

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA

Federal Trade Commission,

Petitioner,

v.

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

Respondent.

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

**PETITION OF THE FEDERAL TRADE COMMISSION FOR A SHOW CAUSE  
HEARING AND AN ORDER ENFORCING CIVIL INVESTIGATIVE DEMAND**

The Federal Trade Commission (“FTC” or “Commission”), by its designated attorneys and pursuant to Section 20 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 57b-1, petitions this Court for an Order requiring Respondent, Retail Services & Systems, Inc. d/b/a Total Wine & More (“Respondent” or

Specifically, the CID seeks documents and information from Total Wine relevant to determining whether Southern is violating Sections 2(a) and 2(e) of the Robinson-Patman Act by giving preferential pricing and services to certain favored, large chain retailers—such as Total Wine—that it does not provide to small independent retailers.

FTC staff attempted for months to work cooperatively with Total Wine to secure compliance; however, Total Wine's CID response remains severely deficient in multiple respects. Rather than negotiate a limited set of document custodians and keyword searches for responding to the CID (as every other retailer CID recipient has done in this investigation), Total Wine filed an administrative petition to limit the CID, which was denied by the Commission. Notwithstanding the Commission's order to comply in full, Total Wine unilaterally narrowed the scope of the CID in a manner inconsistent with the CID's specifications and refused to search any employee's custodial files for responsive documents. Total Wine has not asserted any colorable legal ground for its noncompliance. Its refusal to fulfill its obligations under the CID has burdened and delayed the Commission's investigation into possible discriminatory conduct in the wine and spirits industry and is contrary to the public interest.

As set forth below and in the accompanying memorandum, the FTC has met all requirements for judicial enforcement of the CID. Accordingly, the Commission requests that this Court order Total Wine to appear and show cause why it should not have to comply with the CID, and enter an order directing Total Wine to produce the specified documents and information within twenty days.<sup>2</sup>

A declaration under penalty of perjury by FTC attorney Christina Brown, which verifies the allegations of this Petition, is attached hereto as Exhibit 1 ("Brown Declaration"). Additional

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<sup>2</sup> To avoid further ofs haJ0,j funchernte,

exhibits supporting this Petition are identified in the accompanying Index of Petitioner’s Exhibits in Appendix B.

**PETITION ALLEGATIONS**

To support this Petition, the Commission alleges the following:

**THE PARTIES**

1. The Commission is an administrative agency of the United States government, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.* 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 is also authorized to enforce Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, as amended, which generally prohibits a seller of commodities from providing discriminatory prices and non-price services to different purchasers.

2. Respondent, Total Wine, is a privately held alcohol retailer that sells wines and/or spirits to consumers through “257 superstores across 28 states,” including 20 retail locations in the Commonwealth of Virginia. Pet. Ex. 29. Public sources indicate that Total Wine generated roughly \$3 billion in revenue from retail sales of wine and spirits in 2017, growing to more than \$5 billion in revenue by 2021. Pet. Exs. 30-31<sup>3</sup>. Total Wine purchases wine and/or spirits from Southern in nineteen states, including Virginia. Brown Decl. ¶ 6. Total Wine touts using its “tremendous buying power and special relationships with producers, importers and wholesalers [to] bring [it] considerable savings[.]” Pet. Ex. 29. Total Wine is one of Southern’s top retail customers. Brown Decl. ¶ 6.

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<sup>3</sup> Peter High, *Founder of \$3 Billion Total Wine & More Discussed His Career and Future in Politics*, Forbes (June 12, 2017), <https://www.forbes.com/sites/peterhigh/2017/06/12/founder-of-3-billion-total-wine-more-discusses-his-career-and-his-future-in-politics/?sh=46acb3a552a2>; *Total Wine’s Revenues Top \$5 Billion, As National Expansion Continues*, Shanken News Daily (July 7, 2021), <https://www.shankennewsdaily.com/index.php/2021/07/07/28971/total-wines-revenues-top-5-billion-as-national-expansion-continues>.

## **JURISDICTION AND VENUE**

3. Section 3 of the FTC Act, 15 U.S.C. § 43, authorizes the Commission to prosecute any inquiry necessary to its duties in any part of the United States. Section 6 of the Act, 15 U.S.C. § 46, empowers the Commission to gather and compile information concerning, and to investigate from time to time, the business and practices of persons, partnerships, or corporations engaged in commerce or whose business affect

jurisdiction within which Total Wine “is found, or transacts business,” Brown Decl. ¶ 6, venue is

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

Brown Decl. ¶ 5; Pet. Exs. 2-3.<sup>4</sup>

9. The CID was signed by Commission Chair Lina Khan, under the authority delegated by the Commission in Section 2.7(a) of its Rules of Practice. 16 C.F.R. § 2.7(a). Brown Decl. ¶ 5; Pet. Ex. 2. Pursuant to the Commission's Rules, Total Wine was served with the CID by expedited delivery service on February 27, 2023. Brown Decl. ¶ 5. The CID requires Total Wine to respond to two interrogatories, six data requests, and eleven document requests on or before March 25, 2023. Brown Decl. ¶ 7; Pet. Ex. 2. As instructed by the CID, upon compliance,

retail sales of wine and spirits (Specifications 12-13). Brown Decl. ¶ 8; Pet. Ex. 2. This information will assist FTC staff to determine whether Southern is providing discriminatory prices, free labor, marketing support, or other advantages to Total Wine or other favored, large chain retailers that it does not make available to small independent retailers. Brown Decl. ¶ 9. This information also will help staff evaluate whether any such sales satisfy the “in commerce” requirement of the Robinson-Patman Act, *see* 15 U.S.C. § 13(a), and whether any such discriminatory pricing is excused by a valid defense, such as a good-faith attempt to meet competition or as cost-justified by documented cost differences in selling to favored and disfavored purchasers. *See* 15 U.S.C. § 13(a), (b); Brown Decl. ¶ 9.

11. The CID informed Total Wine that it must raise any “factual or legal objections” to the CID by filing a petition to limit or quash the CID with the Commission within 20 days after service. Pet. Ex. 2; *see* 16 C.F.R. § 2.10(a).

#### **FTC EFFORTS TO SECURE TOTAL WINE’S COMPLIANCE WITH THE CID**

12. Between February 24, 2023, and April 5, 2023, FTC staff conferred with Total Wine’s counsel seven times and exchanged over eighteen emails and letters in an effort to secure Total Wine’s timely compliance with the CID. Brown Decl. ¶¶ 10-11, 14. Staff repeatedly invited Total Wine to propose a set of relevant employees (“document custodians”) and search terms to delimit its search for materials responsive to certain specifications asking for “all documents.” *See, e.g.,* Brown Decl. ¶¶ 10-11, 14; Pet. Exs. 6-10, 12.

13. During this period, FTC staff agreed to extend the CID return date once and agreed to extend the Rule 2.10(a)(12s cou(toIANCE Wsr/dtoIANC f0 Tw 20C1233 .5 (3dt12s coudocuTf0 Tw

requests to modify the CID, to propose document custodians, and to explain what review methodology it would use to identify responsive material. *See* Brown Decl. ¶ 12; Pet. Exs. 8-9.

14. On April 3, Total Wine made an initial production consisting of one employee chart, one document, and a sample of sales data responsive to Specification 10 for just ten of its wine and spirits products. Brown Decl. ¶ 13; Pet. Ex. 11. Total Wine's transmittal letter objected to the CID and stated that Total Wine would not otherwise respond to the specifications without a global resolution of its objections. Brown Decl. ¶ 13; Pet. Ex. 11. After lengthy negotiations about Total Wine's objections and staff's proposed deferral of certain responses, Total Wine opted to file a petition to limit the CID. Brown Decl. ¶ 15. No other retailer filed a petition to limit or quash its respective, nearly identical CID. *Id.*



appropriateness of word searches of certain custodial files” in response to specifications requiring production of “all documents” related to a topic. *Id.* at 15.

16. On May 19, 2023, the Commission denied Total Wine’s petition to limit the CID, finding insufficient basis or support for Total Wine’s objections. Pet. Ex. 5. The Commission concluded that Total Wine’s “narrow view of relevance to the Commission’s investigation is unjustified” and that the definitions Total Wine contended were overly broad were “well within the scope of the Commission’s investigation.” *Id.* at 4. Additionally, the Commission concluded that the mere fact that a CID requires production of confidential or sensitive business information is no basis for noncompliance, noting that the Commission is generally prohibited from disclosing any documents and information obtained through compulsory process. *Id.* at 5 n.1. The Commission did not limit the five-year timeframe of the CID as requested by Total Wine, finding that the information was relevant to the investigation. *Id.* at 6. Lastly, the Commission found that Total Wine’s conclusory statements regarding data specifications were insufficient to demonstrate an undue burden. *Id.* at 8.

17. The Commission’s order directed Total Wine to “comply in full with the Commission’s Civil Investigative Demand no later than June 16, 2023,” or at such other date as the FTC staff may determine. Pet. Ex. *Id.* at 9. The Commission also encouraged FTC staff and Total Wine to continue to discuss the use of keyword searches of certain custodial files as a means of complying with the “all documents” specifications. *Id.* at 8.

#### **TOTAL WINE’S NONCOMPLIANCE WITH THE COMMISSION ORDER**

18. Consistent with the Commission’s order and FTC staff’s previous efforts, FTC staff again made multiple attempts to confer with Total Wine regarding its CID compliance and reiterated the offer to address any purported burden associated with document requests by

negotiating a set of keyword searches and document custodians. *See, e.g.*, Brown Decl. ¶ 17; Pet. Exs. 14-15, 17-19.

19. Total Wine stonewalled every such attempt and refused to schedule a conference with FTC staff in advance of the Commission-ordered compliance deadline. *See, e.g.*, Brown Decl. ¶ 17; Pet. Ex. 18. Contradicting its prior position before the Commission, Total Wine’s counsel flatly rejected FTC staff’s efforts to confer on custodians and instead asserted “we do not think custodians are necessary for Total Wine to conduct a reasonably diligent search [in] this case.” Brown Decl. ¶ 17; Pet. Ex. 16.

20. On June 15 and 17, 2023, Total Wine made a limited production of materials, which it proclaimed “should relieve [Total Wine] of any further production obligations.” Brown Decl. ¶ 18; Pet. Ex. 20; *see also* Pet. Ex. 21. With this incomplete production, Total Wine not only granted itself the relief previously denied by the Commission, but also narrowed its response in ways not sought in its Petition. For example, Total Wine unilaterally narrowed the definitions of “Distributor” and “Relevant Products,” declining to produce certain data relating to any entity other than Southern. Total Wine did not stop there. Total Wine also refused to search for or produce any responsive internal or external email communications or other documents from any employee’s custodial files, limited its production of certain datasets to information from just four states, failed to produce complete data responsive to Specification 11, and failed to include any explanation or definitions of the fields in several datasets. Brown Decl. ¶ 18. Notably, Total Wine did not provide the certification of compliance required by the CID and the FTC Act. *Id.*

21. In a series of communications between July 6, 2023 and August 23, 2023, FTC staff notified Total Wine that it was in default of its obligations under the CID, identified numerous deficiencies in its CID response, and set forth a schedule and various proposals for Total Wine to

make further limited and specific productions in order to avoid a CID enforcement action. Brown Decl. ¶ 19; Pet. Exs. 22-23, 25, 27.

22. Ultimately, FTC staff requested that Total Wine cure its production deficiencies on a schedule through the following steps: (1) search and produce documents responsive to Specifications 3, 6, 12-13, and 15-16 from the files of five Total

25. The Commission seeks an order compelling Total Wine to cure certain specific deficiencies by producing the following categories of responsive materials:

- a. Documents responsive to Specifications 3, 6, 12-13, and 15-16 from the files of Total Wine employees Thomas Trone, Travis Smith, Eli Aguilera, Angela Weber, Troy Rice—and no more than three additional custodians if the Commission deems it necessary to capture non-duplicative responsive information—identified using the seven keyword searches listed in Appendix A;
- b. Documents responsive to Specification 13, wherever they are found;
- c. Data for purchases of Relevant Products from two additional Distributors, Republic National Distributing Company and Breakthru Beverage Group or their respective affiliates, responsive to Specification 7;
- d. A single, consolidated dataset export that merges Total Wine’s prior response to Specification 11;
- e. Internally created maps identifying stores and competitors (similar to what Total Wine produced for Arizona, California, Florida, and Texas), for all states where Total Wine and its affiliates conduct business with Southern, responsive to Specification 12;<sup>7</sup>
- f. Addresses and opening dates for Total Wine’s warehouses in California and Florida, responsive to Specification 14;
- g. Southern-related Cost Collection Files, QD Buy Tools, Pre-Sell Reports, Out-of-Stock Reports, Vendor Unknown Reports, and Vendor-Does-Not-Carry Reports (similar to what Total Wine produced for Arizona, California, Florida, and Texas) for all states where Total Wine and its affiliates conduct business with Southern, responsive to Specification 15; and
- h. Descriptions of all fields in the datasets produced by Total Wine, similar to the keys provided for datasets responsive to Specifications 7 and 10 and as directed by CID Instruction I.7(c), including for the Cost Collection Files, QD Buy Tools, Pre-Sell Reports, Out-of-Stock Reports, Vendor Unknown Reports, and Vendor-Does-Not-Carry Reports.

26. Total Wine’s refusal to produce these materials has burdened, delayed, and impeded the Commission’s investigation.

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<sup>7</sup> In addition to Arizona, California, Florida and Texas, FTC staff believes that there are fifteen other states where Total Wine purchases Relevant Products from Southern: Colorado, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Mexico, Nevada, New York, South Carolina, and Washington.

27. No previous application for the relief sought herein has been made to this Court or any other.

**PRAYER FOR RELIEF**

WHEREFORE, the Commission invokes the aid of this Court and prays for:

- a. Immediate issuance of an order, substantially in the form attached, directing Total Wine to appear and show cause why it should not produce the materials specified in paragraph 25 (a)-(h) above, in response to the CID; and,
- b. For a prompt determination of this matter and entry of an order requiring Total Wine to produce the information specified in paragraph 25 (a)-(h) within twenty (20) days of such order; and,
- c. For such other relief as this Court deems just and proper.

Dated: October 20, 2023

Respectfully submitted,

ANISHA S. DASGUPTA  
General Counsel

## APPENDIX A Keyword Searches

1. ((“Distributor Search Term”) OR (“Supplier Search Term”)) w/15 (pric\* OR rebat\* OR incentiv\* OR promotion\* OR quantit\* OR volume OR discount\* OR coupon\* OR scan\* OR chargeback\* OR adjust\* OR “QD” or “CQD” or “IRC” or deal\* or channel)
2. (“Distributor Search Term”) OR (“Supplier Search Term”) w/15 (agree\* OR contract\*)
3. (“Distributor Search Term”) w/15 (load\* OR restock\* OR unload\* OR deliver\* OR servic\* OR display\* OR material\* OR tasting\* OR event\* OR input\* OR survey\* OR merchandi\* OR “category captain” OR ((shelves OR shelf) w/2 (stock\* OR rotat\* OR reset)))
4. (competitor\* OR competition\* OR Kroger OR Albertson\* OR BevMo\* OR “Beverage and More” OR “Beverage & More” OR Specs OR Spec’s OR Costco\* OR “Sams w/2 Club” OR “Sam’s w/2 Club” OR “Sam w/2 Club” OR Walmart OR “Wal-Mart” OR independent OR indy OR indies) w/15 ((market w/5 share\*) OR strength\* OR weakness\* OR specializ\* OR “SWOT” OR aggressiv\* OR undercut\* OR threat\* OR position\* OR opportunit\* OR expan\* OR grow\* OR capacit\* OR strategy OR pric\* OR (barrier\* w/5 (entry OR enter\*)))
5. board w/5 (report\* OR presentation\* OR summary)
6. “business plan” OR (strateg\* w/2 “plan”) OR (“strateg\*” w/5 (“business” OR “enterprise” OR “roadmap\*” OR “objective\*” OR “priorit\*” OR “initiative\*”)) OR ((annual OR quarterly) w/5 budget\*)
7. (strateg\* OR practice\* OR polic\*) w/20 ((inventory w/3 manage\*) OR procure\* OR purchas\* OR allocat\* OR warehous\* OR storage)

“**Distributor Search Term**” means (breakthrubev.com OR johnsonbrothers.com OR rndc-usa.com OR southernglazers.com OR winebow.com OR BREAKTHRU OR “JOHNSON BROTHERS” OR “REPUBLIC NATIONAL” OR “RNDC” OR SOUTHERN OR WINEBOW OR “SG” OR “Southern Glazers” OR “Southern Glazer’s” OR “sgws.com” OR sgws)

“**Supplier Search Term**”

