

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

03 05 2015  
576564

In the Matter of

Sysco Corporation  
a corporation,

USF Holding Corp.  
a corporation,

and

US Foods, Inc.  
a corporation.

ORIGINAL

Docket No. 9364

PUBLIC

**ANSWER AND DEFENSES**  
**OF RESPONDENT SYSCO CORPORATION**

Pursuant to Rule 3.12 of the Federal Trade Commission's ("Commission") Rules of Practice for Adjudicative Proceedings, Respondent Sysco Corporation ("Sysco"), by and through its attorneys, admits, denies, and avers as follows with respect to the Administrative Complaint ("Complaint") filed by the Commission:

**INTRODUCTORY STATEMENT**

Sysco states that the premise of the Complaint—that the merger between Sysco and USF Holding Corp. and US Foods, Inc. (together, "US Foods") is anticompetitive—is ill-conceived and reflects an erroneous application of the antitrust laws to business behavior that is inherently localized, populated with numerous competitors, marked by ongoing entry, and defined by fierce competition. The Commission's challenge to the merger therefore is a repudiation of well-established antitrust doctrine.

To the extent the Complaint's preamble requires a response, Sysco denies the allegations alleged therein and specifically denies that the merger violates the FTC Act, the Clayton Act, or any other statute in any way.

**I.**

**NATURE OF THE CASE**

1. Denies the allegations of Paragraph 1 of the Complaint and specifically denies that the merger between Sysco and US Foods is anticompetitive, except: (a) admits that Sysco

has, at all times, competed vigorously against all foodservice distributors and wholesalers, including US Foods; (b) admits that the Commission purports to bring this action to temporarily restrain and preliminarily enjoin Sysco's merger with US Foods; and (c) avers that the Commission's selective quotation of unidentified written material or communications, offered

different industries; and (c) further avers that every foodservice operator has unique needs and purchasing options at any given moment in time and, as such, customers cannot be considered as a homogenous bloc with one set of purchasing characteristics, purchasing options, product preferences, or business practices.



**B.**

**Respondents**

17. Admits the allegations in Paragraph 17 of the Complaint.
18. Admits the allegations in Paragraph 18 of the Complaint.
19. Admits on information and belief the allegations in Paragraph 19 of the Complaint.
20. Admits on information and belief the allegations in Paragraph 20 of the Complaint.

**C.**

**The Merger**

- 21 Admits the allegations in Paragraph 21 of the Complaint.

**III.**

**THE PURPORTED RELEVANT PRODUCT MARKETS**

22. Denies the allegations of Paragraph 22 of the Complaint except: (a) admits that broadline foodservice distribution can involve, among other things, the warehousing, sale, and distribution of products; (b) avers that Sysco lacks information to respond to allegations concerning the desires or purchasing habits of unidentified customers because customer preferences can and do vary widely among a diverse set of foodservice operators in different areas and in different industries; and (c) further avers that every foodservice operator has unique needs and purchasing options at any given moment in time and, as such, customers cannot be considered as a homogenous bloc with one set of purchasing characteristics, purchasing options, product preferences, or business practices.

23. Denies the allegations of Paragraph 23 of the Complaint and specifically denies that broadline foodservice distribution services c

avers that Sysco lacks information to respond to allegations regarding other systems distributors' internal considerations when deciding whether to take on business.

27. Denies the allegations of Paragraph 27 of the Complaint except: (a) admits that customers can and do use myriad distributors, including broadline distributors, systems distributors, and specialty distributors; and (b) admits that Sysco operates some specialty distribution businesses separately from its broadline distribution business.

28. Denies the allegations in Paragraph 28 of the Complaint and specifically denies that "National Customers," as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: (a) avers that Sysco lacks information to respond to allegations concerning the desires or purchasing habits of unidentified customers because customer preferences can and do vary widely among a diverse set of foodservice operators in different areas and in different industries; and (b) further avers that every foodservice operator has unique needs and purchasing options at any given moment in time and, as such, customers cannot be considered as a homogenous bloc with one set of purchasing characteristics, purchasing options, product preferences, or business practices.

29. Denies the allegations of Paragraph 29 of the Complaint.

30. Denies the allegations of Paragraph 30 of the Complaint and specifically denies that broadline foodservice distribution services constitute a relevant product market, except: avers that to the extent Paragraph 30 of the Complaint states legal conclusions, no response is required.

31. Denies the allegations of Paragraph 31 of the Complaint and specifically denies that "National Customers," as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: (a) admits that foodservice management companies and hotel and restaurant chains, among others, are sometimes customers of broadline foodservice distributors; and (b) avers that GPOs are sometimes both competitors and customers of broadline foodservice distributors for purposes of antitrust analysis.

selective quotation of unidentified written material or communications, offered without context, is misleading as framed, and Sysco respectfully refers the Court to the quoted documents for a complete and accurate description of their contents.

known as DMA; (b) avers that the Commission's description of unidentified statements purportedly attributable to Respondents, offered without context, is misleading as framed, and Sysco respectfully refers the Court to the full underlying statements or documents, once identified, for a complete and accurate description of their contents; and (c) avers that Sysco lacks information to respond to allegations concerning the views and opinions of unspecified broadline distributors, customers, and industry participants.

39. Denies the allegations of Paragraph 39 of the Complaint and specifically denies that (1) broadline foodservice distribution services to "National Customers" constitute a relevant market and (2) "National Customers," as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: avers that to the extent Paragraph 39 of the Complaint states legal conclusions, no response is required.

**B.**

V.

**PURPORTED MARKET STRUCTURE AND THE MERGER'S PURPORTED  
PRESUMPTIVE ILLEGALITY**

46. Denies the allegations of Paragraph 46 of the Complaint and specifically denies that “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: avers that to the extent Paragraph 46 of the Complaint states legal conclusions, no response is required.

51. Denies the allegations of Paragraph 51 of the Complaint except: (a) avers that to the extent Paragraph 51 of the Complaint states legal conclusions, no response is required; and (b) further avers that to the extent Appendix A of the Complaint states legal conclusions, no response is required, but Sysco specifically denies that the merger will have anticompetitive effects in any of the “markets” purportedly identified in Appendix A.

## VI.

### PURPORTED ANTICOMPETITIVE EFFECTS

52. Denies the allegations of Paragraph 52 of the Complaint and specifically denies that (1) broadline foodservice distribution services constitute a relevant product market and (2) there is a national market for foodservice distribution, except: (a) admits that Sysco and US Foods currently compete vigorously against one another and myriad other foodservice distributors and wholesalers; and (b) admits that Sysco and US Foods will not compete against each other after they are merged into a single company, but avers that the merged company would be a more robust, efficient, and effective competitor to the thousands of other foodservice distributors and wholesalers, including PFG and DMA, and that customers would directly benefit.

#### A.

#### **The Merger Will Purportedly Likely Harm Competition for “National Customers”**

53. Denies the allegations of Paragraph 53 of the Complaint and specifically denies that (1) broadline foodservice distribution services to “National Customers” constitute a relevant market and (2) “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: (a) admits that Sysco, US Foods, and myriad other providers compete to provide products to a variety of foodservice operators; (b) admits that Sysco and US Foods each have more than sixty distribution centers as well as truck fleets and sales forces, and that each offer private-label products, order tracking, menu planning, and nutritional information; and (c) avers that to the extent Table 2 of the Complaint requires a response, Sysco lacks information sufficient to respond, but specifically denies that “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust law.

54. Denies the allegations of Paragraph 54 of the Complaint and specifically denies that “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: (a) avers that Sysco lacks information to respond to allegations regarding the preferences underlying unidentified foodservice operators’ purchasing decisions because those preferences can and do vary widely among a diverse set of customers in different areas and in different industries; and (b) further avers that every foodservice operator has unique needs and purchasing options at any given moment in time and, as such, customers cannot be considered as a homogenous bloc with one set of purchasing characteristics, purchasing options, product preferences, or business practices.

55. Denies the allegations of Paragraph 55 of the Complaint and specifically denies that “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: (a) admits that Sysco has, at all times, competed aggressively against all foodservice distributors and wholesalers, including US Foods, on the basis of price and non-price terms; and (b) avers that, as in any competitive industry, the perceived pricing of competitors is one of the many factors that a foodservice distributor or wholesaler may take into account when setting its prices.

56. Denies the allegations of Paragraph 56 of the Complaint and specifically denies that “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: (a) admits that Sysco, US Foods, and myriad other foodservice distributors and wholesalers currently compete; (b) avers that Sysco lacks information to respond to allegations regarding the motivations underlying unidentified foodservice operators’ purchasing decisions because those motivations can and do vary widely among a diverse set of customers in different areas and in different industries; and (c) further avers that every foodservice operator has unique needs and purchasing options at any given moment in time and, as such, customers ca

Foods, on the basis of price and non-price terms; (b) admits that Sysco offers high-quality products and services; (c) avers that, as in any competitive industry, the perceived products and services of competitors are among the many factors that a foodservice distributor or wholesaler may take into account when establishing its products and services; and (d) further avers that the Commission's selective quotation of unidentified written material or communications, offered without context, is misleading as framed, and Sysco respectfully refers the Court to the quoted documents, once identified, for a complete and accurate description of their contents.

61. Denies the allegations of Paragraph 61 of

customers; and (b) further avers that the Commission's selective quotation of unidentified written material or communications, offered without context, is misleading as framed, and Sysco respectfully refers the Court to the quoted documents, once identified, for a complete and accurate description of their contents.

## VII.

### **PURPORTED LACK OF COUNTERVAILING FACTORS**

#### A.

##### **Purported Barriers to Entry and Expansion**

67. Denies the allegations of Paragraph 67 of the Complaint and specifically denies that (1) broadline foodservice distribution services to "National Customers" constitute a relevant market, (2) "National Customers," as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, and (3) there are significant barriers to entry for foodservice distribution providers, except: (a) avers that Sysco lacks information to respond to allegations concerning the beliefs of unspecified employees of US Foods' owners; and (b) further avers that the Commission's selective quotation of unidentified written material or communications, offered without context, is misleading as framed, and Sysco respectfully refers the Court to the quoted documents, once identified, for a complete and accurate description of their contents.

68. Denies the allegations of Paragraph 68 of the Complaint and specifically denies that "National Customers," as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: admits that Sysco currently operates 72 distribution centers and that US Foods currently operates 61 distribution centers.

69. Denies the allegations of Paragraph 69 of the Complaint and specifically denies that there are significant barriers to entry for foodservice distribution providers and that stretch distribution is more costly.

70. Denies the allegations of Paragraph 70 of the Complaint except: avers that Sysco lacks information sufficient to form a belief as to the truth of the allegations concerning other foodservice distributors' internal considerations regarding the offering of foodservice distribution services.

71. Denies the allegations of Paragraph 71 of the Complaint and specifically denies that there are significant barriers to entry for foodservice distribution providers, except: admits that foodservice distributors are subject to certain regulatory requirements.

#### B.

##### **Efficiencies**

72. Denies the allegations of Paragraph 72 of the Complaint.

## C.

**The Proposed Divestiture**

73. Denies the allegations of Paragraph 73 of the Complaint and specifically denies that “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws, except: (a) admits that Respondents announced on February 2, 2015, that they would divest 11 US Foods distribution centers by selling them to Performance Food Group upon consummation of the Sysco and US Foods merger; (b) admits that US Foods currently operates 61 distribution centers and that Sysco would operate 122 distribution centers post-merger; and (c) avers that to the extent Paragraph 73 of the Complaint states legal conclusions, no response is required.

74. Denies the allegations of Paragraph 74 of the Complaint and specifically denies that “National Customers,” as that phrase is used by the Commission, represent a unique class of foodservice customers for purposes of the antitrust laws.

75. Denies the allegations of Paragraph 75 of the Complaint.

## VIII.

**PURPORTED VIOLATION****COUNT I—PURPORTED ILLEGAL AGREEMENT**

76. Except as where specifically admitted above, the allegations contained in Paragraphs 1 through 75 of the Complaint are denied.

77. Denies the allegations of Paragraph 77 of the Complaint.

**COUNT II—PURPORTED ILLEGAL ACQUISITION**

78. Except as where specifically admitted above, the allegations contained in Paragraphs 1 through 75 of the Complaint are denied.

79. Denies the allegations of Paragraph 79 of the Complaint.

**SYSCO’S AFFIRMATIVE AND OTHER DEFENSES**

Sysco asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the Commission:

1. The Complaint fails to state a claim on which relief can be granted.
2. Granting the relief sought is contrary to the public interest.
3. The alleged relevant geographic market definitions fail as a matter of law.

4. The Complaint fails adequately to allege a relevant product market.
5. The Complaint fails to allege harm to competition.
6. The Complaint fails to allege harm to any consumers.
7. The Complaint fails to allege harm to consumer welfare.
8. The combination of the Respondents' businesses will be procompetitive. The merger will result in substantial merger-specific efficiencies, cost synergies, and other procompetitive effects that will directly benefit consumers. These benefits greatly outweigh any and all proffered anticompetitive effects.
9. Sysco reserves the right to assert any other defenses as they become known to Sysco.

WHEREFORE, having fully answered the Compla

**CERTIFICATE OF SERVICE**

Pursuant to Rule 4.4(c), 16 C.F.R. § 4.4(c), I hereby certify that on March 5, 2015, I filed the foregoing document electronically with the Commission using the FTC's E-Filing System, emailed a copy of the foregoing to secretary@ftc.gov, and served a paper copy on the following individuals by first-class mail:

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Federal Trade Commission  
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Chief Administrative Law Judge  
Federal Trade Commission  
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March 5, 2015

By: /s/ Katrina M. Robson

Katrina M. Robson

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 5, 2015

Notice of Electronic Service for Public Filings

**I hereby certify that on March 05, 2015, I filed via hand a paper original and electronic copy of the foregoing Answer and Defenses of Respondent Sysco Corporation, with:**

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**I hereby certify that on March 05, 2015, I filed via E-Service of the foregoing Answer and Defenses of Respondent Sysco Corporation, with:**

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