

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

05 17 2018
590791

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.

ORIGINAL

Docket No. 9377

PUBLIC

COMPLAINT COUNSEL'S REQUEST FOR CLARIFICATION REGARDING
RESPONSES AND OBJECTIONS TO RESPONDENT TRONOX'S CONTENTION
INTERROGATORIES AND RESPONDENT CRISTAL'S CONTENTION
INTERROGATORIES

Complaint Counsel move for clarification concerning Complaint Counsel's obligation to respond to Respondents' contention interrogatories. Respondents will likely take the position that comments by the Court at the May 16, 2018 conference impose obligations on Complaint Counsel that greatly exceed the requirements of the Rules of Practice and applicable law, and that would be unduly burdensome and highly prejudicial. We respectfully request that the Court clarify this issue.

INTRODUCTION

During the final prehearing conference on May 16, 2018, without first filing a motion to compel, Respondents suggested that Complaint Counsel's responses to Respondents' contention

interrogatories were insufficient. In the ensuing discussion, the Court stated that during trial, in response to an objection, “any information that was asked for in discovery, that was not provided – documents, testimony, your side of the story...any information that was requested and was not provided will not be allowed to be entered into the record.”¹ To be clear, all of the evidence Complaint Counsel will rely on has been produced in discovery: Complaint Counsel will rely on documents produced by Respondents and third parties that are listed on the parties’ exhibit lists; testimony from fact witnesses who have already been deposed; and testimony from expert witnesses who provided reports and were deposed in this case.

Complaint Counsel seeks to clarify the Court’s further statement that “if there’s something that could answer that question that you’re going to try to present in this trial, you better put it in writing and provide it.”² Complaint Counsel seeks clarification to avoid any disputes with Respondents regarding whether the Court’s statements should be interpreted as ordering Complaint Counsel to respond to Respondents’ contention interrogatories with an exhaustive recitation of every piece of evidence in the record related to the contention or be barred from relying on any evidence not identified in those responses. That interpretation would be inconsistent with the Court’s actual statements, inconsistent with case law, inconsistent with this Court’s Orders in previous cases, and is prejudicial and unduly burdensome.

We understood the Court to be providing general guidance that Complaint Counsel—like Respondents—would not be permitted to introduce at trial evidence not previously disclosed in discovery, and that if any such evidence had not yet been disclosed, it should be provided in response to properly pending discovery requests. We understand, and have complied with, that obligation, as noted above. We did not, however, understand the Court to be ruling on

¹ Draft Prehearing Tr. at 40:13-17 (May 16, 2018).

² Draft Prehearing Tr. at 41:11-14.

Respondents' contention interrogatories, particularly since Respondents had not filed any motion relating to those interrogatories, and there had been no briefing. While Complaint Counsel intends to supplement its interrogatory answers in response to the Court's statement, we respectfully request clarification regarding responses to contention interrogatories so that we are not unduly burdened and prejudiced at trial.

ARGUMENT

Interpreting the Court's statements to require Complaint Counsel to respond to the contention interrogatories with an exhaustive recitation of evidence would be improper, inconsistent with the case law and unduly burdensome and prejudicial, for at least three reasons.

First, Complaint Counsel objected to Respondents' interrogatories as overly broad and unduly burdensome. The proper procedure under the Commission's Rules of Practice is for the Respondents to file a motion to compel to address whether answers to interrogatories are sufficient in light of properly raised objections.³ Because Respondents did not follow this process, the Court has not had an opportunity to consider the issues with all of the relevant information, including reviewing Respondents' overly broad, improper and burdensome contention interrogatories, Complaint Counsel's objections and answers, and past Orders and the relevant case law addressing these very issues.

Complaint Counsel's answers and objections are proper under the Commission's Rules of Practice. Specifically, the Commission's Rules of Practice, 16 C.F.R. § 3.35(a)(2), state that

³ 16 C.F.R. § 3.38(a) (2009) ("A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to... an interrogatory under §3.35....").

either party has the right to state objections to the interrogatory in lieu of an answer.⁴ Complaint Counsel not only properly objected to these interrogatories, but also answered these overly broad and unduly burdensome interrogatories, subject to our objections.

Second, Respondents' contention interrogatories are plainly improper and fly in the face of a long line of decisions rejecting exactly the kind of contention interrogatories at issue here, including this Court's past Orders. Respondents' interrogatories effectively ask Complaint Counsel to restate the entire discovery and evidentiary record in response to each interrogatory. For example, Tronox Interrogatory No. 7 states:

This is consistent with prior rulings of this Court. As the Court

evidence will be needed at trial and to reduce the possibility of surprise at the trial.”¹¹ In this case, there is no risk to Respondents of an evidentiary surprise at the trial. Complaint Counsel has provided Respondents with extensive discovery and with a comprehensive roadmap to Complaint Counsel’s case and evidence. That roadmap includes Complaint Counsel’s pretrial brief and exhibits, which explain our theory of the case and summarizes the evidence on which we intend to rely; a final exhibit list that contains a list of all of the documents, data and testimony Complaint Counsel intends to rely on; copies of all of these exhibits; and expert reports summarizing the economic analyses and supporting evidence for our case.¹² Respondents cannot credibly claim that they are in any doubt about what we intend to prove and how we intend to prove it.

On the other hand, imposing a broad interpretation of the Court’s statements would be unduly burdensome and prejudicial to Complaint Counsel. As noted above, these contention interrogatories effectively ask Complaint Counsel to specifically list every piece of evidence Complaint Counsel might use to support each and every element of the case. Literally doing so

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 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
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I hereby certify that on May 17, 2018, I caused a copy of the foregoing document to be served via email on:

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/s/ Blake Risenmay
Blake Risenmay

Counsel Supporting the Complaint

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.

May 17, 2018

By: /s/ Blake Risenmay
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