

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

**ORDER DENYING RESPONDENTS' MOTION
TO AMEND THE PROTECTIVE ORDER**

I.

On January 19, 2018, Respondents filed a Joint Motion to Amend the Protective Order Governing Confidential Material, to designate Respondent Cristal USA's Senior Corporate Counsel and Secretary James G. Koutras and Respondent Tronox Limited's Deputy General Counsel Steven Kaye (collectively, "designated in-house counsel") as individuals to whom materials that have been designated confidential in this case may be disclosed ("Motion"). Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed an opposition to the Motion on February 1, 2018 ("Opposition").

Having fully considered the Motion and the Opposition, and as further explained below, the Motion is DENIED.¹

II.

The Protective Order in this case was issued on December 7, 2017 in accordance with Commission Rule 3.31(d) of the Commission's Rules of Practice. 16 C.F.R. § 3.31(d). That rule states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). In accordance with the standard protective order language in the appendix to Rule 3.31, the Protective Order in this case allows access to and review of confidential materials by, among others, "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." 16 C.F.R. § 3.31(d), Protective Order ¶ 7. The standard protective order language does not include access to confidential materials for in-house counsel.

Respondents state that the Protective Order precludes Respondents' employees, including in-house counsel, from accessing information designated as confidential by parties or third parties and that Complaint Counsel has designated nearly all of its discovery responses confidential. Respondents argue that it is necessary for the designated in-house counsel to have access to confidential material in order to adequately participate in and direct the defense of the claims against Respondents. Respondents further assert that neither designated in-house counsel plays a part in Respondents' competitive decision-making, and thus could not use the information for a competitive advantage. Lastly, Respondents argue that there is a "special need" in this case for access to confidential material because of the relatively condensed period of time between now and trial, and the expertise of designated in-house counsel is needed to expeditiously prepare their clients' defense.

Complaint Counsel states that Respondents have demonstrated no special need to amend the Protective Order and that Respondents can adequately defend their interests in this case. Complaint Counsel further states that third parties have reasonably relied upon the Protective Order when producing confidential materials. Complaint Counsel also contends that the designated in-house counsel appear to be involved in competitive decision-making and that allowing them access to competitively sensitive and confidential material would contravene the intent of the Protective Order. Finally, Complaint Counsel states that the Commission determined in a public rulemaking that the standard protective order provided in Appendix A to Rule 3.31(d) should be mandatory, should not be

¹ On February 1, 2018, non-party Venator Materials PLC filed a Motion for Leave to File a Response to the Motion together with a proposed response, arguing that Respondents' Motion should be denied on the ground that it would be harmed if its confidential materials were disclosed to the designated in-house counsel. Also on February 1, 2018, non-party PPG Industries, Inc. filed a Motion to Quash or Limit Subpoenas, which includes a request in the alternative that Respondents' Motion should be denied on similar grounds. Based on the ruling in this Order, the non-party motions are denied as moot.

negotiated on a case-by-case basis, and should not allow in-house counsel to access confidential discovery material.

III.

In amending its Rules of Practice in 2009, the Commission adopted Rule 3.31(d), which requires the ALJ to issue the standard protective order set forth in an appendix to the Rule. FTC Rules of Practice, Interim Rules with Request for Comment, 74 Fed. Reg. 1804, 1812 (Jan. 13, 2009) (“Interim Rules”). The Commission rejected arguments that parties should be able to negotiate orders suited to the needs of the particular case on grounds that the negotiations can delay discovery, prevent the Commission from protecting confidential material in a uniform manner in all Part 3 cases, and reduce the confidence of third party submitters that their confidential submissions will be protected. *Id.* The Commission specifically rejected the suggestion that in-house counsel be allowed access to confidential materials because prohibiting such access might inhibit a respondent’s ability to defend itself, stating:

The Commission’s statutory obligation to maintain the confidentiality of commercially sensitive information . . . raises serious questions about the wisdom of allowing disclosure of information in its custody to in-house counsel, who might intentionally or unintentionally use it for purposes other than assisting in respondent’s representation, for example, by making or giving advice about the company’s business decisions. The Commission believes it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.

Id. at 1812-13.

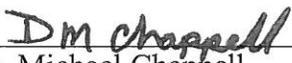
In accordance with Rule 3.31(d), the Protective Order issued in this case does not permit disclosure of confidential materials to in-house counsel and will not be amended in this case to allow the designated in-house counsel such access.²

² The Protective Order provides that “[a] designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of [the] Order.” 16 C.F.R. § 3.31(d), Protective Order ¶ 5. According to Respondents, the FTC has designated nearly all of its discovery responses as confidential. The Protective Order was issued to protect the rights of parties and non-parties from disclosure of their confidential information by limiting disclosure to the narrow set of persons listed in Paragraph 7 of that Order. It does not give parties or non-parties the unfettered ability to designate every document produced as “confidential.” If Respondents have a basis for believing that materials that have been designated as “confidential” should not have been, Respondents’ counsel shall request that Complaint Counsel, as the party who served subpoenas on the non-parties, work with the non-parties to ensure that the non-parties have designated as “confidential” only those documents that are properly designated as confidential, in accordance with the definition of that term in the Protective Order.

IV.

After full consideration of Respondents' Motion to Amend Protective Order and Complaint Counsel's Opposition thereto, and for all the foregoing reasons, Respondents' Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 2, 2018