

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	Civil Action No. 5:11-cv-00043
)	
v.)	
)	
GEORGE’S FOODS, LLC,)	
)	Judge Glen E. Conrad
GEORGE’S FAMILY FARMS, LLC,)	Chief United States District Judge
)	
and)	
)	
GEORGE’S, INC.,)	
)	
<i>Defendants.</i>)	

Declaration of Jill A. Ptacek

My name is Jill Ptacek. I am an attorney employed by the Antitrust Division of the United States Department of Justice (“the Division”). I am the lead attorney on the Division’s investigation of the acquisition by George’s, Inc. (“George’s”) of the Harrisonburg, Virginia, poultry processing assets operated by Tyson Foods, Inc. (“Tyson”). I provide this declaration to describe the materials submitted to the Court as exhibits to this Declaration and to identify the sources of those materials, where necessary.

1. Exhibit 1, attached hereto, is a copy of the United States’s Proposed Scheduling Order.
2. Tyson and George’s announced on March 18, 2011, that George’s intended to purchase Tyson’s Harrisonburg, Virginia, chicken processing facilities (“the proposed transaction”). The Division opened an investigation of the proposed transaction shortly thereafter. Because the purchase price of the transaction was less than the minimum reporting threshold under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, the parties had no statutory obligation to notify and provide information to the Department of Justice and the Federal Trade Commission before consummating the transaction. Consequently, I asked Tyson whether it would voluntarily agree to provide the Division with some notice prior to selling its assets to George’s.

3. On April 5, 2011, Michael Keeley sent me a letter in which Tyson agreed to provide notice 7 days prior to consummating the proposed transaction with George's. Michael Keeley is a partner with the law firm Axinn, Veltrop & Harkrider, LLP, which represented Tyson in conjunction with the proposed transaction. A true and correct copy of that letter is attached hereto at Exhibit 2.
4. On April 18, 2011, the Division issued civil investigative demands ("CIDs") to Tyson and George's regarding the proposed transaction. That same date, I sent a letter to Michael Keeley attaching the Tyson CID. In the cover letter, I explained briefly why the Division was issuing a CID to Tyson and reiterated the Division's desire to expeditiously investigate the competitive effects of the proposed sale of the Harrisonburg assets, including discussion of the applicability of the "failing division" defense, should Tyson be contemplating asserting that defense. A true and correct copy of that letter is attached hereto at Exhibit 3.
5. On April 21, 2011, Michael Keeley sent a letter to me responding to my April 18, 2011 cover letter to the Tyson CID. A true and correct copy of that letter is attached hereto at Exhibit 4.
6. On May 9, 2011, two days after Tyson and George's consummated the sale of the Tyson Harrisonburg assets to George's, George's submitted materials in response to the CID issued by the Division to the company on April 18. Exhibits 5 and 6, attached hereto, are true and correct copies of documents submitted by George's in response to the April 18 CID.
 - a. Exhibit 5: G0000929-G0000961, "Agreement," was produced by George's pursuant to the CID. This exhibit contains confidential business information and is to be filed under seal.
 - b. Exhibit 6: G0000886-G0000927, "Asset Purchase Agreement," was produced by George's pursuant to the CID. This exhibit contains confidential business information and is to be filed under seal.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on May 20, 2011

/s/
Jill Ptacek

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	Civil Action No. 5:11-cv-00043
)	
v.)	[PROPOSED]
)	SCHEDULING ORDER
GEORGE’S FOODS, LLC,)	
)	By: Glen E. Conrad
GEORGE’S FAMILY FARMS, LLC,)	Chief United States District Judge
)	
and)	
)	
GEORGE’S, INC.,)	
)	
<i>Defendants.</i>)	

In accordance with Fed. R. Civ. P. 16(b), it is **ORDERED** that the following schedule shall govern the proceedings in this action:

Initial Disclosures	May 27, 2011
Answer	May 27, 2011
Service of Party and Non-Party Discovery Demands	May 27, 2011
Complete Discovery on “Failing Division” Defense	June 7, 2011
Status Conference on “Failing Division” Defense	June 14, 2011
Notice Fact Depositions	June 16, 2011
Identify Fact Witnesses	July 5, 2011
Close of Fact Discovery	July 19, 2011

Expert Reports	August 2, 2011
Rebuttal Reports	August 9, 2011
Identification of Trial Exhibits	August 16, 2011
Expert Depositions Completed	August 23, 2011
Pre-trial Motions and Memoranda	August 26, 2011
Trial Date	September 12-16, 2011

ENTER:

Chief United States District Judge

AXINN | VELTROP | HARKRIDER | LLP

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April 5, 2011

VIA ELECTRONIC MAIL

Jill Ptacek, Esq.
United States Department of Justice
Antitrust Division
Liberty Square Building
450 5th St. N.W., Suite 8000
Washington, D.C. 20001

Re: Tyson Foods, Inc. – Acquisition of Harrisonburg, VA Poultry Complex by
George’s, Inc.

Dear Jill:

On or about March 21, 2011, the DOJ made initial inquiries to Tyson Foods, Inc. (“Tyson”) and George’s, Inc. (“George’s”) (together, “the parties”) about Tyson’s potential sale to George’s of Tyson’s Harrisonburg, VA poultry facility (the “potential sale”). You informed us that the Division opened a preliminary investigation into the potential sale and requested that Tyson provide the Division with certain information on a voluntary basis. Tyson has provided certain information to the Division in response to the Division’s request.

This letter confirms my statement to you last week that Tyson will provide to the Division at least seven days notice prior to consummating the potential sale, provided that neither of the parties is served with a Civil Investigative Demand or other compulsory process by the DOJ relating to the potential acquisition.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael L. Keeley", with a long horizontal flourish extending to the right.

Michael L. Keeley



U.S. Department of Justice

Antitrust Division

Liberty Square Building

*450 5th Street, N.W.
Washington, DC 20001*

April 18, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Michael L. Keeley, Esq.
Axinn Veltrop Harkrider, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: George's Acquisition of Tyson Foods' Harrisonburg Plant – Civil
Investigative Demand No. 26480

Dear Mr. Keeley:

Enclosed with this letter is a Civil Investigative Demand (“CID”) issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14, requiring your client, Tyson Foods, Inc. (“Tyson”) to produce certain documents and information specified in the annexed Schedule. The CID seeks this material as part of an Antitrust Division investigation of the competitive effects of the potential sale by Tyson of its Harrisonburg, Virginia, chicken processing plant, and related assets, to George's, Inc.

As you are aware, the Division opened its investigation shortly after Tyson announced on March 18 that it had entered into a letter of intent with George's. The Division is investigating the competitive impact of the transaction – which would reduce from three to two the number of integrators with chicken processing facilities in the Shenandoah Valley area.

It is our understanding that the parties have not reached a definitive agreement for the asset sale but that a final deal may occur by the end of April. In our initial conversations, I requested that Tyson provide the Division notice prior to closing the transaction so that the Division and the parties could move forward under a reasonable schedule. In your April 5, 2011 letter to me, you stated that Tyson would provide the Division at least seven days notice prior to consummating a sale to George's, provided, however, “that neither of the parties is served with a Civil Investigative Demand or other compulsory process by the DOJ relating to the potential acquisition.”

Although Tyson has not provided us information relating to the potential competitive effects of the transaction, you have asserted that the Harrisonburg facility recently has not been profitable. As I have explained, the Division is willing to evaluate a claim by Tyson that the Harrisonburg processing complex constitutes a “failing

division” under Section 11 of the Horizontal Merger Guidelines. Under that provision, a merger that otherwise would cause competitive harm may not be likely to enhance market power if imminent failure otherwise would cause the assets to exit the relevant market in the near future. For that provision to hold, (1) the “failing division” must have had a persistently negative cash flow (applying proper accounting tests), and (2) the owner must have made unsuccessful good faith efforts to shop the assets to a firm that poses a less severe danger to competition than does the proposed acquisition.

To this end, I have repeatedly encouraged you voluntarily to provide us with additional financial information showing that the Harrisonburg plant has persistently operated at a loss and with evidence that Tyson has appropriately shopped the Harrisonburg assets. The information you have provided to date is insufficient for the reasons we have discussed. We remain willing to consider any additional information supporting a “failing division” claim that you wish to provide, as well as evidence that the proposed transaction is unlikely to substantially affect competition for grower services.

Your delay in responding to our requests for information has complicated our effort to resolve this matter as quickly and efficiently as possible. Given that a final deal with George’s may be imminent, the Division has concluded that issuing a CID is necessary to complete our investigation and to take any action that may be required. Your assertion in your April 5 letter that issuance of the CID will result in Tyson rescinding its agreement to provide us notice prior to closing any deal is not productive. We continue to believe that it is in the best interest of all involved to have the investigation proceed under a reasonable timing agreement and, therefore, renew our request that Tyson agree to provide us with appropriate notice prior to closing the acquisition. And, as you are aware, closing does not preclude the Division from challenging a transaction ultimately determined to lessen competition. We look forward to your response on this issue.

As you will note, I am the designated Deputy Custodian of the documentary materials sought from Tyson. After reviewing the CID, please feel free to contact me to discuss possible modifications to either the scope of the CID or the timing of Tyson’s compliance with the CID. Our intent is to ensure that the Division receives sufficient information to expeditiously assess the competitive effects of the proposed acquisition, with the least burden to Tyson.

As noted on the CID, the due date for compliance is May 9, 2011. I also call your attention to the certificate of compliance form printed on the reverse side of the CID. This certificate must be completed by all persons responsible for producing the documentary material called for by the CID and must accompany the documents and information you submit. To minimize your inconvenience in complying with the CID and to assist us, we propose that you submit copies of all documents by mail or messenger to me at the Antitrust Division, Transportation, Energy, and Agriculture Section, 450 Fifth Street NW, Suite 8000 Washington, DC 20530. If you elect not to follow this procedure, please contact me as soon as possible.

If you have any questions regarding the CID, please contact me at (202) 307-6607.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jill Ptacek".

Jill Ptacek
Attorney
Transportation, Energy &
Agriculture Section

Enclosure

cc: David L. Van Bebber, Esq.

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**CONFIDENTIAL INFORMATION
PROTECTED FROM DISCLOSURE BY
15 U.S.C. § 1313**

April 21, 2011

VIA E-MAIL

Jill Ptacek, Esq.
United States Department of Justice
Antitrust Division
Liberty Square Building
450 5th St. N.W., Suite 8000
Washington, D.C. 20530

Re: Civil Investigative Demand No. 26480 - Tyson Foods, Inc.

Dear Jill:

This letter responds to your letter to me dated April 18, 2011 regarding the potential sale of assets in Harrisonburg, VA, by Tyson Foods, Inc. ("Tyson") to George's Inc. ("George's").

I was quite surprised to receive a CID, especially one that is a full-blown Second Request and whose potential compliance costs may approach, if not exceed, the \$3.1 million size of the transaction. The issuance of a massive CID in connection with a transaction this small is entirely disproportionate. Indeed, the costs being imposed on Tyson by the CID can only make a money-losing plant even more inefficient.

In addition, it is odd that the Division would even consider seeking to prevent a transaction that shrinks Tyson and grows one of Tyson's smaller competitors in the sale of chicken to consumers. It would indeed be ironic if the Division used its resources to prevent a smaller firm like George's from becoming a more potent competitor.

Moreover, I am disappointed by some of the characterizations in your letter, and I write to clarify the facts.

Jill Ptacek, Esq.
April 21, 2011
Page 2

First, your letter incorrectly suggests that Tyson has failed to live up to its obligations to provide information to the Division. As you know, the potential transaction is not subject to the Hart-Scott-Rodino Act's filing requirements because of its small size – again, just \$3.1 million for the property, plant and equipment. As such, Tyson's cooperation with the Division's preliminary information and document requests was entirely voluntary.

Despite the fact that Tyson was under no obligation to cooperate with the Division's preliminary investigation, Tyson *immediately* responded to the Division's request for information and, over a two-week period, provided to the Division documents regarding the growers that provide chickens to Tyson's Harrisonburg facility, the capacity and capacity utilization of the Harrisonburg facility, detailed plant-level financial information about the Harrisonburg facility, and business documents outlining Tyson's strategic options for the Harrisonburg plant. Tyson and George's have voluntarily provided ample information for the DOJ to recognize the benefits of the proposed transaction both to consumers and growers.

Second, you assert in your letter that the sale by Tyson of its Harrisonburg plant to George's "would reduce from three to two the number of integrators with chicken processing facilities in the Shenandoah Valley area." Tyson does not know the factual basis of this statement, but selling the Harrisonburg plant to George's is meant to solidify the future of the plant, its growers, and its hundreds of employees. Selling the plant to George's will increase, not decrease, competition. Tyson also takes issue with the suggestion that the Division has established the contours of a relevant antitrust market.

Third, you have characterized my April 5 letter – now two weeks old – as having merely "asserted" that the issuance of a CID would result in Tyson rescinding its agreement to provide seven days advance notice of consummating the sale to George's. To be clear, in our conversations I *explicitly* conditioned our agreement to provide advance notice of closing on the Division's not issuing a costly CID to Tyson or George's. I repeated that condition in my letter, and at no time did the Division object.

As you know, Tyson already has been burdened with other CIDs from the Division within the last six months, including an overly broad CID issued in connection with a proposed transaction in which Tyson has no interest whatsoever. Compliance with the Division's CIDs has already cost Tyson hundreds of thousands of dollars. Given this recent and costly history, Tyson reasonably sought to condition its voluntary cooperation with the Division's preliminary investigation of this small transaction on the avoidance of another costly and burdensome CID. Until I received your recent letter, the tenor of our conversations with the Division had suggested that continued voluntary cooperation would be acceptable to the Division. The tone of that letter, however, coupled with the issuance of yet another CID, has made it clear that the Division has no wish to continue to engage on a voluntary basis. As a result, Tyson is no longer obligated to provide the Division with any notice prior to consummating the sale of the Harrisonburg facility to George's.

Jill Ptacek, Esq.
April 21, 2011
Page 3

Despite our differences as to the appropriateness of a CID in this matter, we remain hopeful that we can convince the Division that the sale of the Harrisonburg plant to George's is in the best interests of consumers, employees, and growers in the Harrisonburg area. We welcome the opportunity to explain to the Division why any effort to prevent the consummation of the sale would be inappropriate. Please let me know if such a meeting would be of interest to the Division.

Sincerely,

A handwritten signature in blue ink that reads "Michael L. Keeley". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael L. Keeley

cc: William Stallings, Esq.

Exhibit 5
Filed Under Seal

Exhibit 6
Filed Under Seal