

**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' LIMITED OPPOSITION TO
DEFENDANTS' MOTION TO MODIFY THE PROTECTIVE ORDER TO ALLOW
CERTAIN IN-HOUSE COUNSEL ACCESS TO CONFIDENTIAL INFORMATION**

Plaintiff Federal Trade Commission ("FTC" or "Commission"), on behalf of itself and the Plaintiff States, submits this Limited Opposition to Defendants' Motion to Modify the Protective Order to Allow Certain In-House Counsel Access to Confidential Information.¹

Under separate cover, Plaintiffs are submitting their Opposition to Defendants' Motion to Make Public Declarant Names and Affiliations.

Plaintiffs have no objection to the inclusion of Barrett Flynn (Sysco), Dorothy Capers (US Foods), and Andrew Nelson (US Foods) on the list of individuals to whom confidential information may be disclosed pursuant to the terms of the Protective Order entered by this Court on February 23, 2015. Plaintiffs oppose, however, the inclusion of Russell Libby (Sysco) in

¹ In the Parties' February 25 Joint Status Report, Defendants asked the Court to modify the existing Protective Order "to grant access to Confidential Material to three members of each Defendant's in-house legal team." Parties' Joint Status Report and Respective Proposals for Case Management Order at 16-17 (Dkt. 29, Feb. 25, 2015). The Court stated that it would treat that request as a motion by Defendants to modify the protective order. Tr. of Status Conference at 20:24 - 21:3 (Mar. 4, 2015) ["Mar. 4 Tr."].

light of concerns about his role in, and his being in a position to advise about, competitive decision-making at Sysco.

To be clear, Plaintiffs do not question Mr. Libby's integrity or ethics. Nor do Plaintiffs assert that he *willfully* would divulge confidential information learned through the litigation about competitors or the customers and potential customers with whom Sysco regularly negotiates pricing and other terms. But, as this Court noted during last week's status conference (*see* Mar. 4 Tr. at 33:12-18), that is not the dispositive inquiry under *Whole Foods* and does not address the fundamental rationale for the *Whole Foods* standard. According to the *Whole Foods* court:

U.S. Steel would preclude access to information to anyone who was *positioned to advise the client as to business decisions* that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions.

FTC v. Whole Foods Market, Inc., No. 07-cv-1021 (PLF), 2007 WL 2059741, at *2 (D.D.C. July 6, 2007) (emphasis added) (quoting *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55, 57-58 (D.D.C. 2007) (referencing *U.S. Steel Corp. v. U.S.*, 730 F.2d 1465 (Fed. Cir. 1984)); *see also Volvo Penta of the Americas, Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 242 (E.D. Va. 1999) (as cited by *Intervet* and *Whole Foods*) (competitive decision-making involves decisions “that affect contracts, marketing, employment, pricing, product design” and other decisions made in light of similar or corresponding information about a competitor).

The rationale for this “competitive decision-making” test is that it is untenable for an in-house attorney with any involvement in business decision-making to have to choose between advising his or her client and inadvertently disclosing or using the knowledge he or she obtains through access to the confidential information. *See, e.g., Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992) (“Knowledge of Symantec's trade secrets would

place in-house counsel in the ‘untenable position’ of having to refuse his employer legal advice on a host of contract, employment, and competitive marketing decisions lest he improperly or indirectly reveal Symantec’s trade secrets.”); *Carpenter Tech. Corp. v. Armco, Inc.*, 132 F.R.D. 24, 27 (E.D. Pa. 1990) (“Notwithstanding the rules of professional conduct, the inadvertent use or disclosure of confidential information remains a major concern.”).

Here, respectfully, Mr. Libby does not appear to meet the *Whole Foods* standard and, therefore, should not be granted access to confidential information. Mr. Libby apparently is involved in competitive decision-making. Table 1 below (excerpting entries from Sysco’s privilege log, copies of which were provided to the Court and defense counsel during the March 4 status conference) strongly suggests that Mr. Libby, as the Chief Legal Officer and Executive Vice President of Corporate Affairs for Sysco, routinely advises his client (Sysco) on issues relating to customers and other broadline foodservice distributors, including on the very types of competitively-sensitive matters enumerated in *Whole Foods*.

TABLE 1: INFORMATION FROM SYSCO’S PRIVILEGE LOG

Row	Identified Counsel	Document Description
131	Libby	regarding marketing strategy
375	Libby	regarding contract review
543	Libby	regarding [national customer] Master Distributor Agreement
863	Libby	regarding [national customer] RFP
1086	Libby	regarding summary of status of Project Naples
2044	Libby	regarding materials for meeting with [national customer]
2966	Libby	regarding [national customer] Pricing
4153	Libby	regarding competitive assessment of [broadline competitor] and [broadline competitor]
8098	Libby	regarding analysis of [broadline competitor]
8479	Libby	regarding assessment of market competitors
15665	Libby	regarding potential agreement with [national customer] and Buckhead Beef

Additionally, Mr. Libby's declaration states that he is "involved in decisionmaking in the evaluation of market competitors as potential acquisition targets" Libby Decl. ¶ 3.²

More notably, the declaration also states he is "a member of the Executive Team" and "attend[s] weekly meetings in that capacity." *Id.* This fact alone places him on different footing than the General Counsel who was granted limited access to confidential information in *Whole Foods*, whose affidavit emphasized that she was *not* a member of the "E Team," a "group of senior executives with ultimate responsibility for those competitive decisions that are made at the national level." Mem. of Points & Authorities in Supp. of the Mot. of Def. Whole Foods Market, Inc. for Entry of a Final Protective Order at 5 (Dkt. 12), *FTC v. Whole Foods Market, Inc.*, No. 07-cv-1021 (PLF) (June 11, 2007) (GX1). Furthermore, although Mr. Libby declares that he does not "participate" in pricing or other strategic decisions, his declaration acknowledges that competitive decision-making "may be discussed at these [weekly] meetings" that he attends. Libby Decl. ¶ 3. Allowing Mr. Libby access to these materials would require that he be forced to sit quietly during portions of these meetings lest he inadvertently disclose competitively sensitive information, a position clearly at odds with his role as the company's most senior legal officer.

Accordingly, as Table 1 and his declaration show, Mr. Libby is, at the very least, in a position to advise his client (Sysco) about matters directly relating to the confidential information to which he seeks access. This creates "an unacceptable opportunity for inadvertent disclosure," *U.S. Steel*, 730 F.2d at 1468, and puts Mr. Libby in the "untenable position" of potentially having to refuse giving legal advice to his client, *Brown Bag*, 960 F.2d at 1471. The

² The documents that Sysco produced to the Commission during its investigation included many documents showing that Mr. Libby is involved in assessing Sysco's competitors, identifying potential acquisition targets, and discussing financial offers for acquisition targets. *See, e.g.*, SYS14291017; SYS14866329; SYS14871705; SYS14871795; SYS14921022; SYS14991436; SYS15162358; SYS15264339; SYS15264685; SYS15317761; SYS15371938; SYS15619310; SYS15638645; SYS16157077. Each of these documents is marked as "CONFIDENTIAL," so the Plaintiffs are not submitting them as exhibits. Copies can be provided under seal at the Court's direction.

test is not whether Mr. Libby is a decision-maker on certain matters, but whether his “employment would necessarily entail *advising* his employer in areas relating to” the confidential information to which he seeks access. *See Brown Bag*, 960 F.2d at 1471 (emphasis added).

This question of Mr. Libby’s access is of particular importance because the materials at issue include voluminous confidential information from other foodservice distributors—primarily that of Sysco’s closest and most significant competitor: US Foods—as well as significant confidential information from broadline customers and several other sources. This confidential information includes customers’ revenues, food costs, contract terms, and contract negotiating strategies.

Plaintiffs are mindful that, unlike in *Whole Foods*, the Court has stated that it intends to give *four* designated in-house lawyers access to *all* documents and information. *See* Order at 2 (Dkt. 48, Mar. 5, 2015). Insofar as the Court might determine that Mr. Libby meets the *Whole Foods* test (and that Sysco should not proffer another in-house counsel who does not raise the same concerns), Plaintiffs respectfully request that any access of confidential information to Mr. Libby be limited to the types of access provided to the general counsel in *Whole Foods*. There, Whole Foods’ general counsel had access to *certain* materials, specifically, “only to unredacted draft and final versions of pleadings, deposition and hearing transcripts, and expert reports, but shall not have access to any accompanying exhibits or underlying discovery materials to the extent those exhibits or discovery materials have been designated ‘Confidential.’” Protective Order at 8 (Dkt. 100), *FTC v. Whole Foods Market, Inc.*, No. 07-cv-1021 (PLF) (D.D.C. July 10, 2007).

Finally, the consequences of disclosure here are more severe than in *Whole Foods*. In *Whole Foods*, individual customers' confidential information was not at issue (the confidential information at issue principally came from competitors) and, of course, the merging supermarkets in that case did not negotiate individual contracts with individual customers. There is more sensitivity with disclosing confidential information in this case because information about individual customers could affect contract negotiations.

Accordingly, Plaintiffs respectfully submit that Sysco has not demonstrated that Mr. Libby satisfies the *Whole Foods* standard and that, in any case, at least the same limitations applied in *Whole Foods* should apply to Mr. Libby here.

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 *Plaintiffs' Limited Opposition to Defendants' Motion to Modify the Protective Order to Allow Certain In-House Counsel Access to Confidential Information* with the Court using the CM/ECF system, which will automatically send electronic mail notification of such filing to the CM/ECF registered participants.

I FURTHER CERTIFY that I served the foregoing *Plaintiffs' Limited Opposition to Defendants' Motion to Modify the Protective Order to Allow Certain In-House Counsel Access to Confidential Information* via electronic mail to:

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