

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya

In the Matter of)
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Civil Investigative Demand Issued to)
Retail Services & Systems, Inc.)
d/b/a/ Total Wine & More)
)
_____)

File No. 211-0155
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VERSION

ORDER DENYING PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND

By BEDOYA, Commissioner:

Retail Services & Systems, Inc., d/b/a Total Wine & More (“TWM”) petitions the Commission to limit the Civil Investigative Demand (“CID”) issued on February 23, 2023. The CID was issued in connection with the Commission’s investigation into whether a U.S. distributor of wine and spirits, Southern Glazer’s Wine and Spirits, LLC (“Southern”), or its affiliates have engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act or engaged in discriminatory practices in violation of the Robinson-Patman Act. TWM is a retailer that purchases wine and spirits from Southern. See Petition App. A (CID) at 1.

TWM contends that two definitions in the CID are overly broad so that the CID is materials and information that are not relevant to the investigation and imposes an unreasonable burden and expense on TWM. Consequently, TWM asks the Commission, as a threshold matter, [to] limit the definitions of ‘Distributor’ and ‘Relevant Products’ to Southern and the wines and spirits that Southern sells to TWM.” Petition at 5. Similarly, TWM asks the Commission to limit particular specifications that seek confidential and proprietary data and information to business involving Southern. TWM also asks the Commission to limit data specifications and specifications seeking “all documents” regarding particular issues to reduce the burden on TWM. Finally, TWM also asks the Commission to narrow the five-year timeframe for materials

For the reasons stated below, the Commission denies the petition.

I. BACKGROUND

The production, distribution, and sale of wine and spirits in the United States occur within a three-tier system created by the 21st Amendment and the Federal Alcohol Administration Act of 1935. Despite differences among state regulations for the distribution and sale of alcohol, the three-tier structure exists in every state and spirits are transferred from suppliers in the first tier to distributors in the second tier, and later transferred to retailers in the third tier. Suppliers include wine and spirit brand owners, manufacturers, and importers. Distributors purchase wine and spirits for wholesale and provide logistics and distribution services. Retailers sell wine and spirits to consumers for on-premise consumption (e.g., a bar or restaurant) or off-premise consumption (e.g., a liquor or grocery store).

Southern is a distributor in the second tier. TWM is a retailer in the third tier and purchases wine and spirits from Southern.

As described in the CID, Commission staff are investigating “[w]hether Southern Glazer’s Wine and Spirits, LLC or its affiliates have engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act . . . through . . . conduct, including exclusive dealing, tying, and related conduct; and/or (2) engaged in discriminatory practices in violation of the Robinson-Patman Act.” Petition App. A (CID) at 1. As part of the investigation, the Commission issued the CID to TWM on February 23, 2023.

Consistent with Commission Rule 2.7(k), which requires a CID recipient to meet and confer with Commission staff “to discuss compliance and to address promptly to resolve all issues” regarding the CID, there have been numerous communications between TWM and FTC staff regarding TWM’s response to the CID. See Petition App. D (Statement of Counsel Under 16 C.F.R. §2.10(a)(2)).

On February 24, FTC staff sent an electronic courtesy copy of the CID to TWM’s General Counsel, Mr. Shaffer. Following an exchange of email, on March 13, TWM’s General Counsel, Mr. Shaffer, spoke with FTC staff. Id. at ¶ 4.b. On March 15, Mr. Weissman informed FTC staff that TWM retained his firm as outside counsel, and following that notification, FTC staff extended the CID return date and the deadline to petition to limit or quash the CID to March 25. Staff also identified priority specifications for prompt responses from TWM. Id. at ¶¶ 4.c, 4.d. On March 22, FTC staff and counsel for TWM discussed TWM’s response to the priority specifications. Id. at ¶ 4.e. Two days later on March 24, FTC staff again extended the CID return date and the deadline to petition to limit or quash the CID to April 7, asking TWM to propose a comprehensive production plan and to produce material during the extension period. Id. at ¶ 4.f.

On March 30, FTC staff requested information from TWM before the next meeting and confer discussion about TWM’s plans for production. Id. at ¶ 4.g. On April 3, TWM provided a letter summarizing TWM’s objections to the CID and provided limited material to respond to the priority specifications. Id. at ¶ 4.h, Petition App. B. On April 4, TWM and FTC staff held a series of extended discussions regarding the CID. Petition App. D at ¶ i. Also on April 4, FTC staff told TWM that the deadline for filing a petition to quash the CID would not be extended. On April 5, FTC staff sent a letter memorializing the April 4 discussions, which also stated that

TWM had not yet provided a comprehensive production plan and explained that ongoing negotiations

RobinsonPatman Act violation by Southern based on discriminatory wholesale or services for retailers. TWM's ~~now~~ view of relevance to the Commission's investigation is unjustified. In fact, on its face, ~~he~~ CD states that the investigation is not limited to possible violations of the Robinson ~~ite~~

Specification 8 seeks consolidated, companywide financial information for TWM, such as operating and net income.¹ TWM's argument that this information is not relevant to the market in question misapprehends the subject of the Commission's investigation under the FTC Act and Robinson-Patman Act. As described by the CID, the subject of investigation is Southern's conduct. See Petition Ex. A 1 (CID). Assessing Southern's conduct under the Robinson-Patman Act requires examination of both the wholesale market where Southern operates and the retailers to whom Southern sells. That, in a secondary line price discrimination case, the possible injury is to competition at the retail level, between favored and disfavored customers. Consequently, information regarding TWM and the retail market is relevant to the investigation. The consolidated financial information sought by Specification 8 is relevant to examine the purpose, context, and effect of any discriminatory conduct.

Specification 12 seeks TWM documents about competition at the retail level. TWM objects to the Specification on the ground that the information "has nothing to do with Southern." Again, the effect of possible discriminatory conduct by Southern occurs at the retail level. Information about competition at the retail level is relevant to the investigation.

Specification 13 seeks documents provided to TWM's board and executive leaders regarding strategies for both the purchase of wine and spirits from distributors and their sale to consumers. Here again the information is relevant to the investigation. Strategic planning documents are relevant to understand the operations, distribution and retail markets and

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TWM argues that Specifications 3, 12, and 15-16 should be limited in time frame to no more than three years, asserting that information from an earlier period is not relevant. Petition at 16. TWM explains that, if the FTC were to seek an injunction against Southern, the Commission would need to challenge current conduct. TWM contends that “[h]istorical information . . . before January 2020 . . . does not reflect Southern’s current business practices and has substantially less probative value than more recent information.” We disagree that information before January 2020 sought by the CID is not relevant to the investigation and we do not limit the time frame identified in instruction I.1.

First, TWM does not actually claim that the requested information is irrelevant; TWM claims only that the information regarding the earlier period is less probative. Second, information sought in a CID need only be relevant to the investigation; it is not required to be the basis for a subsequent lawsuit. See *Westside Ford v. 2016 F.2d 627, 632 (9th Cir. 1953)* (“The standards of materiality or relevancy are far less rigid in an ex parte inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceedings.” (quoting *Hagan v. Porter*, 156 F.2d 362, 365 (9th Cir. 1946) *FTC v. Gibson Prods. Of San Antonio, Inc.*, 569 F.2d 900, 908 (5th Cir. 1978) (“We hold that, as long as the material is reasonably relevant to the alleged violations, it can be discovered by subpoena, regardless of y th24ocove

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Yet, as already discussed, FTC staff proposed relief for Specification 10 to address burden. Staff's position that data be provided as it is kept in the ordinary course and staff's clarification that the FTC did not demand TWM's internal quality check, see Petition App. C (April 5, 2023, letter from Altumash Mufti to Stephen Weissman) at 2 (discussing Specification 10), help mitigate the burden associated with the other data specifications. Consequently, we find that the data specifications in the CID do not impose an undue burden on TWM.

2. Specifications seeking "all documents"

TWM fails to show that Specifications 8, 12-13, and 15-16 seek "all documents" impose an undue burden. Mr. Kooser's Declaration addresses only the burden of complying with Specifications asking for data. Mr. Kooser's Declaration does not address Specifications seeking documents.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT Retail Services &