

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

In the Matter of

The Kroger Company

and

Albertsons Companies, Inc.

Docket No. 9428

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO REQUIRE RESPONDENTS TO IDENTIFY
NO MORE THAN FIVE EXPERT WITNESSES**

Complaint Counsel argues that Respondents' expert witness list violated FTC Rule 3.31A(b) by designating six experts. But FTC Rule 3.31A(b) only limits experts that may be "call[ed] at the evidentiary hearing" to testify; it does not expressly limit the number of experts that may be *disclosed*. Respondents have made clear to Complaint Counsel that they may not ultimately call six experts to testify at the evidentiary hearing, but if they elect to do so, Respondents would seek leave under FTC Rule 3.31A(b). *See* Mot. at 3. Simply put, there is nothing in the language of Rule 3.31A(b) requiring leave to disclose more than five experts, and Respondents' expert disclosures are fully consistent with the clear, unambiguous language of that Rule. *See In re POM Wonderful, LLC*, Dkt. 9401, 2011 WL 734462, at *2 n.2 (F.T.C. 2011).

Nevertheless, to avoid dispute, Respondents will file by Tuesday, May 28, 2024, a motion for leave to call six experts to testify at the evidentiary hearing under Rule 3.31A(b). The Court will either grant this relief or deny it and require Respondents to designate only five experts, which is the same relief Complaint Counsel seeks here. *See* Mot. at 1. Respondents' forthcoming motion for leave to call an additional expert under FTC Rule 3.31A(b) therefore obviates the need for a

ruling on this motion. Indeed, Complaint Counsel’s motion contemplated Respondents filing such a motion. *See* Mot. at 2 n.2 (reserving rights to oppose Respondents moving for leave to call an additional expert under FTC Rule 3.31A(b)). And to the extent Complaint Counsel argues that Respondents should be precluded from receiving leave to call six experts due to their initial disclosures, that result would be inconsistent with this Court’s precedent. *See In re POM Wonderful, LLC*, Dkt. 9401, 2011 WL 734462, at *2 n.2 (F.T.C. 2011) (rejecting argument that it “violated procedural requirements” to “designat[e] eight expert witnesses on Respondents’ expert witness list without first obtaining leave pursuant to Rule 3.31A(b)”).

Accordingly, given Respondents’ forthcoming motion for leave to call an additional expert witness under FTC Rule 3.31A(b), the Court should deny Complaint Counsel’s motion.

May 23, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 23, 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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