PUBLIC

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINSTRATIVE LAW JUDGES

In the Matter of **Axon Enterprise, Inc.** **a corporation;** **and** **Safariland, LLC,** **a corporation.**

DOCKET NO. 9389

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT AXON ENTERPRISE, INC.'S MOTION TO MODIFY THE PROTECTIVE ORDER

Respondent Axon Enterprise, Inc. ("Respondent") seeks to ignore all of this Court's prior rulings and the Commission's clear intent to become the first Respondent to modify the Part 3 standard protective order to allow disclosure of competitively sensitive business information produced by third parties to in-house counsel.[1] Respondent's Motion to Modify the Protective Order ("Respondent's Motion") to allow Respondent's in-house counsel, Ms. Pamela Petersen, and other un-named in-house staff, to receive confidential materials should be denied. First, the standard protective order provided in Appendix A to Section 16 C.F.R. Section 3.31 (amended Aug. 22, 2011), which must be issued in each Part 3 proceeding, does not and should not allow disclosure of third party confidential information to in-house counsel. Second, the standard protective order cannot be modified or amended without further rulemaking. Third, Respondent has cited no authority that this Court may rely upon to grant Respondent's Motion. Finally, even

[1] Respondent's Motion seeks to modify the protective order to allow in-house counsel Pamela Peterson and other staff access to materials designated confidential by third parties. Neither Respondent's Motion nor the proposed order identify the purportedly "litigation only" staff who would receive confidential information.

if this Court could modify the standard protective order, Respondent has not demonstrated any special need for access to confidential material or any prejudice that would result from compliance with the same protective order that has governed every Part 3 adjudication for the past eleven years. Respondent currently has three large, capable law firms working on its behalf, and experienced litigation counsel from the law firm Jones Day have appeared in this matter.

BACKGROUND

During the investigation of the consummated merger between Axon and its closest competitor, VieVu, Complaint Counsel received confidential information from Axon's customers and competitors. Information provided by these third parties includes their most sensitive business information, such as analyses of competition and competitors; sensitive information on research, development and innovation; win loss data; cost and pricing information; terms and conditions; future strategic plans; purchasing information; and revenues. Complaint Counsel provided third parties with a detailed explanation of the protections afforded to their confidential materials. Third parties are likely to produce more sensitive business information during discovery in this matter.

After the complaint was filed, this Court issued the standard protective order required by Commission Rules of Practice ("Rules"), 16 C.F.R. Section 3.31(d) ("Rule 3.31(d)"). As further required under the Rules, Complaint Counsel provided a copy of the protective order to third parties and informed them that their competitively sensitive information would be produced to Respondent Axon and Respondent Safariland's outside counsel and, per the protective order, that information would be protected from disclosure to Respondents' employees. On January 21,

2020, Complaint Counsel provided both Respondents' outside counsel all of the materials it received from third parties.

ARGUMENT

A. The Protective Order Does Not and Should Not Allow In-House Counsel Access to Confidential Information

1. Rule 3.31(d) Protects Confidential Third Party Information From Disclosure to In-House Counsel

Rule 3.31(d) requires that the Administrative Law Judge issue the protective order as set forth in Appendix A in Rule 3.31 in every Part 3 proceeding. Rule 3.31(d); *see also In re Tronox Ltd.*, Docket No. 9377, 2018 WL 852244, at *2 (F.T.C. Feb. 2, 2018) ("Rule 3.31(d) . . . requires the ALJ to issue the standard protective order."). This standard protective order, which was issued in this case, allows for confidential information to pass to "outside counsel of record for any respondent . . . provided they are not employees of a respondent. . . ." Rule 3.31, Appendix A § 7. Accordingly, in-house counsel of respondents, like Ms. Petersen, may not receive information designated confidential under the protective order. The exclusion of in-house counsel from the standard protective order was intentional.

When it promulgated Rule 3.31, with notice and public comment, the Commission "rejected arguments that parties should be able to negotiate orders suited to the needs of the particular case on grounds that the negotiations can delay discovery, prevent the Commission from protecting confidential material in a uniform manner in all Part 3 cases, and reduce the confidence of third party submitters that their confidential submissions will be protected." *Tronox*, 2018 WL 852244, at *2 (citing FTC Rules of Practice, Interim Rules with Request for Comment, 74 Fed. Reg. 1804, 1812 (Jan. 13, 2009) ("Interim Rules")). The Commission specifically considered the question of whether in-house counsel should have access to

confidential information in response to a comment submitted by the Section of Antitrust Law of the American Bar Association. Much as Respondent does here, the Antitrust Section suggested that prohibiting disclosure of confidential discovery materials to a respondent's in-house counsel might "inhibit a respondent's ability to defend itself." Interim Rules, 74 Fed. Reg. 1804, 1812. The Commission carefully considered this comment, weighed it against the Commission's own statutory confidentiality obligations, and concluded that, as a policy matter, protective orders in Part 3 proceedings should not permit in-house counsel access to confidential information:

> The Commission's statutory obligation to maintain the confidentiality of commercially sensitive information . . . raises serious questions about the wisdom of allowing disclosure of information in its custody to in-house counsel, who might intentionally or unintentionally use it for purposes other than assisting in respondent's representation, for example, by making or giving advice about the company's business decisions. The Commission believes it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.

Id. at 1812-13 (footnote omitted); *see also Tronox*, 2018 WL 852244, at *2 ("The Commission specifically rejected the suggestion that in-house counsel be allowed access to confidential materials because prohibiting such access might inhibit a respondent's ability to defend itself[.]"). Thus, in adopting Rule 3.31(d), the Commission considered the arguments that Respondent now raises and rejected them.

2. <u>The Standard Protective Order May Not Be Modified or Amended Absent Further Rule Making</u>

As noted above, Rule 3.31(d) requires that the Administrative Law Judge issue the same, standard protective order automatically in every case. Rule 3.31(d); Interim Rules, 74 Fed. Reg. at 1812; *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 WL 3249715, at *3 (F.T.C. June 15, 2018); *Tronox*, 2018 WL 852244, at *1; *In re McWane, Inc.*, Docket No. 9351, 2012 WL 3518638, at *2 (F.T.C. August 8, 2012). Respondent is effectively asking the Court to change

Rule 3.31's standard protective order. The last time that the Commission revised the Rules in 2009 it engaged in a formal rulemaking process. Interim Rules, 74 Fed. Reg. 1804, 1812-13, 1824-26; FTC Rules of Practice, Proposed Rule Amendments; Request for Public Comment, 73 Fed. Reg. 58832, 58837, 58846-48 (Oct. 7, 2008). To change the Rules, the Commission would be required, at a minimum, to "currently publish [the new rules] in the Federal Register for the guidance of the public." 5 U.S.C. § 552(a)(1)(C).

3. The Standard Protective Order Has Never Been Modified to Permit Disclosure of Confidential Third Party Information to In-House Counsel

This Court has consistently rejected similar attempts by respondents to modify the standard protective order. *Tronox*, 2018 WL 852244 (denying motion to amend the protective order to disclose confidential third party information to in-house counsel; respondents argued that their in-house counsel needed the information to adequately participate in and direct the defense); *Benco*, 2018 WL 3249715; *McWane*, 2012 WL 3518638.

Rule 3.31(d) was adopted in 2009. Since then, Complaint Counsel is not aware of any Commission administrative proceeding in which the standard protective order was modified to permit disclosure of confidential third party information to in-house counsel. Respondent does not cite a single Commission administrative proceeding after 2009 where in-house counsel was granted access to third party confidential information. Instead, Respondent cites to *In the Matter of Schering-Plough Corp.*, Docket No. 9297, 2001 WL 1478371 (F.T.C. June 20, 2001), which was issued nearly a decade before Rule 3.31(d) was adopted. Respondent otherwise relies on federal cases, where, unlike here, parties are entitled to seek and negotiate protective orders. *See* Fed. R. Civ. Pro. 26(c). Where the Federal Rules of Civil Procedure conflict with the Rules, the former are not authoritative in administrative proceedings. *See In re of Impax Laboratories, Inc.*, Docket No. 9373, 2017 WL 4948985, at *3 (Oct. 18, 2017).

Respondent further relies on specific protective orders issued in private litigation. *See* Respondent's Motion, Ex. B ("Petersen Decl."), ¶¶ 11-13 & Exs. B-D contained therein. The legal and institutional issues implicated here – including the regulatory and statutory protections afforded to third party confidential information obtained by the Commission, and the chilling effect on the Commission's future investigations if it fails to uphold those protections – were not present in any of the commercial cases on which Respondent relies. *See* Interim Rules, 74 Fed. Reg. at 1813 n.39 (discussing concerns about third parties cooperation with Commission investigations if they could only "guess what degree of protection would eventually be afforded their confidential information . . . ."). Granting Respondent's Motion would subvert the intent behind the Rule: to promote efficiency, uniformity, and protect third party expectations.

B. Respondent Fails to Demonstrate a Special Need to Modify the Protective Order

For the reasons set forth in this Opposition, Respondent's Motion should be denied. Even if this Court could modify the standard protective order, Respondent has failed to provide any special need or prejudice that warrants modifying the standard protective order. *Benco*, 2018 WL 3249715, at *3 (citing *McWane*, 2012 WL 3518638, at *2). Respondent has hired well-qualified counsel and, indeed, has had no fewer than three national law firms involved in this matter. While Respondent argues that Ms. Petersen will take a "key" role in this fast-paced proceeding,[2] that same argument has been considered and rejected by this Court. *See Tronox*, 2018 WL 852244, at *2. Respondent has failed to provide any specific reason why Ms. Petersen, as opposed to Respondent's outside counsel, needs access to confidential third party information. *Benco*, 2018 WL 3249715, at *3 ("there is no valid basis for concluding that [respondent's]

[2] During the investigation, until just a few weeks before the Complaint issued, Respondent's outside counsel conducted all formal communication with and made all submissions to Complaint Counsel. Ms. Petersen did not defend or attend any investigational hearings in this matter.

outside counsel will be unable to sufficiently develop these arguments absent in-house counsel's access to" confidential third party information); *United States v. Aetna Inc.*, 2016 WL 8738420, at *8-9 (D.D.C. Sept. 5, 2016).

Respondent asserts that Ms. Peterson does not have competitive decision-making responsibility,[3] but admits that Ms. Petersen has been involved in several litigations with Respondent's competitors, *e.g.*, she has been "intimately" involved in Respondent's patent infringement suit with competitor, Digital Ally. Petersen Decl. ¶¶ 6, 11-13. This is a merger case where sensitive confidential information from Respondent's competitors – including information about their research and development – will inevitably arise. There is nothing to stop Ms. Petersen and her litigation team from weaponizing confidential third party information – even if inadvertently – against the third parties in intellectual property or other litigation as they zealously represent their employer. *See F.T.C. v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 670 (N.D. Ill. 2016) ("[O]nce . . . a lawyer . . . learns the confidential information that is being sought, that individual cannot rid himself of the knowledge he has gained; he cannot perform a prefrontal lobotomy on himself, as courts in various contexts have recognized.").

Finally, Respondent's assertion that it is "crucial" to Axon's defense that Ms. Petersen play a key role in "all aspects of the litigation" is conclusory and unsupported. *See, e.g.*, *Benco*, 2018 WL 3249715, at *2-3 (rejecting respondent's claim that in-house counsel's access to confidential information was "vital" and/or "essential" to provide "meaningful input"). Respondent relies on Ms. Peterson's declaration, which does not adequately support any specific

[3] While it is Complaint Counsel's position that the federal court standard articulated in *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 3 (D.D.C. 2015) is not applicable here, even if it were, Respondent has failed to show Ms. Peterson lacks competitive decision-making responsibilities. Respondent never produced a privilege log in the course of the investigation as required by subpoena. Without this information, Complaint Counsel and this Court do not have any way to assess Respondent's claim that Ms. Petersen and the un-named others it seeks to access confidential information do not have competitive decision-making responsibilities, and that they are unlikely to inadvertently use or share confidential information from competitors and customers, aside from Ms. Petersen's own statements.

need in this matter. Ms. Peterson's appellate responsibilities (*e.g.*, Petersen Decl. ¶ 7) are irrelevant; the unknown likelihood of appeal does not justify providing Ms. Petersen access to confidential materials now. Additionally, unlike the matters where Ms. Petersen and other in-house litigation counsel exclusively represent Respondent (Petersen Decl. ¶ 11) or where litigation is substantively handled by Respondent without outside counsel (Petersen Decl. ¶ 9), here, Respondent is represented by at least three law firms.[4]

CONCLUSION

For the foregoing reasons, Respondent's Motion to Modify the Protective Order should be denied.

Dated: January 30, 2020

Respectfully submitted,

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[4] Respondent does not seem as concerned about cost as its Motion contends, as evidenced by the numerous law firms it has engaged and the six partners from Jones Day who have entered appearances in this matter. Reuters published in 2018 that the average Jones Day partner billed clients $950/hour. *See* Reynolds Holding, "Breakingviews – Holding: $1,745-An-Hour Lawyers Due for Disruption," (May 25, 2018), *available at* https://www.reuters.com/article/us-usa-lawyers-breakingviews/breakingviews-holding-1745-an-hour-lawyers-due-for-disruption-idUSKCN1IQ2GN.

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

January 30, 2020

By: /s/ Jennifer Milici
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