UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	
v.	)	Civil Case No. 1:11-CV-02239 (RLW)
GRACO INC., *et al.,*	)	
Defendants.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO UNSEAL THE UNREDACTED COMPLAINT

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I. INTRODUCTION

Defendant Graco Inc. ("Graco") begins its Memorandum of Law in Response to Plaintiff's Motion to Unseal the Unredacted Complaint ("Memorandum") [DKT# 44] by asking the Court to add a seventh factor to the time-tested, six-factor *Hubbard* analysis. *U.S. v. Hubbard*, 650 F.2d 293, 317-21 (D.C. Cir. 1980). Graco asks the Court to analyze the question of timing—to predict, in other words, the *best* time for public disclosure. This mocks *Hubbard's* foundation: the "strong presumption" that the public deserves access *now*. *Id.* at 317; *see also EEOC v. Nat'l Children's Ctr.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) ("[T]he starting point in considering a motion to [un]seal court records is a 'strong presumption in favor of public access to judicial proceedings.'" (quoting *Johnson v. Greater Se. Com'ty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991)).

Graco then asks the Court to ignore *Hubbard* altogether, pretending that Plaintiff bears the burden of justifying public disclosure. *See*, *e.g.*, Memorandum at 5 ("Consideration of the FTC's motion should be heavily colored by the fact that the FTC identifies no particular need for public access . . . .") [DKT# 44]. For over 30 years, the D.C. Circuit has placed the burden of persuasion squarely on those parties seeking confidentiality. *See Greater Se. Com'ty. Hosp.*, 951 F.2d at 1277 ("[In *Hubbard*], we articulated a series of factors a district court should weigh in determining whether and to what extent a party's interest in privacy or confidentiality . . . outweighs this strong presumption in favor of public access . . . .").

Having attempted to shift this unavoidable burden, Graco then fails to meet this burden. Instead, Graco offers vague, broad assertions of confidential and sensitive information while predicting generalized harm to its public image. *See*, *e.g.*, Memorandum at 8 ("[T]here is no reason to allow the FTC to impugn Graco publicly . . . .") [DKT# 44]. Such assertions are

explicitly insufficient to justify the present seal. *See Zapp v. Zhenli Ye Gon*, 746 F. Supp. 2d 145, 150 (D.D.C. 2010) (unsubstantiated reputational and property interests do not favor sealing); *Friedman v. Sebelius*, 672 F. Supp. 2d 54, 60 (D.D.C. 2009) (a "broad reference to 'confidential and sensitive information'" cannot justify a seal).

II. ARGUMENT

A. TIMING IS NOT A FACTOR UNDER *HUBBARD*

Graco argues that the possibility of dismissal and the lack of a final protective order render Plaintiff's Motion to Unseal the Unredacted Complaint ("Motion") untimely [DKT# 40].[1] As Graco illustrates in its Memorandum, the *Hubbard* analysis contains six inquiries, none of which asks whether Defendant finds the timing of disclosure ideal or whether future events will obviate the inquiry. Memorandum at 4 [DKT# 44]. In *U.S. ex rel. Durham v. Prospect Waterproofing, Inc.*, No. 10-1946, 2011 U.S. Dist. LEXIS 117051 (D.D.C. Oct. 4, 2011), the court specifically refused to let the question of timing influence the *Hubbard* analysis. There, the plaintiff argued that the court should maintain a seal on the complaint because the plaintiff had already "voluntarily dismissed the case" without prejudice. *Id* at *10. There, unlike here, dismissal was certain. There, as here, a new venue was possible. The court still refused to seal the complaint. *Id.* at *11.

[1] Chief Administrative Law Judge D. Michael Chappell has already entered a Protective Order Governing Discovery Material ("Administrative Protective Order") in the ongoing administrative proceeding regarding the same transaction. *In the Matter of Graco Inc.*, Docket No. 9350, available online at http://www.ftc.gov/os/adjpro/d9350/111216aljprotectordgovdisc.pdf. As is customary, the final protective order here is likely to be nearly identical to the Administrative Protective Order. Plaintiff has also filed a similar Motion to Place the Unredacted Complaint on the Public Record ("Administrative Motion") in the administrative proceeding. The Administrative Motion as well as the relevant complaint are available online at http://www.ftc.gov/os/adjpro/d9350/.

Under *Hubbard* and its progeny, court proceedings that do not merit present sealing merit present disclosure. *U.S. ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 171 (D.D.C. 2008) ("In this Circuit, 'the starting point in considering a motion to [un]seal court records is a "strong presumption in favor of public access to judicial proceedings.'" (quoting *Nat'l Children's Ctr.*, 98 F.3d at 1409)).

B. *HUBBARD* REQUIRES DISCLOSURE

Graco's Memorandum abundantly illustrates that the only *Hubbard* factor remotely favoring the seal is the third factor—an inquiry into the existence and identity of an objecting party. Graco is the only party objecting to Plaintiff's Motion. Motion at 1 [DKT# 40]. The other Defendants—Illinois Tool Works Inc. and ITW Finishing LLC (collectively "ITW")—do not oppose unsealing similar information. Under *Hubbard*, Graco's objection is insufficient to justify maintaining the seal. *See*, *e.g.*, *Nat'l Children's Ctr.*, 98 F.3d at 1410 (holding that a sealed document merits unsealing when *Hubbard's* third factor is the only factor favoring the seal).

1. The First Factor—the Public's Need for Access to the Documents at Issue—Does Not Favor the Seal

Graco devotes a significant portion of its Memorandum to arguing that "there is no need for public access" to the unredacted Complaint. Memorandum at 5, 6, 8-9 [DKT# 44]. The argument asks the Court to ignore 30 years of unambiguous case law. That law certainly bears repeating: "In this Circuit, when evaluating whether to seal case pleadings, 'the starting point . . . is a "strong presumption in favor of public access to judicial proceedings.'"" *Prospect Waterproofing*, 2011 U.S. Dist. LEXIS 117051, at *2 (quoting *Nat'l Children's Ctr.*, 98 F.3d at 1409). In this Circuit, public access is particularly vital where the government is a party and taxpayers are, therefore, "real parties in interest." *Schweizer,* 577 F. Supp. 2d at 172.

Graco relies partly on rulings from other circuits to argue that the D.C. Circuit's "strong presumption in favor of public access to judicial proceedings" does not extend to the Complaint, the very document that initiated the present judicial proceeding. Memorandum at 5 (citing case law from the First and Fifth Circuits) [DKT# 44]. Otherwise, Graco relies on a tortured interpretation of a vacated D.C. Circuit Court opinion. Memorandum at 5 (citing *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984), *vacated on other grounds*, 763 F.2d 1472 (D.C. Cir. 1985) (en banc)) [DKT# 44]. The *Tavoulareas* court declined to unseal 3,800 pages of deposition transcripts, the vast majority of which were never "submitted into evidence, read into the record, or submitted in support of a pretrial motion." 724 F.2d at 1011 n.2. The court ruled that the common law right of access does "not include documents not used at trial." *Id.* at 1016.

Extrapolating wildly, Graco posits (without fully articulating) the novel theory that information in a complaint is specifically outside the realm of public access until it is "used at trial." This reading of *Tavoulareas* presumably means that all complaints merit complete sealing until the material therein is "submitted into evidence, read into the record, or submitted in support of a pretrial motion." *Id.* at 1011 n.2. Graco's approach is not a theory of presumed public access but rather presumed confidentiality. The theory is precisely refuted by relevant case law. In *Prospect Waterproofing* 2011 U.S. Dist. LEXIS 117051, at *9-11, the court used *Hubbard* to justify unsealing a complaint voluntarily dismissed *before* trial. The court stated: "When [Plaintiff] filed his Complaint, his purpose was for his allegations to be the basis of a potential trial. Therefore, there is a strong presumption for public access weighing in favor of unsealing the Complaint." *Id.* at *10. Under *Hubbard*, it is therefore irrelevant whether the unredacted Complaint has technically been "used at trial."

The presumptive need for public access is a given under *Hubbard* and it extends specifically to the unredacted Complaint. Plaintiff needs not justify the presumption nor rehearse the logic behind it. This Court has already done so repeatedly. Despite Graco's arguments to the contrary, the only question before this Court is whether Graco's privacy and confidentiality interests trump the need for public access. *See Greater Se. Com'ty. Hosp.*, 951 F.2d at 1277 ("[In *Hubbard*], we articulated a series of factors a district court should weigh in determining whether and to what extent a party's interest in privacy or confidentiality . . . outweighs this strong presumption in favor of public access . . . .").

2. The Second Factor—Previous Public Access—Does Not Favor the Seal

Graco argues that a lack of previous public access to the redacted material supports the seal. This is a misreading of the case law. Lack of previous public access does not lend support to maintaining a seal. *Prospect Waterproofing*, 2011 U.S. Dist. LEXIS 117051 at *6 ("The public did not have prior access to the pleadings in the present case because this case was under seal . . . . This factor is thus neutral.").

3. The Fourth Factor—Countervailing Property and Privacy Interests—Does Not Favor the Seal

Relying, again, on a weak blend of the *Tavoulareas* opinion and tangential case law from other circuits, Graco argues that the D.C. Circuit's "strong presumption in favor of public access" is outweighed by Graco's vague property and privacy interests. Memorandum at 7 (citing the Third and First Circuits and *Tavoulareas*) [DKT# 44].

Graco argues *Tavoulareas* is pertinent here because in both cases the government obtained the contested material during pre-trial investigations. Memorandum at 7 [DKT# 44]. The precedent is unavailing for three reasons. First, the ruling in *Tavoulareas* is based on the *superfluity* of the sealed material, not on the particular time of its gathering. 724 F.2d at 1029

(finding that "the depositions at issue were never used at trial" and therefore did not merit disclosure). Second, the court in *Tavoulareas* did not actually seal "the small portion of these depositions and exhibits" used in filings and arguments. *Id.* at 1011-12. The court, in other words, did exactly what Plaintiff is moving this Court to do: publicly disclose excerpts of otherwise sealed documents.

This second point bears repeating in light of the Memorandum's reference to the "confidentiality of Graco's documents." Memorandum at 4 [DKT# 44]. At this time, the FTC is only seeking to unseal the language quoted in the Complaint, *not* the cited documents and transcripts. While other portions of the cited documents may indeed merit sealing, nothing precludes public disclosure of the redacted material in the Complaint. This is evident in the fact that ITW has not objected to public disclosure of similar material. Motion at 1 ("[ITW] does not oppose unsealing the Complaint as to information received from ITW . . . .") [DKT# 40].

Finally, *Tavoulareas* is distinguished from the present case by the simple fact that the contested material there actually qualified as "sensitive commercial information" and thus merited confidentiality. 724 F.2d at 1023 ("[Plaintiff] succeeded in confirming that the 3,800 pages of depositions designated confidential contained a kind of information that, if revealed, would harm its competitive position."). The "adequately specified" harms in *Tavoulareas* included the likelihood that disclosure could "undermine [Plaintiff's] relationship with the Kingdom of Saudi Arabia, hamper its ability to compete in the marine transportation business, and threaten its access to substantial volumes of crude oil from Saudi Arabia." *Id.* at 1013. The plaintiff in *Tavoulareas* substantiated the likelihood of these harms with two affidavits and an exhibit. *Id.* at 1024.

Here, the claimed harms are not so specified, substantial, or substantiated. Graco raises the vague possibility of "harm to both its legal and business interests." Memorandum at 8. This ethereal claim is accompanied by broad assertions that the contested material comprises "confidential business information." *See*, *e.g.*, Memorandum at 7 [DKT# 44]. Such unsubstantiated statements are explicitly insufficient to justify the present seal. *See*, *e.g.*, *Friedman*, 672 F. Supp. 2d at 60 (a "broad reference to 'confidential and sensitive information'" cannot justify a seal).

Graco primarily stakes its claims of confidentiality on two irrelevant facts: 1) the material comes from the "highest levels of management," and 2) the FTC obtained the material during a non-public, pre-Complaint investigation. Memorandum at 7-9. Plaintiff can find no court holding that the corporate standing of a given communicator bolsters a privacy or property interest under *Hubbard*. Only the substance of the material matters. *Hubbard*, 650 F.2d at 315-16 (public access may be denied "to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity"). If anything, the fact that the contested material comes from the "highest levels" of Graco management demonstrates its importance and reliability—its suitability for explaining the nature of the case to the public.

That the FTC came by the contested material during a confidential pre-trial investigation has no bearing. The FTC Act expressly empowers the Commission to "make public from time to time" non-sensitive information gathered during its investigations as is "in the public interest." 15 U.S.C. § 46(f).

4. The Fifth Factor—Potential Prejudice to Those Opposing the Seal—Does Not Favor the Seal

Here Graco again advances a strained argument instead of a relevant one, claiming that disclosure will "harm both its legal and business interests." Memorandum at 8 [DKT# 44]. The law is unmistakable on this point. The fifth factor is only interested in the possibility of *legal* prejudice. *See Hubbard*, 650 F.2d at 320-21. Graco offers no real claim that such prejudice will occur here, arguing simply that "there is no reason to allow the FTC to impugn Graco publicly." Memorandum at 8 [DKT# 44]. The FTC is not impugning Graco, Plaintiff simply seeks to unseal information that is not competitively sensitive and does not qualify as a trade secret.

Without a more precise rendering of potential legal prejudice, the fifth factor cannot weigh in favor of the seal. *See Friedman,* 672 F. Supp. 2d at 60 (holding that the fifth factor does not support the seal when the relevant party has "not claimed that unsealing this matter would affect them in any future litigation; rather, they refer only to generalized reputational harm").

5. The Sixth Factor—the Purpose of the Relevant Document—Does Not Favor the Seal

Graco adds redundancy to irrelevancy, arguing, once again, that the seal must abide because the FTC has failed to justify disclosure; or, more precisely, because the FTC "fails to explain how any legitimate litigation purpose supports its Motion." Memorandum at 9 [DKT# 44]. Again, *Hubbard* makes clear that Graco bears the burden of justifying confidentiality.

In reality, the sixth factor is a "bright line" inquiry into the purpose of the relevant document. *See U.S. v. Thomas*, No. 06-0497, 2011 U.S. Dist. LEXIS 150939, at *10 (D.D.C. Dec. 23, 2011). *Prospect Waterproofing* recently made clear that the Complaint falls well within the category of documents meriting the presumption of disclosure. 2011 U.S. Dist. LEXIS

117051 at *10 ("When [Plaintiff] filed his Complaint, his purpose was for his allegations to be the basis of a potential trial. Therefore, there is a strong presumption for public access weighing in favor of unsealing the Complaint.").

Graco cannot reasonably argue that public disclosure of the redacted material—which quotes Graco's documents and a Graco executive discussing competition in the relevant markets and the likely impact of the acquisition—serves no purpose when the Complaint alleges an antitrust violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The redacted material goes to the very heart of the Complaint. *See Doe v. Exxon Mobil Corp.*, 570 F. Supp. 2d 49, 52 (D.D.C. 2008) (proposed redactions that "go to the heart" of the document are necessarily left unredacted).

III. CONCLUSION

For the foregoing reasons, Graco respectfully requests that the Court grant Plaintiff's Motion [DKT# 40].

January 19, 2012

Respectfully submitted,

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I HEREBY CERTIFY that on the 19th day of January 2012, I served the attached on the following counsel by electronic mail (PDF):

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