

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

PLAINTIFF’S MOTION TO UNSEAL THE UNREDACTED COMPLAINT

1. Plaintiff, the Federal Trade Commission (“Commission”), respectfully moves the Court for an order to unseal the unredacted Complaint for Temporary Restraining Order and Preliminary Injunction (“unredacted Complaint”). This motion is supported by the memorandum of points and authorities attached hereto. Pursuant to Local Civil Rule 7(m), Plaintiff’s counsel discussed this motion with Defendants’ counsel. Defendant Illinois Tool Works, Inc. does not oppose unsealing the Complaint as to information received from ITW contained in paragraphs 5 and 29 of the unredacted Complaint. Defendant Graco Inc. opposes this motion.

2. In light of the public’s strong interest in the outcome of this case and the longstanding public policy in favor of open access to judicial records, Plaintiff moves to unseal the unredacted Complaint. Plaintiff respectfully moves the Court for expedited treatment of this motion in order to facilitate a more open and thorough discussion of the issues.

January 9, 2012

Respectfully submitted,

By: /s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of January 2012, I served the attached on the following counsel by electronic mail (PDF):

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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S
MOTION TO UNSEAL THE UNREDACTED COMPLAINT**

Plaintiff, the Federal Trade Commission (“Commission”), respectfully moves the Court for an order to unseal the Complaint for Temporary Restraining Order and Preliminary Injunction (“Complaint”). Plaintiff first filed the Complaint on December 15, 2011, together with an unopposed motion to seal the Complaint, the Motion for Temporary Restraining Order and Preliminary Injunction (“Motion”) [DKT# 7], and other documents. On December 16, 2011, the Court ordered the documents sealed until “the commencement of any hearing” on the Motion. On December 19, 2011, the Court ordered [DKT# 12] the parties to confer and file redacted public versions of the sealed filings, including the Complaint. After conferring with Defendants, Plaintiff filed a redacted Complaint on December 23, 2011 [DKT# 26]. The redacted text quotes Defendants’ documents and a Graco Inc. (“Graco”) executive. The Commission protected these quotes from public disclosure during the Commission’s pre-Complaint antitrust investigation. That investigation ended on December 15, 2011, when the

Commission filed its administrative complaint challenging the transaction.¹ The unredacted Complaint remains under seal.

In light of the longstanding public policy in favor of open access to judicial records, and the public's strong interest in the antitrust violations in this case, Plaintiff now moves to unseal the unredacted Complaint. Plaintiff will also move to unseal its administrative complaint, which contains the same quotations.

ARGUMENT

In *U.S. v. Hubbard*, the D.C. Circuit Court found a “strong presumption in favor of public access to judicial proceedings.”² The presumption serves to ensure “the integrity of judicial proceedings in particular and of the law enforcement process more generally.”³ Property and privacy interests may occasionally outweigh the presumption;⁴ however, the D.C. Circuit has seldom favored confidentiality over transparency, particularly when the government is a party to the case.⁵

Hubbard articulates a six factor balancing test for determining whether property and privacy interests merit protection.⁶ The six factors are:

- (1) the need for public access to the documents at issue;
- (2) the extent to which the public had access to the documents prior to the sealing order;
- (3) the fact that a party has objected to disclosure and the identity of that party;
- (4) the strength of

¹ *In the Matter of Graco Inc.*, FTC File No. 111-0169, available online at <http://www.ftc.gov/os/adjpro/d9350/111215gracoadmincmpt.pdf>.

² *U.S. v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1981); *see also EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (“[T]he starting point in considering a motion to 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))).

³ *Hubbard*, 650 F.2d at 315.

⁴ *Greater Se. Com'ty. Hosp.*, 951 F.2d at 1277.

⁵ *See Nat'l Children's Ctr.*, 98 F.3d at 1409 (citing *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (“The appropriateness of making court files accessible is accentuated in cases where the government is a party.”)).

⁶ *Hubbard*, 650 F.2d at 317-22.

the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.⁷

In *Hubbard*, the fourth factor was the deciding one.⁸ Property and privacy interests must be specific and pressing to qualify for protection.⁹ Here, the redacted material quotes Defendants' documents and a Graco executive discussing competition and the likely impact of the acquisition.¹⁰ Such information does not merit protection under *Hubbard*. Subsequent courts have ruled that nondescript reputational interests do not weigh in favor of sealing documents.¹¹ Broad references to confidential or sensitive information are equally insufficient.¹² Property interests must typically rise to the level of trade secret before earning protection.¹³ In the D.C. Circuit, a trade secret is defined as a "commercially valuable plan, formula, process, or device" related to the "productive process" of a particular product or products.¹⁴ Here, none of the redacted material reveals anything about Defendants' "productive process." Disclosure will not

⁷ *Greater Se. Com'ty Hosp.*, 951 F.2d at 1277, n.14 (citing *Hubbard*, 650 F.2d at 317-22).

⁸ *Hubbard*, 650 F.2d at 320.

⁹ *Hubbard*, 650 F.2d at 315-16 (public access may be denied, however, "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").

¹⁰ See, e.g., ¶¶ 1-2, 5-6, 16, 25-26, 29-30, and 47 of the sealed Complaint.

¹¹ *Zapp v. Zhenli Ye Gon*, 746 F. Supp. 2d 145, 150 (D.D.C. 2010) (unsubstantiated reputational interests do not weigh in favor of sealing documents).

¹² *Friedman v. Sebelius*, 672 F. Supp. 2d 54, 60 (D.D.C. 2009).

¹³ *Hubbard*, 650 F.2d at 315-16; *Doe v. Exxon Mobil Corp.*, 570 F. Supp. 2d 49, 53 (D.D.C. 2008) (finding that none of the proposed redactions concerned trade secrets).

¹⁴ *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001) (emphasizing that the D.C. Circuit "narrowly cabins trade secrets to information relating to the 'productive process' itself"). Section 6(f) of the Federal Trade Commission Act ("FTC Act") forbids the Commission from making public "any trade secret." 15 U.S.C. § 46(f). The FTC Act does not define the term.

reveal Defendants' trade secrets, and mere embarrassment or loss of reputation does not justify the seal.¹⁵

Four of the remaining five factors are equally unsupportive of the seal. The public's need for access (the first factor) peaks when the government is a party to the proceeding.¹⁶ In such cases, "the taxpaying public are, in effect, real parties in interest."¹⁷ Here, the government has brought an antitrust challenge to a merger that will affect consumers in this region and elsewhere. These consumers, if not all taxpayers, are effectively parties in interest with a corresponding need for access.

The second factor asks whether previous publication obviates present sealing. Here, the relevant quotations have apparently never been public. This renders the second factor neutral in determining whether to publicize the unredacted Complaint.¹⁸ The third factor is an inquiry into the existence and identity of an objecting party. Defendants are the only parties who object to unsealing the unredacted Complaint. In *Exxon*, the lack of a third-party objector weighed against redaction.¹⁹ Other courts have found that a defendant's objection favors the seal, but is insufficient to justify it.²⁰ Here, Defendants' objection provides insufficient support, if any, because there is no other rationale under *Hubbard* for maintaining the seal.

¹⁵ *Zapp*, 746 F. Supp. 2d at 150.

¹⁶ See *Nat'l Children's Ctr.*, 98 F.3d at 1409 (the fact that a government agency was a party to the lawsuit and objected to sealing the record "strengthened the already strong case for access" (citing *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 ("The appropriateness of making court files accessible is accentuated in cases where the government is a party."))).

¹⁷ *U.S. ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 172 (D.D.C. 2008).

¹⁸ *U.S. ex rel. Durham v. Prospect Waterproofing, Inc.*, 2011 U.S. Dist. LEXIS 117051, at *6 (D.D.C. 2011).

¹⁹ *Exxon*, 570 F. Supp. 2d at 53.

²⁰ See, e.g., *Nat'l Children's Ctr.*, 98 F.3d at 1410 (holding that a sealed document should be unsealed given that the only *Hubbard* factor supporting the seal was the fact that the defendant objected to disclosure); *Prospect Waterproofing*, 2011 U.S. Dist. LEXIS 117051 at *7 (holding

The fifth factor—the possibility of prejudice—asks whether public disclosure will prejudice the objecting party in litigation.²¹ Public disclosure cannot logically prove prejudicial in the underlying litigation because the Court—the decision maker in this matter—already has access to the redacted quotations. Prejudice in future litigation is equally unlikely because the redacted material is specifically relevant to current cause of action. The quotations speak to existing competition between merging parties and the potential for anticompetitive effects post-acquisition.²² While the quotations are certainly probative here, the possibility of future prejudice is too minimal to favor the seal.

The sixth factor—the purpose of the sealed material—weighs the importance of the relevant information.²³ As noted in the previous paragraph, the redacted material is highly relevant to the claims at hand. Indeed, the redacted quotations “go to the heart” of the sealed document, making public disclosure even more important.²⁴

Unsealing the unredacted Complaint supports the purpose of the Court’s Protective Order [DKT# 29], which only allows for the sealing of “confidential material.”²⁵ The FTC Act expressly empowers the Commission to “make public from time to time” non-sensitive information gathered during investigations “as [the Commission] shall deem expedient in the

that a complaint and other documents should be unsealed, despite plaintiff’s objection that unsealing the documents would lead to employer retaliation).

²¹ *Hubbard*, 650 F.2d at 320-21.

²² ¶¶ 1-2, 5-6, 16, 25-26, 29-30, and 47 of the sealed Complaint.

²³ *Prospect Waterproofing*, 2011 U.S. Dist. LEXIS 117051 at *9-10 (“There is a strong presumption against sealing court pleadings that are relevant to the litigation . . . because the public has a right to access the filings.” (citing *Friedman*, 672 F. Supp. 2d at 61 (“if the documents sought to be sealed are entered as evidence during a trial, there is a strong presumption against sealing . . .”))).

²⁴ *Exxon*, 570 F. Supp. 2d at 52 (proposed redactions that “go to the heart” of the document are necessarily left unredacted).

²⁵ Protective Ord. ¶ 1 [DKT# 29]; *see, e.g., Exxon*, 570 F. Supp. 2d at 52 (“approval of the Protective Order, which allows the parties to file certain documents under seal, does not mean that references to protected information and document . . . must be redacted”).

public interest.”²⁶ The Commission never hoped for the unredacted Complaint to remain under seal indefinitely.²⁷ In its motion to seal, the Commission stated: “Under these circumstances, the Commission’s practice is to (1) file the documents under seal and (2) notify the producing parties of the filing. After those parties have had an opportunity to review the documents, the Commission may move to unseal some or all of them.”²⁸ The Commission now does so.

²⁶ 15 U.S.C. § 46(f) (“*Provided*, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information.”).

²⁷ Pl. Mot. to File Under Seal ¶ 5.

²⁸ *Id.*

CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court unseal the unredacted Complaint.

January 9, 2012

Respectfully submitted,

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