

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

SYSCO CORPORATION,

Petitioner,

v.

GLAZ LLC, POSEN INVESTMENTS LP,
and KENOSHA INVESTMENTS LP,

Respondents.

Case No. 1:23-cv-01451

Judge: Martha M. Pacold

Magistrate Judge: Gabriel A. Fuentes

**MOTION TO DISMISS AMENDED PETITION WITHOUT PREJUDICE AND STAY
ACTION**

In a case of blatant forum shopping, Sysco rushed to this Court to file a challenge to a TRO granted by a New York-seated arbitration tribunal, which it knew was days from being mooted. Sysco then violated Federal Rule of Civil Procedure 15(d) by filing a so-called “amended petition” once the arbitral tribunal vacated the TRO and entered a preliminary injunction. Sysco is now relying on the (improper) pendency of this case to tell a New York judge – sitting in the New York seat of this New York law arbitration – that the New York court should not proceed to confirm the award and should instead transfer oversight of the arbitral proceeding to this Court because Sysco was “first to file” here. And to top off this outrageous conduct, it is not even clear that this Court has subject matter jurisdiction in the first place.

Respondents are not standing on a procedural technicality. Once the Tribunal issued its preliminary injunction and vacated the TRO that was the subject of Sysco’s original petition, Respondents appropriately filed to confirm the preliminary injunction in New York Supreme Court – the seat of the arbitration. At that point, there was no operative proceeding in this Court, as the initial petition here was mooted by the Tribunal’s vacatur of the TRO. To convert its case before this Court into one challenging the preliminary injunction, Sysco would have needed

either to withdraw its petition and file a new one, or else seek leave under Rule 15(d) to file a supplemental pleading addressing new, post-suit developments – meaning there would not have been any operative proceeding here when the New York confirmation action was filed. Sysco, however, did neither of these. Instead, Sysco proceeded improperly – unilaterally and without seeking leave – with a so-called “amended” petition under Rule 15(a), so it could argue to the New York court that it was first to file in Illinois.

Sysco’s motives are clear, as shown by its concurrent filing to reassign this case to Judge Durkin. *See In re Broiler Chicken Antitrust Litig.*, No. 16-cv-08637 (N.D. Ill. Mar. 24, 2023), ECF No. 6487. Since 2019, Respondents have provided Sysco over \$140 million in capital collateralized by the proceeds of Sysco’s antitrust claims in several cases, including the *Broilers* litigation pending before Judge Durkin. Following an initial breach of the parties’ financing agreement, admitted by Sysco and resolved by negotiated settlement, Sysco attempted to breach the parties’ agreement again and was enjoined from doing so by the Tribunal. By seeking to reassign the parties’ dispute over that arbitral award to Judge Durkin, Sysco is trying to turn a straightforward New York debtor-creditor dispute into a sideshow in Judge Durkin’s *Broilers* case. Sysco’s hope is that Judge Durkin will be irritated by this wrinkle in resolving some of those cases and take some precipitate action. Sysco’s effort is self-evidently misguided, as large portions of the cases pending before Judge Durkin have been assigned away by their original owners, including Sysco, and so the *Broilers* litigation will proceed apace regardless how the parties’ dispute plays out. Moreover, Sysco’s effort to complicate the straightforward confirmation of an arbitral award won’t work if this case is where it belongs – in New York at the seat of the arbitration.

This Court should not countenance this gamesmanship. Pursuant to Rule 15(d), it should dismiss Sysco's so-called "Amended Petition" as being filed improperly, without prejudice to Sysco seeking leave to file a supplemental petition as Rule 15(d) requires. Until resolution of a properly filed Rule 15(d) motion for leave, the Court also should stay any deadlines regarding Sysco's now moot, original petition to vacate the TRO. Once Sysco properly seeks leave to file a supplemental petition, and if the Court grants leave, the parties can meet and confer regarding an order of dismissal for Sysco's first petition. The parties also can negotiate a briefing schedule for any of Respondents' forthcoming motions – either to dismiss for lack of subject matter jurisdiction or to transfer the case to the Southern District of New York.

Sysco has informed Respondents that it does not consent to this motion.

BACKGROUND

This matter arises out of a pending debtor-creditor arbitration proceeding before an eminent and highly experienced New York-seated arbitration tribunal. That tribunal, applying New York law, issued a temporary restraining order against Sysco further dissipating Respondents' collateral in December 2022. Sysco declined the Tribunal's invitation to contest the TRO and sat on its hands for months. In February 2023, following extensive briefing and lengthy reports from seven expert witnesses, the Tribunal conducted a two-day evidentiary hearing concerning the issuance of a preliminary injunction.

On March 2, 2023, Sysco inquired of the Tribunal about its timing for the release of its preliminary injunction decision, and the Tribunal responded the next day that it intended to release its decision, at the latest, within 14 days – meaning Sysco knew that the TRO would be vacated before any court proceedings could be heard. Nevertheless, after doing nothing about the TRO since December 2022, Sysco proceeded to file a petition challenging the TRO on March 8, 2023. *See* ECF No. 1. Two days later, consistent with its guidance to the parties, the Tribunal

released its 78-page, reasoned decision vacating the TRO and granting a preliminary injunction. The Tribunal is now engaged in setting the schedule for a hearing on the permanent injunction.

The background to this dispute is that Sysco entered into a series of financing arrangements with Respondents pursuant to which Respondents advanced over \$140 million in capital to Sysco since 2019, bolstering Sysco's liquidity during the COVID-19 pandemic. The collateral for those financings was Sysco's expected proceeds from a series of antitrust cases against Sysco's suppliers in the food industry, including the *Broilers* MDL pending before Judge Durkin in this District. Using litigation matters as collateral for financing is a commonplace occurrence in general, and doubly so in antitrust cases as they are freely assignable.

Indeed, as the antitrust cases proceeded, Sysco faced pressure from its customers – indirect purchasers of the goods at issue – to assign the claims to them as it became apparent that those claims were likely to have significant value. For example, Pilgrim's Pride has pleaded guilty to criminal price fixing and paid a fine of more than \$100 million. *See* Plea Agreement, *United States v. Pilgrim's Pride Corp.*, No. 20-cr-00330 (D. Colo. Feb. 23, 2021), ECF No. 58.

Notwithstanding that assignment of Respondents' collateral was explicitly (and understandably) prohibited by the financing agreement absent Respondents' consent, Sysco's business units proceeded to assign billions of dollars of purchases to their customers. Once Sysco's in-house lawyers and Respondents discovered the assignments and the facial breaches of the financing agreement, Sysco sought a settlement and a release for those breaches. Ultimately, after the parties discussed and Sysco rejected a complete assignment of the remaining claims to Respondents, the settlement took the form of Sysco pledging a very substantial part of the proceeds from the remaining unassigned claims to Respondents. Alive to the misalignment in interests that this would cause, Sysco also agreed that Respondents would have a limited consent

right to settlements to avoid Sysco settling too low – now that it no longer had as much incentive to litigate. This unprecedented approach for Respondents was made necessary because of Sysco’s prior breaches – and it was a condition Sysco entered into freely and willingly.

Months later, under pressure from its suppliers – the defendants in the food antitrust cases – and without adequate incentive to keep litigating, Sysco proposed to settle some of the underlying cases at a substantial undervalue. Not only did Respondents hold the view that the settlements were unreasonably low, based on their significant experience in and exposure to the underlying cases (including their knowledge of other settlement levels in these cases), but so too did Sysco’s outside counsel.

Rather than heed Respondents’ and counsel’s advice, or comply with the contractual consent provision it had just agreed to in exchange for a release of its prior breaches, Sysco decided to go to war, presumably so that it could tell its suppliers that the question of settling with them is out of its hands. In December, after the arbitration was underway, Sysco provided execution copies of the proposed settlement agreements and threatened to complete those settlements without the contractually required consent absent an order from the Tribunal. Respondents promptly moved for a TRO and preliminary injunction, which led to the Tribunal issuing a TRO on December 14, 2022.

On March 8, 2023 – nearly three months after the TRO, a month after the preliminary injunction hearing, and just days before the Tribunal indicated it would rule on the preliminary injunction – Sysco initiated this litigation by filing its petition to vacate the TRO on supposed “due process” grounds. *See* ECF No. 1, ¶¶ 1, 16, 57. The Tribunal’s preliminary injunction award – released two days later – predictably mooted Sysco’s entire case. *See* ECF No. 19-3. In an effort to cure this jurisdictional defect, instead of filing a new petition addressed to the new

arbitration award, Sysco filed what it styled an “amended” petition on March 20, 2023. Sysco’s second petition effectively withdraws its prior challenge to the vacated TRO and instead seeks vacatur of the preliminary injunction. Sysco also concedes that supposed violations of its “due process rights . . . provide[] extremely limited (if any) grounds for a court to vacate an arbitration award,” and so raises, primarily, a “public policy” defense. ECF No. 18, ¶ 64. Sysco did not seek leave of Court or confer with counsel for Respondents before filing its second petition.

On March 10, 2023, Respondents moved to confirm the preliminary injunction award in the New York Supreme Court, because the seat of the arbitration is New York. *See Glaz LLC v. Sysco Corp.*, No. 651289/2023 (N.Y. Sup. Ct. Mar. 10, 2023), NYSCEF Doc. 1. Sysco then removed the New York action to the Southern District of New York on March 24 and filed a pre-motion letter seeking leave to file a motion to transfer to the Northern District of Illinois. *See Glaz LLC v. Sysco Corp.*, No. 23-cv-02489 (S.D.N.Y. Mar. 24, 2023), ECF No. 5.

ARGUMENT

A party may file an amended pleading under Rule 15(a) when the amendment “add[s] allegations concerning . . . pre-complaint events.” *Saint Anthony Hosp. v. Eagleson*, 40 F.4th 492, 517 (7th Cir. 2022); 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1504 (3d ed. 1998) (Rule 15(a) amendments “relate to matters that occurred prior to the filing of the original pleading”). Here, by contrast, Sysco’s “amended” petition challenges a preliminary injunction that *post*-dates its original petition. As explained above, the original petition was filed on March 8, 2023 and challenged the TRO that the Tribunal issued in December 2022. The “amended” petition dated March 20, 2023 seeks to vacate the preliminary injunction award, issued on March 10, which vacated the TRO. As such, the second petition “set[s] out [a] transaction, occurrence, or event that happened after the date of the [original petition],” and so is properly considered a “supplemental pleading” under Rule 15(d). *See also*

Saint Anthony Hosp., 40 F.4th at 517, 526 (supplemental pleadings “concern[] . . . post-complaint events”).

Importantly, under the plain text of Rule 15(d), a party must seek leave of Court before filing a supplemental pleading. *See* Fed. R. Civ. P. 15(d) (“On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading”); Wright & Miller § 1504 (“all supplemental pleadings require leave of court under Rule 15(d)”). Yet Sysco did not seek leave of court to file its second petition, as required, and so its pleading is unauthorized. The Court should therefore dismiss the amended petition without prejudice so Sysco can properly seek the Court’s leave. Until resolution of a properly filed Rule 15(d) motion for leave, the Court also should stay any deadlines regarding Sysco’s moot petition to vacate the TRO. There is little point in litigating an obviously moot motion before the parties settle on the operative pleadings that will guide the Court’s consideration of the parties’ dispute.

Once Sysco seeks leave to file its supplemental petition under Rule 15(d), Respondents could respond to Sysco’s arguments as to why a supplemental pleading is appropriate. If the Court were to grant leave, the parties then could meet and confer regarding a stipulation of dismissal for Sysco’s original petition, and a briefing schedule for further motions practice – for example, any jurisdictional objections or a motion to transfer the litigation to the Southern District of New York.¹

¹ In the alternative, if the Court concludes that Sysco’s “Amended Petition” was properly filed under Rule 15(a), Respondents respectfully request that the Court construe this motion as a motion for an extension and direct Respondents to file a responsive pleading within 45 days, by May 4, 2023. If the Court concludes that Sysco’s motion is proper under Rule 15(a), it would not need to enter any order regarding Sysco’s original petition, which would be superseded as a matter of law. *See, e.g., 188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir. 2002). The proposed schedule provides a reasonable length of time for Respondents to respond to the issues raised in Sysco’s supplemental petition, and further accounts for parallel litigation and motions practice pending between the parties in the Southern District of New York.

CONCLUSION

For the foregoing reasons, the Court should dismiss Sysco's "Amended Petition to Vacate" without prejudice, and stay any deadline to respond to Sysco's original petition to vacate the TRO, pending disposition of any motion for leave under Rule 15(d).

Dated: March 27, 2023

Respectfully submitted,

By: /s/ Richard Prendergast
Richard Prendergast
Michael Layden
CROKE FAIRCHILD DUARTE & BERES
191 N. Wacker Dr., 31st Floor
Chicago, IL 60606
(312) 641-0881 (Telephone)
rprendergast@crokefairchild.com
mlayden@crokefairchild.com

Derek T. Ho (*pro hac vice forthcoming*)
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street NW, Suite 400
Washington, D.C. 20036
(202) 326-7900 (Telephone)
dho@kellogghansen.com

Elizabeth Snodgrass (*pro hac vice
forthcoming*)
THREE CROWNS LLP
Washington Harbour
3000 K Street, N.W., Suite 101
Washington, D.C. 20007
(202) 540-9492 (Telephone)
liz.snodgrass@threecrownsllp.com

*Attorneys for Respondents Glaz LLC, Posen
Investments LP, and Kenosha Investments LP*

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2023, I caused a true and correct copy of the foregoing document to be filed electronically. Notice of the filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Dated: March 27, 2023

By: /s/ Richard Prendergast
Attorney for Respondents