IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, Plaintiff, v. BOOZ ALLEN HAMILTON HOLDING CORP., *et al.*, Defendants.	Civil No.: 1:22-cv-01603-CCB

PLAINTIFF'S SURREPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND SANCTIONS

For the first time, the EverWatch Defendants' reply acknowledges the statutory authorization in the Antitrust Civil Process Act for the United States' use of documents here. Yet they raise a number of other arguments for the first time to distract from that clear and unambiguous statutory language. Each of these new arguments—many of which would drastically alter the longstanding and accepted practice of the Department of Justice and have negative consequences on law enforcement and the openness of court proceedings—should be rejected.[1]

[1] The EverWatch Defendants also argue in reply that the United States cites no law supporting its interpretation. But interestingly, Defendants don't cite any law supporting their interpretation either. All of their cases involve confidentiality protections during the investigative phase or in discovery—not about confidentiality protections in court filings for defendants who are the subject of an enforcement proceeding. (*See* EverWatch Reply Br. 5; U.S. Opp'n 7 & n.10.)

The law so clearly permits the United States' action here that previous defendants apparently have not spent the time to litigate it. As discussed in its Opposition, the Department of Justice routinely uses Civil Investigative Demand materials in complaints and court documents prior to the entry of a protective order. (*See* U.S. Opp'n Br. 6-7.) The fact that the EverWatch Defendants have not identified a single case on point demonstrates that the relief they seek is far-reaching and unprecedented. *See, e.g.*, *Ueland v. United States*, 291 F.3d 993, 997 (7th Cir. 2002) ("As is true for many legal points, the paucity of support in appellate opinions does more

First, the EverWatch Defendants belatedly acknowledge—and then conveniently misread—the relevant portions of 15 U.S.C. § 1313. (EverWatch Reply Br. 4-6.) They now argue that the "prefatory" language of § 1313(c)(3)—which states "[e]xcept as otherwise provided in this section"—does *not* apply to § 1313(d)(1), which explicitly authorizes "official use in connection with any such [court] case." (*See id.*) Their argument ignores simple and obvious principles of statutory interpretation. The exception refers to a "section", which means the entire Section 1313 of the U.S. Code—*not* simply to § 1313(c), one of its *subsections*. *See, e.g., Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018) ("And 'when Congress wants to refer to only a particular subsection or paragraph, it says so.'") (quoting *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 938-39 (2017) (alteration marks omitted)). The "exception" in § 1313(c) plainly indicates that the cross-referenced subsections (which includes § 1313(d)(1)) should prevail. *Cyan*, 138 S. Ct. at 1070 ("Thousands of statutory provisions use the phrase 'except as provided in…' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict.").

Relatedly, the EverWatch Defendants argue that the text of an entirely different statute, the Hart-Scott-Rodino Act, supports their interpretation. Even if Congress may have used different statutory language in a separate statute, that language does not make the clear statutory language in the Antitrust Civil Process Act any less clear. Nor should it overcome the plain language of Section 1313, which expressly *permits* the use of CID materials in court proceedings without the limitations suggested by the Defendants.

Second, the EverWatch Defendants incorrectly claim, for the first time, that the DOJ's interpretation of the statute is "contrary to public policy." (EverWatch Reply Br. 7-8.)

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to show that the proposition is too clear to be questioned than to show that it is debatable.").

Specifically, the EverWatch Defendants contend that 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." (*Id.*) Of course, the EverWatch Defendants conveniently ignore the decades of precedent where the United States has, in accordance with its rights under the statute, selectively disclosed CID material in antitrust complaints and motions without objection, including in cases where counsel for EverWatch Defendants have been involved. *See, e.g.*, U.S. Opp'n 6-7 & n.9. Moreover, courts have rejected similar "chilling" arguments in the FOIA disclosure context on the basis that compliance with Civil Investigative Demands is *mandatory*, not voluntary. *See, e.g.*, *Frank LLP v. Consumer Fin. Prot. Bureau*, 288 F. Supp. 3d 46, 60-62 (D.D.C. 2017). Thus, there could be no chilling effect for the recipient of a Civil Investigative Demand, given that compliance with the CID is mandatory.

The EverWatch Defendants' remaining arguments on this point are similarly unavailing. The Department of Justice—rather than defendants in an enforcement action—is best positioned to determine if the documents it uses will "undercut" its enforcement efforts elsewhere. (*See* EverWatch Reply Br. 8.) Indeed, it is the EverWatch Defendants' position that would have far-reaching law enforcement and policy consequences, and completely upend longstanding Department of Justice practice. In effect, the EverWatch Defendants argue that any document submitted in response to a CID cannot be used in court without either sealing or a defendant's consent. That is not, and cannot be, the law. For example, their position would require the United States to either shield crucial information from public *or* provide notice to an investigatory target of an enforcement action prior to publicly filing a complaint. Their position would also result in unnecessary shielding of information from the public—contrary to First

Amendment principles and the common law presumption for access to judicial documents and court proceedings.

Third, the EverWatch Defendants explain, for the first time, the basis for their claim that the exhibits at issue are somehow deserving of confidential treatment. (*See* EverWatch Reply Br. at 9-11.) They first argue that the "identity of [EverWatch's] team members can be confidential and competitively sensitive information." (*Id.* at 10.) Regardless of whether or not that is true here, the Department of Justice *did* redact the identities of non-parties to this litigation. There is *nothing* "arbitrary" about the decision to redact non-party names on privacy grounds,[2] and to not redact the identity of *party* representatives—such as managers, executives, and board directors who are likely to be party witnesses.

The EverWatch Defendants also claim that this material warrants protection because "[i]nformation suggesting that a team member might stand down from a bid" is somehow "untrue" (despite the plain language in the email). (EverWatch Reply Br. 10.) The "truth" of a party admission is something that can be litigated at trial, but it is not grounds for redaction. EverWatch's concerns of "reputational damage" or generic "business harm" from the public release of that information amounts to nothing more than embarrassment. (*See id.*)[3]

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[2] *See, e.g., Sky Angel U.S., LLC v. Discovery Commc'ns., LLC*, No. DKC 13-0031, 2016 U.S. Dist. LEXIS 187680, at *61 (D. Md. Aug. 15, 2016) (permitting "reasonable and narrowly tailored" redactions to protect third-party interest in anonymity).

[3] "The interests that courts have found sufficiently compelling to justify closure under the First Amendment include a defendant's right to a fair trial before an impartial jury; protecting the privacy rights of trial participants such as victims or witnesses; and risks to national security. Adjudicating claims that carry the potential for embarrassing or injurious revelations about a corporation's image, by contrast, are part of the day-to-day operations of federal courts. . . A corporation may possess a strong interest in preserving the confidentiality of its proprietary and trade-secret information, which in turn may justify partial sealing of court records. We are unaware, however, of any case in which a court has found a company's bare allegation of reputational harm to be a compelling interest sufficient to defeat the public's First Amendment right of access." *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (internal citations

The EverWatch Defendants attempt to characterize Exhibit C as a confidential "settlement discussion" also strains credulity. (EverWatch Reply Br. 10.) EverWatch does not provide any declaration to support its assertion that the Defendants' discussions and efforts were part of settlement contracts or explain why such efforts were being done through a non-party intermediary. And that's not surprising. Legitimate settlements of antitrust violations would not embody a violation of Section 1 of the Sherman Act, as an agreement between two putatively independent competitors to refrain from bidding for a contract assuredly would. *See e.g. Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978) (professional society's "ban on competitive bidding" is "nothing less than a frontal assault on the basic policy of the Sherman Act"); *see also United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 316 (4th Cir. 1983).

Notably, the EverWatch Defendants do not make any attempt to argue that these weak explanations of confidentiality could meet the high and exacting standard for sealing judicial documents under the First Amendment or the common law presumption of access. (*See* U.S. Opp'n Br. at 9 n.14.) That is because there is no such credible argument.

Fourth, the EverWatch Defendants attach an entirely new exhibit to their reply brief. EverWatch Defendants' Exhibit 13 is email correspondence from 9:21 p.m. July 11, 2022 (after EverWatch had filed its motion) concerning the negotiations of a proposed protective order in this case.[4] The EverWatch Defendants appear to suggest that the Department of Justice was somehow bound to a document that was still being negotiated, and certainly was not stipulated to or ordered by the Court. Accepting their argument would cause an absurd result at odds with

omitted).

[4] The United States proposed a draft protective order to Defendants on June 29, 2022, the same day that it filed the instant action. The parties have been negotiating the terms of that draft order since then.

basic principles of court orders and contracts. Namely, the Department of Justice would be required to comply with its proposed protective order, even where the Defendants are not bound by the same requirements. And, as discussed in its opposition brief, the Department of Justice routinely uses Civil Investigative materials in complaints and court documents prior to the entry of a protective order. (*See* U.S. Opp'n Br. 6-7.) Accepting the EverWatch Defendants' argument would upend this longstanding practice.

For all of the additional reasons discussed above,[5] the EverWatch Defendants' Emergency Motion for a Protective Order and Sanctions should be denied.

[5] The EverWatch Defendants also fail to address their failure to abide by the "safe harbor" provision of Federal Rule of Civil Procedure 11, other than to point, without any analysis, to the "inherent" powers of the Court to sanction. But the EverWatch Defendants neglect to mention that those inherent powers are extremely narrow and limited. The Court's "inherent" powers are reserved for instances of bad faith conduct, ethical misconduct or fraud on the court. *See also Obifuele v. 1300, LLC*, No. SKG-04-3839, 2006 U.S. Dist. LEXIS 60043, at *29 (D. Md. Aug. 23, 2006) (noting that "a finding of bad faith is sine qua non to the imposition of inherent power sanctions" and contrasting with Rule 11 which "focuses on specific abuses and is not limited to willful conduct" (internal quotations omitted)). The cases that EverWatch cite are clear on that as well. *See* EverWatch Reply Br. 12 n.8 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)); EverWatch Op. Br. 13 (citing *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 458, 462 (4th Cir. 1993)).

Dated this 15th day of July, 2022.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, I electronically filed the foregoing Plaintiff's Surreply Memorandum in Opposition to Defendants' EverWatch Corp., EC Defense Holding LLC, and Analysis, Computing & Engineering Solutions, Inc.'s Emergency Motion for Protective Order and Sanctions, and served, via electronic filing, counsel of record for all parties.

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