UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, Plaintiff, vs. BOOZ ALLEN HAMILTON, INC., et al., Defendants.	Case No.: 1:22-cv-01603-CCB

DEFENDANTS EVERWATCH CORP., EC DEFENSE HOLDINGS, LLC, AND ANALYSIS, COMPUTING & ENGINEERING SOLUTIONS, INC.'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR PROTECTIVE ORDER AND SANCTIONS

The issue before this court is a simple, but critical one, with far-reaching implications: when parties produce documents to the Department of Justice ("DOJ") Antitrust Division ("Division") in response to a Civil Investigative Demand ("CID") pursuant to the terms of the Antitrust Civil Process Act, and designate those documents "Highly Confidential," does the Division retain the unilateral ability to splay them across a public docket without (1) any prior engagement with the producing parties to obtain consent before filing or (2) a ruling from the court in advance as to whether the documents are confidential? The answer to both questions is no. A holding to the contrary flies in the face of the text of the statute, legislative history, and case law. DOJ's Opposition mocks the suggestion that parties expect their information to be treated as confidential when they designate their documents as such and produce them to the government pursuant to compulsory process. Opposition to Everwatch Defendants' Motion, ECF No. 46 ("Opp'n" or "Opposition") at 6. That posture, combined with DOJ's ongoing refusal to simply remove the documents while the Court considers this issue, reflect an unprecedented disregard for the legal protections afforded to private parties and their confidential information.

Four days after EverWatch[1] alerted DOJ that it had improperly publicly disclosed EverWatch's CID materials, those materials remain on the public docket. Instead of taking the easy step of removing public access to the materials while the Parties addressed the dispute with the Court, DOJ has doubled down on its extreme interpretation of the Antitrust Civil Process Act. Counsel for EverWatch was unable to find a single case that adopts DOJ's interpretation of the statute, and DOJ itself cites none.[2] That is because the law is clear—DOJ's decision to litigate a proposed merger does not give it carte blanche to disclose to the public materials that a party produced in response to a CID, in advance of a legal determination from a court as to whether they are confidential.

Given that DOJ has arrogated power away from the Court to itself to determine what information is "confidential," one could fairly say at this point that CID materials which have been filed on the public record, quoted on social media, and picked up in the press are no longer, practically speaking, "confidential." Nevertheless, the law and the process that govern the treatment of confidential information matter for future cases, and for the rules that will govern the DOJ going forward in this case so long as a Protective Order is not in place. As for that process, here, DOJ was on notice that EverWatch considered Exhibits B and C to its Motion for Preliminary Injunction, ECF No. 29 ("PI Motion") to contain "Highly Confidential" information—the designation was stamped on each document. ECF Nos. 29-4 – 5, 35-2 – 3. *DOJ itself proposed a*

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[1] EverWatch Corp., EC Defense Holdings, LLC, and Analysis, Computing & Engineering Solutions, Inc. (collectively, "EverWatch").

[2] DOJ contends that it "routinely includes material provided to it pursuant to a CID" in publicly filed complaints. Opp'n to Everwatch Defs.' Mot. for Protective Order & Sanctions, ECF No. 46 ("Opp'n" or "Opposition") Opp'n at 6. Just because DOJ has violated the Antitrust Civil Process Act in the past does not mean it should be allowed to do so again.

protective order to Defendants[3] *that, when entered by the Court, will protect these types of documents from public disclosure. And DOJ took steps to protect information from these documents that it determined warranted protection; it just decided not to give EverWatch the same opportunity.* Rather than engaging with EverWatch to determine what information should be filed under seal in the first instance, DOJ made its own decisions as to what it could disclose, selectively choosing to disclose the identities of EverWatch individuals, along with the substance of the communications in Exhibits B and C, with the effect of impugning those individuals and EverWatch's business—the exact harms that Congress sought to prevent by enacting the Antitrust Civil Process Act.

To be clear, EverWatch is not asking that DOJ, or this Court, do anything extraordinary. EverWatch is not disputing DOJ's ability to use CID materials in court proceedings, and it is not objecting to DOJ's right to disagree about whether those materials should be kept confidential in those proceedings. EverWatch is simply asking that DOJ either file CID materials under seal in the first instance, or seek consent from a producing party before publicly filing CID materials, to allow EverWatch (and any other similarly situated party) to take steps, if necessary, to seek protections before confidential material is broadly, and irrevocably publicized (as it has been in this case). The Court should grant EverWatch's Motion for Protective Order and Sanctions, ECF No. 39 ("Motion").

I. DOJ'S EXPANSIVE READING OF THE ANTITRUST CIVIL PROCESS ACT IS UNSUPPORTED BY THE STATUTE, CASE LAW, OR LEGISLATIVE HISTORY, AND CONTRARY TO PUBLIC POLICY

DOJ contends that the Antitrust Civil Process Act allows it to unilaterally decide to publicly

[3] Booz Allen Hamilton, Inc., Booz Allen Holding Corporation, and EverWatch (collectively, "Defendants").

file *any* material it obtains through a CID so long as a DOJ attorney "designated to appear before any court" determines that public disclosure is "required." 15 U.S.C. § 1313(d)(1). This expansive reading of the statute confers unfettered, unilateral discretion on the DOJ that is inconsistent with the statutory text, contrary to legislative history, and will disincentivize future cooperation with CIDs.

A. The Text of the Antitrust Civil Process Act Does Not Support DOJ's Interpretation

The Antitrust Civil Process Act is separated into six sections. Section (c) governs "Responsibility for Materials; Disclosure" of materials produced pursuant to a CID, and states that "Except as otherwise provided in this section, . . . no documentary material, . . . shall be available for examination, *without the consent of the person who produced such material*[.]" *Id.* § 1313(c)(3) (emphasis added). Section (d) governs the "Use of Investigative Files."[4] Subsection (1) of Section (d) provides that "Whenever any attorney of the Department of Justice has been designated to appear before any court . . . the custodian of any documentary material . . . may deliver to such attorney such material . . . for official use in connection with any such case. . . as such attorney determines to be required." § 1313(d)(1).

DOJ contends in its Opposition that the prefatory language of § 1313(c)(3) applies to the entire text of § 1313(d), resulting in the tortured transformation of "official use in connection with any case" into free reign for DOJ to publicly disclose any CID materials whenever DOJ considers it to be "required."[5] If DOJ's reading of § 1313 is correct, that means DOJ has the unilateral

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[4] *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (relying on section heading to interpret statutory text).

[5] DOJ offers no interpretation of what "required" means in this context. Use and disclosure are two very different concepts, and required use and required disclosure are two very different things. DOJ has posited no explanation why public *disclosure* was required here. No statute or rule of this Court "required" DOJ to disclose publicly EverWatch's documents.

authority to not simply use (which is not in dispute), but also to *publicly disclose* any document or information it obtains from any person pursuant to a CID so long as it decides to "use" that document in a court proceeding. Opp'n at 2.

That is not how the Supreme Court, federal courts, or CID recipients have understood the confidentiality provisions of the Act. *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 571 (1983) ("CID materials may not be disclosed to persons outside the federal government without the consent of the provider."); *Nat'l Elec. Mfr. Ass'n v. U.S. Dep't of Just.*, No. 87-1889, 1987 WL 25532, at *1 (D.D.C. Aug. 27, 1987) (granting DOJ motion to require production in accordance with CID because "[T]he Act requires the designation of an official custodian for the materials and provides that individuals other than employees or agents of the Department of Justice may review the materials only with the consent of the party who produced the materials." (citing 15 U.S.C. § 1313(c))); *Aluminum Co. of Am. v. U.S. Dep't of Just.*, 444 F. Supp. 1342, 1347 (D.D.C. 1978) (noting that "Alcoa released numerous documents (now in the possession of the Department) containing confidential information without a meaningful opportunity to object to possible disclosure to third parties, and on the specific assurance that there would be no disclosure to anyone not employed by the Department without Alcoa's consent."). DOJ points to no case in which a court has endorsed DOJ's extreme position in this litigation—specifically, the minute DOJ institutes litigation, all bets related to CID confidentiality are off.

If Congress had truly authorized DOJ "to use CID materials in precisely the manner they have been used here," Opp'n at 2, Congress would have said so explicitly in the statute itself. It did not. The differences between the statutory text of the Hart-Scott-Rodino ("HSR") Act and the

Antitrust Civil Process Act are instructive.[6] 15 U.S.C. § 18a(h). The HSR Act, which does not apply to CID materials, specifically provides that no "information or documentary material" submitted pursuant to the HSR Act "may be made public, *except as may be relevant to any administrative or judicial action or proceeding*." *Id.* (emphasis added). The Antitrust Civil Process Act contains no such carve out for judicial proceedings. 15 U.S.C. § 1313. In fact, Congress passed the Antitrust Civil Process Act specifically to increase the Attorney General's CID powers, but limited that power with a trade-off: a mandate "that materials obtained in this manner be kept strictly confidential." *Abbott & Assocs., Inc.*, 460 U.S. at 571; *Aluminum Co. of Am.*, 444 F. Supp. at 1346 ("While the overriding purpose of the 1976 Amendments . . . is to increase the effectiveness of antitrust investigations, Congress also intended to increase the protection available to CID recipients.").

Moreover, the legislative history makes clear that the Act "requires that strict confidentiality be accorded to all CID investigative files in order to protect the reputation and standing of witnesses, as well as their trade secrets and proprietary financial data." H.R. Rep. No. 94-1343, at 3 (1976). Indeed, Congress recognized that "[e]ven disclosure of the mere fact of a CID investigation-much less disclosure of the substance of the inquiry-would often cast unfair and prejudicial aspersions on the integrity of the CID recipient." *Id.* at 13.

DOJ fully recognizes the sensitivity of the documents it disclosed in this case, and the potential reputational harms that the public disclosure of those documents might cause – particularly when coupled with DOJ's overreaching allegations and blatant mischaracterizations of the Parties' conduct. *Because it understood this, DOJ arbitrarily redacted certain names in*

[6] Both nondisclosure provisions were enacted on July 30, 1976 as part of the HSR Act. *Mattox v. F.T.C.*, 752 F.2d 116, 119 & n.7 (5th Cir. 1985).

Exhibits B and C, while leaving the names of individuals at EverWatch unredacted. DOJ clearly intended to "cast unfair and prejudicial aspersions" on EverWatch by publicly disclosing their identities and now argues that that "embarrassment" is just the price that EverWatch must pay for its conduct – which, in reality was nothing more than a lawful attempt to address DOJ's expressed concerns and settle the dispute. *See* H.R. Rep. No. 94-1343, at 3 (1976); Opp'n at 9. This Court should not endorse DOJ's behavior.

B. DOJ's Expansive Reading Of The Statute Is Contrary To Public Policy

DOJ's disregard for the plain terms of the Antitrust Civil Process Act will have ramifications beyond this case. DOJ's power to demand the production of documents under a CID is extraordinarily broad and easily triggered—DOJ may issue a CID to "any person [that] may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation." 15 U.S.C § 1312.

But if DOJ were correct that its decision to "use" a document in judicial proceedings eviscerates all of the confidentiality provisions of the Antitrust Civil Process Act, third parties responding to CIDs can expect their responses to be publicly disclosed before they are afforded an opportunity to seek protection. Companies responding to DOJ CIDs should fear having their trade secrets splashed across the web without prior notice, and companies in the national security space (such as EverWatch) should be on alert that confidential mission information could be made available for the world's bad actors to review. A company that alerted DOJ to the anticompetitive conduct of a dominant rival would no longer have confidence that any documents they provide to assist DOJ would be kept confidential. And employees who wished to report anticompetitive conduct of their employers would need to be informed that they may find their deposition testimony on a public docket without warning. If DOJ were right, the purpose of its investigative

powers to uphold the antitrust laws would be completely undercut by the widespread chilling effect DOJ's position would have on parties' willingness to cooperate and comply with DOJ investigations. DOJ's response may very well be "trust us," but if Congress intended that to be the law, then it would not have enacted the Antitrust Civil Process Act to provide parties with basic due process rights that the DOJ now asks this Court to discard.

II. DOJ ITSELF PROPOSED THE SPECIFIC TERMS THAT IT NOW IGNORES IN THE PROTECTIVE ORDER THAT EVERWATCH REQUESTS THIS COURT ENTER

DOJ argues in its Opposition that EverWatch is not entitled to a protective order because Exhibits B and C do not contain confidential information. DOJ misunderstands the relief EverWatch seeks and is wrong about the confidentiality of Exhibits B and C.

A. DOJ Proposed Treating "Highly Confidential" Documents Under Seal in its Proposed Protective Order

Because DOJ has improperly publicly disclosed EverWatch's confidential CID materials, and apparently believes that it is entitled to do so again before the Court enters a comprehensive protective order in this proceeding, a protective order is necessary.

DOJ's Opposition to EverWatch's requested relief is surprising, because EverWatch has requested that the Court enter as an order a provision of the draft protective order *that DOJ itself proposed*. *Compare* Proposed Order, ECF No. 39-2 *with* Mot. Ex. 8, at 1, ECF No. 39-11. Although the Parties' negotiations as to other provisions in the draft protective order are ongoing, the Parties are in agreement on this provision—no party has changed the substance of the provision, and the DOJ's latest round of edits kept this provision intact. Ex. 13, Email from C. Montezuma to T. Stenerson (July 11, 2022).

The text of DOJ's revised proposed protective order contemplates that "[a]ny Investigation Materials that a Defendant previously provided to any Plaintiff during the Investigation that the

Defendant designated as Confidential or Highly Confidential or for which the Defendant requested confidential treatment . . . will be treated as containing Confidential or Highly Confidential Information." *Id.* at Proposed Protective Order ¶ 17. Information designated as confidential or highly confidential must be filed under seal and not disclosed in a public filing. *See id.* ¶ 36 (emphasis added). In proposing this language, DOJ *agreed* that a protective order covering this material is necessary to protect EverWatch from "annoyance, embarrassment, oppression, or undue burden or expense" under Federal Rule of Civil Procedure 26(c)(1). This is all EverWatch requests here.

But DOJ has now made clear that it believes it has the complete discretion to publicly file documents EverWatch designated as "Highly Confidential" in the period before the Court enters the Parties' agreed-upon stipulated protective order. Opp'n at 2-3 ("[T]he statute specifically permits what the United States did here—use CID materials in court proceedings—and does not place any restrictions on how it may do so"). EverWatch merely asks the Court to adopt paragraphs 17 and 36 of DOJ's own proposed protective order, to make clear that DOJ cannot point to the lack of a protective order in this case to avoid its confidentiality obligations. Opp'n at 7 (arguing that DOJ has no obligation to maintain CID materials as confidential because EverWatch cited cases "involve disclosure under protective orders[.]").

B. Exhibits B and C Contain Confidential Information

On its face, the Antitrust Civil Process Act protects all documents produced pursuant to a CID from disclosure, not only those that contain confidential material. 15 U.S.C. § 1313(c). This is, of course, consistent with Congress's requirement that "strict confidentiality be accorded to all CID investigative files in order to protect the reputation and standing of witnesses." H.R. Rep. No. 94-1343, at 3. But DOJ's Opposition makes clear that DOJ believes that it, and not EverWatch or the Court, should decide what information should and should not be considered competitively

sensitive information in EverWatch's documents. EverWatch properly designated Exhibits B and C as Highly Confidential, as shown by DOJ's selective (but incomplete) redaction of those documents.

Exhibit B is a communication with one of EverWatch's team members for the Optimal Decision ("OD") bid, as DOJ acknowledges. Opp'n at 8. In the government contracting space, the identity of team members can be confidential and competitively sensitive information. Presumably, that is one reason DOJ redacted the name and affiliation of the team member. ECF No. 29-4. Information suggesting that a team member might stand down from a bid (particularly when that information is untrue, as EverWatch looks forward to proving at trial), is also information that could result in reputational damage or business harm to EverWatch as it prepares to compete vigorously for the OD bid and numerous other bids for the government.

Exhibit C relates to the status of EverWatch's confidential attempts to settle the DOJ's concerns with the Transaction. DOJ's Opposition confirms that EverWatch's discussions with the proposed new bid lead occurred during and were the result of EverWatch's efforts to resolve the DOJ's investigation into the Transaction. Opp'n at 11-13. Settlement discussions are extremely sensitive and reflect confidential business considerations, and settlement agreements themselves are routinely protected from public disclosure under protective orders. *See, e.g.*, *Cadmus Commc'ns Corp. v. Goldman*, No. 5-257, 2006 WL 3359491 (W.D.N.C. Nov. 17, 2006) (granting motion for protective order to preserve confidentiality of settlement agreement). And, again, this information could be used by a potential competitor to undermine EverWatch's business relationships with team members and its customers.

DOJ's argument that it is excused from its obligations to keep Exhibits B and C confidential because those documents were wrongly designated as "Highly Confidential" is belied by DOJ's

own decision to partially redact those documents. DOJ obviously felt it was appropriate to redact the identity of certain individuals to maintain *their* confidentiality, but did not redact the names of EverWatch individuals. There is no principled basis for the distinction, other than to cause reputational harm to EverWatch individuals. And ultimately, as recognized by this district's model protective order, even if DOJ disagreed with EverWatch about the appropriate confidentiality designation, the proper approach is to file the materials under seal while the Court resolves the dispute. *See* Stip. Order Regarding Confidentiality of Disc'y Material (L.R. 104.13), App. D, U.S. Dist. Ct. for the Dist. of Md. ("Even if the filing party believes that the materials subject to the Confidentiality Order are not properly classified as confidential, the filing party shall file the Interim Sealing Motion.").

In any event, partially redacted versions of Exhibits B and C have been public for four days and counting. Although EverWatch has asked the Court to sanction DOJ and order it to remove the documents from public view pursuant to the Court's inherent authority, EverWatch did not ask for a protective order with respect to Exhibits B and C. Mot. ¶ 3, ECF No. 39 (asking the Court to "bar[] DOJ from further publicly disclosing documents EverWatch produced in response to the CID" pursuant to Fed. R. Civ. P. 26(c)(1)). Rather, EverWatch respectfully requests that the Court enter EverWatch's proposed protective order to ensure that DOJ follows proper procedure going forward. Proposed Order, ECF No. 39-2.

III. DOJ'S CONTINUED REFUSAL TO REMOVE THE DISPUTED DOCUMENTS FROM THE PUBLIC DOCKET DEMONSTRATES WHY SANCTIONS ARE NECESSARY

DOJ's Opposition and its refusal to remove the documents from the public record while

the Court adjudicates this issue proves that the limited sanctions EverWatch seeks are appropriate.[7] In what one public commentator described as DOJ "quite literally trying to put one version of Schrödinger's cat back in the bag while the other version is still alive and publicly viewable,"[8] DOJ filed versions of Exhibits B and C completely under seal as part of their Opposition, and redacted quotes from those documents from the public version of its brief. ECF No. 45. In its Corrected Motion to Seal the Opposition, ECF No. 57 ("Mot. to Seal"), DOJ noted that "Plaintiff's Memorandum in Opposition contains, or refers to, internal business discussions that Defendant EverWatch considers to be confidential."[9] Mot. to Seal ¶ 2. The draft protective order *DOJ itself proposed* provides that the documents EverWatch produced pursuant to the CID and designated "Highly Confidential" should be filed under seal. Ex. 13 at Proposed Protective Order ¶ 17. However, DOJ *still* has not taken the very simple step of asking the clerk to remove its Preliminary Injunction filing from public access nor has it replaced its original Preliminary Injunction brief and Exhibits with redacted versions. Incredibly, it has taken *no* steps to correct the issue even after the Court explained on July 13th that DOJ could do so without prejudice to its arguments regarding the Antitrust Civil Process Act. EverWatch respectfully requests that the Court grant its requested sanctions and order DOJ to remove the filing from public access until an appropriate version is filed.

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[7] DOJ's argument that EverWatch has not met the procedural requirements for Federal Rule of Civil Procedure 11 sanctions is a red herring. Opp'n at 14. EverWatch did not purport to bring sanctions under Rule 11. This Court may impose sanctions under its inherent power regardless of whether Rule 11 provides an independent avenue for sanctioning the same conduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).

[8] Bryan Koenig (@bkoenig94), Twitter (July 12, 2022, 4:51 PM EST), https://twitter.com/bkoenig94/status/1546960455209521152.

[9] DOJ has still not filed a motion to seal its PI Motion.

Dated: July 13, 2022

/s/ Molly M. Barron

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