FTC that chose not to sue in the District of
8 Columbia or any other location that they might normally sue,
9 but the FTC has chosen to come file their request for
10 preliminary injunction in Oregon, and so they've got to work
11 with the availability of the Oregon court, and I do believe
12 that the August 25th forward date accommodates everybody's
13 concerns.

14 MR. WOLF: Kroger certainly agrees with that.

15 THE COURT: Well, those are the dates that we're
16 going to put in place. I need to talk to you, though, about
17 the other dates. We will have motions, the response and the
18 replies, and once we do that, we need to talk about the
19 proposed redacted complaint that we haven't addressed yet.

20 MR. WOLF: Your Honor, this is Matt Wolf. With the
21 hearing date set, might I suggest that the parties meet and
22 confer and offer you a proposal? My guess is we're going to be
23 able to agree on most, if not all, of the interim dates.

24 THE COURT: That's fine.

25 MR. WOLF: If there are a handful of dates we

1 disagree about, we can submit them to you, but I suspect we can
2 be efficient with the Court's time if you just give us a couple
3 days to come up with a stipulated plan with that date in mind.

4 THE COURT: The Court is more than willing to let the
5 parties confer with one another. We definitely encourage any
6 need for conferral at any stage of the litigation.

7 Let's talk about the proposed redacted complaint.
8 Clearly a new redacted copy of the complaint needs to be
9 submitted to the Court because it's not in agreement. I would
10 hope that counsel, based on how you've presented yourselves
11 today, can confer and come up with a proposed redacted
12 complaint that is a joint one, based on what was submitted to
13 the Court sometime this week.

14 MS. PFAFFENROTH: Your Honor, this is Sonia
15 Pfaffenroth for Kroger. We are happy to work together with the
16 parties to put together a single complaint that we can submit
17 to the Court this week.

18 THE COURT: Okay. Do you want to give yourself an
19 internal deadline? Because it sounds like you're all very
20 busy, but I also know that attorneys move their calendars
21 around based on dates.

22 MS. PFAFFENROTH: If the parties could have until
23 Friday to work together to put that together for Your Honor,
24 that would work for Kroger.

25 THE COURT: That would work for the Court if it works

1 for Albertsons.

2 MR. ANGELI: Yes, Your Honor.

3 THE COURT: I see local counsel say yes.

4 MS. MAINIGI: Yes, Your Honor.

5 THE COURT: Since we have a preliminary hearing date,
6 the temporary restraining order will remain in place because it
7 was stipulated. That was the Court's assumption, and I wanted
8 to verify that while I have all counsel present.

9 MALE SPEAKER: Yes.

10 MR. WOLF: Kroger understands, Your Honor.

11 MS. MAINIGI: And for Albertsons, Your Honor.

12 THE COURT: All right. Is there anything else we
13 should do today?

14 MR. WOLF: Not from Kroger's perspective, Your Honor.

15 MS. MAINIGI: No, Your Honor. But we do very much
16 thank you for your time?

17 THE COURT: I think I heard Mr. Weingarten.

18 MR. WEINGARTEN: Yes. I was going to say nothing
19 further, Your Honor. Thank you for the Court's time.

20 THE COURT: Absolutely. Hopefully the Court has
21 indicated its availability and willingness to work with counsel
22 on dates, but if you didn't get that impression, I am saying
23 that. I do understand what an important issue this is, how
24 important it is, it's of national interest and importance, and
25 the Court will be as flexible as the Court can be in light of

1 the other matters that it has before it.

2 And with that, Court is adjourned.

3 MR. WOLF: We appreciate that, Your Honor.

4 MS. MAINIGI: Thank you, Your Honor.

5 MR. WEINGARTEN: Thank you, Your Honor.

6 (Proceedings concluded at 2:20 p.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

March 11, 2024

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

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<p>S</p> <p>Sonia [3] 3/19 8/9 34/14 soon [1] 18/5 sorry [2] 22/15 29/21 sought [2] 22/23 22/25 sounds [2] 22/11 34/19 space [1] 31/17 speaker [1] 6/6 speaking [2] 8/23 15/5 special [2] 11/8 32/16 specific [1] 18/17 spent [1] 16/17 spillover [1] 26/24 St [1] 2/23 stack [1] 25/22 stage [1] 34/6 standard [5] 12/12 12/12 24/13 28/15 32/16 start [10] 9/16 10/25 16/11 16/19 16/19 16/22 18/24 25/12 29/14 30/5 Starting [1] 29/22 starts [1] 19/7 state [26] 2/7 2/11 2/19 2/22 3/1 3/4 6/8 6/10 6/12 6/14 6/16 6/17 6/22 6/24 6/25 7/2 7/3 7/5 7/7 7/8 7/11 7/13 7/18 7/19 7/22 14/24 STATES [3] 1/1 1/18 4/17 status [3] 1/15 5/8 11/11 statute [2] 11/10 24/6 stayed [1] 17/22 step [4] 16/11 24/1 24/6 32/20 still [2] 5/14 25/3 stipulated [4] 9/14 23/23 34/3 35/7 Stoel [1] 3/10 store [1] 15/21 stores [2] 12/5 15/10 Street [7] 2/6 2/9 2/17 2/20 3/6 3/17 4/3 strike [1] 24/15 submit [2] 34/1 34/16 submitted [5] 9/4 9/8 9/15 34/9 34/12 suboptimal [1] 22/9 substantial [10] 11/19 12/1 12/4 12/15 12/19 13/1 13/11 13/25 24/17 33/2 succeed [1] 21/10 success [1] 20/7 such [1] 20/9 sue [2] 33/7 33/8 suffices [1] 11/20 sufficient [1] 26/12 suggest [5] 13/14 14/6 22/8 23/3 33/21 suggested [5] 19/19 22/24 23/18 31/10 32/24 suggestion [3] 19/6 19/10 21/23 Suite [8] 2/9 2/13 3/2 3/6 3/11 3/17 4/3 4/9 summer [1] 20/20 supermarket [1] 12/7 supermarkets [1] 27/9 sure [9] 8/6 9/2 12/13 13/5 24/24 25/10 26/20 26/23 28/18 suspect [1] 34/1</p>	<p>18/3 21/9 21/18 24/13 31/11 takes [1] 18/22 talk [3] 33/16 33/18 34/7 talking [3] 26/19 31/17 32/12 Tania [3] 3/5 7/14 7/17 Target [2] 15/11 31/16 team [1] 6/3 Ted [2] 8/22 22/15 telephone [2] 1/15 7/13 tell [2] 6/12 14/14 temporary [2] 23/23 35/6 tender [1] 21/25 tens [1] 31/2 terms [3] 12/20 13/2 15/9 testimony [3] 12/21 19/16 33/3 than [4] 13/14 14/7 23/10 34/4 thank [12] 5/24 6/15 8/18 10/18 19/3 21/22 26/10 30/1 35/16 35/19 36/4 36/5 that [164] that's [16] 11/7 13/8 17/13 17/18 18/25 18/25 19/1 20/1 23/1 24/6 24/7 27/22 28/3 29/13 32/7 33/24 their [8] 5/12 12/20 30/19 30/20 31/14 31/15 33/9 34/20 them [5] 19/15 19/19 25/23 32/11 34/1 then [24] 11/1 13/24 14/1 14/17 15/2 17/22 18/20 19/16 20/10 21/6 21/15 24/8 25/25 26/2 26/3 26/23 27/1 27/21 30/14 31/8 31/10 31/18 31/20 33/3 there [29] 5/14 6/2 6/12 9/3 9/7 9/8 9/14 12/7 12/7 13/20 14/21 17/16 20/25 21/4 22/24 23/7 23/7 23/8 23/25 24/17 24/18 25/2 26/23 26/24 30/16 30/18 30/22 33/25 35/12 there's [6] 10/4 12/14 21/11 29/16 30/21 31/4 Therefore [1] 19/9 these [3] 15/17 24/22 25/21 they [18] 9/5 16/6 16/18 22/21 22/21 22/25 24/24 24/25 24/25 25/6 27/20 27/22 28/1 31/15 32/5 32/17 32/17 33/8 they'll [1] 28/3 they're [1] 9/6 they've [3] 16/3 16/19 33/10 thing [2] 13/8 19/19 things [2] 17/13 19/18 things: [1] 21/10 things: either [1] 21/10 think [20] 7/10 10/13 12/18 22/17 23/1 23/12 24/3 26/21 26/22 26/24 27/10 28/22 28/24 30/15 30/23 30/24 31/2 32/4 32/11 35/17 third [13] 4/18 11/5 22/5 30/12 30/14 30/16 31/7 31/10 31/18 32/7 32/9 32/10 33/3 third-party [6] 11/5 30/12 31/10 32/7 32/9 32/10 this [59] those [11] 5/21 21/9 21/13 23/13 26/12 26/14 27/4 27/6 28/25 32/10 33/15 though [2] 15/13 33/16 thought [1] 6/11 thousands [1] 12/5 three [4] 19/15 26/25 27/13 29/16 three-week [3] 26/25 27/13 29/16</p>	<p>through [9] 5/10 24/2 24/5 25/22 25/25 26/1 26/5 26/8 26/22 time [17] 5/8 5/25 10/8 12/11 14/4 20/2 20/3 20/21 23/2 24/14 24/25 29/16 30/6 30/9 34/2 35/16 35/19 times [1] 17/17 timing [1] 26/13 tiny [2] 16/11 16/11 today [11] 5/25 6/3 6/6 7/14 9/3 15/18 16/3 28/2 28/6 34/11 35/13 today's [1] 9/9 together [4] 34/15 34/16 34/23 34/23 tomorrow [1] 30/5 top [2] 24/1 32/20 total [1] 12/17 towards [1] 22/22 TRADE [8] 1/3 2/4 2/5 5/6 5/23 6/1 9/21 10/19 traditional [1] 15/9 Tranetzki [1] 4/2 transaction [1] 16/5 transcript [3] 1/16 37/5 37/6 tremendous [5] 30/17 30/21 30/25 30/25 31/5 trial [13] 10/23 11/22 12/22 13/3 13/8 14/13 16/16 18/25 20/19 22/22 22/23 23/9 24/7 trials [1] 22/6 Tronox [10] 13/20 19/10 19/14 22/9 22/17 22/20 23/10 23/16 23/19 24/2 true [1] 28/3 try [1] 24/11 trying [8] 17/6 17/13 18/24 23/16 24/3 25/4 26/20 30/3 Tucson [1] 2/10 Tuesday [1] 22/8 turns [1] 15/17 two [10] 16/25 19/8 19/15 21/4 21/9 26/25 27/9 28/24 30/6 30/13 two-day [1] 21/4</p> <hr/> <p>U</p> <p>U.S.C [1] 11/7 unconsummated [1] 23/11 under [8] 5/18 10/19 11/6 12/12 15/10 28/16 28/19 32/15 understand [13] 9/3 9/5 16/10 17/5 17/6 24/20 24/23 25/1 26/20 28/19 29/22 30/3 35/23 understanding [2] 18/10 18/17 understands [2] 24/18 35/10 understood [2] 13/7 18/21 unfair [1] 22/1 UNITED [3] 1/1 1/18 4/17 unlawful [1] 24/16 unless [2] 15/3 25/5 unopposed [1] 9/6 unredacted [1] 5/19 unsealed [1] 5/20 until [7] 13/19 13/22 17/24 26/3 29/24 31/15 34/22 up [6] 11/1 21/7 27/1 28/11 34/3 34/11 upon [1] 19/21 us [8] 20/21 23/12 25/18 30/22 31/2 31/6 32/11 34/2</p>
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<p>U</p> <p>use [2] 24/14 26/14 useful [1] 31/15</p> <hr/> <p>V</p> <p>Vacura [1] 3/5 various [1] 25/21 vast [2] 32/1 32/13 Vegas [1] 3/3 verify [1] 35/8 versus [1] 5/6 very [10] 11/17 18/12 20/19 24/13 28/15 28/20 30/23 31/25 34/19 35/15 vices [1] 21/24 video [1] 5/14 violate [1] 10/21 violates [1] 10/24 voice [4] 7/16 25/11 25/12 26/9 voluntarily [1] 32/9 voted [1] 10/21</p>	<p>24/11 24/15 24/18 26/7 26/24 29/5 30/23 33/4 33/15 were [3] 9/5 22/24 28/4 what [27] 5/22 9/3 10/14 10/14 13/4 13/8 14/21 14/22 15/9 17/5 17/6 18/3 18/9 20/21 21/16 25/7 25/17 25/18 26/5 27/23 29/13 30/3 32/12 32/17 33/1 34/12 35/23 whatever [6] 12/11 13/23 14/4 22/3 24/14 32/24 when [4] 10/7 25/3 26/25 30/16 where [7] 13/18 22/6 23/22 24/4 24/7 28/1 30/13 whether [6] 9/7 10/23 13/24 16/1 20/20 23/21 which [6] 11/7 18/3 26/24 30/6 33/2 33/2 while [5] 11/12 22/22 23/24 28/11 35/8 who [3] 5/22 8/22 14/19 whoever [1] 9/15 whole [7] 13/8 16/14 18/1 23/10 27/16 27/21 28/1 why [5] 16/10 16/25 17/13 20/1 20/2 will [40] Williams [1] 4/5 willing [1] 34/4 willingness [1] 35/21 win [2] 11/11 16/14 windows [2] 21/9 21/13 wins [1] 16/15 wisely [1] 24/14 within [2] 14/5 26/17 without [3] 25/22 30/14 37/6 witness [1] 33/4 witnesses [6] 13/23 19/15 20/9 22/4 22/5 33/4 Wolf [18] 3/19 8/7 15/4 15/8 17/1 17/1 17/1 17/2 21/7 23/5 23/9 23/18 26/11 28/4 28/21 30/10 31/8 33/20 won't [1] 19/18 wonder [1] 14/12 wondering [2] 9/6 20/20 work [17] 17/13 17/14 17/15 23/16 23/17 24/11 26/17 26/23 29/1 30/2 30/23 33/10 34/15 34/23 34/24 34/25 35/21 workers [1] 15/20 working [1] 28/19 works [3] 13/4 29/18 34/25 would [46] would like [1] 9/15 wrinkle [1] 32/8 write [1] 31/14 Wyoming [2] 7/20 7/22</p>	<p>you've [1] 34/10 PUBLIC your [109] yourself [2] 22/14 34/18 yourselves [1] 34/10</p>
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EXHIBIT C

PUBLIC

From: [Weingarten, James](#)
To: [Holler, John](#); [Hall, Laura](#); [Hassi, Ted](#); [Wolf, Matthew M.](#); [Pfaffenroth, Sonia Kuester](#); [Davis, Joshua M.](#); [Kientzle, Michael](#); [Ewart, Jason C.](#); [Yasmine Harik -contact](#); [Cleveland, Christina](#); [Perry, Mark](#); [Barrington, Luna](#); [Obaro, Bambo](#); [Sullivan, Luke](#); [Schaper, Michael](#); [Selden, Shannon R.](#); [Abraham, J. Robert](#); [Born, Natascha](#); [Fried, Jaime](#); [Cardenas, Marieugenia](#); [Buckley, Tom E.](#); [Mehler, Heather T.](#); [Ventimiglia, Marie S.](#); mike.cowie@dechert.com; [James A. Fishkin](mailto:James.A.Fishkin); Thomas.Miller@Dechert.com; emainigi@wc.com; jpitt@wc.com; apodoll@wc.com
Cc: [Dickinson, Charles](#); [Pai, Rohan](#); [Ma, Rachel](#); [Wint, Corene](#)
Subject: Re: Kroger: Draft Part 3 Proposed Scheduling Order
Date: Friday, March 22, 2024 9:23:02 AM
Attachments: [image001.png](#)

Counsel:

Complaint Counsel declines to join the proposed motion. In Meta, the 13(b) preliminary injunction hearing had concluded before the Part 3 administrative proceeding on the merits was set to commence. That circumstance is not analogous to the circumstances here.

Sincerely,
 James

James H. Weingarten
 Chief Trial Counsel
 Federal Trade Commission
 Tel: (202) 326-3570

From: Holler, John <John.Holler@arnoldporter.com>
Sent: Thursday, March 21, 2024 1:00:52 PM
To: Weingarten, James <jweingarten@ftc.gov>; Hall, Laura <lhall1@ftc.gov>; Hassi, Ted <thassi@debevoise.com>; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Kientzle, Michael <Michael.Kientzle@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; Cleveland, Christina <Christina.Cleveland@arnoldporter.com>; Mark Perry <mark.perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; Sullivan, Luke <Luke.Sullivan@weil.com>; Schaper, Michael <mschaper@debevoise.com>; Selden, Shannon R. <srselden@debevoise.com>; Abraham, J. Robert <jrabraham@debevoise.com>; Born, Natascha <nborn@debevoise.com>; Fried, Jaime <jmfried@debevoise.com>; Cardenas, Marieugenia <mcardenas@debevoise.com>; Buckley, Tom E. <tebuckley@debevoise.com>; Mehler, Heather T. <htmehler@debevoise.com>; Ventimiglia, Marie S. <msventim@debevoise.com>; mike.cowie@dechert.com <mike.cowie@dechert.com>; James A. Fishkin <james.fishkin@dechert.com>; thomas.miller@dechert.com <thomas.miller@dechert.com>; emainigi@wc.com <emainigi@wc.com>; jpitt@wc.com <jpitt@wc.com>; apodoll@wc.com <apodoll@wc.com>
Cc: Dickinson, Charles <cdickinson@ftc.gov>; Pai, Rohan <rpai@ftc.gov>; Ma, Rachel <rma@ftc.gov>; Wint, Corene <cwint@ftc.gov>
Subject: RE: Kroger: Draft Part 3 Proposed Scheduling Order

PUBLIC

Counsel,

In light of the Court's clear guidance at the scheduling conference yesterday afternoon that the best way to resolve the scheduling conflict between the Part 3 hearing and federal preliminary injunction hearing would be to file a "joint motion to delay the start of the FTC trial," please let us know if Complaint Counsel is now willing to join Respondents' motion to continue the Part 3 hearing until after a decision is reached in the federal preliminary injunction action.

Respondents note that the FTC has agreed to join a motion to continue in analogous circumstances in the recent past. In *Meta*, Complaint Counsel joined Respondents' motion to continue the Part 3 hearing after the Court similarly advised the parties to "seek[] a continuance or extension of the trial date until 2 weeks after a ruling by the district court in the pending preliminary injunction proceeding." Respondents respectfully request that Complaint Counsel do the same here.

Best,
John

John Holler

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From: Weingarten, James <jweingarten@ftc.gov>

Sent: Wednesday, March 20, 2024 9:36 AM

To: Hassi, Ted <thassi@debevoise.com>; Holler, John <John.Holler@arnoldporter.com>; Hall, Laura <lhall1@ftc.gov>; Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Pfaffenroth, Sonia Kuester <Sonia.Pfaffenroth@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Kientzle, Michael <Michael.Kientzle@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Harik, Yasmine <Yasmine.Harik@arnoldporter.com>; Cleveland, Christina <Christina.Cleveland@arnoldporter.com>; Mark Perry <mark.perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; Sullivan, Luke <Luke.Sullivan@weil.com>; Schaper, Michael <mschaper@debevoise.com>; Selden, Shannon R. <srselden@debevoise.com>; Abraham, J. Robert <jrabraham@debevoise.com>; Born, Natascha <nborn@debevoise.com>; Fried, Jaime <jmfried@debevoise.com>; Cardenas, Marieugenia <mcardenas@debevoise.com>; Buckley, Tom E. <tebuckley@debevoise.com>; Mehler, Heather T. <htmehler@debevoise.com>; Ventimiglia, Marie S. <msventim@debevoise.com>; zzz.External.mike.cowie@dechert.com <mike.cowie@dechert.com>; James A. Fishkin <james.fishkin@dechert.com>; zzz.External.thomas.miller@dechert.com <thomas.miller@dechert.com>; zzz.External.emainigi@wc.com <emainigi@wc.com>; jpitt@wc.com; zzz.External.apodoll@wc.com <apodoll@wc.com>

PUBLIC**Cc:** 1042-Kroger-Albertsons-DL <1042-Kroger-Albertsons-DL@ftc.gov>**Subject:** RE: Kroger: Draft Part 3 Proposed Scheduling Order

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Ted:

Complaint Counsel intends to oppose Respondents' proposed motion to move the administrative adjudication to October 1 or later.

We disagree that good cause exists to delay the administrative adjudication of this case. If it appears that the administrative and District Court proceedings will indeed overlap, the parties can work with the District Court, e.g., by starting the 13(b) preliminary injunction hearing on September 3. In the alternative, if necessary, the parties could finish the administrative hearing on the merits while the preliminary injunction hearing begins. As counsel for Kroger told the Court: "If we need to go simultaneously, we'll go simultaneously." Mar. 11, 2024 Tr. at 21.

The District Court offered Kroger and Albertsons a choice of a May or August hearing date, and Respondents chose August. As a result, the administrative merits hearing will come first. The District Court will assess the likelihood of the FTC's success on the merits in the underlying administrative proceeding. As it turned out in this case, the district court will have the benefit of the actual record of the merits proceeding as it makes that determination. The parties in turn will be able to tailor their presentations to the district court based on the evidence admitted in the merits proceeding.

Sincerely,
James

James H. Weingarten
Chief Trial Counsel
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Bureau of Competition
Tel: (202) 326-3570
jweingarten@ftc.gov

From: Hassi, Ted <thassi@debevoise.com>**Sent:** Monday, March 18, 2024 8:48 PM**To:** 'Holler, John' <John.Holler@arnoldporter.com>; Hall, Laura <lhall1@ftc.gov>; Weingarten, James <jweingarten@ftc.gov>; Matt Wolf <Matthew.Wolf@arnoldporter.com>; Sonia Pfaffenroth <Sonia.Pfaffenroth@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Kientzle, Michael <Michael.Kientzle@arnoldporter.com>; Jason Ewart

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<Jason.Ewart@arnoldporter.com>; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; Cleveland, Christina <Christina.Cleveland@arnoldporter.com>; Mark Perry <mark.perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; Sullivan, Luke <Luke.Sullivan@weil.com>; Schaper, Michael <mschaper@debevoise.com>; Selden, Shannon R. <srselden@debevoise.com>; Abraham, J. Robert <jrabraham@debevoise.com>; Born, Natascha <nborn@debevoise.com>; Fried, Jaime <jmfried@debevoise.com>; Cardenas, Marieugenia <mcardenas@debevoise.com>; Buckley, Tom E. <tebuckley@debevoise.com>; Mehler, Heather T. <htmehler@debevoise.com>; Ventimiglia, Marie S. <mventim@debevoise.com>; mike.cowie@dechert.com; James A. Fishkin <james.fishkin@dechert.com>; thomas.miller@dechert.com; emainigi@wc.com; jpitt@wc.com; apodoll@wc.com

Cc: 1042-Kroger-Albertsons-DL <1042-Kroger-Albertsons-DL@ftc.gov>

Subject: RE: Kroger: Draft Part 3 Proposed Scheduling Order

James,

Thank you for meeting with us earlier today.

As we discussed, Respondents seek Complaint Counsel's position on a motion to continue the July 31 administrative hearing until October 1, 2024, or a mutually agreeable date thereafter. Judge Nelson has scheduled a hearing on the FTC's motion for a preliminary injunction in the federal Section 13(b) proceeding for August 26 – September 16, less than a month after the Part III hearing is currently set to begin, resulting in overlapping and conflicting schedules in the federal and administrative proceedings. Indeed, the FTC stated on the record before Judge Nelson that the Part 3 hearing would likely take "a minimum of four to five weeks." 3/11 Tr. at 27:10-11. The FTC further stated that Part 3 hearings "generally . . . run for five weeks" but this case "has a particularly large scope to it," suggesting the merits hearing could be even longer. Id. at 27:6-8.

In light of these statements, even if the Part 3 hearing begins on July 31, it will very likely not be complete before the federal preliminary injunction hearing begins—resulting in a disjointed and inefficient process of starting, stopping, and then resuming the Part 3 trial. This would unduly burden the FTC ALJ and his staff, the parties, and third parties that will be required to testify. Accordingly, a short continuance of the administrative hearing is warranted and would avoid a piecemeal approach to the Part 3 trial. It would also allow the parties to align the fact and expert discovery deadlines in the two proceedings and thus minimize the burdens on non-parties and parties and preserve the Commission's resources. Moreover, even if the Part 3 hearing date is continued, Respondents are prepared to complete all discovery in Part 3 before the federal preliminary injunction hearing begins to ensure the case is ready to proceed to trial on October 1 if necessary. At the same time, if Judge Nelson's decision obviates the need to hold two successive evidentiary hearings on the same question, granting the continuance will conserve resources of the FTC ALJ and his staff, the parties, and third parties.

Please let us know your position by 10am ET on Wednesday, March 20 in advance of our status conference with Judge Chappell.

Best,

Ted

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From: Holler, John [<mailto:John.Holler@arnoldporter.com>]

Sent: Sunday, March 17, 2024 22:19

To: Hall, Laura; Weingarten, James; Matt Wolf; Sonia Pfaffenroth; Davis, Joshua M.; Kientzle, Michael; Jason Ewart; Harik, Yasmine; Cleveland, Christina; Mark Perry; Barrington, Luna; Obaro, Bambo; Sullivan, Luke; Hassi, Ted; Schaper, Michael; Selden, Shannon R.; Abraham, J. Robert; Born, Natascha; Fried, Jaime; Cardenas, Marieugenia; Buckley, Tom E.; Mehler, Heather T.; Ventimiglia, Marie S.; mike.cowie@dechert.com; James A. Fishkin; thomas.miller@dechert.com; emainigi@wc.com; jpitt@wc.com; apodoll@wc.com

Cc: 1042-Kroger-Albertsons-DL

Subject: RE: Kroger: Draft Part 3 Proposed Scheduling Order

EXTERNAL

James and Laura,

Attached please find Defendants' markup of Plaintiffs' edits to the proposed Part 3 scheduling order. Defendants' edits are redlined and highlighted in yellow.

Defendants are available to meet and confer regarding the Part 3 scheduling order tomorrow at 3pm ET.

Best,
John

John Holler

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From: Hall, Laura <lhall1@ftc.gov>

Sent: Sunday, March 17, 2024 3:46 PM

To: Weingarten, James <jweingarten@ftc.gov>; Wolf, Matthew M.

<Matthew.Wolf@arnoldporter.com>; Pfaffenroth, Sonia Kuester

<Sonia.Pfaffenroth@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>;

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Further to the below,

Would 3pm tomorrow work for a meet and confer on the Part 3 scheduling order?

Best,
Laura

From: Weingarten, James <jweingarten@ftc.gov>

Sent: Sunday, March 17, 2024 9:45 AM

To: Wolf, Matthew M. <Matthew.Wolf@arnoldporter.com>; Sonia Pfaffenroth <Sonia.Pfaffenroth@arnoldporter.com>; Davis, Joshua M. <Joshua.Davis@arnoldporter.com>; Kientzle, Michael <Michael.Kientzle@arnoldporter.com>; Ewart, Jason C. <Jason.Ewart@arnoldporter.com>; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; Holler, John <John.Holler@arnoldporter.com>; Cleveland, Christina <Christina.Cleveland@arnoldporter.com>; Perry, Mark <Mark.Perry@weil.com>; Barrington, Luna <Luna.Barrington@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; Sullivan, Luke <Luke.Sullivan@weil.com>; Hassi, Ted <thassi@debevoise.com>; Schaper, Michael <mschaper@debevoise.com>; Selden, Shannon R. <srselden@debevoise.com>; Abraham, J. Robert <jrabraham@debevoise.com>; Born, Natascha <nborn@debevoise.com>; Fried, Jaime <jmfried@debevoise.com>; Cardenas, Marieugenia <mcardenas@debevoise.com>; tebuckley@debevoise.com; htmehler@debevoise.com; msventim@debevoise.com; mike.cowie@dechert.com; James A. Fishkin <james.fishkin@dechert.com>; thomas.miller@dechert.com; emainigi@wc.com; jpitt@wc.com; apodoll@wc.com

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Subject: Kroger: Draft Part 3 Proposed Scheduling Order

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Counsel:

As discussed, please find attached Complaint Counsel's proposed edits to the Chief Administrative Law Judge's proposed scheduling order.

Sincerely,
James

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