

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

SYSCO CORPORATION,
USF HOLDING CORP., and
US FOODS, INC.

Defendants.

Civil Action No. 1:15-cv-00256 (APM)

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION TO MAKE PUBLIC DECLARANT NAMES AND AFFILIATIONS**

BACKGROUND

Plaintiff Federal Trade Commission (“FTC” or “Commission”) and the States (collectively “Plaintiffs”) conducted a non-public investigation of the proposed Sysco/US Foods merger pursuant to the authority granted to it by the Congress of the United States. *See* 15 U.S.C. §§ 41-58, as amended. The governing statute and regulations require the Commission to maintain the confidentiality of any information submitted to it pursuant to subpoena, or voluntarily in lieu of subpoena. *See* 15 U.S.C. § 18a(h); 15 U.S.C. § 46(f); 15 U.S.C. § 57b-2(f); 16 C.F.R. §§ 4.10, 4.11. The Plaintiff States, through their own state confidentiality statutes and by agreement with the FTC to abide by the confidentiality statutes and rules governing the Commission, are required to maintain the same confidentiality.

Relying on these confidentiality protections, many third parties—broadline foodservice distributors, customers, and others—agreed to participate openly and candidly in Plaintiffs’ investigation. Third parties, particularly Defendants’ customers, were often nervous about participating because they feared retaliation if Defendants learned that they had complained about the proposed merger. *See* Quillian Decl. ¶¶ 5, 7 (GX5). Nevertheless, customers and other third parties agreed to participate in the investigation by providing declarations.

The Protective Order already entered in this case, which is substantively identical to the protective order in the administrative proceeding (*see* 16 C.F.R. § 3.31, Appx. A), recognizes the need to protect the identities of declarants. Protective Order Governing Confidential Information ¶ 2 (Dkt. 25, Feb. 23, 2015) [“Protective Order”]. Defendants’ attempt to modify the Protective Order to disclose publicly the declarants in this case (“Defendants’ Motion”) is inconsistent with the protective orders entered in similar merger cases in this court. It also carries significant risk to these third parties and Plaintiffs’ ability to conduct future investigations. Modifying the Protective Order is also unnecessary for Defendants to litigate this case or for the public’s

understanding of these proceedings. Thus, Defendants' request should be denied.

DISCUSSION

Defendants' submission is a motion to modify the existing Protective Order. Defendants, as the party seeking modification of the Protective Order, "bear[] the burden of showing that good cause exists." *Infineon Technologies AG v. Green Power Technologies Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005) (citation omitted). "[A] continuing objection to the terms of an order does not constitute good cause to modify [] a protective order." *Id.* Defendants have not shown good cause to modify the Protective Order.

I. Individual and Business Names Are Protectable Information

Declarant identities and business names fall within the categories of information that the law protects from disclosure. In fact, courts in this District have recognized the importance of protecting from disclosure the individual and business names of third parties in merger cases. The protective orders in *Ardagh*, *CCC Holdings*, and *Staples* each contains provisions stating that the identities of third parties who participated in Plaintiffs' investigation are presumptively confidential. Protective Order ¶ 2 (Dkt. 9), *FTC v. Ardagh Group S.A.*, No. 13-cv-1021 (BJR) (D.D.C. July 9, 2013) (GX1); Protective Order ¶ 2 (Dkt. 30), *FTC v. CCC Holdings, Inc.*, No. 08-cv-2043 (RMC) (D.D.C. Dec. 9, 2008) (GX2); Protective Order ¶ 2 (Dkt. 26), *FTC v. Staples, Inc.*, No. 97-cv-701 (TFH) (D.D.C. Apr. 16, 1997) (GX3).¹

The case on which Defendants rely for the proposition that declarants' names are not

¹ That Defendants can cite protective orders in three merger cases that do not contain explicit provisions protecting third-party identities is not surprising. *See* Mem. at 3 n.2. Protective orders are flexible and designed to accommodate the relevant interests in each case. *See, e.g., U.S. v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C. Cir. 1999) ("Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise") (citations omitted). Moreover, the protective orders that Defendants cite—*US Airways*, *OSF Healthcare*, and *Whole Foods*—are from cases that by their nature do not involve the type of customer-declaration issues here; those companies provide goods and services primarily to individual consumers, whereas the merging parties here provide their goods and services to business customers, who in turn sell to individual consumers.

confidential is inapposite. *See* Mem. at 2 (citing *Bryant v. Mattel, Inc.*, No. 04-cv-9049, 2007 WL 5416684 (C.D. Cal. Feb. 6, 2007)). At issue in *Bryant* was a motion by plaintiff MGA for defendant Mattel to re-designate its *list of witnesses*—the “bulk” of which were current *Mattel and MGA employees*—so that MGA’s counsel could share the identities of potential witnesses with its client. *Bryant*, 2007 WL 5416684, at *1-*2. Defendants’ motion here much more broadly pertains to every *declarant* in this case. Moreover, *Bryant* is distinguishable in that it pertained to the disclosure of a party’s own *employees*, which the court noted defendant had not shown it had a policy to protect, whereas this case involves the protection of *third parties*, whose identities and information Plaintiffs must protect by law, unless ordered otherwise. *See* 15 U.S.C. § 57b-2(f). In short, *Bryant* did *not* hold that declarants’ names are not confidential or that the names should be publicly disclosed.

II. The Hubbard Factors Weigh in Favor of Non-Disclosure

The presumption of public access to judicial records does not warrant public disclosure of declarants’ identities. The D.C. Circuit has identified six factors to test the presumption:

- (1) the need for public access to the documents at issue;
- (2) the extent of previous public access to the documents;
- (3) the fact that someone has objected to disclosure, and the identity of that person;
- (4) the strength of any property and privacy interests asserted;
- (5) the possibility of prejudice to those opposing disclosure; and
- (6) the purposes for which the documents were introduced during the judicial proceedings.

E.E.O.C. v. Nat’l Children’s Ctr., Inc., 98 F.3d 1406, 1409 (D.C. Cir. 1996) (citation omitted).

The balance of these factors weighs in favor of keeping declarants’ identities confidential here.

Declarants’ identities and business names have not previously been public and each of the declarants has requested (including in their declarations) that his or her identity be kept confidential. Declarants also have a strong interest in maintaining their privacy due to the prejudice they would face if their identities and business names were disclosed. Three-quarters

of Plaintiffs' declarants are customers, including local customers, mostly small local independent restaurants. Customers typically deal with Sysco or US Foods through a single point of contact—their sales representative (either national or local). Customer declarants, including local customers, fear that their sales representative or other Sysco or US Foods employees will learn of their involvement in Plaintiffs' investigation. *See* Quillian Decl. ¶ 6. Defendants' memorandum indicates that the first thing they will do if the Court grants their motion is to share the declarants' identities with the sales representatives and other Sysco and US Foods employees who interact with the declarants. Mem. at 3-4. That could expose the customer-declarants, who rely on Defendants for the food that they buy, to retribution and reputational harm. *See* Quillian Decl. ¶¶ 5-6. Customers fear particular harm to their businesses and damage to their valuable relationships with their sales representatives. *Id.*

Furthermore, neither Defendants nor the public will be prejudiced if declarants' identities are not disclosed. Defendants will not be prejudiced in preparing their defense of the merger because the Court will soon permit certain in-house attorneys at Sysco and US Foods to have access to confidential information, including declarants' identities. *See* Order at 2 (Dkt. 48, Mar. 5, 2015). Indeed, each of the in-house attorneys that Defendants propose to gain access to confidential information declares that they have "in-depth" or "superior" knowledge of the industry. *See, e.g.,* Flynn Decl. ¶ 6; Capers Decl. ¶ 6; Nelson Decl. ¶ 7. Defendants' counsel know the specific markets at issue in this case (the alleged markets are public, of course), they know the local and national sales representatives who service or handle bids for those markets, and they can talk with these sales representatives and gather relevant documents at any time. Discussing competitive conditions in particular markets and preparing a defense do not require the identification of particular declarants, much less their disclosure to the public.

Protecting the confidentiality of declarants' identities and business names does not significantly limit public access to this judicial proceeding, as the public will have access to the parties' arguments, the hearing, other portions of the factual record, and the Court's decision.²

III. Comity and Policy Reasons Favor Maintaining Confidentiality

Declarants' identities should not be disclosed at this time for reasons of judicial comity: the protective order in the administrative proceeding protects the identities of *all third parties*. Protective Order Governing Discovery Material ¶ 2, *In the Matter of Sysco Corp., et al.*, FTC Dkt. No. 9364 (Feb. 20, 2015). Modifying the Protective Order here effectively eliminates the protections provided to third parties in the administrative proceeding. Moreover, maintaining the confidentiality of declarants' identities also protects the ability of Plaintiffs to conduct thorough merger reviews. Without the cooperation of third parties, who may be unwilling to participate or less willing to be forthcoming without confidentiality protections (Quillian Decl. ¶ 7), Plaintiffs would be hindered in their ability to gather information to analyze mergers.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Motion.³ If the Court is otherwise inclined, Plaintiffs respectfully request that the Court implement a process whereby third parties can petition to maintain the confidentiality of their identities, business names, and business information.⁴ *See* Parties Joint Status Report at 15-16 (Dkt. 29, Feb. 25, 2015).

² Paradoxically, while urging this Court to expose declarants' names, Defendants simultaneously seek extensive redactions to their own materials cited in the public versions of the Complaint and the Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. Much of what Defendants propose to redact does not meet their definition of confidential information. Defendants cannot have it both ways.

³ Plaintiffs recognize that in the hearing and in the Court's decision in this case, the identities of declarants could, under some circumstances, become public. Before the hearing and decision phases, however, it is unnecessary to release publicly the names of all declarants. *See, e.g.*, Complaint Counsel's Pre-Trial Brief, *In re ProMedica Health Sys., Inc.*, FTC Docket No. 9346 (May 24, 2011) (GX4) (pre-trial brief submitted with declarants' names redacted).

⁴ Plaintiffs remain open to redacting the declarations as an alternative to granting Defendants' motion.

Dated: March 10, 2015

Respectfully submitted,

By: /s/ Alexis J. Gilman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 10, 2015, I filed the foregoing *Memorandum in Opposition to Defendants' 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.

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