

The Discovery Timing Trap

Meet and Confer Podcast · Kelly Twigger ·  [Listen](#) ·  Case in Minerva26: [FTC v. Uber Technologies, Inc.](#) · No. 4:25-cv-03477-JST (TSH), ECF No. 281 · Signed October 15, 2026 · United States Magistrate Judge Thomas S. Hixson · United States District Court for the Northern District of California

Introduction

Hi, and thanks for joining me this week. This week's case raises a situation that every litigator faces eventually. Late in discovery, you find something in the other side's production that changes what you need. And that is essentially that the data that would prove your point exists. The court agrees that the data you want is relevant, but you still don't get it because of when and how you asked. And that's exactly what happened in a case that the Federal Trade Commission brought against Uber, which 21 states and the District of Columbia later joined. The lessons are about this level of strategic thought that it takes to actually get discovery. And while this is high-stakes litigation, the lesson is equally applicable, and perhaps more so, in smaller cases where the budget is tight and you need to be focused on what you ask for in discovery.

Welcome back to the Meet and Confer podcast. My name is Kelly Twigger. I'm the CEO and founder at Minerva26 and the principal at ESI Attorneys. I've been a discovery strategist and practicing lawyer for just under three decades. This is the Case of the Week series of our podcast, where I choose a recent decision or order on the discovery of ESI and turn it into practical advice for you to use.

Following these decisions really matters because they shape how you run your next case. More and more discovery disputes are decided on short letter briefs like this one, on calendars that keep getting tighter because the courts are shortening the discovery periods. And this order shows how much of the outcome is decided before you ever file your motion. Watch how judges are treating timing and build your plan around it. If you don't, you're going to learn on your own motion and on your client's own dime.

The case for this week is [FTC v. Uber Technologies](#). The decision is from United States Magistrate Judge Thomas Hixson in the Northern District of California. This one was decided on October 15, 2026, so just five days ago. This is ECF No. 281. United States District Judge Jon Tigar is the District Judge on the case.

Where This Sits in the Series

Let's talk about where this sits in the series of the Case of the Week. Timing has been one of our themes on this show for a long time. And the short version of that theme is that you need to start your planning for discovery strategy early. And why am I always harping on that? Because we know that harping is a special gift of mine. Litigators know that there are always a million different things that they are supposed to be doing in one case. And it's next to impossible to follow up as quickly as you need to on specific issues to keep them moving, to keep things happening in the case, to create the right timeline on a specific issue. Whether that means analyzing the data you get, understanding what the expert is telling you and putting that together for the bigger picture, or just responding to a letter from opposing counsel on a specific issue. It's an incredibly difficult job, and courts are making it harder by allowing for no leeway within factual discovery cutoffs or giving you extra time to respond to things.

Let's look at a couple of examples that we've covered on the Case of the Week before. In [Staggers v. Medtronic](#), the court pulled the original 2016 requests for production off the shelf and asked why the same request gave notice in 2022, but not in 2016. And it held the parties to notice from 2016. In [Schulte v. LinkedIn](#), also from the Northern District of California, like our case for today, the plaintiffs lost their challenge to LinkedIn's search strings because they never showed that the strings were deficient and they didn't raise concerns when the strings were disclosed. Those details are on both of those episodes, and we'll include them in the show notes.

Today's case adds something new to that timing issue. You can be inside the deadlines, you can have relevant evidence, and you can still lose because the burden of what you asked for depends on how much time is left to do it.

The Facts and the Transaction Data Request

All right, let's talk about the facts. The FTC sued Uber in April 2025 over Uber One, Uber's subscription program. 21 states and the District of Columbia later joined the case. The plaintiffs alleged that Uber enrolled people without their consent, made it hard to cancel, and misrepresented how much members save in violation of federal law, including the Restore Online Shoppers' Confidence Act, known as ROSCA, and state consumer protection laws. For much of this period, Uber advertised that members saved about \$25 a month on average. Whether members actually saved that money is at the center of this case and the factual contention that's at issue on this motion.

The fight here is over Request for Production 61, which the plaintiff sent to Uber. The FTC asked for transaction-level data on a 10% random sample of all U.S. consumers who used Uber at least once between January 2021 and August 2026, members and non-members alike. Let's be specific about what the FTC wanted. For every ride and every Uber Eats order, it wanted the time down to the second for pickup and drop-off, pickup and drop-off coordinates, distance, surge pricing for rides, every component of

the price, and any Uber One discount. It also asked for a data dictionary and proof that the sample was random.

Now, the point from the FTC's perspective was to compare what members actually paid against what comparable non-members paid. The request itself refers to the statistical method for that comparison, called a difference-in-differences analysis.

The Timeline Behind Request 61

Now, let's look at the timeline of this issue throughout discovery because that's the whole story. And as I walk through it, I want you to listen for two things: when the FTC first asked for pricing information, and when it learned the facts that made it want this data in Request Number 61.

Now, the FTC was investigating before it ever filed suit. In September 2024, it sent Uber a voluntary access letter, and Uber produced information going back to October 2021. The FTC then filed its complaint in April 2025, so a little more than seven months later.

In August 2025, District Judge Tigar entered the scheduling order. It told the parties to take all necessary steps to conduct and compel discovery so they could finish on time. Fact discovery was set to close in June 2026. Not a long time.

By March 2026, the FTC had already asked how Uber set its prices in Request for Production 33. And after a hearing on March 11, Magistrate Judge Hixson denied the general pricing parts of that request, but he compelled the parts of how Uber One membership affects price. So the FTC did start to ask early about pricing, but the Court gave it a narrower version of what it asked for.

In April 2026, the Court approved the parties' agreement to push the fact discovery deadline to September 14. According to the FTC, Uber did not produce its first custodial document until mid-June 2026, and it finished producing custodial documents in mid-July. At that point, fact discovery was set to close in about two months. That's already cutting it very close for the FTC to review and leverage produced documents, not to mention the coordination between the FTC and the attorneys general of 21 states and the District of Columbia. Keep in mind that means they have to get through those documents, follow up on the documents and the requests, conduct depositions, follow up on those, et cetera, et cetera. In August, then, the plaintiffs moved without opposition to extend fact discovery again, and the Court moved the deadline to November 16, 2026.

Now I know this is a long timeline, but we are getting to it. Then in late August, the facts behind Request 61, that's the subject of this motion, came into focus. In interrogatory answers dated August 24, Uber explained how it calculated the average savings it advertised. Until July 2025, that calculation included amounts members saved from promotions. So that would have been one of the metadata fields that would have been included in the original pricing ask. In July 2025, Uber changed its method to exclude promotions that were available to all users, members or not. For the FTC, that raised a

question that Uber's own savings numbers couldn't answer: how much do members actually save compared to people who never signed up? And that's the root of the issue in this case.

The FTC also pointed to an internal Uber document filed under seal that it says showed members paid higher service and delivery fees than non-members. Uber says that the FTC misread it. That comparison, members versus non-members, again is exactly what Request 61 asks for.

Now, Request 61 was part of the FTC's fifth set of document requests. We don't know exactly when it was served because document requests don't make it onto the docket. But what we do know is that Uber's written response is dated September 23, and that Uber refused to respond to Request 61.

Several other things were happening at the same time. In mid-September, the FTC served a Rule 30(b)(6) notice, which asked the company to designate witnesses to testify on its behalf on listed topics. One topic asked how Uber sets prices and fees differently for members, and another asked how Uber prepared the databases it had produced. Uber refused to designate a witness on either one. So now Uber's refusing to produce documents in response to RFP 61 and refusing to designate 30(b)(6) witnesses on the same topics that would give rise to RFP 61.

A couple weeks later, on September 29, the FTC sent Uber its draft of the joint discovery letter. And according to Uber, that draft was the first time the FTC raised the internal fee document with Uber. The parties met and conferred on September 30, the very next day. And on October 2, with just six weeks left in fact discovery, they filed the joint letter, and the FTC asked the Court to order production of the Request 61 data within two weeks.

Now Uber's position was that it had already produced savings data, including a field titled `total_savings_usd`. It argued that Request 61 was another way of asking for the general pricing discovery the Court had already denied, that the FTC was misreading one document out of more than 175,000, and that the request covered billions of transactions at the very end of discovery.

Letter Brief Courts and Tight Records (ECF No. 275)

And let's look at the letter brief from October 2, because that filing matters as much as its timing. Magistrate Judge Hixson resolves discovery disputes on joint letter briefs. His standing discovery order sets a five-page limit, not counting a cover page. It also limits what you can attach to things like the discovery requests and responses, deposition testimony, and meet and confer correspondence, and it does not allow affidavits. In this case, however, Uber attached a declaration to the joint letter brief it filed in June.

This joint letter ran about 15 pages of argument. It covered five categories of disputes. There was an interrogatory about how many people clicked on the Uber One terms. There was Request 61. There were two other data requests that the parties had already

agreed on. There was the FTC's request for more depositions. And there was a set of fights over the FTC's 30(b)(6) notice, including the time period and four separate topics. Several of those were already resolved or close to it. So we weren't necessarily having a hearing or getting judgment from the Court on all of the issues in the original letter brief. Uber had agreed to supplement the interrogatory, the parties had agreed on two other data requests, and the FTC had accepted Uber's proposal on one of the 30(b)(6) topics.

Request 61 was the most complex issue in the letter brief, and it got about a page and a quarter from both sides. In that space, the FTC had to explain why the data was relevant, why it was different from the Request 33 discovery the Court had already limited, why the burden was reasonable, and why it was asking now, so late in discovery.

Now we don't know whether the parties had permission to exceed the page limit here, but we do know that Magistrate Judge Hixson gives parties more room when the issues call for it, including in this case. At the March hearing, he ordered a joint letter on the date range and eight document requests and suspended the page limits for it. In April, he suspended the page limit for a joint status report. In June, he went the other way and capped a letter at five pages total. And in [*Kadrey v. Meta*](#), another decision, he signed an order in November 2024 allowing one 30-page combined letter brief in place of five separate letters.

Magistrate Judge Hixson also holds hearings. Between March and September, Magistrate Judge Hixson held 10 discovery hearings by Zoom in this case. The RFP 33 dispute got a hearing of more than an hour, and he ruled the same day. The October letter got no hearing. He decided Request 61 on the papers alone: a page and a quarter from each of the parties.

The Ruling: Relevant Evidence, Too Costly, Too Late (ECF No. 281)

Now let's talk about the ruling. Magistrate Judge Hixson opened his analysis this way: "This RFP is a doozy." That's a direct quote. On relevance, he didn't hesitate. He asked whether the information was relevant, and he answered, "Oh, sure." He said that it would let the FTC determine with "incredible precision," whether Uber One membership actually saves consumers money after controlling for all the factors that affect price.

On burden, Uber had said that the request covered billions of transactions. The Court said that just by reading the request and considering how granular the data was, you could see that the estimate was likely correct.

And then the Court reached its holding. It said that the real problem was that the FTC filed its motion about six weeks before the close of fact discovery. In the Court's words, "Had the FTC filed this motion to compel earlier in fact discovery, the Court might have granted it." The Court called this a "crushing burden in the final weeks of fact discovery, which could so easily have been avoided had the FTC brought this motion to compel

earlier," and found that it was not proportional to the needs of the case, which is the standard set out in Rule 26(b)(1). And therefore the Court denied the motion.

But look what also happened on the same day that that letter brief was filed. On October 2, Magistrate Judge Hixson granted the plaintiffs' request to take 15 fact depositions instead of the presumptive 10, finding that the six weeks left in fact discovery was enough time for five more. It was the same six weeks which was not enough time for Uber to put together this transactional data. Five depositions fit inside it, but not a data pull of billions of transactions. Now, proportionality is not only about how important the case is. It's also about whether the work can actually get done in the time that is left.

It's worth being precise about what the order says and doesn't say. The Court measured the delay from the date the motion was filed, on October 2, but the FTC filed nine days after Uber refused in writing to respond to the 30(b)(6) deposition topics or Request 61. That means that the only way to file earlier was to ask earlier. And the order doesn't say when that should have been. It also doesn't address the FTC's argument that the request followed up on evidence it had just found, or the FTC's account of how late Uber's documents arrived. That's this Court's approach, Magistrate Judge Hixson's approach. And another judge might weigh a motion filed inside the discovery period differently. But you have to plan as if your judge will see it the way Magistrate Judge Hixson did.

Now, if you look at this docket, there are hundreds and hundreds of entries. And this is a very complex case, and a lot has happened. We just went through the timeline of what's happened in the last six months in discovery. It's a lot. And so there may be other factors behind the scenes that are not mentioned in the order here, right? We can only stay within the four corners of what the judge has issued here. So the question this case really raises is not whether the FTC moved quickly once Uber said no. It's what it takes to get a court to see the whole timeline and to say yes when timing is the issue.

Takeaways: Practical Fixes for Late Discovery

So there are several takeaways from this decision that I want you to focus on.

- **Put the dated timeline where the judge decides the issue.** First, put the dated timeline where the judge decides the issue. When the reason that you are asking late is that the other side produced late, the court has to see that, with dates, in the argument on that request. In this letter, the pieces were in the record. Uber's August 24 interrogatory answers were an exhibit, and the late custodial production was in a footnote in the section on depositions, but they were not pulled together in the argument for Request for Production 61. Five dated lines probably would have done it: when the production finished, when you learned the new facts, when you served the request, when the other side refused, and when you filed with the court. Document, document, document. Track the actions that you take and the decisions that you make. You'll need it throughout the entire litigation process.

- **Make the ask fit the time left.** Second takeaway: make the ask fit the timeline left. Late evidence can justify a late request, but the request has to be one the court can grant in the time remaining. Instead of everything at once, consider a phased proposal. Ask for a small pilot sample, say 1%, over a narrower window and with only the fields that drive price and the data dictionary. Then have your expert analyze it within a set number of days and report back to the court on whether more is needed. That gives the judge a decision point instead of an all-or-nothing choice. And because this Court had already found the data relevant, a smaller first step would have given it a way to say yes. Pair it with a narrow request to let that one production and that report happen after the cutoff without moving anything else, and show good cause under Rule 16(b)(4), which turns on your diligence.
- **Burden is a fact, so get the facts.** Takeaway number three: burden is a fact, so make sure you've got the facts. Uber said the request was burdensome and the FTC said it wasn't, but neither side put facts about the extraction itself in front of the Court. The way to change that is evidence about what pulling the data actually takes. In my experience, at large technology companies, data like this lives in platforms built to be queried, and drawing a random sample can be simple or it can be very complex. The harder parts of that are narrower, like matching each transaction to the user's membership status on the date, or any part of a request that asks the producing party to do analysis instead of pulling data. Basically, when you have to cross-reference multiple databases to get multiple data points to create the picture you're asking for, that increases the level of complexity. The FTC's 30(b)(6) notice here already included a topic on how Uber prepared its databases. Uber refused to designate a witness, and that topic was not one of the 30(b)(6) disputes that the FTC took to the Court. Done early enough, a short 30(b)(6) deposition on how the ride and Eats pricing data is stored and what it takes to pull a sample would have put sworn testimony into the record, and deposition testimony is one of the things that Magistrate Judge Hixson allows you to attach to a joint letter brief. Sworn facts could have come in on letters in this case before. Uber attached a declaration to one in June. And in fact, if one of the FTC's remaining depositions provides that information, it may be enough for the FTC to renew its motion on RFP 61. Now, back in [Schulte](#), which we talked about on a previous Case of the Week, the plaintiffs lost because they had no factual showing that the search strings were deficient. Burden works exactly the same way. And this is the planning point that we keep coming back to. To know what you want, you have to know the technology you want the data from. If you don't know it, find out, or find someone who does.
- **Raise new evidence in writing as soon as you find it, even if the other side won't engage.** Fourth takeaway: raise new evidence in writing as soon as you find it, even if the other side won't engage. Uber said the FTC first raised the internal document with Uber in its September 29 draft of the joint letter, and Uber used that to call the request a pretext. Put it in writing as soon as you find it, with the Bates number. Even if opposing counsel won't engage, delays its answer, or refuses to explain the document, that letter is as much for the judge as it is for them. If they explain it, you have learned something. If they don't, their silence

becomes your exhibit, and meet and confer correspondence is another thing that Magistrate Judge Hixson allows to be attached to a letter brief. My recommendation is to send that letter within a week of finding the document and serve the follow-up request within two weeks. And use the letter to put everything that doesn't fit in a letter brief, the whole timeline, essentially the entire argument, so that you can just refer to it in the letter brief in the limited space allowed. Keep in mind you've got to stay within the parameters of what the court actually allows to be attached to the letter briefs. Don't stretch that. Know what the boundaries are.

- **In letter-brief courts, every move you make is critical.** Now, that falls into the next takeaway. In letter-brief courts, every move that you make is critical. Know your judge's letter-brief rules before the dispute exists, because they'll tell you what kind of record you need to build. Ask for a dedicated letter or for more briefing on the issue that matters most. This judge suspended page limits twice in this very case, so there was room here to ask for it. Ask for a hearing, too. He held 10 of them in this case. And a hearing is where you walk the court through the timeline you couldn't fit on the page. And triage your issues. Put agreed items in the stipulation and spend your pages on the fight that moves the case. A simple issue like the depositions here can win in a short letter. A complex one like Request 61 needs room to tell the story. Plan for that. Be strategic. It's very difficult, because timing, the amount of time that we have to respond to these things and to get them done, is always a huge pressure-packed instance. You've got to really sit down and focus on what you're doing and where the best bang for your buck is before doing it.
- **Start early, and re-plan the day the court narrows you.** Next takeaway: start early and re-plan the day the court narrows you. The FTC asked about pricing early. When the Court cut back Request 33 in March, that was the moment to plan the next request with the expert: what data the analysis actually needs, how to tie it to Uber One rather than pricing in general, and a sample request served while there was still time to produce it. Structured data takes longer to get than almost anything else in discovery. So it belongs at the front of your plan, not at the back.
- **If you are the responding party, don't count on the request proving your burden for you.** Last takeaway: if you are the responding party, don't count on the request proving your burden for you. Here the Court found Uber's burden estimate likely correct from the face of a very broad request. Against a narrow, phased request, you will need a declaration from someone who knows the systems. And if the other side has already deposed that person about how the data can be pulled, your argument has to match that testimony.

What I'm Watching

All right, let's talk about what I'm watching on this case as it moves forward. Three things.

First, what the FTC does next. On October 16, the day after the ruling, the FTC filed a motion to extend the time to complete discovery and the case schedule. The FTC could

also still ask District Judge Tigar to review the order. Under Rule 72(a), a party has 14 days after being served with the magistrate judge's non-dispositive order to object, which puts the deadline at about October 29. In the Northern District of California, that objection is filed as a motion for relief under Civil Local Rule 72-2, and it is limited to five pages. If the district judge doesn't deny it or set a briefing schedule within 14 days, it is deemed denied. The standard, and this is important, is whether the order is clearly erroneous or contrary to law. That review generally looks at the record the magistrate judge had, which matters for what comes next. As of today's date, October 20, no objection has been filed.

Next, I'm also watching whether a narrower request comes back. It's getting tight on discovery, but it's still an option. And if the court grants more time for discovery, it becomes a more realistic one. My read is that a new, phased request built on new facts may be a more practical path than a review of this current order, because it is a different and much smaller ask. Fact discovery closes November 16, unless the court extends it. So if that happens, it's going to have to happen fast.

Third, how other courts treat timing when a party argues that its request was late because the other side's production was late. This order did not reach that question. And I expect we're going to start seeing that determined by courts more squarely. We've seen a lot of gamesmanship in litigation over the last three or four years, especially in high-stakes litigation. I'm not accusing anybody of doing that here, but there is always more time needed to do things than what the court allots. And the key here is staying in touch with the court on what's happening and when, so the court is aware, when this October 2 letter comes up, of what that history is.

Closing Strategy and Final Advice

All right, in closing, the type of structured data at issue here that goes to the crux of the case is a common occurrence in litigation, and it's often the most compelling evidence. But getting it amidst these games of litigation can be hard. And you need to be constantly iterating on your strategy with your goal in mind. ESI and the limits that courts have set on timing have made litigating harder. There's no question about that. So make a plan early, keep iterating on it every time a new development occurs, and keep track of those critical issues so you can convince the court of what you need and when you found out you needed it.

If you want to follow this line of cases yourself, the decision is in *Minerva26*, and you can find it with the other rulings on burden and timing under the Proportionality tag. Combine it with the Sampling tag to see how courts handle phased and sampled requests for data.

If this was helpful, please share it with a colleague who's heading into the last months of fact discovery, or anyone who has a structured data request on their list. Thanks so much for joining me, and I'll see you on the next episode.