

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

Complaint Counsel submits this Opposition to Respondents’ Motion to Compel Complaint Counsel’s Response to Cristal Interrogatory #1 (“Motion to Compel”). Cristal Interrogatory #1 asks 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).

Respondents’ Motion to Compel should be denied for several reasons. *First*, Complaint Counsel properly and timely objected to Cristal Interrogatory #1 and submitted a detailed

response, fully satisfying the requirements of the Commission's Part 3 Rules. *Second*, Respondents are attempting to compel Complaint Counsel to conduct further analysis of Respondents' *own TiO2 output data and documents*. This data is within Respondents' custody and control, as are Respondents' contemporaneous business documents and relevant employees. To the extent Respondents want more than the analysis Complaint Counsel has already provided, it will be significantly less burdensome for Respondents to analyze their own TiO2 output reductions than for Complaint Counsel to do so. *Finally*, Respondents also seek an analysis of the third party competitors' TiO2 output data, but Complaint Counsel's expert has provided Respondents with the relevant analysis, and Respondents have for quite some time had all of the available data and documents and can analyze them just as easily as Complaint Counsel if they feel further analysis is necessary. Therefore, Respondents' Motion to Compel should be denied.

FACTUAL BACKGROUND

On January 30, 2018, Respondent Cristal served Cristal Interrogatory #1. By Commission Rule, responses to that contention interrogatory were not due until March 1, 2018. Commission Rule 3.35(a)(2). Complaint Counsel served responses and objections on March 1, 2018, and then properly supplemented that response under Commission Rule 3.31(e)(2) on May 14, 2018 and then again on May 17, 2018¹ with a detailed response and proper objections.² As we show below, Complaint Counsel's response meets all of the requirements of the rules.

¹ Complaint Counsel's Responses and Objections to Respondent Cristal's First Set of Interrogatories (1-10) (Mar. 1, 2018) at 3; Complaint Counsel's Response and Objections to Respondent Tronox's Contention Interrogatories (3-8) and Respondent Cristal's Contention Interrogatories (1, 8) (May 14, 2018) at 6-7; Complaint Counsel's Supplemental Responses and Objections to Respondent Cristal's Contention Interrogatories (1, 8) (May 17, 2018) at 1-2.

² 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.").

ARGUMENT**I. Complaint Counsel Submitted an Appropriate and Complete Answer, Subject to Proper Objections**

As detailed below, Complaint Counsel answered Cristal Interrogatory #1 in detail, identifying the relevant periods of output reduction and demonstrating the link between those reductions and price increases, while raising proper and timely objections. In particular, in the May 17, 2018 supplemental response, Complaint Counsel referenced 10 different time-periods and circumstances when Tronox, Cristal, or Chemours adjusted their production of TiO₂. Complaint Counsel also stated that Dr. Nicholas Hill's expert reports and all of the documents and data cited therein—PX5000, PX5002, and PX5004—contained answers to Cristal Interrogatory #1. This is a proper response under Commission Rule 3.35(c) which allows a party to “specify records from which answers to interrogatories may be derived or ascertained” if the “burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.” 16 C.F.R. § 3.35(c).

Respondents complain that this response is inadequate, but in doing so, they overlook settled precedent and the robust evidence and analysis in Dr. Hill's reports concerning output reductions and price effects. For example, in his rebuttal report, PX5002, Dr. Hill includes figures detailing output reductions, price, variable cost, and variable margin. Below is one example:

{ [REDACTED] }

The sources for this figure are all from Respondent Tronox and include, among other things, the output data.

Moreover, Dr. Hill's expert reports cite and quote numerous documents from Respondents and competitors addressing output reductions during the time-periods detailed in Dr. Hill's expert reports and the rationale behind them. Below are a few examples of statements by Tronox included in the documents cited by Dr. Hill in his expert reports. These documents illustrate that Respondents understand that output reductions of chloride TiO₂ have a positive effect on price:

- { [REDACTED] }
- On a 2015 earnings call, Mr. Casey, Tronox's then-CEO, stated that "the question is, when will [the prices] turn? We're addressing that by managing our production so that inventories get reduced to normal or below normal levels. And when that happens price will rise...From what we see happening with Chemours and Huntsman and presumably the others as well, they're doing the same thing. We see them acting in the same way."⁴
- In a 2016 earnings call, Mr. Casey stated that "We believe that a very disciplined approach to production, to managing supply relative to demand, is what has facilitated the recovery in our markets, and we intended to continue to be disciplined about that. So,

³ { [REDACTED] }

⁴ PX9005 (Q3 2015 Tronox earnings call) at 010.

we don't intend to bring back the full production immediately simply because we see the very first signs of price recovery.”⁵

- [REDACTED]

Complaint Counsel's responses clearly complied with their obligations and no further responses to Cristal Interrogatory #1 are warranted. *See, e.g., In The Matter of North Texas Specialty Physicians*, 2004 FTC LEXIS 12 (Jan. 21, 2004), at *4 (denying motion to compel interrogatory responses based on Commission Rule 3.35(c)); *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503, 507 (S.D.N.Y. 1955) (“It is elementary that a party has no right to require his opponent to make compilations of information when documents containing the material necessary for the compilations are available to the first party.”).

The only part of Cristal Interrogatory #1 that Complaint Counsel did not address was the request that Complaint Counsel specify output reduction information by TiO2 grade. However, this is not an analysis Complaint Counsel performed because we did not believe it was necessary to demonstrate likely competitive effects. [REDACTED]

[REDACTED]

[REDACTED] }⁷ Consequently, this exercise is irrelevant. Moreover, this Court in *In the Matter of 1-800 Contacts, Inc.*, 2016 FTC LEXIS 206 (Dec. 12, 2016), denied a motion to compel, partly because Complaint Counsel had not conducted the requested analysis: “Respondent cannot compel Complaint Counsel to provide information that Complaint Counsel does not presently possess.” *Id.* at *5.

⁵ PX9003 (Q1 2016 Tronox earnings call) at 010-011.

⁶ [REDACTED].

⁷ [REDACTED].

Finally, Respondents express frustration with Complaint Counsel’s objection that the 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.” Respondents’ Mot. at 7. Respondents incongruously deny that the interrogatory assumes this, but then immediately demand precisely such a response—namely, that Complaint Counsel identify output reductions that occurred “for the purpose of supporting higher prices *as opposed to* for the purpose of conducting maintenance or as a result of operational issues.” *Id.* (emphasis added). As highlighted above, there is robust evidence that Respondents have reduced output with the purpose and effect of raising prices. Those are the facts regardless of whether that behavior coincided with maintenance or other operational adjustments.

II. Cristal Interrogatory #1 Seeks Analysis of Respondents’ Own Data

Respondents also ask us to analyze their own data. As noted above, Complaint Counsel’s expert has already done so, and has disclosed this analysis in his reports. There is no obligation to do more, particularly in light of Commission Rule 3.31, which provides that discovery may be limited where “[t]he discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive....” 16 C.F.R. § 3.31(c)(2)(i). This Court has previously rejected attempts to seek discovery of materials already in possession of the requesting party. For example, in *1-800 Contacts*, 2016 FTC LEXIS 206 (Dec. 12, 2016), this Court denied a motion to compel an answer to interrogatories requiring an analysis of data because “such data is...within Respondent’s custody and control, and it is less burdensome for Respondent to analyze its own data than for Complaint Counsel to do so.” *Id.* at *5-6. *See also NTSP*, 2004 FTC LEXIS 12, at *4. That is the situation here. Respondents have all of the data and documents plus access to

their employees, and it would be more burdensome for Complaint Counsel to analyze Respondents' own output data than for Respondents to do so. More importantly, Complaint Counsel answered the interrogatory identifying the necessary analysis that demonstrates the link between past output reductions and price increases.

III. Cristal Interrogatory #1 Seeks Analysis of Data Provided to Respondents

Cristal Interrogatory #1 seeks specific analysis regarding competitor TiO₂ producers' output reductions. Complaint Counsel conducted the relevant analysis of competitor plant closures and the effect on price from these output reductions. These analyses are included in Dr. Hill's reports, which are listed in Complaint Counsel's answer to Cristal Interrogatory #1. As stated above, Respondents have all of the data and documents in their possession to conduct their own analyses. Complaint Counsel does not need to conduct additional analysis on this issue to support our contention that there is a link between past output reductions and price increases.

CONCLUSION

For the forgoing reasons, the Court should deny Respondents' Motion to Compel Complaint Counsel's Response to Cristal Interrogatory #1.

Dated: May 29, 2018

By: Dominic Vote

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Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 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 29, 2018, I caused a copy of the foregoing document to be served via email on:

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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 29, 2018

By: /s/ Blake Risenmay
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