

PUBLIC-REDACTED

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Joseph Simons, Chairman
Maureen Ohlhausen
Rohit Chopra
Noah Phillips
Rebecca Slaughter

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

**NON-PARTY PPG INDUSTRIES, INC.'S SUPPLEMENTAL MOTION FOR *IN*
CAMERA TREATMENT PURSUANT TO FTC RULE 3.45**

PPG Industries, Inc. ("PPG"), by and through its undersigned counsel and pursuant to 16 C.F.R. § 3.45(b), respectfully moves the Commission for *in camera* treatment of a certain PPG document moved into evidence by Respondents at the administrative hearing in this matter (the "Confidential Document"). PPG produced this document in response to third party subpoenas from Complaint Counsel and Respondents. As explained more fully below, this document is entitled to *in camera* treatment because it contains competitively sensitive information that is material to PPG's business, such that public disclosure of this information would result in serious

competitive injury to PPG. PPG also requests that any hearing testimony concerning this document be maintained *in camera*.

BACKGROUND

PPG is a manufacturer and distributor of coatings products, for which one of the key input materials is TiO₂. On May 23, 2018 and May 24, 2018, Mr. Paul Malichky testified on behalf of PPG at trial. On May 24, on cross-examination, Respondents introduced a PPG document bearing Bates number PPG-TROX-00002256 – PPG-TROX-00002260, which had been designated Confidential pursuant to the Protective Order in this matter. Respondents marked this document RX2003 and moved it into evidence.

Exhibit No.	Document Title/Description	Date	Beginning Bates No.	Ending Bates No.	Full or Partial Treatment
RX2003		08/08/17	PPG-TROX-00002256	PPG-TROX-00002260	Full

As PPG noted at trial, PPG seeks full *in camera* treatment of this document, a copy of which is attached hereto as Exhibit A. This document is a confidential business document that contains competitively sensitive, proprietary, or trade secret information about material aspects of PPG's business, such that PPG would be significantly harmed in its ability to compete if this information were disclosed to the public. In support of this motion, PPG relies on the Declaration of Mr. Paul Malichky ("Malichky Decl."), which is attached hereto as Exhibit B. As he testified at trial, Mr. Malichky is the Director of Raw Material Purchasing for PPG. Mr. Malichky's declaration provides specific information about the document for which PPG is seeking *in camera* treatment.

Accordingly, for the reasons stated herein and in the Declaration of Mr. Paul Malichky,

PPG respectfully requests that *in camera* treatment be granted for RX2003 for a period of ten years.

LEGAL STANDARD

Under FTC Rule 3.45(b), *in camera* treatment is appropriate where “public disclosure would likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.” 16 C.F.R. 3.45(b). Stated differently, *in camera* treatment should be granted where the information is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

In assessing whether information is sufficiently secret and material, the Commission 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). Applying these factors, the Commission has held that “[t]he likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” See *In re Dura Lube Corp.*, No. 9292, 1999 FTC LEXIS 255, at *7 (Dec. 23, 1999) (quoting *Gen. Foods*, 95 F.T.C. at 355).

Requests for *in camera* treatment that are made by non-parties should be given “special solicitude.” See *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1715 (1967); see also *In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984).

ARGUMENT

I. PPG'S DOCUMENT IS SECRET AND MATERIAL SUCH THAT DISCLOSURE WOULD RESULT IN SERIOUS HARM TO PPG.

As the Commission has held, "confidential records of businesses involved in Commission proceedings should be protected insofar as possible." *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1185 (1961). Here, protection is warranted because the Confidential Document for which PPG is seeking *in camera* treatment is both secret and material to PPG's business and would cause serious competitive injury to PPG if disclosed to the public.

First, as explained in Mr. Malichky's declaration, the Confidential Document contains information that is material to PPG's business. Because TiO₂ is a key ingredient in PPG's coatings products, PPG must have sufficient volume of TiO₂ at a competitive price to compete with other coatings manufacturers, who also use TiO₂ in their products. The Confidential Document contains competitively sensitive information about PPG's purchase and use of TiO₂, including its pricing, volume, and a draft memorandum of understanding with a TiO₂ supplier, *see, e.g.*, Malichky Decl. ¶¶ 6, 10; and its negotiating strategy and status of negotiations with a TiO₂ supplier, *see, e.g., id.*

Second, given the competitive significance of this information, PPG has taken great care to protect this information from public disclosure. As explained in Mr. Malichky's declaration, PPG does not share information relating to TiO₂ pricing, volume, supply agreements, or negotiations with employees of PPG generally. Instead, it limits distribution of this information to a limited set of PPG employees, which generally includes a handful of employees in purchasing and a small number of employees in senior management. To protect disclosure of this information more broadly, PPG does not save or store this information in places that are generally accessible to PPG employees. PPG does not share any of this information with its

customers, competitors, or suppliers. Nor does it share this information with non-PPG personnel in the ordinary course of business. In producing this document to the parties, PPG designated all of this information “Confidential” pursuant to the Protective Order.

Third, PPG is likely to suffer severe financial harm and competitive disadvantage if the Confidential Document is made public. For example, if information about PPG’s pricing, volume, and negotiating strategy for TiO₂ is made public, Respondents, and other TiO₂ suppliers, may use this information to PPG’s disadvantage in future negotiations. TiO₂ suppliers may refuse to offer a lower price, knowing that PPG has accepted a higher price from other suppliers. PPG could also lose bargaining leverage with TiO₂ suppliers to the extent they know the degree to which PPG was willing to negotiate over certain TiO₂ supply terms. Alternatively, PPG’s competitors, who also use TiO₂, may use this information to their advantage to disrupt PPG’s supply, particularly when the market is tight and supply is low. Put simply, disclosure of the Confidential Documents will result in serious loss of business advantage to PPG.

Moreover, the Third Circuit recently found that “[f]here is little doubt” that the TiO₂ industry “was conducive to price fixing” because it is a “highly concentrated market for a commodity-like product with no viable substitutes and substantial barriers to entry.” *Valspar Corp. v. E.I. Du Pont De Nemours and Co.*, 873 F.3d 185, 197 (3d Cir. 2017). Making PPG’s pricing, volume, and other information related to TiO₂ draft supply agreements public only heightens the risk of price coordination among TiO₂ suppliers, which is likely to result in higher prices to PPG.

Finally, as a non-party to this case, PPG’s request for in camera treatment deserves “special solicitude.” *In re Crown Cork & Seal Co.*, 71 F.T.C. at 1715. PPG complied with the substantial discovery requests made by the parties with the understanding that its information

would remain Confidential. Moreover, the serious competitive harm that PPG would suffer substantially outweighs any interest in disclosing PPG's confidential information to the public.

II. PPG'S DOCUMENT SHOULD BE GIVEN *IN CAMERA* TREATMENT FOR TEN YEARS.

Where confidential information "is likely to remain sensitive or become more sensitive with the passage of time," *in camera* treatment for more than five years is appropriate. *In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *8-9. Here, this document is likely to remain competitively sensitive for more than five years because the pricing cycle in the TiO₂ industry typically lasts three to five years. *See* Malichky Decl. ¶ 7. Even when a pricing cycle terminates, PPG's competitors and TiO₂ suppliers can use information about pricing and volume to back-calculate PPG's price and volume relative to the market, which can be used to PPG's disadvantage during supply negotiations. *Id.* ¶ 8. Moreover, the Commission recently granted ten years of *in camera* treatment for similar information in this case. *See* Order on Non-Parties' Motions for *In Camera* Treatment, Dkt. No. 9377 (May 15, 2018). Accordingly, to protect this competitively sensitive information, PPG requests *in camera* treatment for RX2003 for a period of 10 years.

CONCLUSION

For the foregoing reasons, PPG respectfully requests that the Commission grant its motion for *in camera* treatment pursuant to FTC Rule 3.45(b) for a period of ten years.

Dated: May 30, 2018

Respectfully submitted,

/s/ J. Robert Robertson

J. Robert Robertson

Leigh L. Oliver

Kimberly D. Rancour

HOGAN LOVELLS U.S. LLP

555 13th Street NW

Washington, DC 20004

Tel: (202) 637-5600

Fax: (202) 637-5910

robby.robertson@hoganlovells.com

leigh.oliver@hoganlovells.com

kimberly.rancour@hoganlovells.com

Attorneys for PPG Industries, Inc.

Notice of Electronic Service

I hereby certify that on May 30, 2018, I filed an electronic copy of the foregoing Supplemental Motion for In Camera Treatment - PUBLIC, Exhibit A - PUBLIC, Exhibit B - Declaration of Paul Malichky, Proposed Order, Certificate of Service, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

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Seth Wiener
Arnold & Porter Kaye Scholer LLP
seth.wiener@apks.com
Respondent

Matthew Shultz
Arnold & Porter Kaye Scholer LLP
matthew.shultz@apks.com
Respondent

Albert Teng
Arnold & Porter Kaye Scholer LLP
albert.teng@apks.com
Respondent

Michael Williams
Kirkland & Ellis LLP
michael.williams@kirkland.com
Respondent

David Zott
Kirkland & Ellis LLP
dzott@kirkland.com
Respondent

Matt Reilly
Kirkland & Ellis LLP
matt.reilly@kirkland.com
Respondent

Andrew Pruitt
Kirkland & Ellis LLP
andrew.pruitt@kirkland.com
Respondent

Susan Davies
Kirkland & Ellis LLP
susan.davies@kirkland.com

Respondent

Michael Becker
Kirkland & Ellis LLP
mbecker@kirkland.com
Respondent

Karen McCartan DeSantis
Kirkland & Ellis LLP
kdesantis@kirkland.com
Respondent

Megan Wold
Kirkland & Ellis LLP
megan.wold@kirkland.com
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Michael DeRita
Kirkland & Ellis LLP
michael.derita@kirkland.com
Respondent

Charles Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Cem Akleman
Attorney
Federal Trade Commission
cakleman@ftc.gov
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Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Krishna Cerilli
Attorney
Federal Trade Commission
kcerilli@ftc.gov
Complaint

Steven Dahm
Attorney
Federal Trade Commission
sdahm@ftc.gov
Complaint

E. Eric Elmore
Attorney
Federal Trade Commission
eelmore@ftc.gov
Complaint

Sean Hughto

Attorney
Federal Trade Commission
shughto@ftc.gov
Complaint

Joonsuk Lee
Attorney
Federal Trade Commission
jlee4@ftc.gov
Complaint

Meredith Levert
Attorney
Federal Trade Commission
mlevert@ftc.gov
Complaint

Jon Nathan
Attorney
Federal Trade Commission
jnathan@ftc.gov
Complaint

James Rhilinger
Attorney
Federal Trade Commission
jrhilinger@ftc.gov
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Attorney
Federal Trade Commission
brisenmay@ftc.gov
Complaint

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Attorney
Federal Trade Commission
krogers@ftc.gov
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Z. Lily Rudy
Attorney
Federal Trade Commission
zrudy@ftc.gov
Complaint

Robert Tovsky
Attorney
Federal Trade Commission
rtovsky@ftc.gov
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Attorney
Federal Trade Commission
dvote@ftc.gov
Complaint

Cecelia Waldeck
Attorney
Federal Trade Commission
cwaldeck@ftc.gov
Complaint

Katherine Clemons
Associate
Arnold & Porter Kaye Scholer LLP
katherine.clemons@arnoldporter.com
Respondent

Eric D. Edmondson
Attorney
Federal Trade Commission
eedmondson@ftc.gov
Complaint

David Morris
Attorney
Federal Trade Commission
DMORRIS1@ftc.gov
Complaint

Zachary Avallone
Kirkland & Ellis LLP
zachary.avallone@kirkland.com
Respondent

Rohan Pai
Attorney
Federal Trade Commission
rpai@ftc.gov
Complaint

Rachel Hansen
Associate
Kirkland & Ellis LLP
rachel.hansen@kirkland.com
Respondent

Peggy D. Bayer Femenella
Attorney
Federal Trade Commission
pbayer@ftc.gov
Complaint

Grace Brier
Kirkland & Ellis LLP
grace.brier@kirkland.com
Respondent

Alicia Burns-Wright
Attorney
Federal Trade Commission
aburnswright@ftc.gov
Complaint

J. Robert Robertson
Attorney



EXHIBIT A

**DOCUMENT MARKED CONFIDENTIAL
IN FULL**

***IN CAMERA* TREATMENT REQUESTED**

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Respondent

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michael.williams@kirkland.com
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matt.reilly@kirkland.com
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andrew.pruitt@kirkland.com
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Kirkland & Ellis LLP
susan.davies@kirkland.com

Respondent

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Kirkland & Ellis LLP
mbecker@kirkland.com
Respondent

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Kirkland & Ellis LLP
kdesantis@kirkland.com
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Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Krishna Cerilli
Attorney
Federal Trade Commission
kcerilli@ftc.gov
Complaint

Steven Dahm
Attorney
Federal Trade Commission
sdahm@ftc.gov
Complaint

E. Eric Elmore
Attorney
Federal Trade Commission
eelmore@ftc.gov
Complaint

Sean Hughto

Attorney
Federal Trade Commission
shughto@ftc.gov
Complaint

Joonsuk Lee
Attorney
Federal Trade Commission
jlee4@ftc.gov
Complaint

Meredith Levert
Attorney
Federal Trade Commission
mlevert@ftc.gov
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Attorney
Federal Trade Commission
jnathan@ftc.gov
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Attorney
Federal Trade Commission
jrhilinger@ftc.gov
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Attorney
Federal Trade Commission
brisenmay@ftc.gov
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Federal Trade Commission
krogers@ftc.gov
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Federal Trade Commission
zrudy@ftc.gov
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Federal Trade Commission
rtovsky@ftc.gov
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Federal Trade Commission
dvote@ftc.gov
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Federal Trade Commission
cwaldeck@ftc.gov
Complaint

Katherine Clemons
Associate
Arnold & Porter Kaye Scholer LLP
katherine.clemons@arnoldporter.com
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Federal Trade Commission
eedmondson@ftc.gov
Complaint

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DMORRIS1@ftc.gov
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Kirkland & Ellis LLP
zachary.avallone@kirkland.com
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Federal Trade Commission
rpai@ftc.gov
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Rachel Hansen
Associate
Kirkland & Ellis LLP
rachel.hansen@kirkland.com
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Attorney
Federal Trade Commission
pbayer@ftc.gov
Complaint

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grace.brier@kirkland.com
Respondent

Alicia Burns-Wright
Attorney
Federal Trade Commission
aburnswright@ftc.gov
Complaint

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Attorney



ORIGINAL

EXHIBIT B

DECLARATION OF PAUL MALICHKY

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph Simons, Chairman**
 Maureen Ohlhausen
 Rohit Chopra
 Noah Phillips
 Rebecca Slaughter

In the Matter of

Tronox Limited
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Docket No. 9377

DECLARATION OF PAUL MALICHKY IN SUPPORT OF NON-PARTY PPG
INDUSTRIES, INC.'S SUPPLEMENTAL MOTION FOR *IN CAMERA* TREATMENT

I, Paul Malichky, hereby declare as follows:

1. I am the Director of Raw Material Purchasing for PPG Industries, Inc. (“PPG”). I make this declaration in support of Non-Party PPG Industries, Inc.’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. PPG, based in Pittsburgh, Pennsylvania, is a global manufacturer of coatings products, for which one of the key input materials is titanium dioxide (“TiO₂”). I joined PPG in

2008 and have worked in various capacities at PPG since then, including as Manager, Regulatory and Emerging Issues; Director, Product Stewardship; and now as Director of Raw Material Purchasing.

3. In my current position, I am responsible for procuring all of the TiO₂ used by PPG, which includes negotiating volume, pricing, and other aspects of supply with TiO₂ suppliers. I am also involved in developing and implementing PPG's TiO₂ supply strategies, which include among other things, developing alternative sources of supply and exploring TiO₂ alternatives.

4. I testified in the administrative hearing in this matter on May 23 and May 24, 2018. During my cross-examination on May 24, counsel for Tronox asked me questions about a PPG document bearing the Bates range PPG-TROX-00002256 - PPG-TROX-00002260. This document was marked RX2003 and moved into evidence.

5. I have reviewed RX2003. As the Director of Raw Material Purchasing for PPG, I am familiar with the information in this document and its competitive significance to PPG. PPG is seeking full *in camera* treatment of the document because it contains especially sensitive and confidential business information. Based on my review of the documents, my knowledge of PPG's business, and my familiarity with the confidentiality protection afforded this type of information by PPG, I submit that disclosure of this information to the public, including to PPG's TiO₂ suppliers and competitors, will cause serious competitive harm to PPG.

6. RX2003 is an email and a draft memorandum of understanding with a particular TiO₂ supplier describing PPG's proposed supply agreement with that supplier, including the price, volume, payterms, and grade of TiO₂ covered by that agreement. It also describes PPG's

negotiating strategy, including target and potential compromise positions for ongoing negotiations, pros and cons of the agreement, and whether PPG should sign such an agreement.

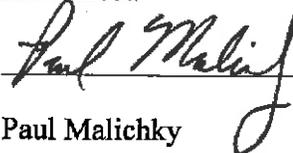
7. The foregoing information is material to PPG's business. TiO₂ is an essential raw material in most of PPG's coatings products. It is used in thousands of different coatings formulations for products ranging from house paint to automotive and industrial coatings. As a result, TiO₂ is one of the most significant raw materials that PPG purchases for use in its products. The TiO₂ pricing cycle typically lasts three to five years.

8. PPG shares this information with only a small number of PPG employees. PPG maintains this information in strict confidence because it would cause serious harm to PPG's negotiating position with TiO₂ suppliers if they were aware of PPG's volume, pricing, and negotiations with other TiO₂ suppliers. For example, a supplier may refuse to offer (or accept) a lower price, knowing that PPG paid a higher price to another TiO₂ supplier. Public disclosure of this information would also cause serious harm to PPG because its competitors could use this information to estimate a key cost input to PPG's coatings products, which could result in a less competitive coatings offering, or to disrupt PPG's TiO₂ supply by negotiating volume away from PPG. PPG's competitors and TiO₂ suppliers can use information about pricing and volume to back-calculate PPG's price and volume relative to the market, which can be used by suppliers to PPG's disadvantage in supply negotiations or by PPG's competitors to disrupt supply.

9. PPG seeks full *in camera* treatment for a period of ten years for RX2003.

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

Executed on May 30, 2018.


Paul Malichky

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matthew.shultz@apks.com
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michael.williams@kirkland.com
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andrew.pruitt@kirkland.com
Respondent

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susan.davies@kirkland.com

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mbecker@kirkland.com
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Kirkland & Ellis LLP
kdesantis@kirkland.com
Respondent

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cloughlin@ftc.gov
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Federal Trade Commission
cakleman@ftc.gov
Complaint

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Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Krishna Cerilli
Attorney
Federal Trade Commission
kcerilli@ftc.gov
Complaint

Steven Dahm
Attorney
Federal Trade Commission
sdahm@ftc.gov
Complaint

E. Eric Elmore
Attorney
Federal Trade Commission
eelmore@ftc.gov
Complaint

Sean Hughto

Attorney
Federal Trade Commission
shughto@ftc.gov
Complaint

Joonsuk Lee
Attorney
Federal Trade Commission
jlee4@ftc.gov
Complaint

Meredith Levert
Attorney
Federal Trade Commission
mlevert@ftc.gov
Complaint

Jon Nathan
Attorney
Federal Trade Commission
jnathan@ftc.gov
Complaint

James Rhilinger
Attorney
Federal Trade Commission
jrhilinger@ftc.gov
Complaint

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Attorney
Federal Trade Commission
brisenmay@ftc.gov
Complaint

Kristian Rogers
Attorney
Federal Trade Commission
krogers@ftc.gov
Complaint

Z. Lily Rudy
Attorney
Federal Trade Commission
zrudy@ftc.gov
Complaint

Robert Tovsky
Attorney
Federal Trade Commission
rtovsky@ftc.gov
Complaint

Dominic Vote
Attorney
Federal Trade Commission
dvote@ftc.gov
Complaint

Cecelia Waldeck
Attorney
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katherine.clemons@arnoldporter.com
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Federal Trade Commission
DMORRIS1@ftc.gov
Complaint

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Kirkland & Ellis LLP
zachary.avallone@kirkland.com
Respondent

Rohan Pai
Attorney
Federal Trade Commission
rpai@ftc.gov
Complaint

Rachel Hansen
Associate
Kirkland & Ellis LLP
rachel.hansen@kirkland.com
Respondent

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Attorney
Federal Trade Commission
pbayer@ftc.gov
Complaint

Grace Brier
Kirkland & Ellis LLP
grace.brier@kirkland.com
Respondent

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Attorney
Federal Trade Commission
aburnswright@ftc.gov
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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen Ohlhausen, Acting Chairman



ORIGINAL

In the Matter of

Tronox Limited
a corporation,

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(TASNEE)
a corporation,

National Titanium Dioxide
Company Limited (Cristal),
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AND

Cristal USA Inc.
a corporation.

Docket No. 9377

[PROPOSED] ORDER
ON NON-PARTY PPG INDUSTRIES, INC.'S
SUPPLEMENTAL MOTION FOR *IN CAMERA* TREATMENT

Upon consideration of non-party PPG Industries, Inc.'s Supplemental Motion for *In Camera* Treatment, and finding good cause, it is HEREBY ORDERED that the following document is to be provided *in camera* treatment of a period of ten years from the date of this Order in its entirety:

Exhibit No.	Date	Beginning Bates No.	Ending Bates No.
RX2003	08/08/17	PPG-TROX-00002256	PPG-TROX-00002260

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated: _____, 2018.

Notice of Electronic Service

I hereby certify that on May 30, 2018, I filed an electronic copy of the foregoing Supplemental Motion for In Camera Treatment - PUBLIC, Exhibit A - PUBLIC, Exhibit B - Declaration of Paul Malichky, Proposed Order, Certificate of Service, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on May 30, 2018, I served via E-Service an electronic copy of the foregoing Supplemental Motion for In Camera Treatment - PUBLIC, Exhibit A - PUBLIC, Exhibit B - Declaration of Paul Malichky, Proposed Order, Certificate of Service, upon:

Seth Wiener
Arnold & Porter Kaye Scholer LLP
seth.wiener@apks.com
Respondent

Matthew Shultz
Arnold & Porter Kaye Scholer LLP
matthew.shultz@apks.com
Respondent

Albert Teng
Arnold & Porter Kaye Scholer LLP
albert.teng@apks.com
Respondent

Michael Williams
Kirkland & Ellis LLP
michael.williams@kirkland.com
Respondent

David Zott
Kirkland & Ellis LLP
dzott@kirkland.com
Respondent

Matt Reilly
Kirkland & Ellis LLP
matt.reilly@kirkland.com
Respondent

Andrew Pruitt
Kirkland & Ellis LLP
andrew.pruitt@kirkland.com
Respondent

Susan Davies
Kirkland & Ellis LLP
susan.davies@kirkland.com

Respondent

Michael Becker
Kirkland & Ellis LLP
mbecker@kirkland.com
Respondent

Karen McCartan DeSantis
Kirkland & Ellis LLP
kdesantis@kirkland.com
Respondent

Megan Wold
Kirkland & Ellis LLP
megan.wold@kirkland.com
Respondent

Michael DeRita
Kirkland & Ellis LLP
michael.derita@kirkland.com
Respondent

Charles Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Cem Akleman
Attorney
Federal Trade Commission
cakleman@ftc.gov
Complaint

Thomas Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Krishna Cerilli
Attorney
Federal Trade Commission
kcerilli@ftc.gov
Complaint

Steven Dahm
Attorney
Federal Trade Commission
sdahm@ftc.gov
Complaint

E. Eric Elmore
Attorney
Federal Trade Commission
eelmore@ftc.gov
Complaint

Sean Hughto

Attorney
Federal Trade Commission
shughto@ftc.gov
Complaint

Joonsuk Lee
Attorney
Federal Trade Commission
jlee4@ftc.gov
Complaint

Meredith Levert
Attorney
Federal Trade Commission
mlevert@ftc.gov
Complaint

Jon Nathan
Attorney
Federal Trade Commission
jnathan@ftc.gov
Complaint

James Rhilinger
Attorney
Federal Trade Commission
jrhilinger@ftc.gov
Complaint

Blake Risenmay
Attorney
Federal Trade Commission
brisenmay@ftc.gov
Complaint

Kristian Rogers
Attorney
Federal Trade Commission
krogers@ftc.gov
Complaint

Z. Lily Rudy
Attorney
Federal Trade Commission
zrudy@ftc.gov
Complaint

Robert Tovsky
Attorney
Federal Trade Commission
rtovsky@ftc.gov
Complaint

Dominic Vote
Attorney
Federal Trade Commission
dvote@ftc.gov
Complaint

Cecelia Waldeck
Attorney
Federal Trade Commission
cwaldeck@ftc.gov
Complaint

Katherine Clemons
Associate
Arnold & Porter Kaye Scholer LLP
katherine.clemons@arnoldporter.com
Respondent

Eric D. Edmondson
Attorney
Federal Trade Commission
eedmondson@ftc.gov
Complaint

David Morris
Attorney
Federal Trade Commission
DMORRIS1@ftc.gov
Complaint

Zachary Avallone
Kirkland & Ellis LLP
zachary.avallone@kirkland.com
Respondent

Rohan Pai
Attorney
Federal Trade Commission
rpai@ftc.gov
Complaint

Rachel Hansen
Associate
Kirkland & Ellis LLP
rachel.hansen@kirkland.com
Respondent

Peggy D. Bayer Femenella
Attorney
Federal Trade Commission
pbayer@ftc.gov
Complaint

Grace Brier
Kirkland & Ellis LLP
grace.brier@kirkland.com
Respondent

Alicia Burns-Wright
Attorney
Federal Trade Commission
aburnswright@ftc.gov
Complaint

J. Robert Robertson
Attorney

CERTIFICATE OF SERVICE



I HEREBY CERTIFY that on the 30th day of May, 2018, I filed the foregoing document electronically using the FTC's E-filing system, which will send notification of such filings to:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Rm. H-113
Washington, DC 20580

ORIGINAL

I also hereby certify that I caused a true and correct copy of the foregoing documents to be served upon the following via electronic mail:

Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Rm. H-110
Washington, DC 20580

Bruce Hoffman
Haidee Schwartz
Chuck Loughlin
Thomas Brock
Benjamin Gris

Dominic Vote
Jon Nathan
Krisha Cerilli
Robert Tovsky
April Tabor

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
dhoffmanl@ftc.gov
hschwartzl@ftc.gov
cloughlin@ftc.gov
tbrock@ftc.gov
bgris@fte.gov

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
dvote@ftc.gov
jnathan@ftc.gov
kcerilli@ftc.gov
rtovsky@ftc.gov
atabor@ftc.gov

Counsel Supporting the Complaint

James L. Cooper
Peter J. Levitas
Ryan Z. Watts
Albert Teng

Counsel Supporting the Complaint

Michael F. Williams, P.C.
Matthew J. Reilly, P.C.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.

ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001
(202) 942-5000
(202) 942-5999 (facsimile)
james.cooper@apks.com
peter.levitas@apks.com
ryan.watts@apks.com
albert.teng@apks.com

*Attorneys For National Industrialization
Company (Tasnee), The National
Titanium Dioxide Company Limited
(Cristal), and Cristal USA Inc.*

Suite 1200
Washington, D.C. 20005
(202) 879-5000
(202) 879-5200 (facsimile)
michael.williams@kirkland.com
matt.reilly@kirkland.com

David J. Zott, P.C.
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2428
(312) 862-2200 (facsimile)
david.zott@kirkland.com

Attorneys For Tronox Limited

Dated: May 30, 2018

/s/ J. Robert Robertson

J. Robert Robertson
HOGAN LOVELLS U.S. LLP
555 13th Street NW
Washington, DC 20004
Tel: (202) 637-5600
Fax: (202) 637-5910
robby.robertson@hoganlovells.com

Attorney for PPG Industries, Inc.

Notice of Electronic Service

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seth.wiener@apks.com
Respondent

Matthew Shultz
Arnold & Porter Kaye Scholer LLP
matthew.shultz@apks.com
Respondent

Albert Teng
Arnold & Porter Kaye Scholer LLP
albert.teng@apks.com
Respondent

Michael Williams
Kirkland & Ellis LLP
michael.williams@kirkland.com
Respondent

David Zott
Kirkland & Ellis LLP
dzott@kirkland.com
Respondent

Matt Reilly
Kirkland & Ellis LLP
matt.reilly@kirkland.com
Respondent

Andrew Pruitt
Kirkland & Ellis LLP
andrew.pruitt@kirkland.com
Respondent

Susan Davies
Kirkland & Ellis LLP
susan.davies@kirkland.com

Respondent

Michael Becker
Kirkland & Ellis LLP
mbecker@kirkland.com
Respondent

Karen McCartan DeSantis
Kirkland & Ellis LLP
kdesantis@kirkland.com
Respondent

Megan Wold
Kirkland & Ellis LLP
megan.wold@kirkland.com
Respondent

Michael DeRita
Kirkland & Ellis LLP
michael.derita@kirkland.com
Respondent

Charles Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Cem Akleman
Attorney
Federal Trade Commission
cakleman@ftc.gov
Complaint

Thomas Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Krishna Cerilli
Attorney
Federal Trade Commission
kcerilli@ftc.gov
Complaint

Steven Dahm
Attorney
Federal Trade Commission
sdahm@ftc.gov
Complaint

E. Eric Elmore
Attorney
Federal Trade Commission
eelmore@ftc.gov
Complaint

Sean Hughto

Attorney
Federal Trade Commission
shughto@ftc.gov
Complaint

Joonsuk Lee
Attorney
Federal Trade Commission
jlee4@ftc.gov
Complaint

Meredith Levert
Attorney
Federal Trade Commission
mlevert@ftc.gov
Complaint

Jon Nathan
Attorney
Federal Trade Commission
jnathan@ftc.gov
Complaint

James Rhilinger
Attorney
Federal Trade Commission
jrhilinger@ftc.gov
Complaint

Blake Risenmay
Attorney
Federal Trade Commission
brisenmay@ftc.gov
Complaint

Kristian Rogers
Attorney
Federal Trade Commission
krogers@ftc.gov
Complaint

Z. Lily Rudy
Attorney
Federal Trade Commission
zrudy@ftc.gov
Complaint

Robert Tovsky
Attorney
Federal Trade Commission
rtovsky@ftc.gov
Complaint

Dominic Vote
Attorney
Federal Trade Commission
dvote@ftc.gov
Complaint

Cecelia Waldeck
Attorney
Federal Trade Commission
cwaldeck@ftc.gov
Complaint

Katherine Clemons
Associate
Arnold & Porter Kaye Scholer LLP
katherine.clemons@arnoldporter.com
Respondent

Eric D. Edmondson
Attorney
Federal Trade Commission
eedmondson@ftc.gov
Complaint

David Morris
Attorney
Federal Trade Commission
DMORRIS1@ftc.gov
Complaint

Zachary Avallone
Kirkland & Ellis LLP
zachary.avallone@kirkland.com
Respondent

Rohan Pai
Attorney
Federal Trade Commission
rpai@ftc.gov
Complaint

Rachel Hansen
Associate
Kirkland & Ellis LLP
rachel.hansen@kirkland.com
Respondent

Peggy D. Bayer Femenella
Attorney
Federal Trade Commission
pbayer@ftc.gov
Complaint

Grace Brier
Kirkland & Ellis LLP
grace.brier@kirkland.com
Respondent

Alicia Burns-Wright
Attorney
Federal Trade Commission
aburnswright@ftc.gov
Complaint

J. Robert Robertson
Attorney