

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



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In the Matter of))
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Benco Dental Supply Co.,))
a corporation,))
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Henry Schein, Inc.,))
a corporation, and))
))
Patterson Companies, Inc.,))
a corporation.))
))
Respondents.))
_____)

Docket No. 9379

**ORDER DENYING RESPONDENT HENRY SCHEIN, INC.'S
MOTION TO AMEND THE PROTECTIVE ORDER**

I.

On May 21, 2018, Respondent Henry Schein, Inc. (“Schein”) filed a Motion to Allow its In-House Counsel Access to Certain Investigational Hearing Transcripts (“Motion”). Specifically, Schein seeks an order amending the protective order issued in this case on February 13, 2018 (the “Protective Order”) to permit two of Schein’s in-house attorneys, Walter Siegel and Marjorie Han, to have access to two non-party investigational hearing transcripts (“IHTs”) that were taken during the Part 2 investigation and produced in discovery in the Part 3 matter by Federal Trade Commission (“FTC”) Complaint Counsel, described further below. Complaint Counsel filed an opposition to the Motion on May 31, 2018 (“Opposition”).

As further explained herein, the Motion is DENIED.

II.

The Complaint in this matter was issued on February 12, 2018. In summary, the Complaint alleges that Respondent Benco Dental Supply Company (“Benco”), Respondent Patterson Companies, Inc. (“Patterson”), and Respondent Schein, distributors of dental products, agreed that they would not provide discounts or otherwise contract with buying groups seeking to obtain supply agreements on behalf of independent dentists. Complaint ¶¶ 1, 8. “Buying

Groups,” according to the Complaint, “are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” Complaint ¶ 3. The Complaint charges that the alleged agreement has restrained price competition, in addition to having other anticompetitive effects, and constitutes a violation of Section 5 of the FTC Act. Complaint ¶¶ 75-76. Respondents filed Answers on March 6, 2018 that denied any unlawful agreement or any violation of the FTC Act, and raised a number of affirmative defenses. *See, e.g.,* Answer of Schein, ¶¶ 8, 75-76 and Defenses at pp. 17-18.

Based on the Motion, the Opposition, and the exhibits submitted therewith, in July 2017, during the investigatory phase of this matter, Complaint Counsel took investigative hearing testimony from representatives of two Buying Groups referred to in the IHTs as (1) Smile Source and (2) Kois. Pursuant to 15 U.S.C. 57b-2(b)(3)(C), the investigational hearing transcripts were designated confidential.¹ After commencement of the litigation, the IHTs were produced to Schein and the other Respondents. There is no dispute that the IHTs are subject to the Protective Order.

The Protective Order was issued 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). The standard protective order provided under the Rules does not allow access to review of confidential materials produced in discovery to in-house counsel, but does allow access to and review of confidential discovery 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 ¶ 7.² Accordingly, Respondent seeks an amendment of the Protective Order to allow its designated in-house counsel to review the IHTs.

III.

Schein argues that Smile Source and Kois gave testimony that “directly contradicts” and “undercuts” relevant allegations of the Complaint. Motion at 4. Respondent points to testimony from the Smile Source representative indicating that in 2013 Schein made an offer to do business with Smile Source, but Smile Source was not interested. Motion at 5-6, citing Smile Source IHT (Exhibit A to Motion) at 115-16; 192-93. This testimony, Schein argues, contradicts allegations in the Complaint that Schein did not “bid on Smile Source in 2013” (¶ 57) and that Benco and

¹ Section 57b-2(B)(3)(C) governs “transcripts of oral testimony received pursuant to compulsory process in investigation” by the Commission and provides in pertinent part that such transcripts shall not be available “for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material, things, or transcripts.” 15 U.S.C. 57b-2(B)(3)(C).

² Complaint Counsel states that it would not object to access to the IHTs by Schein’s in-house attorneys if Smile Source and Kois agreed, but asserts that Complaint Counsel has been advised that both Smile Source and Kois oppose such access. *See* Opposition at 2 and Declarations, attached as Exhibits 2 and 3. Schein and Smile Source engaged in negotiations for access to certain portions of Smile Source’s IHT, but were unable to agree on the scope. Motion Exhibit E.

Schein had an illegal agreement not to do business with Smile Source (¶¶ 60-61). With respect to Kois, Respondent cites testimony that Schein argues shows that Kois' success as a Buying Group was not adversely impacted by the alleged illegal agreement. Motion at 6-7, citing Kois IHT (Exhibit B to Motion) at 159-60. Schein argues that this testimony contradicts the allegation in paragraph 10 of the Complaint that the alleged illegal agreement "deprived independent dentists of the benefits of Buying Groups, including lower prices." (Complaint ¶ 10).

Based on the foregoing, Schein argues that review of the IHTs by in-house counsel is "essential" and "vital" to their participation in Schein's defense and to avoid prejudice. Motion at 4-5. Schein asserts that the nature of the historical and current business relationships between Schein and Buying Groups is "fact-intensive" and that allowing its in-house counsel to review the IHTs will enable its in-house counsel to provide "meaningful input." Motion at 5. Schein further argues that neither in-house counsel at issue in this Motion is involved in Schein's competitive decision-making with regard to the Smile Source or Kois Buying Groups and that neither Smile Source nor Kois will be harmed by allowing in-house counsel access because, according to Schein, the IHTs do not contain any competitively sensitive information.

Complaint Counsel contends that the standard protective order required by the Rules, which bars in-house counsel from accessing confidential materials, was the result of a formal rulemaking process and cannot be changed without further rulemaking procedures. Complaint Counsel further argues that allowing deviation from the standard protective order in individual cases to allow in-house counsel access to confidential materials obtained in the investigatory phase would undermine the Commission's ability to guaranty confidentiality and thereby obtain cooperation in investigations.

Complaint Counsel argues in the alternative that even if an amendment to the Protective Order were permissible, Schein has failed to justify the requested amendment. Complaint Counsel asserts that Schein's in-house attorneys are sufficiently able to assist outside counsel because the in-house attorneys have full access to all of Schein's internal business information concerning relationships with Buying Groups, as well as access to non-confidential information from other sources. Complaint Counsel further contends that, contrary to Schein's assertions, the in-house attorneys at issue are involved in competitive decision-making.

IV.

As noted in *In re Tronox Ltd.*, Docket No. 9377 (F.T.C. Feb. 2, 2018), Rule 3.31(d) requires issuance of the standard protective order, which does not permit access to confidential discovery materials by in-house counsel. Moreover, amendment is not appropriate where, as here, Schein has failed to demonstrate any special circumstances that might justify a deviation from the standard protective order language. *In re McWane, Inc.*, 2012 FTC LEXIS 140, at *4 (August 8, 2012).

The Motion fails to demonstrate that denial of the requested amendment to allow in-house counsel access will prejudice Schein's defense. To the extent that the IHTs contain testimony that contradicts the allegations of the Complaint or supports Schein's defenses, there is no valid basis for concluding that Schein's outside counsel will be unable to sufficiently develop

these arguments absent in-house counsel's access to the IHTs. In addition, Schein's assertions that in-house counsel's access to the IHTs is "vital" and/or "essential" to its defense are largely conclusory and lacking in explanation or factual support. See *FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 674 (N.D. Ill. 2016) (refusing access to highly confidential material by defendants' in-house counsel, stating: "There is nothing in any of the defendants' submissions that explains why it is essential that in-house counsel pour over the Highly Confidential information their competitors had to produce to the FTC pursuant to government subpoena. There is only the *ipse dixit* of the defendants to sustain their position. . . . '[U]nfortunately . . . saying so doesn't make it so . . .").

For all the foregoing reasons, the Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: June 15, 2018