

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA

Federal Trade Commission,

Petitioner,

**Case No.** \_\_\_\_\_

v.

Retail Services & Systems, Inc. d/b/a Total Wine  
& More,

Respondent.

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## **INTRODUCTION**

On February 23, 2023, the Federal Trade Commission (“FTC” or “Commission”) issued a civil investigative demand (“CID”) to Retail Services & Systems, Inc. d/b/a Total Wine & More (“Total Wine”) as part of an investigation into whether large chain retailers like Total Wine are receiving discriminatory pricing and services unavailable to smaller, independent businesses in violation of the Robinson-Patman Act. Despite FTC staff’s repeated, good faith efforts to secure Total Wine’s timely compliance with the CID—including several conferences, extensive correspondence, and multiple extensions of time—Total Wine, on April 7, 2023, filed a petition

documents and information within twenty days.

### **BACKGROUND**

The FTC is investigating potentially discriminatory—and thus, potentially illegal—pricing and services in the wine and spirits industry. In the United States, the production, distribution, and sale of wine and spirits occur within a three-tier system created by the 21st Amendment and the Federal Alcohol Administration Act of 1935. The three-tier structure exists in every state: wine and spirits are sold and transported from brand owners, manufacturers, and importers (“suppliers”) in the first tier, to distributors in the second tier, to retailers in the third tier, and then to consumers. Southern Glazer’s Wine & Spirits LLC (“Southern”) is the largest U.S. distributor of wine and spirits and operates in the second tier. Brown Decl. ¶ 3. Total Wine is a large chain retailer in the third tier with over 250 retail locations in the United States; it purchases wine and spirits from Southern and other distributors. Id. ¶ 6. Total Wine is one of Southern’s top retail customers. Id.

The Commission is investigating whether Southern has (1) engaged in discriminatory practices in its sales to retailers like Total Wine in violation of the Robinson-Patman Act, 15 U.S.C. § 13, as amended; and/or (2) engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Brown Decl. ¶ 3.

Enacted in 1936, the Robinson-Patman Act was a response by Congress to growing concerns that increased market power and the coercive practices of chain stores and other big buyers threatened the existence of small, independent retailers. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 43-45 (1948). As Congressman Wright Patman explained, the Robinson-Patman Act sought “to give all of the independent merchants of this country the same rights, privileges, benefits, and opportunities as the larger chains or concerns receive, and no more.”<sup>1</sup> Section 2(a)

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<sup>1</sup> Hearing on H.R. 8442, H.R. 4995, H.R. 5062 Before the H. Comm. on the Judiciary, Cong. 4 (1935) (statement of Congressman Wright Patman).

prohibits a supplier from bestowing a competitive advantage to large, favored retailers through the contemporaneous sale of goods of like grade and quality to small, independent businesses at higher prices, with exceptions for price differences that can be justified by cost savings associated with doing business with the favored retailer or that constitute bona fide attempts to meet a competitive offer.<sup>2</sup> 15 U.S.C. §§ 13(a) & (b). Sections 2(d) and 2(e) require a seller to provide promotional or advertising allowances or services to competing buyers on proportionally equal terms. 15 U.S.C. §§ 13(d) & (e). Not just focused on sellers, the Robinson-Patman Act also makes it illegal for a buyer to knowingly induce or accept a discriminatory price prohibited by Section 2(a). 15 U.S.C. § 13(f). Here, the Commission’s investigation is focused on potential “secondary-line” price discrimination under the Robinson-Patman Act, where the actual or threatened injury is to competition between favored customers of the seller who receive the discriminatory price and the seller’s disfavored customers. See, e.g., *Volvo Trucks No. Amç. İm. Reeder-Simco GMC, İnc.* 546 U.S. 164, 176 (2006).

As part of its active investigation into Southern, the Commission issued CIDs to Total Wine and nine other large chain retailers—possible favored customers or beneficiaries of Southern’s potentially discriminatory practices—on February 23, 2023, with a return date of March 25, 2023. All retailers have completed (or n



scope of the CID Southern, competing distributors, and all wine and spirits they sell; (2) narrow the five-year relevant timeframe specified in Instruction 1 of the CID; (3) strike Specifications 8 and 12-15 seeking information about Total Wine's retail business and competitive position in the market; and (4) modify certain specifications seeking "all documents." Pet. Ex. 4. On May 19,

Cir. 1992). Recognizing that “Congress delegated enforcement mechanisms to agency discretion,” the Fourth Circuit has emphasized that the district court’s role in a proceeding to enforce an administrative subpoena—like the CID here—is “sharply limited.” *Solis v. Food Emps. Lab. Rels. Ass’n*, 644 F.3d 221, 226 (4th Cir. 2011).

Actions enforcing administrative process “are designed to be summary in nature,” and therefore are properly instituted by a petition and order to show cause rather than by complaint and summons. *United States v. Am. Target Advert.*, 1257 F.3d 348, 353-55 (4th Cir. 2001); see also *Solis*, 644 F.3d at 223-26; *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (“[T]he ‘very backbone of an administrative agency’s effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate . . . .’”) (citation omitted). To protect “the important governmental interest in the expeditious investigation of possible unlawful activity,” *United States v. Markwood*, 48 F.3d 969, 979 (6th Cir. 1995) (quoting *Texaco*, 555 F.2d at 872-73), show cause orders frequently are issued within days after the Commission files an enforcement petition. See *FTC v. Am. Buyers Network, Inc.*, No. CIV. A. 91-B-1158, 1991 WL 214163 at \*3 (D. Colo. Aug. 19, 1991) (“Subpoena enforcement actions should proceed with dispatch so that the underlying investigation is not unduly disrupted”); see also *FTC v. Reckitt Benckiser Pharms., Inc.*, No. 3:14-MC-00005, ECF No. 6 (E.D. Va. Aug. 26, 2014) (issuing show cause order within three weeks after petition was filed); *FTC v. LabMD, Inc.*, No. 1:12-CV-3005, 2012 WL 13104826, at \*2 (N.D. Ga. Nov. 26, 2012) (issuing show cause order one week after petition was filed); *FTC v. Dinamica Financiera LLC*, No. CV0804649, 2008 WL 11342612, at \*2 (C.D. Cal. Sept. 22, 2008) (issuing show cause order the day after petition was filed).

## II. The Commission Has Met All Requirements For CID Enforcement

A district court must enforce an administrative subpoena when an agency establishes that: “(1) it is authorized to make such investigation; (2) it has complied with statutory requirements of due process; and (3) the materials requested are relevant.” *EEOC v. Am. & Efird Mills, Inc.* 964 F.2d 300, 302-03 (4th Cir. 1992); see also *United States v. Morton Salt* 338 U.S. 632, 652 (1950) (“it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant”); *Am. Target Advert* 257 F.3d at 351 (explaining that in granting an enforcement petition, the district court “need only have discerned” the *Efird Mills* elements).<sup>3</sup> A declaration from a knowledgeable government employee may be relied on to demonstrate that these requirements for subpoena enforcement have been satisfied. In *re McVane* 44 F.3d 1127, 1135-36 (2d Cir. 1995) (“An affidavit from a government official is sufficient to establish a prima facie showing that these requirements have been met.” (citations omitted)); *United States v. Dynavac, Inc.* 6 F.3d 1407, 1414 (9th Cir. 1993) (“[T]he government’s burden is a slight one, and may be satisfied by a declaration . . . .”); see also *Alphin v. United States* 809 F.2d 236, 238 (4th Cir. 1987) (“[the agent’s] affidavit discloses that as a matter of law the government has established a prima facie case”).

Not only is the government’s prima facie burden slight, but a respondent’s rebuttal burden is “heavy.” *FTC v. Dresser Indus., Inc.* No. 77-44, 1977 WL 1394, at \*3 (D.D.C. Apr. 26, 1977). Indeed, a respondent—whether it be a target or a third party—can only rebut an agency’s prima facie showing by demonstrating that it would incur an unreasonable or undue burden in complying

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<sup>3</sup> This analysis applies equally to FTC and other agency subpoenas. See *Am. & Efird Mills, Inc.*, 964 F.2d at 303 (stating standard for administrative subpoenas generally and citing *Morton Salt*

with the CID. See *Solis*, 644 F.3d at 226; *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475-76 (4th Cir. 1986) (citing *Texaco*, 555 F.2d at 882).

As documented in the Petition and Brown Declaration, the Commission has satisfied each of the requirements for judicial enforcement of the CID issued to Total Wine. The Commission is authorized to investigate violations of the FTC Act and Robinson-Patman Act; the Commission issued the CID pursuant to all statutory and procedural prerequisites; and the CID seeks materials relevant to the ongoing investigation. Moreover, Total Wine cannot avoid enforcement of the CID on grounds of indefiniteness or undue burden.

**A. The Investigation Is Within the Commission’s Authority, and the CID Complies with All Statutory Prerequisites**

The Commission lawfully and properly issued the CID to Total Wine as part of an ongoing investigation into whether Southern, the largest U.S. distributor of wine and spirits product, has violated the Robinson-Patman Act by engaging in discriminatory sales practices in favor of large chain retailers—such as Total Wine—and harming smaller, independent retailers. The Commission is authorized by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prevent unfair or deceptive acts or practices in or affecting commerce. The Commission also is authorized to enforce Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, as amended, which generally prohibits a seller from discriminating in price and non-price services provided to favored customers and disfavored purchasers of commodities of like grade and quality. See *Morton Salt*, 34 U.S. at 40-50. The investigation to which the CID pertains thus falls well within the FTC’s statutory authority.

Administrative agencies’ authority to gather documents and information from third parties in an investigation also is well-established. See 15 U.S.C. § 57b-1(c)(1) (authorizing the Commission to issue CIDs “[w]henver the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have

any information, relevant to unfair or deceptive acts or practices”); see also *United States v. Art Metal-U.S.A., Inc.* 484 F. Supp. 884, 887 (D.N.J. 1980) (“Administrative agencies vested with investigatory and subpoena powers may compel the production of information and documents from third persons who are not expressly within their regulatory jurisdiction, so long as the information sought is relevant and necessary to the effective conduct of their authorized and lawful inU.nts

Supreme Court has characterized the relevancy requirement as ‘not especially constraining.’” EEOC v. Lockheed Martin Corp., 16 F.3d 110, 113 (4th Cir. 1997) (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1983)). And “[c]ourts defer to an agency’s own appraisal of what is relevant ‘so long as it is not obviously wrong.’” *Id.* (quoting *Invention Submission*, 965 F.2d at 1089). Importantly, “the Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation.” *Invention Submission*, 965 F.2d at 1090 (citations omitted). If the requested information “touches a matter under investigation,” it will survive a relevancy challenge. *Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd.*, 878 F.2d 875, 882 (5th Cir. 1989) (citation omitted).

### **1. The Nine CID Specifications at Issue Request Information Directly Relevant to the Matters Under Investigation**

Here, the Commission seeks an order compelling Total Wine to cure specific deficiencies by producing data and information responsive to CID Specifications 3, 6, 7, and 11-16. As explained in the Commission’s May 19 order denying Total Wine’s Petition to Limit the CID, and as detailed below, each of these specifications seeks materials highly relevant to evaluating an element of or potential defense to a Robinson-Patman Act violation and possible injury in the markets potentially affected by secondary-line price discrimination. Pet. Ex. 5 at 4-6. Indeed, every other third-party retailer that received a CID from the Commission produced materials in response to these CID Specifications. The Court should order Total Wine to do the same.

Specification 3 seeks documents related to formal or informal agreements, offers, understandings, arrangements, negotiations, or discussions between Total Wine and any distributor or supplier regarding the availability, price, discounts, or quantity of any wine or spirits product purchased by Total Wine. Pet. Ex. 2. This information is relevant to identifying any disparate pricing (including discounts and promotional allowances) that may be available to large

chain retailers and to ascertain the motivation, purpose, context, and effect of the possible discriminatory conduct. Indeed, “[i]t is difficult to imagine a more relevant line of inquiry in a Robinson-Patman case” than documents relating to negotiations and agreements governing the quantities, prices, discounts, and specifications of commodities sold by a distributor or supplier to a potentially favored purchaser. See *Arvco Container Corp. v. Weyerhaeuser Co.*, No. 1:08-cv-548, 2009 WL 311125, \*3 (W.D. Mich. Feb. 9, 2009).

Specification 6 seeks information and documents

low price of a competitor or to match the services or facilities furnished by a competitor. Pet. Ex. 5 at 4; see also 15 U.S.C. § 13(b); *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 439 (1983) (explaining that the meeting competition defense “requires that . . . the lower price must actually have been a good faith response to that competing low price”). Thus, information about other distributor’s prices to Total Wine—although not dispositive of the issue—will help the Commission assess whether a prudent seller would reasonably believe that an equally low price was available from a competitor. Pet. Ex. 5 at 4; see also *Falls City*, 460 U.S. at 438-39 (vacating rejection of meeting competition defense and criticizing lower courts’ lack of findings regarding competitors’ prices and the information available to the seller about those prices).

Specification 11 seeks data on Total Wine’s loyalty program cardholders and their purchases of relevant products by store.<sup>4</sup> Pet. Ex. 2. Specification 12 seeks Total Wine documents “related to competition in the market for retail sale” of wine and spirits. Pet. Ex. 2. In a secondary-line price discrimination case, such as here, the possible injury to competition occurs at the retail level betwTf2r



identifying which wine and spirits retailers may compete with a particular Total Wine retail store location.

Specification 13 seeks documents provided to Total Wine's board and executive leaders regarding strategies, plans, and budgets for both the purchase of wine and spirits from distributors and their subsequent sale to consumers. Pet. Ex. 2. These strate

the price differentials can be ju

asserted that there are no internal communications relevant to the Commission's investigation of Southern's potentially discriminatory practices and thus it need not search any employee's custodial files. Pet. Exs. 26, 28. Moreover, Total Wine argues that any external communication between Total Wine and Southern is likely already in the FTC's possession from Southern. *Id.* Both arguments are erroneous.

First, there are myriad ways internal emails and documents touch on topics relevant to this investigation. For example, internal documents and communications may shed light on Total Wine's competition with other retailers. Internal Total Wine documents may also explain any discriminatory prices, discounts, or services Southern provided to Total Wine or may recount communications or negotiations between Total Wi

emails, there is no guarantee that any single source saved every responsive communication. Thus, Total Wine may in fact possess highly relevant communications not otherwise available to the Commission. See *infra* Part II.C. In any event, the incremental burden of producing external communications is slight if Total Wine conducts a collection and search for responsive internal communications.

Third, the Commission here seeks production of custodial documents from a group of Total Wine executives directly involved in Total Wine's purchasing, marketing, and sales. Specifically, the Commission seeks documents from five custodians—Thomas Trone (Vice President, Merchandising), Travis Smith (Senior Vice President, Merchandising), Elias Aguilera (former Senior Vice President, Mercha



785 F.2d at 479. Total Wine cannot make this showing. To begin, its categorical refusal to search a single employee's custodial files or to produce a single custodial document or email is untenable. "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the

at 882 & n.53 (affirming CID enforcement even though company claimed responding to the subpoena would cost the equivalent of \$4 million).

Total Wine claims that the CID is unreasonable and unduly burdensome because it is a non-party and because it believes that all relevant information should be available directly from Southern. *See* Pet. Ex. 4. These contentions lack merit.

Although presently a third-party, Total Wine is a large chain retailer that may be deriving significant financial benefits and unfair competitive advantages over small independent retailers from the possible discriminatory practices of Southern. Total Wine is thus not a typical witness. In any event, the standard for enforcement of administrative compulsory process is the same whether the subpoenaed entity is a target of the investigation or a third party. *See, e.g. Dresser Indus*, 1977 WL 1394, at \*3 (applying *Texaco* standard to enforce non-party subpoena and holding “[i]n view of this standard and the ‘strictly limited’ role of the court, one who opposes an agency’s subpoena necessarily must bear a heavy burden. That burden is essentially the same even if the subpoena is directed to a third party not involved in the adjudicative or other proceedings out of which the subpoena arose” (citation omitted)). The statute authorizing the Commission to issue CIDs specifically empowers the Commission to obtain from third-party “witnesses” “all such documentary evidence relating to any matter under investigation” 15 U.S.C. § 49 (emphases added); *see also* 15 U.S.C. § 57b-1.<sup>7</sup> Indeed, an important and effective tool in investigations involves comparing, contrasting, and supplementing information and materials obtained from targets with those obtained fro. 14sm11 Tc.0699 Tw

opposing party before seeking them from a non-party.” *Software Rts. Archive, LLC v. Google Inc.* No. 2:07-CV-511, 2009 WL 1438249, at \*2 (D. Del. May 21, 2009) (quotation omitted); see also *Viacom Int’l, Inc. v. YouTube, Inc.* No. C 08-80129 SI, 2008 WL 3876142, at \*2-8ue





Total Wine knowingly waived any argument against producing those documents—including the use of keyword searches—to respond to Specifications 3, 6, and 15-16.

**CONCLUSION**

Based on the foregoing, the FTC submits that it has met the relevant legal requirements for enforcement of the CID. Total Wine’s course of conduct demonstrates that, absent an enforcement order from this Court, the company will continue to flout its production obligations. Accordingly, the FTC requests that the Court enforce the CID consistent with the prayer for relief in the Petition.

Dated: October 20, 2023

Respectfully submitted,

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which requires a CID recipient to “attempt to resolve all issues” and directs that the Commission “will consider only issues raised during the meet and confer process.” See Brown Decl. ¶ 14.