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

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.**	**Docket No. 9377**

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' JOINT MOTION TO AMEND THE PROTECTIVE ORDER
GOVERNING CONFIDENTIAL MATERIAL

Respondents' Joint Motion to Amend the Protective Order Governing Confidential Material should be denied. First, Respondents have demonstrated no special need to amend the standard Protective Order and can adequately defend their interests in th

materials included documents and data that third parties designated confidential and produced in accordance with the confidentiality protections afforded by the Commission's rules.

Shortly after discovery began, Complaint Counsel issued compulsory process to third parties in this proceeding and included the Protective Order in the subpoena package. Third parties are negotiating with Complaint Counsel regarding the scope of the document requests and are preparing responses to the subpoenas.

ARGUMENT

A. Respondents Are Not Materially Harmed by the Provisions of the Protective Order.

Respondents have not demonstrated a need to modify the Protective Order to properly defend themselves. The standard protective order has been issued in every administrative proceeding since it was adopted nearly 10 years ago. In all these matters, parties have been able to defend their cases without granting in-house counsel access to third party confidential information. Respondents attempt to distinguish this case by claiming this proceeding is moving quickly and therefore outside counsel has less time to learn about industry dynamics. But they have been representing their clients during this investigation for almost a year. And they have represented these clients for years before that. Tronox's attorneys represented it during a 2011 acquisition in the TiO2 feedstock industry. Exhibit 1. Cristal's attorneys represented it during the class action antitrust litigation. *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 801 (D. Md. 2013). As a result, Respondents' outside counsel should be more than sufficiently familiar with their clients and the TiO2 industry to litigate this case without amending the Protective Order.[1]

[1] While Respondents argue that their in-house lawyers need immediate access to confidential

Respondents have provided no specific reason beyond the purported need to participate in general litigation strategy to support their request. Generalized arguments regarding knowledge of the industry are insufficient to show good cause to permit in-house counsel to access confidential information. *McWane, Inc.*, 2012 WL 3518638, at *2 (F.T.C. Aug. 8, 2012) (noting that Respondent failed to "assert any special circumstances that might justify a deviation"); *United States v. Aetna Inc.*, No. 1:16-cv-01494, 2016 WL 8738420, at *8-9 (D.D.C. Sept. 5, 2016). This is especially true here because outside counsel are experienced litigators from sophisticated law firms. *Aetna*, 2016 WL 8738420, at *8-9. Respondents' motion fails to explain why such counsel are ill-equipped to analyze the confidential information provided.[2]

B. Third Parties Have Relied On the Vital Protections Set Out in the Standard Protective Order.

"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 followed the standard protective order required by Rule 3.31 *verbatim*." *McWane, Inc.*, 2012 WL 3518638, at *2. Third parties produced documents during the investigation and adjudicative phases of this case – and elected not to seek further protection or relief from the Court – with the reasonable expectation that dissemination of their discovery would be protected under the Commission's rules. Thus, the proper question is not, as Respondents suggest, whether third parties provided information before or after the Protective Order was issued in this

case. The question is whether the Commission's rules and the standard protective order were in place when the information was provided. The answer is unquestionably yes. That is, third parties were aware when they produced documents and information to the Commission that they would be protected by the Commission's rules, and had a right to rely on those protections when providing Complaint Counsel with documents and information. *See McWane*, 2012 WL 3518638, at *2.

These third parties also had a right to rely on the Protective Order when they made a decision whether to seek relief from the Court prior to Complaint Counsel releasing their confidential information as part of initial disclosures.[3]

C. Respondents' Proposed In-House Counsel Appear to be Involved in Competitive Decision-Making.

The proposed in-house counsel should not be permitted access to confidential information because documents suggest they are involved in competitive decision-making. When courts have permitted in-house counsel access to confidential third party information, individuals involved in competitive decision-making are not permitted to access such information. *Aetna*, 2016 WL 8738420, at *8-9. The term competitive decision-making includes "business decisions that the client would make regarding, for example, pricing, marketing, or design issues." *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 3 (D.D.C. 2015) (internal citations and quotation marks omitted). In-house counsel access in such situations is improper whether the information belongs to competitors (creating an unfair advantage in competition) or to customers (creating leverage in negotiations). *Aetna*, 2016 WL 8738420, at *8-9.

[3] A number of third parties have informed Complaint Counsel that they will file their own oppositions to Respondents' motion. Under 16 C.F.R. 4.10(g), they and other third parties should be afforded an opportunity to oppose Respondents' motion or to seek additional protections should the Court change the protective order. The Commission's rules generally indicate that 10 days notice is a reasonable amount of time. *See* 16 C.F.R. 4.10(e), (f).

Thus, in *Sysco*, the court found that in-house counsel's involvement in competitive decision-making created a risk that confidential information would inadvertently be used or disclosed as part of the attorney's role in the client's business. 83 F. Supp. 3d at 3-4. It is not an issue of an attorney's integrity. *Id.* Indeed, "[t]he primary concern underlying the 'competitive decision-making' test is not that lawyers involved in such activities will intentionally misuse confidential information; rather, it is the risk that such information will be used or disclosed inadvertently because of the lawyer's role in the client's business decisions." *Id.*

Like the in-house counsel in Sysco, both Mr. Koutras of Cristal and Mr. Kaye of Tronox appear to be involved in competitive decision-making at their respectiv

a respondent's ability to defend itself." *See* FTC Rules of Practice, Interim Rules with Request for Comment, 74 Fed. Reg. 1804, 1812 (Jan. 13, 2009) ("Interim Rules"). The Commission considered this comment, weighed it against the Commission's statutory confidentiality obligations, and concluded that, as a policy matter, protective orders in Part 3 proceedings should *not* permit in-house counsel access to confidential information:

> 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*.

Id. at 1812-13 (footnotes omitted) (emphasis added). Thus, the Commission has already considered and rejected Respondents' arguments.

2. Rule 3.31(d) Does Not Allow Amendments to the Standard Protective Order.

The Commission also decided that the standard protective order should not be amended on a case-by-case basis. The Commission issued Rule 3.31(d) to *require* that the same protective order be issued automatically and routinely in every case. Interim Rules, 74 Fed. Reg. at 1812; *McWane, Inc.*, 2012 WL 3518638, at *2. In its comments, the ABA suggested that parties should be able to negotiate orders "suited to the needs of the particular case." *See* Interim Rules, 74 Fed. Reg. at 1812. The Commission considered this question and rejected it. The Commission concluded that individualized negotiations would undermine efficiency, uniformity, and protection of third- party expectations:

> [Negotiations] can substantially 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. Because the Commission issued Rule 3.31(d) and sets agency-wide policy, it is the proper body to decide upon changes to the rules and the standard protective order.

Granting Respondents' motion would impair Commission investigations and defeat the purpose of the 2009 rulemaking. Uncertainty as to the level of protection can have a chilling effect upon the willingness of third parties to cooperate in Commission investigations, and the Commission sought to avoid creating situations in investigations in which third parties "could only guess what degree of protection would eventually be afforded their confidential information." Interim Rules, 74 Fed. Reg. at 1813 n.39.

Rule 3.31(d) does not permit the type of individualized tailoring of protective orders that Respondents seek. Complaint Counsel knows of no instance in which the standard protective order issued under Rule 3.31(d) was amended to grant in-house counsel access to confidential third-party materials. Respondents cite to federal court cases, but the Commission was aware of such cases when it specifically chose not to allow modifications to the standard protective order. *Cf.* Motion at 4-5. Because of the mandatory nature of the language in Rule 3.31(d), only the Commission can alter the protections provided in the standard protective order. As a result, a straightforward reading of Rule 3.31 compels denial of Respondents' Motion.

CONCLUSION

For the foregoing reasons, Respondents' Joint Motion to Amend the Protective Order Governing Confidential Material should be denied.

Dated: February 1, 2018

By: /s/ Dominic Vote

Dominic Vote
Charles Loughlin
Robert Tovsky
Z. Lily Rudy
Bureau of Competition

Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

Complaint Counsel

EXHIBIT 1

FIRM NEWS

Boston
Chicago
Houston
Los Angeles
New York

EXHIBIT 2

Vote, Dominic E.
Thursday, December 21, 2017 3:51 PM

Please let me know if I've missed any important issues from our call. I look forward to seeing you tomorrow at the hearing. Thanks.

MICHAEL F. WILLIAMS, P.C. | KIRKLAND & ELLIS LLP
655 15th Street, NW, Suite 1200 | Washington, DC 20005
1+202 879 5123 PH | http://www.kirkland.com/mwilliams

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View Steven's Full Profile

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EXHIBIT 4

Confidential - Redacted in Entirety

EXHIBIT 5

Confidential - Redacted in Entirety

EXHIBIT 6

Confidential - Redacted in Entirety

EXHIBIT 7

Confidential - Redacted in Entirety

EXHIBIT 8

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EXHIBIT 9

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 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
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Michael F. Williams
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
michael.williams@kirkland.com

Karen McCartan DeSantis
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
kdesantis@kirkland.com

Matt Reilly
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
matt.reilly@kirkland.com

Travis Langenkamp
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
travis.langenkamp@kirkland.com

James L. Cooper
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington D.C. 20001
james.cooper@apks.com

Seth Wiener
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington D.C. 20001
seth.wiener@apks.com

Carlamaria Mata
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington D.C. 20001
carlamaria.mata@apks.com

Counsel for Respondents
National Industrialization Company
National Titanium Dioxide Company Ltd.
Cristal USA, Inc.

Counsel for Respondent
Tronox Limited

By: /s/ Dominic Vote

Dominic Vote
Complaint Counsel
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20024

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