

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



ORIGINAL

In the Matter of)
)
Axon Enterprise, Inc.)
a corporation,)
)
and)
)
Safariland, LLC,)
a partnership,)
)
Respondents.)

Docket No. 9389

ORDER DENYING RESPONDENT'S MOTION
TO MODIFY THE PROTECTIVE ORDER

I.

On January 17, 2020, Respondent Axon Enterprise, Inc. ("Axon") filed a Motion to Modify the Protective Order, to allow Axon's in-house counsel, Ms. Pamela Petersen, and other in-house litigation-only staff, access to materials that have been designated as confidential in this case ("Motion"). Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed an opposition to the Motion on January 30, 2020 ("Opposition"). Having fully considered the Motion and the Opposition, and as further explained below, the Motion is DENIED.

II.

The Protective Order in this case was issued on January 6, 2020 in accordance with Rule 3.31(d) of the Commission's Rules of Practice. 16 C.F.R. § 3.31(d). That rule states: "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." 16 C.F.R. § 3.31(d). In accordance with the standard protective order language in the appendix to Rule 3.31, the Protective Order in this case allows access to and review of confidential materials by, among others, "outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent." 16 C.F.R. § 3.31(d), Protective Order ¶ 7. The standard protective order language does not include access to confidential materials for in-house counsel.

Respondent states that Ms. Petersen is Axon's Director of Litigation and National Appellate Counsel, has represented the company since 2005, and is a subject matter, technology, and product expert critical to Axon's defense in this matter. Respondent asserts that because Ms. Petersen is not engaged in competitive decision-making, there is no concern that confidential information obtained by her would be used in competition. Respondent argues that denying Ms. Petersen full access to confidential material would prejudice Axon's ability to defend this case.

In addition, Respondent argues that a categorical bar for all in-house counsel, regardless of whether a specific attorney participates in competitive decision-making, would violate fundamental rights, as it would, *inter alia*, deprive Axon of its right to be represented by counsel of its choice. Respondent also argues that there is no rational basis for the government pursuing antitrust claims against some companies in administrative proceedings and others in federal court and that because Ms. Petersen has been granted access to confidential information in cases in federal courts, a categorical rule barring access for in-house counsel would violate Axon's right to equal protection.

Complaint Counsel argues that the standard protective order provided in Appendix A to 16 C.F.R. Section 3.31, 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; that the standard protective order cannot be modified or amended without further rulemaking; and that Respondent has cited no authority on which this Court may rely to grant Respondent's Motion.

In addition, Complaint Counsel argues that Respondent has not demonstrated any special need for access to confidential material or any prejudice that would result from compliance with the standard protective order. Complaint Counsel asserts that Respondent currently has three large, capable law firms working on its behalf. Complaint Counsel also argues that Respondent has admitted that Ms. Petersen has been involved in several litigations with Respondent's competitors, including patent litigation, and thus should be precluded from access to competitors' sensitive confidential information, including information about their research and development.

III.

In amending its Rules of Practice in 2009, the Commission adopted Rule 3.31(d), including the standard protective order set forth in an appendix to the Rule. FTC Rules of Practice, Interim Rules with Request for Comment, 74 Fed. Reg. 1804, 1812 (Jan. 13, 2009) ("Interim Rules"). The argument that in-house counsel be allowed access to confidential materials because prohibiting such access might inhibit a respondent's ability to defend itself was specifically rejected. *Id.* at 1812-13.

In the instant case, it is not necessary to determine whether or not, as a matter of law, the standard protective order can be modified since Respondent has not persuasively demonstrated that the requested modification is necessary. Respondent has hired well-qualified counsel and has failed to provide any specific reason why Ms. Petersen needs access to confidential non-

party information. *See In re Benco Dental Supply Co.*, 2018 FTC LEXIS 109, at *8 (June 15, 2018) (“there is no valid basis for concluding that [respondent’s] outside counsel will be unable to sufficiently develop these arguments absent in-house counsel’s access to” confidential non-party information). Further, 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 Benco*, FTC LEXIS 109, at *8-9 (rejecting respondent’s claim that in-house counsel’s access to confidential information was vital or essential). Thus, Respondent has not demonstrated any special need or prejudice that warrants modifying the standard protective order. *See Benco*, FTC LEXIS 109, at *8.

In accordance with Rule 3.31(d), the Protective Order issued in this case does not permit disclosure of confidential materials to in-house counsel and will not be amended in this case to allow the designated in-house counsel such access.

IV.

After full consideration of Respondent’s Motion to Modify the Protective Order and Complaint Counsel’s Opposition thereto, and for all the foregoing reasons, Respondent’s Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: January 31, 2020

Notice of Electronic Service

I hereby certify that on January 31, 2020, I filed an electronic copy of the foregoing Order Denying Respondents Motion to Modify the Protective Order., with:

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I hereby certify that on January 31, 2020, I served via E-Service an electronic copy of the foregoing Order Denying Respondents Motion to Modify the Protective Order., upon:

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