IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, et al., Plaintiffs, v. SYSCO CORPORATION, USF HOLDING CORP., and US FOODS, INC. Defendants.	Civil Action No. 15-cv-00256 (APM)

PARTIES' JOINT STATUS REPORT AND RESPECTIVE PROPOSALS FOR CASE MANAGEMENT ORDER

Pursuant to the Court's February 21, 2015 Minute Order, Plaintiffs Federal Trade Commission ("FTC" or "Commission"), the District of Columbia, the States of California, Illinois, Iowa, Maryland, Minnesota, Nebraska, Tennessee and Ohio, and the Commonwealths of Pennsylvania and Virginia (collectively with FTC, "Plaintiffs") have met and conferred with Defendants Sysco Corporation, USF Holding Corp., and US Foods, Inc. (collectively, "Defendants"). The parties have reached agreement on a number of issues, primarily relating to discovery, and respectfully submit their resolution of those matters for the Court's review. Several significant issues remain in dispute, however—most fundamentally, the nature, scope, and length of the discovery period and hearing in this case. Defendants contend these issues are of critical importance and respectfully request the opportunity to appear before the Court and be heard at the Court's earliest convenience. Plaintiffs also request the opportunity to be heard if the Court is inclined to adopt Defendants' proposed schedule.

The first part of this joint status report sets forth the parties' positions on the date and length of the hearing, which affects virtually every date on the hearing schedule. The report then addresses another disputed issue that has already been brought to the Court's attention—whether representatives of the Defendants (rather than just Defendants' outside counsel) should receive access to Confidential Material, and if so, how many. Finally, the report contains a joint proposed scheduling order. The matters on which the parties agree are reflected in regular font and the matters on which the parties do not agree are reflected in **bold-face type**. The parties have also attached for the Court's consideration a table comparing the dates proposed by each side.

I. The Parties' Positions on the Hearing Date and Length of Hearing

Plaintiffs' Position: The hearing on Plaintiff's Motion for Preliminary Injunction should last no more than three days and begin on or about April 21, 2015, subject to the Court's availability.

Plaintiffs' proposal for the timing of the preliminary injunction hearing is far more consistent with the timing contemplated by this Court's Local Rule 65.1(d), as well as the vast majority of recent FTC Act, §13(b) cases, than the extended process proposed by Defendants. See, e.g., FTC v Whole Foods Market, Inc., 502 F. Supp. 2d 1, 5 (D.D.C. 2007) (60 days from complaint to hearing), rev'd on other grounds, 533 F.3d 869 (D.C. Cir. 2008); FTC v. ProMedica Health Sys., Inc., No. 11-cv-47, 2011 U.S. Dist. LEXIS 33434, at *2-*4 (N.D. Ohio Mar. 29, 2011) (34 days from complaint to hearing) (attached hereto as GX1); Scheduling Order, FTC v. CCC Holdings Inc., No. 08-cv-2043 (Ring) (attachedbSoucings Inc.

the complaint) (attached hereto as GX3); Stipulated Order Regarding Preliminary Hearing and Pre-Hearing Schedule and Arrangements, FTC v. Western Refining Inc., No. 07-cv-352 (JB/ACT), Docket No. 83 (D.N.M. April 20, 2007) (25 days from complaint to hearing) (attached hereto as GX4).

The only Section 13(b) hearings held significantly beyond 60 days were either by stipulation or because of court scheduling restrictions. See Stipulated Joint Proposed Scheduling Order, FTC v. Ardagh Group, S.A.

propose. Defendants were free to try to close their transaction as of September 30, 2014, but voluntarily extended that date repeatedly in an effort to address the Commission's concerns and avoid the instant suit. They cannot now cite that delay as a ground for an extended PI proceeding. Furthermore, the September 8, 2015 termination date can be extended by mutual agreement of the parties, and the parties have offered nothing but conclusory statements about why it would not make sense to do so. As the Court of Appeals said in FTC v. H.J. Heinz Co., 246 F.3d 708, 726 (D.C. Cir. 2001), "[i]f the merger makes economic sense now, the appellees have offered no reason why it would not do so later."

Likewise, a PI hearing of three or fewer days of live testimony and oral argument is consistent with each of the last five Section 13(b) preliminary injunction cases. Since 2009, when the Commission amended its rules to expedite administrative trials in merger cases, see 16 CFR § 3.11 (Jan. 13, 2009), no court has held (or planned to hold) a hearing lasting more than three days. See Stipulated Joint Proposed Scheduling Order, FTC v. Ardagh Group S.A., No. 13-cv-1021 (RMC), Docket No. 29 (D.D.C. July 19, 2013) (hearing scheduled for 3 days) (attached hereto as GX5); Order, FTC v. ProMedica Health Sys., Inc., No. 11-cv-47, Docket No. 69 (N.D. Ohio Jan. 25, 2011) (two-day hearing) (attached hereto as GX6); Order, FTC v. OSF Healthcare Sys., No. 11-cv-50344 (FJK), Docket No. 115 (N.D. Ill. Dec. 28, 2011) (three-day hearing) (attached hereto as GX7); FTC v. Phoebe Putney, (1-day hearing) (attached hereto as GX3); Order Granting Defendants' Motion for Discovery and an Evidentiary Hearing, FTC v. Lab. Corp. of Am., No. 10-cv-1873 (AG-MLG), Docket No. 55 (Dec. 16, 2010) (1-day hearing) (attached hereto as GX8); see also Stipulated Joint Proposed Case Management Order, FTC v Whole Foods Market, Inc., No. 07-cv-1021 (PLF), Docket No. 49 (D.D.C. June 21, 2007) (approved by minute order date June 21, 2007) (two-day hearing) (attached as GX9).

As in prior §13(b) cases, this Court will have an ample evidentiary record on which to decide the important but focused issue of whether to preserve the status quo, including: (1) expert reports and declarations (including rebuttal reports) describing and analyzing the competitive implications of the merger and Defendants' efficiencies claims; (2) excerpts of sworn testimony from Defendants' executives and third-party witnesses from 15 FTC "investigational hearings"; (3) excerpts of depositions of Defendants and non-parties taken during discovery; (4) sworn declarations from fact witnesses with direct knowledge of the broadline foodservice distribution industry; (5) thousands of pages of documentary exhibits; (6) hundreds of pages of pre-hearing briefs and proposed findings of fact and conclusions of law; and (7) oral argument.

In addition, Defendants' lengthy hearing proposal would require witnesses to testify live in both the PI hearing and the trial on the merits, thereby placing an undue burden on non-parties.

Similarly, Plaintiffs' proposal that fact discovery close on March 27, 2015 is consistent with previous 13(b) preliminary injunction actions, especially those occurring after the Commission's Rules of Practice fo

merger challenges filed in this court, the court allowed approximately one month of fact discovery.[1]

Furthermore, contrary to their assertions below, Defendants already have a wealth of information at their disposal, including the materials already produced by Plaintiffs. They have access to all of their own documents, data, and business people; they have access to customers and other third parties with whom they have long-standing relationships and do business with on a daily basis; they attended all FTC investigational hearings of their executives; they already received on February 19 the over 200 exhibits to Plaintiffs' brief; and on February 23, they started receiving, pursuant to Fed. R. Civ. P. 26(a)(1), on a rolling basis all third-party materials gathered during the FTC's investigation, which production should be substantially complete this week. Defendants' assertion that Plaintiffs have identified 550 additional "witnesses" is simply inaccurate and a red herring; those were simply names of individuals who the Commission identified, pursuant to Fed. R. Civ. P. 26(a), as persons potentially with knowledge of the facts relevant to the case. Consequently, there is no justification for prolonged discovery related to Plaintiffs' Motion for Preliminary Injunction.

Defendants' Position: An evidentiary hearing should start on May 28, 2015, and last for ten trial days, including opening statements and closing arguments.

Broadly speaking, Plaintiffs seek expedited proceedings in this Court, with limited time for development of the factual record and relevant legal principles and a quick hearing lasting no more than three days, on the theory that the Court should defer to the FTC's administrative inquiry into the legality of the proposed merger. Defendants seek a slightly longer (though expedited) discovery timetable and a ten-day evidentiary hearing, based on the Commission's

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fourteen-month head start in investigating this complex transaction, the voluminous and one-sided record the Commission has assembled, the Commission's unwillingness promptly to share information to which Defendants are entitled, and the fact that a hearing in this Court is the only real chance the parties have for judicial review of the Commission's attempt to block the merger. Unconsummated mergers are inherently fragile. None has ever

favor" from the Local Rule 65.1(d) process, which (to Defendants' knowledge) has never

deposition and hearing transcripts and one declaration 502 F. Supp. 2d 1, 5 (D.D.C. 2007). Here, the FTC seeks to introduce at least 92 declarations, supplemented by testimony or declarations from some fraction of the 550 other witnesses they have identified. Nor would Defendants' proposed discovery schedule impair the FTC's administrative proceeding—the parties have agreed that any discovery exchanged in this case can be used in that proceeding as well.

The time permitted for discovery is far from the only issue. The nature and duration of the hearing is, frankly, of even greater importance. Defendants respectfully submit that the Court should set aside ten days for an evidentiary hearing. That hearing will not prejudice the FTC in any way. By contrast, the Defendants would be prejudiced by the FTC's near term trial date and three-day proposed proceeding because it rests in part on the premise that their 92 declarations (and perhaps more from other witnesses) should be admitted without cross-examination. See infra at __. This trial-by-many-declarations is patently unfair. The FTC should choose which witnesses it needs (not 92 or more, which would obviously be cumulative), and allow Defendants to cross-examine them. Defendants will then call their senior executives to describe the competitiveness of their business and the procompetitive rationale for the merger, other witnesses to quantify the conservatively estimated $600 million in synergies, and expert economists to explain the merger's beneficial economic effects. This live testimony from both sides' witnesses will assist the Court in deciding this matter, by providing the parties an opportunity to directly challenge each other's case, and the Court an opportunity to assess the credibility of the witnesses.

More importantly, the issue before the Court is not "narrow," as the Commission suggests. The Court's preliminary injunction decision effectively will decide the fate of the

proposed merger. Substantial mergers cannot be held together indefinitely. They create uncertainty in the marketplace, and obvious issues for key employees, distract management from its ordinary responsibilities, and consume substantial resources. The FTC suggests that it has "amended its rules to expedite administrative trials," but even under those rules, it takes years finally to resolve a merger's validity. It is therefore imperative that the Defendants receive a fair opportunity fully to present their defense of this proposed merger, as the injunction hearing will likely be their only chance to do so.

The recent Promedica proceedings, which addressed an already-consummated merger, underscore the point. Applying its "expedite[d]" rules, the FTC filed its administrative complaint in January 2011, the ALJ conducted a 30-day hearing and then issued a decision in December 2011 (almost a year later), and the full Commission rendered its decision in March of 2012 (over two years after the complaint was filed). See ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 563-64 (6th Cir. 2014). Other proceedings have lasted still longer. See, e.g., Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 420-22 (5th Cir. 2008) (Commission proceedings ended over four years after filing of complaint). The FTC's own authorities likewise confirm the problem—the Commission cites the proceedings in FTC v. Laboratory Corporation of America to support its scheduling proposal, but neglects to mention that the court in that case denied a preliminary injunction based in part on the "glacial pace of an FTC administrative proceeding," and the likelihood that an injunction would "spell the doom of an agreed merger." 2011 U.S. Dist. LEXIS 20354, at *58 (C.D. Cal. Feb. 22, 2011) (quotations omitted).

No unconsummated merger can survive such protracted proceedings. Indeed, while the Commission suggests that its administrative process will "expeditiously" resolve the merger's

validity and protect Defendants' interests, Mem. 4, it neglects to mention that no unconsummated merger has ever survived the delays inherent in FTC proceedings. Not once, not ever. Accordingly, when a district court preliminarily enjoins an unconsummated merger pending those proceedings, the deal can be expected to die. So it is here: the parties have already exhausted the extensions included in the merger agreement in order to comply with the FTC's fourteen-month investigation, and the agreement will terminate on September 8, 2015. The FTC's administrative trial is slated to begin just over a month earlier, on July 21, 2015, and as just explained, there is no chance it will conclude in time for the merger to proceed. To enjoin the merger pending those proceedings is to enjoin the merger full stop.

Because the injunction hearing presents the only real opportunity for the defendants to subject the government's case to adversarial testing, and because live testimony is of significant value to the Court, judges, including judges in this district, routinely conduct evidentiary hearings lasting far more than three days. See,

Brown, J.); see also FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 36 (D.D.C. 2009) (same). Rather, a court "must exercise independent judgment about the questions [§ 13(b)] commits to it." Whole Foods, 548 F.3d at 1035 (internal quotation marks omitted). A meaningful ten-day hearing will ensure the Court can properly exercise such judgment.

II. Modification of the Protective Order

Plaintiffs' Position: Plaintiffs urge the Court to keep the names of third-party declarants and their companies under seal, and not modify the protective order to permit Defendants' internal lawyers to access this information and unredacted copies of declarations (and other materials). Maintaining these materials under seal and preventing Defendants' internal lawyers from accessing them is necessary to protect third parties from retaliation and protect their confidential business information.

Most declarants here are Defendants' customers, many of which are small local independent restaurants. Regardless of their size, many declarants fear retaliation if Defendants' businesspeople discover their participation in the Commission's investigation. The remaining declarants primarily consist of other broadline foodservice distributors. Both customers' and distributors' declarations include non-public competitively sensitive information, such as non-public revenues, sensitive pricing information, information and strategies about contract negotiations or business practices, and specific contract terms.

These customers and distributors participated in the FTC's non-public investigation and provided such confidential competitively sensitive information pursuant to the Commission's confidentiality rules, which provide that information obtained by the Commission during its investigation will be treated in confidence and exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552. 15 U.S.C. § 18a(h); 15 U.S.C. § 57b 2(f). See also 16 C.F.R.

§§ 4.10, 4.11. In fact, the declarants specifically requested that their identities, their companies' identities, and the contents of their declarations be kept confidential and be exempt from public disclosure. Releasing declarants' names, company names, and confidential business information to Defendants' internal lawyers or publicly puts these non-parties at risk of retribution and discloses sensitive—and often competitively sensitive—business information. Doing so could result in a chilling effect on the ability of the Commission to obtain highly relevant, reliable, and probative evidence from customers and other market participants in this and future cases.

Moreover, the protective order issued by the administrative law judge in this case, like the protective order here, prevents disclosure of confidential third-party information to anyone other than the excepted group. If the Court permits disclosure of third-party material to Defendants' internal lawyers or to the public, then it will have effectively amended the protective order issued by the administrative law judge. Any modifications of these two protective orders should be consistent.

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partnership with . . . [the] Procurement[ ] and Operations departments."[3] It may be the case that all seven attorneys proposed by Defendants have non-legal business responsibilities, in which case it is additionally important to preclude them from gaining access to the identities, company names, and confidential information of the declarants.

Many courts in this District have recognized the importance of protecting from disclosure the individual and business names of third parties that participate in the Commission's non-public investigations. For example, the Protective Order in CCC contained a default provision that the materials and identities of third parties that participated in the Commission's investigation were confidential. Protective Order at 3-7, FTC v. CCC Holdings, Inc., No. 08-2043 (RMC), Docket No. 30 (D.D.C. Dec. 9, 2008) ["CCC Protective Order"]. Similarly, in Ardagh, the Protective Order stated that "[t]he identity of a third party submitting [ ] confidential information shall [ ] be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment." Protective Order at 2, FTC v. Ardagh Group S.A., No. 13-cv-1021 (BJR), Docket No. 9 (D.D.C. July 9, 2013) ["Ardagh Protective Order"]. See also Protective Order at 2, FTC v. Staples, Inc., No. 97-701 (PLF) (Apr. 16, 1997) ["Staples Protective Order"]. The Ardagh Protective Order did not allow for the disclosure of confidential information, including the identities of third parties that submitted information during the Commission's investigation, to in-house counsel for the defendants in that case.[4]

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[3] LinkedIn Profile of Luis Avila, available at https://www.linkedin.com/pub/luis-avila/4/8b6/27a?trk=biz_employee_pub (last visited Feb. 25, 2015).

[4] Ardagh Protective Order at 3-4. See also CCC Protective Order at 4 (permitting disclosure of third party identities to "a defendant" only after giving the Commission and the affected third parties the right to challenge that disclosure in court); accord Staples Protective Order at 2. Even in Whole Foods, where the in-house attorney for Whole Foods gained access to certain confidential information, the Protective Order did not permit Whole Foods' in-house attorney to access the confidential exhibits accompanying the unredacted pleadings, deposition and hearing transcripts, and expert reports to which she had access. Protective Order Governing Discovery

Given the concerns of third parties, the Commission respectfully requests that the Court prohibit disclosure of the declarants' identities, business names, and confidential business information to both the public and to Defendants' internal lawyers. In lieu of such a modification to the protective order, the Commission is willing to provide versions of the declarations at issue here that are redacted to remove any information identifying the declarant, his/her business, and any confidential business information. Under this approach, Defendants' internal lawyers would have access to the substantive information contained in the declarations and outside counsel for Defendants would have access to the declarants' identities. Thus, this result would not prejudice Defendants' litigation strategy, would protect the declarants (and future declarants) from any real or perceived retaliation, and protect declarants' confidential business information, thereby preserving the Commission's ability to conduct merger investigations. This proposal also would require redaction of any identifying information of the individual and business names of the declarants, as well as any confidential business information, from any publicly filed documents.

In the event that the Court is inclined to unredact third-party information, it is common practice in this District to allow the affected third parties the opportunity to petition the court for greater protection. In Ardagh, CCC, Whole Foods, Cardinal Health, and Staples, the respective protective orders placed the burden of notice on the party seeking disclosure while also giving the relevant third party an opportunity to block the sought disclosure. Ardagh Protective Order

(N.D. Ill. Dec. 28, 2011); Stipulated Protective Order at 3-5, FTC v. Phoebe Putney Health System, Inc., No. 1:11-cv-58 (WLS) (M.D. Ga. Apr. 26, 2011). For example, in Whole Foods, a litigating party seeking to publicly disclose third-party information had the right to challenge a confidentiality designation by giving notice to the relevant third party, which third party then had the ability to protect its confidential information in good-faith negotiations and, if necessary, before the court. Whole Foods Protective Order at 6-7. The Protective Order in Ardagh required a litigating party seeking to introduce third-party confidential information into evidence to notify the third party, which then had the opportunity to request in camera treatment of the evidence at issue. Ardagh Protective Order at 5. In CCC, where the identities of third parties that participated in the Commission's investigation were confidential, the Protective Order required defendants' counsel to notify the Commission if defendants' counsel intended to disclose any information submitted to the Commission during its investigation, including information that did not qualify as "confidential material." CCC Protective Order at 6-7. The Commission would then notify the third party that had originally produced the information, which could waive confidentiality or make a written objection to the release of its information within five days of receiving notification. Id.

In sum, we respectfully urge the Court not to modify the protective order. Plaintiffs instead propose to provide redacted versions of third-party declarations and exhibits to Defendants' internal lawyers. If the Court is otherwise inclined, we respectfully request that the Court implement a process whereby third parties can petition to maintain the confidentiality of their identities and business information.

Defendants' Position: The protective order should be modified to grant access to Confidential Material to three members of each Defendant's in-house legal team. For Sysco,

those individuals are: Russell Libby, Chief Legal Officer and Executive Vice President of Corporate Affairs; Carmen Ng, a Vice President for Transactions who is assuming the litigation oversight responsibilities of the VP Employment & Litigation while that person is on maternity leave; and Barrett Flynn, a Counsel in the Litigation Department. For US Foods, the three individuals are: Juliette Pryor, General Counsel and Chief Compliance Officer; Dorothy Capers, Associate General Counsel; and Andrew Nelson, Assistant General Counsel. Luis Avila, Assistant General Counsel, will replace Andrew Nelson when Mr. Nelson leaves his employment with US Foods, Inc. A copy of the proposed Protective Order with revisions shown in redline is attached as Exhibit DX1.

Plaintiffs required Defendants to sign the existing Protective Order as a precondition of providing Defendants access to the pleadings. But the Order severely impairs Defendants' ability to prepare their case. The Order grants Defendants' outside law firms access to Confidential Material, but prohibits Defendants themselves from reviewing the same materials. Making matters worse, the Order sets forth a broad and malleable definition of Confidential Material. To name just one example, Plaintiffs claim that the exhibit list submitted with their motion is Confidential—meaning that Defendants cannot learn the names or corporate employers of the various individuals who provided ex parte declarations supporting the FTC's pleadings.

The Commission's position does not comport with applicable law. Courts routinely grant parties access to confidential material to enable them effectively to participate in their defense. See, e.g., Williams v. Shockley, 2013 WL 3816086, at *4 (D. Del. July 19, 2013) ("[D]efendants are entitled to have access to all filings by the plaintiffs."); Emily Q. v. Bonta, 2001 WL 1902812, at * 1 (C.D. Cal. Mar. 30, 2001) (order granting access to "defendants, defendants' counsel and the employees and agents of any of them"). Access to confidential information is

especially critical where, as here, the case is proceeding on an expedited basis and the Defendants have "a degree of knowledge and experience in the . . . industry which makes them indispensable to counsel." In re Se. Milk Antitrust Litig., 2009 WL 3713119, at *2 (E.D. Tenn. Nov. 3, 2009). Further, the FTC has not shown and cannot show that this narrowly-tailored group of in-house lawyers will exploit or otherwise attempt to use Confidential Material for competitive gain. See Trading Technologies, Int'l. Inc. v. BCG Partners, Inc., 2011 WL 1547769, at *2-3, *7 (N.D. Ill. Apr. 22, 2011) (granting in-house attorneys "intimately involved in [the company's] overall litigation strategy" access to confidential materials where there was no reason to suspect misuse).

Moreover, the names of the FTC's witnesses are not Confidential Material, yet the FTC is withholding that information from all employees of Sysco and US Foods. The FTC generally identifies in their public filings the witnesses opposing the transaction. See e.g. FTC v. CCC Holdings Inc, No. 1:08-cv-02043, Dkt. 600-1 (D.D.C. 2009) (declarants identified in FTC exhibit list); FTC v. Arch Coal, No. 1:04-cv-00534, Dkt. 77 (D.D.C. 2004) (same); FTC v. OSF Healthcare System, No. 3:11-cv-50344, Dkt. 1-1 (N.D. Ill. 2011) (same); St. Luke's Health System, Ltd, and Saltzer Medical Group, P.A., No. 1:12-cv-00560, Dkt. 247 (D. Idaho 2013) (same). Courts in this District similarly identify in their public opinions witnesses who have given testimony for and against the transaction.

witness list). Indeed, the FTC's own administrative hearing requires that court to keep information confidential "only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting in camera treatment or after finding that the material constitutes sensitive personal information" such as an individual's social security number. FTC Rule 3.45, 16 CFR 3.45. Ample precedent, as well as basic due process principles, thus compel granting Defendants' selected in-house lawyers access to Confidential Material.

III. Joint Proposed Scheduling Order

A.

Transaction"), that are not privileged or otherwise protected by the work-product doctrine

6. Expert Materials Not Subject to Discovery. Expert disclosures and reports shall

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prior to confirming any deposition to coordinate the time and place of the deposition. The Parties may not serve a deposition notice with fewer than seven days' notice. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate the witness's schedule.

b) All depositions shall be limited to a maximum of seven (7) hours.

c) For any deposition noticed by both Plaintiffs and Defendants, the maximum time for the deposition shall be allocated evenly between the two sides. For any noticed deposition for which either side has obtained a declaration from the deponent, the maximum time shall be allocated for five (5) hours for the party that did not obtain the declaration, and two (2) hours for the party that obtained the

it should challenge an acquisition and are not intended to replace depositions. Indeed, the Commission's rules (applicable to the parallel administrative proceeding) explicitly provide: "The fact that a witness testifies at an investigational hearing does not preclude the deposition of that witness." FTC Rules of Practice for Administrative Proceeding, 16 C.F.R. § 3.33(b). Certainly no arbitrary limit should be established before the Parties exchange their proposed witness lists. Therefore, the Commission would be prejudiced if it is limited in its ability to take discovery of party witnesses and particularly if that limit were established before the Parties even exchange their preliminary witness lists: For any party deponent who has previously been deposed in an investigational hearing in the Federal Trade Commission's investigation of investigation of the acquisition of USF Holding Corp. by Sysco Corporation, FTC File No. 141-0067, the deposition shall be limited to a maximum time of 3.5 hours; provided, that, Plaintiffs shall be entitled to designate a maximum of four (4) depositions of deponents who have previously been deposed in an investigational hearing for which the deposition shall have a maximum time of 7 hours; provided, further that, the CEOs of Sysco and US Foods shall not be among these four.

Defendant's Position: The FTC shall not re-depose party witnesses whose investigational hearings were already taken by the FTC in its investigation of the acquisition of USF Holding Corp. by Sysco Corporation, FTC File No. 141-0067. Unused time in any party's allocation of deposition time shall not transfer to the other party.

d) If a Party serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven days after the original return date for the document subpoena.

12. Expert Reports.[6] **[Plaintiffs' Propose a simultaneous exchange of expert witness reports: The parties shall serve thier expert report(s) no later than March 18,**

C. BRIEFING SCHEDULE

16. **Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction shall be filed by _____, 2015. The Plaintiffs' Reply Brief shall be filed by _____, 2015.**

Plaintiffs' Position:

Defendants' Memorandum in Opposition should be filed by March 20, 2015, and Plaintiffs' Reply Brief should be filed by April 4, 2015.

Defendants' Position:

Defendants' Memorandum in Opposition should be filed by May 11, 2015, and Plaintiffs' Reply Brief should be filed by May 18, 2015.

D. DATE AND LENGTH OF PRELIMINARY INJUNCTION HEARING

17. **Subject to further direction of the Court, the hearing on Plaintiffs' Motion for Preliminary Injunction will be held over __ days beginning on _____, 2015.**

Plaintiffs' Position:

The hearing should be no more than three (3) days in duration beginning on or about April 21, 2015, subject to the Court's availability.

Defendants' Position:

The hearing should be ten (10) days in duration beginning on or about May 28, 2015, subject to the Court's availability.

E. OTHER MATTERS

18. Use of Declarations.

Plaintiffs' Position: Plaintiffs disagree with Defendants' attempt to preclude the Court from considering sworn declarations of customers, distributors, and other

hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction stage"); Johnson v. Couturier, 572 F.3d 1067, 1083 (9th Cir. 2009) (affirming district court's reliance on affidavits in a preliminary injunction proceeding); United States v. Buddhu, 2008 U.S. Dist. LEXIS 57728, 2-3 (D. Conn. June 5, 2008) ("In considering a motion for a preliminary injunction, the Court may rely on affidavits, deposition, and sworn testimony, even when they include hearsay").

Even before the 2009 amendments to the FTC's adjudicative rules, this Court considered declarations submitted by the parties in evaluating merger challenges under the preliminary injunction standard of Section 13(b) of the FTC Act.[8] Most recently, in a recent FTC merger challenge, the Ohio federal court granted a preliminary injunction after considering a range of evidence, including declarations, noting that the "Administrative Law Judge has scheduled over 200 hours . . . for a trial and will have the opportunity to hear live testimony and judge the credibility of witnesses." FTC v. ProMedica Health Sys., 11-cv-47, 2011 WL 1219281, at *1 (N.D. Ohio Mar. 29, 2011).

Nor are Defendants in any way disadvantaged by this practice here. Since the merger's announcement in December 2013, Defendants and their counsel have contacted their customers to solicit written support for the proposed merger. Because Defendants have ongoing business relationships with these potential declarants, they are in at least as good a position as Plaintiffs to obtain declarations and have had more

[8] See, e.g., FTC v. Whole Foods Market, Inc., Civ. No. 07-cv-01021-PLF, ¶ 15 (Stipulated Joint Proposed Case Management Order) (D.D.C. 2007) ("In general hearsay, shall be admitted in this proceeding subject to the Court's determination of the weight to be accorded any document or information").

than ample time to do so. Plaintiffs do not object to Defendants offering at the preliminary injunction proceeding any decl

too voluminous for electronic mail, the parties shall serve an electronic disk version of the papers on opposing counsel by hand at their Washington, D.C. office. The serving Party will telephone the other side's principal designee when the materials are sent to alert them that the materials are being served. Electronic delivery shall be treated the same as hand delivery for purposes of calculating response times under the Federal Rules. Service on Plaintiff FTC shall be deemed service on the Plaintiff States. Plaintiff FTC shall provide copies to the Plaintiff States of any papers served by Defendants.

20. Privilege Logs: The parties agree to suspend the obligation under Rule 26(b)(5)(A),

Designations		
Pre-hearing conference	Date to be set by the Court	
Parties Exchange Objections to Exhibits and Deposition Designations	**April 16, 2015**	**May 22, 2015**
Hearing on Plaintiffs' Motion for Preliminary Injunction	**April 21-23, 2015**	**May 28, 2015 - June 10, 2015**
Proposed Findings of Fact and Conclusions of Law	**May 3, 2015**	**June 17, 2015**

Respectfully submitted,

Dated: February 25, 2015

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Ordered: _____