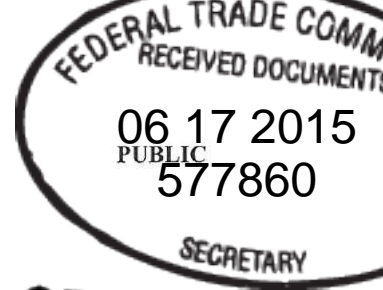


Aquaforest TIFF Junction Evaluation



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

_____))
In the Matter of))
))
Sysco Corporation,))
a corporation,))
))
USF Holding Corp.,))
a corporation, and))
))
US Foods Inc.,))
a corporation,))
Respondents.))
_____)

DOCKET NO. 9364

**ORDER GRANTING COMPLAINT COUNSEL’S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS FROM RESPONDENT SYSCO CORPORATION**

I.

On June 4, 2015, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion to Compel Respondent Sysco Corporation to Produce Documents Requested by Complaint Counsel’s Requests for Production of Documents (“Motion”). Respondent Sysco Corporation (“Respondent” or “Sysco”) filed an opposition to the Motion on June 12, 2015 (“Opposition”).

As explained below, the Motion is GRANTED.

II.

The Complaint in this matter, issued February 19, 2015, seeks an order enjoining a planned merger between Respondents Sysco and US Foods, Inc. The FTC is also seeking a preliminary injunction against the merger in a federal action pending in the United States District Court for the District of Columbia, Civil No. 1:15-cv-00256 (the “Federal Action”). Acknowledging that discovery would occur in the Federal Action, the Additional Provisions of the Scheduling Order issued in this case on March 16, 2015, provide in pertinent part: “All discovery taken in connection with *FTC v. Sysco Corp.*, Case No. 1:15-cv-2056-APM (D.D.C.) (the “Federal Action”) may be used in this action” Additional Provision 11. The parties

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submitted their briefs in the Federal Action and oral argument was held on May 28, 2015. The evidentiary hearing in this matter is scheduled to commence on July 21, 2015.

On April 17, 2015, Complaint Counsel served Respondent with a request for production of documents (“RFP”) containing 16 specifications. Complaint Counsel thereafter agreed to limit its request to documents responsive to Specification 1 and Specification 10. These requests and the parties respective arguments are detailed below.

III.

A. Specification 1

Specification 1 of Complaint Counsel’s RFP states:

Submit all documents that refer to US Foods or competition with US Foods from the files (electronic or paper) of the OpCo¹ President, the OpCo VP Sales, and the OpCo SVP Operations for each of the following Sysco distribution centers:

- a) Albany
- b) Atlanta
- c) Baltimore
- d) Central Alabama
- e) Central Florida
- f) Central Illinois
- g) Central Pennsylvania
- h) Charlotte
- i) Chicago
- j) Cleveland
- k) Eastern Wisconsin
- l) Gulf Coast
- m) Intermountain
- n) Jackson
- o) Kansas City
- p) Las Vegas
- q) Lincoln
- r) Los Angeles
- s) Memphis
- t) Minnesota
- u) North Dakota
- v) Philadelphia
- w) Pittsburgh
- x) Raleigh
- y) San Diego
- z) San Francisco
- aa) South Carolina

¹ The RFP does not define “OpCo” and the motion papers do not include a definition.

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- bb) St. Louis
- cc) Syracuse
- dd) Virginia
- ee) West Coast Florida
- ff) West Texas

Complaint Counsel argues that Specification 1 seeks relevant, non-duplicative documents that have not been previously produced. Complaint Counsel states that the documents obtained in the Federal Action were limited to distribution centers in 7 geographical areas, while through Specification 1, Complaint Counsel seeks information for 25² additional areas. Furthermore, Complaint Counsel asserts, the request for production in the Federal Action was narrowed to documents from two custodians (OpCo President and OpCo VP Sales) in the seven subject distribution centers, while the RFP here seeks documents from three custodians (OpCo President, OpCo VP Sales, and SVP Operations). Complaint Counsel argues that Specification 1, therefore, is supplemental to discovery in the Federal Action and seeks documents that have not been previously produced. Complaint Counsel affirms that it does not seek production of any documents that have already been produced by Respondent in the Federal Action. Motion at 4.

Respondent asserts that Specification 1 is unnecessary and burdensome. Respondent states that responding to Specification 1 will require Sysco to “coordinate” with up to three different document custodians at each of the specified geographic areas all across the country, which would require “countless hours of work” for the custodians and staff, as well as for counsel. Opposition at 3-4. Moreover, Respondent argues, Complaint Counsel has not provided “any compelling rationale” for finding it necessary to impose this burden, because the documents are not likely to be admissible. *Id.* at 4. In this regard, Respondent notes that discovery has closed and Complaint Counsel’s witness list fails to identify a competent witness that could sponsor admission of the documents. Therefore, Respondent argues, there is no point in ordering production of the documents.

B. Specification 10

Specification 10 of Complaint Counsel’s RFP states:

Submit all documents responsive to Specifications 16, 17, 24 and 26 of the Second Request [defined as the FTC’s Request for Additional Information and Documentary Evidence issued to the Company on February 18, 2014, Transaction Identification No. 2014-0468] including those covering the time period after the most recent documents submitted in the preliminary injunction hearing in [the Federal Action] to the present.

Complaint Counsel argues that Specification 10 seeks relevant, non-duplicative documents that have not been previously produced. Complaint Counsel states that Specification 10 seeks only a “refresh” of documents produced pursuant to relevant Second Request

² In its Motion, Complaint Counsel agreed to forego documents from custodians from six listed geographic areas, specifically: Las Vegas, Kansas City, Minnesota, San Francisco, Cleveland, and Intermountain.

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specifications, requiring only “newly created documents” since the document production in the Federal Action. Motion at 6.

Respondent asserts that Specification 10 seeks broad categories of documents. In particular, Respondent notes, Specification 16 of the Second Request, incorporated into RFP Specification 10, required documents relating to any bid or negotiation with any of Sysco’s over 450,000 customers, and has twenty-nine subparts, and that Specification 16 of the Second Request contained 15 subparts and sought all documents related to the merger. Respondent further states that it “refreshed” this production in the Federal Action in the spring. Respondent contends that it is unnecessary, cumulative, and unjustified to require Respondent to produce further documents.

Finally, Respondent argues that the merging parties have no expectation that this matter will proceed once a decision has been reached in the Federal Action, which matter has been fully briefed and argued, with a decision expected at any time. If the FTC’s motion for a preliminary injunction is denied, Respondent states, Respondent will file a motion to have the instant administrative action withdrawn from adjudication under FTC Rule 3.26(d) and it is likely that such withdrawal will result. Conversely, a senior US Foods executive testified in the Federal Action that if a preliminary injunction is granted, US Foods will terminate the merger. Thus, Respondent concludes, requiring further document production for a trial in this case is ultimately “pointless.” Opposition at 7.

IV.

FTC Rule 3.31(c)(1) provides: “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.” However, even if discovery is otherwise permitted under the Rules, it shall be limited if it is determined that the discovery is, *inter alia*, unreasonably cumulative or duplicative, or the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(2)(i),(iii). Unless it is determined that Respondent’s objections are justified, “the Administrative Law Judge shall order” that the requested documents be produced. 16 C.F.R. § 3.38(a).

Respondent has failed to demonstrate that its objections to complying with Specifications 1 and 10 are justified. First, the requests do not appear to be duplicative or cumulative of discovery in the Federal Action, as asserted by Respondent. Complaint Counsel specifically does not seek production of documents already produced by Respondent in the Federal Action, and seeks documents that either have not been previously requested or are supplemental to a previous request. Second, Respondent has failed to identify with specificity or to provide evidence to support its assertion that complying with the document requests would be unduly burdensome. Respondent’s general, unsupported allegations of burden and expense are insufficient to meet its burden of demonstrating that the requested discovery should be denied. *See In re Lab Corp.*, 2011 FTC LEXIS 22, at *8 (Feb. 17, 2011); *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009).


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Furthermore, absent evidence demonstrating the alleged burden, it cannot be determined that the alleged burden outweighs the likely benefit of the requested discovery, as Respondent argues. Respondent's objection that some of the requested documents will not be admissible into evidence at trial is also without merit. The standard for discoverability is not whether documents are ultimately admissible at trial, but whether such documents "may be reasonably expected to yield" relevant information. 16 C.F.R. § 3.31(c)(1). Finally, whether a ruling in the Federal Action will end this litigation remains to be seen, and discovery should not be denied based upon speculation. However, should a decision be issued in the Federal Action, which is apparently imminent, the parties are instructed to meet and confer as soon as practicable regarding compliance with this Order.

V.

For all the foregoing reasons, Complaint Counsel's Motion to Compel production of documents in response to Specifications 1 and 10 of the RFP, as limited by Complaint Counsel, is GRANTED, and it is hereby ORDERED that Respondent shall provide responsive documents no later than July 1, 2015.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: June 17, 2015

Notice of Electronic Service

I hereby certify that on June 17, 2015, I filed an electronic copy of the foregoing Order Granting Complaint Counsel's Motion to Compel, with:

D. Michael Chappell
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I hereby certify that on June 17, 2015, I served via E-Service an electronic copy of the foregoing Order Granting Complaint Counsel's Motion to Compel, upon:

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