IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et al.*,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 1:15-cv-00256 (APM)
SYSCO CORPORATION, USF HOLDING CORP., and US FOODS, INC.	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MAKE PUBLIC DECLARANT NAMES AND AFFILIATIONS

INTRODUCTION

Defendants Sysco and US Foods submit this memorandum in support of their motion to make public the names and corporate affiliations of the declarants relied on by the Federal Trade Commission in support of its motion for a preliminary injunction.

Over the course of their 14-month investigation, Plaintiffs secretly amassed declarations from 92 individuals who are associated with customers or competitors of Sysco and US Foods. Until now, discovery has been completely one-sided, and Defendants have been kept in the dark about who the FTC was talking to and what they were saying. On February 20, 2015, the FTC filed its preliminary injunction motion and attached, under seal, both the declarations and an exhibit list identifying the names and affiliations of the declarants. As a condition of obtaining access to the pleadings against them, Plaintiffs required Sysco and US Foods to agree to the current Protective Order, which provides that "[t]he identity of a third party submitting . . . Confidential Material shall . . . be treated as Confidential Material for the purposes of this Order where the submitter has requested such confidential treatment."[1] That provision should not operate to conceal the identities of government witnesses in litigation. Yet, to date, Sysco and US Foods have not been told the name of a single witness against them.

Both Defendants and the public have a right to know the names and affiliations of the persons who have submitted declarations, which Plaintiffs plan to offer into evidence as sworn testimony. First, this basic information should be public under the law in this district and the FTC's own rules. Indeed, in similar merger injunction cases both here and before the FTC's own administrative law judge, witness names have been conspicuously noted on dockets, in exhibit lists, and decisions. Second, preventing Defendants from knowing who is testifying against them

[1] The declarations themselves contain little or no "Confidential Material." Defendants reserve all rights to contest the "Confidential Material" designation of any declaration.

severely impairs their ability to gather evidence from the relevant business people who interact with these declarants, which in turn is necessary to test the declarations through cross-examination, identify relevant counterevidence, and otherwise mount a proper defense. Third, Plaintiffs' arguments for keeping the declarant names and affiliations confidential are unavailing.

Accordingly, the names and affiliations of Plaintiffs' witnesses should no longer be hidden from Defendants and the public.

ARGUMENT

I. DECLARANT NAMES AND AFFILIATIONS ARE NOT PROTECTED INFORMATION

Declarant names and affiliations do not fall within any of the categories of information that the law protects from public disclosure. Rule 26(c)(1) of the Federal Rules of Civil Procedure provides that the Court may issue an order to protect a person from "annoyance, embarrassment, oppression, or undue burden or expense," including "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." None of these justifications supports concealing the declarants' names and affiliations here. *See Bryant v. Mattel, Inc.*, No. 04-cv-09049, 2007 WL 5416684, at **3-5 (C.D. Cal. Feb. 6, 2007) (witness names not confidential). Unsurprisingly, the names of witnesses in merger injunction cases have *routinely* been made public in this Court and others, and there is no basis to distinguish declarants and live witnesses where Plaintiffs are seeking to use declarations in lieu of live testimony. *See, e.g.*, *FTC v. CCC Holdings Inc.*, No. 1:08-cv-02043, Dkt. 60-1 (D.D.C. 2009) (Collyer, J.); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1072 (N.D. Ill. 2012); *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 121-22 (D.D.C. 2004) (Bates, J.); *FTC v. Libbey*, Inc., 211 F. Supp. 2d 34, 48 (D.D.C. 2002) (Walton, J.); *FTC v.*

Staples Inc., 970 F. Supp. 1066, 1077 (D.D.C. 1997) (Hogan, J.).[2]

II. DEFENDANTS AND THE PUBLIC WOULD BE PREJUDICED WITHOUT ACCESS TO DECLARANT NAMES AND AFFILIATIONS

The public has a right to know the basis of this Court's decision and the evidence before it. Indeed, there is a "strong presumption in favor of public access to judicial proceedings," including judicial records like the declarations offered by Plaintiffs. *In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, 6 (D.D.C. 2013) (internal quotations and citations omitted). And the presence of a government entity in the litigation "enhances the need for public access to judicial records." *Id.* at 7. Plaintiffs – all government entities – have offered declarants' written testimony in support of their attempt to block Sysco and US Foods from closing a highly publicized merger, and yet they ask this Court to rely on that testimony in secret.[3]

Moreover, fundamental fairness dictates that these names and affiliations be disclosed. Plaintiffs have had more than a year of one-sided and hidden discovery. Defendants now have a very limited period for fact discovery to catch-up. To mount a defense, outside counsel must immediately begin communicating with Sysco and US Foods employees who interact with the declarant-customers and compete against the declarant-competitors on a day-to-day basis in the real world. Absent that direct, candid give-and-take and feedback from the people on the ground who know these issues best, Defendants' ability to test the witnesses' statements against Sysco and US Foods will be severely hamstrung. For example, Sysco and US Foods employees have

[2] Moreover, many protective orders in merger injunction cases do not keep identities confidential. *See, e.g.*, *United States v. US Airways Group, Inc.*, No. 1:13-cv-01236, Dkt. 55 (D.D.C. 2013) (Ex. A); *FTC v. OSF Healthcare Sys.*, No. 3:11-cv-50344, Dkt. 115 (N.D. Ill. 2012) (Ex. B); *FTC v. Whole Foods Market, Inc.*, No. 1:07-cv-01021, Dkt. 100 (D.D.C. 2007) (Ex. C).

[3] At least with respect to disclosing names and affiliations, the strong presumption in favor of public access is not rebutted by any of the factors identified in *United States v. Hubbard*, 650 F.2d 293, 317-24 (D.C. Cir. 1980).

first-hand knowledge of core issues such as (1) whether declarant-customers threatened or actually switched their business to a competitor; (2) which competitors could or do, in fact, service the declarant-customer; and (3) what documents may be of relevance on these issues. Two in-house counsel who have no involvement in business decisions, marketing, or pricing having access to the declarants' names simply cannot provide a substitute for that vital resource. *See, e.g., Arvco Container Corp. v. Weyerhaeuser Co.*, No. 1:08-cv-548, 2009 WL 311125, at *6 (W.D. Mich. Feb. 9, 2009); *Defazio v. Hollister, Inc.*, No. 04-cv-1358, 2007 WL 2580633, at *2 (E.D. Cal. Sept. 5, 2007).

III. PLAINTIFFS' ARGUMENTS IN FAVOR OF CONTINUED SECRECY ARE UNAVAILING

Plaintiffs' argument that declarant names should be kept from the public based on vague and unsubstantiated concerns of retaliation – which Plaintiffs themselves recognize may not be real[4] – is groundless. First, this purported concern is not a cognizable legal justification for concealing declarant identities in merger challenges. Second, even if it were, Plaintiffs have failed to make any particularized showing that the retaliation concern is legitimate. Many customers have publicly opined on the merger (for and against), and Defendants have made no attempt to retaliate against those voicing reservations. On the contrary, Sysco and US Foods cannot risk losing valuable customers, who would swiftly punish any attempt at retaliation by switching their business to competitors. *See In re Aetna Inc. Securities Litig.*, MDL 1219, 1999 WL 354527, at **5-6 (E.D. Pa. May 26, 1999) (refusing to credit unsubstantiated retaliation concerns in motion for protective order).

Third, the fact that the declarations were afforded confidential treatment during the investigatory stage has no bearing on whether the declarants' names and affiliations remain

[4] *See* Joint Status Report at 15, No. 15-cv-00256 (D.D.C.), Dkt. 29.

protected *after* the government has offered them into evidence *in litigation*. Indeed, under Rule 3.45(b) of the FTC's own Rules of Practice, information can be hidden from the public record only if "its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting in camera treatment." 16 C.F.R. § 3.45(b).[5] Moreover, the information in question must be "sufficiently secret and sufficiently material to [the applicant's] business that disclosure would result in serious competitive injury." *See In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, at *6 (Dec. 23, 1999). Here, Plaintiffs have made no attempt to meet that standard.

Nor can they. While Plaintiffs point to a purported "chilling effect" if witness names are disclosed, the names of third-parties who provide information to the FTC during its investigations are made public as a matter of course in subsequent litigation, even in the FTC's own administrative court. *See, e.g.*, FTC Counsel's Post-Trial Findings of Fact and Conclusions of Law, *In the Matter of ProMedica Health Sys., Inc.*, FTC Dkt. No. 9346 (Sept. 20, 2011), at 173-88, 207-13; *In the Matter of Ardagh Group S.A.*, FTC Dkt. No. 9356, 2014 WL 333626 (Jan. 16, 2014).[6] And, in any event, the FTC can compel the production of documents and testimony through its subpoena power. For these reasons, Plaintiffs should not be permitted to shroud in secrecy the identity of the witnesses against Sysco and US Foods.

[5] We note that administrative rules and procedures on confidentiality designations do not preempt federal law limiting the scope of permissible protective orders.

[6] Transparency is also a hallmark of administrative proceedings. *See, e.g.*, *In the Matter of OSF Healthcare Sys.*, FTC Dkt. No. 9349, 2012 WL 1355598, at *2 (Mar. 29, 2012) ("The [FTC] recognizes the 'substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.'"). Surely, the FTC did not – and could not – guarantee witnesses that their names and affiliations would remain confidential after their testimony was introduced into evidence in litigation.

Dated: March 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2015, with the Court's permission, I filed the foregoing *Defendants' Memorandum of Points and Authorities in Support of Motion to Make Public Declarant Names and Affiliations* with the Court using the CM/ECF system, which will automatically send electronic mail notification of such filing to the CM/ECF registered participants.

/s/ *Joseph F. Tringali*
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