

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

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

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

Defendants.

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

**THIRD PARTY INTERVENOR SHAMROCK FOOD COMPANY'S
LIMITED OPPOSITION TO DEFENDANTS' MOTION TO MODIFY THE
PROTECTIVE ORDER TO ALLOW CERTAIN IN-HOUSE COUNSEL ACCESS TO
CONFIDENTIAL INFORMATION**

Pursuant to the Court's March 5, 2015 Order (Dkt. #48), Third Party Intervenor Shamrock Foods Company ("Shamrock") hereby responds to the declarations of in-house counsel (Dkts. 56-59) filed by Defendants in support of their request that those in-house counsel be permitted to review information and documents designated as "Confidential Material" under the Protective Order. Such "Confidential Material" includes non-public, highly confidential, competitively sensitive, and trade secret material produced by Shamrock – a competitor of Defendants in certain markets in the West, Southwest, and Rocky Mountains – in response to compulsory process issued by the Federal Trade Commission and certain state Attorney General Plaintiffs. For the reasons set forth below, Shamrock vigorously opposes Sysco Corporation's ("Sysco") request that its Chief Legal Officer and Executive Vice President of Corporate Affairs, Russell Libby, be permitted access to Confidential Material. As the Court has already ruled that it will permit two in-house counsel from Sysco and US Foods, Inc. ("US Foods") respectively to have access, Shamrock does not oppose granting access to the other three declarants,

provided appropriate controls and limitations are adopted as detailed below.¹

I. Russell Libby Should be Denied Access Due to His Business Role with Sysco and Involvement in Competitive Decisionmaking

Shamrock vigorously opposes Russell Libby's request for access to Confidential Material because of his senior business role with Sysco. Due to Mr. Libby's hybrid role as a "Chief Legal Officer and Executive Vice President of Corporate Affairs," and his position on Sysco's Executive Team, he is too closely tied to the competitive decisionmaking process at Sysco to be provided access to Shamrock's and other competitors' Confidential Material.

Despite the conclusory statement in Mr. Libby's Declaration (Dkt. 58) (the "Libby Declaration") that he has "no responsibility for competitive decisionmaking," the facts stated therein imply otherwise. Mr. Libby is a member of Sysco's Executive Team and attends weekly Executive Team meetings, in which competitive decisionmaking is discussed. *See* Libby Declaration ¶ 3. Although he disavows participation in "pricing decisions, purchasing decisions, marketing decisions, selection of vendors or any other strategic decisionmaking regarding market competitors," Mr. Libby is a participant in weekly Executive Team meetings where those very issues are discussed, and, as the company's "Chief Legal Officer," his advice is likely sought by other members of the Executive Team with respect to (at the very least) the legal issues concerning these activities. *See id.*

Furthermore, Mr. Libby's admitted responsibilities include supervision of a number of initiatives outside of Sysco's legal department, including "Business Development." *Id.* ¶ 2. Notably, Mr. Libby fails to fully describe his Business Development responsibilities (which by itself should be fatal to his request), but rather states that they "*chiefly* include mergers and acquisitions," leaving the Court with no

¹ Shamrock also joins in Plaintiffs' Limited Opposition to Defendants' Motion to Modify the Protective Order to Allow Certain In-House Counsel Access to Confidential Information (Dkt. 67) to the extent it can, noting, that Shamrock does not have access to, and its counsel has not reviewed, Sysco's privilege log or the documents cited therein in FN 2.

record as to the balance of those responsibilities. *Id.* ¶ 3. Moreover, in the limited information Mr. Libby provides about his Business Development role, he admits his involvement “in decisionmaking in the evaluation of market competitors as potential acquisition targets.” *Id.* Indeed, such “evaluation of market competitors” alone meets the definition of “competitive decisionmaking” as defined in *U.S. Steel Corp. v. U.S.*, which stated that the phrase is “shorthand for a counsel’s activities, association, and relationship with a client that are such as to involve counsel’s advice and participation **in any or all of the client’s decisions** (pricing, product design, etc.) **made in light of similar or corresponding information about a competitor.**” 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984) (emphasis added).

In addition, publicly available information suggests that Mr. Libby’s role goes beyond that of a general counsel or in-house lawyer to one that is closely tied to business and competitive decisionmaking at Sysco. Indeed, as noted in a Sysco press-release, Mr. Libby was promoted last year from General Counsel to an “expanded role” of “executive vice president-Corporate Affairs and Chief Legal Officer.” *See* Press Release, attached hereto as **Exhibit 1**. In fact, Sysco brought in another lawyer from Mr. Libby’s former law firm who replaced him as the company’s General Counsel. *Id.* Mr. Libby, who is described as “a valued and trusted member of the Sysco senior leadership team” remains the company’s Corporate Secretary, a position that ordinarily entails attendance at Board of Directors meetings. *Id.* Moreover, Sysco has already announced that, if the proposed merger with US Foods is consummated, Mr. Libby will remain in his current role with the merged entity. *See* Post Merger Press Release, attached hereto as **Exhibit 2**.

Shamrock does not doubt the veracity of Mr. Libby’s declaration and good intentions to attempt to cabin his work on this litigation from his ongoing business responsibilities. However, recognizing the demands on in-house lawyers who maintain dual business and legal roles within a company, Courts have routinely denied access to competitively sensitive material, particularly when the in-house lawyer in question is involved in management decisions at a high level. For example, in *Norbrook*

Laboratories Ltd. v. G.C. Hanford Mfg. Co., No. 5:03CV165(HGM/GLS), 2003 WL 1956214 (N.D. N.Y. Apr. 24, 2003), the Court held that an in-house lawyer's business positions as the Corporate Secretary and a member of the board of directors precluded his requested access to confidential information. Indeed, the Court's statements concerning the lawyer's role on the Board of Directors raises analogous concerns with respect to Mr. Libby's position on Sysco's Executive Team and as Sysco's Corporate Secretary:

The court finds that Mr. Heath's positions, both as Hanford's **Corporate Secretary** and as a member of Hanford's Board of Directors, create a serious risk of the inadvertent disclosure of confidential documents and information. **While Mr. Heath may not directly participate in competitive decisionmaking-product design, marketing strategy, scientific research, etc.-as a member of the Board of Directors, he sits in the same room as those who are involved in competitive decisionmaking.** As such, Hanford's board meetings present an unacceptable opportunity for the inadvertent disclosure of confidential information. While the court does not doubt Mr. Heath's assurances that he will abide by the protective order, it cannot endorse a situation that places Mr. Heath's ethical obligations as an attorney in direct competition with his fiduciary duty to Hanford.

Id. at *5. (emphasis added).

Likewise, in *Irwin Indus. Tool Co. v. Worthington Cylinders Wisconsin, LLC*, No. 3:08cv291, 2009 WL 606190 (W.D. N.C. Mar. 9, 2009), the Court barred access to confidential material to an in-house lawyer who regularly gave and was sought out for business advice. *See id.* at **3-4 (noting that executives sought "business advice from [the in-house lawyer] and defer[ed] to him on purely business matters" and raising concerns about his additional "dual role as general counsel and assistant corporate secretary").

In short, Mr. Libby's hybrid business / legal role at Sysco ties him too closely to the competitive decisionmaking process, as he not only "sits in the same room as those who are involved in competitive decisionmaking," but is a party to those conversations at the weekly Executive Team meetings and presumably Sysco's Board meetings. Moreover, Mr. Libby is a competitive decision maker himself to the extent his Business Development responsibilities, which he fails to fully explain, concern "evaluation of market competitors." The Court should therefore deny Mr. Libby access to the

Confidential Material.

II. Mr. Libby's Role is Very Different from that of the General Counsel in the Whole Foods Litigation

The Court specifically requested in its March 5 Order that the declarants attest to their roles in a manner similar to the declarant in *F.T.C. v. Whole Foods Market, Inc.*, No. 07-1021 (PLF), 2007 WL 2059741, at *2 (D. D.C. July 6, 2007). Mr. Libby's declaration, however, shows he is in a markedly different position from the in-house lawyer who was granted access to the confidential material in the *Whole Foods* litigation, a copy of whose declaration is attached hereto as **Exhibit 3** (the "Whole Foods Declaration").

To begin, the Whole Foods Declaration is executed by its General Counsel, a position Mr. Libby vacated and was promoted from in March 2014. Whole Foods Declaration ¶ 3. More importantly, Whole Foods' General Counsel explicitly disavows membership in her company's Executive Team, which is something Mr. Libby cannot do. *See id.* ¶ 6. Rather, Whole Foods' General Counsel was a member of that company's expanded Whole Foods Leadership Network, which was a collection of approximately 27 Vice Presidents and Regional Presidents that met periodically to discuss such non-competition-related topics as "the company's benefit programs, the company's compensation and bonus programs, and whether products [met Whole Foods'] quality standards." *Id.* ¶ 7. This is a significant departure from Mr. Libby's participation in weekly Executive Team meetings, where competitive decisionmaking is admittedly undertaken.

III. Shamrock Does Not Oppose the Other Declarants If Reasonable Controls Are Put in Place to Protect the Confidential Material

Shamrock does not oppose some access to Confidential Material by Dorothy Capers, Andrew Nelson, and Barrett Flynn (Dkts. 56, 57, and 59), provided certain reasonable controls and limitations are adopted in the revised Protective Order regarding the transmission and maintenance of the Confidential Material and the scope of Ms. Capers', Mr. Nelson's, and Mr. Flynn's access. Specifically, Shamrock requests that the

Confidential Material be made accessible to these declarants through a secure electronic data room or document review platform (such as Relativity or Concordia), wherein the declarants would be provided individual login identifications and passwords. Use of a secure data room or document review platform would also enable the declarant's activities to be tracked, so, in the event of a breach, a review trail documenting documents reviewed, and any documents downloaded and printed, would be available and could be sought in discovery by any party seeking sanctions. Such precautions would guard against the risk of inadvertent disclosure if hard copy documents were shipped to Sysco's or US Foods' corporate headquarters, or if documents were emailed to unsecure personal email accounts or to Sysco and US Foods work email accounts that presumably are accessible by personnel in Sysco's and US Foods' IT Departments and perhaps others. As the FTC has stated it provided the Confidential Information to Sysco's and US Foods' outside counsel in electronic format, it is also highly likely that outside counsel for Sysco and US Foods already maintain such a secure document review database from which they can provide access to these individuals.

More significantly, to the extent that the Court intended to pattern its rulings here on those in the *Whole Foods* litigation, none of the declarants should be allowed unfettered access to all documents identified as Confidential Material. Rather, they should be allowed access only to unredacted pleadings, transcripts, and expert reports, but not to any exhibits thereto, or to any underlying confidential data or evidence on which they may be based. This limitation would be consistent with the level of access provided to Whole Foods' General Counsel in that particular litigation. *See Whole Foods Market, Inc.*, 2007 WL 2059741, at *1 ("The Court understands this to mean that Ms. Lang may review draft and final versions of pleadings, motions and other briefs, deposition and hearing transcripts, and expert reports-including portions of such filings that quote or paraphrase 'Confidential Discovery Material'-but may not see exhibits to such filings, depositions or reports or underlying discovery material designated as 'Confidential.'").

Shamrock suggests that the Court adopt relevant language from the Protective Order entered in the *Whole Foods* litigation, a copy of which is attached hereto as **Exhibit 4**. The pertinent language is found in Paragraph 8(c) of that Protective Order, which states:

Confidential Discovery Material Shall not, directly or indirectly, be disclosed or otherwise provided to anyone except:

* * *

- (c) Roberta L. Lang, General Counsel of Whole Foods Market, Inc., on condition that Ms. Lang shall have access 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”;

Such a limitation is appropriate and necessary here as well. None of the Declarants have demonstrated a need for the underlying confidential information in order to advise their respective companies or to assist outside counsel with the litigation. *See Intel Corp. v. VIA Technologies, Inc.*, 198 F.R.D. 525, 528 (N.D. Cal. 2000) (party seeking to modify protective order to provide access to confidential material to in-house counsel had “the burden of establishing a sufficient need for the information”). Thus, provided controls and limitations are adopted that are similar to those stated above, Shamrock will not object to the Declarations of Dorothy Capers, Andrew Nelson, and Barrett Flynn.

IV. Conclusion

For the reasons set forth above, Shamrock requests that Russell Libby be denied access to Confidential Material in this litigation. Shamrock further requests that any access granted to in-house counsel be provided only on secure data platforms, and that it be limited to unredacted pleadings, transcripts, and expert reports, and not underlying data or exhibits thereto.

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