

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

05 21 2018
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In the Matter of

ORIGINAL

Docket No. 9377

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curtail TiO₂ output unilaterally or in coordination with other TiO₂ suppliers. In support of this theory, Complaint Counsel claims that Tronox and Cristal have previously curtailed production in an attempt to increase prices or prevent them from falling. *See, e.g.*, Compl. ¶¶ 23-24, 47, 50-52; Complaint Counsel's Pretrial Br. 1, 5-6, 33-37; Complaint Couns

(1/30/18 Cristal's First Set of Interrogs. Issued to Complaint Counsel).

Complaint Counsel responded on March 1. As to Cristal Interrogatory #1, Complaint Counsel solely objected and provided no substantive response. Complaint Counsel's response, in its entirety, was as follows:

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as unduly burdensome to the extent it calls for Complaint Counsel to identify adjustments to production level by producers or plants other than those used to serve the North American market. Complaint Counsel objects to the interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

(3/1/18 Complaint Counsel's Resps. & Objs. to Cristal's First Set of Interrogs. (1-10)).

Rule 3.35(b)(2) provides that a contention "interrogatory need not be answered until after designated discovery has been completed, *but in no case later than 3 days before the final prehearing conference.*" (Emphasis added). On May 14, *two days* before the final prehearing conference, Respondents asked Complaint Counsel when to expect Complaint Counsel's responses to the Respondents' contention interrogatories. Complaint Counsel provided its responses later that day, less than forty-eight hours before this Court's May 16 final prehearing conference. Complaint Counsel's supplemental response to Cristal Interrogatory #1, in its entirety, was as follows:

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as unduly burdensome to the extent it calls for Complaint Counsel to identify adjustments to production level by producers or plants other than those used to serve the North American market, and that it seeks Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent Cristal. Complaint Counsel further objects that this Interrogatory incorrectly assumes that adjustments to production levels cannot be for the purpose of both influencing prices and for maintenance or other operational reasons. Dr. Nicholas Hill has analyzed output at Respondents' North American plants, and that analysis shows that Respondents periodically reduce output at their plants. *See* PX5000. For

example, Tronox slowed production in 2015 for the purpose of influencing price but may also have conducted maintenance while production was slowed.

(5/14/18 Complaint Counsel’s Resps. and Objs. to Resp. Contention Inter. (1, 8), Exhibit A).

Complaint Counsel’s late submission did not respond fully to Cristal’s Interrogatory #1, as the Part 3 Rules require, because it contained only a vague and exemplary, rather than a fulsome, response. Respondents immediately informed Complaint Counsel that the response to Cristal Interrogatory #1 was inadequate and should be addressed at the meet-and-confer already scheduled to take place the next day.

On May 15, the day before the final prehearing conference, counsel for Respondents met and conferred with Complaint Counsel about Complaint Counsel’s deficient interrogatory responses. The parties discussed Cristal Interrogatory #1, and evidently to avoid having evidence excluded later, Complaint Counsel offered to provide a supplemental response by 5:00 pm May 17.

Complaint Counsel did supplement its response to Cristal Interrogatory #1 on May 17 by again providing an exemplary, non-exhaustive list of information and documents. (5/17/18 Complaint Counsel’s Supp. Resps. and Objs. to Cristal’s Contention Inter. (1, 8), Exhibit B).

On May 21,¹ the parties met and conferred again about Complaint Counsel’s deficient supplemental response to Cristal Interrogatory #1. Complaint Counsel confirmed that the response was non-exhaustive because additional examples of output adjustment might exist other than those listed in Complaint Counsel’s response. With regard to details about production adjustments (amount of adjustment, grades affected, effect on price), Complaint Counsel referred Respondents

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to the portion of its answer listing three expert reports. Complaint Counsel indicated that these details could be found in the expert reports and all of the listed expert reliance materials. Respondents explained that these answers were insufficient, and the parties reached an impasse.

II

Contention interrogatories ask a party “to state what it contends; to state whether it makes a specified contention; to state all facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or theoretical basis for a contention.” *In re Impax Labs., Inc.*, No. 9373, 2017 WL 2570856, at *2 (FTC June 12, 2017), quoting *B. Braun Med. Inc. v. Abbott Labs.*, 155 F.R.D. 525, 527 (E.D. Pa. 1994). The Part 3 Rules explicitly contemplate and allow contention interrogatories like Cristal Interrogatory #1. Rule 3.35(b) expressly provides that interrogatories are “not necessarily objectionable merely because an answer ... involves an opinion or contention.” *See also In re N. Texas Specialty Physicians*, No. 9312, 2003 WL 22936410, at *2 (FTC Dec. 4, 2003) (“The Commission’s Rules authorize the use of contention interrogatories.”). The same principle applies in federal district court. *See, e.g., English v. Wash. Metro. Area Trans. Auth.*, 323 F.R.D. 1, 19 (D.D.C. 2017) (“[I]t is well se

Third, Complaint Counsel’s response has left several parts of Cristal Interrogatory #1 entirely unanswered and unaddressed. Complaint Counsel has not explained the amount by which TiO₂ production was adjusted at any facility, the grades affected, or the amount by which prices were higher than they otherwise would have been. Merely referring to three expert reports, without page numbers, and the entire body of expert reliance materials is insufficient. Complaint Counsel is uniquely in possession of information about what it *contends* in this case. For example, if Complaint Counsel contends that output adjustments raised prices, then it is incumbent on Complaint Counsel to make that contention and disclose its support. Cristal Interrogatory #1 explicitly asked for “the amount by which prices were higher than they otherwise u eisbn t b by e

or in the alternative, to limit Complaint Counsel to the contentions and supporting evidence listed in its answer.

Dated: May 21, 2018

Respectfully Submitted By:

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing document to be served via email to:

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 21, 2018

By: /s/ Michael F. Williams
Michael F. Williams

Notice of Electronic Service

I hereby certify that on May 22, 2018, I filed an electronic copy of the foregoing Respondents' Motion to Compel Complaint Counsels' Response to Cristal Interrogatory #1, with:

D. Michael Chappell
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Donald Clark
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I hereby certify that on May 22, 2018, I served via E-Service an electronic copy of the foregoing Respondents' Motion to Compel Complaint Counsels' Response to Cristal Interrogatory #1, upon:

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I hereby certify that on May 22, 2018, I served via other means, as provided in 4.4(b) of the foregoing Respondents' Motion to Compel Complaint Counsels' Response to Cristal Interrogatory #1, upon:

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Andrew Pruitt
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