

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

PUBLIC

EXPEDITED TREATMENT
REQUESTED

**COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONDENTS TO IDENTIFY
THE INFORMATION FROM UPCOMING WITNESSES FOR WHICH THEY WILL
CONTINUE TO SEEK *IN CAMERA* TREATMENT**

Complaint Counsel respectfully requests that the Court issue an order compelling Respondents to identify the information from upcoming trial witnesses for which they will continue to seek *in camera* treatment.

BACKGROUND

During the June 1, 2018 examination of Complaint Counsel's expert witness, Dr. Nicholas Hill, the Court directed that more of the trial be conducted in public session going forward, with *in camera* sessions limited to truly *in camera* material.¹ The Court observed that documents granted *in camera* status may contain both *in camera* and public information, and that

¹ Trial Tr. at 1746 (June 1, 2018).

examination questions about such documents should be in public session so long as they relate to underlying information that is not *in camera*.²

Complaint Counsel has two remaining fact witnesses to call at trial: Tronox executive John Romano and Cristal executive Mark Stoll. Mr. Stoll is scheduled to testify on June 6, 2018, which Respondents have represented is the only day he is available. Mr. Romano is scheduled to testify immediately after Mr. Stoll. Respondents requested *in camera* treatment of Mr. Stoll's and Mr. Romano's deposition and investigational hearing ("IH") transcripts in their entirety.³ Respondents also requested *in camera* treatment of the deposition and IH transcripts for the eleven Tronox and Cristal employees on their final witness list,⁴ in their entirety, as well as for the reports and depositions transcripts of their three expert witnesses, again in their entirety.⁵ The Court granted Respondents' *in camera* requests.⁶

In order to prepare examinations that separate properly public information from properly *in camera* information, Complaint Counsel asked Respondents to designate portions of Mr. Stoll's and Mr. Romano's IH and deposition transcripts that actually contain *in camera* material as soon as possible, but no later than June 5, 2017.⁷ Complaint Counsel further requested that Respondents notify Complaint Counsel of the information in each of Respondents' expert reports

² Trial Tr. at 1749-50 (June 1, 2018) (discussing this issue in the context of Dr. Hill's expert reports, for which Respondents sought and obtained *in camera* treatment in their entirety).

³ Respondent Tronox Limited's Motion for *In Camera* Treatment of Trial Exhibits, May 1, 2018; Respondents National Industrialization Company, The National Titanium Dioxide Company Limited, and Cristal USA Inc.'s Motion for *In Camera* Treatment of Proposed Trial Exhibits, May 1, 2018.

⁴ Respondents' final witness list consists of nine Tronox employees, two Cristal employees, and two third parties. The only witness who appears on both Complaint Counsel's and Respondents' final witness lists is John Romano.

⁵ Respondent Tronox Limited's Motion for *In Camera* Treatment of Trial Exhibits, May 1, 2018; Respondents National Industrialization Company, The National Titanium Dioxide Company Limited, and Cristal USA Inc.'s Motion for *In Camera* Treatment of Proposed Trial Exhibits, May 1, 2018; Respondent Tronox Limited's Supplemental Motion for *In Camera* Treatment of Trial Exhibits, May 24, 2018; Respondent Tronox Limited's Second Supplemental Motion for *In Camera* Treatment of Trial Exhibits, May 24, 2018.

⁶ Order on Respondent Tronox's Motion for *In Camera* Treatment, May 15, 2018; Order on Respondent Cristal's Motion for *In Camera* Treatment, May 15, 2018; Order on Respondent Tronox's Supplemental Motion for *In Camera* Treatment, May 18, 2018; Order on Respondent Tronox's Second Supplemental Motion for *In Camera* Treatment, May 30, 2018.

⁷ June 4, 2018 email exchange between Dominic Vote and Michael Williams.

that needs to remain *in camera*, as well as designate the true *in camera* portions of the IH and deposition transcripts of any employee witnesses Respondents intend to call at trial, at least 72 hours before each witness is called.⁸

Given the impending examinations of Mr. Stoll and Mr. Romano, Complaint Counsel asked Respondents to agree to the above-described proposal before 3:00 pm on June 4, 2018.⁹ Respondents' counsel replied via email that Complaint Counsel's request was "burdensome and unnecessary," but that Respondents would consider it and get back to Complaint Counsel.¹⁰ In a June 5, 2018 email to Complaint Counsel, Respondents' counsel stated that they have reviewed the transcripts and expert reports for the upcoming trial witnesses, but made clear that they do not intend to provide any designations of those transcripts or reports to identify information for which Respondents continue to assert *in camera* treatment. Instead, Respondents' counsel broadly stated that he "expect[s] Complaint Counsel is familiar enough with this case at this point to understand that we are seeking *in camera* treatment of information internal to the respective respondents or third parties, and we have no problem with public discussion of information that is public."¹¹ Complaint Counsel responded by reiterating our view that we are not in a position to guess about what information Respondents actually believe meets the standard for *in camera* treatment.¹²

ARGUMENT

In order to comply with the Court's instruction to conduct as much of the trial as possible in public session, Complaint Counsel needs to know the specific information for which Respondents will continue to seek *in camera* treatment. Complaint Counsel is not in a position

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ June 5, 2018 email exchange between Dominic Vote and Michael Williams.

¹² *Id.*

to determine what information from Respondents' own employees and experts would cause "clearly defined, serious injury" to Respondents if publicly disclosed, versus what would not. *See* 16 C.F.R. § 3.45(b). Without Respondents providing this information, Complaint Counsel is put in the impossible position of trying to determine for ourselves what is truly confidential and thereby risking disclosure of information that is actually confidential (as well as violating the terms of the Court's *in camera* Orders), or simply doing everything *in camera*. Moreover, if everything that is "internal" to Respondents is going to remain *in camera*, then the vast majority of Complaint Counsel's examinations will continue to be *in camera*, which is contrary to what Complaint Counsel understood the Court to want. Therefore, despite Respondents' protests to the contrary, it is necessary that they tell us what information they believe should properly remain *in camera*.

Providing this information will not pose an undue burden on Respondents. In fact, in order to comply with the Court's directive, Respondents have to make these determinations in order to conduct their own examinations of the witnesses on their witness list. Complaint Counsel's request is narrowly tailored to achieve the Court's objective of conducting as much of the upcoming examinations in public session as possible, while imposing minimal burden on Respondents. To that end, Complaint Counsel is only requesting that Respondents designate the transcripts of the remaining two fact witnesses that Complaint Counsel intends to call (one of whom is also on Respondents' witness list), as well as the transcripts of any witnesses that Respondents intend to call, and the reports of their experts. To be clear, if Respondents do not intend to call a witness listed on their witness list, they will not need to provide *in camera* transcript designations for that witness. To further minimize any burden, Complaint Counsel's request contemplates that with the exception of Mr. Stoll and Mr. Romano, Respondents may

provide the designated transcripts on a rolling basis, so long as Complaint Counsel receives them at least 72 hours before each witness is called.¹³

CONCLUSION

Complaint Counsel respectfully requests that the Court order Respondents to (1) provide Complaint Counsel with designated versions of the IH and deposition transcripts for Mr. Stoll and Mr. Romano by June 5, 2018, and (2) identify the information in each of Respondents' expert reports that needs to remain *in camera*, and provide designated versions of the IH and deposition transcripts of any witnesses Respondents intend to call at trial, at least 72 hours before each witness is called.

Dated: June 5, 2018

By: Dominic Vote

Dominic Vote
Bureau of Competition
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

Counsel Supporting the Complaint

¹³ Moreover, as noted above, Respondents filed extremely broad *in camera* motions. Unlike many of the third parties, Respondents designated the entirety of their employees' IH and deposition transcripts for *in camera* treatment. Prior to filing their *in camera* motions, Respondents should have identified the portions of their employees' transcripts and their experts' reports that would truly result in a "clearly defined, serious injury" if publicly disclosed. 16 C.F.R. § 3.45(b). They should not now be heard to complain that it is burdensome to do work that they should have done in the first instance.

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

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)	
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a corporation,)	
)	
National Industrialization Company)	
(TASNEE))	
a corporation,)	DOCKET NO. 9377
)	
National Titanium Dioxide Company)	
Limited (Cristal))	
a corporation, and)	
)	
Cristal USA Inc.)	
a corporation,)	
)	
Respondents.)	
_____)	

[PROPOSED] ORDER

Having carefully considered Complaint Counsel’s Motion to Compel Respondents to Identify the Information from Upcoming Witnesses for Which They Will Continue to Seek *In Camera* Treatment, Respondent’s opposition thereto, all supporting evidence, and the applicable law, it is hereby ORDERED that Complaint Counsel’s Motion to Compel Respondents to Identify the Information from Upcoming Witnesses for Which They Will Continue to Seek *In Camera* Treatment is GRANTED and it is hereby ORDERED that:

Respondents (1) provide Complaint Counsel with designated versions of the IH and deposition transcripts for Mr. Stoll and Mr. Romano by June 5, 2018; and (2) identify the information in each of Respondents’ expert reports that needs to remain *in camera*, and provide designated versions of the IH and deposition transcripts of any witnesses Respondents intend to call at trial, at least 72 hours before each witness is called.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June __, 2018

STATEMENT REGARDING MEET AND CONFER

I certify that before filing Complaint Counsel's Motion to Compel Respondents to Identify the Information from Upcoming Witnesses for which They Will Continue to Seek *In Camera* Treatment ("Motion"), Complaint Counsel and Respondents' counsel met and conferred in good faith in an effort to resolve the issue raised in the Motion, and were unable to reach an agreement.

Specifically, on June 4, 2018, at 11:00 a.m., Dominic Vote, on behalf of Complaint Counsel, emailed Michael Williams and Karen DeSantis, counsel for Tronox, and James Cooper and Peter Levitas, counsel for Cristal, requesting that Respondents designate the portions of the investigational hearing and deposition transcripts of upcoming trial witnesses Mark Stoll and John Romano that actually contain *in camera* material as soon as possible, but no later than June 5, 2017. Complaint Counsel further requested that Respondents notify Complaint Counsel of the information in each of Respondents' expert reports that needs to remain *in camera*, as well as designate the true *in camera* portions of the investigational hearing and deposition transcripts of any employee witnesses Respondents intend to call at trial, at least 72 hours before each witness is called. Given the impending examinations of Mr. Stoll and Mr. Romano, Complaint Counsel asked Respondents to agree to the above-described proposal before 3:00 p.m. on June 4, 2018.

On June 4, 2018, at 11:12 a.m., Mr. Williams replied via email to Mr. Vote, stating that Complaint Counsel's request was "burdensome and unnecessary," but that Respondents would consider it and get back to Complaint Counsel. On June 5, 2018, at 9:28 a.m., Mr. Williams emailed Mr. Vote and stated that Respondents have reviewed the transcripts and expert reports for the upcoming trial witnesses, but Mr. Williams did not indicate that Respondents intend to provide any designations of those transcripts or reports to identify information for which

Respondents continue to assert *in camera* treatment. Instead, Mr. Williams broadly stated that he “expect[s] Complaint Counsel is familiar enough with this case at this point to understand that we are seeking *in camera* treatment of information internal to the respective respondents or third parties.” As set forth in the Motion, this does not resolve Complaint Counsel’s concerns. On June 5, 2018, at 11:15 a.m., Mr. Vote responded to Mr. Williams via email, stating that Complaint Counsel is not in a position to guess about what information Respondents actually believe meets the standard for *in camera* treatment.

Chuck Loughlin, Joonsuk Lee, Simone Oberschmied, and Caitlin Durand, representing Complaint Counsel, were also copied on all of the above-described emails.

Dated: June 5, 2018

By: Dominic Vote

Dominic Vote
Bureau of Competition
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 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 hereby certify that on June 5, 2018, I caused a copy of the foregoing document to be served via email on:

Michael F. Williams
Karen McCartan DeSantis
Matthew J. Reilly
Travis Langenkamp

James L. Cooper
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*Counsel for Respondent
Tronox Limited*

*Counsel for Respondents National
Industrialization Company (TASNEE),
The National Titanium Dioxide Company
Limited (Cristal), and Cristal USA, Inc.*

/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.

June 5, 2018

By: /s/ Blake Risenmay
Blake Risenmay