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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

FEDERAL TRADE COMMISSION,
STATE OF ARIZONA,
STATE OF CALIFORNIA,
DISTRICT OF COLUMBIA,
STATE OF ILLINOIS,
STATE OF MARYLAND,
STATE OF NEVADA,
STATE OF NEW MEXICO,
STATE OF OREGON, and
STATE OF WYOMING,

Plaintiffs,

v.

THE KROGER COMPANY and
ALBERTSONS COMPANIES, INC.,

Defendants.

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

**PLAINTIFFS' MOTION *IN LIMINE*
FOR AN ADVERSE INFERENCE**

REDACTED VERSION

CERTIFICATION PURSUANT TO LR 7-1(a)(1)

Plaintiffs have conferred with Defendants regarding this motion, and Defendants oppose the relief sought herein.

MOTION

Plaintiffs respectfully request that the Court draw an adverse inference from, and take all reasonable steps necessary to cure any prejudice relating to, Albertsons' failure to preserve text messages relevant to this litigation.

MEMORANDUM

Four of eight testifying Albertsons witnesses failed to preserve responsive text messages after receiving a preservation hold and numerous reminders. Although the Court and Plaintiffs will never know the full extent of these lost communications, their destruction serves to obscure internal views about the likely effects of the merger and the proposed divestiture. At least one thread—although stripped of its full context—still reveals one Albertsons executive’s assessment that the merger will likely increase prices. Because these executives’ actions withheld from the Court this critical and candid record, Plaintiffs respectfully request the Court draw an adverse inference from, and take all reasonable steps necessary to cure any prejudice relating to, Albertsons’ failure to preserve text messages relevant to this litigation.

BACKGROUND

On November 3, 2022, Kroger and Albertsons notified the Federal Trade Commission (“FTC”) of the parties’ intent to merge. Four days later, the FTC informed Albertsons that the merger was under investigation and specifically requested that “pending completion of this investigation, please cease all document destruction activities with respect to matters that may be of relevance to this investigation,” including “the Proposed Transaction,” and “the competitiveness of” Albertsons. Musser Dec., Ex. A at 5. In response, Albertsons [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” Musser Dec., Ex. B at 2-3.

In the ensuing months, the FTC and Albertsons negotiated both a list of custodians as well as the scope of production in response to the FTC’s investigatory subpoena. Relevant here,

the FTC and Albertsons agreed that [REDACTED]

Musser Dec., Ex. C at 1-2.

In October 2023, the FTC first noted that Albertsons’ production appeared to omit responsive text messages, highlighting in particular that several text messages involving Todd Broderick—Albertsons’ Division President for Colorado—seemed to be missing one side of the conversation. Musser Dec., Ex. D at 1-2. On November 7, 2023, Albertsons confirmed that Mr. Broderick’s “apparent one-sided conversations were not on this iPhone” and that “this may have been because of settings on the iPhone that automatically delete files after a period of time.” *Id.* at 1. Prompted by this discovery, a week later Albertsons [REDACTED] [REDACTED]” Musser Dec., Ex. B at 3.

On January 17, 2024, the FTC requested a detailed accounting from Albertsons about how responsive documents were lost and what efforts had been taken to recover lost documents. Musser Dec., Ex. E. Albertsons did not respond for nearly four months. When they finally responded, they detailed efforts to recover deleted messages from Mr. Broderick’s and Vivek Sankaran’s phones. Musser Dec., Ex. F. Although Albertsons was able to recover approximately 70 text messages from Mr. Sankaran’s phone, further efforts proved unsuccessful. *Id.* at 4. Weeks later, Albertsons discovered—and eventually disclosed to Plaintiffs—that [REDACTED] [REDACTED] Musser Dec., Ex. B at 7-8.

For months, Plaintiffs have tried to seek information about the extent to which Albertsons’ text messages were deleted, obtaining a court order in the Administrative Adjudication requiring production of texts from potential trial witnesses, Musser Dec., Ex. G, and raising repeated inquiries about inexplicably missing documents, *see, e.g.*, Musser Dec, Ex.

H & I. Albertsons dismissed Plaintiffs’ queries, downplaying the seriousness of their failed preservation efforts and assuring Plaintiffs that responsive text messages had been produced. *See, e.g.*, Musser Dec., Ex. H at 9. And yet despite their repeated assurances, Albertsons continues to produce dribs and drabs of previously unseen text messages, often only after depositions have occurred and in some instances on the eve of this Court’s evidentiary hearing. *See, e.g.*, Musser Dec., Ex. J. But many remain missing; Albertsons admits it cannot “[REDACTED]” and that in fact [REDACTED] Musser Dec., Ex. K at 10, 14.

Most notably, the following four¹ Albertsons executives—all of whom appear on either Plaintiffs’ or Defendants’ witness lists—continued to delete text messages well after the FTC’s investigation began and [REDACTED]:

- Todd Broderick, Colorado Division President (Plaintiffs’ witness list)
- Carl Huntington, Pacific Northwest Division President (Plaintiffs’ witness list)
- Vivek Sankaran, Chief Executive Officer (Defendants’ witness list)
- Lisa Kinney, VP of Customer and Market Intelligence (Defendants’ witness list)

The FTC and Albertsons agreed that each of these four executives would be among the document custodians from the outset of the FTC’s investigation. Musser Dec., Ex. N. And according to Albertsons, [REDACTED] [REDACTED]. Musser Dec., Ex. B at 3, 14-18. As

¹ Albertsons’ struggle to produce responsive text messages is not limited to these four executives. Susan Morris, the company’s Chief Operating Officer, testified that [REDACTED] [REDACTED]. Musser Dec., Ex. L at 698-99. Yet inexplicably, Defendants initially only produced nine text message exchanges from Ms. Morris’s custodial file. *See* Musser Dec., Ex. M at 2-3. After repeated inquiries about the dearth of Ms. Morris’s text messages, Albertsons suddenly produced 900 new text message exchanges a week ago, well after Ms. Morris was deposed and just before the evidentiary hearing. *Id.* Critically, Ms. Morris appears on Defendants’ witness list, and Plaintiffs will be forced to conduct a cross-examination with no opportunity to probe this sizable new production in advance.

detailed below, however, each continued to delete responsive messages, in some instances up until the eve of their depositions in this matter.

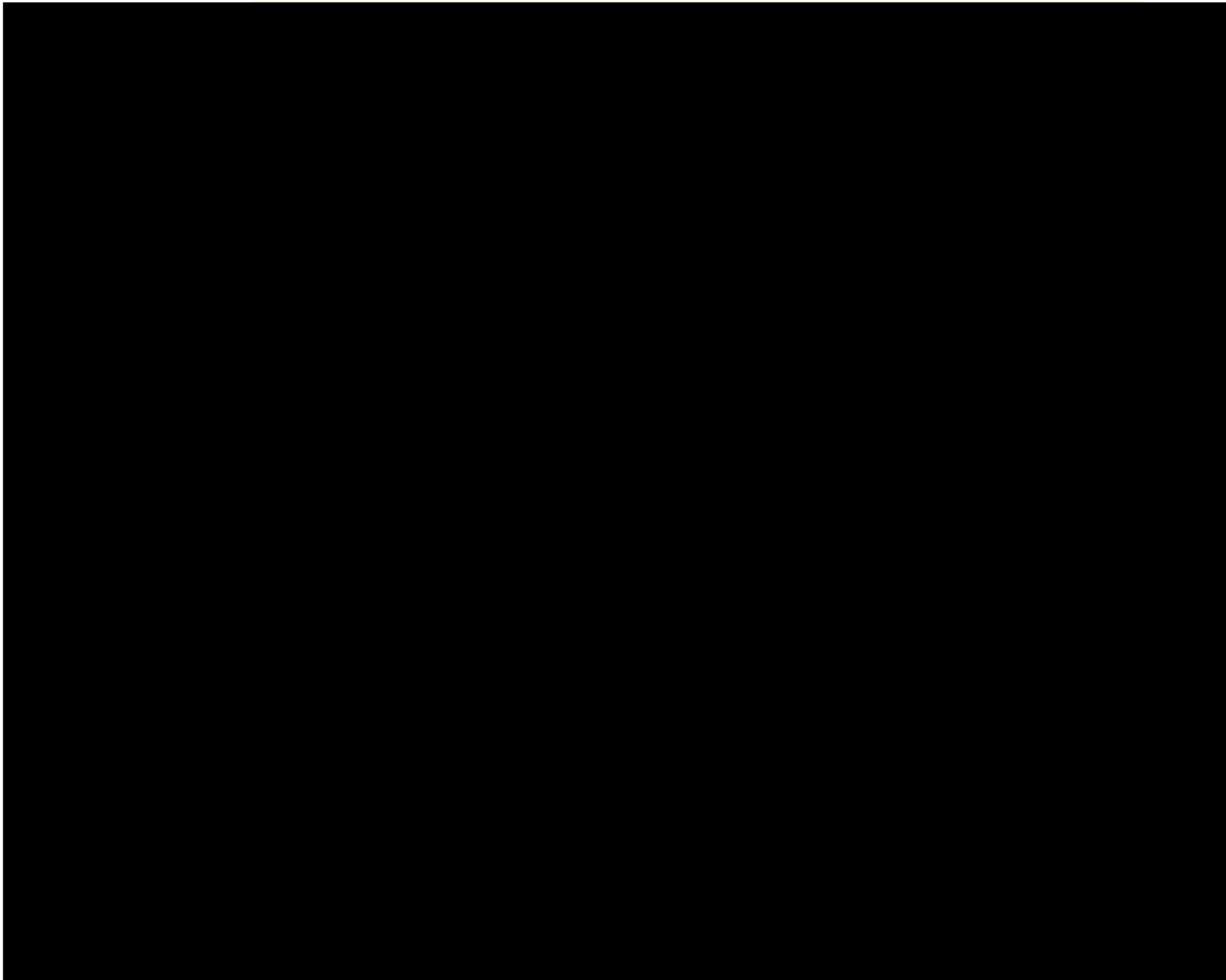
Todd Broderick. As President of one of the key geographic markets where Kroger and Albertsons compete vigorously head-to-head, Mr. Broderick's testimony will be highlighted in Plaintiffs' case-in-chief. Mr. Broderick testified that [REDACTED] [REDACTED] Musser Dec., Ex. O at 71, 73, 75, 79. He admitted, though, that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. *Id.* at 229-31.

While Plaintiffs and the Court will never know the exact substance of what Mr. Broderick deleted, the incomplete message threads that Albertsons has produced in this matter reveal that he was texting about the very substance of this litigation. In one example, Albertsons produced a text message thread involving Mr. Broderick and his Senior Director of Human Resources, Scott Shores. *See* Musser Dec., Ex. P. The exchange occurred in the early evening of November 29, 2022 (two weeks after the preservation notice was issued), *id.*, [REDACTED] [REDACTED] Musser Dec., Ex. Q at 111, 116-17. Regrettably, all that remains is Mr. Shores's side of the of the conversation; but even that reveals a great deal. Speaking about the merger, Mr. Shores wrote:

[REDACTED]

Musser Dec., Ex. P. Mr. Shores testified that, [REDACTED] [REDACTED]; those texts appear to have been deleted sometime after November 29,

2022. Musser Dec., Ex. Q at 112. In fact, the preserved thread includes several instances where Mr. Shores seemingly responds to a message, though we have no record of what he is responding to. For example, at 5:18pm Mr. Shores wrote “[REDACTED]” though the produced thread includes no message from Mr. Broderick. Musser Dec., Ex. P at 2; *see also* Musser Dec., Ex. Q at 118-19. Later, as shown in the below excerpt, Mr. Shores begins a message with “[REDACTED]” but again the thread reveals no message from Mr. Broderick that Mr. Shores is responding to.



Musser Dec., Ex. P at 4. For his part, Mr. Broderick [REDACTED]



[REDACTED]. Musser Dec., Ex. O at 232-38. The FTC alerted Albertsons to this missing exchange in November 2023 and requested that Albertsons search Mr. Shores’s phone for the full

exchange with Mr. Broderick. It was not until May 2024, at Plaintiffs' insistence, that Albertsons finally attempted to retrieve Mr. Broderick's deleted messages from those he texted, including Mr. Shores. Musser Dec., Ex. K at 11. By that time, however, the messages could not be retrieved because [REDACTED]

[REDACTED] Musser Dec., Ex. Q at 140-50.

Mr. Broderick and Albertsons claim that [REDACTED] but the evidence suggests otherwise. Mr. Broderick appears to have preserved his own messages from just days later on December 2, which—perhaps conveniently—include sentiments defending the proposed merger. *See* Musser Dec., Ex. R. If Mr. Broderick's messages were missing from the November 29 thread with Mr. Shores because of [REDACTED] his December 2 messages would be missing as well. Instead, it appears Mr. Broderick was manually deleting the messages he sent on November 29.

Vivek Sankaran. As Albertsons' CEO, Mr. Sankaran is a significant witness for Defendants. Mr. Sankaran testified that [REDACTED] [REDACTED] Musser Dec., Ex. S at 54; Ex. T at 425.

Significantly, Mr. Sankaran admitted that he [REDACTED] [REDACTED] [REDACTED] Musser Dec., Ex. T at 437-39.

Plaintiffs and this Court can only guess as to the substance of Mr. Sankaran's text messages around the time of the merger agreement and the original divestiture. Despite [REDACTED], Musser Dec., Ex. T at 429, 431, the FTC learned for the first time during his investigational hearing that [REDACTED] [REDACTED], Musser Dec., Ex. S at 54-55, 57.

Other Albertsons' Executives. Lisa Kinney, also on Defendants' witness list, seemed like a possible avenue for recovering some of Mr. Sankaran's messages. Ms. Kinney testified that

[REDACTED]. Musser Dec., Ex. U at 101-05.

Unfortunately, Ms. Kinney [REDACTED]

[REDACTED]. *Id.* at 107-08, 336-37.

Carl Huntington is a President of one of the key geographic markets where Defendants compete, and so his testimony will also be part of Plaintiffs' case-in-chief. Mr. Huntington testified that [REDACTED]" Musser Dec., Ex. V at 255-57. Mr. Huntington claimed [REDACTED]

[REDACTED]. *Id.* at 259-62.

ANALYSIS

Of the eight Albertsons' executives set to testify at this evidentiary hearing, four exhibited a pervasive practice of deleting business-related text messages. The deletion of text messages occurred well after [REDACTED], after the FTC's investigation began, and in some cases after this Complaint was filed. Facing a severely limited ability to impeach these witnesses, Plaintiffs respectfully request that the Court draw an adverse inference about the content of these missing text messages. In the alternative, Plaintiffs request that the testimony of these four Albertsons' executives—about the likely consequences of the merger and in particular whether [REDACTED] or whether the divestiture will remedy the merger's anticompetitive impacts—should be viewed with skepticism.

I. The Court May Infer that Albertsons' Deleted Text Messages Were Adverse to Defendants

The Ninth Circuit provides that “[a] party’s destruction of evidence qualifies as willful spoliation if the party has ‘some notice that the documents were *potentially* relevant to the litigation before they were destroyed.’” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (citation omitted); *see also Dallas Buyers Club, LLC v. Doughty*, 2016 WL 1690090, at *6-7 (D. Or. Apr. 27, 2016). And “[i]n the Ninth Circuit, spoliation of evidence raises a presumption that the destroyed evidence goes to the merits of the case, and further, that such evidence was adverse to the party that destroyed it.” *Dallas Buyers Club*, 2016 WL 1690090, at *6 (quoting *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 888 F. Supp. 2d 976, 993 (N.D. Cal. 2012)); *see also Leon*, 464 F.3d at 959 (“[B]ecause ‘the relevance of . . . destroyed documents cannot be clearly ascertained because the documents no longer exist,’ a party ‘can hardly assert any presumption of irrelevance as to the destroyed documents.’” (citation omitted)).

Albertsons’ executives’ claimed use of an “auto-delete” feature does not change the analysis. Courts have found that an employer’s failure to automatically preserve communications—i.e., an employer’s decision to give individual employees discretion to decide how and what to preserve—is sufficient to show willful destruction of evidence. *See, e.g., In re Google Play Store Antitrust Litig.*, 664 F. Supp. 3d 981 (N.D. Cal. 2023); *United States v. Google LLC*, — F. Supp. 3d —, 2024 WL 3647498, at *133-34 (D.D.C. Aug. 5, 2024) (warning that “[a]ny company that puts the onus on its employees to identify and preserve relevant evidence does so at its own peril,” but declining to draw an adverse inference because it would not change the court’s decision).

Here, responsive text messages have been lost and cannot be recovered. Musser Dec., Ex. K at 10, 14. Despite their duty to preserve such communications, Albertsons’ executives “did not take reasonable steps to preserve” these messages. *Google Play*, 664 F. Supp. 3d at 993.

While it is impossible to know the content of all the deleted texts, at least some of the destroyed messages were highly relevant to the litigation and the price-increasing impact of the merger. *See Leon*, 464 F.3d at 959. For example, Mr. Broderick’s text messages with Mr. Shores about the proposed merger, [REDACTED] [REDACTED] reveal Albertsons’ executives’ candid opinions about the competitive impacts the merger will have and appeared to have been manually deleted. Other Albertsons’ executives likewise confirmed that [REDACTED] [REDACTED] [REDACTED]. *See, e.g., Musser Dec., Ex. T at 437-39, Ex. U at 101-05, Ex. V at 255-57.* Thus, Plaintiffs respectfully request an inference that Albertsons’ deleted text messages went to the merits of this litigation, and that they were adverse to Defendants.

II. The Court May Order Relief Necessary to Cure Prejudice to Plaintiffs

In addition to affording Plaintiffs an adverse inference, the Court may also fashion remedies to cure any prejudice to Plaintiffs. *See Leon*, 464 F.3d at 959 (recognizing that in past decisions, the Ninth Circuit “found prejudice when a party’s refusal to provide certain documents forced [the plaintiff] to rely on incomplete and spotty evidence at trial” (cleaned up)).

Courts have recognized that, “[i]n the contemporary world of communications,” there is “potential and reality of finding the modern-day litigation equivalent of a ‘smoking gun’ in text messages.” *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 234 (D. Minn. 2019).

Defendants’ production of emails does not cure the loss of responsive text messages; both are “internal, contemporaneous communications” that are “plainly relevant.” *Sage Prods., LLC v. Chemrite Copac, Inc.*, 2021 WL 5299789, at *4 (N.D. Ill. Nov. 12, 2021). Defendants attempted

to evade producing relevant text messages in connection with this matter, arguing to the administrative law judge in the underlying merits proceeding that their production of emails and other files negates any value of text messages. *See* Musser Dec., Ex. G at 3. The administrative law judge found unpersuasive Defendants' attempt to minimize the importance of text messages and granted the FTC's motion to compel production. *See id.* at 3-4.

Here, Plaintiffs must rely on incomplete or spotty evidence at the evidentiary hearing, most notably relating to Defendants' proposed divestiture and efficiencies claims. The record reflects, for example, [REDACTED] [REDACTED]. *See* Musser Dec., Ex. P. The record also shows that Mr. Broderick likely responded, but Plaintiffs have no evidence of that response. Similarly, the record suggests that [REDACTED], but none of those messages were preserved, and so Plaintiffs are unable to reconstruct a complete record of Mr. Sankaran's contemporaneous assessment of the proposed divestiture.

Accordingly, and in addition to drawing an adverse inference as described above, Plaintiffs respectfully request that the Court cure this prejudice by granting leeway to examine in depth these four Albertsons' executives practice of deleting work-related text messages. Moreover, Plaintiffs request that the Court treat with skepticism any promises or assertions made by these executives about the planned divestiture or claimed efficiencies, given that the record is irretrievably tainted by Albertsons' failure to preserve related communications.

CONCLUSION

For the foregoing reasons, Plaintiffs ask the Court to draw an adverse inference from, and to take all reasonable steps necessary to cure any prejudice relating to, Albertsons' failure to preserve text messages relevant to this litigation.

Dated: August 14, 2024

Respectfully submitted,

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