

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



In the Matter of

**BENCO DENTAL SUPPLY CO.,
a corporation,**

**HENRY SCHEIN, INC.,
a corporation, and**

**PATTERSON COMPANIES, INC.,
a corporation.**

Docket No. 9379

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT
HENRY SCHEIN, INC.'S MOTION TO AMEND THE PROTECTIVE ORDER**

Respondent Henry Schein, Inc. asks the Court to provide its in-house attorneys access to two non-parties' investigational hearing transcripts. Those transcripts are designated confidential, and contain pricing data, results from recent competitive bids, industry analyses, and other confidential information. As this Court held just three months ago in *Tronox* in denying a similar motion, Commission Rule 3.31 squarely precludes modifying the protective order to provide in-house counsel access to confidential third-party information. *In the Matter of Tronox Ltd.*, Docket No. 9377, slip op. at 2 (F.T.C. Feb. 2, 2018) (Ex. 1). We know of no instance, and Schein cites none in its brief, where the Court has departed from the protective order required by the current version of Rule 3.31(d).¹ Schein's Motion lacks any legal support and should be denied.

¹ To support its argument, Schein cites *In the Matter of Schering-Plough Corp.*, Docket No. 9297, 2001 WL 1478371 (F.T.C. June 20, 2001), which pre-dates Rule 3.31(d)'s current iteration. (Resp't Schein's Mot. to Amend Protective Order at 4.)

Much of Schein’s Motion consists of baseless attacks on Complaint Counsel, as well as mischaracterizations of the evidence. While we regret burdening the Court with this, we will respond very briefly to Schein’s improper² and false allegations to clarify the record.

ARGUMENT

A. The Investigational Hearing Transcripts At Issue Are Confidential.

The transcripts at issue are from investigational hearings of Smile Source LP and Kois Buying Group, both are third-party dental buying groups. Per the governing statutes and regulations, Complaint Counsel marked both transcripts as confidential, and they are covered by the Protective Order. 15 U.S.C. § 57b-2(b)(3)(C); (Protective Order §§ 1-3).³ Smile Source and Kois could lift those “confidential” designations, in which case we would raise no objection to Schein’s in-house attorneys accessing the de-designated transcripts. But Schein attempted to negotiate this path, and failed.⁴ Both non-parties oppose Schein’s request for its in-house attorneys to access their confidential testimony.⁵ (Ex. 2 (Decl. of Jasmine Y. Rosner) ¶ 3; Ex. 3 (Decl. of Jeanine K. Balbach) ¶ 2.)

B. Commission Rules Do Not Permit In-House Counsel Access to Confidential Materials.

Schein argues that its ability to defend the case is compromised if it cannot give its in-

² Commission Rule 4.1(e) provides that attorney misconduct includes “knowingly or recklessly giv[ing] false or misleading information” and “unprofessional conduct during the course of any Commission proceeding.” 16 C.F.R. § 4.1(e)(1)(i)(C)-(D).

³ On February 12, 2018, the Commission issued the Complaint in this matter. The next day, the Court issued the Protective Order, as specified in Commission Rule 3.31(d). 16 C.F.R. § 3.31(d). Complaint Counsel promptly produced the confidential transcripts at issue here to Schein’s outside counsel as part of initial disclosures.

⁴ Complaint Counsel informed Schein that it had no issue with Schein’s in-house counsel accessing any de-designated materials. (Ex. 2 (Decl. of Jasmine Y. Rosner) ¶ 2.) Smile Source, however, declined to de-designate confidentiality for any excerpt, explicitly refusing to share its testimony with any other person, especially the other Respondents’ in-house attorneys. (Schein’s Mot. at Ex. E.) While Smile Source was willing to allow Schein’s in-house attorneys access to limited transcript passages, it specifically did not want its “competitively sensitive information related to the 2017 bidding process” disclosed. (*Id.*) Kois similarly objected to disclosing testimony revealing its confidential supplier contract terms to Schein’s in-house counsel. (Ex. 3 (Decl. of Jeanine K. Balbach) ¶ 2.)

⁵ Neither third party is filing an objection for cost reasons. (Ex. 2 ¶ 3; Ex. 3 ¶ 2.)

house counsel access to confidential third-party materials. In *Tronox*, the Court squarely rejected this argument. *Tronox*, slip op. at 2 (Ex. 1). The *Tronox* decision is based, in part, on the clear language of Rule 3.31(d) that does not permit a respondent's employees—including in-house counsel—to access confidential information. *Id.* at 3 (Ex. 1); Rule 3.31(d) App. A § 7(c)-(d); *see also In the Matter of McWane, Inc.*, Docket No. 9351, 2012 FTC Lexis 140, *2 (Aug. 8, 2012) (“The standard protective order language does not include access to confidential materials for in-house counsel.”).

The Court found the legislative history behind Rule 3.31(d) instructive. In promulgating Rule 3.31(d) in 2009, the Commission made a policy determination that in-house counsel should not have access to third-party confidential information. In the 2008-2009 note and comment process on the standard protective order, the Commission received a comment from the American Bar Association Section of Antitrust Law that echoes Schein's alleged concern here. The Commission carefully considered the argument and squarely rejected it. As the Court quoted in *Tronox*:

The Commission's statutory obligation to maintain the confidentiality of commercially sensitive information, however, raises serious questions about the wisdom of allowing disclosure of information in its custody to in-house counsel, who might intentionally or unintentionally use it for purposes other than assisting in respondent's representation, for example, by making or giving advice about the company's business decisions. The Commission believes it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.

Slip op. at 3 (Ex. 1) (quoting FTC Rules of Practice, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1812-13 (Jan. 13, 2009)).

Schein is effectively asking the Court to change Commission Rule 3.31's standard protective order. The last time that the Commission revised the Part 3 rules in 2009, it engaged in

a formal rulemaking process. FTC Rules of Practice, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1812-13, 1824-26; FTC Rules of Practice, Proposed Rule Amendments; Request for Public Comment, 73 Fed. Reg. 58832, 58837, 58846-48 (Oct. 7, 2008). Moreover, to change the rules, the Commission would be required, at a minimum, to “currently publish [the new rules] in the Federal Register for the guidance of the public.” 5 U.S.C. § 552(a)(1)(C). As a practical matter, deviating from the standard protective order in individual cases would render meaningless the confidentiality guaranteed to third parties (which was the very purpose of the current rules), compromising the Commission’s ability to obtain confidential information in Part 2 investigations and Part 3 litigations.

Schein cites no authority supporting its request, and ignores the Court’s *Tronox* decision. Schein’s requested relief is squarely barred by the applicable law, and so its Motion should be denied.

C. Schein Is Not Prejudiced by the Protective Order.

The Rules do not permit deviations from the standard protective order. But even if they did, Schein’s justification for the requested modification falls flat. The Court has issued identical protective orders in every proceeding for nearly 10 years, without granting in-house counsel access to third-party confidential materials. Schein claims in-house counsel’s input is “vital to outside counsel’s determination of litigation strategy.” (Schein’s Mot. at 5.) Yet it fails to explain why this input is so “vital.” *See FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 674 (N.D. Ill. 2016) (“There is nothing in any of the defendants’ submissions that explains why it is essential that in-house counsel pour over [confidential third-party materials]. There is only the *ipse dixit* of defendants to sustain their position. And that is not enough. Unfortunately saying so doesn’t make it so.”) (internal citation and ellipses omitted).

Even without the confidential transcripts, Schein's in-house attorneys can assist in the company's defense. They have full access to Schein's internal information, as well as non-confidential information from other sources. In addition, through its experienced outside counsel, Schein has access to the confidential materials. The Protective Order imposes no prejudice on Schein.⁶

D. Schein's Allegations Against Complaint Counsel Are Baseless And Disregard the Rules.

Schein makes two false claims in its Motion. First, while it carefully avoids asserting this as a fact, it strongly insinuates that Complaint Counsel concealed evidence from the Commission. Second, it claims that by not providing the transcripts in question to Schein's outside counsel until litigation was filed, Complaint Counsel concealed evidence from Schein. These claims cannot survive even basic scrutiny.

First, Complaint Counsel's communications with the Commission are confidential, so Schein has no factual basis whatsoever for any claim—cleverly couched as an insinuation or not—that we withheld evidence from the Commission. According to longstanding Commission practice—and as occurred in this case—the Commission (including management of both the Bureau of Competition and the Bureau of Economics, the Commissioners' Attorney Advisers, the Office of the General Counsel, and the Commissioners themselves) had access to the entire investigative record.

Second, the accusation that we “concealed” evidence from Schein reflects either ignorance or disregard of Commission Rules. During the Part 2 investigation, Complaint Counsel

⁶ We note that contrary to the declarations of Schein's designated in-house counsel, evidence suggests that they are involved in competitive decision-making. (*See, e.g.*, Ex. 4 (Walter Seigel's Bio, Henry Schein, Inc. Website) (Mr. Siegel advises “the Company on a broad range of legal matters affecting various business units [and] oversees and participates in drafting a broad range of commercial documents and contracts between the Company's business units (and affiliates) and third parties.”).) Thus, the harm to non-parties that formed the basis for the Commission's adoption of the standard protective order appears to be present here.

was not permitted to disclose third-party information, and was not allowed to share such information with Schein or anyone else outside the Commission. 15 U.S.C. §§ 46(f), 57b-2(b)(3)(C), 57b-2(f)(1). And during Part 3, at its first opportunity, Complaint Counsel produced third-party information to Schein and the other Respondents subject to the Protective Order issued by this Court, which precludes giving in-house counsel access to confidential information. 16 C.F.R. §§ 3.31(b), 3.31(d), 4.10.

Finally, Schein’s claim that a couple of fragments of testimony conflict with the Complaint’s allegations is not relevant to this Motion. At trial, Complaint Counsel will present the overwhelming evidence—documentary and testimonial, direct and circumstantial, from Respondents and third parties—that supports the Complaint’s allegations.⁷ Schein, of course, will be entitled to present its evidence at that time. We have no doubt that, with the entire record before it, the Court will have no difficulty concluding that Schein and the other Respondents entered into an unlawful agreement to refuse to discount or sell to buying groups.

CONCLUSION

Based on the foregoing, Complaint Counsel respectfully requests that this Court deny Schein’s Motion to Amend the Protective Order.

Dated: June 4, 2018

Respectfully submitted,

/s/ Jasmine Y. Rosner

Jasmine Y. Rosner

Thomas H. Brock

Federal Trade Commission

⁷ See, e.g., Ex. 5 (Text message from Benco’s president to Schein’s president: “Tim: Did some additional research . . . So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.”) (Mar. 27, 2013, Henry Schein-000068334 at 68334, IH Exhibit 223); Ex. 6 (Benco internal email: “Re: Smile Source . . . Very Familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.”) (Jan. 27, 2014, BDS-FTC00002808, IH Exhibit 21); Ex. 7 (Patterson internal email: “Confidential and not for discussion . . . [.] our 2 largest competitors stay out of these [buying group bids] as well. If you hear differently and have specific proof please send that to me.”) (Feb. 27, 2013, PDCO 00051886, IH Exhibit 110); Ex. 8 (Patterson internal email: “Schein, Benco, and Patterson have always said no [to buying groups.] I believe it is our duty to uphold this and protect this great industry.”) (Aug. 4, 2013, PDCO 00027980, IH Exhibit 125).

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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June 4, 2018

By: /s/ Lin Kahn
Attorney

CERTIFICATE OF 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 documents that is available for review by the parties and the adjudicator.

June 4, 2018

By: /s/ Lin Kahn
Attorney

EXHIBIT 1

PUBLIC



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

ORIGINAL

In the Matter of)
)
Tronox Limited,)
a corporation,)
)
National Industrialization Company)
(TASNEE))
a corporation,)
)
National Titanium Dioxide Company)
Limited (Cristal))
a corporation, and)
)
Cristal USA Inc.)
a corporation,)
)
Respondents.)

DOCKET NO. 9377

**ORDER DENYING RESPONDENTS' MOTION
TO AMEND THE PROTECTIVE ORDER**

I.

On January 19, 2018, Respondents filed a Joint Motion to Amend the Protective Order Governing Confidential Material, to designate Respondent Cristal USA's Senior Corporate Counsel and Secretary James G. Koutras and Respondent Tronox Limited's Deputy General Counsel Steven Kaye (collectively, "designated in-house counsel") as individuals to whom materials that have been designated confidential in this case may be disclosed ("Motion"). Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed an opposition to the Motion on February 1, 2018 ("Opposition").

Having fully considered the Motion and the Opposition, and as further explained below, the Motion is DENIED.¹

II.

The Protective Order in this case was issued on December 7, 2017 in accordance with Commission 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.

Respondents state that the Protective Order precludes Respondents' employees, including in-house counsel, from accessing information designated as confidential by parties or third parties and that Complaint Counsel has designated nearly all of its discovery responses confidential. Respondents argue that it is necessary for the designated in-house counsel to have access to confidential material in order to adequately participate in and direct the defense of the claims against Respondents. Respondents further assert that neither designated in-house counsel plays a part in Respondents' competitive decision-making, and thus could not use the information for a competitive advantage. Lastly, Respondents argue that there is a "special need" in this case for access to confidential material because of the relatively condensed period of time between now and trial, and the expertise of designated in-house counsel is needed to expeditiously prepare their clients' defense.

Complaint Counsel states that Respondents have demonstrated no special need to amend the Protective Order and that Respondents can adequately defend their interests in this case. Complaint Counsel further states that third parties have reasonably relied upon the Protective Order when producing confidential materials. Complaint Counsel also contends that the designated in-house counsel appear to be involved in competitive decision-making and that allowing them access to competitively sensitive and confidential material would contravene the intent of the Protective Order. Finally, Complaint Counsel states that the Commission determined in a public rulemaking that the standard protective order provided in Appendix A to Rule 3.31(d) should be mandatory, should not be

¹ On February 1, 2018, non-party Venator Materials PLC filed a Motion for Leave to File a Response to the Motion together with a proposed response, arguing that Respondents' Motion should be denied on the ground that it would be harmed if its confidential materials were disclosed to the designated in-house counsel. Also on February 1, 2018, non-party PPG Industries, Inc. filed a Motion to Quash or Limit Subpoenas, which includes a request in the alternative that Respondents' Motion should be denied on similar grounds. Based on the ruling in this Order, the non-party motions are denied as moot.

negotiated on a case-by-case basis, and should not allow in-house counsel to access confidential discovery material.

III.

In amending its Rules of Practice in 2009, the Commission adopted Rule 3.31(d), which requires the ALJ to issue 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 Commission rejected arguments that parties should be able to negotiate orders suited to the needs of the particular case on grounds that the negotiations can 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.* The Commission specifically rejected the suggestion that in-house counsel be allowed access to confidential materials because prohibiting such access might inhibit a respondent’s ability to defend itself, stating:

The Commission’s statutory obligation to maintain the confidentiality of commercially sensitive information . . . raises serious questions about the wisdom of allowing disclosure of information in its custody to in-house counsel, who might intentionally or unintentionally use it for purposes other than assisting in respondent’s representation, for example, by making or giving advice about the company’s business decisions. The Commission believes it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.

Id. at 1812-13.

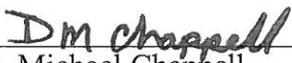
In accordance with Rule 3.31(d), the Protective Order issued in this case does not permit disclosure of confidential materials to in-house counsel and will not be amended in this case to allow the designated in-house counsel such access.²

² The Protective Order provides that “[a] designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of [the] Order.” 16 C.F.R. § 3.31(d), Protective Order ¶ 5. According to Respondents, the FTC has designated nearly all of its discovery responses as confidential. The Protective Order was issued to protect the rights of parties and non-parties from disclosure of their confidential information by limiting disclosure to the narrow set of persons listed in Paragraph 7 of that Order. It does not give parties or non-parties the unfettered ability to designate every document produced as “confidential.” If Respondents have a basis for believing that materials that have been designated as “confidential” should not have been, Respondents’ counsel shall request that Complaint Counsel, as the party who served subpoenas on the non-parties, work with the non-parties to ensure that the non-parties have designated as “confidential” only those documents that are properly designated as confidential, in accordance with the definition of that term in the Protective Order.

IV.

After full consideration of Respondents' Motion to Amend Protective Order and Complaint Counsel's Opposition thereto, and for all the foregoing reasons, Respondents' Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 2, 2018

EXHIBIT 2

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

In the Matter of

**BENCO DENTAL SUPPLY CO.,
a corporation,**

**HENRY SCHEIN, INC.,
a corporation, and**

**PATTERSON COMPANIES, INC.,
a corporation.**

Docket No. 9379

DECLARATION OF JASMINE Y. ROSNER

1. I am an attorney for the Federal Trade Commission and Complaint Counsel in this proceeding. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
2. Complaint Counsel and Henry Schein, Inc.'s counsel had a series of meet and confers regarding Schein's request for in-house attorney access to confidential investigational hearing ("IH") transcripts. During a telephonic meet and confer on April 27, 2018 between Complaint Counsel and John McDonald, Esq. and Lauren Fincher, Esq. (Schein's counsel), Ronnie Solomon and I stated that Complaint Counsel would consent to Schein's in-house attorneys having access to any transcripts excerpts that IH witnesses agreed to de-designate as confidential, as long as Schein identified the de-designated excerpts for Complaint Counsel.
3. On May 24, 2018, I spoke with Darren Tucker, Esq., counsel for Smile Source, LP. Mr. Tucker explained that his client opposes Schein's Motion to make the Smile Source

confidential transcript available to Schein's in-house attorneys. Smile Source has significant concerns about its commercially sensitive business information being available to its supplier and potential suppliers. Because of cost reasons, however, Smile Source will not file a separate opposition to Schein's motion.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of May, 2018, in Washington, D.C.

Respectfully submitted,

/s/ Jasmine Y. Rosner

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EXHIBIT 3

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**BENCO DENTAL SUPPLY CO.,
a corporation,**

**HENRY SCHEIN, INC.,
a corporation, and**

**PATTERSON COMPANIES, INC.,
a corporation.**

Docket No. 9379

DECLARATION OF JEANINE K. BALBACH

1. I am an attorney for the Federal Trade Commission and Complaint Counsel in this proceeding. I have personal knowledge of the facts set forth in this declaration, and if called as a witness, I could and would testify competently under oath to such facts.
2. On May 22, 2018, I spoke with Nicholas Ryan-Lang, Esq., counsel for the Kois Buyers Group. Mr. Ryan-Lang explained that his client opposes Schein's Motion to make the Kois Buyers Group confidential transcript available to Schein's in-house attorneys. The Kois Buyers Group has significant concerns about its commercially and competitively sensitive business information being available to its potential suppliers. Because of cost reasons, however, the Kois Buyers Group will not file a separate opposition to Schein's motion.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of May, 2018, in Washington, D.C.

Respectfully submitted,

/s/ Jeanine K. Balbach

Jeanine K. Balbach

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Counsel Supporting the Complaint

EXHIBIT 4

Walter Siegel

Senior Vice President and General Counsel

Now in his third year, Mr. Siegel currently serves as Senior Vice President and General Counsel.

Mr. Siegel directs the Company's worldwide legal functions and activities, advising the Company on a broad range of legal matters affecting various business units. Mr. Siegel manages the Company's mergers and acquisitions activities, litigation portfolio, intellectual property portfolio, and SEC reporting. He also manages input from outside counsel on corporate and litigation matters, and oversees and participates in drafting a broad range of commercial documents and contracts between the Company's business units (and affiliates) and third parties.

Mr. Siegel comes to Henry Schein with a diverse and wide background of legal expertise, including mergers and acquisitions, partnerships, securities, litigation and regulatory. Mr. Siegel previously held the position of Senior Vice President, General Counsel and Secretary for Standard Microsystems Corporation, a publicly traded global semiconductor company. Mr. Siegel is a Yale Law School graduate.

EXHIBIT 5

**CONFIDENTIAL – REDACTED IN
ENTIRETY**

EXHIBIT 6

**CONFIDENTIAL – REDACTED IN
ENTIRETY**

EXHIBIT 7

**CONFIDENTIAL – REDACTED IN
ENTIRETY**

EXHIBIT 8

**CONFIDENTIAL – REDACTED IN
ENTIRETY**