

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
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)
 Plaintiff,)
)
 v.) Civil No.: 01-2196 (ESH)
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)
 SUNGARD DATA SYSTEMS, INC.,)
 et al.,)
)
 Defendants)

**PLAINTIFF'S MOTION FOR PERMISSION TO
FILE COMPETITIVELY SENSITIVE INFORMATION UNDER SEAL
AND FOR AN INTERIM PROTECTIVE ORDER**

Plaintiff moves the Court for entry of an order (i) permitting plaintiff to file under seal competitively sensitive information submitted in the Complaint, in its Motion for a Temporary Restraining Order and in the appendices submitted in support of that Motion, filed with the Court today; and (ii) restricting access to those documents and other information to outside counsel for SunGard Data Systems, Inc. (“SunGard”) and Comdisco, Inc. (“Comdisco”). This relief is sought on an interim basis, pending the entry by the Court of a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Rule 5.1(j)(1) of the United States District Court for the District of Columbia. In support of this motion, plaintiff states as follows:

1. Plaintiff has today filed with the Court a Complaint alleging that the proposed acquisition by SunGard of substantially all of the disaster recovery solutions assets of Comdisco violates Section 7 of the Clayton Act, 15 U.S.C. § 18. The United States has also filed a Motion

for a Temporary Restraining Order, a memorandum in support of that motion, and appendices with supporting declarations, documents, and other materials.

2. Plaintiff's Complaint, Memorandum in Support of the Motion for a Temporary Restraining Order, and supporting appendices contain, or make references to, business plans, sales and revenue information, and other competitively sensitive information produced by SunGard, Comdisco and third parties to the Antitrust Division of the United States Department of Justice during its investigation of SunGard's proposed acquisition. This information was provided to the Department in confidence and has been protected from public disclosure during the Department's investigation. See, e.g., 15 U.S.C. § 18a(h); 28 C.F.R. §16.7.

**The Court Should Permit Plaintiff to File
Certain Competitively Sensitive Information Under Seal**

3. Public disclosure of the confidential information contained in plaintiff's Complaint, memorandum, and supporting appendices might place the companies that provided the information — including SunGard and Comdisco — at a competitive disadvantage with respect to their competitors, who would gain access to sensitive business plans and product development and marketing information. Pursuant to Fed. R. Civ. P. 26(c)(7), the Court may enter an order to restrict the disclosure of such sensitive business information. “It is clear that a court may issue a protective order restricting disclosure of discovery materials to protect a party from being put at a competitive disadvantage.” Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 529 F. Supp. 866, 890 (E.D. Pa. 1981); Tavoulares v. Washington Post Co., 93 F.R.D. 24, 29 (D.D.C. 1981) (imposing a protective order on documents submitted to protect third-party from likely competitive harm should they be released).

4. Nevertheless, plaintiff recognizes the public's legitimate interest in having access to court filings. Plaintiff will therefore file redacted versions of the Complaint and Motion for a Temporary Restraining Order as soon as is practicable.

**The Court Should Restrict Access to
Competitively Sensitive Information to Outside Counsel**

5. One reason plaintiff seeks to restrain and enjoin SunGard's proposed acquisition is to prevent competitive harm resulting from the flow of competitively sensitive business information between SunGard and Comdisco while litigation is pending. To prevent the exchange of information between SunGard and Comdisco before the Court enters a protective order, as well as to protect the interests of third parties who have provided plaintiff with confidential business information, plaintiff seeks interim relief limiting access to competitively sensitive information to defendants' outside counsel.

6. Courts have recognized the need to restrict inside counsel's access to competitively sensitive information when inside counsel plays a role in competitive decision-making. E.g., Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1471 (9th Cir. 1992). To the extent that defendants' inside counsel are involved in the making of business decisions, their unrestricted access to sensitive information obtained from competitors or customers would put inside counsel in the "untenable position of having to refuse [their] employer legal advice lest [they] improperly or indirectly reveal" competitively sensitive information learned through litigation. Brown Bag Software, 960 F.2d at 1471 (internal quotations omitted). The Court should therefore bar inside counsel's access to competitively sensitive information, at least the entry of a Stipulated Protective Order.

7. Plaintiff does not believe that limiting the access defendants' inside counsel have to competitively sensitive information will interfere with defendants' ability to organize their defense. Defendants are represented by prominent, knowledgeable outside antitrust counsel.

Attached hereto is a proposed order granting plaintiff's motion to file plaintiff's Complaint, Memorandum in Support of the Motion for a Temporary Restraining Order, and supporting appendices under seal and to limit access to this information to outside counsel.

Dated: October 22, 2001

Respectfully submitted,

_____/s/_____
Kent R. Brown
N. Scott Sacks (D.C. Bar No. 913087)
Antitrust Division
U.S. Department of Justice
Computers & Finance Section
600 E Street, N.W., Suite 9500
Washington, D.C. 20530
(202) 307-6200

DUTY TO CONFER UNDER D.D.C. RULE 7.1 (M)

Pursuant to D.D.C. Rule 7.1(m), plaintiff discussed this motion with opposing counsel on October 22, 2001, in an effort to narrow any areas of disagreement, and opposing counsel have indicated that they do not oppose it.

CERTIFICATE OF SERVICE

The undersigned certifies that on October 22, 2001, copies of the United States' Motion for Permission to File Competitively Sensitive Information Under Seal and for an Interim Protective Order were served upon counsel for defendants as follows:

BY HAND DELIVERY

Counsel for SunGard

Stephen M. Axinn, Esq.
Axinn, Veltrop & Harkrider LLP
1370 Avenue of the Americas
New York, NY 10019
(212) 728-2222

BY FACSIMILE AND U.S. MAIL

Counsel for Comdisco

Neal R. Stoll, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, New York 10036-6522
(212) 735-3660

/s/
N. Scott Sacks