

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



In the Matter of

TRONOX/CRISTAL USA.,
Respondent.

PUBLIC

DOCKET NO. 9377

ORIGINAL

**NON-PARTY AXALTA COATING SYSTEMS LTD.'S
MOTION FOR *IN CAMERA* TREATMENT**

Non Party Axalta Coating Systems, Ltd. ("Axalta") moves this Court for *in camera* treatment of competitively-sensitive, confidential business information contained in Axalta's Response to Civil Investigative Demand (the "Confidential Document") in accordance with Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b). Axalta requests that the confidential business information be disclosed only to the Court, counsel for the Federal Trade Commission ("FTC") and outside counsel for Tronox Limited ("Tronox") and Cristal USA Inc. ("Cristal"). The FTC has notified Axalta that it intends to offer the Confidential Document into evidence at the administrative trial in this matter. *See* Letter from the Federal Trade Commission dated April 18, 2018 (attached as Exhibit A).

The Confidential Document warrants protection from public disclosure, or disclosure to any employees of Tronox or Cristal, given the sensitive business information it contains. Axalta submits this Motion requesting permanent *in camera* treatment of the Confidential Document indefinitely. The information for which Axalta is seeking *in camera* treatment is confidential, such that if it were to become part of the public record, Axalta would be significantly harmed in its ability to compete in the coatings industry. In support of this motion, Axalta relies on the Affidavit of Jared T. Zane ("Zane Declaration" or "Decl."), attached as Exhibit B, which provides additional details on the document for which Axalta is seeking *in camera* treatment.

I. The Confidential Document

Axalta seeks *in camera* treatment for the following Confidential Document, a copy of which is attached as Exhibit C.

Exhibit No.	Document Title/Description	Date	Beginning Bates No.	Ending Bates No.
PX4229	Axalta Coating Systems' Responses to Civil Investigative Demand	7/17/2017	PX4229-001	PX4229-003

II. The Confidential Document is Secret and Material such that Disclosure Would Result in Serious Injury to Axalta

In camera treatment of material is appropriate when its “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting” such treatment. 16 C.F.R. § 3.45(b). The proponent demonstrates serious competitive injury by showing that the document contains information that is secret and material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, *5 (1999). In this context, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In considering both secrecy and materiality, the Court may consider: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-457 (1977). An analysis of the factors discussed above supports Axalta’s request for *in camera* treatment of the Confidential Document.

First, PX4229 does not exist anywhere outside of Axalta’s business. It was created in response to requests for information from the FTC. Axalta has not produced this document to anyone other than the FTC. (Decl. at ¶ 4.)

Second, only a limited number of Axalta employees have seen PX4229. It has not been widely disseminated within Axalta. (*Id.*)

Third, Axalta has taken steps to preserve the confidentiality of PX4229. When Axalta produced PX4229 to the FTC, it took steps to maintain confidentiality by designating the document “Confidential Commercial or Financial Information” and produced it for “attorney’s eyes only” pursuant to the Protective Order in this case. (*Id.* at 5.)

Fourth, PX4229 is both secret and material to Axalta’s business. The document contains information of competitive significance to Axalta, including the exact amount and cost of titanium dioxide products Axalta purchased since 2014, broken down by supplier. (*Id.* at 8.) The document also includes information about price increases, and steps taken by Axalta to negotiate or refuse announced price increases. (*Id.* at 9.) This information is highly sensitive. As a coatings company, Axalta depends on its ability to negotiate optimal prices with titanium dioxide suppliers in order to compete in the marketplace. Thus, it has developed internal processes to negotiate prices with suppliers and address price increases from suppliers. (*Id.* at 12.) This information and processes are proprietary to Axalta and not publicly known outside of Axalta. (*Id.* at 11.)

Further, disclosure of PX4229 will result in the loss of a business advantage to Axalta. See *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999) (“The likely loss of business advantages is a good example of a clearly defined, serious injury.”). PX4229 is material

to Axalta's manufacture of coatings and its contract with key suppliers. (Decl. at ¶¶ 10-11, 13.) Making this information public would result in a loss of business advantage that Axalta has built as the result of its own substantial investments in its relationship with suppliers.

Finally, the information in PX4229 could not be duplicated by others. The exact amount of titanium dioxide purchased by Axalta, by supplier, and Axalta's response to price increases is not information that any third party could obtain or duplicate. (*Id.* at 10.)

III. Axalta's Status as a Third Party Should be Considered

Axalta's status as a third party is relevant to the treatment of the Confidential Document. The FTC has held that "[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible." *H.P. Hood & Sons*, 58 F.T.C. at 1186. This is especially so in the case of a third-party, which deserves "special solicitude" in its request for *in camera* treatment for its confidential business information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (1984) ("As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests."). Axalta created PX4229 in response to a request from the FTC for information, and then produced it to the FTC on a confidential basis. Axalta's third-party status weighs in favor of granting *in camera* status to PX4229.

IV. The Confidential Document Contains Trade Secrets, which will Remain Sensitive Over Time and Thus, Permanent In Camera Treatment is Justified

Given the highly sensitive nature of the information contained in the PX4229, Axalta requests that they be given *in camera* treatment indefinitely. The trade secret information contained in PX4229 "is likely to remain sensitive or become more sensitive with the passage of time" such that the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 1999 FTC LEXIS at *7-8. "Trade secrets"—such as financial or business pricing information—are granted more protection than ordinary business documents. *Id.* at *5. Here, as described in the Zane Declaration, PX4229 contains business and trade secrets in the form of internal Axalta supplier and pricing information in connection with Axalta's negotiation of prices increases and amount of titanium dioxide purchased from each supplier. (Decl. at ¶ 13.) The competitive significance of this pricing information and negotiation strategy is unlikely to decrease over time as it will be valuable to Axalta's competitors and suppliers. (*Id.* at 13.) Therefore, indefinite protection from public disclosure is appropriate.

V. Conclusion

For the reasons set forth above and in the accompanying Zane Declaration, Axalta respectfully requests that this Court grant permanent *in camera* treatment for PX4229.

PUBLIC

Dated: May 1, 2018

Respectfully Submitted:

/s/ Natalie A. Fleming Nolen
Natalie A. Fleming Nolen
District of Columbia Bar No. 1024018
nflemingnolen@mof.com
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2000 Pennsylvania Ave., NW
Washington, DC 20006-1888
Telephone: 202.887.1500

*Attorney for Third Party Axalta Coating
Systems Ltd.*

STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Non-party Axalta Coating Systems Ltd. (“Axalta”) notified counsel for the parties via email on or about April 26, 2018 that it would be seeking *in camera* treatment of the Confidential Document. Both counsel for the Federal Trade Commission and Respondents indicated that they would not object to Axalta’s motion.

Dated: May 1, 2018

Respectfully Submitted:

/s/ Natalie A. Fleming Nolen
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*Attorney for Third Party Axalta Coating
Systems Ltd.*

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

In the Matter of

**TRONOX/CRISTAL USA.,
Respondent.**

DOCKET NO. 9377

[PROPOSED] ORDER

Upon consideration of Non-Party Axalta Coating Systems Ltd. ("Axalta's") Motion for *In Camera* Treatment, it is HEREBY ORDERED that the following document is to be provided permanent *in camera* treatment from the date of this Order in their entirety.

Exhibit No.	Document Title/Description	Date	Beginning Bates No.	Ending Bates No.
PX4229	Axalta Coating Systems' Responses to Civil Investigative Demand	7/17/2017	PX4229-001	PX4229-003

ORDERED

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

PUBLIC

EXHIBIT A



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Mergers II Division

April 19, 2018

VIA EMAIL TRANSMISSION

Axalta Coating Systems
c/o Natalie Fleming Nolen
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Suite 6000
Washington, DC 20006-1888
nflemingnolen@mofo.com

RE: *In the Matter of Tronox Limited et al.*, Docket No. 9377

Dear Natalie:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intends to offer the documents referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. For your convenience, a copy of the documents and testimony will be sent to you in a separate email with an FTP link.

The administrative trial is scheduled to begin on May 18, 2018. All exhibits admitted into evidence become part of the public record unless Administrative Law Judge D. Michael Chappell grants *in camera* status (i.e., non-public/confidential).

For documents or testimony that include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45 and 4.10(g). Judge Chappell may order that materials, whether admitted or rejected as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly-defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re Jerk, LLC*, 2015 FTC LEXIS 39 (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). For your convenience, we included, as links in the cover email, an example of a third-party motion (and the accompanying declaration or

affidavit) for *in camera* treatment that was filed and granted in an FTC administrative proceeding. If you choose to move for *in camera* treatment, you must provide a copy of the document(s) for which you seek such treatment to the Administrative Law Judge. Also, you or your representative will need to file a Notice of Appearance in the administrative proceeding. For more information regarding filing documents in adjudicative proceedings, please see <https://www.ftc.gov/faq/ftc-info/file-documents-adjudicative-proceedings>.

Please be aware that under the current Second Revised Scheduling Order (revised on February 23, 2018), **the deadline for filing motions seeking *in camera* treatment is May 1, 2018**. A copy of the February 23, 2018 Second Revised Scheduling Order and the December 20, 2017 original Scheduling Order, which contains Additional Provisions, can be found at <https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcrystal-usa>.

If you have any questions, please feel free to contact me at (202) 326-2397.

Sincerely,

/s/ Cem Akleman
Cem Akleman
Counsel Supporting the Complaint

Attachment

Attachment A

Exhibit No.	Full Name	Date	BegBates	EndBates
PX4229	Axalta Coating Systems' Responses to Civil Investigative Demand	7/17/2017	PX4229-001	PX4229-003

EXHIBIT B

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

In the Matter of

TRONOX/CRISTAL USA.,
Respondent.

DOCKET NO. 9377

DECLARATION OF JARED T. ZANE
IN SUPPORT OF NON-PARTY AXALTA COATING SYSTEMS LTD.'S
MOTION FOR *IN CAMERA* TREATMENT

I, Jared T. Zane, hereby declare as follows:

1. I am the Assistant General Counsel and Assistant Secretary of Axalta Coating Systems Ltd. ("Axalta"). I make this declaration in support of Non-Party Axalta's Motion for *In Camera* Treatment (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.
2. Axalta is a coatings company that develops, manufactures, and sells liquid and powder coatings worldwide. It provides coatings for a variety of commercial applications, including light and commercial vehicles. Titanium dioxide is an important component in Axalta's products.
3. I have reviewed and am familiar with the document Axalta produced in the above-captioned matter in response to a civil investigative demand from the Federal Trade Commission. Given my position at Axalta, I am familiar with the type of information contained in the document at issue and its competitive significance to Axalta. Based on my review of the documents, my knowledge of Axalta's business, and my familiarity with the confidentiality protection afforded this type of information by Axalta, I submit that the disclosure of this information to the public and to competitors of Axalta would cause serious competitive injury to Axalta.
4. The FTC has informed Axalta that it intends to use as an exhibit in the administrative hearing in this matter a document that Axalta created to respond to a civil investigative demand. This document does not otherwise exist in Axalta's business. Very few employees have seen the document, and other than the FTC and outside counsel for Axalta, Axalta has not provided this document to anyone outside of Axalta.
5. Axalta took steps to protect the confidentiality of this document when it was produced to the FTC. The document was designated "Confidential Commercial or Financial Information" and produced for attorney's eyes only pursuant to the Protective Order in

this case.

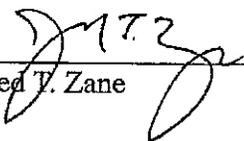
6. As described in the Motion, Axalta seeks permanent *in camera* protection of the following document:

Exhibit No.	Document Title/Description	Date	Beginning Bates No.	Ending Bates No.
PX4229	Axalta Coating Systems' Responses to Civil Investigative Demand	7/17/2017	PX4229-001	PX4229-003

7. PX4229 is particularly sensitive and contains confidential financial and business information.
8. PX4229 is a snapshot of Axalta's relationship with its suppliers of titanium dioxide and reflects how much Axalta pays for these products from various suppliers. PX4229 also contains confidential information about the actual amount of these products that Axalta uses in its business.
9. PX4229 also includes information about price increases and Axalta's strategy for negotiating or resisting price increases from various suppliers.
10. Axalta considers the information in PX4229 to be highly sensitive and keeps this information in strict confidence because it would be harmful to Axalta's ability to compete if it was publicly disclosed. The information in PX4229 is not known outside of Axalta, and Axalta takes measures to protect its confidentiality. It would not be possible for a third party to duplicate this information.
11. Axalta does not make this confidential information available to its competitors or customers and Axalta does not share this information with non-Axalta personnel in the ordinary course of business.
12. Axalta has devoted significant resources to developing its relationships with suppliers, and an internal process for negotiating with suppliers, as well as securing the discounts that it receives from those suppliers, represented in PX4229. As a coatings company, Axalta depends on its relationships with its suppliers as well as its ability to negotiate prices based on volume to compete with other coatings companies.
13. It would not only harm Axalta's ability to compete with other coatings companies if this information was disclosed, but it also would harm end-users if other companies that compete with Axalta obtain and misuse the information. The information regarding which suppliers Axalta uses, the cost of titanium dioxide from each supplier, and Axalta's negotiating strategy for proposed price increase would be very valuable to Axalta's competitors. This information will likely be valuable to Axalta's competitors even years into the future as the historical purchase decisions and negotiating strategy could be misused by Axalta's competitors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed April 27, 2018, at Philadelphia, Pennsylvania.



Jared V. Zane

EXHIBIT C

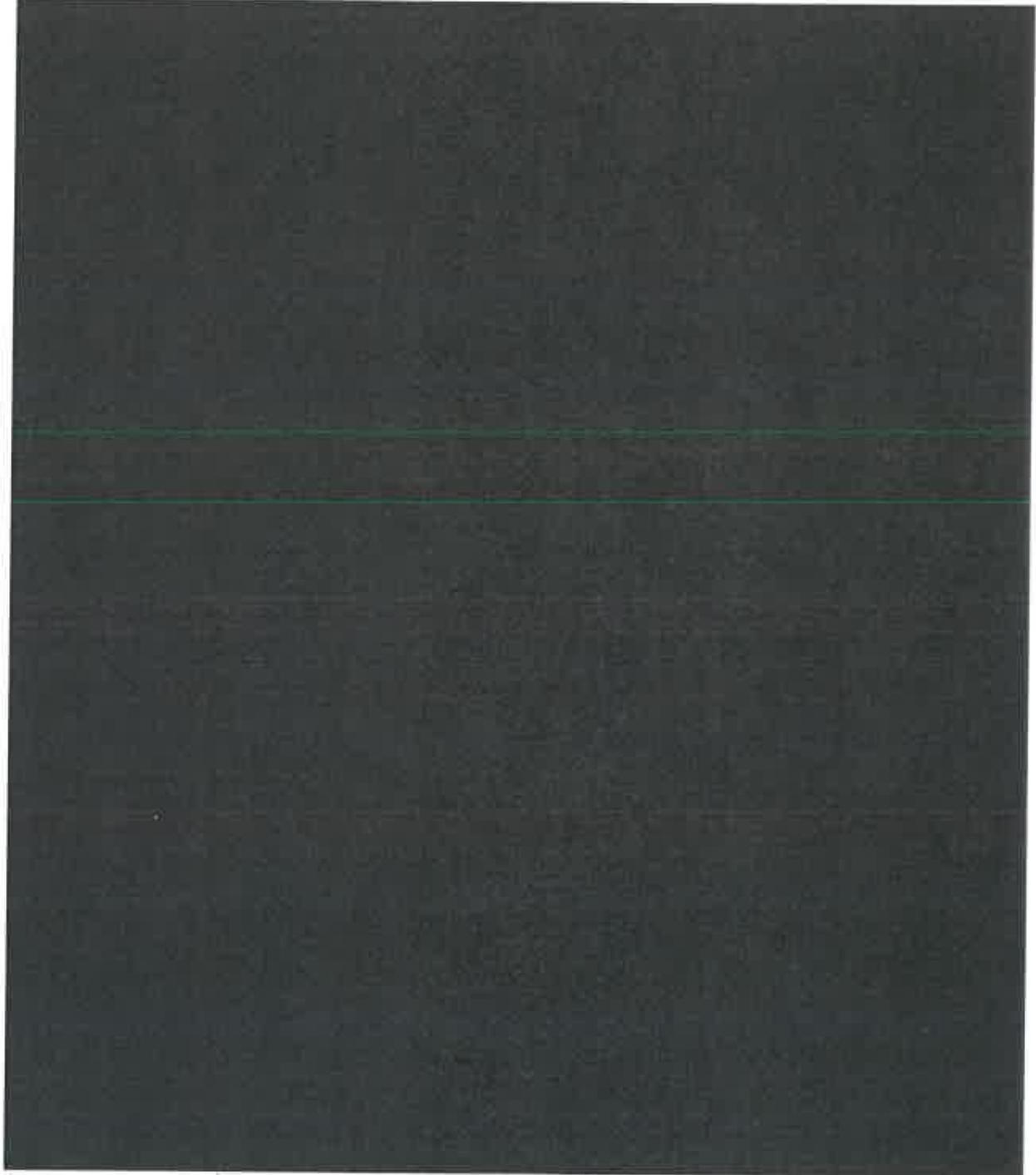
Hearing Exhibits Nos. PX4229

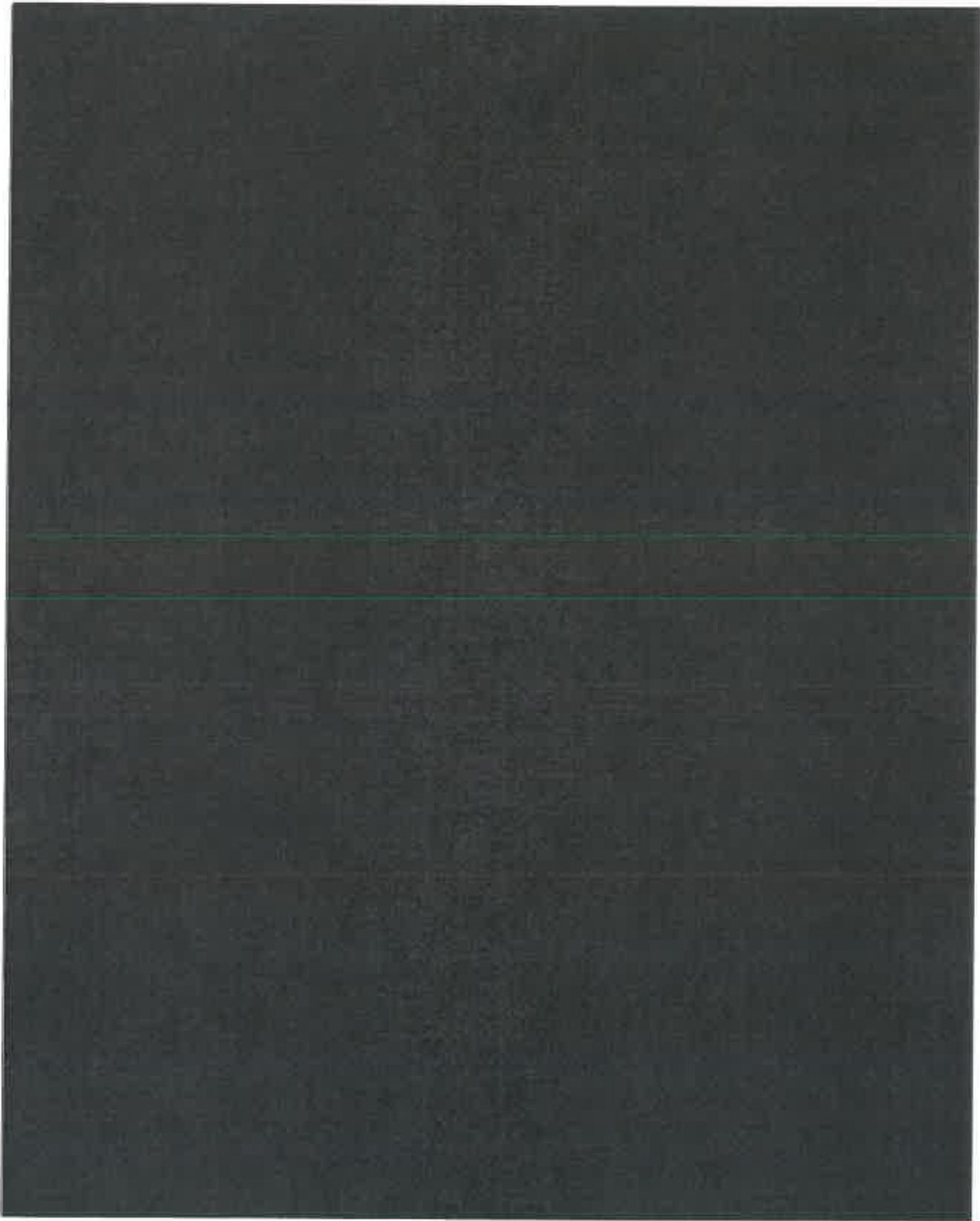


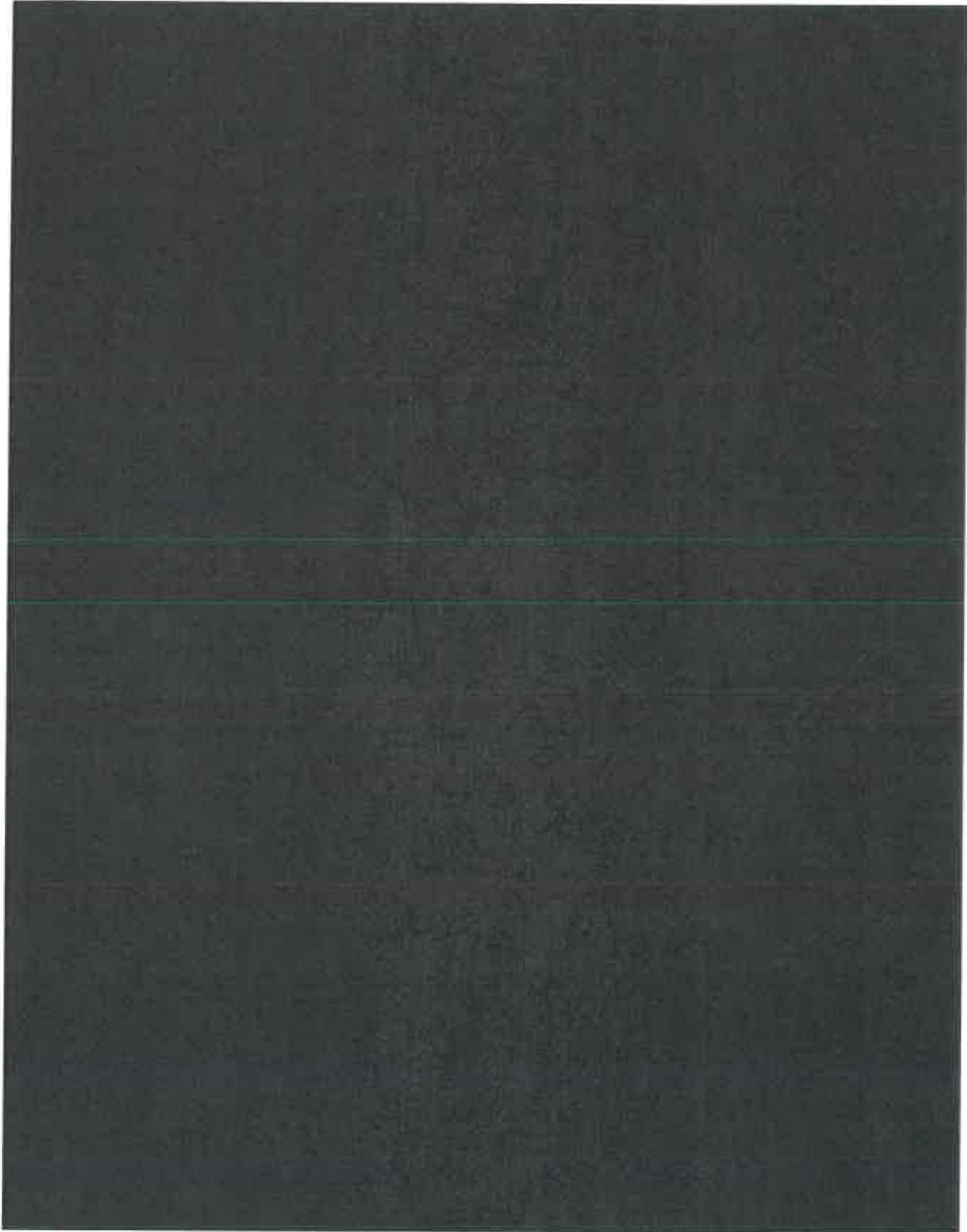
REDACTION IN THEIR ENTIRETY REQUESTED

**AXALTA COATING SYSTEMS RESPONSE TO
CIVIL INVESTIGATIVE DEMAND FTC FILE NO. 171-0085**

July 17, 2017







CERTIFICATE OF SERVICE

I, Cynthia O. Akatugba, certify that I caused a copy of the foregoing Third Party Axalta Coating Systems Ltd.'s Motion to be served on counsel for Respondents counsel today May 1, 2018.

- NOTICE OF APPEARANCE
- NON-PARTY AXALTA COATING SYSTEMS LTD.'s MOTION FOR *IN CAMERA* TREATMENT (PUBLIC VERSION AND NON-PUBLIC VERSION)
- [PROPOSED] ORDER

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/s/ Cynthia O. Akatugba