IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et al.*,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 1:15-cv-00256 (APM)
SYSCO CORPORATION, USF HOLDING CORP., and US FOODS, INC.	:	
Defendants.	:	

DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF MOTION TO MAKE PUBLIC DECLARANT NAMES AND AFFILIATIONS

The secrecy afforded to the FTC's investigation during the Hart-Scott-Rodino merger review process is not at issue – that investigation has concluded. Plaintiffs seek to extend that secrecy into a federal court proceeding, concealing from Defendants and the public the names and affiliations of every witness offering testimony in support of their claims, including the ones they intend to call live at the preliminary injunction hearing.[1] Now that Plaintiffs have emerged from their *ex parte* investigation and chosen to make the declarations an element of their case, they should not be permitted to hide this evidence and further impede Sysco and US Foods' defense.

Nothing in Plaintiffs' Opposition supports their ongoing refusal to disclose the witnesses' identities. Notably,

- Plaintiffs fail to cite a single case holding that federal law protects witness names and affiliations from disclosure in merger injunction cases. To the contrary, witness identities are routinely disclosed in such cases, including on exhibit lists, witness lists, and in court opinions, regardless of whether those witnesses were first contacted by the FTC during its investigation.

- Despite the passage of more than three weeks since the complaint was filed in this case, Plaintiffs still offer only vague and unsubstantiated claims of concerns about retaliation. As Defendants observed in their opening brief, while many customers are supportive of the transaction, there are real world examples of customers, including independent restaurants, who have been quoted in the press as opposing the transaction since it was announced back in December 2013, and yet Plaintiffs have not identified a single instance of retaliation against any customer. Plaintiffs' Opposition does not dispute this critical fact.

- Plaintiffs do not dispute that witness names and affiliations are unprotected under the FTC's own Rules of Practice. *See* 16 C.F.R. § 3.45(b). In fact, third-party witness names and affiliations are routinely made public in the FTC's own administrative proceedings.

[1] In correspondence with Defendants, Plaintiffs have also taken the position that the names on their preliminary witness list should be kept secret. *See* E-mail from Stephen Weissman, Deputy Dir. Bureau of Competition, FTC to Edward D. Hassi et al., Counsel for Sysco Corp. (Mar. 9, 2015, 19:02:58 EST).

Accordingly, Defendants respectfully request that the Court order Plaintiffs to make public the names and affiliations of all declarants and each of the witnesses on Plaintiffs' preliminary witness list.

I. Federal Law Does Not Protect Witness Identities in Merger Injunction Cases

Plaintiffs' reliance on the Freedom of Information Act, 5 U.S.C. § 552, related statutes and regulations for the proposition that witness names and affiliations are protected in federal court litigation is misplaced. The provisions cited by Plaintiffs are inapposite and/or contain explicit exceptions for disclosure in court proceedings such as this one. *See* 15 U.S.C. § 18a(h)(restricts disclosure "*except as may be relevant to any administrative or judicial action or proceeding*") (emphasis added); 15 U.S.C. § 46(f) (restricts disclosure of "any trade secret or any commercial or financial information"); 15 U.S.C. §§ 57b-2(a)(1), 57b-2(f), 16 C.F.R. §§ 4.10, 4.11 (limiting disclosure of certain "documentary material, tangible things, written reports or answers to questions, and transcripts of oral testimony," but not witness names and affiliations).[2] Not surprisingly, Plaintiffs fail to cite a single case that has interpreted any of these provisions to prohibit witness names and affiliations from being made public in federal court litigation. On the other hand, numerous merger injunction cases have made public witness names and affiliations.[3]

In support of their argument, Plaintiffs point to three protective orders—from *Staples*, *CCC*, and *Ardagh*. But Plaintiffs fail to mention that in *Staples* and *CCC* the names of third-

[2] Moreover, under 16 C.F.R. § 4.10(g), documentary material may be disclosed in court proceedings, and protective orders should only be entered where "appropriate" and where the submitter has requested such an order. *FTC v. Std. Fin. Mgmg. Corp.*, 830 F.2d 404, 411 (1st Cir. 1987). Here, protecting witness names and affiliations based on vague and unsubstantiated claims is not appropriate.

[3] *See e.g. United States v. H&R Block Inc.*, No. 1:11-cv-00948-BAH (D.D.C. Sept. 30, 2011) (Dkt. 100); *FTC v. OSF Healthcare*, No. 3:11-cv-50344 (N.D. Ill. Nov. 18, 2011) (Dkt. 1-1); *FTC v. CCC Holdings, Inc.*, No. 08-cv-02043-RMC (D.D.C. Dec. 9, 2008) (Dkt. 60-1); *United States v. Oracle Corp.*, No. 3:04-cv-00807-VRW (N.D. Cal. Sept. 9, 2004) (Dkt. 427 at 99); *FTC v. Arch Coal*, No. 1:04-cv-00534 (D.D.C. July 12, 2004) (Dkt. 77-2).

party witnesses were public. *See FTC v. Staples Inc.*, 970 F. Supp. 1066, 1077 (D.D.C. 1997); *FTC v. CCC Holdings, Inc.*, No. 08-cv-02043-RMC (D.D.C. Dec. 9, 2008) (Dkt. 60-1). And in *Ardagh*, the FTC disclosed its witness list in a public document, which included the names and affiliations of each of its third-party witnesses, in the proceedings before its own administrative law judge. *See* Compl. Counsel's Final Proposed Witness List, *In the Matter of Ardagh Group S.A.* (November 1, 2013) (FTC Dkt. No. 9356).[4] These cases further underscore the dispositive distinction between confidentiality in the now concluded investigative stage and the strong presumption of public access in the current federal court litigation.

II. The Harm to Defendants from Non-Disclosure Outweighs Any Speculative and Unsubstantiated Claims of Retaliation

Defendants' ability to respond to Plaintiffs' claims is hindered each day that goes by without access to declarant names and affiliations. In the compressed timetable for fact discovery—which Plaintiffs sought—Plaintiffs have proposed to offer 92 declarations into evidence in lieu of live testimony. Meanwhile, Defendants are left to build their defense in the dark. Plaintiffs cannot have it both ways. If they want the Court to consider witness testimony, then Defendants must have a meaningful opportunity to cross-examine those witnesses.

Providing access to two in-house attorneys does little to offset this prejudice. The only in-house counsel who will be privy to the witness names and affiliations are uninvolved in

[4] *See also* Compl. Counsel's Pre-Trial Br., *passim*, *In the Matter of OSF Healthcare Sys.* (Apr. 4, 2012) (FTC Dkt. No. 9349); Compl. Counsel's Post-Trial Findings of Fact and Conclusions of Law at 173-88, 207-13, *In the Matter of ProMedica Health Sys., Inc.* (Sept. 20, 2011) (FTC Dkt. No. 9346). The fact that witness names and affiliations are disclosed in administrative proceedings notwithstanding inclusion of the language in the protective orders on which Plaintiffs seek to rely directly undermines their comity point. This Court—like numerous other courts before it—would be well within its rights to follow suit and order disclosure of witness names and affiliations without modification of the protective order. Alternatively, the Court could accomplish the same objective through modification. *See Infineon Tech. AG v. Green Power Tech. Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005) ("[P]rotective orders are not permanent and may be modified to serve important efficiency or fairness goals in the court's discretion.").

business decisions. Their generalized understanding of foodservice distribution cannot substitute for insights and direct knowledge from the people with day-to-day familiarity with particular customers, the areas in which they and competitors operate in those markets, and critically, which competitors the customers have purchased—or threatened to purchase—from, besides Sysco and US Foods. Plaintiffs' proposed solution that in-house counsel "talk with . . . sales representatives and gather relevant documents" is no fix at all. Without a name, zeroing in on relevant information for a particular witness—among hundreds of thousands of customers and myriad competitors—is akin to finding a needle in a haystack. As Plaintiffs well know, the practical effect of denying Defendants access to the names and affiliations is to seriously hinder their efforts to identify the evidence necessary to refute or undermine the witnesses' testimony.[5]

Plaintiffs' prejudice argument rings hollow. First, not a single declarant has come forward to challenge Defendants' motion despite the issue being on the table for more than two weeks. In fact, the FTC cites only *one* unidentified declarant of the 92 declarants as saying that they would not have *voluntarily* cooperated if they had known their identity would be made public.[6] Second, Plaintiffs have not offered any evidence that the purported fear of retaliation is grounded in reality. Instead, Plaintiffs offer an FTC attorney's conclusory affidavit that relies on hearsay and fails to identify a single customer who purportedly fears retribution.[7] Third, Plaintiffs ignore the common sense fact that Defendants would be foolish to attempt any retaliation against customers with whom they work every day to obtain business against

[5] Plaintiffs' proposal to make public redacted versions of the declarations (which is already required under the current protective order) also does not solve the problem because to refute what the declarant has said requires knowing who the declarant is and the facts surrounding it.
[6] *See* Quillian Decl. ¶ 7. Indeed, Plaintiffs fail to identify any purported chilling effect following the countless instances of FTC witness names becoming public in litigation.
[7] Given this fact and the passage of several weeks, the Court should reject Plaintiffs' proposal to further extend the time for customers to petition the Court. Defendants have been, and will continue to be, prejudiced without immediate access to declarant names and affiliations.

numerous competitors. No court has kept secret witness names and affiliations on such a record. Finally, Plaintiffs' purported retaliation concern is belied by their recognition that the identities of declarants will eventually become public at the hearing and in the Court's decision in this case. This admission suggests Plaintiffs merely seek to delay disclosure until after Defendants have missed their opportunity to conduct meaningful cross-examinations of declarants and to prepare for trial.[8]

III. The Public and Defendants Have a Right to Know the Witnesses' Identities

Plaintiffs do not dispute that there is a strong presumption in favor of public access to the declarants' names and affiliations. Plaintiffs fall far short of demonstrating that any of the *Hubbard* factors support further secrecy here. For example, the need for public access (Factor 1) is high because (i) the government is a party, (ii) this is a case of national significance, and (iii) the witnesses are an integral part of the proceedings. *See In re Fort Totten Metrorail Cases*, 960 F. Supp.2d 2, 5-11 (D.D.C. 2013); *Guttenberg v. Emery* 26 F. Supp. 3d 88, 92-97 (D.D.C. 2014); *U.S. v. Stevens*, Crim. No. 08-231, 2008 WL 8743218, *9-*12 (D.D.C. Dec. 19, 2008). Plaintiffs' purpose for introducing the declarations (Factor 6) also weighs in favor of public access because Plaintiffs want the Court to consider in its decision the declarations from this particular, albeit small, set of customers. The other factors likewise fail to overcome the strong presumption of access.[9]

[8] The admission also underscores the undisputed fact that the FTC did not – and could not – have guaranteed the declarants that their names and affiliations would remain secret in litigation.

[9] The FTC's objection to disclosure (Factor 3) carries little weight; the real parties in interest have stayed conspicuously silent. *See In re Fort Totten*, 960 F. Supp. 2d at 8. And as discussed above, Plaintiffs have failed to make any particularized showing that they would be prejudiced, or that their privacy or property interests would be compromised (Factors 4 and 5).

Dated: March 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2015, with the Court's permission, I filed the foregoing *Defendants' Reply Memorandum of Points and Authorities in Further Support of Motion to Make Public Declarant Names and Affiliations* with the Court using the CM/ECF system, which will automatically send electronic mail notification of such filing to the CM/ECF registered participants.

/s/ *Joseph F. Tringali*
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