

PUBLIC

UNITED STATES OF AMERICA  
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, )  
)  
Respondents. )

DOCKET NO. 9377

**MOTION OF NON-PARTY VENATOR MATERIALS PLC FOR LEAVE TO FILE A  
RESPONSE TO RESPONDENTS' JOINT MOTION TO AMEND THE PROTECTIVE  
ORDER GOVERNING CONFIDENTIAL INFORMATION**

Non-party Venator Materials PLC, by its attorneys, seeks leave to respond to Respondents' Joint Motion To Amend the Protective Order Governing Confidential Information.

Venator produced highly confidential information in response to a Subpoena Duces Tecum and a Civil Investigation Demand issued by the Federal Trade Commission during its investigation of the Respondents' proposed acquisition. Pending is another Subpoena Duces Tecum issued to Venator in relation to this proceeding, and yesterday Respondents, which are competitors of Venator, emailed three subpoenas to Venator asking for extremely sensitive commercial information and testimony regarding pricing and other sensitive topics. The Court should grant Venator's leave to file the attached response to Respondents' motion because

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Venator's response speaks directly to the effect that Respondents' motion would have on Venator's highly confidential information. Importantly, Venator could be prejudiced, and its ability to compete harmed, by the outcome of Respondents' motion.

Dated: February 1, 2018

Respectfully submitted,

/s/ William Vigdor  
Evan Miller  
Ryan Will

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**ATTORNEYS FOR VENATOR  
MATERIALS PLC**

PUBLIC

UNITED STATES OF AMERICA  
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Respondents. )  
\_\_\_\_\_

DOCKET NO. 9377

**RESPONSE OF NON-PARTY VENATOR MATERIALS PLC TO  
RESPONDENTS' JOINT MOTION TO AMEND THE PROTECTIVE ORDER  
GOVERNING CONFIDENTIAL MATERIAL**

Non-party Venator Materials PLC (“Venator”) is a participant in the Titanium Dioxide business. Pursuant to a Subpoena Duces Tecum and Civil Investigative Demand issued by the Federal Trade Commission (the “Commission”) during its Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 18 U.S.C. §18a (the “HSR Act”) investigation, Venator produced highly sensitive commercial information, including business plans, production costs, and extremely detailed customer-specific transaction-level data containing prices, volumes, and customer information. In reliance on the standard Protective Order, Venator did not object to the disclosure of such information to outside counsel for Tronox Limited and Cristal USA Inc. On January 22, 2018, Venator received a Subpoena Duces Tecum in the present matter seeking

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similarly sensitive information. Yesterday, Respondents, which are competitors of Venator, emailed three subpoenas to Venator asking for extremely sensitive commercial information and testimony regarding pricing and other topics.

On January 19, 2018, Respondents jointly moved to modify the Protective Order to grant access to this sensitive information to select in-house counsel who, by their own testimony, routinely attend and participate in business planning meetings. Disclosures of highly confidential information of Venator to these individuals would be highly prejudicial to Venator. Declaration of Mahomed Maiter, Paragraph 9 (attached hereto as Exhibit A) (hereinafter, "Maiter Decl. ¶ \_\_"); Declaration of Russell Stolle, Paragraph 15 (attached hereto as Exhibit B) (hereinafter, "Stolle Decl. ¶ \_\_").

It is our understanding that the Commission plans to oppose the Respondents' motion,<sup>1</sup> and that the Commission's Rules of Practice for Adjudicatory Proceedings generally prohibit the amendment of the form protective order to grant in-house counsel access to confidential information. *See* Appendix A to 16 C.F.R. § ("Confidential material shall be disclosed only to: (a) . . . ; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), *provided they are not employees of a respondent*" (emphasis added)); FTC Proposed Rule Amendments with Request for Comment, 73 Fed. Reg. 58,832, 58,838 (Oct. 7, 2008) (noting that employing a form protective order ensures "that discovery materials are handled uniformly and in a manner that is fully consistent with the FTC's statutory obligations").

If the Court is inclined to grant Respondents' motion, Venator respectfully requests that the Court further amend the Protective Order to include a second level of confidential information

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<sup>1</sup> Respondents' Motion states that Complaint Counsel opposes the Motion. *See* Respondents' Mot. at 1, n.1.

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for highly sensitive commercial information and to prohibit Respondents' in-house counsel from accessing that level of confidential material.

### **Background**

As part of the Commission's HSR Act investigation, the Commission required Venator to produce, among other things, the following confidential and highly-sensitive information: (i) customer-specific transaction-level data including the line-item detail of each transaction conducted by Venator, showing customer-specific information, including customer name and address, product grade, price, quantity supplied, format of packaging and delivery, and ship-to-location; and (ii) detailed production and manufacturing data sets containing detailed information on production levels and costs, production location, crystal forms, and manufacturing process. Maiter Decl. ¶ 5, 8. The information disclosed by Venator is critical to the success of its business. Soon after the initiation of this proceeding, on December 7, 2017, Venator was informed that the Commission was going to disclose its information to Respondents outside counsel and the Commission's standard Protective Order, as set forth in Appendix A to Rule 3.31 (the "Protective Order"), would be entered by the Court. The Protective Order prohibited, *inter alia*, disclosure of confidential material to the Respondents' employees, which would necessarily include their in-house counsel. Venator was provided an opportunity to review the Protective Order prior to its information being disclosed to outside counsel for Respondents. Stolle Decl. ¶ 12. Based on a review of the Protective Order and relying on the adequacy of the protections contained therein, Venator did not object to the Commission disclosure of its information to outside counsel for the Respondents. Stolle Decl. ¶ 13. Now, Respondents seek to amend the Protective Order to permit James G. Koutras and Steven Kaye, in-house counsel for the Respondents, to have plenary access to all materials submitted by third parties to the Commission throughout its HSR investigation and

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this proceeding, including, in Venator's case, particularly sensitive transaction-level data. It is for this reason that, in the event that the Court grants Respondents' motion, Venator requests that the Court limit the Respondents' in-house counsel's access to the most sensitive information.

### Argument

#### I. Venator Relied on the Court's Protective Order to Protect Highly Sensitive Commercial Information

This Court has previously rejected motions similar to the Respondents' when third parties had relied on the Protective Order at issue when disclosing information. *See McWane, Inc.*, 2012 WL 3518638 (Aug. 8, 2012). In their motion, Respondents argue that third parties in this case could not have relied on the Protective Order because it came after such parties had already disclosed the confidential materials to the Commission. But, Venator produced its information during the course of the Commission's investigation relying on the confidentiality protections contain in the Commission's rules of practice. Stolle Decl. ¶ 13. Further, Venator was made aware of the Protective Order and applicable Commission rules prior to the Commission disclosing such information to outside counsel for Respondents. Stolle Decl. ¶ 10. Venator's General Counsel conducted a careful review of the Protective Order and did not seek additional protections because he relied on its terms. Stolle Decl. ¶ 13. Further, the information sought to be disclosed to in-house counsel is extremely sensitive, the disclosure of which would be highly prejudicial to Venator. Maiter Decl. ¶ 9-10. Because of this reliance, and the prejudice the requested disclosure could cause, the Court should limit the scope of information accessible by in-house counsel in the event that it grants Respondents' motion.

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### **II. If it Grants Respondents' Motion, the Court Should Take Efforts to Protect Highly Confidential Information**

If this Court is inclined to grant Respondents' motion, Venator respectfully requests that this Court further revise the Protective Order to establish a second level of confidential information—"highly confidential information"—and prohibit Respondents' in-house counsel from accessing such information. Venator requests that "highly confidential information" be defined as "all customer-specific or transaction-level information, including, but not limited to, customer-specific transaction-level prices, costs, profit margins, or product information." This information is critically sensitive as it describes the terms of sale, including volume, product, and customer details. Maiter Decl. ¶ 5, 9. Such information is critical to Venator's business. Maiter Decl. ¶ 9. In the hands of a competitor, this information could be used to undermine Venator's negotiations and relationships with customers, and its ability to compete. *Id.* Further, this is the very type of information that an antitrust court, like this Court, should prevent from being disclosed, or even risk being disclosed, to a competitor. Granting Respondents' motion as-is would result in the disclosure of sensitive pricing and customer strategies that should not be shared with a competitor.

In their declarations, Messrs. Koutras and Kaye admit that they interact with individuals that are involved in competitive decision-making, and participate in meetings where competitively sensitive information is discussed. *See* Resp. Mot., Ex. A at 3-4 and Ex. B at 4. There would be no meaningful way to ensure that in-house counsel, fully aware of the deepest and most important information of a competitor, was not using competitively sensitive information in business discussions or when rendering legal advice. Even assuming the best intentions of in-house counsel, individuals cannot ignore what they know, and the risks of their wielding this knowledge

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is particularly acute. Accordingly, this Court should exclude this data from disclosure under the Protective Order.

As previewed above, in the event that this Court grants Respondents' motion, Venator would propose the following changes to Respondents' Proposed Amended Protective Order Governing Confidential Material:

**Add the following sentence to the end of Paragraph 1:**

“Highly confidential material” shall mean all customer-specific or transaction-level information, including, but not limited to, customer-specific transaction-level prices, costs, profit margins, or product information.

**Add the following sentence to the end of Paragraph 7:**

Highly confidential material shall only be disclosed to the individuals identified in sections (a) through (e) of this Paragraph 7.

#### **Conclusion**

In reliance on the Protective Order, Venator did not object to the Commission providing highly confidential commercial information to outside counsel for the Respondents. In light of Respondents' request to now make such information available to its in-house counsel, Venator respectfully requests that if the Court were to grant Respondents' motion such grant be limited to ensure that “highly confidential information,” as defined herein, is not disclosed to any employee of the Respondents. Otherwise, providing Respondents' in-house counsel access to such information would prejudice Venator by disrupting its ability to compete with the Respondents in the Titanium Dioxide industry.

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Dated: February 1, 2018

Respectfully submitted,

/s/ William Vigdor

Evan Miller

Ryan Will

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**ATTORNEYS FOR VENATOR  
MATERIALS PLC**

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# EXHIBIT A

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

In the Matter of )  
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Tronox Limited, )  
a corporation, )  
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National Industrialization Company )  
(TASNEE) )  
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National Titanium Dioxide Company )  
Limited (Cristal) )  
a corporation, and )  
 )  
Cristal USA Inc., )  
a corporation, )  
 )  
Respondents. )

DOCKET NO. 9377

DECLARATION OF MAHOMED MAITER

1. My name is Mahomed Maiter. I am Senior Vice President of White Pigments at Venator Materials PLC ("Venator"). I submit this Declaration in Support of Non-Party Venator Material PLC's Response to Respondents' Joint Motion to Amend the Protective Order Governing Confidential Material.

2. I am over 21 years of age, and I am competent to make this Declaration. The statements herein are true and are within my personal knowledge.

3. I am a Senior Vice President at Venator, and oversee the White Pigments business of Venator's Titanium Dioxide segment.

4. As part of my responsibilities: I monitor market and competitor activity based on publicly available information; and I manage Venator's activity based on non-public, internally produced reports and analyses based on customer-specific transaction-level data for

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the sale of Titanium Dioxide by Venator, on detailed production and manufacturing data sets for the production of Titanium Dioxide by Venator, and on confidential business plans.

5. The customer-specific transaction-level data includes the line-item detail of each transaction conducted by Venator, showing customer-specific information including customer name and address, product grade, price, quantity supplied, format of packaging and delivery, and ship-to-location (the "Customer-Specific Transaction-Level Data"). The detailed production and manufacturing data sets contain detailed information on production levels and costs, production location, crystal forms, and manufacturing process (the "Detailed Production and Manufacturing Data Sets").

6. I am aware of the circumstances surrounding the Federal Trade Commission's ("FTC") investigation of the merger of Tronox Limited ("Tronox") and National Titanium Dioxide Company Limited (Cristal) to the extent that it pertains to information requests made of Venator by the FTC and Venator's responses.

7. On June 14, 2017, the FTC issued a subpoena duces tecum (the "SDT") and a civil investigative demand ("CID") to Huntsman Corporation ("Huntsman"). At that time, the Titanium Dioxide and Performance Additives segments operated as one division, Huntsman's Pigments and Additives division. Subsequent to the issuance of the SDT and CID, Huntsman separated its Pigments and Additives division into a separate publicly traded company pursuant to an initial public offering of the shares of Venator. Venator now operates the former Pigments and Additives division separately from Huntsman.

8. Venator produced the Customer-Specific Transaction-Level Data and the Detailed Production and Manufacturing Data Sets as part of its responses to the SDT and CID.

9. The Customer-Specific Transaction-Level Data and the Detailed Production and Manufacturing Data Sets are considered to be the "Crown Jewels" of Venator's business

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information because they are critical to developing and implementing pricing and customer strategies. This data is used to monitor and measure customer purchases and profits, to inform our negotiation strategy with customers, and to configure our commercial and competitive offer to individual customers. Venator would not share the Customer-Specific Transaction-Level Data and the Detailed Production and Manufacturing Data Sets with a competitor. Competitors could use this data to “reverse engineer” Venator’s business strategy, operational capabilities, and relationships. In my view, the data could be used to undermine the ability of Venator to negotiate and build relationships with new and existing customers, and to compete.

10. I would be very concerned if Tronox or Cristal could access or use this data. I am very concerned that the disclosure of the Transaction Data to Cristal and Tronox, even to in-house counsel, would be highly prejudicial to Venator.

Pursuant to 15 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my belief.

Executed this 1<sup>st</sup> day of February, 2018.



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Mahomed Maiter

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# EXHIBIT B

UNITED STATES OF AMERICA  
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,

Respondents.

DOCKET NO. 9377

DECLARATION OF RUSSELL R. STOLLE

1. My name is Russell R. Stolle. I am Senior Vice President, General Counsel, and Chief Compliance Officer of Venator Materials PLC ("Venator"). I submit this Declaration in Support of Non-Party Venator Material PLC's Response to Respondents' Joint Motion to Amend the Protective Order Governing Confidential Material.

2. I am over 21 years of age, and I am competent to make this Declaration. The statements herein are true and are within my personal knowledge.

3. As General Counsel, I am the senior lawyer at Venator and responsible for leading the legal department of Venator as it addresses all legal services requirements of the company, including the protection of Venator's valuable and sensitive confidential business information, among other responsibilities.

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4. I am aware of the circumstances surrounding the Federal Trade Commission's ("FTC") investigation of the merger of Tronox Limited ("Tronox") and National Titanium Dioxide Company Limited (Cristal) to the extent that it pertains to information requests made of Venator by the FTC and Venator's responses.

5. On June 14, 2017, the FTC issued a subpoena duces tecum (the "SDT") and a civil investigative demand ("CID") to Huntsman Corporation ("Huntsman"). At that time, the Titanium Dioxide and Performance Additives segments operated as one division, Huntsman's Pigments and Additives division. Subsequent to the issuance of the SDT and CID, Huntsman separated its Pigments and Additives division into a separate publicly traded company pursuant to an initial public offering of the shares of Venator. Venator now operates the former Pigments and Additives division separately from Huntsman.

6. The scope of the SDT and CID were extremely broad. Venator engaged outside counsel and negotiated extensively with the staff of the FTC to narrow the scope.

7. Prior to the receipt of the SDT and CID, the staff of the FTC interviewed Mahomed Maiter, who is now Senior Vice President, White Pigments, at Venator and oversees the White Pigments business of Venator's Titanium Dioxide segment.

8. Venator's responses to the SDT and CID included highly sensitive business information, including but not limited to confidential business plans and detailed data sets containing production levels, costs, and customer-specific price information. Venator would not share such information with a competitor or outside of the company.

9. The staff of the FTC also requested another interview with Mr. Maiter and that he provide a declaration documenting the substance of the interview. The declaration was provided in lieu of Mr. Maiter having to appear at an investigational hearing.

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10. On December 7, 2017, the staff of the FTC informed Venator through its outside counsel that it was filing suit and would be required to disclose to outside counsel of Cristal and Tronox and their experts the information produced to the FTC by Venator during the investigation. A true and accurate copy of the email from Robert Tovsky to William Vigdor (Venator's outside counsel) is attached as Attachment A.

11. In the December 7 communication, the FTC notified Venator that a protective order would be put in place and that "Access to your [Venator's] confidential information is limited to court personnel, FTC employees, the FTC's experts and consultants hired to help us with our investigation and litigation, any witness or deponent who may have authored or received the information in question, and the *outside* counsel hired by the merging parties, their experts, and consultants. No executives or employees of the merging parties may access your information." It is my understanding that these protections were documented in a protective order (the "Protective Order") attached to the email and that this Protective Order would be applicable in this matter.

12. The message also provides that "Venator retains the right to seek legal counsel and file for a separate, additional protective order tailored to your situation and the information you submitted." FTC staff also stated that "In connection with the federal court preliminary injunction proceeding, we will seek to have a similarly strict protective order entered by the court."

13. At that time, I reviewed the Protective Order provided by Complaint Counsel and believed that the Protective Order was sufficient to protect the interests of Venator. In reliance upon the Protective Order governing the disclosure of Venator information to Cristal and Tronox

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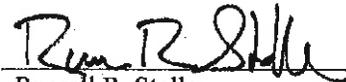
in the administrative proceeding, and the FTC's rules of practice, Venator did not object to the disclosure of such information.

14. I understand that Tronox and Cristal are now seeking to modify the protective order to allow Jamie Koutras and Steven Kaye, in-house counsel at Cristal and Tronox, respectively, to access all Venator information.

15. The Venator information provided to the FTC is highly sensitive and would be extremely prejudicial to Venator if used commercially by a competitor.

Pursuant to 15 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my belief.

Executed this 1st day of February, 2018.

  
\_\_\_\_\_  
Russell R. Stolle

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Attachment A

**From:** Tovsky, Robert S. [mailto:RTOVSKY@ftc.gov]  
**Sent:** Thursday, December 7, 2017 1:13 PM  
**To:** Vigdor, William R. <wvigdor@velaw.com>  
**Subject:** Tronox-Cristal

Dear Billy,

Thank you for the information Venator provided in connection with the Federal Trade Commission's investigation of the proposed transaction between Tronox and Cristal. As described in the following FTC press release, <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies>, the Commission has voted to challenge the proposed transaction in an administrative trial, and it also has authorized FTC staff to file a complaint in federal district court for a preliminary injunction, which would prevent the parties from closing the transaction until the administrative trial is complete.

In connection with our administrative trial, we will be required to provide the Respondents with any materials that you (and many other third parties) provided to us during our investigation. In the interest of preserving the confidentiality of information submitted by third parties in FTC investigations, the FTC's Rules of Practice prescribe a standard protective order for the administrative proceeding. The FTC's standard protective order, which is attached in PDF format, restricts the people that have access to third-party information and places restrictions on what they can do with that information. Access to your confidential information is limited to court personnel, FTC employees, the FTC's experts and consultants hired to help us with our investigation and litigation, any witness or deponent who may have authored or received the information in question, and the *outside* counsel hired by the merging parties, their experts, and consultants. No executives or employees of the merging parties may access your information.

Venator retains the right to seek legal counsel and file for a separate, additional protective order tailored to your situation and the information you submitted. I will continue to update you with the latest developments in this case as well as any related litigation that may affect you.

In connection with the federal court preliminary injunction proceeding, we will seek to have a similarly strict protective order entered by the court. We will keep you posted on any developments.

If you have any questions please do not hesitate to contact me by phone at (202) 326-2634 or by email at [rtovsky@ftc.gov](mailto:rtovsky@ftc.gov). Again, we greatly appreciate your assistance.

Regards,

Bob Tovsky

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**CERTIFICATION OF 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 the paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: February 1, 2018

/s/ William Vigdor  
William Vigdor

VINSON & ELKINS LLP  
2200 Pennsylvania Avenue NW  
Suite 500 West  
Washington, DC 20037  
(202) 639-6650  
wvigdor@velaw.com

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**CERTIFICATION OF SERVICE**

I HEREBY CERTIFY that on this 1 of February 2018, that I filed the foregoing documents 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  
secretary@ftc.gov

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

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:

Bruce Hoffman  
Haidee Schwartz  
Chuck Loughlin  
Thomas Brock  
Benjamin Gris

Dominic Vote  
Jon Nathan  
Krisha Cerilli  
Robert Tovsky  
April Tabor

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*Counsel for Tronox Limited*

Dated: February 1, 2018

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*Counsel for National Industrialization  
Company (TASNEE), National Titanium  
Dioxide Company Limited, and Cristal USA  
Inc.*

/s/ William Vigdor  
William Vigdor

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2200 Pennsylvania Avenue NW  
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Washington, DC 20037  
(202) 639-6650  
wvigdor@velaw.com

Notice of Electronic Service

**I hereby certify that on February 01, 2018, I filed an electronic copy of the foregoing Motion of Non-Party Venator Materials PLC for Leave to File a Response to Respondents' Joint Motion to Amend the Protective Order Governing Confidential Information, 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 February 01, 2018, I served via E-Service an electronic copy of the foregoing Motion of Non-Party Venator Materials PLC for Leave to File a Response to Respondents' Joint Motion to Amend the Protective Order Governing Confidential Information, upon:**

Seth Wiener  
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seth.wiener@apks.com  
Respondent

Matthew Shultz  
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matthew.shultz@apks.com  
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Albert Teng  
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Andrew Pruitt  
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Complaint

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Respondent

**I hereby certify that on February 01, 2018, I served via other means, as provided in 4.4(b) of the foregoing Motion of Non-Party Venator Materials PLC for Leave to File a Response to Respondents' Joint Motion to Amend the Protective Order Governing Confidential Information, upon:**

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Respondent

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William Vigdor  
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