

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

In re CID Issued To Retail)
Services & Systems, Inc.)
_____)

FTC File No. 211-0155

**Retail Services & System, Inc.'s Petition to Limit
Civil Investigative Demand**

April 7, 2023

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**RETAIL SERVICES & SYSTEM, INC.'S PETITION TO LIMIT
CIVIL INVESTIGATIVE DEMAND**

I. Introduction

Retail Services & Systems, Inc., d/b/a Total Wine & More (“TWM” or the “Company”), owns the Total Wine & More trade name and related intellectual property used by separate but affiliated businesses that operate under the Total Wine trade name in 27 different states. The Company itself does not sell wine or spirits; the independent Total Wine retail stores do.¹ Staff has confirmed that the Company and its affiliated retail businesses are not a target or subject of the FTC investigation at issue, which relates to Southern Glazer’s Wine and Spirits, LLC (“Southern”). Nevertheless, the Company is compelled to file this Petition to Limit the Civil Investigative Demand (the “CID”) served on the Company on February 27, 2023.

The CID includes nineteen different specifications, including nearly one hundred separate sub-parts therein, seeking sensitive and confidential information about almost the entirety of TWM’s business over a period of more than five years. Despite producing on April 3 materials and sample data responsive to the “priority” specifications identified and requested by Staff, and despite diligent efforts by TWM to discuss a narrowing of the CID, Staff refused to extend the April 7 deadline for filing a petition to limit or quash the CID. The Company’s strong preference would have been to continue negotiating with Staff—the parties were making substantial progress on a production plan earlier this week—while securing an agreed extension of the April 7 petition deadline. Staff rejected that proposal in a letter dated April 5, while also acknowledging that the negotiations were ongoing and that the parties had not yet reached an impasse on any Specification.

¹ The records that the FTC seeks from the Company are actually records of the separate but affiliated entities that have not been served with a CID but are nonetheless referenced in the definition section of CID under D.1.

Absent Staff granting the requested extension, TWM regrettably has no choice but to file this Petition to Limit to preserve its legal rights.

The heart of the dispute pertains to two broad definitions in the CID.

First, the CID defined “Distributor” to mean any distributor of any wine or spirit product. Second, the CID defined “Relevant Products” as any wine or spirit TWM has purchased or sold. Neither definition is limited to Southern. However, the CID specifies that the subject of the Commission’s investigation is whether *Southern* “engaged in unfair methods of competition” or “discriminatory practices in violation of the Robinson-Patman Act.” See CID at 1, attached as Appendix A. And Staff has informed the Company that the CID concerns only the Robinson-Patman Act aspects of its investigation of *Southern*.

But when limitless definitions for “Distributor” and “Relevant Product” are applied to the nearly one hundred separate sub-parts in the CID, the FTC has effectively asked TWM to turn over all data and documents in its possession regardless of whether such data or documents have any connection to Southern. TWM’s business activity unrelated to Southern has no relevance to an administrative investigation into Southern, and Staff has failed to offer any explanation otherwise. The Company fails to see any relevance of such information, which it explained in comprehensive objections to the CID’s definitions. See April 3 Ltr. at 3–4, attached as Appendix B.

Staff has responded that the *only* reason it needs data and documents about TWM’s purchases, sales, and dealings with non-Southern distributors and their products is to satisfy a “need for information in [the FTC]’s investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.” See April 5 Ltr. at 4, attached as Appendix C. Neither

Staff's April 5 letter nor any other letter or email from Staff articulates a different theory of relevance.

But this is no theory at all and amounts to overreach. As an initial matter, a vaguely asserted "need for information" does not establish its relevance. Further, the FTC is not investigating the entire "wine and spirits" industry. The FTC is investigating *Southern*. The FTC is only authorized to compel the production of "relevant" information. 15 U.S.C. § 57b-1(c)(1) (authorizing the FTC to issue CIDs for information "*relevant* to unfair or deceptive acts or practices" (emphasis added)); *see also* 15 U.S.C. § 49 (granting the FTC the "power to require by subpoena . . . the production of all such documentary evidence *relating to any matter under investigation*" (emphasis added)). If merely the alleged "need for information" was enough to compel burdensome productions from third-party witnesses, as Staff claims, then multiple relevance standards under the FTC Act are rendered superfluous. *See* 15 U.S.C. § 57b-1(c)(1); 15 U.S.C. § 49.

Simply put, an administrative investigation into a target company does not give the agency free rein to obtain whatever it wants from innocent third parties who transact business with the target company, nor does it reasonably permit an agency intrusion into business transactions with unrelated entities. As federal courts have held, if "the things sought by [an administrative] subpoena do not relate to the [third party's] business with the [target company] under investigation, then the [agency] *does not have the right to obtain them.*" *Servitron, Inc. v. Interstate Comm. Commish.*, 380 F. Supp. 1344, 1346 (M.D. La. 1974) (emphasis added); *see also Belle Fourche Pipeline Co. v. U.S.*, 554 F. Supp. 1350, 1362 (D. Wyo. 1983) ("If the Court were to try to think of a document that the Plaintiffs might have that is not covered by the [agency] subpoenas, it could not do so. These subpoenas require a production of very extensive magnitude, with very little

direction or specificity; as such, they do not fall within the requirement of being ‘reasonably relevant.’”) (overturned on jurisdictional grounds).

Staff’s non-existent relevance theory does not justify inflicting TWM with the additional unreasonable burden and expense that would be required for TWM to produce such information, especially before the Staff has an opportunity to appropriately narrow and focus its requests based on the evolution of its investigation. TWM’s burdens are explained in greater detail below.

TWM respectfully requests that the Commission, as a threshold matter, limit the definitions of “Distributor” and “Relevant Products” to Southern and the wines and spirits that Southern sells to TWM. Once these terms, which appear in all but one of the Specifications, are properly limited, the vast majority of the parties’ disputes over the scope of the CID can be easily resolved. But several other concerns exist.

First, certain Specifications seek confidential, sensitive, and proprietary data and information about such things as TWM’s gross and net profits, operating margins, and business tactics and strategies that have no connection to any business transaction with Southern, nor has Staff attempted to draw such a connection in response to TWM’s objections. These Specifications should be stricken or limited to data or information that relate to TWM’s business with Southern.

Second, the Specifications that ask TWM to produce “all documents” are overbroad and unreasonably burdensome. These Specifications seek “all documents” for a period covering five-plus years related to competition, TWM’s negotiations and interactions with all distributors (not just Southern), its inventory management processes and methods, and the allocation of any distributor's product. *See* Appendix A at 2, 5–7. Such Specifications are especially overbroad given their marginal relevance to the FTC’s investigation of potential Robinson-Patman Act

violations by Southern. These and similar requests for “all documents” should be limited in time frame and scope to information that the Commission targets with more specificity, including the set of Southern products in question.

In short, especially as a third party, TWM should not be required to comply with the CID’s overbroad specifications—for which a valid explanation of relevance does not exist—and cannot do so without “disrupting” and “seriously hindering” TWM’s time-sensitive business initiatives, as described more below. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). Respectfully, the CID should be limited in the manner described in this Petition. Alternatively, TWM is willing to continue discussing with Staff its efforts to comply with the CID, including by withdrawing this Petition, so long as it is not required to waive its rights by doing so.

II. History of Conferrals

On February 27, 2023, the FTC served the CID. During meet and confers on March 13, 15, 23, and April 4, the Company explained its concerns about the breadth of the CID and the unreasonable burdens that the CID, as drafted, would inflict on the Company, especially as a third party. During two such conferrals, Staff conceded that if Southern violated the Robinson-Patman Act, TWM might be a “victim” of such violations.

During the Company’s meeting with Staff on March 15, Staff identified four “priority” Specifications—Nos. 2, 10, 18, and 19—that it requested the Company focus on for production before the other Specifications. The Company agreed to focus on these Specifications and to discuss them, including any concerns, on the call scheduled for March 22. The Company then discussed the priority Specifications with Staff on March 22 and indicated that the Company could produce certain information responsive to Specifications Nos. 2, 18, and 19 before the next call

scheduled for April 4. The Company also described the massive effort that would be required to comply with Specification 10, which, when limited to products purchased from Southern alone, sought data regarding the Company's sales of more than 18,000 products. Staff suggested that the Company produce a sample of the data so that it could evaluate both the sufficiency of the data fields and its needs regarding the remainder of Specification 10. On April 3, the Company submitted a 31-page letter, along with the requested sample data set and other information Staff requested, along with numerous objections to Definitions and Specifications. *See* Appendix B.

On April 4, the Company and Staff engaged in multiple discussions to try to avoid, or at least defer and narrow the scope of this Petition. The parties made progress. The Company clarified that it did not want to file this Petition and that it did not need the Staff to waive any of its rights with regard to compliance with the CID while discussions continued. The Company believed there was an understanding that, in return for a further extension of the April 7 petition deadline, TWM would provide the requested data for all 18,000 products within three months and other information responsive to Specification 11 within 45 days.² The Company further believed that the parties would continue to engage in further good faith discussions over the next thirty days to reach an agreement on limiting and sequencing the Company's production of other data sought under the remaining specifications.

After the calls, Staff informed the Company by email that there would be no extension of the April 7 petition deadline. Because the Company is unwilling to waive its rights—a point repeatedly conveyed to Staff, including on April 4—it is now forced to file this Petition.

² TWM's prior data analysis suggested that it purchased over 21,000 wines or spirits from Southern since 2018, which is the figure TWM conveyed to Staff. However, recent verification efforts revealed that the number is over 18,000. *See* Appendix D ¶ 9.

Staff then sent TWM a letter on April 5 that failed to mention any of the concessions and proposals that TWM had made to reasonably limit the overbroad Specifications (among other material omissions). To date, the Staff has not granted a single modification to the CID other than granting a minimal extension of the return/petition deadlines.

III. Legal Standards

The FTC's subpoena power is not without "limits." *Texaco*, 55 F.2d at 903. A CID must be reasonable relative to the "nature, purposes, and scope of the inquiry." *See Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946). The "disclosure sought" by an agency subpoena "should not be unreasonable." *Id.* Sufficient justification for sweeping investigations exists only if "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." *U.S. v. Morton Salt*, 338 U.S. 632, 652 (1950).

In addition to the relevance requirements, a CID demand will not be enforced if it is "unduly burdensome or unreasonably broad," which occurs where "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Okla. Press*, 327 U.S. at 209. When evaluating burden, courts weigh compliance costs inflicted on third parties (like TWM) more heavily, especially when the information sought might be duplicative of information available from other sources. *FTC v. Carter*, 464 F. Supp. 633, 641 (D.C. Cir. 1979) (quashing subpoenas issued to third-party researchers as unduly burdensome upon finding it would "'disrupt (and) unduly hinder the normal operations' of these research corporations to search all their files for subpoenaed materials that other respondents would be producing."); *see also EEOC v. Packard Electric Division*, 569 F.2d 315, 318–19 (5th Cir. 1978).

Unreasonably short response dates are unduly burdensome and should be extended by the Commission to facilitate compliance and reduce burden. *See* 16 C.F.R. § 2.7; *In re CID to Beam Fin., Inc., Dated May 21, 2020*, 2020 WL 5037434, at *4 (FTC Aug. 17, 2020). Ultimately, the Commission or a court is authorized to impose reasonable conditions and restrictions with respect to the production of data, documents, and other materials designated in agency subpoenas. *See generally, FCC v. Cohn*, 154 F. Supp. 899, 913 (S.D.N.Y. 1957); *Willing v. Am. Rolbal Corp.*, 135 F.2d 1003, 1005 (2d Cir. 1943); *Goldberg v. Truck Drivers*, 293 F.2d 807, 812 (6th Cir. 1961).

IV. The CID Seeks Irrelevant Information and is Unduly Burdensome.

As explained in greater detail below, the CID has at least three fatal flaws that require limitations from or quashing by the Commission.

First, the CID improperly defines “Distributor” and “Relevant Products” to include distributors and products that are not relevant to an investigation into Southern. Not only do the terms seek irrelevant information, but they impose undue and substantial real-world burdens on TWM. Since these overly broad terms are used in all but one of the Specifications, TWM is unable to continue its efforts of compliance with the CID except as described in Part IV.4 below. Both terms should be limited to Southern and the wines and spirits that Southern has sold to TWM. Such limitations will allow TWM to substantially comply with the CID.

Second, certain Specifications, by their own terms, seek confidential and proprietary data and information that is unrelated to Southern and its products. Those Specifications should be limited accordingly or quashed entirely.

Third, and finally, certain specifications seek “all documents” on various topics. Despite TWM’s objections, Staff has refused to agree to any limitation on such obvious overreach.

For these reasons and those stated below, TWM respectfully requests that the Commission greatly limit or quash the CID.

1. The Threshold Definitions Framing the Entire CID Are Flawed and Must Be Limited.

TWM objected to the CID's definitions of "Distributor" and "Relevant Products" as overbroad because neither is limited to Southern or the products that Southern distributes and, therefore, when applied to the Specifications, call for the production of irrelevant data and documents that would inflict unnecessary and unreasonable burdens on the Company. *See* Appendix B.

The fact that both definitions call for irrelevant data and documents should be obvious. The CID is clear that the FTC's investigation is focused only on Southern. *See* Appendix A at 1. Staff repeated this singular focus during prior calls. Therefore, the term "Distributor" should be limited to Southern. Defining such a term in a manner that includes irrelevant information about other distributors or the wine and spirit products they distribute for suppliers is overbroad and would unnecessarily add significant burdens to TWM that are disproportionate to any conceivable relevance. The term "Relevant Products" should be similarly limited to the products that Southern distributes.

TWM's position is based on both federal statutes and case law. As explained in the Introduction above, the FTC may only seek by CID information from third parties "***relevant*** to unfair or deceptive acts or practices," 15 U.S. Code § 57b-1 (emphasis added), and "relating to ***any matter under investigation.***" 15 U.S.C. § 49 (emphasis added). The matter under investigation here is Southern, and the evidence that the FTC seeks should be limited accordingly. Further, federal courts have held that if "the things sought by [an administrative] subpoena do not relate to the [third parties'] business with the [target company] under investigation, ***then the [agency] does not***

have the right to obtain them.” *Servitron*, 380 F. Supp. at 1346 (emphasis added). This proposition is anchored in Supreme Court precedent. The high Court in both *Oklahoma Press* and *Morton Salt* held that relevance matters. *Ok. Press*, 327 U.S. at 209. *Morton Salt*, 338 U.S. at 652. And here, Staff pegged relevance to Southern since Southern is the undisputed target of the investigation.³

At a minimum, the above showing should shift the burden back to Staff to articulate why other distributors and non-Southern wine and spirit products have any relevance to the investigation. Staff failed. In the only written articulation of its relevance theory for these definitions, Staff claim that every distributor and every wine and spirit bought and sold is relevant due to “Staff’s need for information into its investigation into the distribution of wine and spirits.” Appendix C at 5. This theory of relevance is no theory at all, contradicts the FTC’s own CID, and finds no basis in the enabling statute, as the FTC Act does not give the FTC free reign to investigate industries *carte blanche*.

The burdens that flow from the CID’s improper definition of “Distributor” and “Reasonable Products” are extensive and grossly disproportionate to the Staff’s needs. For example, Specification 10 seeks detailed product-level data about sales of all wine and spirit products that the Company purchased from any distributor (not limited to Southern) over 64 months and in 27 states. *See* Appendix A at 5. As described in the attached Declaration of Tom Kooser, TWM has purchased over 18,000 different wine or spirit products from Southern alone since 2018. *See* Appendix D ¶ 9. Weekly sales data for just those products over the 272 weeks

³ Specification 17 is doubly irrelevant because the law is clear that product allocations by a supplier are not a cognizable theory under the Robinson Patman Act. *See, e.g., Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 123 (E.D.N.Y. 1976) (recognizing that “discrimination in the allocation or timeliness of deliveries does not constitute a Robinson-Patman violation”).

since January 1, 2018 will result in approximately 5.7 million transaction-level entries, each of which then requires additional data points for product description, dollars sold, units sold, costs, and other information requested by the Specification.⁴ *Id.* ¶ 10. Thus, tens of millions of datapoints are implicated for Specification No. 10 alone, even if the terms “Distributor” and “Relevant Products” are limited. And then once the data is queried and pulled using expensive cloud-computing software, TWM then must redeploy substantial employee resources to review and validate such data prior to production to the FTC. *Id.* This pulling and validation process is a cross-functional effort involving hundreds of hours. *Id.* ¶¶ 8–10. TWM estimates that undertaking full compliance with the CID as written would disrupt strategic and critically important projects currently underway. *Id.* ¶¶ 4–12.⁵

Despite these burdens, TWM has not refused to engage with Staff. On April 4, and in light of the above-described burdens, TWM produced sample sales data for the top-five selling wines and top-five selling spirits, as determined by Nielson Global Solutions, that are predominately distributed by SG (the “Nielson Sample”). That production included 7.5 million data points and took a cross-functional team nearly a week of time to pull and validate. *Id.* ¶ 10. But TWM did not stop there. It offered to use its resources to produce additional samples of data that would extend the Nielson sample to the Top 100 or Top 300 selling wines or spirits. *See* Appendix B. TWM even extended its offer to produce thousands of additional Southern products if it received assurances from Staff that further data

⁴ On April 4, Staff discussed deferring production of weekly data and accepting monthly data instead, but has not modified the CID to do so as of this date. Nor would such a modification, if granted, eliminate the unreasonable burden associated with the request. *See* Appendix D ¶¶ 4–12.

⁵ While Staff claims that TWM has no right to validate as accurate and reliable the data before production to the FTC (and cannot rely on the validation exercise as part of its burden), that position is unreasonable and unprecedented. TWM has every right to reasonably ensure the accuracy of information provided to a government agency, and the Commission should not break new ground here. *See, e.g.* footnote 2.

productions would not be needed. Staff refused, insisting that they were entitled to data on every wine or spirit product that TWM has ever sold since January 2018.

To be clear, the dispute over Specification 10 is the natural by-product of the CID's overbroad definitions for "Distributor" and "Relevant Products" and, therefore, reflective of the parties' disputes over every Specification that uses one or both of those terms. If Staff and TWM could reach an alignment on the proper definitions, the rest of the disputes would fall to the side because those disputes flow from TWM's belief that information related to non-Southern products or business activities is irrelevant. TWM does not believe it is necessary to describe in detail the burden associated with complying with each Specification as written, given the CID's failure to properly define the terms that it uses throughout each Specification.⁶

2. Certain Specifications Make No Attempt At Targeting Relevant Information.

At least five Specifications do not even pretend to ask for documents or data related to the FTC's investigation of Southern. These Specifications include:

- Specification 8, which seeks consolidated, Company-wide financial data, such as operating and net income;
- Specification 12, which seeks internal Company documents about competition at the retail level;
- Specification 13, which seeks all documents provided to TWM's board and executive leaders;

⁶ On the April 4 call, Staff discussed deferring production of data and other information about products not purchased from Southern—and deferring data and other information for states in which TWM does not purchase products from Southern. Staff has not formalized any of those modifications to the CID to date. Regardless, even with this proposed deferral, Staff's concept would leave the CID unbounded and, therefore, subject to unreasonable burdens in the future, especially without the Company's right to file a petition to limit the CID.

- Specification 14, which seeks data and information about facilities where TWM stores the products it purchases; and
- Specification 15, which seeks internal documents about TWM's inventory strategies. *See* Appendix A.

The data and information sought by these five Specifications has nothing to do with Southern. This is obvious from the face of the Specifications themselves. But if further confirmation is needed, Staff provided it in the April 5 letter. For Specifications 12 through 15, Staff's lone relevance theory is the "Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act." Appendix C at 6. As explained above, Staff's unsupported claim of "need for information" does not somehow prove that the information is also relevant. Federal statutes and the Supreme Court establish that relevance matters.

As for Specification 8, Staff's purported theory of relevance is even less justifiable. Staff claims that consolidated financial data is "highly relevant to understanding Total Wine's place in the market subject to the Commission's investigation under the FTC Act and the Robinson-Patman Act." Again, Staff is wrong. The market subject to the FTC's investigation is wholesale distribution of wines and spirits, which is apparent given that the target of the FTC's investigation is a distributor. TWM does not distribute wines and spirits. In fact, in every state where it operates, TWM is prohibited by state law from distributing wines and spirits. TWM is a retailer. Neither the retail market nor TWM are under investigation. TWM offered to produce materials in response to 8(a) and 8(b), which are more than sufficient to address the question of the Company's size, but Staff rejected our proposal.

3. Specifications that Require Production of “All Documents”, Including for a 5-Plus Year Time Frame, Are Oppressive and Overly Broad.

The CID’s requests for “all documents” related to competition or the purchase or sale of any products (not limited to Southern’s products) (Specifications 12 and 13), to the Company’s negotiations and interactions with all distributors (not just Southern) (Specifications 3 and 16), and to its inventory management processes and methods (Specification 15), at a bare minimum should be limited both in time frame (no more than three years) and in scope to information that the Staff identifies with more specificity, including about the specific Southern products in question. Again, “[i]f the things sought by the subpoena do not relate to the [CID recipient’s] business with the [companies] under investigation, then the Commission does not have the right to obtain them.” *Servitron*, 380 F. Supp. at 1346–47.

Prior to being left with no choice except to file this Petition, the Company proposed an expeditious timeline (*i.e.*, within the next 30 days) to discuss with Staff the nature and scope of searches of the Company’s files in response to specifications requiring production of “all documents related to” a broad range of topics, including the appropriateness of word searches of certain custodians’ files. The Company remains willing to engage in those discussions in the hopes of mooted this part of the Petition. For example, regarding Specification 3, which requests all documents related to agreements with distributors, the CID’s request for “all documents” could be read to require TWM to retrieve and produce five years of purchase orders and wholesaler invoices. That is because, in the wine and spirits industry, retailers generally do not have “agreements” with distributors in the same way that suppliers or manufacturers have distribution or franchise agreements with wholesalers. Rather, it is standard practice for retailers to order wines and spirits from licensed wholesalers through purchase orders; for wholesalers to fulfill those orders by

delivering the goods in the quantities and at the prices specified in the purchase order; and for the wholesaler upon delivery, to tender an invoice payable upon receipt or within a short period thereafter based on applicable state law. While purchase orders, once accepted, form an enforceable “agreement” between the wholesaler and the retailer, standard contract terms (*e.g.*, terms of delivery, acceptance, and rejection) are often prescribed by state law. Given that TWM will provide the same information for Southern products in response to other CID data specifications, the cost and burden of producing these purely transactional documents would substantially outweigh their minimum probative value.

But, if Staff is not prepared to engage in discussions about potential custodians and search terms while this Petition is pending, the Commission should limit the requirements of these specifications to documents (i) pertaining to Southern's activities or products for which Staff provides more specificity, and (ii) prepared since January 1, 2020. Staff has not articulated the relevance of information that goes back before 2020, and such information is not necessary or relevant to the issue of whether Southern. Indeed, to seek an injunction under FTC Act, Section 13(b) against Southern’s conduct, or a cease and desist order in Part 3 proceedings, the FTC must show that Southern at least threatens to engage in unlawful conduct. Historical information, much less before January 2020, does not reflect Southern’s current business practices and has substantially less probative value than more recent information for evaluating whether Southern’s current practices are unlawful.

4. TWM Is Still Complying With Certain Parts of the CID.

In the spirit of cooperation, TWM intends, while this Petition is pending, to honor its commitment made on April 4 to produce voluminous information regarding all Southern products.

TWM will provide on or before May 5 narrative responses to Specifications 4, 5, and 9 as limited by the April 3 letter. Staff's April 5 letter failed to address any of these Specifications. TWM will also produce within three months an extension of the prior data set produced in response to Specification 10, but expanded to include all 18,000+ products that TWM has purchased from Southern since 2018. Finally, TWM will also produce on or before May 5 an export reflecting certain data sought by Specification 11. The export will show the total annual purchases of anonymized loyalty card holders and their respective zip codes.

* * *

For the reasons described above, TWM respectfully requests that the Commissioners limit or quash the CID. A simple solution is at hand: Should the Commissioners agree with TWM that "Distributor" and "Relevant Products" should be redefined to mean only Southern and the wines and spirits that it sells to TWM, then TWM is confident that it will be able to reach a resolution with Staff on all outstanding Specifications within 21 days.

At a minimum, the Commission should extend the CID's unreasonably short and unduly burdensome petition date beyond April 7 pursuant to Rule 2.7 of the FTC Rules of Practice, which requires a CID to allow "a reasonable period of time" to respond. 16 C.F.R. § 2.7(b). The CID's current April 7 return/petition date is unreasonable on its face and violative of Rule 2.7(b). A new,

reasonable return/petition date for the CID should be issued, depending on the breadth of the CID after the Commission's decision on this Petition.

Dated April 7, 2023

Respectfully submitted,



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APPENDIX A



RECEIVED
FEB 27 2023

CIVIL INVESTIGATIVE DEMAND

LEGAL DEPARTMENT

<p>1. TO</p> <p>Retail Services & Systems, Inc. d/b/a Total Wine & More 6600 Rockledge Drive Suite 150 Bethesda, MD 20817 c/o Robert Shaffer</p>	<p>1a. MATTER NUMBER</p> <p>FTC File No. 211-0155</p>
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This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

<p>LOCATION OF HEARING</p>	<p>YOUR APPEARANCE WILL BE BEFORE</p> <p>No appearance required.</p>
<p>DATE AND TIME OF HEARING OR DEPOSITION</p>	

- You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.
- You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.
- You are required to produce the tangible things described on the attached schedule. Produce such things to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS, ANSWERS TO INTERROGATORIES, REPORTS, AND/OR TANGIBLE THINGS MUST BE AVAILABLE
March 25, 2023 by 5pm ET

3. SUBJECT OF INVESTIGATION
See Attached Schedule (Subject of the Investigation) and Resolution Directing Use Of Compulsory Process Regarding Acts Or Practices Affecting Labor Or Small Business Operators

<p>4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN</p> <p>Geoffrey M. Green, Assistant Director Patricia M. McDermott, Deputy Assistant Director</p>	<p>5. COMMISSION COUNSEL</p> <p>J. Wells Harrell Federal Trade Commission 600 Pennsylvania Avenue NW Washington, DC 20580 (202) 326-3211 jharrell@ftc.gov</p>
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<p>DATE ISSUED</p> <p>02/23/2023</p>	<p>COMMISSIONER'S SIGNATURE</p> <p><i>Lina Khan</i></p>
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INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCSRulesofPractice>. Paper copies are available upon request.

Form of Certificate of Compliance*

I/We do certify that all of the documents, information and tangible things required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document or tangible thing responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to its submission and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

**CIVIL INVESTIGATIVE DEMAND
ISSUED TO RETAIL SERVICES & SYSTEMS, INC. D/B/A TOTAL WINE & MORE
FTC File No. 211-0155**

Unless modified by agreement with the staff of the Federal Trade Commission (“the Commission” or “the FTC”), each Specification of this Civil Investigative Demand (“CID”) requires a complete search of the Company as defined in the Definitions that appear after the following Specifications. Pursuant to the Commission’s Rules of Practice, 16 C.F.R. § 2.7(k), Company representatives must confer with the Commission representative identified in Instruction I.15 of this CID within 14 days after receipt of this CID. If the Company believes that the required search or any other part of the CID can be narrowed in any way that is consistent with the Commission’s need for information, you are encouraged to discuss such questions and possible modifications with the Commission representative. All modifications to this CID must be agreed to in writing pursuant to the Commission’s Rules of Practice, 16 C.F.R. § 2.7(l).

SUBJECT OF THE INVESTIGATION

Whether Southern Glazer’s Wine and Spirits, LLC or its affiliates have: (1) engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, through unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary conduct, including exclusive dealing, tying, and related conduct; and/or (2) engaged in discriminatory practices in violation of the Robinson-Patman Act, 15 U.S.C. § 13, as amended. See also the attached resolution.

SPECIFICATIONS

1. For each calendar year from 2018 to 2022:
 - (a) identify by state each Relevant Product sold by the Company;
 - (b) state separately by state for each Relevant Product the volume sold by the Company in dollars and units; and
 - (c) identify all Distributors from which the Company purchased each Relevant Product in each state.

2. † Submit an electronic spreadsheet listing each Company store in the Relevant Area that sells or has sold any Relevant Product at any time from January 1, 2018 to present. For each such Company store, provide the following information:
 - (a) the store number and any other unique number, code, value, or name used by the Company to identify or refer to the store;
 - (b) the street address, city, county, state, and zip code;
 - (c) the name of any department that sells or has sold any Relevant Product;
 - (d) the operating region, metropolitan statistical area, or micropolitan statistical area

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

- served;
 - (e) the primary trade or draw areas (*i.e.*, the smallest geographic area closest to the store where approximately 50% and 85% of the store’s customers reside);
 - (f) annual sales, by units and dollars, of all spirits products;
 - (g) annual sales, by units and dollars, of all wine products;
 - (h) the date originally opened, or projected to open, and the date closed, or expected to close, as applicable;
 - (i) the number of distinct Relevant Products, by SKUs, UPCs, or unique products if SKU information is not available, the store sells or has sold annually, broken out separately by spirits and wines and by year;
 - (j) the name, address, and contact information for any Distributor that sells or has sold any Relevant Product to the store;
 - (k) the name and address of any Company distribution center, warehouse, sortation center, or storage facility that services or has serviced the store, or that receives or holds inventory of any Relevant Product for any period of time for the store;
 - (l) the name and address of all competing off-premise retail stores engaged in the sale of any Relevant Product; and
 - (m) variables or metrics used in the ordinary course of business to evaluate the store’s competitive position, including market share.
3. Submit:
- (a) all Agreements and Proposed Agreements between the Company and any Distributor or any supplier relating to any Relevant Product;
 - (b) all documents relating to the negotiation, drafting, or evaluation of any such Agreement or Proposed Agreement; and
 - (c) all documents relating to negotiations or discussions between the Company and Southern or any supplier regarding the availability, price, or quantity of any Relevant Product available for purchase by the Company.
4. Describe in detail the process by which the Company negotiates for or is notified of available pricing, discounts, rebates, promotions, coupons, scanbacks, price adjustments, or other concessions for any Relevant Product purchased from Southern or any supplier. Submit and identify by document control number all documents used to prepare the response to this Specification.
5. Describe in detail each service Southern or any supplier furnishes, has furnished,

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More**FTC File No. 211-0155**

contracted to furnish, contributed to furnishing, offered to furnish, or that the Company has requested Southern or any supplier furnish, to the Company from January 1, 2018 to the present. Submit and identify by document control number all documents used to prepare the response to this Specification.

6. † For each service identified in response to Specification 5 above, submit documents, an electronic spreadsheet, or a Data Set sufficient to show:
 - (a) the provider or offeror of the service;
 - (b) the service provided or offered;
 - (c) the date(s) or time period(s) during which the service was provided or offered;
 - (d) the Relevant Product(s) involved;
 - (e) the store location(s), geographic area(s), and state(s) in which the service was provided or offered;
 - (f) the name, title, and affiliation of any person who acted as a provider, offeror, receiver, or offeree of the service;
 - (g) the method by which the Company was notified of the availability of the service provided or offered;
 - (h) the date(s) of, participants in, and substance of any communication with Southern or any supplier about the service; and
 - (i) any consideration the Company provided for the service.

7. † For each Relevant Product purchased from any Distributor, submit a Data Set or electronic spreadsheet that includes the following, from January 1, 2018 to present:
 - (a) SKU, UPC, or any other item number;
 - (b) product description and other product information (*e.g.*, brand, flavor, bottle size, package type);
 - (c) product manufacturer or supplier;
 - (d) order date(s);
 - (e) the Distributor receiving the order, including the Distributor's name and the geographic location of the Distributor's facility receiving, shipping, or delivering the order (*e.g.*, address of the facility, city, state, county, and/or Metropolitan Statistical Area);
 - (f) information on how the order was placed (*e.g.*, method of communication, distributor contact name);

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More**FTC File No. 211-0155**

- (g) dollars paid, promised, or owed to the Distributor (e.g., purchase price), separately by SKU and fee type;
 - (h) quantity ordered;
 - (i) quantity ordered as expressed in equivalent units;
 - (j) all quantity discounts available when the purchase was made;
 - (k) all quantity discounts applied to the purchase;
 - (l) all other discounts, rebates, promotions, coupons, scanbacks, price reductions, price adjustments, or other concessions available when the purchase was made;
 - (m) all other discounts, rebates, promotions, coupons, scanbacks, price reductions, price adjustments, or other concessions applied to the purchase;
 - (n) the name and address (including zip code) of the Company facility that received the delivery;
 - (o) the name and address (including zip code) of each Company facility that warehoused, stored, stocked, displayed, offered for sale, or sold at retail the Relevant Product; and
 - (p) date fulfilled, also noting if an order is not fulfilled.
8. Submit for each month from January 1, 2018 to the present, and separately for Relevant Products and for the Company as a whole, the Company's:
- (a) gross and net sales dollars, separately by revenue source;
 - (b) cost of sales, separately by revenue source;
 - (c) gross profit;
 - (d) any other fixed or variable costs, separately by type;
 - (e) operating income; and
 - (f) net income.
9. Identify each electronic database (including data sources used in or processed by the database) used or maintained by the Company that contains information concerning the Company's sales of Relevant Products. For each such database, submit a data dictionary that includes:
- (a) a list of field names and a definition for each field contained in the Data Set;
 - (b) the meaning of each code that appears as a field value in the Data Set; and

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More**FTC File No. 211-0155**

- (c) the primary key in the Data Set or table that defines a unique observation.
10. † Submit a Data Set or electronic spreadsheet reporting the Company's sales of Relevant Products by Company store, by SKU/UPC/item number, by week, and from January 1, 2018 to present, including:
- (a) a description of the product (*e.g.*, brand, flavor, bottle size, package type);
 - (b) gross sales in units and dollars;
 - (c) total discounts, rebates, promotions, coupons, scanbacks, returns, price reductions, or other adjustments, listed separately by type;
 - (d) net sales in units and dollars, after accounting for all discounts, rebates, promotions, coupons, scanbacks, returns, price reductions, or other adjustments;
 - (e) the cost of goods sold;
 - (f) any adjustments (*e.g.*, slotting allowances, merchandising allowances, marketing development funds, volume discounts) to cost of goods sold (specified and listed separately); and
 - (g) the advertised sales price of the product.
11. † Submit a Data Set or electronic spreadsheet that captures the following information tracked for loyalty card cardholders who have purchased any Relevant Product from the Company since January 1, 2018, including:
- (a) store identification value, as identified in response to Specification 2 above;
 - (b) unique identifying value for the individual;
 - (c) unique household identifier;
 - (d) the 5 digit zip code of the individual's residential address; and
 - (e) total monthly purchases of Relevant Products in dollars separately at each store.
12. Submit all documents related to competition in the market for retail sale of Relevant Products, including documents related to:
- (a) the market share, competitive position, and relative strengths and weaknesses of the Company and each of its actual or potential competitors, including all market-share analyses related to the retail of Relevant Products prepared by the Company or any other analyst;
 - (b) opportunities or attempts to win customers from any actual or potential competitor, or, threatened or actual losses of customers to any actual or potential competitor;

FTC File No. 211-0155

- (c) the Company's or any other person's price lists, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, and pricing decisions related to any Relevant Product;
 - (d) the current and future requirements and barriers to entry or expansion in the retail sale of any Relevant Product;
 - (e) the actual or potential entry, expansion, exit, or contraction, of any actual or potential competitor, including the contemplated or actual effect of such entry, expansion, exit, or contraction on the Company's sales, pricing, costs, product offering, or performance; or
 - (f) the capacity, product volume, number of retail locations, amount of square footage, or other factors required to attain any available cost savings or other efficiencies necessary to compete profitably in the retail sale of Relevant Products.
13. Submit all documents prepared by or for, or delivered to, the Company's officers, directors, department leadership, investors, or owners relating to the Company's strategies, plans, or budgets for:
- (a) the purchase of any Relevant Product from any Distributor; or
 - (b) the sale at retail of any Relevant Product by the Company.
14. † Submit an electronic spreadsheet identifying each Company distribution center, warehouse, or storage facility that has received, or has stored for any period of time, any Relevant Product purchased from a distributor or supplier. For each such facility, provide the following information:
- (a) the number or any other unique number, code, or name used by the Company to identify or refer to the facility;
 - (b) the dates during which the facility has operated;
 - (c) the street address, city, county, state, and zip code of the facility;
 - (d) the Company stores supplied or supported by the facility;
 - (e) the operating region, metropolitan statistical area, or micropolitan statistical area served or supported by the facility;
 - (f) the total annual volume of Relevant Products, from 2018 until the present, in both dollar value and equivalent cases, distributed from the facility to each Company Store supported or served by the facility;
 - (g) the annual cost, from 2018 until the present, incurred by transporting Relevant Products from the facility to each Company store supported or served by the

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More**FTC File No. 211-0155**

facility; and

- (h) the annual cost to operate the facility from 2018 until the present.
15. Submit all documents relating to the Company's strategies, practices, or policies regarding its management of inventory of Relevant Products, including the processes or methods by which the Company:
- (a) decides which Company facility will receive each delivery of Relevant Products;
 - (b) tracks the physical location of Relevant Products ordered by the Company while they remain in the Distributor's possession, custody, or control; or
 - (c) tracks the physical location of the Relevant Products in the Company's possession, custody, or control.
16. Submit all documents relating to the Company's strategies, practices, or policies regarding its relationships and interactions with any supplier of a Relevant Product, including:
- (a) acts by suppliers to promote or market Relevant Products to the Company;
 - (b) discounts, rebates, electronic coupons, scanbacks, price reductions, or price adjustments provided by suppliers related to any Relevant Product;
 - (c) communications between the Company and suppliers regarding the Company's expected demands or orders for any Relevant Product; or
 - (d) sale or delivery of any Relevant Product from suppliers to Distributors in anticipation of, or in response to, orders of such product from the Company.
17. Submit all documents relating to the allocation of any Relevant Product by Southern, any supplier, or the Company, including decisions by Southern or any supplier to limit the volume of any Relevant Product available for purchase by the Company or another retailer.
18. Submit one copy of each organizational chart and personnel directory for the U.S. operations of the Company, including for each of the Company's subsidiaries, facilities, or divisions involved in the Distribution, marketing, promotion, or sale of any Relevant Product.
19. List each employee of the Company with managerial, supervisory, strategic, or decision-making responsibilities for selecting, negotiating Agreements with, purchasing from, or managing the Company's relationship with any Distributor or any supplier of any Relevant Product, and for each identify:

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

- (a) the specific responsibilities of the employee;
- (b) the dates the employee held such responsibilities for or participated in such activity;
- (c) the employee's job title(s) during such period; and
- (d) the name of the person to whom the employee reported during such period.

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More**FTC File No. 211-0155****DEFINITIONS**

For the purposes of this CID, the following definitions apply:

- D.1. The term “**Company**” means Retail Services & Systems, Inc. d/b/a Total Wine & More and its directors, officers, trustees, employees, attorneys, agents, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its predecessors, divisions, parents, subsidiaries, affiliates, partnerships, and joint ventures.
- D.2. The term “**Agreement**” means any oral, written, or implied contract, arrangement, understanding, or plan, or term thereof, whether formal or informal, between two or more persons, together with all modifications or amendments thereto.
- D.3. The terms “**and**” and “**or**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any Specification all information that otherwise might be construed to be outside the scope of the Specification.
- D.4. The term “**communication**” means any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, communications via text message, chat program, or social media application, or email contacts.
- D.5. The term “**Data Set**” means data held by, or accessible to, the Company in the ordinary course of business that is provided by the Company to respond to any Specification in this CID, in the form and with the accompanying information called for in Instruction I.7(c).
- D.6. The terms “**Distribution**,” “**Distribute**,” and “**Distributing**” mean:
- (a) the purchase of a Relevant Product from a supplier for distribution or wholesale in the Relevant Area;
 - (b) the purchase of a Relevant Product from a Distributor for sale at retail by a retailer;
 - (c) the provision of distribution, wholesale, or brokerage services to a supplier in connection with the sale of any Relevant Product in the Relevant Area; or
 - (d) any other arrangement to deliver a Relevant Product from a supplier to a retailer, including any arrangement to move a Relevant Product through the second tier of the three-tier alcohol distribution system in the United States.

For the avoidance of doubt, “**Distribution**,” “**Distribute**,” and “**Distributing**” include a retailer’s purchase of a Relevant Product from a Distributor.

- D.7. The term “**Distributor**” means any person that Distributes a Relevant Product.
- D.8. The term “**documents**” means any information, on paper or in electronic format, including written, recorded, and graphic materials of every kind, in the possession, custody, or control of the Company. The term “documents” includes, without limitation: computer files; email messages; audio files; instant messages, including instant messages sent via intraoffice message or chat programs or via social media applications; text messages; documents contained in collaborative work environments used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, such as Microsoft Sharepoint sites, OneNote, Google Docs, eRooms, document management systems (*e.g.*, iManage), intranets, web content management systems (“CMS”) (*e.g.*, Drupal), wikis, and blogs; drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Company.
- (a) Unless otherwise specified, the term “documents” excludes:
- i. architectural plans and engineering blueprints;
 - ii. documents solely relating to environmental, tax, OSHA, or ERISA issues; and
 - iii. relational and enterprise databases, except as required to comply with an individual Specification.
- (b) The term “computer files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mobile devices, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission’s need for documents and information, you are encouraged to discuss a possible modification to this Definition with the Commission representatives identified on the last page of this CID. The Commission representative will consider modifying this Definition to:
- i. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;
 - ii. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain Specifications identified by Commission

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

- representatives; or
- iii. include other proposals consistent with Commission policy and the facts of the case.
- (c) If the Company intends to utilize any de-duplication, near-de-duplication, or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this CID, or if the Company's computer systems contain or utilize such software, the Company must contact Commission representatives to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this CID.
- D.9. The terms "**each**," "**every**," "**any**," and "**all**" mean "each and every."
- D.10. The term "**order**" means any communication from the Company to a Distributor to facilitate the Company's purchase of a Relevant Product.
- D.11. The term "**person**" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- D.12. The term "**Proposed Agreement**" means any Agreement or term thereof that a person has offered, requested, or otherwise proposed, including any expressions of interest or intent to enter into an Agreement.
- D.13. The term "**relating to**" means in whole or in part constituting, containing, concerning, embodying, reflecting, discussing, explaining, describing, analyzing, identifying, stating, reporting, forecasting, referring to, dealing with, or in any way pertaining to.
- D.14. The term "**Relevant Area**" means any state.
- D.15. The term "**Relevant Product**" means, and information shall be provided separately for (a) wine Distributed, purchased, or sold at the retail level and (b) spirits Distributed, purchased, or sold at the retail level. For the avoidance of doubt, the term "Relevant Product" includes wine and spirits intended for both off-premises and on-premises sales.
- D.16. The term "**retailer**" means any person that sells any Relevant Product at retail, including on-premises and off-premises sales.
- D.17. The term "**service**" means any act, financial or other support, monetary allowance, or provision of facilities by Southern—other than the mere delivery of any Relevant Product to the Company's premises—connected with the Company's processing, handling, marketing, sale, or offering for sale of any Relevant Product, including labor, advice, allowance, funding, or other assistance with respect to shelf stocking, design of store schematics or planograms, discounts, rebates, construction of promotional displays, inventory resets, marketing, warehousing, and inventory availability guarantees.

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More**FTC File No. 211-0155**

- D.18. The term “**SKU**” means a stock keeping unit or other unique code consisting of letters and numbers used to identify characteristics about a product, including brand, flavor, and package size. “
- D.19. The term “**Southern**” means Southern Glazer’s Wine and Spirits, LLC, and its directors, officers, trustees, employees, attorneys, agents, consultants, and representatives, parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.
- D.20. The term “**state**” means any U.S. state or the District of Columbia.
- D.21. The term “**supplier**” means any person that sells or otherwise transfers any Relevant Product to the second tier of the three-tier alcohol distribution system in the United States. The term “supplier” includes any person that produces or manufactures Relevant Products in, or imports Relevant Products into, any Relevant Area.
- D.22. The term “**Technology Assisted Review**” means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.
- D.23. The term “**units**” refers to quantities in nine-liter cases or nine-liter case equivalents.
- D.24. The term “**UPC**” means Universal Product Code. A UPC is a 12-digit identifier that includes a number and a barcode. It identifies unique products sold by retailers in the United States.
- D.25. The singular form of a noun or pronoun includes its plural form, and vice versa; and the present tense of a verb includes the past tense, and vice versa.
- D.26. Any word or term that the Company considers vague or insufficiently defined has the meaning most frequently assigned to it by the Company in the ordinary course of business.

FTC File No. 211-0155

INSTRUCTIONS

For purposes of this CID, the following Instructions apply:

- I.1. All references to year refer to calendar year. Unless otherwise specified, each of the Specifications calls for documents and information dated, created, modified, sent, received, or in effect from January 1, 2018 to the present. Where information, rather than documents, is requested, provide it separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If calendar year information is not available, supply the Company's fiscal year data indicating the 12-month period covered, and provide the Company's best estimate of calendar year data.
- I.2. This CID shall be deemed continuing in nature so as to require production of all documents responsive to any Specification included in this CID produced or obtained by the Company up to 45 calendar days prior to the date of the Company's full compliance with this CID.
- I.3. Unless otherwise specified, each Specification calls for documents and information limited to the United States.
- I.4. Compliance with this CID requires a search of all documents in the possession, custody, or control of the Company including, without limitation, those documents held by any of the Company's officers, directors, employees, agents, representatives, or legal counsel, whether or not such documents are on the premises of the Company. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Company must provide the Commission with the following information as to each such person: his or her name, address, telephone number, and relationship to the Company. In addition to hard copy documents, the search must include all of the Company's Electronically Stored Information.
- I.5. Do not destroy or dispose of documents responsive to this CID, or any other documents relating to the subject matter of this CID. The destruction or disposal of such documents during the pendency of this investigation may constitute a felony in violation of 18 U.S.C. § 1505 and 18 U.S.C. § 1512. The Company shall preserve documents responsive to this CID created or received after the issuance of this CID until a Commission representative notifies the Company that the investigation has ended.
- I.6. 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:

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

- 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.

I.7. Form of production: the Company shall submit documents as instructed below absent written consent.

- (a) Except for privileged material, the Company shall produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Company shall submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Company will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
- (b) 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.

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

Metadata/Document Information	Description
Bates Begin	Beginning document control (or "Bates") number of the email.
Bates End	Bates number of the last page of the email.
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]

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine &

More

FTC File No. 211-0155

Metadata/Document Information	Description
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.

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

Metadata/Document Information	Description
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.

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

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

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

Metadata/Document Information	Description
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]

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

Metadata/Document Information	Description
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.
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:

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine &

More

FTC File No. 211-0155

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 I.10.

- (c) Submit data compilations, Data Sets, and specifications marked with a dagger (†) 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. All terms, allocations, calculations, and methods of calculation must be clearly explained and defined; costs must be disaggregated to the lowest level of detail possible and fully allocated. Further, for each Data Set, identify the specific Company databases from which these data were obtained and provide (i) a list of field names and a definition for each field contained in the Data Set; (ii) the meaning of each code that appears as a field value in the Data Set; (iii) the primary key in the Data Set or table that defines a unique observation; and (iv) any programming code used to calculate any of the data provided.

- (d) 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-

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine &**More****FTC File No. 211-0155**

- 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 the Company's compliance with this CID.
 - iv. Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
- (e) 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.
 - (f) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this CID.
- I.8. Before using software or technology (including search terms, email threading, Technology Assisted Review, deduplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this CID, the Company must submit a written description of such software or technology and any related processes and workflows used to conduct any part of its search. In addition:
- (a) if you use Technology Assisted Review to identify documents and information responsive to this CID or to exclude documents and information from further review, describe your collection and review methodology, including:
 - i. how any software is used to identify responsive documents or exclude nonresponsive documents;
 - ii. the process to identify and validate any seed set documents, if applicable;
 - iii. the process to determine and validate accuracy of the automatic determinations of responsiveness and nonresponsiveness; and
 - iv. 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 the CID

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More**FTC File No. 211-0155**

or to exclude documents or information from further review, then for each custodian, search location, or document population provide:

- (i) a list of proposed terms;
 - (ii) a tally of all the terms that appear in the collection and the frequency of each term;
 - (iii) a list of stop words and operators for the platform being used; and
 - (iv) a glossary of industry and company terminology;
- (c) provide recall, precision, and confidence-level statistics (or an equivalent);
 - (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 CID.

I.9. All documents responsive to this CID:

- (a) shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's 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 an officer of the Company stating that the copies are true, correct, and complete copies of the original documents.

FTC File No. 211-0155

- I.10. If any documents or parts of documents are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes, in separate fields, a privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; all custodians; date of the document; the title or subject line; an indication of whether it is redacted; the basis for the privilege claim (*e.g.*, attorney-client privilege), including the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Commission staff, the Commission, or a court to assess the applicability of the privilege claimed. For each document or part of a document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this Instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third party, such as internal law firm memoranda, may be omitted from the log. Provide the log in Microsoft Excel readable format.
- I.11. If the Company is unable to answer any question fully, supply such information and data as are available. Explain why the answer is incomplete, the efforts made by the Company to obtain the information and data, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.
- I.12. If documents responsive to a particular Specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the Specification(s) to which they are responsive, and identify the persons having knowledge of the content of such documents.
- I.13. In order for the Company's response to this CID to be complete, the attached certification form must be executed by the Company official supervising compliance with this CID and submitted along with the responsive materials.

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More

FTC File No. 211-0155

- I.14. Responses to Specification 11, and any other responses that include PII, of this Request shall be produced to the Bureau of Economics using the Commission's secure FTP. For instructions on using this FTP, please contact the BE Data Support Center by phone at (202) 326-3481 or (202) 326-2147 or by email at BE-DataMgt@ftc.gov. If using the FTP is not feasible, the Company's responses to this Request shall be delivered, between 8:30 a.m. and 5:00 p.m., to the following address: BE Data Support Center, Attn: Kevin Richardson and Constance Herasingh, Federal Trade Commission, 600 Pennsylvania Avenue NW, Room H-285, Washington, DC 20580. Please notify the BE Data Support Center in advance of each such delivery, and provide a confirmation or tracking number for each delivery.
- I.15. Any questions you have relating to the scope or meaning of anything in this CID or suggestions for possible modifications thereto should be directed to **Altumash Mufti** at **202-326-2157**, **amufti@ftc.gov**. To obtain instructions for your delivery of responsive documents and other information, please contact **Rebecca Hyman** at **(202) 326-3563**, **rhyman@ftc.gov**.

Civil Investigative Demand Issued to Retail Services & Systems, Inc. d/b/a Total Wine & More
FTC File No. 211-0155

CERTIFICATION OF COMPLIANCE

Pursuant to 28 U.S.C. § 1746

I, _____, certify the following with respect to the Federal Trade Commission’s (“FTC”) Civil Investigative Demand issued to [·] (FTC File No. 211-0155) (the “CID”):

1. The Company has identified all documents, information, and/or tangible things in the Company’s possession, custody, or control responsive to the CID and either:
 - a. provided such responsive information to the FTC; or
 - b. for any such responsive information not provided, given the FTC written objections setting forth the basis for withholding the responsive information.
2. I verify that the responses to the CID are complete and true and correct to my knowledge.

I certify under penalty of perjury that the foregoing is true and correct.

Date: _____

Signature

Printed Name

Title

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

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

**RESOLUTION DIRECTING USE OF COMPULSORY PROCESS
REGARDING ACTS OR PRACTICES AFFECTING
LABOR OR SMALL BUSINESS OPERATORS**

File No. P210100

Nature and Scope of Investigation:

To investigate whether any persons, partnerships, corporations, or others have engaged or are engaging in unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices in, or affecting commerce targeting current or prospective workers or small business operators, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, or any statutes or rules enforced by the Commission; and to determine the appropriate action or remedy, including whether monetary relief would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it, including subpoenas and orders to file special reports, be used in connection with any inquiry within the nature and scope of this resolution for a period not to exceed ten years. The expiration of this ten-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the ten-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the ten-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; and FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1 *et seq.*, and supplements thereto.

By direction of the Commission.



April J. Tabor
Secretary

Issued: July 1, 2021
Expires: July 1, 2031

APPENDIX B

April 3, 2023

Altumash Mufti
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580
(202) 445-7917
amufti@ftc.gov

RE: Civil Investigation Demand, FTC File No. 211-0155

Dear Al:

On behalf of Retail Services & Systems, Inc., d/b/a Total Wine & More (“TWM”), I hereby provide via secure file transfer documents bearing Bates numbers TWM-CID-000001 through TWM-CID-0000017. TWM hereby designates all documents in this production as “HIGHLY CONFIDENTIAL – TRADE SECRET INFORMATION” and respectfully requests that the Federal Trade Commission (“FTC”) treat such documents accordingly and as exempt from any FOIA requests, in accordance with the FTC Act and all applicable rules and regulations.

During our March 15, 2023 meet and confer, the FTC identified Specification Nos. 2, 10, 18, and 19 as “priorities” on which TWM should focus in the short term. During our March 22, 2023 meet and confer, we explained that TWM would focus on those priority Specifications and would endeavor to diligently respond to them in the coming weeks. In Part I below, we reaffirm our prior oral objection to the return date specified in the CID. In Part II below, TWM provides objections and responses to the FTC’s priority Specifications. TWM’s responses submitted with this letter include the production of the sample data sets that your colleague, Wells Harrell, requested on March 22 as an interim step to assist Bureau of Economics staff evaluate staff’s data needs from TWM. In Part III below, TWM provides its preliminary comments and objections to the non-priority Specifications. The parties have not yet had any substantive discussions about these non-priority Specifications, and TWM is hopeful that the information in Part II will lead to discussions in the future.

TWM remains very concerned about the entirety of the scope of the CID, including the substantial burdens it would inflict on its business operations and the need for certain highly proprietary TWM information requested. Our sincere hope, however, is that, through this letter and our upcoming meeting on April 4, Staff and TWM can make substantial progress in reaching a resolution of TWM’s concerns about the CID consistent with the Commission’s need for relevant information regarding its investigation of Southern Glazer’s Wine and Spirits, LLC (“SG”). As reflected in the FTC’s letter dated March 24, 2023, TWM’s current deadline to file a petition to limit or quash the CID is April 7, 2023. We are

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 2

prepared to make such a filing, but again, our strong preference is to work with you in good faith to reach a global resolution of the CID's requirements as to TWM.

Now that TWM has addressed in good faith the FTC's priority Specifications and offered its initial positions on the non-priority Specifications, we respectfully request that, pursuant to 16 CFR § 2.10(a)(5), the FTC extend TWM's deadline to file its petition to limit or quash to May 5, 2023. This modest extension should provide the FTC time to evaluate the information responsive to the priority Specifications and the parties sufficient time and meaningful opportunity to discuss the scope and breadth of the remaining Specifications, including non-priority Specifications, so we can both avoid the distraction and delays associated with motions practice. As you have repeatedly stated, TWM is a non-party, non-target of the Staff's investigation. Consequently, we hope that you will work cooperatively with us to get you the information you reasonably need from TWM while remaining sensitive to the substantial burdens and distractions the CID would inflict on our client.

We look forward to discussing this letter and accompanying document production during our meet and confer scheduled for April 4, 2023.

* * * *

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 3

I. OBJECTIONS TO RESPONSE DATE IN CID, INCLUDING AS MINIMALLY MODIFIED

Section 2.7(b) of the FTC Rules of Practice states, in relevant part, that CIDs for the production of documentary material, including ESI, “shall . . . prescribe a return date *providing a reasonable period of time within which the material so demanded may be assembled and made available* for inspection and copying or reproduction.” (Emphasis supplied). The CID, which was served on February 27, 2023, and had a return date of March 25, 2023 (since extended to April 7, 2023), contains nineteen different specifications with numerous sub-parts, covering a period of more than five years. TWM, therefore, objects to the return date (as minimally modified) as unreasonable on its face and in violation of Rule 2.7(b). TWM, nevertheless, will continue to work in good faith with the Staff to understand the FTC’s needs and work to appropriately narrow the scope of certain Specifications, which will facilitate the production of information on a reasonable timeframe contemplated by Rule 2.7(b).

II. PRIORITY SPECIFICATIONS

A. Objections to Definitions

Definition D.7

The term “Distributor” means any person that Distributes a Relevant Product.

TWM objects to this term as overbroad. As we explained during prior telephonic meet and confers, any information related to TWM’s purchase and sale of wines or spirits *not* distributed by SG is irrelevant, and production of such information would significantly exacerbate the unduly burdensome nature of the CID. More details regarding such burdens are described below in the discussion of the Specifications. The CID is clear that the FTC’s investigation is focused only on SG. *See* CID pg. 1. Therefore, the term “Distributor” should be limited to SG. Defining such a term in a manner that includes irrelevant information about other distributors or the wine and spirit products they distribute for suppliers is overbroad and would unnecessarily add significant burdens to TWM that are disproportionate to any conceivable relevance.

Here, the need to limit the definition is especially warranted because TWM is a third-party witness, not a subject or target of FTC’s investigation. Federal courts provide third parties protection from overbroad and burdensome discovery during civil litigation. *E.g.*, FED. R. CIV. P. 45(d)(1) (“A party or attorney responsible for issuing and serving a subpoena

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 4

must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”). If the FTC needs information or data related to other distributors, it would be more appropriate and efficient to obtain that information from the distributors directly.

Thus, TWM proposes to limit the definition of “Distributor” to SG unless expressly stated differently in its responses to the Specifications set forth below. Moreover, we are available to meet and confer with you to discuss certain requests for which you believe you need information from TWM about distributors other than SG to address our objections above. We request that you come prepared on April 4 to do so.

Definition D.15

The term “Relevant Product” means, and information shall be provided separately for (a) wine Distributed, purchased, or sold at the retail level and (b) spirits Distributed, purchased, or sold at the retail level. For the avoidance of doubt, the term “Relevant Product” includes wine and spirits intended for both off-premises and on-premises sales.

TWM objects to this term as overbroad and unduly burdensome, as described in more detail below. TWM incorporates its objections to Definition D.7 above. TWM proposes to limit the definition of “Relevant Product” to only wines or spirits distributed by SG unless expressly stated differently in its responses to the Specifications set forth below. Moreover, we are available to meet and confer with you to discuss certain requests for which you believe you need information from TWM about products not distributed by SG to address our objections above. We request that you come prepared on April 4 to do so.

Instruction 1.1

All references to year refer to calendar year. Unless otherwise specified, each of the Specifications calls for documents and information dated, created, modified, sent, received, or in effect from January 1, 2018 to the present. Where information, rather than documents, is requested, provide it separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If calendar year information is not available, supply the Company’s fiscal year data indicating the 12-month period covered, and provide the Company’s best estimate of calendar year data.

TWM objects to the five-plus year date range (January 1, 2018, to present) for documents and other information requested in the CID. This 64-month date range is overly broad, unduly burdensome to comply with, and disproportionate to the needs of the

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 5

investigation, especially given that TWM is a non-party to the investigation. Requiring TWM to search for, collect, review, and then assemble for production 64 months' worth of materials would inflict hundreds of thousands of dollars in costs and distraction on TWM's business operations and divert TWM's scarce IT and other resources from time-sensitive business projects that are mid-stream and for which TWM already has committed substantial investment dollars. TWM proposes to discuss appropriate time periods for each specification, to which TWM will respond during our April 4, 2023, meeting.

B. Objections and Responses to Priority Specifications

Specification No. 2

Submit an electronic spreadsheet listing each Company store in the Relevant Area that sells or has sold any Relevant Product at any time from January 1, 2018 to present. For each such Company store, provide the following information:

- (a) the store number and any other unique number, code, value, or name used by the Company to identify or refer to the store;**
- (b) the street address, city, county, state, and zip code;**
- (c) the name of any department that sells or has sold any Relevant Product;**
- (d) the operating region, metropolitan statistical area, or micropolitan statistical area served;**
- (e) the primary trade or draw areas (*i.e.*, the smallest geographic area closest to the store where approximately 50% and 85% of the store's customers reside);**
- (f) annual sales, by units and dollars, of all spirits products;**
- (g) annual sales, by units and dollars, of all wine products;**
- (h) the date originally opened, or projected to open, and the date closed, or expected to close, as applicable;**
- (i) the number of distinct Relevant Products, by SKUs, UPCs, or unique products if SKU information is not available, the store sells or has sold annually, broken out separately by spirits and wines and by year;**
- (j) the name, address, and contact information for any Distributor that sells or has sold any Relevant Product to the store;**
- (k) the name and address of any Company distribution center, warehouse, sortation center, or storage facility that services or has serviced the store, or that receives or holds inventory of any Relevant Product for any period of time for the store;**
- (l) the name and address of all competing off-premise retail stores engaged in the sale of any Relevant Product; and**

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 6

(m) variables or metrics used in the ordinary course of business to evaluate the store's Competitive position, including market share.

TWM incorporates its objections to the terms “Relevant Product” and “Distributor,” as set forth above.

The document produced with Bates number TWM-CID-0000001 - TWM-CID-0000016 contains information responsive to subparts (a), (b), (d), and (h) and reflects the store numbers, addresses, operating region, and open/closed date for each store in the states where TWM purchases wines or spirits from SG or its affiliates. Below is a list of each state in which TWM sells wines and spirits that it purchased from SG or its affiliates, which is information sought by subpart (j):

1. Arizona
2. California
3. Colorado
4. Delaware
5. Florida
6. Illinois
7. Indiana
8. Kentucky
9. Louisiana
10. Maryland
11. Michigan
12. Minnesota
13. Missouri
14. New Mexico
15. Nevada
16. New York
17. South Carolina
18. Texas
19. Washington¹

Subject to reaching an agreed reasonable extension and resolution of the CID with staff, TWM proposes to undertake the work necessary to assemble and produce data that

¹ TWM operates stores in 8 states where it does not buy wines or spirits from SG. Those states are Connecticut, Georgia, Massachusetts, North Carolina, New Jersey, Tennessee, Virginia, and Wisconsin.

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 7

reflects TWM's marketing assessment of the geographic areas where 50% and 85% of the customers for each store within the states where TWM purchases wines or spirits from SG or its affiliates. Such data will be responsive to subpart (e).

For subpart (c), TWM does not have "departments" within its stores that sell or have sold wines or spirits distributed by SG. Products within TWM's stores are categorized by type, such as "wine" or "spirit," for organizational purposes, but structural departments for purposes of sales do not exist.

Subparts (f), (g), and (i) call for store-level sales data that is reflected in other Specifications, including Specification No. 10, but limited to SG. Therefore, TWM refers the FTC to its responses to those Specifications.

For subpart (k), TWM does not own or operate any "distribution centers" or "sortation centers" as we understand those terms. Recently, however, TMW began to utilize warehouses in two states (i.e., California and Florida) to hold alcohol inventory that could not be received in the stores due to insufficient storage capacity. The warehouses are used to replenish inventories in the California or Florida stores when needed. With this exception, TWM's inventory is held in the stores where it sells the products. Further, where permitted by state law, TWM will occasionally rebalance inventories between stores to meet demand by transferring inventory from one store to another in the same state.

For subpart (l), TWM does not maintain comprehensive data sets that contain the requested information about "all competing off-premise retail stores." TWM can and has identified competing retailers through various channels, such as the internet, advertisements, physical locations, etc., but it does not maintain such comprehensive data, nor can it create such data sets for the FTC in response to this Specification.

For subpart (m), TWM does not maintain business variables and metrics regarding competitive positions or market shares on a store-by-store basis.

Specification No. 10

Submit a Data Set or electronic spreadsheet reporting the Company’s sales of Relevant Products by Company store, by SKU/UPC/item number, by week, and from January 1, 2018 to present, including:

- (a) a description of the product (e.g., brand, flavor, bottle size, package type);**
- (b) gross sales in units and dollars;**
- (c) total discounts, rebates, promotions, coupons, scanbacks, returns, price reductions, or other adjustments, listed separately by type;**
- (d) net sales in units and dollars, after accounting for all discounts, rebates, promotions, coupons, scanbacks, returns, price reductions, or other adjustments;**
- (e) the cost of goods sold;**
- (f) any adjustments (e.g., slotting allowances, merchandising allowances, marketing development funds, volume discounts) to cost of goods sold (specified and listed separately); and**
- (g) the advertised sales price of the product.**

TWM incorporates its objections to the terms “Relevant Product” and “Distributor,” as set forth above.

TWM objects to this specification as overly broad and because compliance would inflict unreasonable burdens on TWM. As we described on our March 22 call, during the relevant time period, TWM has purchased over 21,000 different wine or spirit products from SG alone. Weekly sales data for just those products over the 272 weeks since January 1, 2018—which is what Specification No. 10 seeks—will result in approximately 5.7 million transaction-level entries, each of which then requires additional data points for product description, dollars sold, units sold, costs, etc. Simply put, tens of millions of datapoints are implicated for Specification No. 10 alone. And then once the data is queried and pulled using expensive cloud-computing software, TWM then must redeploy substantial employee resources to review and validate such data prior to production to the FTC. TWM is unable to produce data that it has not validated as accurate and reliable. This pulling and validation process is a cross-functional effort involving numerous employees critical to other preexisting and ongoing business objectives. TWM estimates that undertaking such an exercise for Specification No. 10 will cost hundreds of thousands of dollars in lost time and productivity at a time when TWM also needs those computing and personnel resources to support the immediate demands of its business. Such burdens exist even when limiting the definitions of “Relevant Product” and “Distributor” to SG. Expanding these burdens to include *every* wine or spirit that TWM has purchased from *every* distributor over more than five years would be grossly overbroad, unduly burdensome, and disproportionate to the needs of the investigation.

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 9

In response to Mr. Harrell's request on March 22, 2023, TWM hereby produces as a sample sales data for the top-five selling wines and top-five selling spirits, as determined by Nielson Global Solutions, that are predominately distributed by SG (the "Nielson Sample"). With minor variation, the data provided on these ten products represent purchases from SG.² These ten products account for a substantial portion of the national sales at all retail channels. For example, the five wines in the Nielson Sample are as follows:

1. Josh Cabernet Sauvignon California State, 750ml
2. Kendall-Jackson Vntrs RSV Chardonnay California State, 750ml
3. Meiom Pinot Noir Monterey County, 750ml
4. Kim Crawford Sauvignon Blanc New Zealand, 750ml
5. Josh Chardonnay North Coast, 750ml

In the last 52 weeks ending February 4, 2023, these five wines accounted for \$765 million in sales, according to the latest publicly available data from Nielson.

The five spirits are as follows:

1. Tito's Vodka 80 Proof, 1.75ml glass bottle
2. Tito's Vodka 80 Proof, 750ml glass bottle
3. Patron Silver Tequila 80 Proof, 750ml glass bottle
4. Jameson Reg Irish Whiskey 80 Proof, 750ml glass bottle
5. Jameson Reg Irish Whiskey 80 Proof, 1.75ml glass bottle

² In most states where TWM operates, SG is the exclusive distributor for these 10 products. In a few states, we believe that SG, while the predominant distributor, is not exclusive. We used a Nielsen Sample because quantifying variations by distributors is exceedingly difficult, not performed in the ordinary course of business, and such an exercise would require a product-by-product and state-by-state inquiry.

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 10

In the last 52 weeks ending February 4, 2023, these five spirits accounted for \$1.28 billion in sales, according to the latest publicly available data from Nielson.

The document produced with Bates number TWM-CID-0000017 contains data for retail sales of the Nielson Sample in the states where TWM purchases wines or spirits from SG or its affiliates. The data is responsive to subparts (a), (b), (d), (e), and (g). The following chart describes the column headers in TWM-CID-0000017:

Column Header	Description
FISCAL_YEAR	The fiscal year ranging from 2018 to 2023
FISCAL_WEEK	The fiscal week ranging from 1 to 52
STORE_NUM	The unique number that TWM assigns to each store
STORE_NAME	The unique name that TWM assigns to each store
STATE_ABBR	The state where the store is located
ITEM_CODE	The unique identifying number that TWM assigns to each product
ITEM_NAME	The product name
UPC	The UPC
CLASS	The category of product

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 11

SIZE	The volume of each unit
COGS_CS	The average weekly cost of goods sold, by case, for the fiscal week, which is calculated as follows: $AVG((Cost * Units_Per_Case))$
UCOGS	The average weekly cost of goods sold, by unit, for the fiscal week, which is calculated as follows: $AVG(Cost)$
AD_PRICE	The average weekly posted price for the fiscal week: $AVG(Orig_Unit_Price)$
TOT_UNITS_SOLD	The total number of units sold during the fiscal week, which is calculated as follows: $SUM(Quantity)$
TOT_UCOGS	The total weekly cost of goods sold, by unit, for the fiscal week, which is calculated as follows: $SUM(Cost)$
GROSS_SALES	The total sales for the fiscal week, which is calculated as follows: $SUM(Orig_Unit_Price * Quantity)$
NET_SALES	The total sales for the fiscal week, less returns and adjustments, which is calculated as follows: $SUM(Sales_Dollars)$

Subpart (c) is an immensely burdensome and difficult request. While the terms used in subpart (c) are somewhat imprecise—e.g., TWM does not maintain unique data called “promotions”—the type of data sought by subpart (c) is not available in the main system that TWM has used for other subparts discussed above. Based on a preliminary investigation, TWM is uncertain whether historical data reflecting various adjustments to either laid-in-cost from the wholesaler (e.g., single-purchase quantity discounts or cumulative quantity

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 12

discounts based upon purchases that may occur over many months) or adjustments to retail sales dollars and margin (e.g., advertised “limited time specials,” TWM or manufacturer coupons), among others, is even available today from other business records or if it can be tied to specific item transactions for the last 272 weeks, as the FTC requested. To be clear, the total amount of adjustments is reflected in column Q’s “NET_SALES” (*see* TWM-CID-0000017), but identifying each type of adjustment as required by subpart (c) (if that’s even possible) would be a very tedious and costly undertaking for any third-party witness to have to undertake and would far outweighed any probative value it may have on the FTC’s investigation of SG.

Given our intentional focus on other areas, we are willing to continue to investigate whether and how such data can be obtained from other records and/or systems and tied to weekly sales in the manner requested by the FTC, and the likely cost of any such effort. Subject to reaching a reasonable extension and resolution of the CID with Staff, TWM is willing to continue its investigation of the availability of data necessary to respond to subpart (c), and if feasible, it will separately produce a dataset that contains certain data sought by subpart (c) along with, if necessary, an explanation of the data. It would be helpful if the FTC could identify the data within subpart (c) that it considers a priority, which would allow TWM to focus its efforts there. For example, if the FTC is primarily interested in data on coupons, TWM can prioritize its collection, verification, and production of such data. If the FTC is not interested in “returns” because such data is an adjustment to inventory and not price (unlike the other components of subpart (c)), then TWM can redirect its efforts to more important data.

Subpart (f) seeks data that is not reflected in the retail sales data that TWM maintains in the ordinary course of business. As explained in Part III below, TWM is willing to produce data related to its purchases from SG. *See* Specification No. 7 below. Data reflecting returns and adjustments are reflected in the “NET_SALES” data point in TWM-CID-0000017.

TWM is willing to consider expanding the size of the Nielson Sample to more than ten products, but doing so is extremely burdensome and time-consuming. For example, TWM-CID-0000017, by itself, contains over 442,000 rows of data and 17 columns. That equates to over 7.5 million data points that TWM had to validate prior to production. This produced data set consumed nearly a week of time from a cross-functional team comprised of numerous employees who set aside business-critical efforts to assist with this project. Extending the Nielson Sample to the top 100 or top 300 selling wines or spirits would obviously increase the burden by orders of magnitude. However, if the FTC is willing to identify a narrow set of wine or spirit products for additional data pulls, TWM would

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 13

consider doing so in the spirit of cooperation and as part of a broader resolution of TWM's objections to the CID.

Specifications No. 18 & 19

Submit one copy of each organizational chart and personnel directory for the U.S. operations of the Company, including for each of the Company's subsidiaries, facilities, or divisions involved in the Distribution, marketing, promotion, or sale of any Relevant Product.

List each employee of the Company with managerial, supervisory, strategic, or decisionmaking responsibilities for selecting, negotiating Agreements with, purchasing from, or managing the Company's relationship with any Distributor or any supplier of any Relevant Product, and for each identify:

- (a) the specific responsibilities of the employee;**
- (b) the dates the employee held such responsibilities for or participated in such activity;**
- (c) the employee's job title(s) during such period; and**
- (d) the name of the person to whom the employee reported during such period.**

TWM incorporates its objections to the terms "Relevant Product" and "Distributor," as set forth above.

During the March 15, 2023, meet and confer, we agreed with FTC staff to prioritize these Specifications to cover departments, managerial employees, and decisionmakers that interact with SG. The relevant departments are Marketing Department, Supply Chain Department, and Market Management Department. These departments, either individually or collectively, provide services to TWM's separate but affiliated store operating entities in the areas of purchasing, marketing, promotion, or sale of SG's wine and spirit products. The below table contains information sought by Specification 19.³

³ During the March 15, 2023 meet and confer, we discussed the possibility of identifying certain custodians who interact with SG on a regular basis, should the FTC decide to request documents from those custodians. This process of identifying custodians is acceptable to TWM, subject to TWM's right to object to any specific requests for further documents based upon scope, burden, or relevance. We are prepared to consider such requests and propose custodians once we have reached agreement with Staff on a narrowing of the CID and therefore understanding the scope of TWM's production, as doing so now would be premature and inefficient. The same is true with regard to proposed search terms with

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 14

Name	Title	Dates in Role	Direct Report
Kevin Tyldesley	Senior Director, Market Management	Original Hire Date 08/31/2015 Time in Position 2 year(s), 0 month(s), 7 day(s)	Thomas Trone
Geoffrey Sherren	Senior Director, Market Management	Original Hire Date 04/16/2012 Time in Position 1 year(s), 11 month(s), 3 day(s)	Thomas Trone
Angela Weber	SVP Merchandising	Original Hire Date: 10/2/2006	Troy Rice
Travis Smith	SVP Merchandising	Original Hire Date: 3/1/2003	Troy Rice

respect to searches of any electronic files. Depending on TWM's production of materials, TWM may not need to use word searches to identify potentially responsive materials as part of a reasonably diligent search because it can identify, collect, and review such materials through approaches other than electronic word searches.

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 15

Name	Title	Dates in Role	Direct Report
Paul Piho	VP New Store Group	Original Hire Date 01/01/1994 Time in Position 16 year(s), 7 month(s), 20 day(s)	Chris Galletto
Jen Burke	Senior Manager, Market Management	Original Hire Date 01/03/2012 Time in Position 1 year(s), 7 month(s), 27 day(s)	Geoffrey Sherren
Nichole Miller	Senior Manager, Market Management	Original Hire Date 02/13/2012 Time in Position 1 year(s), 7 month(s), 27 day(s)	Geoffrey Sherren
Leonard Giraldo	Senior Manager, Market Management	Original Hire Date 08/02/2010 Time in Position 1 year(s), 7 month(s), 27 day(s)	Kevin Tyldesley

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 16

Name	Title	Dates in Role	Direct Report
Nina Arend	Manager, Market Management	Original Hire Date 02/03/2020 Time in Position 1 year(s), 5 month(s), 18 day(s)	Kevin Tyldesley
Nick Fraijo	Manager, Market Management	Original Hire Date 07/06/2005 Time in Position 0 year(s), 9 month(s), 23 day(s)	Jen Burke
Rob Brosnan	Manager, Market Management	Original Hire Date 03/05/2012 Time in Position 1 year(s), 7 month(s), 27 day(s)	Kevin Tyldesley
Meghan Capasso	Manager, Market Management	Original Hire Date 10/17/2016 Time in Position 1 year(s), 7 month(s), 27 day(s)	Geoffrey Sherren

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 17

Name	Title	Dates in Role	Direct Report
Heather Kitson	Manager, Market Management	Original Hire Date 09/08/2020 Time in Position 0 year(s), 7 month(s), 28 day(s)	Nichole Miller
Erin Robertie	Manager, Market Management	Original Hire Date 02/11/2019 Time in Position 1 year(s), 5 month(s), 18 day(s)	Nichole Miller
Bill Barnhart	Manager, Market Management	Original Hire Date 02/17/1998 Time in Position 1 year(s), 9 month(s), 8 day(s)	Geoffrey Sherren
Marc Herman	Manager, Market Management	Original Hire Date 06/20/2022 Time in Position 0 year(s), 9 month(s), 9 day(s)	Leonard Giraldo

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 18

Name	Title	Dates in Role	Direct Report
Heather Lalla	Assistant Manager, Store 801	Original Hire Date 07/12/2011 Time in Position 0 year(s), 6 month(s), 3 day(s)	Nicholas Klinger
James Porter	Assistant Manager, Store 613	Original Hire Date 09/21/2007 Time in Position 3 year(s), 0 month(s), 6 day(s)	Jen Parks
Mike McGuire	Manager, Store 2201	Original Hire Date 07/17/2017 Time in Position 5 year(s), 8 month(s), 17 day(s)	Tom Shea
Sharon Martin	Assistant Manager, Store 701	Original Hire Date 09/06/2012 Time in Position 9 year(s), 6 month(s), 13 day(s)	William White

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 19

Name	Title	Dates in Role	Direct Report
Thomas Trone	VP, Merchandising	Original Hire Date 03/31/2003 Time in Position 1 year(s), 6 month(s), 2 day(s)	Angela Weber

III. NON-PRIORITY SPECIFICATIONS

As explained above, TWM has focused on and substantially completed responses to the FTC’s priority Specifications, with the exception of Specification No. 10, for which, at your suggestion, we have now provided a sample set of data on the agreed timeline. After Staff analyzes those responses, and in furtherance of the FTC’s investigation of SG, TWM would be willing to continue to discuss other Specifications and reasonable timelines for the production of information as contemplated by the FTC Rules of Practice. *See* Section 2.7(b) (requiring CIDs for the production of documentary material to “prescribe a return date providing a **reasonable period of time** within which the material so demanded may be assembled and made available for inspection and copying or reproduction.”) (emphasis added).

TWM offers below its preliminary positions on the non-priority Specifications, even though these Specifications are overbroad as written, unduly burdensome, and seek irrelevant information. TWM incorporates by reference its objections to the unreasonable return date in the CID (as modified) and the terms “Relevant Product” and “Distributor,” as set forth above, for each of the non-priority Specifications listed below. TWM will work in good faith with the FTC to understand the FTC’s needs and work to narrow the scope of certain Specifications. In order to avoid inefficient, piecemeal collections and productions, TWM wishes to reach an agreement with Staff on these non-priority Specifications before it begins further preparing its responses and producing documents in response to the CID.

A. Preliminary Positions on Non-Priority Specifications

Specification No. 1

For each calendar year from 2018 to 2022:

- (a) identify by state each Relevant Product sold by the Company;**
- (b) state separately by state for each Relevant Product the volume sold by the Company in dollars and units; and**
- (c) identify all Distributors from which the Company purchased each Relevant Product in each state.**

Subject to its objections to the terms “Relevant Product” and “Distributor,” TWM believes that it will have provided all responsive information through its responses to Specification Nos. 2 and 10.

Specification No. 3

Submit:

- (a) all Agreements and Proposed Agreements between the Company and any Distributor or any supplier relating to any Relevant Product;**
- (b) all documents relating to the negotiation, drafting, or evaluation of any such Agreement or Proposed Agreement; and**
- (c) all documents relating to negotiations or discussions between the Company and Southern or any supplier regarding the availability, price, or quantity of any Relevant Product available for purchase by the Company.**

As an initial matter, TWM objects to the term “Agreement” as vague and ambiguous. *See* CID at D.2. It is not limited to oral and written contracts, which could be the common and ordinary understanding of “agreement.” Instead, it is expanded to an “understanding,” which definition would not be an agreement. By way of example, TWM believed it had an understanding with the Staff after the March 15, 2023 meet and confer that TWM would prioritize responses to Specification Nos. 2, 10, 18, and 19, before further specifications and responses to the CID would be discussed. Subsequent letter correspondence from the FTC makes clear that whatever “understanding” we thought the parties had, it did not rise to the level of an agreement. Further, this definition includes an attempted catchall with the phrase “or term thereof,” which adds to the vagueness and ambiguity of the definition.

TWM proposes to limit the definition of “Agreement” to written agreements in the nature of a contract or an amendment thereto, which includes purchase orders placed by the store and invoices issued by SG as part of fulfilling a purchase order. Our understanding is that FTC does not want us to attempt to retrieve and produce five years of POs and wholesaler invoices, which would be difficult, costly, take a very long time, and impose

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 21

obligations on TWM that are disproportionate to the reasonable needs of the FTC's investigation.

TWM further objects to this Specification as overbroad since it seeks "all documents" on the designated topics. In TWM's experience, retailers generally do not have "agreements" with distributors in the same way that suppliers or manufacturers might have distribution or franchise agreements with wholesalers. As noted above, retailers order wines and spirits from licensed wholesalers through purchase orders, and wholesalers fulfill those orders by delivering the goods in the quantities and at the prices specified in the purchase order. At the time of delivery, the wholesaler (or its agent) tenders an invoice payable upon receipt or within a short period of time thereafter based on applicable state law. Purchase orders, once accepted, form what one could regard as an "agreement" between the wholesaler and the retailer. But whether and how goods may be delivered, accepted, and rejected is often prescribed by state law, not by agreement between the parties.

This Specification calls for documents that are also within the possession of SG. In the spirit of cooperation, and subject to reasonable extensions of the CID date and reaching an agreement on other Specifications, if the FTC informs TWM that it was unable to obtain a particular agreement or document related to TWM's prior business dealings with SG, TWM will conduct a reasonable search to locate such documents so long as the FTC provides the relevant time period and other information to facilitate TWM's efforts.

Specification No. 4

Describe in detail the process by which the Company negotiates for or is notified of available pricing, discounts, rebates, promotions, coupons, scanbacks, price adjustments, or other concessions for any Relevant Product purchased from Southern or any supplier. Submit and identify by document control number all documents used to prepare the response to this Specification.

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. In the spirit of cooperation, and subject to a reasonable extension of the CID return date and resolution of TWM's objections, TWM would undertake the work needed to assemble and provide a narrative response that explains the requested business practices as they relate to SG for the states where TWM purchases wines or spirits from SG.

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 22

Specification No. 5

Describe in detail each service Southern or any supplier furnishes, has furnished, contracted to furnish, contributed to furnishing, offered to furnish, or that the Company has requested Southern or any supplier furnish, to the Company from January 1, 2018 to the present. Submit and identify by document control number all documents used to prepare the response to this Specification.

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. In the spirit of cooperation, and subject to a reasonable extension of the CID return date and resolution of TWM's objections, TWM would undertake the work needed to assemble and provide a narrative response that explains the requested business practices as they relate to SG for the states where TWM purchases wines or spirits from SG.

Specification No. 6

For each service identified in response to Specification 5 above, submit documents, an electronic spreadsheet, or a Data Set sufficient to show:

- (a) the provider or offeror of the service;**
- (b) the service provided or offered;**
- (c) the date(s) or time period(s) during which the service was provided or offered;**
- (d) the Relevant Product(s) involved;**
- (e) the store location(s), geographic area(s), and state(s) in which the service was provided or offered;**
- (f) the name, title, and affiliation of any person who acted as a provider, offeror, receiver, or offeree of the service;**
- (g) the method by which the Company was notified of the availability of the service provided or offered;**
- (h) the date(s) of, participants in, and substance of any communication with Southern or any supplier about the service; and**
- (i) any consideration the Company provided for the service.**

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. In the spirit of cooperation, and subject to a reasonable extension of the CID return date and resolution of TWM's objections, TWM would undertake the work needed to assemble and provide a narrative description of the types of services described in its response to Specification No. 5. TWM currently believes that it does not maintain comprehensive data sets relating to specific services provided by SG in each state where TWM's business operates.

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 23

Specification No. 7

For each Relevant Product purchased from any Distributor, submit a Data Set or electronic spreadsheet that includes the following, from January 1, 2018 to present:

- (a) SKU, UPC, or any other item number;**
- (b) product description and other product information (e.g., brand, flavor, bottle size, package type);**
- (c) product manufacturer or supplier;**
- (d) order date(s);**
- (e) the Distributor receiving the order, including the Distributor's name and the geographic location of the Distributor's facility receiving, shipping, or delivering the order (e.g., address of the facility, city, state, county, and/or Metropolitan Statistical Area);**
- (f) information on how the order was placed (e.g., method of communication, distributor contact name);**
- (g) dollars paid, promised, or owed to the Distributor (e.g., purchase price), separately by SKU and fee type;**
- (h) quantity ordered;**
- (i) quantity ordered as expressed in equivalent units;**
- (j) all quantity discounts available when the purchase was made;**
- (k) all quantity discounts applied to the purchase;**
- (l) all other discounts, rebates, promotions, coupons, scanbacks, price reductions, price adjustments, or other concessions available when the purchase was made;**
- (m) all other discounts, rebates, promotions, coupons, scanbacks, price reductions, price adjustments, or other concessions applied to the purchase;**
- (n) the name and address (including zip code) of the Company facility that received the delivery;**
- (o) the name and address (including zip code) of each Company facility that warehoused, stored, stocked, displayed, offered for sale, or sold at retail the Relevant Product; and**
- (p) date fulfilled, also noting if an order is not fulfilled.**

TWM incorporates its objections to Specification No. 10, as set forth above. TWM further objects because the information requested by this Specification is available directly from SG, and it is therefore unfair, duplicative, and unnecessarily burdensome for TWM, a third party, also to be required to undertake the work and expend the resources needed to respond to this Specification.

In the spirit of cooperation, and subject to a reasonable extension of the CID return date and reaching an agreement on other Specifications, TWM could produce a data set that

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 24

reflects all purchases of the Nielson Sample (defined in the response to Specification No. 10) within the states where TWM purchases wines or spirits from SG and would consider reasonable Staff requests commensurate with a revised scope for Specification 10. To be clear, the burdens described in the above response to Specification No. 10 exist here, too.

For subpart (e), TWM currently believes that it does not maintain comprehensive data about the locations of SG's facilities where the products were received, shipped, etc. As indicated, such information is more appropriately requested from SG or other distributors.

For subpart (f), TWM places hundreds of thousands of orders from distributors each year. Thus, TWM does not maintain comprehensive data about the method and manner in which it placed each order. TWM typically conducts all transactions via written or electronic purchase orders, and it is our understanding that the FTC does not want TWM to produce each purchase order with a distributor, nor would doing so be reasonable or proportionate to the needs of the investigation especially given the burden involved.

For subpart (o), and as explained elsewhere in these Responses, TWM will occasionally transfer products between stores to meet demand where allowed under the state law where those stores operate, and TWM occasionally utilizes a limited number of warehouses in certain markets to manage an increased demand in those markets that cannot be met by the space available in existing retail stores in those markets. Since the wines and spirits that TWM purchases are fungible commodities and producers/manufacturers often change distributors (or use different distributors in different states or regions), TWM does not specifically track wine or spirit inventory from the point of purchase to the moment of retail sale. Stated differently, when a retailer sells wines or spirits at retail, it is generally not concerned where that unit originated—i.e., the distributor or distribution facility—and, as a result, does not maintain comprehensive data linking distribution purchases to retail sales.⁴

⁴ However, we do track the laid-in-costs of our inventory utilizing a FIFO method of accounting, which presumes that a quantity of goods acquired on February 1, 2022, will be depleted before subsequently purchased inventory of that same good.

Specification No. 8

Submit for each month from January 1, 2018 to the present, and separately for Relevant Products and for the Company as a whole, the Company's:

- (a) gross and net sales dollars, separately by revenue source;**
- (b) cost of sales, separately by revenue source;**
- (c) gross profit;**
- (d) any other fixed or variable costs, separately by type;**
- (e) operating income; and**
- (f) net income.**

TWM incorporates its objections to Specification No. 10, as set forth above. TWM further objects to this Specification as irrelevant and, to the extent it asks for product-by-product information because it would be unduly burdensome to comply with given the number of SKUs at issue (as indicated above, TWM has purchased over 21,000 different wine or spirit products from SG alone). Such financial sales and profit information is not relevant to the FTC's investigation into SG's potential violation of the Robinson-Patman Act, nor has the FTC provided any such theory of relevance. In terms of burden, TWM estimates that undertaking the exercise of assembling, reviewing, and producing such data will add substantially to the already hundreds of thousands of dollars in lost time and productivity at a time when TWM also needs those computing and personnel resources to support immediate demands of its business. Such burdens exist even when limiting the definitions of "Relevant Product" and "Distributor" to SG. Expanding these burdens to include *every* wine or spirit that TWM has purchased from *every* distributor over more than five years would be grossly overbroad, unduly burdensome, and disproportionate to the needs of the investigation.

Specification No. 9

Identify each electronic database (including data sources used in or processed by the database) used or maintained by the Company that contains information concerning the Company's sales of Relevant Products. For each such database, submit a data dictionary that includes:

- (a) a list of field names and a definition for each field contained in the Data Set;**
- (b) the meaning of each code that appears as a field value in the Data Set; and**
- (c) the primary key in the Data Set or table that defines a unique observation.**

In the spirit of cooperation, subject to a reasonable extension of the CID return date, and once we agree on the data set for Specification No. 10, TWM will provide the information requested in this Specification, including descriptions of field names. TWM does not currently possess a data dictionary for its databases.

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 26

Specification No. 11

Submit a Data Set or electronic spreadsheet that captures the following information tracked for loyalty card cardholders who have purchased any Relevant Product from the Company since January 1, 2018, including:

- (a) store identification value, as identified in response to Specification 2 above;**
- (b) unique identifying value for the individual;**
- (c) unique household identifier;**
- (d) the 5 digit zip code of the individual's residential address; and**
- (e) total monthly purchases of Relevant Products in dollars separately at each store.**

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. TWM also objects to this Specification as irrelevant. Comprehensive data related to TWM's loyalty cardholders, including zip codes of families, is not relevant to SG's potential violation of the Robinson-Patman Act, nor has the FTC provided any such theory of relevance.

Specification No. 12

Submit all documents related to competition in the market for retail sale of Relevant Products, including documents related to:

- (a) the market share, competitive position, and relative strengths and weaknesses of the Company and each of its actual or potential competitors, including all market share analyses related to the retail of Relevant Products prepared by the Company or any other analyst;**
- (b) opportunities or attempts to win customers from any actual or potential competitor, or, threatened or actual losses of customers to any actual or potential competitor;**
- (c) the Company's or any other person's price lists, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, and pricing decisions related to any Relevant Product;**
- (d) the current and future requirements and barriers to entry or expansion in the retail sale of any Relevant Product;**
- (e) the actual or potential entry, expansion, exit, or contraction, of any actual or potential competitor, including the contemplated or actual effect of such entry, expansion, exit, or contraction on the Company's sales, pricing, costs, product offering, or performance; or**
- (f) the capacity, product volume, number of retail locations, amount of square footage, or other factors required to attain any available cost savings or other**

Altumash Mufti
 600 Pennsylvania Avenue NW
 April 3, 2023
 Page 27

efficiencies necessary to compete profitably in the retail sale of Relevant Products.

TWM objects to this Specification as irrelevant, as well as overbroad and unduly burdensome, as it seeks “all documents” on the designated topics over a period of more than five years. TWM also objects to this Specification because of the unreasonable return date. The FTC staff has provided no theory of relevance for these materials of TWM. In terms of burden, TWM estimates that undertaking the exercise of assembling, reviewing, and producing such materials will add hundreds of thousands of dollars, excluding attorneys’ fees, in lost time and productivity at a time when TWM also needs these resources to support immediate demands of its business. The files requested are not centrally maintained and would require a massive and time-consuming effort to locate the materials, before reviewing them for responsiveness and privileged content. Estimated costs would be hundreds of thousands of dollars in employee time and attorney time.

Specification No. 13

Submit all documents prepared by or for, or delivered to, the Company’s officers, directors, department leadership, investors, or owners relating to the Company’s strategies, plans, or budgets for:

- (a) the purchase of any Relevant Product from any Distributor; or**
- (b) the sale at retail of any Relevant Product by the Company.**

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. TWM further objects to this Specification as overbroad as it seeks “all documents” on the designated topics. TWM’s business is predicated on buying wines and spirits from distributors and then selling those same products at retail. Thus, subparts (a) and (b) cover nearly every aspect of TWM’s entire business model and, therefore, is grossly overbroad and would inflict undue burdens on TWM, above and beyond those described above with regard to Specification 12. TWM further objects to this Specification as irrelevant. TWM’s board decks and other executive-level materials, along with strategies, plans, and budgets, are not relevant to SG’s potential violation of the Robinson-Patman Act, nor has the FTC provided any such theory of relevance. For example, the materials provided to TWM’s board and executives predominately relate to topics such as personnel matters, corporate governance, marketing, budgets, advertising, and a myriad of other topics that are unrelated to the FTC’s investigation of SG. TWM’s interactions with any distributor, let alone SG, are not a focus at the board level. Indeed, TWM’s purchases from SG are heavily regulated under state law and provide few opportunities for business strategy or decisions by TWM’s board or executives. *See, e.g., U.S. Dept. of Treasury, Competition in the Markets for Beer, Wine, and Spirits, February 2022* (“Some states require

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 28

wholesalers to offer uniform pricing for a given product: a single price to all retailers in the on-premise channel, and a single price to all retailers in the off-premise channel. These laws limit retailers' ability to play one distributor off another on price (limiting the ability of distributors to compete on price), and they limit distributors' ability to target particular retailers for price increases or decreases.”).

Specification No. 14

Submit an electronic spreadsheet identifying each Company distribution center, warehouse, or storage facility that has received, or has stored for any period of time, any Relevant Product purchased from a distributor or supplier. For each such facility, provide the following information:

- (a) the number or any other unique number, code, or name used by the Company to identify or refer to the facility;**
- (b) the dates during which the facility has operated;**
- (c) the street address, city, county, state, and zip code of the facility;**
- (d) the Company stores supplied or supported by the facility;**
- (e) the operating region, metropolitan statistical area, or micropolitan statistical area served or supported by the facility;**
- (f) the total annual volume of Relevant Products, from 2018 until the present, in both dollar value and equivalent cases, distributed from the facility to each Company Store supported or served by the facility;**
- (g) the annual cost, from 2018 until the present, incurred by transporting Relevant Products from the facility to each Company store supported or served by the facility; and**
- (h) the annual cost to operate the facility from 2018 until the present.**

As explained in its response to Specification No. 2, TWM does not own or operate any “distribution centers” as it understands that term. TWM’s inventory is primarily held in the stores where it sells the products. However, in late 2022, TWM began to utilize warehouse space in two states (i.e., California and Florida) to hold alcohol inventory that could not be received in its retail stores in those states due to insufficient storage capacity. With this exception, TWM’s inventory is held in the stores where it sells the products. Where permitted by state law, TWM will occasionally rebalance inventories between stores to meet demand by transferring inventory from one store to another in the same state.

Altumash Mufti
600 Pennsylvania Avenue NW
April 3, 2023
Page 29

Specification No. 15

Submit all documents relating to the Company's strategies, practices, or policies regarding its management of inventory of Relevant Products, including the processes or methods by which the Company:

- (a) decides which Company facility will receive each delivery of Relevant Products;**
- (b) tracks the physical location of Relevant Products ordered by the Company while they remain in the Distributor's possession, custody, or control; or**
- (c) tracks the physical location of the Relevant Products in the Company's possession, custody, or control.**

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. TWM further objects to this Specification as overbroad as it seeks "all documents" on the designated topics. TWM further objects to this Specification as irrelevant. TWM's inventory management is not relevant to SG's potential violation of the Robinson-Patman Act, nor has the FTC provided any such theory of relevance.

Specification No. 16

Submit all documents relating to the Company's strategies, practices, or policies regarding its relationships and interactions with any supplier of a Relevant Product, including:

- (a) acts by suppliers to promote or market Relevant Products to the Company;**
- (b) discounts, rebates, electronic coupons, scan backs, price reductions, or price adjustments provided by suppliers related to any Relevant Product;**
- (c) communications between the Company and suppliers regarding the Company's expected demands or orders for any Relevant Product; or**
- (d) sale or delivery of any Relevant Product from suppliers to Distributors in anticipation of, or in response to, orders of such product from the Company.**

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. TWM objects to this Specification as vague and overbroad as it seeks "all documents" on the designated topics. In the spirit of cooperation, and subject to a reasonable extension of the CID return date and reaching an agreement on other Specifications, TWM would undertake the work and expend the resources needed to provide a written narrative for subparts (b) and (d).

Specification No. 17

Submit all documents relating to the allocation of any Relevant Product by Southern, any supplier, or the Company, including decisions by Southern or any supplier to limit the volume of any Relevant Product available for purchase by the Company or another retailer.

TWM objects to this Specification because of the five-plus year time frame of the request and the unreasonable return date. TWM also objects to this Specification as overbroad since it seeks “all documents” on the designated topics.

This Specification calls for documents that are also within the possession of SG. In the spirit of cooperation, and subject to a reasonable extension of the CID return date and reaching an agreement on other Specifications, if the FTC informs TWM that it was unable to obtain a particular document related to SG’s product allocation to TWM, TWM will undertake a reasonable search to locate any such documents so long as the FTC provides the relevant time period and other information to facilitate TWM’s efforts.

* * * *

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SWeissman@gibsondunn.com

Please treat these materials as confidential pursuant to the FTC Act and all other applicable state and federal statutes and regulations.

If you have any questions regarding these documents or anything else, please do not hesitate to contact me at (202) 955 – 8678.

Sincerely,

/S/ Stephen Weissman

Stephen Weissman

Partner

GIBSON, DUNN & CRUTCHER LLP

APPENDIX C



Altumash N. Mufti
Anticompetitive Practices Division
Bureau of Competition
(202) 445-7917
amufti@ftc.gov

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 5, 2023

BY ELECTRONIC MAIL

Stephen Weissman (sweissman@gibsondunn.com)
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Re: CID Issued to Retail Services & Systems, Inc.
FTC File No. 221-0155

Dear Stephen:

This letter memorializes and responds to our April 4, 2023 teleconferences, in which we discussed Retail Services & Systems, Inc.’s (“Total Wine’s”) compliance with the February 23, 2023 Civil Investigative Demand (“CID”) issued by the Federal Trade Commission. We had three separate teleconferences: in the morning, afternoon, and evening of April 4, 2023 (respectively, “Conference 1”, “Conference 2”, and “Conference 3”).

Conference 1

During Conference 1, we discussed each Specification of the CID. We requested, as we have in every teleconference with Total Wine thus far, that you propose a production plan with dates by which Total Wine will comply with each Specification. Despite our requests, you refused to propose any date by which Total Wine will comply with any CID Specification other than Specifications 18 and 19, which requested employee information that Total Wine recently produced. You did not make any affirmative proposal at all for responding to CID Specifications 1, 3, 6, 11–13, or 17. Further, you informed us that you would not agree to provide any further response to any CID Specifications without a global resolution of Total Wine’s objections. You also articulated the following positions with respect to certain Specifications, with any proposal to produce information contingent on a global resolution.

Specification 2: On April 3, 2023, you produced one document responsive to part of Specification 2. You proposed limiting the data requested by Specification 2 to products sold by Southern Glazer’s Wine and Spirits, LLC (“Southern”). You also proposed

April 5, 2023

Page 2

eliminating the eight states where Total Wine does not purchase products from Southern from this Specification and Specification 10. We agreed to defer production of data involving those states. However, you did not commit to providing a full response to Specification 2 even with these proposed limitations.

Specifications 4 and 5: You proposed supplying a narrative response to respond to Specifications 4 and 5.

Specification 7: You informed us it is your position that Specification 7 is redundant of the information sought by Specification 10 and thus does not require a separate response.

Specification 8: You proposed responding to only subpart 8(a), but did not raise any burden objection to subparts (b)–(f). We did not agree to this limitation because doing so would be inconsistent with the Commission’s need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act, particularly when no credible burden argument is proffered.

Specification 9: Instead of identifying each relevant electronic database as required by Specification 9, you proposed to supply information responsive only to a limited dataset produced in response to Specification 10—though Total Wine did not agree to produce any data responsive to Specification 10 beyond its sample of 10 SKUs, discussed below.

Specification 10: You raised a burden objection predicated primarily on the resources required to perform an internal quality check on the data after running a query for the responsive data. We explained, as we have during previous teleconferences, that we are seeking data only as it is kept in the ordinary course of business and are not requiring Total Wine to create or modify data. As such, we requested that Total Wine produce the data returned by the pertinent query without the self-inflicted burden of an unnecessary quality-check. Total Wine did not agree to do so.

You asked us to narrow Specification 10 by permitting Total Wine to produce only a small fraction of the ~100,000 relevant SKUs called for by the Specification. To accommodate Total Wine’s claims of undue burden,¹ we discussed deferring ~80% of items responsive to the CID—namely, those not purchased from Southern—and deferring data for states in which Total Wine does not purchase products from Southern. To further accommodate Total Wine, we also proposed deferring production of weekly data and accepting monthly data instead, further reducing any purported burden by an additional factor of over four. You still did not agree to produce any data responsive to Specification 10 beyond the sample of 10 SKUs provided on April 3, 2023.

¹ Total Wines’ claims of undue burden were not sufficiently explained during any of the conferences. Although Total Wine’s in-house counsel explained that it took approximately a week to create and revise a query to pull the sample of data for 10 SKUs, he specifically acknowledged that this time would not be directly proportional to the length of time needed to use that query to produce a larger set of data. No estimate for complete production, nor any related burden, was provided. Despite 16 C.F.R. §2.7(k)’s requirement that where issues relate to electronically stored information, “the recipient shall have a person familiar with its ESI systems and methods of retrieval participate in the meeting,” Total Wine never produced any such person to substantiate any claim of burden.

April 5, 2023

Page 3

Specification 14: You informed us that you would investigate whether Total Wine has material responsive to Specification 14, but you did not agree to respond to the Specification.

Specifications 15 and 16: You proposed responding to Specifications 15 and 16 with narrative responses in lieu of the documents requested by those Specifications. We cannot agree to accept narrative responses in lieu of documents for these Specifications, because doing so would deprive us of documents relevant to the Commission's investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

We scheduled an additional teleconference for later in the day to continue discussing Total Wine's compliance with the CID.

Conference 2

You called me in advance of our scheduled teleconference to make Total Wine's first affirmative, interim production proposal since the CID was issued on February 23, 2023. You requested:

- (a) three additional months to respond to Specification 10;
- (b) 45 additional days to provide narrative responses;
- (c) an additional month-long extension of the CID deadline;
- (d) a commitment to the potential deferrals for Specification 10 discussed during Conference 1; and
- (e) an additional concession of modifying the CID to limit the responsive data we might later seek under Specification 10 to either a fixed volume of data or to data involving only two other distributors.

I told you that we would consider the proposal.

Conference 3

During Conference 3, we explained that we were willing to accept four of your requests made during Conference 2—(a)–(d) as outlined above—provided you would supply a date by which Total Wine would respond to Specification 11. We further explained that through Specification 11 we sought only three pieces of information, as they are kept by Total Wine in the ordinary course, for each loyalty cardholder: zip code, purchase volume, and store of purchase. We also explained that we cannot modify the CID as you requested in part (e) of your proposal, as it is not consistent with the Commission's need for information in its ongoing investigation.

April 5, 2023

Page 4

You later wrote, via email, to inform us that Total Wine accepted this proposal and would respond to Specification 11 within 45 days. I wrote to confirm agreement and reiterated that we would extend the CID compliance deadline, as requested, but we would not extend for a third time the Rule 2.10 petition to limit or quash deadline.² Although we never discussed an extension of the Rule 2.10 deadline in Conference 1, 2, or 3, you then withdrew Total Wine's agreement to the proposal and indicated that Total Wine would move to limit or quash the CID.

Petition to Limit or Quash the CID

Despite our numerous proposed concessions and ongoing efforts to discuss Total Wine's compliance with the CID, Total Wine has failed to make substantial progress towards compliance. In the 40 days since CID issuance, Total Wine has produced only one 17-page document listing its stores, a list of employees in response to Specifications 18–19, and one sample dataset in response to the CID.

To the extent Total Wine believes its April 3, 2023 Objection to the CID constitutes proposals for modification, and to the extent we have not responded above, we respond below.

Total Wine raises objections to a number of Specifications because they seek “all documents” responsive to the Specifications, including Specifications 3, 12, 15–17. We have repeatedly stated we are prepared to address burdens associated with requests for “all documents” with custodian and search term proposals, but Total Wine has not provided any. We remain available to discuss these search parameters and request that Total Wine submit their proposal as soon as possible.

Definition D.7 of “Distributor”: Total Wine proposes limiting the definition of “Distributor” to mean only Southern. We cannot agree to this limitation because it is inconsistent with the Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

Definition D.15 of “Relevant Product”: Total Wine proposes limiting the definition of “Relevant Product” to mean only wines or spirits distributed by Southern. We cannot agree to this limitation because it is inconsistent with the Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

Instruction 1.1 January 2018–Present Timeframe: Total Wine objects to this instruction, but has never proposed an alternative timeframe.

Specification 1: Total Wine maintains this Specification is redundant of Specifications 2 and 10. We do not agree, in particular, based on Total Wine's refusal to provide full datasets in response to Specifications 2 and 10 and the deferrals offered. With Total

² See March 24, 2023 FTC Ltr. to Total Wine (“FTC staff does not expect that further extension of the Rule 2.10(a)(1) deadline will be warranted.” (citing *In re Civil Investigative Demand to ACIA17 Automotive, Inc.* dated Dec. 21, 2022, FTC File No. 232-3004 at 3-4 (Feb. 27, 2023))

April 5, 2023

Page 5

Wine's refusal to provide data responsive to all subparts of Specification 2 and refusal to provide non-Southern data responsive to Specification 10, the Commission has no substitute for the information sought by Specification 1.

Specification 2: Total Wine maintains subparts (f), (g), and (i) are redundant of Specification 10. We do not agree, in particular, based on Total Wine's refusal to provide a full dataset in response to Specification 10. However, we are willing to offer a deferral with respect to these subparts.

Specification 3: Total Wine proposes limiting the definition of "Agreement" to "written agreements in the nature of a contract or an amendment thereto." We cannot agree to this limitation because it is inconsistent with the Commission's need for information about all agreements between Total Wine and distributors. As Total Wine has confirmed, written contracts between distributors and retailers are uncommon in this industry. Total Wine further objects to the Specification's request for "all documents," and proposes retrieving documents strictly on a go-get basis. Again, we cannot agree to this modification because we do not know the universe of agreements between distributors and Total Wine.

Specification 6: Total Wine proposes to respond to this Specification with a narrative response, in lieu of the requested dataset. We do not agree to accept a narrative response to satisfy Specification 6. Specification 6 seeks information about specific instances of services rendered to Total Wine, not just a narrative description of the types of services rendered to Total Wine as described in a response to Specification 5. We are willing to accept documents in lieu of a dataset to satisfy this Specification. As stated before, we are willing to address burdens associated with requests for documents with custodian and search term proposals, but Total Wine has not provided any. We remain available to discuss these search parameters and again request that Total Wine submit its proposal as soon as possible.

Specification 7: Total Wine proposes to limit its response to this Specification to the 10 items chosen for the sample data responsive to Specification 10. We cannot agree to this limitation because the Commission's investigation is not limited to the 10 items proposed by Total Wine.

Specification 8: Total Wine misapprehends this Specification and makes a blanket objection of relevance and burden. Total Wine's blanket objection is misplaced, because the high-level financial data sought by this Specification is (1) highly relevant to understanding Total Wine's place in the market subject to the Commission's investigation under the FTC Act and the Robinson-Patman Act, and (2) the annual high-level data sought by this Specification is fundamental accounting information we expect Total Wine keeps in the ordinary course of business.

Specification 11: Total Wine makes a blanket objection to the relevance of this Specification, which seeks information regarding purchases by loyalty card cardholders. We have explained this Specification's relevance to the Commission's investigation

April 5, 2023

Page 6

under the FTC Act and Robinson-Patman Act, including its relevance to defining geographic markets. Total Wine makes no proposal for modification. We cannot agree to eliminate this Specification because doing so would be inconsistent with the Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

Specification 12: Total Wine makes a blanket objection to the relevance of this Specification, which seeks "documents related to competition in the market for retail sale of Relevant Products." Total Wine makes no proposal for modification. We cannot agree to eliminate this Specification because doing so would be inconsistent with the Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

Specification 13: Total Wine makes a blanket objection to this Specification's relevance, which asks for a set of documents relating to the purchase and sale of Relevant Products. Total Wine makes no proposal for modification. We cannot agree to eliminate this Specification because doing so would be inconsistent with the Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

Specification 14: Total Wine raises neither an objection to this Specification nor a proposal for modifying or responding to the Specification. We cannot agree to eliminate this Specification because doing so would be inconsistent with the Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

Specification 15: Total Wine makes a blanket objection to this Specification's relevance, which asks for documents relating to Relevant Products inventory. Total Wine makes no proposal for modification. We cannot agree to eliminate this Specification because doing so would be inconsistent with the Commission's need for information in its investigation into the distribution of wine and spirits under the FTC Act and the Robinson-Patman Act.

Specification 16: Total Wine proposes responding to subparts 16(b)–(d) with a narrative response in lieu of documents as requested by the Specification. Total Wine makes no proposal for modifying or responding to subpart 16(a). We cannot agree to eliminate subpart 16(a) or accept a narrative response in lieu of documents responsive to subparts Specification 16(b)–(d) because doing so would be inconsistent with the Commission's need for information relevant to its investigation under the FTC Act and Robinson-Patman Act.

Specification 17: Total Wine objects to the Specification's request for "all documents," and proposes retrieving documents strictly on a go-get basis. Again, we cannot agree to this modification because we do not know the universe of documents in Total Wine's possession relating to allocation of Relevant Products not only by Southern, but also by other suppliers.

CID Issued to Retail Services & Systems, Inc., FTC File No. 221-0155

April 5, 2023

Page 7

We are unaware of any other specific modification to the CID sought by Total Wine to date. If there are requested modifications that you believe we have not addressed, please let us know immediately so that we may promptly respond.

Total Wine's current deadline to file a petition to limit or quash the CID is April 7, 2023, after two separate extensions of the deadline. In its April 3, 2023 letter, Total Wine sought an extension of its deadline to petition to limit or quash the CID to May 5, 2023. The only rationale supplied in support of a third extension of this deadline was that it would provide additional time to continue discussing the scope of the CID. In this instance, this is insufficient to warrant another extension under 16 C.F.R. § 2.10(a)(5). *See In re Civil Investigative Demand to ACIA17 Automotive, Inc. dated Dec. 21, 2022*, FTC File No. 232-3004 at 3–4 (Feb. 27, 2023) (rejecting asserted need for additional time to negotiate to narrow the scope of the CID as good cause for extending the petition to quash deadline). Before filing a petition to limit or quash, sections 2.7(k) and 2.10(a)(2) of the Commission's rules require Total Wine to meet and confer with staff regarding all grounds for the petition in a good faith effort to resolve the issues by agreement. 16 C.F.R. §§ 2.7(k), 2.10(a)(2). To this end, to the extent not previously raised by Total Wine or discussed with staff, please identify, in writing, any grounds for a petition to quash or limit the CID that Total Wine plans to pursue, including the Specifications at issue, the basis for all asserted burden objections, and any additional proposals for modifying any Specifications of the CID by tomorrow, April 6, 2023.

Sincerely,

/s/ Altumash N. Mufti
Altumash N. Mufti
Attorney

Approved:

/s/ Geoffrey M. Green
Geoffrey M. Green
Assistant Director
Anticompetitive Practices Division

APPENDIX D

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

)
In re CID Issued To Retail)
Services & Systems, Inc.)
)
)

FTC File No. 211-0155

DECLARATION OF THOMAS KOOSER

I, Thomas Kooser, hereby declare and state under penalties of perjury that I am over 18 years of age and am competent to make the following Declaration:

1. I am competent to testify about the following matters based on my personal knowledge as well as documents and information accessible to me through my work for Retail Services & Systems, Inc., d/b/a Total Wine & More (the “Company” or “TWM”). The information in this Declaration is true and correct to the best of my knowledge, information, and belief.

2. I serve as Chief Technology Officer (“CTO”) of TWM, a position I have held since June 2019. In my role as CTO, I am familiar with the matters related to TWM’s data storage and cloud computing capacity, IT staffing resources, and the demands currently placed on our IT resources to achieve the Company’s strategic initiatives for the current year.

3. I submit this Declaration in support of TWM’s accompanying Petition to Limit or Quash the FTC’s Civil Investigation Demand (“CID”).

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STATEMENT OF COUNSEL UNDER 16 C.F.R. §2.10(a)(2)

I, Stephen Weissman, hereby state as follows:

1. I am a partner at Gibson, Dunn & Crutcher LLP and one of the lawyers who represent Retail Services & Systems, Inc. d/b/a Total Wine & More (“TWM” or the “Company”) in connection with the Civil Investigative Demand (the “CID”) issued to TMW by the Federal Trade Commission in connection with its investigation into whether 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, 15 U.S.C. § 45 and/or engaged in discriminatory practices in violation of the Robinson-Patman Act, 15 U.S.C. § 13 (the “Investigation”).

2. I make this statement upon personal knowledge and belief.

3. Prior to the filing of the Company’s accompanying Petition to Limit, I conferred on numerous occasions with Commission staff—in particular, but not exclusively with the lead FTC staff attorney currently assigned to the CID, Altumash Mufti of the Anticompetitive Practices Division of the FTC’s Bureau of Competition—pursuant to 16 C.F.R. § 2.7(k) in a good faith effort to resolve by agreement the issues raised by the petition and have been unable to reach such an agreement as of the date of this petition.

4. As required by Rule 2.7(k), the following are the date, time, and place of each conference between counsel and the names of all parties participating in each such conference:¹

- a. On February 27, 2023, the FTC served the Company with a CID seeking information in connection with the Investigation.

¹ Pertinent additional details about the substance of the communications with Staff are described in Section II of the Petition to Limit.

- b. On March 13 at or around 3 p.m., Robert Shaffer, TWM's General Counsel, spoke with Wells Harrell of the FTC via Teams.
- c. On March 15, at or around 4:00 PM, I spoke with Mr. Harrell and Mr. Mufti via Zoom, during which I informed them that TWM had retained Gibson, Dunn & Crutcher LLP to represent it in connection with responding to the CID.
- d. On March 16, Mr. Mufti transmitted a letter via email memorializing our conversation and extending the CID return date and the deadline to petition to limit or quash the CID to March 25.
- e. On March 22 at 9:00 AM, My colleague, Logan Billman, and I spoke via Zoom with Messrs. Harrell and Mufti, in particular to discuss the priority specifications previously identified on March 15 by staff, Specifications 2, 10, 18, and 19.
- f. On March 24, Mr. Mufti transmitted a letter via email extending the CID return date and the deadline to petition to limit or quash the CID to April 7, 2023.
- g. On March 30, Mr. Mufti sent me an email requesting that TMW provide certain information prior to our next meet and confer call, which was scheduled for April 4.
- h. On April 3, Mr. Billman, transmitted to Mr. Mufti a letter via email summarizing the Company's objections to the CID, proposing a plan and negotiating process for progressing reasonable compliance with the priority and non-priority Specifications, and containing responses to Specifications 18 and 19. *See* Appendix B to Petition to Limit. Mr. Billman simultaneously transmitted to the FTC the Company's data partially responsive to Specification Nos. 2 and 10 via FTP.

- i. On April 4, Mr. Billman and I met and conferred with Mr. Mufti and/or his colleagues, Christine Brown and Kendall Karr, multiple times to try to avoid, or at least defer and narrow the scope of, the accompanying petition to limit. Specifically, at 9:30 AM, Mr. Billman, Mr. Shaffer, and I spoke with Mr. Mufti, Ms. Brown, and Ms. Karr via Zoom for over two hours, during which we discussed the issues and proposals outlined in the Company's April 3 letter. Mr. Mufti indicated that he was satisfied with the Company's response to Specifications 18 and 19 but that the FTC was not able to accept the Company's other proposals. Subsequently, at or around 2:00 PM, I spoke with Mr. Mufti telephonically to further discuss possible resolutions to the Company's objections. Mr. Mufti requested time to consider the proposal, and we agreed to speak later in the day. At 5:00 PM, Mr. Billman, Jefferson Harwell (in-house counsel for TWM), and I spoke with Mr. Mufti via Zoom.
- j. At 6:57 PM, Mr. Mufti sent me an email announcing that there would be no extension of the April 7 deadline to file a petition to limit or quash our prior agreement in response to an earlier email I sent to him 30 minutes earlier stating the following: "Thanks for the discussions today. We are aligned on the issues we discussed at 5:00 PM in terms of the agreed deliverables, including using reasonably diligent efforts to produce for Spec 11 the zip code, store, and volume information within 45 days. We will review your letter and let you know if there is a misunderstanding on where we landed today (hopefully things were clear and I know we all took good notes)." Because the Company is unwilling to waive its rights – a point repeatedly conveyed to Staff, including on April 4 – I informed Mr.

Mufti in an email response that the Company had no choice but to file a Petition to Limit to preserve its legal rights.

- k. At 7:14 PM on April 4, I sent Mr. Mufti an email asking Mr. Mufti to “please send me a letter by tomorrow with any modifications Staff has agreed to. If we don’t hear from you, we will assume for our petition that you have not agreed to any.”
- l. On April 5, Mr. Mufti sent me a letter purporting to summarize the discussions on April 4 but failing to recognize, among other matters discussed, TMW’s repeated statements throughout April 3 and 4 that TMW was unwilling to waive its legal rights to file a petition to quash or limit based on TWM’s objections to the CID. *See Appendix C to Petition to Limit.*

April 7, 2023

Respectfully submitted,



Stephen Weissman
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
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CERTIFICATE OF SERVICE

I hereby certify that, on April 7, 2023, an electronic copy in Adobe portable document format of the foregoing and appendices thereto were served via electronic mail upon the following:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, D.C. 20580
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Altumash Mufti
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
amufti@ftc.gov

I further certify that, on April 7, 2023, an original and twelve paper copies of the foregoing and appendices thereto were served by courier upon the following:

Office of the Secretary
Federal Trade Commission
Constitution Center,
400 Seventh Street, SW
Suite 5610,
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

)
In re CID Issued To Retail)
Services & Systems, Inc.)
)
_____)

FTC File No. 211-0155

REQUEST FOR CONFIDENTIAL TREATMENT

Retail Services & Systems, Inc., d/b/a Total Wine & More (“TWM” or the “Company”), hereby requests that the Declaration of Tom Kooser, attached as Appendix D, be afforded confidential treatment pursuant to 16 C.F.R. § 4.2(d) as it contains information that is secret and material to the business and the disclosure of such information would result in serious competitive injury. *See General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

The Kooser Declaration contains the Company’s competitively sensitive information, including (1) forward-looking capital investment strategy and plans; (2) forward-looking plans for achieving cost reductions and efficiencies; and (3) cost and payroll information. This is the type of “confidential business information” that the commission routinely affords confidential treatment to “protect” from “unnecessary airing.” *See, e.g., In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961) (“[T]he confidential records of businesses involved in Commission proceedings should be protected insofar as possible.”). Confidential treatment is particularly important where, as here, the information concerns a non-party. *See In re Kaiser Aluminum & Chern. Corp.*, 103 F.T.C. 500, 500 (1984) (explaining that a non-party’s confidential information deserves “special solicitude”)

If this information is made public, competitors and other industry participants would discover information essential to TWM's development plans, strategies, and capacity constraints. This would allow competitors to unfairly compete against TWM and/or undermine the advantages TWM has built based on its substantial investments in the development and commercialization of its proprietary technologies and processes.

Therefore, the Declaration of Tom Kooser should be afforded confidential treatment to prevent the disclosure of competitively sensitive information of TWM, a third party not subject to any FTC investigation. If the Commission determines to disclose some or all of the confidential information, please notify the below counsel.

April 7, 2023



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