

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Lina M. Khan, Chair
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

FTC Matter No. P162318

ORDER TO FILE A SPECIAL REPORT

Pursuant to a resolution of the Federal Trade Commission (“FTC” or “the Commission”) dated November 24, 2021, entitled “Resolution Directing Use of Compulsory Process Regarding the Competitive Impact of Supply Chain Disruptions in Consumer Goods,” a copy of which is enclosed, [company name] (the “Recipient”) is ordered to file with the Commission, no later than 45 days after date of service, a Special Report containing the information and Documents specified herein.

The Commission is seeking information concerning the sources of supply chain disruptions and the impact of such disruptions on competition in consumer goods and retail markets. The Special Report will assist the Commission in conducting a study of these supply chain issues.

The Special Report is required to be subscribed and sworn by an official of the Recipient who has prepared or supervised the preparation of the report from books, records, correspondence, and other data and material in your possession. Your written report should restate each item of this Order with which the corresponding answer is identified. If any question cannot be answered fully, give the information that is available and explain in what respects and why the answer is incomplete. The Special Report and all accompanying documentary responses must be Bates-stamped.

The Recipient is required to respond to this Order using information in the Recipient’s possession, custody, or control, including information maintained in a central data repository to which the Recipient has access. The Recipient should not seek any responsive information and data from separately incorporated subsidiaries or affiliates or from individuals (other than in their capacity as the Recipient’s employee or as the Recipient’s agent). However, the Recipient should provide information relating to separately incorporated subsidiaries or affiliates if the Recipient already has possession, custody, or control of such information. No later than 14 days from the date of service, the Recipient should contact Commission staff and indicate whether all of the information required to respond to this Order is in the Recipient’s possession, custody, or control. If certain information is not in the Recipient’s possession, custody, or control, no later than 14 days from the date of service, the Recipient also must: (1) Identify, both orally and in writing, each question or sub-question that the Recipient is not able to fully answer because information is not in the Recipient’s possession, custody, or control, and (2) for each, provide the full names and addresses of all entities or individuals who have possession, custody, or control of such missing information.

Confidential or privileged commercial or financial information will be reported by the Commission on an aggregate or anonymous basis, consistent with Sections 6(f) and 21(d) of the FTC Act. Individual submissions responsive to this Order that are marked “confidential” will not be disclosed without first giving the Recipient ten (10) days’ notice of the Commission’s intention to do so, except as provided in Sections 6(f) and 21 of the FTC Act.

Specifications

1. Describe the supply chain disruptions you have experienced and how those disruptions have varied by geography. Include in your description:
 - a. the primary factors causing disruptions in your acquisition of products or transportation and the geographic regions in which those issues are most prevalent;
 - b. the primary factors causing disruptions in your distribution and sale of products by region, including issues relating to:
 - i. product manufacturing;
 - ii. air freight;
 - iii. shipping container availability;
 - iv. container shipping;
 - v. ports, terminals, and terminal operators, including fees and rules;
 - vi. warehouses;
 - vii. trucking and chassis availability; and
 - viii. rail;
 - c. the product and input categories for which supply chain disruptions have had the most significant impact on your business by region;
 - d. identification of the twenty suppliers whose supply chain disruptions have had the greatest impact on your business;
 - e. how the disruptions in your acquisition of products or transportation manifest, whether in terms of cancelled orders, modification of orders, delayed delivery, delivery of only a portion of the ordered goods, increased cost of goods, or increased transportation costs;
 - f. how the disruptions in your distribution and sale of products manifest, whether in terms of increased price of goods, increased transportation costs, or increased frequency of stockouts;
 - g. which supply chain disruptions are generating the most customer complaints; and
 - h. steps you are taking or considering to alleviate such disruptions, including identifying:
 - i. changes to your strategy regarding the factors listed in Specification 1(b);
 - ii. any partners you are working with to address disruptions,
 - iii. plans or efforts to begin new business functions (such as shipping, logistics or manufacturing) or relocate existing ones, whether through your own development or acquisition;
 - iv. changes to your standard terms and conditions; and
 - v. changes to your supplier base (such as diversification efforts or shifts to local suppliers or private label products).

2. Produce all documents prepared by or submitted to senior management relating to supply chain disruptions, including documents relating to the sources of those disruptions, the products and regions affected by those disruptions, your efforts to mitigate those disruptions, and the impact of such disruptions on your or your competitors':
 - a. supply chain strategy;
 - b. prices or pricing strategy;
 - c. marketing and promotions strategy;
 - d. costs;
 - e. margins;
 - f. sales volumes;
 - g. selection of suppliers and brands, including sourcing of private label products;
 - h. market share.
3. Describe your inventory strategy, inventory costs, and how you allocate and price product among your stores when there is a shortage or a product is out of stock, including how the following factors impact that allocation and pricing:
 - a. the anticipated duration of the product shortfall;
 - b. proximity to supplier or distribution center;
 - c. local competitive conditions;
 - d. proximity of competing stores;
 - e. existence of shortages at local competitors' stores.
4. Produce all documents prepared by or submitted to senior management regarding pricing and allocation of products in short supply among your stores.
5. Describe your use or acceptance of trade promotions to determine which products to carry or how prominently to display or market such products, including the total amount of such fees received, the percentage of your suppliers that provide such fees, and any changes that have occurred in your use or acceptance of such fees in response to supply chain disruptions.
6. Identify the ten largest and 41st to 50th largest providers of trade promotions to you (measured by the total value of trade promotions provided to you), and for each:
 - a. state the annual amount of trade promotions paid to you by that supplier; and
 - b. produce all contracts governing your relationship with the supplier.
7. Describe your use of suppliers as category captains, including the identity of each category captain, the services provided to you by category captains, the fees paid by each category captain to obtain that position, and any changes that have occurred in your use of category captains in response to supply chain disruptions.
8. Identify your ten largest and 41st to 50th largest suppliers (measured by the total dollar amount of your purchases from that supplier across all products) and for each:
 - a. produce all contracts governing your relationship with the supplier;
 - b. produce all documents reflecting negotiations relating to shortages, supply chain disruptions, shipping delays, shipping cost changes, and pricing changes;
 - c. state the total annual amount of trade promotions received from each such supplier;
 - d. identify each group of products for which it serves as a category captain, if any.
9. Describe your logistics strategy, including which functions you perform internally (e.g. private fleet and warehousing) and which functions you outsource to third party logistics service providers (e.g., freight brokerage, contract carriage). For each such third party provider include:

- a. the identity of your logistics service provider;
 - b. a description of the services provided to you; and
 - c. how your use of such services has been affected by supply chain disruptions.
10. Produce all reports, analyses, and studies provided to you by any third party logistics provider.
11. Describe your supply chain, procurement, and distribution strategy prior to the COVID-19 pandemic, including with respect to the elements of the supply chain identified in Specification 1(b). Explain why you chose that strategy and the efficiencies, costs, and risks associated with the decision.
12. Describe how you have altered or plan over the next five years to alter your supply chain, procurement, and distribution strategy including with respect to the elements of the supply chain identified in Specification 1(b). Explain why you made or plan to make those changes and the efficiencies, costs, and risks associated with those decisions.

Definitions

For the purposes of this Order, the following Definitions apply:

D1. The terms “you,” “your,” and “the Company” mean [company name]; its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms “parent,” “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between the Company and any other person.

D2. The term “category captain” refers to a product supplier that provides services to a retailer to manage any aspect of the retailer’s display, marketing, and sales of a category of products, including the display, marketing and sales of other suppliers’ products.

D3. The term “contract” refers to any agreement and all related amendments and documents incorporated by reference, including agreements embodied in purchase orders, order acknowledgments, statements of work, memoranda setting out terms and conditions, and cooperative marketing agreements.

D4. The term “identify,” when used with reference to a company, means to provide the name and address of that company, along with the name and contact information for your principal contact at that company.

D5. The term “margins” refers to any metric you use to track the profitability of your business or any part of your business.

D6. The term “senior management” refers to the Company’s Board of Directors, Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, or equivalent positions, as well as the most senior individuals with direct responsibility for each of the following: pricing strategy, supply chain strategy, marketing strategy, promotions, and supplier relationships.

D7. The term “supplier” refers to any company that sells you consumer goods for resale.

D8. The term “supply chain disruption” refers to any delay, delivery shortfall, or cost increase associated with the delivery of products you have ordered from a supplier or shipped to a customer.

D9. The term “store” refers to any brick and mortar store, consumer-facing online platform, or warehouse that ships directly to consumers.

D10. The term “trade promotion” refers to any payment or provision of anything of value that a product supplier makes to a retailer or wholesaler in exchange for the retailer or wholesaler carrying the supplier’s product or providing its product more favorable shelf space or marketing, including slotting fees, staying fees, display fees, free fill, promotional spend, rebates, and discounts. In the context of a wholesaler that provides category management services to retailers, a supplier’s payments to the wholesaler to receive more favorable shelf space or marketing in the retail stores managed by that wholesaler constitute trade promotions. In the context of online sales, a payment to influence the prominence of a supplier’s product display on the retailer’s website or location in the retailer’s search results constitutes a trade promotion.

D11. The term “your competitor” refers to any company that sells to consumers some or all of the products you sell to consumers.

D12. The terms “and” and “or” have both conjunctive and disjunctive meanings.

D13. The terms “each,” “any,” and “all” mean “each and every.”

D14. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

D15. Any word or term that the Recipient considers vague or insufficiently defined has the meaning most frequently assigned to it by the Recipient in the ordinary course of business.

Instructions

For the purposes of this Order, the following Instructions apply:

1. All requests seek information and documents covering the period from January 1, 2019 to the date of this Order.
2. Unless otherwise specified, this Order requires the production of all responsive documents, data, and other information in your possession, custody, or control on the date that this Order was issued.
3. In order to comply in a manner consistent with the Commission’s Rules of Practice, 16 C.F.R. § 2.7(k), the Recipient shall schedule a teleconference, within 14 days after receiving this Order, with the Commission representative identified in Instruction 9 of

this Order to confer regarding your response. Upon request, an extension of no more than 30 days for the teleconference may be granted in writing by a Commission official.

4. Do not produce any Sensitive Personally Identifiable Information (“Sensitive PII”) or Sensitive Health Information (“SHI”) prior to discussing the information with a Commission representative. If any document responsive to a particular Specification contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document.

The term “Sensitive Personally Identifiable Information” means an individual’s Social Security Number alone; or an individual’s name, address, or phone number in combination with one or more of the following:

- date of birth
- driver’s license number or other state identification number, or a foreign country equivalent
- passport number
- financial account number
- credit or debit card number

The term “Sensitive Health Information” includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

5. Form of Production: You must submit documents as instructed below absent written modification.
 - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
 - i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and metadata.
 - ii. Submit emails in TIFF (Group IV) format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the email.
Bates End	Bates number of the last page of the email.

Metadata/Document Information	Description
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of the person from whom the email was obtained.
Email BCC	Names of person(s) blind copied on the email.
Email CC	Names of person(s) copied on the email.
Email Date Received	Date the email was received. [MM/DD/YYYY]
Email Date Sent	Date the email was sent. [MM/DD/YYYY]
Email From	Names of the person who authored the email.
Email Message ID	Microsoft Outlook Message ID or similar value in other message systems.
Email Subject	Subject line of the email.
Email Time Received	Time email was received. [HH:MM:SS AM/PM]
Email To	recipients(s) of the email.
Email Time Sent	Time email was sent. [HH:MM:SS AM/PM]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (e.g., docx, xlsx).
Folder	File path/folder location of email.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt

- iii. Submit email attachments other than those described in subpart (a)(i) in TIFF (Group IV) format. For all email attachments, provide extracted text and the following metadata and information as applicable:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.
Bates End	Last Bates number of the document.
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of person from whom the file was obtained.
Date Created	Date the file was created. [MM/DD/YYYY]
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (e.g., docx, xlsx).
Filename with extension	Name of the original native file with file extension.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Native Link	Relative file path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls
Parent ID	Document ID or beginning Bates number of the parent email.

Metadata/Document Information	Description
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

- iv. Submit all other electronic documents, other than those described in subpart (a)(i), in TIFF (Group IV) format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.
Bates End	Last Bates number of the document.
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of the original custodian of the file.
Date Created	Date the file was created. [MM/DD/YYYY]
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY HH:MM:SS AM/PM]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (e.g., docx, xlsx).
Filename with extension	Name of the original native file with file extension.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.

Metadata/Document Information	Description
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC-0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

- v. Submit documents stored in hard copy in TIFF (Group IV) format accomplished by OCR with the following information:

Metadata/Document Information	Description
Bates Begin	Beginning Bates number of the document.
Bates End	Bates number of the last page of the document.
Custodian	Name of person from whom the file was obtained.

- vi. Submit redacted documents in TIFF (Group IV) format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 5.
- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact. Submit data separately from document productions.
- c. Produce electronic file and TIFF submissions as follows:

- i. For productions over 10 gigabytes, use hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in USB 2.0 or 3.0 external enclosure.
 - ii. For productions under 10 gigabytes, CD-ROM (CD-R, CD-RW) optical disks and DVD-ROM (DVD+R, DVD+RW) optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats.
 - iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. The Commission will return any infected media for replacement, which may affect the timing of your compliance with this Order.
 - iv. Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
 - d. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
6. Before using software or technology (including search terms, predictive coding, de-duplication, email threading or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Order you must submit a written description of such software or technology and any related processes and workflows. In addition:
 - a. if you use Technology Assisted Review to identify documents and information responsive to this Order or to exclude documents and information from further review describe your collection and review methodology, including: (a) how any software is used to identify responsive documents or exclude nonresponsive documents; (b) the process to identify and validate any seed set documents, if applicable; (c) the process to determine and validate accuracy of the automatic determinations of responsiveness and nonresponsiveness; and (d) the collection and review process for foreign language documents, whether reviewed manually or by some technology-assisted method;
 - b. if you use search terms to identify documents and information responsive to this Order or to exclude documents and information from further review: for each custodian, search location, or document population provide (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the number of documents containing each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and company acronyms and terminology;

- c. provide prevalence, recall, precision, validation, and confidence-level statistics;
 - d. provide access to randomized, statistically-significant samples of non-privileged documents excluded from review or production by use of keyword search terms, Technology Assisted Review software, or any other means;
 - e. identify the person(s) able to testify on your behalf about information known or reasonably available to the organization relating to your use of software or technology in responding to this Order.
7. All documents responsive to this Order:
- a. shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in your files;
 - b. shall be marked on each page with corporate identification and consecutive document control numbers when produced in TIFF format (e.g., ABC-00000001);
 - c. if written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;
 - d. shall be produced in color;
 - e. shall be accompanied by an index that identifies: (i) the name of each Person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that Person's documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that, Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request; and
 - f. shall be accompanied by an affidavit of a Recipient's officer stating that the copies are true, correct, and complete copies of the original documents.
8. If any material called for by this Order is withheld based on a claim of protected status, 16 C.F.R. § 2.7(a)(4), the claim must be asserted no later than the return date of this Order. In addition, pursuant to 16 C.F.R. § 2.11(a)(1), submit, together with the claim, a detailed log of the items withheld. The information in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. Unless modified by the Commission representative identified on the last page of this Order, submit the log in a searchable and sortable electronic format, and, for each document, including attachments, provide:
- a. Document control number(s);

- b. The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);
- c. A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;
- d. The date the material was created;
- e. The date the material was sent to each recipient (if different from the date the material was created);
- f. The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;
- g. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;
- h. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;
- i. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;
- j. The factual basis supporting the claim that the material is protected; and
- k. Any other pertinent information necessary to support the assertion of protected status by operation of law.

In the log, identify by an asterisk each attorney who is an author, recipient, or person copied on the material. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, provide in the log the information required by Instruction 6(f). The lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim of protected status must attest, in writing, to the log.

A document, including all attachments, may be withheld or redacted only to the extent necessary to preserve any claim of protected status. Unless otherwise provided in the instructions accompanying this Order, and except for information and material subject to a valid claim of protected status, all responsive information and material shall be produced without redaction.

9. Any questions that you have relating to the scope or meaning of anything in this Order or suggestions for possible modifications to it should be directed to Kenneth Merber at kmerber@ftc.gov or (202) 326-3551. Please notify Mr. Merber by email in advance of each production. Any password(s) necessary to access the response to the Order shall be emailed to Mr. Merber.

You are advised that penalties may be imposed under applicable provisions of federal law for failure to file special reports or for filing false reports.

By direction of the Commission.

Lina M. Khan, Chair

DATED: November 24, 2021