IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. Aon plc et al., Defendant.	Case No.: 21-cv-1633-RBW

DEFENDANTS' MOTION TO COMPEL RESPONSE TO SPECIAL INTERROGATORIES

Defendants Aon plc and Willis Towers Watson plc, through counsel, hereby move the Court to compel Plaintiff to answer Defendants' Special Interrogatories within 14 days. A memorandum of points and authorities in support of the motion, the Certificate of Conference, and the Proposed Order are being submitted herewith.

Dated: July 1, 2021

Respectfully submitted,

/s/ E. Marcellus Williamson

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CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL RESPONSE TO SPECIAL INTERROGATORIES

I.

The Antitrust Division of the Department of Justice ("Division" or "government") is challenging the proposed merger of Aon plc ("Aon") and Willis Towers Watson plc ("WTW") (collectively, "Defendants") based on a dubious legal theory that bypasses traditional market definition principles and instead defines narrow markets based on what products or services appeal to "customer types." This theory fails where, as the government attempts to do here, antitrust markets are defined by what select "customers would *like* or *prefer*," rather than the reasonable interchangeability of products or services, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) (emphasis original); *see also United States v. Sungard Data Sys.*, 172 F. Supp. 2d 172, 193 (D.D.C. 2001), and the alleged markets are so nebulous that it is impossible to identify competitors, calculate market shares, or even conduct a rational antitrust analysis. *See Oracle*, 331 F. Supp. 2d at 1159 (declining to recognize software allegedly preferred by large enterprises in part because the government offered "no 'quantitative metric' that could be used to

determine the distinction between" products within and outside the market); *see also id.* at 1121 ("Product characteristics that are too vague do not meet section 7's requirement that the relevant market be 'well-defined.'") (citation omitted). In advancing its flawed theory, the government failed to plead fundamental facts pertaining to the alleged markets that Defendants need to understand in order to obtain relevant discovery and prepare for trial, which will occur on an expedited schedule. As set forth below, under these circumstances, the government should be compelled to answer in a timely manner the Special Interrogatories that Defendants proposed to fill in critical factual gaps in the Complaint.

II.

Normally, the government defines markets in its complaint in clear and objective terms. That is its legal burden, as Judge Boasberg made clear in the *Facebook* case just this week. *See Fed. Trade Comm'n v. Facebook, Inc.*, Civ. No. 20-3590, 2021 WL 2643627 (D.D.C. June 28, 2021) (dismissing complaint for failure to adequately allege monopoly power). For example, the government met its burden in *Federal Trade Commission v. Staples, Inc*. by alleging that the defendants were "the only meaningful options for some large customers" due to their "facilities in multiple regions of the country" that permitted "nationwide distribution." Complaint, ¶¶ 2, 9, *Fed. Trade Comm'n v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016) (No. 1:15-cv-2115), ECF No. 14-1. The government met its burden in *Federal Trade Commission v. Sysco Corporation* by alleging that "Sysco and US Foods are the only two broadline distributors with nationwide networks of distribution centers." Complaint ¶ 1, *Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015) (No. 1:15-cv-256), ECF No. 11-1. With those pleaded criteria, one could clearly tell who was in and who was out of the relevant markets, and why.

The government also normally pleads market shares that correspond to its market definition allegations. As the Court undoubtedly knows, contemporary merger analysis follows a burden-shifting framework developed by the D.C. Circuit in *United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990), the first step of which puts the burden on the government to define relevant markets and provide market share statistics that may, if the combined market shares of the merging parties are high enough, raise an initial, rebuttable presumption that the merger is anticompetitive. Because this is so fundamental, the government routinely pleads market shares, as well as the associated Herfindahl-Hirschman Index figures ("HHIs") (based on squaring market shares) that it uses in its own *Horizontal Merger Guidelines*. *See, e.g.,* Complaint ¶¶ 54-55, *United States v. Geisinger Health*, No. 4:20-cv-1383 (M.D. Pa. Aug. 5, 2020), ECF No. 1 ("Defendants' partial-acquisition agreement would operate in a market that is already highly concentrated, with an HHI of 3,979. A full merger between [the parties] would trigger the presumption of illegality under the Merger Guidelines by a wide margin, resulting in a post-merger HHI of 5,799 and an increase of 1,820"); Complaint ¶ 49, *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020) (No. 1:19-cv-01548), ECF No. 1 ("The proposed acquisition would result in more than a 350-point increase in HHI and a post-transaction HHI of more than 4,000 in this market.").

The government's Complaint in this matter is a clear departure from the norm. At every turn, it eschews specificity in favor of vagueness. This begins with the definitions of two markets that will be contested in this case: (1) "the market for property, casualty, and financial risk broking for large customers in the United States" (Compl. ¶ 24), and (2) the market for "health benefits broking for large customers in the United States" (*id*. ¶ 35).[1] With respect to each of these alleged

[1] The government pleads Clayton Act violations with respect to three other markets, but later acknowledges that remedies (divestitures) Defendants proposed to the Division and finalized

relevant markets, the government alleges that Aon, WTW, and Marsh & McLennan Companies, Inc. ("Marsh") are the only relevant competitors, even though indisputably numerous other broking firms compete for "large customers." For example, Arthur J. Gallagher & Co. is the number three commercial risk broker in the U.S. and the fourth largest in the world. The Complaint does not indicate whether Gallagher is in any alleged market. The same is true of Alliant Insurance Services, the fourth largest U.S. commercial risk broker. The Complaint is replete with similar gaps and ambiguities on which Defendants require clarity to understand the contours of the litigation and proceed to expedited discovery, including:

Definitions of the terms "large customer" and "large, complex customer" as used throughout the Complaint. The fundamental contention in the Complaint is: "It is appropriate to define relevant product markets around sales made to certain types of customers, such as large customers." Compl. ¶ 13. Yet the closest the Division ever comes to actually defining a "large customer" is in paragraph 25, which alleges that there are "several different metrics" for defining "large" and it "include[s] at least the firms in the Fortune 1000." Compl. ¶ 25. As this point may be outcome determinative, Defendants need an objective definition of "large customer" that can be tested in discovery.

Market shares of each firm identified as a competitor in each alleged market. The government's Complaint in this case has the exact infirmity that just led Judge Boasberg to dismiss the FTC's complaint against Facebook. It does not plead specific market shares, opting instead to plead that in the two key markets Defendants have a "combined market share [that] exceeds 40%[.]" Compl., ¶¶ 16, 19, 28, 30, 37. The Complaint contains no factual allegations as to what

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with binding sale agreements with divestiture buyers are sufficient to resolve those issues. Compl. ¶ 75.

Defendants' combined market shares actually are, what Aon's and WTW's respective shares are, what Marsh's shares are, or how the Division calculated those shares. It does not state whether there are other firms in the relevant markets, or what their shares are. Deprived of such basic facts, Defendants cannot even begin to deconstruct the basis for the "exceeds 40%" allegation, which we believe is dramatically overstated. The government also does not allege HHIs to evaluate market concentration as set forth in its own *Horizontal Merger Guidelines*.

The basis for excluding other major brokerage firms from the alleged relevant markets. The government fails to acknowledge Defendants' major competitors. For example, Gallagher, Alliant, Brown & Brown, Howden (EPIC & McGriff), and more compete in the alleged relevant market for property, casualty, and financial risk; and Gallagher, Alliant, Brown & Brown, Hub International, Lockton, and more compete in the alleged relevant market for health benefits broking. The Complaint is silent as to purported capability gaps between these and other firms on the one hand and Aon, WTW, and Marsh on the other or why any such gaps justify the exclusion of active competitors from the alleged markets.

The basis for the contention that "customers view Aon and WTW—along with Marsh—as offering key advantages over other firms" that other firms cannot replicate. In a case based on markets purportedly defined by "customer types," customer testimony plays a prominent role. A major reason the government's case failed in *Oracle* was because the court found the testimony of the Division's customer witnesses unconvincing. *Oracle*, 331 F. Supp. 2d at 1130-32; *see also, Fed. Trade Comm'n v. Arch Coal, Inc.,* 329 F. Supp. 2d 109, 145-46 (D.D.C. 2004). Here, the customers whose "view[s]" on which the Division is relying should be specified so discovery can be directed to them.

III.

Absent these and other crucial facts that support the Division's theories in this case, discovery and trial preparation cannot proceed. Under normal circumstances, Defendants would move to dismiss based on these pleading deficiencies under Rule 12(b)(6), or otherwise seek a more definitive statement under Rule 12(e). But neither is an option here because of the timing constraints Defendants face in this matter, due in large part to the Timing Agreement entered into with the Division. The Division seeks to use this to its advantage by filing a Complaint that lacks the requisite specificity, while also proposing an unnecessarily delayed and drawn out discovery schedule and refusing to provide Defendants with any clarity on the allegations in the Complaint outside of the government's preferred discovery timeframe. *See* Defs.' Mot. for Expedited Entry of Protective Order, ECF No. 34.

In *Oracle*, the parties faced the same issue. There, the government relied on similarly ambiguous "customer preference" allegations to support its alleged market definitions. And like here, the defendants sought to proceed to trial quickly. Ultimately, the issue was addressed pragmatically with the court ordering the government to answer an initial set of contention interrogatories. *See* Joint Case Management Statement and Order [Entered] ¶ 8a, *United States v. Oracle Corp.,* 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (No. C-04-00807 VRW) (attached as Ex. A to the Declaration of E. Marcellus Williamson ("Williamson Decl.")). The government's answers—provided just three weeks into the case—allowed for expedited discovery and efficient litigation of the case.

Defendants proposed the same approach in this case and provided the government with draft Special Interrogatories on June 22. By email dated June 23, the government advised that it opposed the Special Interrogatories (as it had in *Oracle*). Williamson Decl., Ex. B. The parties

subsequently met and conferred on this request, but the government stuck to its position that early interrogatories are inappropriate.

Defendants ask the Court to compel the government to respond to the Special Interrogatories, Williamson Decl., Ex. C, in order to achieve the same efficiencies achieved in *Oracle* and provide Defendants with the information they need to undertake expedited discovery. Defendants' request poses no burden to the government as every one of the Special Interrogatories seeks information that the government must know after 15 months of investigation. It is simply not plausible that, having filed suit, the government cannot provide facts that are essential in any merger challenge, such as market shares, HHIs, diversion ratios and purported "capability gaps" that supposedly distinguish Defendants and Marsh from other brokers.

CONCLUSION

For the reasons above, Defendants respectfully request that the Court enter the attached Order and order the Division to respond to the Special Interrogatories to provide clarifying facts around the core features of the Complaint and to allow Defendants to adequately respond.

Dated: July 1, 2021

Respectfully submitted,

/s/ E. Marcellus Williamson

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CERTIFICATE OF CONFERENCE

Pursuant to L. Civ. R. 7(m) and Fed. R. Civ. P. 37(a)(1), I hereby certify that Defendants' conferred in good faith with counsel for Plaintiff on June 30, 2021, in an attempt to reach agreement on providing answers to Defendants' interrogatories in lieu of the foregoing "DEFENDANTS' MOTION TO COMPEL RESPONSE TO SPECIAL INTERROGATORIES." As detailed in Exhibit B to my declaration, the parties have been unable to reach agreement on this matter.

/s/ E. Marcellus Williamson
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