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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE

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

Fed. Reg. 1804, 1812 (Jan. 13, 2009) (“Interim

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 doo[/Bottom] 6 BDC 0 Tc 0 T[en1.3-230.15 Td6ee

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

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
Thomas H. Brock