

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRONOX LIMITED, et al.,

Defendants.

Civil Action No. 18-1622 (TNM)

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

TABLE OF AUTHORITIES

CASES

FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015).....4, 5

FTC v. Wilhelmsen, No. 1:18-cv-00414 TSC, Dkt. 29 (D.D.C. 2018).....5, 6

United States v. Aetna Inc., No. 1:16-cv-01494, 2016 WL 8738420,
(D.D.C. Sept. 5, 2016)3, 4, 5

Plaintiff's proposed Protective Order should be granted, and Defendants' proposed Protective Order should be denied. Plaintiff's proposal provides the same protections that have remained in place throughout the administrative proceeding. In contrast, Defendants' proposal provides in-house counsel with broad access to confidential and competitively sensitive third party information. Third parties, such as Defendants' customers and competitors, have relied and continue to rely on the protections set out in the Protective Order entered in the administrative proceeding. It would be unfair to change the third party protections at this point, unless the third parties are provided the opportunity to respond, and, if necessary, object to the broad access to third party confidential information contemplated by Defendants' proposed Protective Order. In addition to third party considerations, Defendants have demonstrated no special need to permit in-house counsel access to such information and can adequately defend their interests in this case under Plaintiff's proposed Protective Order. Finally, Defendants' proposed in-house counsel appear to be involved in competitive decision-making and allowing them access to competitively sensitive and confidential material would contravene the intent of protective orders.

BACKGROUND

On July 10, 2018, Plaintiff filed a Motion for a Protective Order, along with a proposed Protective Order. Pl.'s Motion for Protective Order ("Pl.'s Motion"), Dkt. 2. Plaintiff's proposed Protective Order provides the same protections that are already in place in the administrative proceeding. Pl's Motion at 2; Exhibit A (Administrative Protective Order). On July 12, 2018, Defendants filed an opposition to Plaintiff's Motion for a Protective Order and submitted their own proposed Protective Order. Defs.' Opp'n to Motion for Protective Order ("Defs.' Opp'n"), Dkt. 32.

There is one key difference between Plaintiff and Defendants' proposals. Under the Defendants' proposal, in-house attorneys would be permitted broad access to confidential materials – access that was opposed by third parties in the administrative proceeding and rejected by the administrative law judge (ALJ). Ex. A to Defs.' Opp'n ("Defs.' Proposed Order"); Exhibit B (ALJ's Order).

During the administrative proceeding, Defendants filed a similar motion, asking the ALJ to amend the Protective Order to permit in-house attorneys to gain access to third party confidential information, making the same arguments they present now. Exhibit B at 2. Plaintiff and third parties filed oppositions to this access. Exhibit B at 2 & n.1. The ALJ denied Defendants' motion to amend and denied in-house counsel access to confidential third party information. Exhibit B. As a result, the existing Protective Order has remained in place throughout discovery and trial in the administrative action and does not provide Defendants' in-house counsel with access to confidential third party information.

ARGUMENT

A. Third parties have relied on the protections in Plaintiff's proposed Protective Order.

Third parties relied upon the provisions found in Plaintiff's proposed Protective Order when producing documents and information and when testifying in the administrative proceeding. The entire administrative record was gathered and completed under provisions identical to Plaintiff's proposed Protective Order. Each discovery request to a third party attached the administrative Protective Order, and every witness who testified did so under the provisions of the administrative Protective Order. Exhibit A at 2. Granting Tronox and Cristal access to confidential and competitively sensitive third party materials now would be inconsistent with the expectations of third parties when they provided discovery and testified at the hearing.

Third parties should be given the opportunity to respond to Defendants' proposed Protective Order. Much of the confidential information in question belongs to third parties. In fact, over two dozen third parties were involved in providing confidential information in the FTC investigation and litigation. In many cases, these third parties are either Defendants' direct competitors or customers. These third parties were actively involved in protecting their information, from filing motions for *in camera* treatment of their information to filing oppositions to Defendants' motion to amend the Protective Order. In the administrative action, the ALJ received 25 motions for *in camera* treatment from third parties. Third parties should be afforded the right to respond to Defendants' proposed Protective Order and seek additional protections before a less restrictive protective order is granted.

B. Defendants are not materially harmed by Plaintiff's proposed Protective Order.

Defendants have provided no specific reason for their proposal beyond the purported need to generally supervise litigation. Generalized arguments are insufficient to show good cause to permit in-house counsel to access confidential information. *United States v. Aetna Inc.*, No. 1:16-cv-01494, 2016 WL 8738420, at *8-9 (D.D.C. Sept. 5, 2016). This is especially true here because outside counsel are experienced litigators from sophisticated law firms. *Id.*

Defendants' attached declarations fail to provide any explanation why in-house access is necessary for this specific proceeding. Defendants submitted the same declarations from January 2018 that they submitted in support of their motions to modify the protective order in the administrative case – down to references to the ALJ's December 7, 2017 Protective Order. Exs. B & C to Defs.' Opp'n at ¶¶5, 10. It is clear from reading the declarations that neither attorney was referring to this court's proceeding. Neither declaration make any statement regarding the reasons *this proceeding* requires their participation or why protections should be changed *now*.

C. Defendants' proposed in-house counsel appear to be involved in competitive decision-making.

The proposed in-house counsel should not be permitted access to confidential information because their own declarations suggest they are involved in competitive decision-making. When courts have permitted in-house counsel access to confidential third party information, individuals involved in competitive decision-making were not permitted to access such information. *Aetna*, 2016 WL 8738420, at *8-9. The term competitive decision-making includes “business decisions that the client would make regarding, for example, pricing, marketing, or design issues.” *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 3 (D.D.C. 2015) (internal citations and quotation marks omitted). In-house counsel access in such situations is improper whether the information belongs to competitors (creating an unfair advantage in competition) or to customers (creating leverage in negotiations). *Aetna*, 2016 WL 8738420, at *8-9.

Thus, in *Sysco*, the court found that in-house counsel's involvement in competitive decision-making created a risk that confidential information would inadvertently be used or disclosed as part of the attorney's role in the company's business. 83 F. Supp. 3d at 3-4. It is not an issue of an attorney's integrity. *Id.* Indeed, “[t]he primary concern underlying the ‘competitive decision-making’ test is not that lawyers involved in such activities will intentionally misuse confidential information; rather, it is the risk that such information will be used or disclosed inadvertently because of the lawyer's role in the client's business decisions.” *Id.*

Both Mr. Koutras of Cristal and Mr. Kaye of Tronox appear to be involved in competitive decision-making at their respective employers and thus should not be permitted to access confidential information. Within the responsibilities listed in their signed declarations, both attorneys admit to working on mergers and acquisitions. Def.'s Opp'n, Ex. B ¶ 3 (Mr.

Koutras' Declaration), Ex. C ¶ 9 (Mr. Kaye's Declaration). Courts have found that providing confidential information to in-house attorneys who work on mergers and acquisitions is particularly concerning because information may be inadvertently used when providing advice regarding future mergers. *Aetna*, 2016 WL 8738420, at *7; *Sysco Corp*, 83 F. Supp. 3d at 4.

Mr. Koutras admits that he participates in matters involving price increase announcements and contract disputes and provides legal advice on these matters. Def.'s Opp'n, Ex. B ¶ 9 (Mr. Koutras' Declaration). Mr. Kaye admits that he participates "in meetings where potentially competitively sensitive issues are discussed" and provides legal advice at these meetings. Def.'s Opp'n, Ex. C ¶ 9 (Mr. Kaye's Declaration). Both attorneys also participate in decisions on a variety of issues such as "competition with other titanium dioxide suppliers," "pricing strategies," and "marketing of [their client's] products" in order to provide legal advice. Def.'s Opp'n, Ex. B ¶ 8 (Mr. Koutras' Declaration), Ex. C ¶ 8 (Mr. Kaye's Declaration). Based on the signed declarations of Mr. Koutras and Mr. Kaye, neither of these attorneys should be permitted access to confidential third party information.

D. Defendants' proposed Protective Order goes well beyond the provisions in *Wilhelmsen*.

Defendants argue that they are proposing a protective order that is consistent with what the Commission agreed to in another ongoing merger matter. *FTC v. Wilhelmsen*, No. 1:18-cv-00414-TSC, Dkt. 29 (D.D.C. 2018). But the Protective Order in *Wilhelmsen* is *much narrower* than the Defendants' proposed Protective Order. In *Wilhelmsen*, each Defendant picked a single individual who could access *only* the identities of declarants and redacted version of the declarations. Ex. D to Defs.' Opp'n. In *Wilhelmsen*, confidential information was redacted *before* those individuals could see the declarations. Ex. D to Defs.' Opp'n. In contrast, here, Defendants' proposed Protective Order allows Defendants' chosen individuals to access *all* confidential information submitted from all parties. The *Wilhelmsen* Protective Order thus

provides far narrower access to confidential third party information than Defendants' proposed order. Moreover, the fact that the defendants in *Wilhelmsen* were able to conduct an entire PI hearing *without* the expansive access proposed by Defendants here shows that Defendants can indeed put on a defense without granting in-house counsel access to confidential information.

As a result, Plaintiff respectfully submit that its proposed Protective Order should be granted and Defendants' proposed Protective Order should be denied.

Dated: July 19, 2018

By: /S/ Dominic Vote

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