

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



In the Matter of)
McWANE, INC.,) DOCKET NO. 9351
a corporation, and)
STAR PIPE PRODUCTS, LTD.,)
a limited partnership,)
Respondents.)

**ORDER DENYING RESPONDENT'S MOTION
TO AMEND THE PROTECTIVE ORDER GOVERNING DISCOVERY**

I.

On July 30, 2012, Respondent McWane, Inc. ("Respondent" or "McWane") filed a Motion to Amend the Protective Order Governing Discovery, to permit its in-house general counsel and senior vice-president, James M. Proctor, II, full access to all confidential materials submitted in this case, equal to that permitted for outside counsel under the Protective Order ("Motion"). Complaint Counsel filed an opposition to the Motion on August 7, 2012 ("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 5, 2012, and entered in accordance with Commission Rule of Practice 3.31(d). 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." *Id.* 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, *inter alia*, by "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." Protective Order ¶ 7. The standard protective order language does not include access to confidential materials for in-house counsel.

Respondent argues that its in-house counsel needs to access and review all confidential materials in order to fulfill his responsibilities to the company. Respondent contends that such

access should not be denied solely because Mr. Proctor is in-house counsel; rather, access to confidential materials should be denied only where the in-house counsel is involved in competitive decision-making. Relying upon Mr. Proctor's affidavit, attached to the Motion, Respondent asserts that Mr. Proctor is not involved in competitive decision-making and, therefore, the Protective Order should be amended to enable Mr. Proctor to access and review the confidential materials submitted in this case.

Complaint Counsel contends that, in amending the Commission's Rules of Practice in 2009 to provide for a standard protective order to be issued in each case, the Commission intentionally declined to allow access to confidential materials by in-house attorneys. According to Complaint Counsel, excluding in-house counsel from access to confidential materials serves, among other things, to ensure nonparties that competitively sensitive submissions will not be misused. Complaint Counsel further notes that nonparties in this case produced confidential materials in the investigation and adjudicatory phases in this case, with the expectation that disclosure would be limited to those categories of individuals outlined in the Protective Order, and that it is unfair to such nonparties to change these categories after the fact.

III.

The Protective Order expressly requires that any party serving a discovery request on any nonparty "shall provide . . . a copy of this Order so as to inform each such third party of his, her, or its rights herein." Protective Order ¶ 4. In the instant case, nonparties receiving subpoenas provided responsive information, and may well have foregone moving to quash the subpoenas, or seek other relief, in reliance on the Protective Order then in place. Nonparties responding to a subpoena have a right to expect that submissions designated by them as "confidential" will be treated in accordance to the Protective Order provided to them, which follows the standard protective order required by Rule 3.31 *verbatim*. Moreover, Respondent has failed to articulate any reason for failing to request access to confidential information for in-house counsel earlier in the case, prior to the production of confidential information by these nonparties, or to assert any special circumstances that might justify a deviation from the standard protective order language. Accordingly, Respondent's Motion is DENIED.

IV.

After full consideration of Respondent's Motion to Amend 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: August 8, 2012