

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



ORIGINAL

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

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:

Identify the specific documents, data, and/or persons with knowledge who you contend support your allegations that the Proposed Acquisition will result in anticompetitive effects.⁵

Courts have repeatedly held that contention interrogatories like Respondents' are improper and that there is no obligation to "regurgitate all factual information obtained in discovery" in response to a contention interrogatory in order to use that evidence at trial. *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 173 (S.D.N.Y. 2004)(citations omitted).⁶

⁴ 16 C.F.R. § 3.35(a)(2) ("Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer.").

⁵ Complaint Counsel's Responses and Objections to Respondent Tronox's Contention Interrogatories (3-8) and Respondent Cristal's Contention Interrogatories (1, 8) (May 14, 2018).

⁶ See also *Hilt v. SFC Inc.*, 170 F.R.D. 182, 187 (D. Kan. 1997) (Finding that the rules do not require a statement of all of the facts supporting every allegation and the identifications of every knowledgeable person and supporting document); *In the Matter of Aspen Tech., Inc.*, Dkt. No. 9310 (Dec. 23, 2003)(Order Denying Motion to Compel Responses to Respondent's First Set of Interrogatories)(citing *Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989)(Finding that an interrogatory asking for all facts supporting the entire claim is impermissible); *Mort v. A/SD/S Svendborg, et. Al.*, 41 F.R.D. 225, 226 (E.D. Pa. 1966); *Fischer &Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992)(A party filing contention interrogatories must have well-tailored questions that clarify the issues or narrow the scope of dispute)).

This is consistent with prior rulings of this Court. As the Court ruled in *North Texas Specialty Physicians*,⁷ citing the Commission’s Rules of Practice § 3.35(c) in response to a dispute involving interrogatories, there is no requirement for a party to “to identify specific documents” from the documents that have already been produced, when “the burden of deriving or ascertaining the answers from the documents produced is substantially the same” for both parties.⁸ Consistent with this, here Complaint Counsel objected to the interrogatories on the basis, among others, that the burden is the same for both parties because Respondents already have all of the documents, data and testimony.⁹ Therefore, Complaint Counsel’s responses complied with their obligations and no further responses to Respondents’ interrogatories are necessary.¹⁰

Third, a mischaracterization of the Court’s instructions would provide no legitimate benefit to Respondents, but would be unduly burdensome and unfairly prejudicial to Complaint Counsel. “[T]he purpose of interrogatories is to narrow the issues and thus help determine what

⁷ *In the Matter of North Texas Specialty Physicians*, 2004 WL 318270, at *1-2 (F.T.C. 2004).

⁸ *NTSP*, 2004 WL 318270, at *1. *See also In the Matter of 1-800 Contacts, Inc.*, Dkt. No. 9372 (Dec. 12, 2016)(Order Denying Respondent’s Motion to Compel Complaint Counsel to Answer Respondent’s Interrogatories Nos. 10 and 11)(citing *NTSP*, 2004 WL 318270, at *1-2 (F.T.C. 2004))(denying motion to compel interrogatory responses where “the burden of deriving or ascertaining the answers from the documents produced [was] substantially the same for” the requesting party).

⁹ Complaint Counsel filed several objections to the interrogatories including that “Complaint Counsel objects to Respondent’s Interrogatories to the extent the interrogatories call for information previously provided to Respondent or for information that may be less onerously obtained through other means. Complaint Counsel’s Responses and Objections to Respondent Tronox’s First Set of Interrogatories (1-8), Feb. 14, 2018.

¹⁰ *NTSP*, 2004 WL 318270, at *2. *See also In the Matter of 1-800 Contacts, Inc.*, Dkt. No. 9372 (Dec. 12, 2016) (Order Denying Respondent’s Motion to Compel Complaint Counsel to Answer Respondent’s Interrogatories Nos. 10 and 11). These Part 3 decisions are consistent with federal authority, which also finds such interrogatories overbroad and improper. *See, e.g., Convolv v. Compaq Computer Corp.*, 223 F.R.D. 162, 173 (S.D.N.Y. 2004)(citations omitted)(“A contention interrogatory is not simply a vehicle for requiring an adversary to regurgitate all factual information obtained in discovery.”); *Hilt v. SFC Inc.*, 170 F.R.D. 182, 187 (D. Kan. 1997) (Finding that the rules do not require a statement of all of the facts supporting every allegation and the identifications of every knowledgeable person and supporting document); *In the Matter of Aspen Tech., Inc.*, Dkt. No. 9310 (Dec. 23, 2003)(Order Denying Motion to Compel Responses to Respondent’s First Set of Interrogatories)(citing *Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989)(Finding that an interrogatory asking for all facts supporting the entire claim is impermissible); *Mort v. A/S/D/S Svendborg*, 41 F.R.D. 225, 226 (E.D. Pa. 1966); *Fischer & Porter Co. v. Tolson, et al.*, 143 F.R.D. 93, 96 (ED. Pa. 1992)(Finding that a party filing contention interrogatories must have well-tailored questions that clarify the issues or narrow the scope of dispute.).

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 would require reciting the entire evidentiary record (likely multiple times, as many of the interrogatories overlap). This would impose a huge and infeasible burden on Complaint Counsel.

And, if some document or other piece of evidence from the extensive record was inadvertently omitted from the answer to one or more of the interrogatories, Respondents would

¹¹ In the Matter of *Union Oil Company of California*, Dkt. 9305 (July 8, 2003)(Order Denying Respondent’s Motion to Compel Supplemental Responses to Interrogatories)(citing *In the Matter of TK-7 Corp.*, 1990 FTC LEXIS 20, at *1-2 (March 9, 1990)); *NTSP*, 2004 WL 318270, at *2 (citing *In the Matter of Beatrice Foods Co.*, 1979 FTC LEXIS 598, at *4 (F.T.C. 1979); *TK-7 Corp.*, 1990 FTC LEXIS 20, at *1-2 (“Complaint Counsel’s interrogatories do not seek information that Complaint Counsel does not already have from the documents or narrow the issues for trial.”)).

¹² And, of course, we have answered Respondents’ improper interrogatories and are providing supplements to those answers.

no doubt seek to preclude us from using that evidence at trial, effectively turning their improper interrogatories into equally improper motions in limine. Being forced to regurgitate every piece of evidence in the case in interrogatory answers on pain of exclusion would plainly be unfairly prejudicial to Complaint Counsel. These reasons, of course, are precisely why courts reject improper contention interrogatories like Respondents’.

CONCLUSION

Complaint Counsel respectfully requests that the Court clarify our obligations concerning Respondents’ contention interrogatories so that we are not unduly burdened and prejudiced at trial.

Dated: May 17, 2018

By: Dominic Vote

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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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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
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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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