

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

**RESPONDENTS' MOTION TO COMPEL COMPLAINT COUNSEL'S
RESPONSE TO CRISTAL INTERROGATORY #1**

Respondents respectfully request that the Court issue an order compelling Complaint Counsel to respond fully to Cristal Interrogatory #1 or, in the alternative, limiting Complaint Counsel's contentions and supporting evidence to those noticed in its answer. Cristal's Interrogatory #1 asks about the reasons Complaint Counsel contends TiO₂ producers adjusted output and the details about any alleged output adjustments that Complaint Counsel contends occurred. This contention interrogatory is well-tailored to clarify issues in the case and to narrow the scope of the parties' dispute. Complaint Counsel's evasive response frustrates those important purposes and imposes an undue burden on Respondents.

Complaint Counsel claims that the Commission should block Tronox's acquisition of Cristal because the transaction will increase the likelihood that the combined firm will successfully

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 Counsel's Opening Statement, Trial Tr. Vol. 1 48:25-49:1, 56:13-58:21. In its first interrogatory, Cristal asked Complaint Counsel to identify those times Complaint Counsel contends TiO₂ producers adjusted their output for the purpose of supporting higher prices rather than for maintenance or operational reasons. Complaint Counsel objected, identified no such actions, and promised to supplement the response at the close of discovery. (3/1/18 Complaint Counsel's Resps. & Objs. to Cristal's First Set of Interrogs. (1-10)). Complaint Counsel has now provided two supplements to Cristal Interrogatory #1: both were untimely and neither was fully responsive.

Complaint Counsel has failed to respond fully to Cristal Interrogatory #1, as the Part 3 Rules require, but has instead provided only an evasive and incomplete answer in violation of the Part 3 Rules. The parties have met and conferred twice and are at an impasse. Respondents respectfully move the Court to compel Complaint Counsel's complete response to Cristal Interrogatory #1 or, in the alternative, to limit Complaint Counsel's contentions and supporting evidence to those noticed in its answer.

I

Cristal served its interrogatories on Complaint Counsel on January 25, and reissued those interrogatories on January 30. Cristal's Interrogatory #1 asked Complaint Counsel to:

Identify all adjustments to production levels by TiO₂ producers that You contend were for the purpose of supporting higher prices rather than the result of maintenance or operational issues, including the dates of such conduct, the producer who adjusted its production, the plant at which production was adjusted, the amount by which TiO₂ output was adjusted, the grades of TiO₂ affected, and the amount by which prices were higher than they otherwise would have been (total and for each grade of TiO₂ affected).

(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

¹ In the interim, Complaint Counsel filed a motion for clarification, Respondents responded, and the Court ruled. The day after the ruling, Respondents requested a meet and confer with Complaint Counsel, who offered May 21 as the next available date.

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 settled that contention interrogatories that seek non-privileged information are permissible and warrant a response.”).

Rule 3.35(a)(2) requires that any interrogatory be answered “fully.” This Court’s precedent makes clear that “answer[ing] interrogatories fully requires Complaint Counsel to provide facts supporting its contentions.” *In re N. Texas Specialty Physicians*, 2003 WL 22936410, at *2. “Complaint Counsel’s responses [to interrogatories] may not be complete where Complaint Counsel has used qualifying language, such as ‘the companies include,’ which indicates that Complaint Counsel could have additional information that it has not provided.” *In re Msc.software Corp.*, No. 9299, 2002 WL 31433929, at *1 (FTC Feb. 21, 2002). An order compelling an

“adequate and complete” response is appropriate where a party’s written discovery is “nonresponsive and evasive.” *In re McWante, Inc.*, No. 9351, 2012 WL 3057724, at *1 (FTC July 5, 2012). A request “may not be evaded by responding to a question which was not asked.” *Id.* at *3 (quoting *In re Gen. Motors*, No. 9077, 1977 FTC Lexis 293, at *11 (Jan. 28, 1977)).

Cristal Interrogatory #1 is a “well-tailored question[]” to “clarify issues in the case or narrow the scope of the dispute.” *In re Aspen Tech., Inc.*, 2003 WL 23138444, at *2 (FTC Dec. 23, 2003). It asks Complaint Counsel for specific contentions and the evidence that supports those contentions with regard to one theory (historical output adjustment) of one argument (that the transaction makes unilateral output reduction more likely) that Complaint Counsel has consistently made throughout this case. In response, Complaint Counsel failed to make its contention clear, provided a merely illustrative list of examples of output adjustments, and responded to requested details with a blanket reference to aggregate analysis in three expert reports and their reliance materials. This response was deficient in at least three ways.

First, rather than “[i]dentify all adjustments to production levels by TiO₂ producers that [Complaint Counsel] contend[s] were for the purpose of supporting higher prices rather than the result of maintenance or operational issues,” Complaint Counsel provided a list of “examples” of production adjustments. By providing only “examples” of production adjustments, Complaint Counsel has left open the possibility that it will rely at trial on other production adjustments not listed in response to Cristal Interrogatory #1. An answer to a contention interrogatory is incomplete if it holds back the possibility of other support for the contention that the party chooses not to disclose. *See In re Msc.software Corp.*, No. 9299, 2002 WL 31433929, at *1 (“Complaint Counsel’s responses [to interrogatories] may not be complete where Complaint Counsel has used qualifying language, such as ‘the companies include,’ which indicates that Complaint Counsel

could have additional information that it has not provided.”). Respondents respectfully request that Complaint Counsel be compelled to provide an exhaustive list of production adjustments requested by Cristal Interrogatory #1.

Second, Complaint Counsel’s objection that Cristal Interrogatory #1 “incorrectly assumes that adjustments to production levels cannot be for the purpose of both influencing prices and for maintenance or other operational reasons” does not excuse Complaint Counsel’s failure to provide a substantive response. The interrogatory did not assume that production adjustments could only be undertaken for a single purpose; it simply asked Complaint Counsel for any evidence it would put forward to support a contention that any producer had adjusted output for the purpose of supporting higher price as opposed to the purpose of conducting maintenance or as a result of operational issues. If the evidence does not exist, then Complaint Counsel should say so and explain that it *does not contend* that any production adjustments occurred for the purpose of raising prices without simultaneous maintenance or operational purposes. Respondents should be entitled to narrow the issues by receiving a responsive answer to this discovery request. *See In re N. Texas Specialty Physicians*, No. 9312, 2003 WL 22936410, at *2 (“The purpose of interrogatories is to narrow the issues and thus help determine what evidence will be needed at trial.”). Respondents’ production declined in discrete time periods for legitimate business purposes. Requiring Respondents to introduce evidence showing the legitimate purpose for each and every decline in production is a waste of the Court’s and the Parties’ time and resources where Complaint Counsel have had considerable discovery and still cannot identify any specific alleged curtailment for the purpose of increasing prices.²

² Complaint Counsel also object on the purported ground that the interrogatory “seeks Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent Cristal.” (5/17/18 Complaint Counsel’s Supp. Resps. and Objs. to Cristal’s Contention Inter. (1, 8), Exhibit B). But this is not the type of interrogatory that may be answered

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 would have been" as a result of alleged output reductions. Respondents are entitled to know Complaint Counsel's support for that contention, if Complaint Counsel intends to make it.

Interrogatories serve "to narrow the issues and thus help determine what evidence will be needed at trial." *In re N. Texas Specialty Physicians*, 2003 WL 22936410, at *2. Complaint Counsel's response to Cristal's Interrogatory #1 is plainly inadequate and improperly avoids narrowing the issues to determine what evidence will be needed at trial. Respondents should not be required to guess Complaint Counsel's support for its contentions about alleged output adjustments among titanium dioxide producers, on which Complaint Counsel relies to build its case.

Respondents respectfully move the Court to find Complaint Counsel's objections invalid and compel Complaint Counsel to issue a full and responsive answer to Cristal Interrogatory #1,

just as easily by any party with access to the discovery materials. Cristal is not asking Complaint Counsel to compile all data and documents related to production adjustments. Rather, Cristal is asking which production adjustments Complaint Counsel contend were for the purpose of raising prices, and what evidence Complaint Counsel believe supports that contention.

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:

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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:

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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 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:

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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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