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

In the Matter of	)	**PUBLIC**
McWANE, INC.,	)	DOCKET NO. 9351
Respondent.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT MCWANE, INC.'S MOTION TO AMEND THE PROTECTIVE ORDER GOVERNING DISCOVERY

Respondent McWane, Inc.'s Motion to Amend the Protective Order Governing Discovery should be denied.[1] The relief that Respondent seeks – in-house counsel access to confidential third-party material – is directly contrary to Commission Rule 3.31(d), and was considered and rejected by the Commission during the public rulemaking process that preceded the 2009 revisions to the Commission's Rules of Practice. More generally, in order to expedite proceedings, achieve uniformity across cases, and instill confidence in third parties that their confidential information will be protected, the Commission has declined to contemplate any deviation from the standard protective order terms set forth in the Rules. Granting Respondent's motion would upset the legitimate expectations of third parties that have provided discovery, undermine the confidence of those from whom information is sought in future investigations and adjudicative proceedings, and violate the terms and intent of Rule 3.31(d).

[1] Respondent's Motion incorrectly suggests (Mot. at 1, n.1) that Complaint Counsel does not take a position with respect to the Motion. Apparently, Respondent's counsel misunderstood Complaint Counsel's comment during informal discussions that he understood their position, but that the motion may be premature or moot (see note 4, *infra*), and that in any event, there was not much Complaint Counsel could do if third parties wanted to keep their information confidential. For the reasons stated herein, Complaint Counsel opposes Respondent's Motion.

Background

During this proceeding and the investigation that preceded it, dozens of third parties produced competitively sensitive information in response to compulsory process. For example, Complaint Counsel's Preliminary Witness List sets forth over 25 entities – including foundries, pipe and fitting manufacturers, and distributors – each of which provided information in response to one or more subpoenas that sought competitively sensitive information, such as strategic planning documents; pricing plans, policies, and data; analyses of competition and competitors; production cost information; and detailed transaction data.

These third parties received subpoenas with an attached copy of the protective order, and provided responsive information (and elected not to move to quash subpoenas or seek other relief) knowing that the information designated by them as "confidential" would be treated in accordance with the standard protective order mandated by Rule 3.31(d) and issued, verbatim, in this case. *See* Jan. 5, 2012 Protective Order Governing Discovery Material; Rule 3.31(d). Respondent now seeks to modify the terms of that protective order to permit its in-house counsel to access third-party confidential information.

Argument

A. The Text of Rule 3.31(d) Does Not Allow In-House Counsel Access to Third-Party Confidential Information

Rule 3.31(d), *as amended*, is clear. It requires the Administrative Law Judge to automatically and routinely enter a standard form protective order in every case. 16 C.F.R. 3.31(d) (effective May 1, 2009) ("In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law

Judge *shall* issue a protective order as set forth in the appendix to this section.") (emphasis added). This standard protective order provides that confidential information shall not be disclosed to a respondent's in-house counsel. *See* Rule 3.31(d) app. § 7(c), (d) (excluding employees of a respondent from the categories of people to whom confidential information may be disclosed). The Rule does not contemplate or permit the individualized tailoring of protective orders to allow in-house counsel access to third-party confidential information in a particular case. Complaint Counsel knows of no instance, and Respondent cites none in its brief, in which in-house counsel has been granted access to confidential third-party materials under the current version of Rule 3.31(d). *Cf.* Motion at 3 (citing cases from before the amendment of Rule 3.31). A straightforward reading of the Rule thus compels denial of Respondent's Motion.[2]

B. Rule 3.31(d) Reflects a Policy Determination that In-House Counsel Should Not Have Access to Third-Party Confidential Information

Although the Court need not look beyond the clear text of Rule 3.31(d) to deny Respondent's motion, Commission rulemaking commentary further confirms that Rule 3.31(d) was specifically amended to prohibit disclosure to in-house counsel. In its 2008-2009 rulemaking proceedings, the Commission considered the question of in-house counsel 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." *See* FTC Rules of Practice, Interim Rules with Request for Comment, 74

[2] In fact, in light of the mandatory nature of the regulation requiring a standard protective order, it appears unclear whether *even the Commission* would have the authority to grant the relief sought by Respondent without first engaging in appropriate rulemaking procedures.

Fed. Reg. 1804, 1812 (Jan. 13, 2009) ("Interim Rules") (responding to comments and proposing amendments to 16 C.F.R. Parts 3 and 4). 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, however, 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 (footnotes omitted). Thus, in amending Rule 3.31(d), the Commission has already considered and rejected Respondent's arguments.[3]

As addressed further below, the in-house counsel exclusion applies in every case, but it bears noting that, based on the facts recited in his declaration, Respondent's General Counsel (Mr. Proctor) plays exactly the sort of role within Respondent's business that the Commission viewed as *most* warranting this protection. The Commission was concerned about the potential for inadvertent misuse of information by counsel who engage in "giving advice about the company's business decisions." *Id*. Mr. Proctor admits to playing just such a role – providing legal advice in connection with numerous areas of Respondent's business, including, among many others, "competitive

[3] Additionally, providing in-house counsel with access to competitively sensitive information about their principle competitors raises particularly acute competitive concerns when, as here, the respondent is charged with colluding with those competitors.

practices," and the negotiation of contracts with competitors. *See* Proctor Decl. at 2-3 ¶¶ 3-5. The relief Respondent seeks is thus directly contrary to the expressed intent of the Commission.

C. Rule 3.31(d) Reflects a Policy Determination that the Protections Afforded to Third Parties by Rule 3.31(d) are Mandatory

In its rulemaking process, the Commission also made it clear that protective order terms should not be subject to case-by-case modifications. When it first proposed an amended Rule 3.31(d), requiring a standard protective order, the Commission stated its rationale as follows:

> The Commission believes a standard order would eliminate the delay resulting from negotiations and disputes over case-specific orders and improve quality and reduce agency costs by ensuring that discovery materials are handled uniformly and in a manner that is fully consistent with the FTC's statutory obligations with respect to materials it receives from private parties.

FTC Proposed Rule Amendments with Request for Comment, 73 Fed. Reg. 58,832, 58,838 (Oct. 7, 2008). In its comments to the proposed amendments, the Antitrust Section suggested that parties should be able to negotiate orders "suited to the needs of the particular case." Interim Rules, 74 Fed. Reg. at 1812. In rejecting this comment, the Commission elaborated on its rationale, and concluded that individualized negotiations would undermine important interests in efficiency, uniformity, and protection of third-party expectations:

> [Negotiations] can substantially 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.

Id.[4]

These policy considerations independently mandate denial of Respondent's motion. Most immediately, it would be unfair to the third parties in this case to change the rules in the middle of the game. Those parties produced documents during the investigation and adjudicative phases of this case – and elected not to seek further protection or relief from the Court – with the expectation that the dissemination of their discovery would be limited to the categories of people named in the standard protective order.

Additionally, granting Respondent's motion would impair Commission investigations and party discovery in future cases and defeat the very purpose of the 2009 rulemaking. There can be little doubt that the prospect of disclosure of sensitive materials to an adversary can "have a chilling effect on the parties' willingness to provide confidential information essential to the Commission's fact-finding processes." *Akzo N.V. v. ITC*, 808, F.2d 1471, 1483 (Fed. Cir. 1986) (referring to the International Trade Commission). Uncertainty as to the level of protection can have a similar chilling effect, and one of the Commission's reasons for promulgating Rule 3.31(d) was to avoid creating situations early in investigations in which third parties "could only guess what degree of protection would eventually be afforded their confidential information." Interim Rules, 74 Fed. Reg. at 1813 n.39. Granting the relief sought by Respondent

[4] Rule 3.31(d) does permit the Administrative Law Judge to put in place *additional* protections for parties from whom discovery is sought, *see* Rule 3.31(d) ("The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding."), but by its terms, and especially in light of the Commission's rulemaking commentary, this provision cannot be read as opening the door to case-by-case modifications of protective orders in a manner that diminishes the protection afforded to third parties.

would destroy the certainty third parties need for Commission staff to conduct investigations and for all parties take effective discovery in future cases.

Conclusion

For the foregoing reasons, Respondent McWane, Inc.'s Motion to Amend the Protective Order Governing Discovery should be denied.[5]

Dated: August 7, 2012

Respectfully submitted,

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[5] The relief sought by Respondent's Motion may also be largely superfluous if, as Complaint Counsel anticipates, the vast majority of third-party material previously designated as confidential will not be subjected to *in camera* treatment and will therefore become public when introduced at trial.

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, 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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I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document 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.

August 7, 2012 By: s/ Thomas H. Brock
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