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 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SURREPLY MEMORANDUM IN RESPONSE TO EVERWATCH DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND SANCTIONS

DOJ's desire to have the last word on its improper disclosure of EverWatch's[1] Civil Investigative Demand ("CID") materials does not mean it is entitled to further briefing. First, the DOJ fails to point to any new arguments raised in EverWatch's Reply. Second, this Court's entry of the stipulated Protective Order, ECF No. 71 ("PO"), means that the confidentially-designated materials that were the subject of this Motion, and as to which this Court granted interim relief (Order, ECF No. 60), are now protected from unilateral public disclosure by the DOJ in this litigation. *See* PO ¶¶ 16, 34, ECF No. 71. DOJ is now prohibited by the PO from unilaterally disclosing such protected material going forward. *Id.* As EverWatch's initial motion is now moot, there seems nothing left to argue. Plaintiff's motion for leave to file a surreply should be denied.

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

ARGUMENT

I. DOJ'S PROPOSED SURREPLY IS IMPROPER

Surreplies are "generally disfavored" in the District of Maryland and are always subject to the discretion of this Court. *See EEOC v. Freeman*, 961 F. Supp. 2d 783, 801 (D. Md. 2013), *aff'd on other grounds*, 778 F.3d 463 (4th Cir. 2015). They are only appropriate when a party introduces new legal theories or new evidence in a reply brief to which a further response is required. *See F.D.I.C. v. Cashion*, 720 F.3d 169, 176 (4th Cir. 2013) (refusal to grant surreply where reply brief responded to existing arguments without raising "new legal theor[ies] or new evidence" was not an abuse of discretion or otherwise "inequitable"). DOJ does not meet that standard here because none of EverWatch's responsive arguments to claims raised by DOJ in its opposition were "new" arguments that merit surreply. Indeed, "[n]one of the arguments or evidence introduced in [EverWatch's] reply brief can truly be considered 'new.'" *EEOC*, 961 F. Supp. 2d at 801. DOJ's requested surreply is thus improper as a matter of law.

DOJ's motion relies on four supposedly "new" points. Corrected Mot. for Leave to File Surreply ¶ 5, ECF No. 70. In fact, each is either a response to an issue raised by DOJ in its Opposition to Defendants' Motion for Protective Order and Sanctions, ECF No. 46 ("Opp'n"), or the continuation of an issue raised in EverWatch's initial Motion for Protective Order and Sanctions, ECF No. 39 ("Mot."). *See* Mem. in Supp. of Mot. at 8-9, 10-12, ECF No. 39-1 ("Mem."). DOJ's motion proves the point, as it cites to DOJ's own opposition on three of the four "new" points. *See* Surreply Mem. in Opp'n at 3, 5, 6, ECF No. 70-1.

First, DOJ claims that EverWatch's citation to the Hart-Scott-Rodino-Act, 15 U.S.C. § 18a(h), as an example of a statute which clearly allows for public disclosure, in contrast to the Antitrust Civil Process Act, 15 U.S.C. § 1313, was "new." Reply at 6, ECF 58. But the interpretation of § 1313 is not a "new" argument. EverWatch raised the scope of § 1313 in the

parties' initial meet and confer before EverWatch filed its motion,[2] and both parties briefed the issue extensively. Mem. in Supp. of Mot. at 10-12, ECF No. 39-1; Opp'n at 2-3, ECF No. 46. EverWatch' citation to new authority to support its prior interpretation of § 1313, in response to DOJ's own argument that "Congress has authorized the Department of Justice to use CID materials in precisely the manner they have been used here," did not introduce a new legal theory or new evidence warranting a surreply. Opp'n at 2, ECF No. 46.

Second, DOJ asserts that EverWatch's argument that DOJ's interpretation of § 1313 is contrary to public policy was a "new" argument. Here again, DOJ mistakes a tool of statutory construction for a substantively new legal theory. In reply, EverWatch simply argued that DOJ's expansive reading of the statute would result in outcomes that upset reasonably settled expectations and that would therefore conflict with public policy. This argument merely responded to DOJ's assertion that its absolutist reading was "expressly contemplated and authorized by the relevant antitrust statutes." *Id.* at 5.

Third, DOJ claims that EverWatch's justification of its confidentiality designations was new. But DOJ itself raised the propriety of Defendants' designations in its opposition, and, indeed, argued that EverWatch was required to establish why the documents DOJ unilaterally disclosed should be protected. *Id.* at 7. In its Reply, EverWatch explained the basis for its designations; that was not an introduction of new evidence that would warrant surreply.

Fourth, the DOJ asserts that EverWatch's reference to a draft of the parties' proposed protective order constitutes "new" evidence. Not so. The draft (included as an exhibit to

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[2] *See* Mot. Ex. 9, at 2, ECF No. 39-12 (responding to Kevin Quin's quotation from the Antitrust Division Manual's reference to 15 U.S.C. § 1313(d)(1): "It is one thing to *use* CID materials with the Court by filing them under seal. It is another to unilaterally file them on the public docket without providing any notice . . . .") (emphasis added); *compare with* Opp'n at 6, ECF No. 46 (disclaiming legal effect of Antitrust Division Manual).

EverWatch's Reply) was merely the latest round of negotiations for the protective order that EverWatch raised in its initial motion. Mem. at 8-9, ECF No. 39-1. Notwithstanding the fact that DOJ's implicit agreement to EverWatch's requested relief was a prominent feature of EverWatch's initial motion, *id.*, there is certainly no need for a surreply now, as the Court has already entered the Protective Order. *Compare* Reply Ex. 13, at 9, ¶¶ 17, 36, ECF No. 58-1, *with* PO ¶¶ 16, 34, ECF No. 71.

II. DOJ'S SURREPLY IS UNNECESSARY BECAUSE THE ISSUE IS MOOT

DOJ's surreply is also unnecessary because it is not likely to "alter the Court's analysis." *See Chubb & Son v. C & C Complete Servs., LLC*, 919 F. Supp. 2d 666, 679 (D. Md. 2013), *aff'd on other grounds*, 605 F. App'x 159 (4th Cir. 2015); *see also Doe v. Bd. of Educ. of Prince George's Cnty.*, 982 F. Supp. 2d 641, 664 (D. Md. 2013) (same). The only "new"—and highly relevant—evidence since EverWatch's Reply is the Court's entry of the parties' Stipulated Protective Order, ECF No. 68. Curiously absent in DOJ's Corrected Motion for Leave to File a Surreply, ECF No. 70—filed after the joint submission of the Stipulated Protective Order—is any acknowledgement that DOJ agreed to the specific relief and general protections EverWatch sought from the outset. Further briefing and argument is therefore unnecessary. The Court may deny EverWatch's initial motion as moot; DOJ's motion for leave to surreply should be denied.

Dated: July 20, 2022

/s/ Molly M. Barron

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