

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



In the Matter of

SYSCO CORPORATION,
a corporation

and

USF HOLDING CORPORATION,
a corporation

and

US FOODS, INC.,
a corporation.

Respondents.

Docket No. 9364

**MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO
COMPEL RESPONDENT SYSCO CORPORATION TO PRODUCE DOCUMENTS
REQUESTED BY COMPLAINT COUNSEL'S REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Introduction

Pursuant to Rule of Practice 3.38(a) of the Federal Trade Commission's Rules of Adjudicative Practice, Respondent Sysco Corporation ("Sysco") respectfully requests that this Court deny Complaint Counsel's motion to compel Sysco to produce documents requested by Specifications 1 and 10 of Complaint Counsel's Requests for Production of Documents, served on April 17, 2015 (the "RFP"). Complaint Counsel's motion to compel and memorandum in support ("Memorandum"), filed on June 4, 2015, purports to request a "reasonably limited set of responsive documents." Memorandum at 2. In reality, however, these two Specifications are unnecessary and unduly burdensome, requiring Sysco to compile potentially tens of thousands of

documents from dozens of different custodians scattered across the country when Sysco has already produced millions of documents to Complaint Counsel as part of this litigation. Moreover, Complaint Counsel's "two" Specifications include dozens of different subparts, belying Complaint Counsel's efforts to downplay the burden it is placing on Sysco. Finally, Complaint Counsel has offered no explanation as to what purpose these documents could possibly serve at this late stage in the litigation. Because the burden of these requests severely outweigh any alleged benefit to Complaint Counsel, Sysco respectfully asks that this Court deny Complaint Counsel's motion to compel.

Argument

I. Complaint Counsel is Not Entitled to Part 3 Discovery that is Burdensome and Unnecessary.

Rule 3.31(c)(2)(iii) of the Federal Trade Commission's Rules of Adjudicative Practice permits this Court to limit discovery requests where "[t]he burden and expense of the proposed discovery on a party . . . outweigh its likely benefit." Under this standard, this Court should not require Sysco to produce documents responsive to Specification 1 or Specification 10.

First, Complaint Counsel has failed to articulate any compelling rationale or "benefit" to justify Sysco responding to its extensive discovery requests at this point in the litigation. Complaint Counsel commenced its investigation in January 2014 and Sysco has already produced roughly 6.1 million documents, containing over 20 million pages, in addition to responding to numerous written specifications, interrogatories, and requests for admission. Sysco's witnesses have all had their investigational hearings taken, been deposed, and testified at the hearing in the Federal Action. According to Paragraph 11 of this Court's March 16, 2015 Scheduling Order, all of this information is available to Complaint Counsel for use during the

Part 3 action. Complaint Counsel’s final exhibit list, which was served on June 4, 2015, is over 72 pages long, amply demonstrating that Complaint Counsel has more than enough documents to present its case and will not be prejudiced if this Court denies its motion.

Second, responding to these unnecessary requests, served by Complaint Counsel on the last possible day, would be incredibly burdensome for Sysco. In its Memorandum, Complaint Counsel downplays the arduous nature of its requests, repeatedly emphasizing that it has limited its motion to two Specifications. In reality, however, replying would require Sysco to not only coordinate with dozens of different custodians in more than two dozen locations across the country, but also review tens of thousands of documents when, in the past year, Sysco has already been put to the burden of producing millions of documents to Complaint Counsel. Such efforts are wholly unnecessary, especially in light of the fact that, as described below, Complaint Counsel has failed to explain what, if anything, it hopes to receive from the demands it has placed on Sysco.

A. Specification 1 is an Unnecessary and Burdensome Request.

Throughout its Memorandum, Complaint Counsel highlights that it has reduced its request to “only *two* of sixteen specifications in Complaint Counsel’s RFP.” Memorandum at 2 (original emphasis). This, however, is a gross mischaracterization. Specification 1 alone contains 26 different subparts and would require Sysco to coordinate with up to three different custodians at each of 26 different local operating companies (“OpCos”)¹ across the country.

¹ Complaint Counsel noted in their Motion to Compel that it is “willing to forego” requesting any documents from six of the 32 locations “where the proposed divestiture resolves all competitive concerns, specifically: Las Vegas, Kansas City, Minnesota, San Francisco, Cleveland, and Intermountain.” Memorandum at 5.

Such a task is not easy and would require countless hours of work from local OpCo and corporate staff as well as in-house and outside counsel.

Moreover, Complaint Counsel has not provided any compelling rationale for why such an undertaking is necessary at this point in the Part 3 litigation. Complaint Counsel asserts that Specification 1 would provide “vital document discovery from custodians in the contested geographic market[s] [that] will be the subject of the Part 3 trial.” Memorandum at 5. This statement, however, is entirely unbelievable in light of the procedural posture of this case. Fact discovery in this matter closed on May 15, 2015, expert witness reports have been served, and Complaint Counsel submitted its final witness and exhibits lists on June 4, 2015. Notably, Complaint Counsel’s witness list *did not include a single witness* who would have any familiarity with the documents requested in Specification 1 and, as discovery has already closed, these documents will clearly not be used during any depositions. Complaint Counsel lists 30 witnesses, none of whom are Sysco employees,² and Sysco did not list any of the 78 Sysco OpCo employees whose documents Complaint Counsel now seeks as potential witnesses.³ This means that, even if this Court required Sysco to produce the documents requested by Specification 1,

² Complaint Counsel’s Final Witness List does not identify any Sysco employees, but does have the following reservation: “Respondent Employees – Complaint Counsel reserves the right to call any director, officer, or employee of Sysco or US Foods whom Complaint Counsel identifies in discovery as a person with testimony relevant to this litigation.” Discovery is closed and no such witness has been identified. Respondents reject the suggestion that this reservation, which violates Paragraph 15 of the Court’s Scheduling Order, would permit Complaint Counsel to call any of Respondents’ tens of thousands of employees at trial and Respondents intend to object to this reservation at the appropriate time.

³ Although Sysco has not submitted its final witness list, Sysco’s preliminary list did not include any witnesses from the 26 OpCos at issue and Sysco has no plans to amend its preliminary list to include any individuals familiar with documents potentially responsive to Specification 1.

there would be no sponsoring witness at the Part 3 trial who would be able to discuss the documents with the requisite personal knowledge and such testimony would thus be inadmissible.⁴ Moreover, Complaint Counsel's only evidence regarding these 26 local markets, with the exception of a handful of markets,⁵ will be a table with market share calculations performed by Complaint Counsel's economist using the rather dubious methodology described in his expert report, which was submitted on May 26, 2015.⁶ Therefore, the documents cannot be used at trial with any fact or expert witness and are not exhibits that can be referred to in the pre- or post-trial briefing. At most, Complaint Counsel could seek leave to amend their exhibit list (which has well over one thousand exhibits already) in order to include the documents in a pre-trial document dump disconnected from any sponsoring witness. Despite Complaint Counsel's protestations to the contrary, there is no reason for this Court to require Sysco to engage in the burdensome exercise of responding to Specification 1. Complaint Counsel's motion should be denied.

B. Specification 10 is an Unnecessary and Burdensome Request.

Like Specification 1, Specification 10—part of Complaint Counsel's "only two" requests—includes four separate requests, each with onerous subparts, and requires Sysco to

⁴ See March 16, 2015 Scheduling Order at Paragraph 17.

⁵ Sysco produced documents from 7 OpCos at the FTC's request during discovery in the preliminary injunction proceedings.

⁶ Although Complaint Counsel may provide expert rebuttal reports on June 19, 2015, it would be inappropriate to offer affirmative arguments in these reports based on any documents provided as part of Specification 1. The Respondents' expert reports (which are essentially the same reports filed in the Federal Action) focus on Complaint Counsel's dubious local market share calculation methodology and do not address these local markets beyond the handful of markets the FTC addressed in those proceedings. Thus, there is nothing for Complaint Counsel's expert to rebut regarding those unaddressed local markets.

“[s]ubmit all documents responsive to *Specifications 16, 17, 24 and 26.*” (emphasis added).

Notably, Specification 16, which requires documents relating to any bid or negotiation with any of Sysco’s over 450,000 customers, has *twenty-nine subparts!* Similarly, Specification 26 (and its 15 subparts) seeks all documents related to the merger at a time when hundreds of employees were working on efficiency efforts related to the merger. Moreover, Sysco has previously provided Complaint Counsel with documents responsive to these four requests—not once, but twice. Sysco first provided this information during the Second Request phase of the FTC’s investigation. After the Second Request, Sysco provided a “refresh” of this information in the Federal Action earlier this Spring, Memorandum at 6, providing all responsive documents available as of the date of the filing of the FTC’s complaint. To ask Sysco to go back through all of its documents *a third time*, without providing an adequate rationale for such a burdensome request, is simply unnecessary and entirely cumulative at this point in the litigation. Sysco strenuously objects to being put to such a needless burden.

II. By the Parties’ Own Admissions, Extensive Discovery in the Part 3 Action—Weeks After the End of Discovery—Is Simply Unnecessary.

As previously noted for this Court, the merging parties have no expectation that this matter will proceed once a decision has been reached by the District Court regarding the pending preliminary injunction motion. That action is fully briefed and, as closing arguments were held on May 28, 2015, the District Court could rule on the FTC’s motion at any time. According to the Federal Trade Commission’s own Rules of Adjudicative Practice, Rule 3.26(d) provides a mechanism whereby, if Sysco prevails, Sysco will file a motion to dismiss the administrative complaint as “the public interest [would] not warrant further litigation after a court has denied preliminary injunctive relief to the Commission.” Under Rule 3.26(d)(2), with the filing of this

motion by Sysco, this matter would be automatically stayed “until 7 days following the disposition of the motion by the Commission.” The FTC also recently revised its Rules of Practice, making it even more likely Complaint Counsel will end these administrative proceedings if a federal court denies its motion for a preliminary injunction. *See* FTC, Commission Approves Revisions to Its Rules of Practice (March 13, 2015).⁷ Conversely, in light of business and other practical realities, no unconsummated merger has ever been litigated in Part 3 after the issuance of a preliminary injunction. Testimony during the Federal Action made clear this merger will not survive to be litigated in Part 3 either; a senior US Foods executive testified it will terminate the transaction if the merger is enjoined. *See* Ex. A, Schreiberman (USF), Hearing Tr. at 1516:10-1517:8. The reality is, therefore, that any efforts by Sysco to respond to Complaint Counsel’s onerous requests would not only be burdensome but also ultimately pointless.

Conclusion

For the foregoing reasons, Respondent respectfully requests that this Court deny Complaint Counsel’s motion to produce documents in response to RFP Specifications 1 and 10.

⁷ Forthcoming in the Federal Register.

Dated: June 12, 2015

Respectfully submitted,

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

In the Matter of

SYSCO CORPORATION,
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and

USF HOLDING CORPORATION,
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US FOODS, INC.,
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Respondents.

Docket No. 9364

**[PROPOSED] ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENT SYSCO CORPORATION TO PRODUCE DOCUMENTS REQUESTED
BY COMPLAINT COUNSEL'S REQUESTS FOR PRODUCTION OF DOCUMENTS**

IT IS SO ORDERED:

Complaint Counsel's Motion to Compel Respondent Sysco Corporation to Produce Documents Requested by Complaint Counsel's Requests for Production of Documents, filed on June 4, 2015, is DENIED.

The Honorable D. Michael Chappell
Chief Administrative Law Judge

Dated: _____

CERTIFICATE OF SERVICE

Pursuant to Rule 4.4(c), 16 C.F.R. § 4.4(c), I hereby certify that on June 12, 2015, I filed the foregoing document electronically with the Commission using the FTC's E-Filing System, emailed a copy of the foregoing to secretary@ftc.gov, and served a paper copy on the following individuals by first-class mail:

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, ET AL.,

Plaintiffs,

vs.

SYSCO CORPORATION, ET AL.

Defendants.

CA No. 15-256
Washington, DC
May 11, 2015
1:33 P.M.

DAY 5, AFTERNOON SESSION
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT COURT JUDGE

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1 Honor's time over Premier, Your Honor.

2 BY MR. TRINGALI:

3 Q. Are you familiar with whether your CHEF'STORE tracking
4 of customers that you have customers of every customer
5 category, not just independent restaurants, but GPOs,
6 healthcare, hospitality, shopping at CHEF'STORE?

7 A. Yes. To be clear, GPOS don't shop there, but GPO
8 members, and hospitality and education, they all shop in our
9 cash-and-carry format.

10 Q. Finally, Mr. Schreiber, are you aware if US Foods has
11 any right to terminate unilaterally the merger agreement with
12 Sysco?

13 A. I am.

14 Q. And when can USF exercise that right?

15 A. There's what's known drop dead date in the contract of
16 September 8 or September 9.

17 Q. And has US Foods made a decision as to whether it will
18 exercise its termination right if the transaction is enjoined
19 until the completion of an administrative trial before the
20 Federal Trade Commission?

21 A. We have.

22 Q. And what has US Foods decided in that regard?

23 A. We will terminate if this Court enjoins the
24 transaction.

25 Q. And why is that, Mr. Schreiber?

1 A. We've been in this process now for 16, 17 months. It's
2 very difficult for any business when it doesn't know whether
3 it's going left or right. We have employees who don't know if
4 they'll be living in Houston or Chicago, and our competitors
5 have used this to their advantage. We have lost a substantial
6 number of sales reps and volume commensurate with that, and
7 we've just concluded for our business that it isn't in its
8 best interest to continue this any longer.

9 MR. TRINGALI: I have nothing further.

10 THE COURT: Thank you.

11 Mr. Weissman, do you have cross-examination?

12 MR. WEISSMAN: Thank you, Judge.

13 CROSS-EXAMINATION

14 BY MR. WEISSMAN:

15 Q. Good afternoon, Mr. Schreiber, how are you doing?

16 A. Hey, Steve.

17 Q. Sticking with the last subject, it's fair to say that
18 if the merger doesn't happen, you believe that USF has a very
19 promising future, correct?

20 A. It's fair to say, yes.

21 Q. Okay. And it's also fair to say that USF will be a
22 very formidable competitor going forward if this merger
23 doesn't happen, right?

24 A. Yeah, we have to plan for both scenarios, and we will
25 do that.