

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

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In the Matter of )  
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The Kroger Company, )  
 ) Docket No. 9428  
and )  
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Albertsons Companies, Inc., )  
 )  
Respondents. )  

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 )Requests for Production of Doc

Respondents' employees use text messages to communicate about work and keep handwritten notes on relevant topics.

Complaint Counsel's First Set of RFPs, issued on April 2, 2024 in the above captioned litigation, seeks, among others, all documents and communications relating to the proposed merger and divestiture, competition between Respondents, and labor relations strategies. Respondents provided Responses and Objections, stating they would be collecting only Microsoft Office 365 sources, which includes emails, Microsoft Teams "chats" (or instant messages), and Excel, Word, and PDF files. Asserting that the burden of collecting text messages and hard copies far outstrips the burden of collecting Microsoft 365 documents, Respondents refused to produce them. This Motion followed.

### III.

Unless limited by order of the Administrative Law Judge, parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c)(1). Pursuant to Rule 3.38, "[u]nless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . any requests for . . . documents . . . be made." 16 C.F.R. § 3.38(a).

Discovery shall be limited if the Administrative Law Judge "determines that: (i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; . . . or (iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2). In addition, the Administrative Law Judge may deny discovery to protect a party from undue burden or expense or to prevent undue delay in the proceeding. 16 C.F.R. § 3.31(d).

With respect to electronically stored information ("ESI"), a party "need not provide discovery . . . from sources that the party . . . identifies as not reasonably accessible because of undue burden or cost." 16 C.F.R. § 3.31(c)(3). On a motion to compel discovery of ESI, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. *Id.*

"Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied." *In re Daniel Chapter One*, 2009 WL 569694, at \*2 (F.T.C. Jan. 9, 2009). A movant's general allegation that a document request is unduly burdensome is insufficient to carry its burden of showing that the requested discovery should be denied. *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at \*10 (Jan. 15, 2009).

### IV.

There is no dispute that the documents requested are relevant. Documents produced during the investigation include text messages where Respondents' employees convey that they view each other as competitors, report on visits to each other's stores, and discuss pricing and



V.

For the above stated reasons, Respondents have failed to meet their burden of demonstrating that the request for text messages and handwritten notes from Preliminary Witnesses is unduly burdensome or that the burden or expense of the discovery outweigh its likely benefit. Accordingly, the Motion is GRANTED.

IT IS HEREBY ORDERED that Respondent The Kroger Company shall collect text messages and handwritten notes from Mary Ellen Adcock, Stuart Aitken, Yael Cosset, Andy Groff, Todd Kammeyer, Joseph Kelley, Colleen Lindholz, Mafaz Maharoo, Tim Massa, Rodney McMullen, Jon McPherson, Megan Shaffer, and Brent Stewart for the period from August 1, 2022, or the date of last collection if collected in response to the FTC's December 5, 2022 Request for Additional Information and Documentary Material issued in the investigation ("Second Request"), through April 22, 2024, and shall produce those non-privileged documents that are responsive to Complaint Counsel's RFPs.

IT IS FURTHER ORDERED that Respondent Albertsons Companies, Inc. shall collect text messages and handwritten notes from Todd Broderick, Ryan Cloward, Kevin Curry, Anuj Dhanda, Daniel Dosenbach, Usman Humayun, Carl Huntington, Lisa Kinney, Michelle Larson, Joseph Lask, Susan Morris, Rahul Pinto, Scott Shores, Vivek Sankaran, Tony Silva, Brad Street, and Teresa Whitney for the period from August 1, 2022, or the date of last collection if collected in response to the Second Request, through April 22, 2024, and shall produce those

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