

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CSL LIMITED

and

CERBERUS-PLASMA HOLDINGS, LLC,

Defendants.

Civil Action No. 09-1000 (CKK)

**FILED**

**OCT 30 2009**

**NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT**

**MEMORANDUM OPINION**

(October 30, 2009)

Plaintiff, the Federal Trade Commission (“FTC”), brought the above-captioned civil action against Defendants CSL Limited (“CSL”) and Cerberus-Plasma Holdings, LLC (“Cerberus”) (collectively, “Defendants”), pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, seeking a temporary restraining order and preliminary injunction enjoining CSL’s proposed acquisition of Telecris Biotherapeutics Holding Corporation (“Telecris”) from Cerberus. Currently pending before the Court are two related motions. First, the FTC has filed a [8] Motion to Unseal the Complaint, which is opposed by both Defendants. Second, third-party Pemiscot Memorial Hospital (“Pemiscot”) has filed a [49] Motion to Intervene for the limited purpose of providing its views as well on why Plaintiff’s Complaint should be unsealed, which motion is opposed by CSL only. Having thoroughly considered the parties’ submissions and the attachments thereto, applicable case law, and the record of this case as a whole, the Court shall GRANT the FTC’s [8]

(N)

Motion to Unseal the Complaint and shall DENY as moot Pemiscot's [49] Motion to Intervene, for the reasons stated below.

## I. BACKGROUND

As explained above, the FTC filed the instant action against Defendants for a temporary restraining order and preliminary injunction to enjoin CSL's proposed acquisition of Telecris (hereinafter, the "Merger"). The FTC alleged that the Merger threatened to substantially lessen competition in the markets for several life-sustaining plasma-derivative protein therapies. The FTC initially moved for leave to file the entire case under seal pending further Court order, explaining that it had "[a]ttached to [its] moving papers [] documents that contain sensitive business information provided to the Commission by defendants and third parties during its investigation of the proposed acquisition." Accordingly, the FTC requested that its initial moving papers be placed under seal until the Defendants had a full opportunity to review the documents. Chief Judge Royce C. Lamberth granted the FTC's motion for leave to file the case under seal pending further order. The Complaint in this case, as well as the initial moving papers, were therefore filed under seal.<sup>1</sup>

Chief Judge Lamberth's order, however, explicitly provided that the FTC "may move to unseal some or all documents after the defendants have had the full opportunity to review the documents." The FTC did so shortly thereafter, filing the [8] instant Motion to Unseal the Complaint. The Court subsequently held an on-the-record conference call with counsel for both parties to discuss, *inter alia*, the FTC's Motion to Unseal the Complaint. Counsel for Defendants

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<sup>1</sup> Shortly thereafter, this Court issued an Order unsealing the case and providing that any future submissions would be made public, unless otherwise ordered. *See* 6/1/09 Order to Unseal Case.

advised the Court that they objected to the FTC's Motion and took the position that certain portions of the Complaint should remain properly under seal. Given that the Defendants indicated that they objected to disclosure of only certain portions of the Complaint, the Court directed the parties to confer and submit a redacted version of the Complaint for entry on the public docket — pending final resolution by the Court of the motion to unseal — that redacted only those specific portions of the Complaint that are in dispute between the two parties. The redacted version of the Complaint is now available to the public on the electronic docket in this case. *See Redacted Compl.*, Docket No. [28]. Defendants subsequently filed an Opposition to the FTC's motion that focuses only on the approximately twenty redacted statements that remain in dispute between the parties. *Defs.' Opp'n*, Docket No. [33].

Before the FTC had an opportunity to file its reply, however, Defendants publicly announced that they were abandoning the proposed Merger and that each Defendant had decided to withdraw their Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction. As a result, both the FTC and Defendants agreed that the instant lawsuit had become moot and jointly moved for dismissal of the Complaint. *See Jt. Stip. Mot. for Order Dismissing Compl.*, Docket No. [42]. Based on the parties' representations and their joint request for dismissal, this Court granted the parties' motion and dismissed the Complaint in its entirety. *See 6/10/09 Order*.

Nonetheless, the parties jointly contacted Chambers shortly thereafter to advise the Court that they were both in agreement that the Court's Order dismissing the FTC's Complaint does not deprive the Court of jurisdiction over the FTC's pending motion to unseal and to jointly request that the Court consider and rule on the pending motion. Accordingly, briefing on the FTC's

motion proceeded on schedule, and the FTC filed a timely reply in support of its motion to unseal. The Court also permitted Defendants, at their request, to file a sur-reply to address the impact, if any, that dismissal of the Complaint has on the FTC's motion to unseal. As briefing on the FTC's motion to unseal is now complete, the issue is ripe for the Court's resolution.

After briefing on the motion to unseal was complete but before the Court had an opportunity to rule, third-party Pemiscot moved for permissive intervention for the limited purpose of providing its views as well on why the FTC's Complaint should be unsealed or, in the alternative, for an order granting it *amicus curiae* status with respect to the FTC's motion to unseal. *See* Third Party Mot. to Intervene, Docket No. [49]. As set forth in its motion to intervene, Pemiscot is a public hospital in Missouri that has recently filed a class action against CSL in the United States District Court for the Eastern District of Pennsylvania alleging that it, along with others, conspired to restrict output and fix prices of certain products in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *Pemiscot Memorial Hosp. v. CSL Ltd*, Civ. Act. No. 09-3143 (GP) (E.D. Penn. filed July 15, 2009). Pemiscot indicates that it "fully endorses and supports the FTC's motion [to unseal] and its underlying rationale, but respectfully requests leave to provide its own additional perspective" on "why the presently redacted portions of the complaint should be made public." Third Party Mot. to Intervene at 2. In particular, Pemiscot contends that the language in dispute is likely to be "directly relevant to the core allegations in [Pemiscot's] complaint and should not remain hidden from [Pemiscot] and the class it seeks to represent." *Id.* at 3. Neither the FTC nor Cerberus take a position with respect to the motion to intervene. CSL, however, opposes the motion and has filed a timely opposition. *See* CSL Opp'n to Third Party Mot. to Intervene, Docket No. [50]. Pemiscot has filed its reply, *see* Reply to

Third Party Mot. to Intervene, and briefing on Pemiscot's motion for permissive intervention is also now ripe for the Court's review and resolution.

## II. LEGAL STANDARDS AND DISCUSSION

### A. FTC's Motion to Unseal

Pursuant to this Circuit's case law, the Court's "starting point in considering a motion to [un]seal court records is a 'strong presumption in favor of public access to judicial proceedings.'" *Equal Employment Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (quoting *Johnson v. Greater Southeast Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991)). "[T]he existence of a common law right to inspect and copy judicial records is indisputable." *In re Nat'l Broadcasting Co., Inc.*, 653 F.2d 609, 612 (D.C. Cir. 1981). "This right 'serves the important function of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.'" *Id.* (quoting *United States v. Hubbard*, 650 F.2d 293, 314 (D.C. Cir. 1980)). The D.C. Circuit has "articulated a series of factors that a district court should weigh in determining whether and to what extent a party's interest in privacy or confidentiality of its processes outweighs this strong presumption in favor of public access to judicial proceeding." *Johnson*, 951 F.2d at 1277. These factors include:

(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 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.

*Id.* (citing *Hubbard*, 650 F.2d at 317-22). "[T]he decision as to access [to judicial records] is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* (quoting *Hubbard*, 650 F.2d at 316-

17).<sup>2</sup>

The parties in this case dispute whether certain information in the Complaint should be sealed. More particularly, the parties focus on twenty paragraphs in the Complaint, which Defendants contend should remain under seal, either in whole or in part. The Court notes at the outset that these twenty paragraphs are interspersed throughout the Complaint and are substantively diverse. Although each statement relates generally to the FTC's allegations that the proposed acquisition threatened to facilitate or enhance coordination, the information at issue nonetheless varies significantly in content. For example, the information in dispute variously includes, but is not limited to, generalized impressions of barriers to entry, marketplace dynamics and pricing trends as well as information concerning the proposed merger. Nonetheless, in arguing that this information should remain under seal, Defendants have broadly addressed the statements in a general and often-times conclusory manner, without providing the type of particularized, statement-by-statement analysis that is required to support a request to maintain judicial records under seal. The D.C. Circuit has made clear that Defendants, as the parties seeking to maintain the information under seal, must "come forward with specific reasons why the record, or any part thereof, should remain under seal." *Johnson*, 951 F.2d at 1278.

In particular, Defendants' principal argument against the FTC's motion to unseal is their claim that the material at issue contains "competitively sensitive business information," the release of which has the "potential to severely prejudice the Defendants." Defs.' Opp'n at 1, 5.

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<sup>2</sup> The Court notes that both the FTC and Defendants embrace application of the *Hubbard* factors in this case and proceed on the assumption that the Complaint is a "judicial record" subject to the common law right of public access. See Mot. to Unseal at 4; Pl.'s Reply at 1-10; Defs.' Opp'n at 8-9. The Court has therefore done likewise and proceeds on the understanding that the Complaint is a "judicial record" and that the *Hubbard* factors apply.

As is discussed in more detail below, however, Defendants have failed to provide any specific support for this claim, instead relying almost exclusively on broad, indeterminate assertions of harm. Defendants' failure to provide the required showing is particularly glaring given the FTC's position, explicitly set forth in its opening motion and reply, that the material at issue is neither competitively sensitive nor confidential. The FTC has consistently made clear its position that the information in dispute does "not contain competitively sensitive material, trade secrets, or research, development, commercial or financial information, as such terms are used in Rule 26(c)(1)(G)<sup>3</sup> of the Federal Rules of Civil Procedure" and "has not been kept confidential by Defendants." Mot. to Unseal at 3 & 6; *see also id.* at 5-6 ("The information in the complaint contains no trade secrets or other proprietary intellectual property, customer specific information or sensitive commercial information whose disclosure could cause an identifiable injury."). Defendants were therefore on notice that the FTC had placed into dispute the alleged confidential nature of the information as well as its qualification as competitively sensitive business information.

Nonetheless, Defendants have not made the type of particularized showing required, and, as is demonstrated in the discussion that follows, their failure to do so is ultimately fatal to their position that this information should remain under seal. This Court "declin[e]s to accept conclusory assertions as a surrogate for hard facts." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412 (1st Cir. 1987). "In the absence of some compendium of chapter and verse — a demonstration that cognizable harm is lurking in the background — the [Defendants'] orotund

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<sup>3</sup> Although the FTC's motion referred to Rule 26(c)(7), it is apparent upon review that the FTC intended to cited to Rule 26(c)(1)(G).

protests avail them of naught. We continue to believe that “[a] finding of good cause [to seal judicial records] must be based on a particular factual demonstration of potential harm, not on conclusory assertions.” *Id.* (quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986)).

1. The need for public access to the information at issue.

The Court begins its analysis by considering the need for public access to the information at issue. In *Hubbard*, the D.C. Circuit recognized “this country’s common law tradition of public access to records of a judicial proceeding.” 650 F.2d at 314. “Access to records serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.” *Id.* at 314-15. This first factor looks to whether any particular case-specific considerations exist that “bear upon the precise weight to be assigned in this case to the always strong presumption in favor of public access to judicial proceedings.” *Id.* at 317.

It is well established that the public interest in judicial records is heightened where, as here, suit has been brought by a public agency such as the FTC. *See Nat’l Children’s Ctr.*, 98 F.3d at 1409 (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.”)). In this case, the FTC — “an expert agency acting on the public’s behalf,” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) — filed the Complaint at issue, alleging that the proposed acquisition threatened to substantially lessen competition in the markets for several life-sustaining plasma-derivative protein therapies. The public has a direct and real interest in government antitrust actions. *Cf. United States v. Schweizer*, 577 F. Supp. 2d 169, 172 (D.D.C. 2008) (“because this case involves the [False Claims Act], the taxpaying public are, in effect, real

parties in interest”). Moreover, as the FTC has noted, the public’s general interest in government antitrust matters is further buttressed by the substantial amount of public attention in this case, which has generated considerable media attention. *See* Pl.’s Opp’n at 3, n. 1.

Notwithstanding these considerations, Defendants contend that the need for public access is diminished in this case for two reasons. First, Defendants contend that the redacted version of the Complaint available on the public docket, together with the various FTC press releases, “more than sufficiently sets forth the allegations of Plaintiff’s case.” Defs.’ Opp’n at 8; *see also* Defs.’ Sur-Reply at 4. The Court, however, does not agree that the public’s common law right to access the entirety of the allegations against Defendants has been adequately addressed by the redacted Complaint. The information in dispute and that is currently redacted from the Complaint is directly relevant to and helps form the basis of the FTC’s allegations against Defendants; these statements are not simply extraneous information that have little or no substantive value in understanding the Complaint. To that end, the FTC notes that the redactions in the Complaint have apparently caused some confusion among the public and the media as to the exact nature of the allegations at issue in this case. Pl.’s Reply at 3-4.

Second, Defendants contend that the public no longer has a substantial need to access this material because the Complaint has been dismissed. Defendants urge that the purpose of public access — *i.e.*, to ensure public oversight of the judicial process — is not advanced by release of information where, as here, “the parties have jointly moved to dismiss the Complaint and no decision will be forthcoming.” *Id.* at 4. In this way, Defendants seek to analogize the material in the Complaint to discovery documents and other pretrial materials that may be afforded greater protection in the early stages of litigation. Defs.’ Opp’n at 6. The Court is not persuaded by

Defendants' attempt to equate the Complaint in this case with pretrial discovery material.

Although, as Defendants emphasize, “[a] protective order may be justified as to pretrial materials where it would not be justified as to materials placed on the record at trial or in connection with substantive motions,” the willingness to afford greater protection to such material is borne out of the recognition that not all pretrial discovery materials may prove relevant to the adjudication process. *John Does I-VI v. Yogi*, 110 F.R.D. 629, 643 (D.D.C. 1986). Defendants in this case, however, do not ask for a protective order to keep confidential documents that are produced during discovery and that may later prove to have no direct relevance to the lawsuit. Rather, they seek to preclude public access to information and statements that help form the very basis of the allegations in the FTC’s antitrust lawsuit against Defendants. Accordingly, Defendants’ reliance on the *Yogi* opinion is misplaced.

Nor does the Court agree that dismissal of this action negates the need for public access to the Complaint. As explained above, shortly after the Complaint was filed, Defendants publicly announced that they were abandoning the Merger and had each withdrawn their Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction. The Court subsequently granted the parties’ joint motion for dismissal of the Complaint, finding that Defendants’ abandonment of the Merger rendered the FTC’s allegations challenging the Merger moot. *See* 6/10/09 Order, Docket No. [46]. In order to properly understand this judicial decision dismissing the Complaint as moot in light of Defendants’ decision to abandon the Merger, public access to the Complaint and the allegations contained therein is necessary. Contrary to Defendants’ assertions, access to the information in the Complaint thus “serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law

enforcement process more generally.” *Hubbard*, 650 F.2d at 314-15. This is particularly so where, as here, the Court dismissed a government antitrust action at the parties’ request; the public has an interest in accessing the judicial records relevant to that decision to ensure that the allegations in the Complaint were in fact rendered moot and that the case was not otherwise dismissed for improper reasons. Accordingly, the Court concludes that disclosure of the Complaint in its entirety will substantially advance the purposes of the common law right of public access.

2. The extent to which the public had access to the information prior to the sealing order.

The Court next turns to consider whether the contents of the Complaint that are in dispute were previously available to the public. As explained above, the FTC asserts that the material at issue is neither competitively sensitive nor confidential. In particular, the FTC argues that the “material at issue has not been kept confidential by the Defendants,” and that “many of the quotes Defendants seek to exclude can be found in the internal files of *all three* significant competitors in the plasma protein industry.” Pl.’s Mot. at 6 (emphasis in original). In addition, the FTC notes that some of the information Defendants ask the Court to redact has been previously disclosed in public filings to the Securities and Exchange Commission. Pl.’s Reply at 4-6. The FTC has therefore made an affirmative showing that at least some portion of the substantive information at issue has been previously disclosed to the public.

Defendants make two arguments in response, neither of which is persuasive. First, Defendants broadly assert — without support — that “[n]one of this information [at issue in the Complaint] resides today in the public domain.” Defs.’ Opp’n at 6. Defendants, however, do not

provide any support for this claim, and, as stated above, the FTC demonstrates to the contrary that at least some of the information in dispute has in substance been disclosed in public filings with the Securities and Exchange Commission. *See* Pl.’s Reply at 5-6.<sup>4</sup> The FTC also provides specific evidence that certain of the statements at issue were located in both CLS’ and Telecris’ files, contradicting Defendants’ claim that such information should not be disseminated to competitors. Mot. to Unseal at 6; Pl.’s Reply at 6. Defendants appear to concede that such information does appear in both files, but speculate that this occurred as the result of a former CSL employee’s improper removal of proprietary information. Defs.’ Opp’n at 10-11. As an initial matter, Defendants have not provided the Court with any basis to determine whether this assertion has any validity. More importantly, this assertion is based on the assumption that the information was, in fact, “proprietary” material, but, as discussed below, such a finding is unsupported by the record.

Second, Defendants repeatedly argue that, to the extent the information in dispute is derived directly from the confidential business documents submitted by Defendants to the FTC as part of the Hart-Scott-Rodino antitrust review process, Defendants have “strenuously safeguarded their rights to keep sensitive company documents confidential.” Defs.’ Opp’n at 11. Of course, the only issue in dispute in the instant Memorandum Opinion is whether certain allegations in the Complaint should remain under seal — *not* whether the confidential business documents that the FTC may have attached to the moving papers in this case should be publicly

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<sup>4</sup> The Court notes that, although Defendants requested permission to file a sur-reply to respond particularly to the FTC’s assertion that dismissal does not affect the request to unseal, Defendants made no such similar request for an opportunity to respond to the FTC’s specific assertions that some of the material at issue had been previously disclosed to the Securities and Exchange Commission.

disclosed. Defendants' argument is therefore apparently premised on the assumption that the information at issue is taken directly from the Defendants' confidential business documents (as opposed to other, perhaps public, sources). Although the parties appear to both indicate that this is the case — *i.e.*, that all twenty of the statements at issue are drawn directly from the documents provided by Defendants to the FTC — the Court notes that neither party has made any specific attempt to identify to the Court the specific source of each statement in dispute. Nor can the Court divine the source of the various statements from the Complaint itself, as the Complaint contains no citations or other indication of source. Nonetheless, given that both parties apparently agree that the FTC derived the information at issue from Defendants' confidential business documents, the Court shall proceed on that understanding.

Significantly, this failure by Defendants to specifically identify the source of the information at issue once again highlights the principal problem at hand: the lack of any particularized showing that would support maintaining the information under seal. Even assuming, as the Court does, that all of the information in dispute is drawn from the Defendants' confidential business documents, Defendants have made no showing that the *information* — as opposed to the documents themselves — is confidential and not already available in the public sphere. Defendants argue only as a general matter that the documents submitted to the FTC and the information therein have been kept confidential. The fact that information is included in a confidential business document, however, does not by itself make the information confidential. To the contrary, confidential business documents quite obviously may include both publicly-available information as well as confidential information, and the mere fact that otherwise publicly-available information is included in a confidential business document does not

transform such public information into confidential business information. The key question therefore remains: has the information been previously made available to the public? Again, however, Defendants' broad assertion that all such information is confidential is insufficient.<sup>5</sup>

Although Defendants contest the FTC's assertion that the material at issue does not qualify as a trade secret or sensitive commercial information, the disclosure of which would cause an identifiable injury, Defendants do not provide a particularized showing that the information at issue in fact qualifies as confidential, competitively sensitive business information. Rather, Defendants simply restate the non-controversial principle that competitively sensitive business information should be protected without first establishing that the *specific* statements at issue are sensitive, confidential business secrets. *See* Defs.' Opp'n at 5-6.<sup>6</sup> Indeed, Defendants dedicate less than a single paragraph to identifying which of the actual statements in dispute they allege contain confidential business information and provide only an abbreviated summary of those statements, with a string citation to various paragraphs in the Complaint. *See id.* at 6. Such a showing is clearly inadequate.

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<sup>5</sup> Defendants also assert in a lone footnote in their opposition that 15 U.S.C. § 18a(h) should be interpreted to allow disclosure of information collected pursuant to the Hart-Scott-Rodino review process only to the tribunal hearing the proceeding and not to the general public. *See* Defs.' Opp'n at 10. Defendants, however, have not elaborated on this argument further nor have they explained the particular relevance of this argument to the case at hand. Given Defendants' failure to adequately address and brief this argument, the Court finds the assertion to be without merit.

<sup>6</sup> Defendants, in support of their position that the material is confidential and competitively sensitive, cite to *Vesta Corset Co. v. Carmen Found., Inc.*, No. 97 Civ. 5139, 1999 WL 1327, \*2 (S.D.N.Y. Jan. 13, 1999) and *ACT, Inc. v. Sylvan Learning Sys.*, No. Civ. A. 99-63, 1999 WL 305300, \*2 (E.D. Pa. May 14, 1999). The Court notes that neither decision may be appropriately cited as precedent pursuant to Circuit Rule 32.1, which provides that "unpublished dispositions of district courts entered before [January 1, 2007] may not be cited."

Moreover, the Court, undertaking its own independent review of the information in dispute, cannot conclude that the information is of the type that is so self-evidently confidential in nature that a further particularized showing is not required. Much of the information at issue consists of generalized statements that appear to be, without a showing to the contrary, the sort of information that may be commonly known among competitors in this field. *Cf. Yogi*, 110 F.R.D. at 633 (“The Court will not protect information that is ‘not novel and probably already known, or could be reconstructed, by those familiar with the field.’”) (quoting *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1008 (8th Cir. 1976)). Nonetheless, the Court emphasizes that it is Defendants’ burden to demonstrate the confidentiality of the information at issue — and not the Court’s burden to guess as to whether such information is of a confidential nature. Accordingly, the Court finds that Defendants have not shown that the information at issue is confidential, particularly given that the FTC has demonstrated that at least some of the information is in substance already in the public sphere. Therefore, this factor weighs modestly in favor of disclosure.

3. The fact that a party has objected to disclosure and the identity of that party.

In this case, Defendants themselves are the only parties objecting to disclosure of the information in the Complaint. No third parties have voiced concerns over disclosure, as was the D.C. Circuit’s principal concern in *Hubbard*. *See* 650 F.3d at 319 (“[W]e think the fact that objection to access is made by a third party weighs in favor of non-disclosure.”). The FTC, by contrast, has objected to sealing of the Complaint in its entirety and has filed the instant motion to unseal. As the D.C. Circuit has previously found, “[t]he fact that the [FTC], a party to the

lawsuit and a public agency, objected to sealing the [Complaint] is not only relevant, but strengthens the already strong case for access.” *Nat’l Children’s Ctr.*, 98 F.3d at 1409.

Accordingly, the Court finds that this factor counsels moderately in favor of disclosure.

4. The strength of the property and privacy interests involved.

The Court turns next to the fourth *Hubbard* factor, which considers the strength of the property and privacy interests involved. Defendants have paid scant attention to this factor, asserting only that “the parties have a reasonable expectation that their confidential, internal business documents will remain as such.” Defs.’ Opp’n at 8. Again, however, this argument suffers from the same flaw discussed above — it focuses on the documents in general rather than the specific *information* at issue. As to the actual information in dispute, the FTC contends that such information does not rise to the level of protectable trade secrets and has not been kept secret from the public or its competitors. *See* Pl.’s Reply at 7. Ultimately, the Court finds that this factor weighs moderately in favor of disclosure. Although Defendants undoubtedly have a strong property and privacy interest in their confidential business documents, the FTC does not seek disclosure of the documents themselves — but only certain information presumptively drawn from those documents. As to that information, Defendants have not argued that it rises to the level of a trade secret nor have they demonstrated that, contrary to the FTC’s showing, it has been kept private or includes information in which they have a strong property right.

5. The possibility of prejudice to those opposing disclosure.

Defendants make four principal arguments that they will be unfairly prejudiced by the release of the Complaint in its entirety. First, Defendants contend that disclosure of the confidential and sensitive business information threatens competitive harm to Defendants’

business interests. Defs.' Opp'n at 5-7. This argument is, of course, based on the presumption that the information at issue is competitively sensitive business information that has been kept confidential from the public and its competitors. As discussed above, Defendants have failed to make any such showing. *Cf. United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) ("To establish good cause Rule 26(c) the courts have generally required a 'particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. . . .' With respect to the claim of confidential business information, this standard demands that the company prove that disclosure will result in a 'clearly defined and very serious injury to its business.'") (quoting 8 Wright & Miller, *Fed. Practice and Procedure*, § 2035 at 265 (1970), and *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)). Absent a specific showing to the contrary, it is not readily apparent to the Court that disclosure of the information at issue will seriously injure Defendants' business interests, particularly given that the FTC has indicated that at least some portion of the information in dispute is already available in the public domain. This first argument therefore fails.

Second, Defendants assert that disclosure of the information at issue will result in embarrassment to Defendants and will unfairly damage their business reputation. According to Defendants, "the information has been selectively and misleadingly included in the Complaint in a manner calculated to cause readers to make unfair inferences about the implications of these documents." Defs.' Opp'n at 2. As an initial matter, given that much of the FTC's Complaint and the allegations contained therein have already been disclosed to the public, it is not clear that public disclosure of these additional statements will result in additional embarrassment or harm to Defendants beyond that which may flow from the already public portions of the Complaint

itself. Regardless, even assuming that disclosure of the redacted information may cause embarrassment to Defendants, it is well established that “[s]imply showing that the information would harm the company’s reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records.” *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983). Of course, there is a

natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public. This desire, however, cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public’s need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.

*Id.* at 1180. In this case, Defendants have failed to demonstrate that their request to maintain the redacted information under seal is driven by the legitimate need to protect confidential business information rather than by their natural inclination to prevent public access to embarrassing information.

Third, Defendants argue that they will not have a chance to litigate the merits of these unproven allegations in Court because the Complaint in this case has been dismissed and are therefore unfairly prejudiced without an opportunity to respond. Defs.’ Opp’n at 8. The Court, however, does not agree that the business risk associated with unproven or allegedly inaccurate assertions in the Complaint is sufficient to outweigh public access to judicial records. Although the Court must do its best to prevent “court files [from] becom[ing] a vehicle for improper purposes,” and “to ‘insure that its records are not used to gratify public spite or promote public scandal,’” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978), it cannot permanently seal a civil complaint simply because the parties subsequently agree to dismissal of the

Complaint before the merits of the assertions alleged therein are reached. Rather, a far more specific showing of harm or privilege is required, which Defendants have not made.

Fourth, Defendants complain that the FTC has wrongly attributed statements made by a single CSL employee to the Defendant companies themselves. *Id.* at 9-10. According to Defendants, “[t]he majority of the quotes contained in the Complaint come from documents authored by a single CSL employee,” and Defendants may not be held legally liable for this employee’s “musings.” *Id.* at 9-10. As an initial matter, Defendants have not specifically identified which of the quotes at issue are allegedly attributed to this individual nor have Defendants proffered evidence demonstrating that any of the quotes were in fact taken from documents authored by this employee. Defendants’ failure to do so highlights once again the lack of specificity that plagues Defendants’ arguments. However, as the FTC appears to be in agreement that five of the twenty statements at issue are derived from this particular employee, *see* Pl.’s Reply at 8, the Court shall assume that certain of the material at issue originated from this particular individual. Regardless, the Court is not persuaded that this justifies maintaining the five statements under seal. Defendants’ objections on this point ultimately rest on the contention that they would be able to show at trial that this employee was not an officer of CSL and that his statements do “not represent the thinking of CSL or its decision-making executives.” Defs.’ Opp’n at 9. As discussed above, however, the Court is not persuaded that information in the Complaint must remain under seal simply because the case has been dismissed before a full trial on the merits. Absent a particularized showing of harm, the Court finds that this claim is insufficient to preclude public disclosure.

Accordingly, the Court finds that, although Defendants’ business reputation may be

potentially affected by release of the Complaint in its entirety, Defendants have failed to demonstrate the type of specific injury that counsels against disclosure. This factor therefore weighs neither in favor nor against the pending motion to unseal the Complaint.

6. The purposes for which the information was introduced.

The Court turns now to the final *Hubbard* factor, which considers the purposes for which the information was introduced. In *Hubbard*, the documents at issue were introduced only for the purpose of assisting the court in determining whether the search and seizure were lawful and were not found by the trial judge to be relevant to the crimes charged. 650 F.2d at 321. By contrast, in this case, the information at issue is included in the Complaint and is relevant to and forms the basis of the FTC's allegations against the Defendants. The information is not simply extraneous material tangential to the principal charges in this lawsuit. Accordingly, the Court finds that this last factor weighs in favor of disclosure.

In summary then, the Court finds that, on balance, the *Hubbard* factors weigh in favor of disclosure in this case. Where, as here, the FTC has included relevant, non-extraneous material in its Complaint and Defendants have failed to make any particularized showing that such information is confidential or that disclosure of this material would result in a specific harm, the tradition of public access to judicial records demands that the Complaint be released in its entirety. Accordingly, the Court, in exercising its discretion, shall GRANT the FTC's [8] Motion to Unseal the Complaint.

B. Pemiscot's Motion to Intervene


Finally, in light of the Court's conclusion above granting the FTC's Motion to Unseal, the Court shall DENY as moot Pemiscot's [49] Motion to Intervene. As discussed above, Pemiscot

has moved for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b) or, alternatively, for *amicus curiae* status, for the limited purpose of providing its views on why the presently redacted portions of the Complaint should be made public. *See* Third Party Mot. to Intervene. Pemiscot represents that it “fully endorses and supports the FTC’s motion [to unseal] and its underlying rationale,” but seeks to intervene for the limited purpose of “provid[ing] its own additional perspective.” *Id.* at 2. Because the Court has already concluded, on the basis of the FTC’s [8] Motion to Unseal and related papers, that the Complaint must be unsealed in its entirety, Pemiscot’s request to intervene and/or for *amicus curiae* status is moot at this time.

### III. CONCLUSION

For the reasons set forth above, the FTC’s [8] Motion to Unseal the Complaint is GRANTED, and the Court shall cause an unredacted version of the Complaint to be posted on the public docket in this case on November 9, 2009, *i.e.*, ten days from the date of this Memorandum Opinion and accompanying Order. This Memorandum Opinion shall also remain under seal until November 9, 2009, at which time the Court shall cause it to be posted in its entirety on the public docket. Finally, Pemiscot’s [49] Motion to Intervene is DENIED as moot.

Date: October 30, 2009

  
COLLEEN KOLLAR-KOTELLY  
United States District Judge