

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of)
)
US Foods Holding Corp.,)
a corporation,)
)
Services Group of America, Inc.,)
a corporation,)
)
and)
)
Food Services of America, Inc.,)
a corporation.)
)

)

DECISION AND ORDER
Docket No. G4688

DECISION

limited to, FSA, Amerifresh, Inc., Ameristar Meats, Inc., Gampac Express, Inc., and Systems Services of America, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. "FSA" means Food Services of America, Inc., its ~~directors~~, officers, employees, agents, representatives, successors, and assigns; ~~and its~~ ~~ventures~~, subsidiaries, divisions, groups, and affiliates controlled by Food Services of America, Inc. and the respective directors, officers, employees, agents, ~~representatives~~, successors, and assigns of each.
- D. "Acquirer" means each Person approved by the Commission to acquire ~~respectively~~ the Boise Broadline ~~Divestiture Assets~~, the Fargo Broadline ~~Divestiture Assets~~ and the Kent Broadline ~~Divestiture Assets~~ pursuant to this Order.
- E. "Acquisition" means the acquisition by US Foods of certain subsidiaries ~~SSA~~, as described in and contemplated by the Stock Purchase Agreement by and between US Foods, Inc., Services Group of America, Inc., Amerifresh, Inc., Ameristar Meats, Inc., Food Services of America, Inc., Gampac Express, Inc., Systems Services of America, Inc., and US Foods Holding Corp., dated July 28, 2018.
- F. "Acquisition Date" means the date on which the Acquisition is consummated.

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K. "Broadline Distribution Assets" m

executive offices and principal place of business located at 4014 West Street, Kearney, Nebraska, 68847.

Q. “CashWa Divestiture Agreement” means the Asset Purchase Agreement by and among CashWa Distributing Co. of Kearney Inc., Food Services of America, Inc., US Foods, Inc. and US Foods Holding Corp. dated June 24, 2019. The CashWa Divestiture Agreement is attached to this Order as ~~Public~~ Appendix 1.

R. “Commission” means the Federal Trade Commission.

S. “Confidential Business Information” means any nonpublic Business Information relating to the Broadline Divestiture Assets

1. Obtained by Respondents prior to the Divestiture Date; or
2. Obtained by Respondent US Foods after the Divestiture Date, in the course of performing Respondent US Foods’ obligations under any Divestiture Agreement (including the provision of any Transition Assistance);

Provided, however, that Confidential Business Information shall not include information that

1. Was, is, or becomes generally available to the public other than as a result of a breach of this Order;
2. Was or is developed independently of and without reference to any Confidential Business Information; or
3. Was available, or becomes available, on a confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

T. “Consent” means any approval, consent, ratification, waiver, or other authorization.

U. “Contract” means a contract, lease, ~~sub~~ lease, or other agreement or obligation, whether written or unwritten.

V. “Designated Distribution Assets” means

1. Real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee) including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
2. Tangible personal property (other than inventories or accounts receivable) owned or leased as of the date the Acquisition was announced (or equivalent

replacements) including machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, and vehicles, together with all express or implied warranties by manufacturers, sellers, and all maintenance records and operating manuals;

3. Intangible righ

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6. Assets that are specifically identified as excluded assets in a Divestiture Agreement that is approved by the Commission unless necessary for an Acquirer operate

- 2. Was or is developed independently of and without reference to any DMA Confidential Business Information; or
- 3. Was available, or becomes available, on a confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

DD. “Fargo Broadline Divestiture Assets” means the Broadline Distribution Assets relating to the Fargo Distribution Center, provided, however, that if the Fargo Broadline Divestiture Assets are divested to CashWa pursuant to the CashWa Divestiture Agreement, then the Fargo Broadline Divestiture Assets shall not include those assets excluded by the CashWa Divestiture Agreement, which is attached to this Order as Nonic Appendix 1; provided further, however, that the Contract with each Fargo Multi-Location Customer assigned to CashWa pursuant to the CashWa Divestiture Agreement shall provide

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2. Know-how, trade secrets, software, technical information, data, registrations, applications for Governmental Authorization, inventions, processes, best practices, formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information;
3. Rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

KK. “Kent Broadline Divestiture Assets” means the Broadline Distribution Assets relating to the Kent Distribution Center, provided, however, that if the Kent Broadline Divestiture Assets are divested to Harbor pursuant to the Harbor Divestiture Agreement, then the Kent Broadline Divestiture Assets shall not include those assets included by the Harbor Divestiture Agreement, which is attached to this Order as Non-Public Appendix 2.

LL. “Kent Distribution Center” means the distribution center located at 18430 East Valley Highway, Kent, Washington, 98032.

MM. “Monitor” means the person appointed as Monitor in this Order

NN. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

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- TT. “Shamrock Divestiture Agreement” means the Asset Purchase Agreement by and among Shamrock Foods Company, Food Services of America, Inc. and US Foods, Inc. dated June 24, 2019. The Shamrock Divestiture Agreement is attached to this Order as Public Appendix 3.
- UU. “Shared Contracts” means Contracts that relate to (i) a Broadline Distribution Business

1. The Boise Broadline Divestiture Assets, as an ongoing business, to Shamrock pursuant to the Shamrock Divestiture Agreement;
2. The Fargo Broadline Divestiture Assets, as an ongoing business, to Cashwa pursuant to the Cashwa Divestiture Agreement; and
3. The Kent Broadline Divestiture Assets, as an ongoing business, to Harbor pursuant to the Harbor Divestiture Agreement;

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Shamrock, Cashwa or Harbor is not an acceptable Acquirer, then, after receipt of such written notification, Respondents shall (1) immediately notify each such Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than within five (5) business days, rescind the relevant Divestiture Agreement(s); and (2) within six (6) months of the date Respondents receive notice of such determination from the Commission, divest the Boise Broadline Divestiture Assets, Fargo Broadline Divestiture Assets, or Kent Broadline Divestiture Assets, as applicable, absolutely and in good faith, at no minimum price, as on-going businesses to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided further, however, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which any of the divestitures was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner

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1. Performing their obligations or as permitted under this Order to Maintain Assets, the Decision and Order, or the Divestiture Agreements; or
 2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Broadline Divestiture Assets or Broadline Distribution Centers, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A, and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV, including implementation of access and data controls, training of employees, and all other (a)4 (nd 4 0 Td

V. Asset Maintenance

IT IS FURTHER ORDERED that from the date Respondents sign the Consent Agreement until the Divestiture Date, Respondents shall:

- A. Maintain each of the Broadline Distribution Centers and all Broadline Distribution Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents signed the Consent Agreement;
- B. Take such actions that are consistent with the past practices of Respondents in connection with each Broadline Distribution Center and all the Broadline Distribution Assets, and that are taken in the ordinary course of business and in the normal day operations of the Broadline Distribution Centers;
- C. Keep available the services of the current officers, employees, and agents of Respondents; and maintain the relations and goodwill with suppliers, landlords, customers, employees, agents, and others having business relations with the Broadline Distribution Centers and the Broadline Distribution Assets; and
- D. Preserve the Broadline Distribution Centers and Broadline Distribution Assets as ongoing businesses and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, or marketability of the Broadline Distribution Centers and Broadline Distribution Assets would be diminished.

The purposes of this Paragraph 1.8 are set forth in the Divestiture Order (File No. 10-390) and the Consent Agreement (File No. 10-390). The Divestiture Order (File No. 10-390) is available at <https://www.fcc.gov>.

and interview any Relevant Employee outside the presence or hearing of any employee or agent of Respondents

2. Respondents shall (i) not offer any incentive to any Relevant Employee to decline employment with the Acquirer, (ii) remove any contractual impediments that may deter any Relevant Employee from accepting employment with the Acquirer, including but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondents that would affect the ability of such employee to be employed by Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Relevant Employee by the Acquirer; and
3. Respondents shall to the extent permissible by law (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any Relevant Employee who accepts an offer of employment from the Acquirer and (ii) provide each Relevant Employee with reasonable financial incentive including continuation of all employee benefits and regularly scheduled raises and bonuses as necessary to accept offers of employment with the Acquirer.

Provided, however, that this Paragraph does not require, nor shall it be construed to require, any Respondent to terminate the employment of any employee or to prevent Respondents from continuing to employ any Relevant Employee(s) in connection with the Acquisition or the divestiture of the Broadline Divestiture Assets.

- B. For a period of 2 years after the Divestiture Date, Respondents shall not solicit or induce any Relevant Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Relevant Employees; (ii) hire Relevant Employees if employment has been terminated by an Acquirer, or who apply for employment with Respondents so long as such Relevant Employees were not solicited by Respondents in violation of this Paragraph; or (iii) hire any Relevant Employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Relevant Employee, or where such an offer has been made and the Relevant Employee has declined the offer

VII. Transition Assistance

IT IS FURTHER ORDERED that Respondents shall

- A. Provide the Acquire(s) with Transition Assistance (i) to efficiently transfer the relevant Broadline Divestiture Assets to each Acquirer and (ii) to operate the relevant Broadline Divestiture Assets and Broadline Distribution Business in a manner equivalent in all material respects to the manner in which Respondents operated the Broadline Divestiture

Assets and Broadline Distribution Business prior to the Acquisition, including the ability to develop new products, increase sales of current products, make reasonable modifications to the relevant Broadline Distribution Business, and maintain the competitiveness of the relevant Broadline Distribution Business

B. Provide Transition Assistance:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);
2. At the price set forth in a Divestiture Agreement, or if no price is set forth, at Direct Cost; and
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Monitor's ability to monitor Respondents compliance with this Order and the Divestiture Agreements

5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor including any reports submitted by the Acquirer with respect to the performance of Respondents obligations under this Order and the Divestiture Agreements
8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning the performance by Respondents of their obligations under this Order, and the Divestiture Agreements
9. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Monitor from providing any information to the Commission.

- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Divestiture Agreements
- H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to this Order.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations imposed by Paragraph H of this Order, the Commission may appoint a Divestiture Trustee to divest any remaining Broadline Distribution Assets, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 7 of the Federal Trade Commission Act, 15 U.S.C. § 45 (or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed Divestiture Trustee, pursuant to Section 5 of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
 1. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.
 2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

- a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.
- b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described in Paragraph IX to effectuate the required divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to divest or believes the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.
- c. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time for divestiture under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
- d. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in an offer that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. Each divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.
- e. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and

information received in connection with the performance of
Divestiture Trustee's duties and responsibilities.

- C. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- D. The Commission or, in the case of a appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. notify Commission staff via email at bccompliance@ftc.gov by the Acquisition Date no later than 5 days after the Acquisition Date, and
2. submit each of

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date this Order is issued

By the Commission.

April J. Tabor
Acting Secretary

SEAL

ISSUED

NON-PUBLIC APPENDIX 1

CashWa Divestiture Agreement

NON-PUBLIC APPENDIX 2

Harbor Divestiture Agreement

NON-PUBLIC APPENDIX 3

Shamrock Divestiture Agreement

NON-PUBLIC APPENDIX 4

Relevant Notice Area

APPENDIX 1
Monitor Agreement

NON-PUBLIC APPENDIX A

Monitor Compensation