UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. AON plc and WILLIS TOWERS WATSON plc, *Defendants*.	Case No. 1:21-cv-01633-RBW

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION TO COMPEL RESPONSE TO SPECIAL INTERROGATORIES

In their motion to compel—a discovery motion filed before discovery has begun and before Defendants have even formally served the interrogatories on Plaintiff—Defendants seek to require Plaintiff United States to respond to "special" interrogatories purportedly relating to the allegations in Plaintiff's complaint. But there is nothing "special" about these Defendants or this case that justifies premature discovery.

It is unsurprising that Defendants disagree with the allegations in the complaint, particularly when the allegations so closely resemble recent cases in this district in which courts enjoined anticompetitive mergers. The Federal Rules of Civil Procedure allow for Defendants to challenge such allegations through a motion to dismiss the complaint or a motion for a more definite statement. These motions would fail, as Plaintiff's complaint contains more than adequate allegations to satisfy the applicable standards. The Federal Rules also provide for both fact and expert discovery so that Defendants have an opportunity to contest those allegations at trial. What the Federal Rules do not permit is Defendants to use claims of a "vague" complaint

to impose premature discovery burdens on Plaintiff in the form of interrogatories that, on their face, are nothing but interrogatories that might be found at various points in discovery, or arguments suitable for a pretrial brief.

Defendants have not cited any authority justifying such discovery before a Rule 26(f) conference has even been held. Defendants' motion to compel should be denied.

ARGUMENT

I. DEFENDANTS FAIL TO SHOW GOOD CAUSE FOR THEIR PREMATURE DISCOVERY REQUESTS

Under Federal Rule of Civil Procedure 26, generally "a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d)(1). Defendants do not assert that the parties have had a Rule 26(f) conference; nor can they because Defendants have refused to discuss all the topics required by such a conference with Plaintiff. Only recently, after waiting 15 days following receipt of Plaintiff's draft proposed case management order, did they provide a partial response to Plaintiff's draft, which even then did not reference the "special" interrogatories nor the schedule. Significantly, Defendants have refused to discuss interim dates for a pretrial schedule and have vacillated on important issues that impact discovery and the pre-trial schedule. Because Defendants are seeking early discovery, they bear the burden of showing "good cause" to seek the premature discovery they have propounded here. *Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp.*, 296 F.R.D. 1, 2 (D.D.C. 2013). "Good cause" requires the party seeking discovery to show that the information sought "is necessary before the suit can progress further." *Malibu Media, LLC v. Doe*, 316 F. Supp. 3d 120, 122 (D.D.C. 2018) (internal quotation marks omitted). That type of information is generally limited to "issues of identity, jurisdiction, or venue." *Sky Angel*, 296 F.R.D. at 2.

Defendants do not attempt to show that they have met this standard. In fact, Defendants' motion does not even mention Rule 26. Rather, Defendants' interrogatories seek facts that go directly to the merits of Plaintiff's case. For example:

> "**Interrogatory No. 2:** Identify every firm that competes (1) in the relevant market for property, casualty, and financial risk broking for large customers in the United States and/or (2) in the relevant market for health benefits broking for large customers in the United States, as those purported relevant markets are alleged in the Complaint.
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> **Interrogatory No. 3:** State the market share of each firm identified as a competitor in each purported relevant market in response to Interrogatory No. 2, provide the basis on which those market shares are calculated, including the numerator and denominator for that calculation, and identify the source(s) of the information used to make those calculations.
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> **Interrogatory No. 7:** State whether you contend that as a result of being able to "identify customers that have fewer competitive options," any of Marsh, Aon or WTW have successfully engaged in price discrimination against large customers and, if you so contend, Explain with particularity when that occurred and with respect to which customers, and state all facts supporting that contention.
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> **Interrogatory No. 13:** State the diversion ratios that you contend exists with respect to Aon and WTW in each of the relevant markets for large customer commercial risk broking and health benefits broking, and Identify the data sources used to estimate those diversion ratios."

(Defs. Mot. Ex. C, Dkt. No. 37-4, at 1–5.) Facts about competitors, customers, market shares, and diversion ratios in the alleged relevant markets are commonly litigated in merger cases; they are the type of interrogatories Defendants often serve as part of fact discovery or explore through expert discovery.[1] They have nothing to do with "issues of identity, jurisdiction, or venue," *Sky Angel*, 296 F.R.D. at 2, nor do they seek information that "is necessary before the suit can progress further." *Malibu Media,* F. Supp. 3d at 122.

Defendants' sole authority purportedly authorizing pre-discovery interrogatories is a

[1] Many of Defendants' proposed "special" interrogatories seek not only facts concerning the merits of the case, but also premature expert discovery as well. Plaintiff reserves any and all objections to these interrogatories, should they be properly served.

seventeen-year old case from the Northern District of California. (Corrected Memorandum of Points and Authorities in Support of Defendants' Motion to Compel ("Mem.") at 6, Dkt. No. 37) (citing *United States v. Oracle*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).) Conspicuously absent from Defendants' motion is any precedent from this circuit, merger case or otherwise, supporting the relief Defendants seek. Even if *Oracle* were relevant to the Court's determination of a procedural question in this case, which it is not, the facts there were plainly different. If anything, *Oracle* supports Plaintiff's position that Defendants should serve interrogatories as part of a *comprehensive* case management order. (*See* Defs. Mot. Ex. A, Dkt. No. 37-2, at 6 (requiring Plaintiff to respond to initial set of interrogatories as part of Case Management Statement and Proposed Order).) Here, Defendants have steadfastly refused to negotiate a schedule for discovery and instead seek "special" interrogatories in advance of discovery and divorced from all other case management considerations and without any support under the law. Defendants have failed to meet their burden to show good cause for their premature and one-sided discovery requests.

II. DEFENDANTS OFFER NO VALID JUSTIFICATIONS FOR THEIR PREMATURE DISCOVERY REQUESTS

Rather than cite any applicable law justifying the use of premature "special" interrogatories, Defendants instead spill much ink debating the merits of Plaintiff's case against them. Defendants appear determined to relitigate the *Oracle* case—the only case, albeit inapplicable, they cite in support of their requested relief. But Defendants either misread or mischaracterize Plaintiff's complaint in their attempts to find shadows of *Oracle*.

Defendants assert that Plaintiff's case rests on a "dubious legal theory" based on "customer types." (Mem. at 1.) But relevant markets based on customer types are common in

merger cases and are clearly described in the 2010 Horizontal Merger Guidelines. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, *Horizontal Merger Guidelines* § 4.1.4 (2010) ("[T]he Agencies often define markets for groups of targeted customers, i.e., by type of customer . . . ."). In particular, relevant markets based on sales to large customers formed the basis of several recent decisions in this district enjoining anticompetitive mergers like this one. *See, e.g.*, *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 51–56 (D.D.C. 2018) (market properly defined to include global fleets that satisfy certain criteria); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193–202 (D.D.C. 2017) (market properly defined to include national accounts with 5000 or more employees); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 117–22 (D.D.C. 2016) (market properly defined to include large business-to-business customers that spend $500,000 or more on office supplies annually); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 37–48 (D.D.C. 2015) (market properly defined to include national customers); *cf. FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1039-41 (D.C. Cir. 2008) (opinion of Brown, J.) (rejecting district court's conclusion that FTC could not define price-discrimination market around targeted customers).

In any event, Defendants' dissatisfaction with Plaintiff's theory and claims does not create "good cause" for premature discovery. And as Defendants concede, the Federal Rules of Civil Procedure provide ways to challenge the sufficiency of a complaint (Mem. at 6)—but "special" interrogatories are not one of them. *See* Fed. R. Civ. P 12(b)(6) (allowing a motion to dismiss a pleading for "failure to state a claim upon which relief can be granted"); Fed. R. Civ. P. 12(e) (allowing motion for "more definite statement of a pleading"). These rules do not provide justification to impose one-sided discovery obligations on Plaintiff.

To be clear, any claim that Plaintiff's complaint is legally deficient is wrong. While Defendants claim that Plaintiff fails to allege precise market shares or HHIs in the complaint,

there is no requirement that this be pled to state a claim under Section 7 of the Clayton Act. Although some Section 7 complaints include such allegations, others do not. *See, e.g.*, *United States et al. v. Aetna et al.*, No. 1-16-cv-01494, Dkt. No. 1 (Compl.) at ¶ 31 (merger ultimately enjoined after trial); *United States v. Energy Solutions et al.*, No. 1-99:mc-09999, Dkt. No. 685 (Compl.) at ¶ 61 (merger ultimately enjoined after trial).[2] Moreoever, Plaintiff's allegations that Defendants' combined shares exceed certain thresholds and give rise to a presumption of illegality do not stand alone. These allegations are accompanied by factual assertions from Defendants' own ordinary course businesss documents that highlight the competition that would be lost as a result of Defendants' proposed merger, and are themselves sufficient to allege a substantial lessening of competition. (*See* Compl. ¶¶ 6 (noting that Aon already operates in an "oligopoly" and will have "even more" "leverage" "when Willis deal is closed"), 17, 18, 19, 29, 38, 46, 47, 55, and 57.) Similarly, any argument that Plaintiff's complaint fails to adequately allege relevant markets cannot be squared with the applicable legal standard. *See United States v. Anthem*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017) (noting that a relevant "market . . . 'cannot be measured by metes and bounds,'" and "need not include all potential customers or participants." (quoting *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 (1953))).

In their effort to paint the complaint as vague, Defendants ignore what the complaint actually says. For example, Defendants claim that "the Complaint is silent as to purported capability gaps between these and other firms . . . or why any such gaps justify the exclusion of active competitors from the alleged markets." (Mem. at 5.) Plaintiff's complaint, however, covers these very topics in detail, including the fact that the alleged markets do *not* exclude

[2] Defendants' citation to *FTC v. Facebook* is inapt. That was a case brought under Section 2 of the Sherman Act, and—as Defendants concede in their motion—the court held that the plaintiff failed to "adequately allege monopoly power," which is not an element of a Section 7 claim. (Mem. at 2.)

competitors outside the Big Three. (*See* Compl. ¶ 17 (listing the "mix of broad data, deep experience, knowledge, and instutitonal resources," the "deep talent across[] the full range of commercial risk and employee benefits products and services," the "extensive global networks of offices," and the ability "to secure carriers' attention on behalf of their customers" as advantages maintained by Aon, WTW, and Marsh); *id.* ¶ 18 (noting that some customers in the relevant markets "can and do use other brokers," and alleging that competition in the market as a whole would still be harmed as a result of the merger).) Plaintiff's allegations are sufficiently pled and Defendants' wishful statements otherwise still do not support the relief that they seek.

As a final attempt to justify their motion to compel Plaintiff to answer their unserved "special" interrogatories, Defendants make another misplaced appeal to "timing constraints". (Mem. at 6.) And as they have before, Defendants mischaracterize the record in seeking to blame these "timing constraints" on Plaintiff. For example, Defendants point to "the Timing Agreement entered into with the Division." (*Id.*) But Defendants are large, sophisticated companies with experienced antitrust counsel; they heavily negotiated and entered into the timing agreement of their own volition, as nearly all merging parties do, because they benefit from the agreement. Under the timing agreement, Defendants, among other things, maintained significant control over the timing of various steps during Plaintiff's investigation. Defendants also spent the three months before Plaintiff filed its complaint asking Plaintiff to investigate various, frequently changing, divestiture proposals, which Plaintiff dutifully did. Only three weeks into this litigation, however, Defendants have demonstrated a pattern of delay and subsequent attempt to shift blame for that delay onto Plaintiff. As just one example, Defendants have delayed in negotiating a case management order governing the schedule of this case, the entry of which would allow Defendants to gain access to Plaintiff's investigative file, serve

interrogatories, and seek discovery through other ordinary means to obtain the underlying data and information that they seek with this motion.

Plaintiff is prepared to move expeditiously to complete all the necessary pretrial tasks to bring this case to a trial. That can only begin, however, if Defendants engage in the process. Ultimately, if Defendants want answers to their interrogatories there is an appropriate mechanism to seek them: through proper Rule 26 discovery, once the parties have met and conferred and the Court has entered a case management order. Defendants' motion to compel should be denied so the parties can proceed with this case on the proper track.

CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court deny Defendants' motion to compel.

Dated: July 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 5, 2021, I served the foregoing upon all counsel of record via the Court's CM/ECF system.

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