

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



COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of
Tronox Limited
a corporation,

PUBLIC

Docket No. 9377

National Industrialization
Company (TASNEE)
a corporation,

The National Titanium Dioxide
Company Limited (Cristal)
a corporation, And

Cristal USA Inc.
a corporation.

RESPONDENTS' APPEAL OF THE INITIAL DECISION

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RESPONDENTS' APPEAL OF THE INITIAL DECISION

Respondents Tronox Limited (“Tronox”) and the National Titanium Dioxide Company Limited (“Cristal”) respectfully request that the Commission narrow the geographic scope of the Proposed Order issued by Chief Administrative Law Judge Michael D. Chappell, which enjoins further discussions between Respondents in the six countries outside of North America where Cristal is seeking to divest titanium dioxide (“TiO₂”) production facilities.

The global geographic scope of the Proposed Order is not necessary under the record in this matter. The Complaint, the evidence at trial, and Chief Judge Chappell’s findings were focused on the combination of Tronox’s and Cristal’s U.S. assets in North America, and the impact of that combination on the North American relevant market. The evidence and findings of fact do not imply that combining Tronox’s and Cristal’s ex-U.S. assets would have adverse effects on the North American market. In fact, Complaint Counsel argued and Chief Judge Chappell found that the competitive effects from combining Respondents’ ex-U.S. assets was irrelevant for their competitive analysis.

As a result, the global injunction in the Proposed Order is not required to meet the Commission’s enforcement goals. A global injunction harms the parties unnecessarily—the proposed transaction also includes an Australian company (Tronox) acquiring various foreign assets from a Saudi Arabian company (Cristal), including mines and smelting facilities on other continents. Complaint Counsel argued and Chief Judge Chappell found that the combination of those foreign assets is irrelevant to competition in North America, and eight foreign competition authorities whose jurisdictions *are* impacted by the combination of those foreign assets—and the procompetitive and output-enhancing impact of that combination in those foreign countries—have each cleared the transaction. The Commission should therefore amend the overbroad Proposed

Order, and limit that order to the scope of assets that were the focus of the evidence and findings in this case.

The geographic over breadth of Chief Judge Chappell's order coupled with its requirement that Tronox immediately return all Cristal confidential information will likely produce two unnecessary negative consequences:

- The Proposed Order would require Respondents to cease discussions with Complaint Counsel regarding a proposed remedy whereby Tronox would resolve any alleged competitive concerns through a "clean sweep" of all of Cristal's TiO₂ manufacturing assets in North America plus all associated assets to a single purchaser, INEOS Enterprises ("INEOS"). The proposed remedy will result in absolutely no increase in concentration in the North American market.
- The Proposed Order would require Respondents to cease discussions about the acquisition of certain under- or non-performing production facilities outside the United States where Tronox intends to increase production (the Yanbu TiO₂ production facility) or commence production (the Jazan smelter). If Tronox is successful in these endeavors, global customers will benefit through the increase of overall TiO₂ supply.

Based on the foregoing, Respondents respectfully request that the Commission enter an order enjoining only the North American aspects of their proposed global transaction.

STATEMENT OF THE CASE

A. Summary of Proceedings

On February 21, 2017, Respondents entered an agreement by which Tronox, an Australian corporation, would acquire Cristal, a Saudi Arabian company, and its TiO₂ business around the world. The deal encompasses assets on six continents, requiring the regulatory approval of nine different competition authorities worldwide. Presently, eight of those authorities have approved Respondents' proposed transaction, with this Commission being the sole remaining approval required. Chief Judge Chappell, however, has found that the proposed transaction is substantially likely to lead to anticompetitive effects in the market for chloride TiO₂ sales in North America

(meaning the United States and Canada). Though Respondents disagree with Chief Judge Chappell's findings, they have elected not to appeal those findings on their merits. Instead, Respondents merely request that the Commission modify the order Chief Judge Chappell has proposed so that it does not enjoin the *worldwide* transaction, but only the components of the transaction that would take place in the North American market found by Chief Judge Chappell.

Prior to the issuance of Chief Judge Chappell's decision on December 7, 2018, Tronox and Cristal had proposed to Complaint Counsel the remedy transaction described above which would represent a "clean sweep" of all of Cristal's North American assets, resulting in zero increase in North American market concentration. The proposed buyer is INEOS, a global chemicals manufacturer with impeccable operational bona fides related to chemical businesses in the United States and around the world. INEOS generates over \$60 billion per annum in revenues solely in the chemical industry with a lengthy history of acquiring and successfully operating chemical assets. INEOS has a lengthy and successful history of acquiring chemical production assets and increasing production and efficiency of those assets. Notably, INEOS has been a successful divestiture buyer in two prior structural remedies ordered by the Commission (in the Cytec / UCB transaction in 2005 and the Dow / Union Carbide transaction in 2001). In both cases, as with nearly all of its dozens of other acquisitions in the past two decades, INEOS continues to operate the acquired assets successfully today.

A Commission order limited to North America would enable the parties to continue to explore a remedy transaction in North America and potentially enhance production worldwide. The parties are continuing productive conversations with Staff and believe a mutually satisfactory remedy is within reach.

The entry of a narrowed order would also be entirely consistent with Chief Judge Chappell's findings that anticompetitive effects from the proposed transaction are limited to North America. Those findings are hardly surprising. Competition authorities from around the world have reviewed the transaction and approved it. The European Commission ("EC"), performed an extended, comprehensive investigation, complete with economic research, testimony and customer statements.¹ The EC approved the transaction based on a relatively narrow remedy divestiture that is in the process of being implemented to the EC's satisfaction.

Accordingly, Respondents propose an order (Exhibit A) enjoining only the sale to Tronox of Cristal's North American assets, which are the only assets implicated in the theories of anticompetitive effects advanced in the Complaint, urged by Complaint Counsel at trial, and adopted by Chief Judge Chappell in his Initial Decision (ID). Out of an abundance of caution, Respondents' proposal would also prohibit Respondents from taking any action that would materially impair the competitive viability of Cristal's North American assets.

B. The Relevant Background

The process culminating in the Proposed Order has taken nearly two years. Respondents offer the following summary of the background to help the Commission understand why they believe that the Proposed Order should be amended.

1. TiO₂ Generally

TiO₂ is a powder pigment used to add whiteness, brightness, opacity and durability to paints, industrial and automotive coatings, plastics, and other specialty products. ID 6. TiO₂ is

¹ Customer statements are confidential to the EC investigation. That said, they are available to the Commission confidentially upon request.

produced by mining heavy materials from sand and then smelting that material to produce TiO₂ “feedstock.” ID 6. Feedstock can then be used to manufacture TiO₂ using either a chloride or sulfate process. ID 6. Producers in the paint and coatings, plastic, inks, and paper industries² rely on TiO₂ in their manufacturing processes. ID 6-7.

2. The Proposed Transaction

On February 21, 2017, Tronox announced an agreement to acquire Cristal’s TiO₂ business, including its “global pigment operations around the world, plus [Cristal’s] mineral sands operations in Australia and in Brazil.” Respondents’ FOF ¶ 19 (Quinn, Tr. 2309-10). The proposed transaction includes assets on six continents, the bulk of which are outside the relevant market defined by Complaint Counsel and Chief Judge Chappell. Currently, standalone Tronox (an Australian company) produces TiO₂ at facilities in Hamilton (Mississippi, USA), Kwinana (Australia), and Botlek (the Netherlands) and mines TiO₂ feedstock in South Africa and Australia. Tronox also has a research facility in Oklahoma City (Oklahoma, USA). Cristal is a Saudi Arabian company that manufactures TiO₂ on five continents, at facilities in Ashtabula (Ohio, USA), Yanbu (Saudi Arabia), Stallingborough (United Kingdom), Bunbury (Australia), Bahia (Brazil), and Thann (France). Cristal mines TiO₂ feedstock in Brazil and Australia and operates a research facility near Baltimore (Maryland, USA). As originally proposed, Tronox would have acquired all of Cristal’s worldwide TiO₂ assets.

Because of the geographic scope of the transaction, Respondents need approval from *nine* competition authorities around the world. Thus far, Respondents have secured approval from eight

² Only rutile TiO₂ is at issue in this case. Another form of TiO₂, called anatase, is also used in other industries, like pharmaceuticals, cosmetics, and foods.

of those jurisdictions, including competition authorities in Australia, China, New Zealand, Saudi Arabia, South Korea, Turkey, Columbia, and Europe (the European Commission). The European Commission, after thoroughly assessing the risks that the transaction would lead to coordinated effects, approved the transaction based on a minor remedy, the divestiture of a single product line. The other competition authorities approved the transaction unconditionally. Approval in the United States is the only remaining regulatory hurdle preventing Tronox and Cristal from closing the proposed transaction.

3. Procedural History

On December 5, 2017, the Commission, comprised of then-Acting Chairman Maureen Ohlhausen and Commissioner Terrell McSweeney, issued a complaint (“Complaint”) against Tronox and Cristal to oppose the proposed transaction. The Complaint alleged a relevant product market limited to TiO₂ produced through the chloride process and a relevant geographic market limited to North America, which the Complaint defined as the United States and Canada. Complaint ¶¶1, 25. Specifically, the Complaint alleged that TiO₂ from the rest of the world “does not meaningfully constrain prices to North American customers,” because such imports do not “play[] a material role in the competitive balance in the North American market.” Complaint ¶¶36.

The Complaint further alleged that the transaction “would substantially lessen competition in the North American market for chloride TiO₂ in at least two ways”: by “increas[ing] the likelihood of coordination” among TiO₂ competitors by consolidating the majority of TiO₂ sales and production capacity in North America in two suppliers (New Tronox and Chemours) and by “increas[ing] the incentive and ability of Tronox ... to discipline its output to influence North American chloride TiO₂ supply and increase prices.” Complaint ¶3. It thus limited its two theories

to competitive effects resulting from increased concentration in the alleged North American market.

For example, the Complaint alleges that “anticompetitive conscious parallelism” occurs among *North American* TiO₂ producers “*in the North American chloride TiO₂ market*, resulting in higher chloride TiO₂ prices for customers.” Complaint ¶¶47-49 (emphasis added). It also alleges that there is a “tight link between *North American* chloride TiO₂ prices and *North American production*,” and that “Tronox has a history of seeking to support *North American* chloride TiO₂ prices by curtailing output in *North America*.” Complaint ¶¶50-51 (emphasis added). Finally, the Complaint alleged that countervailing factors, such as TiO₂ imports into North America from producers in other regions, would not mitigate the alleged anticompetitive effects: “TiO₂ imports into North America, mostly sulfate TiO₂, manufactured by smaller TiO₂ companies, primarily from China, are limited and unlikely to provide a meaningful competitive restraint in the near future.” Complaint ¶57.

Following issuance of the Complaint, the Commission assigned the case to Chief Administrative Law Judge D. Michael Chappell.

On May 18, 2018, Chief Judge Chappell heard opening statements from both sides and began hearing witness testimony. Testimony continued over the course of the next month for a total of sixteen days. Chief Judge Chappell heard closing arguments on September 14, 2018.

On July 4, 2018 and in the midst of the Part 3 proceedings, Respondents secured the final foreign regulatory approval required to consummate the transaction from the EC. The EC granted its approval pending Tronox’s successful divestiture of its paper laminate business to a willing

purchaser with chloride-production capacity in Europe.³ On July 16, 2018, Tronox announced that Venator Materials PLC (“Venator”) had agreed to purchase its paper laminate business and that Venator had separately entered an agreement with Tronox in which Tronox could require Venator to purchase Cristal’s two TiO₂ plants in Ashtabula, Ohio in the event an injunction were to be issued against the proposed transaction. On August 20, 2018, the European Commission announced that it had issued its final approval to the proposed transaction, given that the divestiture of Tronox’s paper laminate business to Venator was both adequate and complete.

Once the EC issued its final approval, the parties would have been free to consummate the proposed transaction because there was no federal court injunction in place. Hence, in the midst of the Part 3 proceedings, on July 10, 2018, Complaint Counsel sought a preliminary injunction in federal district court. The district court held an abbreviated hearing—just 8 hours of total presentation per side, including each side’s three witnesses and opening and closing arguments. On September 5, 2018, the district court granted the FTC a preliminary injunction pending the final resolution of the Part 3 adjudication and appeals.

After the ruling by the district court, Respondents commenced remedy discussions with Complaint Counsel, wherein they offered to divest the entirety of Cristal’s TiO₂ manufacturing assets in North America plus all associated assets. As noted above, on July 16, 2018, Tronox announced that Venator had agreed to purchase Cristal’s North American business operations in the event an injunction were to be issued against the proposed transaction. Complaint Counsel indicated that a remedy transaction with Venator would not be suitable, however, because Venator

³ The divestiture represented only approximately 8% of Tronox’s sales volumes in Europe for 2018.

currently has TiO₂ production operations in North America. Accordingly, Tronox sought a buyer for Cristal's North American business that would be a new entrant in North America, resulting in no concentration in North America.

Respondents thus proposed the remedy transaction described above, whereby INEOS would acquire the totality of Cristal's North American operations. Complaint Counsel has been working diligently to review the proposed remedy transaction and Respondents are optimistic that, with time, some form of remedy will be agreed upon. Respondents have done their level best to ensure that the proposed remedy addresses Staff's concerns:

- The divestiture removes any overlap in the relevant market defined by Complaint Counsel, as it includes Cristal's entire North American TiO₂ business. The resulting increase in concentration in the purported relevant market will be zero.
- INEOS is not currently in the TiO₂ business, which means that the divestiture transaction will not raise any competitive concerns on its own.
- INEOS is a highly successful global chemicals company, with over \$60 billion in annual revenues and a lengthy history of acquiring and successfully operating chemical assets.
- INEOS's successful record of acquisitions includes two prior transactions in which INEOS was a successful divestiture buyer in structural remedies ordered by the Commission.
- INEOS is paying 100% cash for the transaction from funds it has on hand and, on information and belief, Ineos does not intend to encumber Cristal's North American TiO₂ business with indebtedness.
- INEOS will be acquiring not only the Cristal plants, but also the people associated with those facilities, the know-how, intellectual property rights, Cristal's state-of-the-art research and development facility in Baltimore, Maryland, and other assets needed to successfully operate these facilities.
- INEOS has conducted extensive due diligence in connection with the proposed acquisition and has reached an informed conclusion that it will be acquiring all necessary assets to successfully operate these facilities and compete in the marketplace.

Significantly, INEOS has presented specific plans to Staff to increase production from

Cristal's North American facilities, resulting in increased output and intensified competition in the relevant market. Moreover, Respondents understand that a number of customers have expressed their support for the proposed divestiture remedy to Staff, further supporting the competitive virtues of this proposed remedy. Respondents and INEOS have endeavored to be open and transparent to enable Staff to undertake a thorough review of the proposed remedy to ensure it would not have anticompetitive effects.

As of the date of this Appeal, Respondents and INEOS continue to work cooperatively with Complaint Counsel to resolve any outstanding issues relating to the proposed divestiture. On December 4, 2018, Tronox announced that it had asked Chief Judge Chappell to certify to the Commission the proposed remedy transaction with INEOS. Tronox acknowledged that Staff was unwilling at that time to support or recommend the proposed remedy transaction. On December 7, 2018, Chief Judge Chappell denied Tronox's motion to certify to the Commission its proposed remedy transaction with INEOS, stating that the proposed remedy at that time was "not comprehensive" and was presented too close in time to the issuance of his Initial Decision. Following that order, the parties have continued to work with Staff to formulate a comprehensive and acceptable remedy.

That same day, Chief Judge Chappell filed his Initial Decision, finding in favor of Complaint Counsel and proposing to enjoin the transaction. Chief Judge Chappell found that chloride TiO₂ sold in North America constitutes a relevant product and geographic market. ID 11-30. Regarding the geographic market, Chief Judge Chappell found that North American TiO₂ customers almost exclusively purchase TiO₂ *produced in North America*. ID 26-28. He also found that customers do not engage in arbitrage by purchasing TiO₂ elsewhere and importing it

into North America, and in fact, “[i]mports account for only 3% of North American chloride TiO₂ sales.” ID 28.

Chief Judge Chappell further found that Complaint Counsel had established that the proposed transaction would result in market share statistics in the North American chloride market that establish “a presumption that the effect of the Acquisition may be to substantially lessen competition.” ID 32. That presumption was strengthened because the North American chloride market is vulnerable to coordinated conduct among competitors, and Chief Judge Chappell found that the proposed transaction would increase this vulnerability. ID 32-43.⁴

Chief Judge Chappell then rejected Respondents’ rebuttal arguments. In particular, he rejected Respondents’ arguments based on efficiencies in plants outside North America, because increases in production from those plants will not affect the relevant market. He reasoned, for example, that performance improvements at the Yanbu pigment facility or their rehabilitation of the Jazan feedstock smelter to productive use (both in Saudi Arabia) “are related to assets outside the United States and thus outside the relevant North America geographic market” and that “Respondents fail[ed] to demonstrate that increased output from the Yanbu plant or the Jazan slagger will benefit the relevant market for chloride TiO₂ in North America.” ID 55. Chief Judge Chappell did not find that the efficiencies would not be realized, merely that the focus for his competitive effects analysis was on North America.

While Chief Judge Chappell’s analysis of competitive effects focused exclusively on North America, his Proposed Order is much broader. In particular, Chief Judge Chappell proposed an

⁴ Judge Chappell did not address Complaint Counsel’s second theory of anticompetitive effects, unilateral output reduction. ID 43, n.13.

order prohibiting the entire global transaction and barring Tronox from acquiring *any part of* Cristal. ID 60. The Proposed Order would impose four requirements: (A) that Tronox and Cristal cease and desist from any consummation, direct or indirect, of the proposed transaction; (B) that Tronox cease and desist from acquiring all or any part of Cristal; (C) that Respondents return all confidential information received from one another; and (D) that Respondents submit verification of their compliance with these requirements within 15 days of the order becoming final. ID 123-24. Chief Judge Chappell justified this Proposed Order by asserting—without specific support—that “its provisions are reasonably related to the proven violation” of Section 7 of the Clayton Act. ID 61-62. Chief Judge Chappell also acknowledged (but rejected) Respondents’ position that no remedy was required because no Section 7 violation existed. ID 61, n.19.

As of the date of this Appeal, Respondents and INEOS continue to work cooperatively with Complaint Counsel in an effort to reach an acceptable and comprehensive structural remedy that will protect competition in North America while permitting the parties to consummate a procompetitive transaction in other jurisdictions, where competition authorities have cleared the transaction. Tronox also remains committed to bringing Cristal’s inactive and underperforming assets in Saudi Arabia into active use to increase TiO₂ production worldwide.

4. Appeal

Respondents now bring this appeal to the Commission, solely objecting to the geographic scope of the injunction order as proposed by Complaint Counsel and adopted by Chief Judge Chappell. Specifically, the breadth and scope of the Proposed Order is not reasonably related to the antitrust violations alleged or proved at trial, and it is not related to protecting competition within the alleged relevant market. Respondents will show that the Proposed Order will both inhibit any acquisition transactions outside North America, including those with the potential to

increase production, and inhibit ongoing settlement discussions with Complaint Counsel. To conform the Proposed Order to the proof at trial and Chief Judge Chappell's findings, the order should be limited only to prohibiting Tronox from acquiring any of Cristal's assets *in the North American geographic market* or materially impairing the viability of those assets. *See* Ex. A, Respondents' Proposed Order.

After nearly two years of a global effort to secure regulatory approval from nine competition authorities and having received approval from eight of those authorities, Respondents would like the opportunity to continue to structure a non-North American transaction that they strongly believe is pro-competitive. In addition, Respondents believe that requirement set forth in the Interim Order to return all confidential information related to the transaction would have the unintended consequence of prohibiting a potential remedy transaction with INEOS. Respondents have elected not to appeal Chief Judge Chappell's factual findings. Respondents do, however, seek a final order that is appropriately related to the Complaint's allegations, to Complaint Counsel's trial evidence, and to Chief Judge Chappell's findings of fact.

QUESTION PRESENTED

Accepting Chief Judge Chappell's factual findings and legal conclusion relating to the North American market for chloride TiO₂, whether the Commission should limit its remedy to prohibiting Tronox from acquiring (or materially impairing) Cristal's *North American* assets, which are the only assets implicated by the theories Complaint Counsel pressed in this case, the evidence Complaint Counsel submitted at trial, and Chief Judge Chappell's factual findings.

ARGUMENT

The Commission is empowered to order divestiture of assets even outside the market relevant to the Section 7 violation, but only "where divestiture of those assets is necessary to

restore competition within the relevant market.” *In re Polypore Int’l, Inc.*, No. 9327, 2010 WL 5132519, at *35 (FTC Dec. 13, 2010); *see also Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 441 (5th Cir. 2008) (same).

Here, Chief Judge Chappell has prepared an order enjoining the entire proposed transaction everywhere in the world—including in the eight other jurisdictions in which competition authorities have already approved the transaction. Yet the breadth of that Proposed Order bears no reasonable relation to the substantial likelihood of anticompetitive harm that Complaint Counsel alleged and that Chief Judge Chappell found to exist. The Complaint does not allege that any portion of the proposed transaction *outside* of North America is substantially likely to cause anticompetitive effects *within* North America.

In fact, the Complaint makes some allegations that directly contradict such a theory, including that imports make up a negligible amount of TiO₂ consumption in North America and that market entry from other international competitors would not materially affect the competitive dynamic in North America. Complaint Counsel also did not put forward any evidence at trial that would suggest that any part of the proposed transaction outside of North America would have a meaningful effect on competition in North America. Chief Judge Chappell’s factual findings were similar, as he found only that the North American aspects of the transaction raised the substantial possibility of anticompetitive effects in North America. Moreover, he specifically found that non-North American aspects of the transaction would not materially affect competition in North America. Accordingly, it is impossible to conclude that a worldwide injunction of the entire proposed transaction is required to remedy the substantial likelihood of anticompetitive effects that the Complaint alleged and that Chief Judge Chappell found to exist.

Settlement discussions between Respondents and staff are continuing to this date. Complaint Counsel is undertaking a thorough review of the proposed settlement and Respondents are working hard to address any concerns related to the proposed remedy. An up-front buyer with impeccable credentials and detailed operating plans, INEOS, is now prepared to acquire the assets in question. Unfortunately, Chief Judge Chappell's Proposed Order would severely inhibit the possibility of a cooperative resolution despite this progress and the efforts that both sides have made toward reaching a solution.

Another unintended consequence of the Proposed Order would be its impact on an existing transaction among Respondents and certain of their affiliates that does not involve TiO₂ production facilities. Specifically, the Proposed Order could be read to prohibit the option agreement (the "Option Agreement") announced on May 9, 2018 between Tronox and an affiliate of Cristal, Advanced Metal Industries Cluster Company Limited ("AMIC"), pursuant to which AMIC granted Tronox an option to acquire 90% of AMIC's ownership in a titanium slag smelter facility (the "Slagger") located in Saudi Arabia. The Slagger produces titanium metal feedstock and pig iron, not TiO₂ pigment. The Slagger is currently not operable due to technical issues and possible design flaws. The purpose of the Option Agreement is to allow Tronox to deploy its considerable expertise to re-start the Slagger, Doing so will bring additional high grade titanium feedstock to the market—product that would otherwise never come to market at all. Moreover, Chief Judge Chappell found that the Option Agreement was not part of the proposed transaction because "the Acquisition at issue in this proceeding does not even include an acquisition of the

Jazan slagger.” ID 56, F. 373 (“Tronox’s February 21, 2017 agreement for the acquisition of Cristal does not include any provisions regarding a purchase of the Jazan slagger.”).⁵

Similar points may be made about Tronox’s proposed acquisition of the other ex-U.S. assets of Cristal. For example, there was no showing at trial that Tronox’s acquisition of Cristal’s mines in Brazil or Australia or production facilities in Saudi Arabia, Australia, Brazil, France, and the UK, will have any plausible anticompetitive effects on the North American chloride TiO₂ market.

Accordingly, the Commission should amend the Proposed Order to clarify that (1) it applies only to the proposed transaction in North America and not to other agreements or transactions between Respondents; and (2) Respondents may retain each other’s confidential information related to North America solely for the purpose of facilitating settlement discussion with Complaint Counsel concerning the proposed “clean sweep” divestiture to INEOS. At the very least, the Commission should clarify that nothing about the order applies to the Jazan Smelter, or other assets that are not part of the relevant market.

⁵ Only Section A of the Proposed Order is limited to the transaction as agreed on February 21, 2017. ID 123. Sections B, C, and D contain no such limitation and so arguably may require Tronox and Cristal to “cease and desist” from any sale of the Jazan slagger and to “return all confidential information” they have exchanged in relation to the option contract and technical services agreement. ID 124. Yet there is no reasonable relation between the Proposed Order and the alleged violations in this case because Judge Chappell made clear that those agreements were not part of the proposed transaction. To the extent the order is *not* intended to affect the Jazan agreements, it is unclear and imprecise and should be modified.

I. THE OVERBROAD PROPOSED ORDER CONFLICTS WITH THE EVIDENCE.**A. The Complaint Makes No Allegations Justifying A Worldwide Injunction.**

An order enjoining the worldwide transaction is not reasonably related to the substantial risk of anticompetitive effects in North America that the Complaint alleged.

The Complaint's allegations were limited to the sale of chloride TiO₂ in the North American market, defined as the United States and Canada. Within that market, the Complaint alleged two theories of anticompetitive effects, neither of which would be (by the Complaint's own terms) materially affected by any part of the transaction outside North America. Complaint ¶1. Although acknowledging that the five major producers in North America (Tronox, Cristal, Chemours, Kronos, and Venator) also produce and sell chloride TiO₂ in other regions, Complaint ¶18, the Complaint alleged that "TiO₂ imports into North America" are "mostly sulfate TiO₂, manufactured by smaller TiO₂ companies, primarily from China," and "are limited and unlikely to provide a meaningful competitive restraint in the near future." Complaint ¶57.

Specifically, "Chinese TiO₂ imports accounted for less than 1% of North American chloride TiO₂ sales." Complaint ¶57. Further "[i]mported chloride or sulfate TiO₂ from China *or other countries* does not meaningfully constrain prices to North American customers." Complaint ¶36 (emphasis added); *see also* ¶21 ("although a few Chinese manufacturers have recently begun producing chloride TiO₂, their production has been limited, and only a very small amount has been imported to North America"). Quoting a Tronox earnings call, the Complaint also alleged that "exports from China or from Europe" do not "play[] a material role in the competitive balance in the North American market," Complaint ¶36, and that smaller TiO₂ producers also do not meaningfully affect the North American market, Complaint ¶21 ("smaller regional manufacturers of TiO₂" make "lower quality" largely sulfate product that "is mostly sold

in local or regional markets outside North America”). Nor can TiO₂ customers, according to the Complaint, seek supply from outside of North America and import it themselves. “Import duties, shipping and handling costs, and other logistical challenges would render such efforts both uneconomical and impractical.” Complaint ¶35.

Given the alleged immateriality of TiO₂ imports into the North American market, the Complaint focused solely on *North American producers in North America* as the source of likely anticompetitive effects:

Given relatively inelastic demand for chloride TiO₂, the major North American TiO₂ producers recognize that by limiting the supply of chloride TiO₂ available in North America they are better able to stabilize or increase North American TiO₂ prices. Several of these companies have curtailed or restricted their North American chloride TiO₂ output over the past several years to prop up prices ... by temporarily idling production lines, lowering production rates, or permanently closing plants. They have also allowed chloride TiO₂ inventory to build up, exported North American production, and slowed or delayed production increases in an effort to increase or maintain higher prices.

Complaint ¶23; *see also* ¶¶52-53.⁶ This alleged ability to affect price by controlling North American output occurs independently from any actions any TiO₂ producer might take elsewhere in the world, because as shown, the Complaint alleged that imports into North America are negligible and thus immaterial to the competitive balance of North American supply.

The Complaint further claimed that this alleged North American output reduction would be more likely to occur as a result of further concentration among North American producers—

⁶ The Complaint’s examples of output reduction allegedly aimed at increasing North American prices demonstrate the point. The Complaint, for instance, alleged that recently, “Tronox and Chemours have been particularly disciplined about their North American sales and production of TiO₂. In 2015, Tronox reduced production at its Hamilton, Mississippi facility by temporarily shutting down a line, and Chemours closed its Edge Moor plant in Delaware and shut down a production line at its New Johnsonville, Tennessee plant.” Complaint ¶24.

not the combination of any of Tronox's and Cristal's foreign assets. According to the Complaint's coordination theory, the proposed transaction would "consolidate[] the overwhelming majority of North American chloride TiO₂ sales and production capacity in the hands of two large and disciplined TiO₂ companies, [New] Tronox and Chemours" and would "enhance[] market transparency among the competitors that remain," thus increasing the "likelihood of coordination" among competing TiO₂ producers in the North American market. Complaint ¶3. According to the Complaint's unilateral output reduction theory, "by doubling the size of Tronox's North American chloride TiO₂ business, the Acquisition would increase the incentive and ability of Tronox ... to discipline its output to influence North American chloride TiO₂ supply and increase prices." Complaint ¶3. Both theories depend on an increase in concentration levels in North America. Neither theory is materially affected by any increase in concentration elsewhere in the world—an issue on which the Complaint is silent—or any competitive issues outside North America.

Lastly, the Complaint's "Notice of Contemplated Relief" confirmed that the alleged theory was limited to addressing concentration within the North American market. The Complaint indicated the Commission could order relief including "[a] prohibition against any transaction between Tronox and Cristal that combines their businesses *in the relevant markets*," or "[a]ny other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Cristal as a viable, independent competitor *in the relevant markets*." Complaint pp.14-15. While these suggested forms of relief were not intended to limit the ultimate relief the Commission may grant, they indicate that the Complaint was primarily concerned with the combination of these companies "in the relevant markets," i.e. the North American market for chloride TiO₂, and did not even attempt to argue for any remedy outside of that market.

In short, by the Complaint's own terms: only the North American chloride TiO₂ market is relevant to the alleged anticompetitive effects here; imports into that market are negligible; competitive conditions in other markets are irrelevant; and the only theories of anticompetitive harm alleged (coordinated and unilateral output reduction) depend solely on the actions of North American producers in North America, not anywhere else in the world. Thus, the worldwide injunction proposed here finds no support in the original allegations in the Complaint that gave rise to this case.

B. The Evidence Complaint Counsel Presented At Trial Does Not Support A Worldwide Injunction.

Throughout trial, the evidence Complaint Counsel presented was consistent with the allegations of the Complaint and limited to the likelihood of anticompetitive effects in the North American chloride market as a result of increased concentration within that market. Complaint Counsel did not present evidence suggesting that other aspects of the proposed transaction would increase the likelihood of anticompetitive effects in North America. In fact, quite the opposite—in their effort to brush aside the procompetitive benefits of the transaction in other markets, Complaint Counsel argued strenuously that competitive effects from the transaction in markets outside North America are *irrelevant* to competition within the North American chloride market. Based on Complaint Counsel's arguments at trial, then, there is no reasonable relationship between the anticompetitive harms Complaint Counsel sought to prove and the aspects of the proposed transaction outside of North America.

Consistent with the Complaint's allegations, Complaint Counsel's pretrial brief argued that imports into the North American chloride TiO₂ market are negligible and therefore immaterial to competition in that market. Complaint Counsel explained that its proposed geographic market

“includes *all* sales of chloride TiO₂ in North America—including imports by foreign suppliers—even *though* imports [into North America] are limited,” CC Pretrial Br. at 16-17 (first emphasis in original, second emphasis added). Complaint Counsel further explained that because “North American customers prefer to source chloride TiO₂ locally, because local supply offers faster order fulfillment, a more responsive supply chain, and greater security of supply.” CC Pretrial Br. at 17. North American customers also do not look outside the North American market for supply on their own because additional costs make arbitrage particularly difficult, and customers prefer a quick turnaround. CC Pretrial Br. at 21-22. Chinese suppliers in particular, Complaint Counsel argued, are not a “meaningful competitive constraint in North America” because “almost all sales of Chinese TiO₂ into North America[] consist[] of sulfate TiO₂, which ... does not provide meaningful competition to chloride TiO₂ in North America.” CC Pretrial Br. at 39. For similar reasons (mostly centered on shipping costs and duties), Complaint Counsel argued that other producers were also unlikely to import additional TiO₂ into North America. CC Pretrial Br. at 43, n.48. Because the North American chloride market, according to Complaint Counsel, is not materially affected by imported TiO₂, the anticompetitive consequences of output reduction in North America, under either a coordinated or unilateral theory, depend on the actions of North American producers in North America. CC Pretrial Br. at 26-36.

Moreover, Complaint Counsel discounted the efficiencies urged by Respondents because those efficiencies pertained to TiO₂ production *outside* North America and were therefore not “likely to impact the chloride TiO₂ market in North America.” CC Pretrial Br. at 46. Likewise, “any post-acquisition output increases at Jazan or Yanbu (both in Saudi Arabia) ... would be unlikely to materially impact the North American TiO₂ market.” CC Pretrial Br. at 52. Complaint Counsel even acknowledged that “Respondents could achieve the ‘ex U.S. synergies’ while

divesting their North American TiO₂ production facilities that are at the core of the anticompetitive effects.” CC Pretrial Br. at 53.

Throughout trial, Complaint Counsel did not deviate from these North America-only arguments. In Complaint Counsel’s proposed findings of fact and conclusions of law, Complaint Counsel once again emphasized that the North American chloride market is not materially affected by TiO₂ manufactured elsewhere in the world. CC FOF ¶141 (“This geographic market includes all sales of chloride TiO₂ in North America regardless of country of origin or supplier and, by definition, includes the [percentage] of North America TiO₂ sales that consist of chloride TiO₂ imported from abroad.”). The small amount of North American imports is not “competitively significant” according to Complaint Counsel. CC Post-Trial Br. at 26. High shipping costs and duties make it difficult to import TiO₂ into North America, so customers cannot engage in arbitrage and import TiO₂ from other regions into North America themselves. CC Post-Trial Br. at 23; CC FOF ¶647. Moreover, North American customers prefer local supply, which provides a quick turnaround for orders. CC Post-Trial Br. at 24. Consistent with this North America focus, Complaint Counsel presented neither evidence nor proposed findings of fact that would suggest any anticompetitive effects arising from the combination of Respondents’ ex-U.S. assets.

Complaint Counsel relied on the same two theories of anticompetitive effects as the Complaint had alleged: coordinated effects and unilateral output reduction, both of which depend exclusively on the actions of North American producers *in North America* and not in the rest of the world. CC Post-Trial Br. at 36-52. After all, if the relevant market is sales of chloride TiO₂ in North America (as Complaint Counsel argued at trial), and imports from the rest of the world have no meaningful competitive impact on that market (as Complaint Counsel also argued at trial), then the transaction’s effects on competitive conditions elsewhere in the world are irrelevant.

Based on this reasoning, Complaint Counsel explicitly argued that the efficiencies Respondents claimed could not be an adequate defense because those efficiencies “would not materially benefit the North American chloride TiO₂ market”—“[i]n indeed, efficiencies outside of the relevant market are not cognizable.” CC Post-Trial Br. at 79. Even though Respondents sought to show that output expansion outside of North America would inure to the benefit of North American customers, Complaint Counsel explicitly rejected that argument based on the fact that the alleged output expansion was *outside* North America.

Finally, Complaint Counsel’s post-trial brief indicated that the Proposed Order should be narrowed from the language Complaint Counsel proposed and that Chief Judge Chappell accepted. Complaint Counsel argued that “the proper remedy [in this case] is an Order prohibiting any transaction between Tronox and Cristal that combines their businesses, *except as may be approved by the Commission.*” CC Post-Trial Br. at 81 (emphasis added). Yet the Proposed Order contains no language authorizing Respondents to seek approval of any other combination of their businesses. CC Post-Trial Br. at Ex. A; ID 123-24.

All of the foregoing shows that the evidence Complaint Counsel presented at trial and the arguments on which Complaint Counsel relied demonstrated (at most) only a likelihood of anticompetitive effects arising from the North American components of the proposed transaction. There was neither evidence nor argument to suggest any anticompetitive effects in the relevant market from the combination of Respondents’ foreign assets. Accordingly, none of the evidence suggests that the worldwide scope of the injunction contained in the Proposed Order bears a reasonable relation to the substantial likelihood of anticompetitive effects in North America that Complaint Counsel sought to prove at trial.

C. The Initial Decision Makes No Findings That Would Support A Worldwide Injunction.

Chief Judge Chappell's Initial Decision accepts most of the allegations in the Complaint based on the evidence presented by Complaint Counsel at trial. As a result, it makes no findings of fact that would support the issuance of a worldwide injunction here, as opposed to an injunction limited to a combination of Tronox and Cristal's North American assets.

Chief Judge Chappell accepted Complaint Counsel's alleged relevant market: sales of chloride TiO₂ into North America. He further found that imports would not have a material effect on competition in that market. First, North American customers do not engage in arbitrage by importing their own supplies of TiO₂ because doing so is expensive, many customers prefer slurry (which presents logistical challenges to import), many customers value on-time delivery (which is facilitated by purchasing locally), and in all events, the supply of TiO₂ available outside North America for importation is small. ID 26-28. Specifically, Chief Judge Chappell found that "[i]mports account for only 3% of North American chloride TiO₂ sales." ID 28.

Chief Judge Chappell also found that the evidence supported Complaint Counsel's theory of coordinated action among remaining North American producers (he did not address Complaint Counsel's theory of unilateral output reduction). ID 34, 43 n.13. His findings depended on effects of the proposed transaction *in North America, caused by North American producers*. Specifically, Chief Judge Chappell focused on the market concentration post-transaction of Tronox and Chemours, both in terms of North American sales and North American capacity, finding that "[w]ith only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier." ID 35. At no point did he rely on sales or capacity data from outside the North American market. Nor did Chief Judge Chappell rely on any

effects from combining Tronox's and Cristal's ex-U.S. assets. Nor did he reference any effect that non-North American production would have on coordinated conduct in the North American market.

Chief Judge Chappell also rejected Respondents' rebuttal evidence, including their evidence of imports into the North American market and the procompetitive effect of output enhancement in other parts of the world as a result of the transaction. Chief Judge Chappell found that Chinese suppliers of TiO₂ would not provide easy or rapid market entry because "only a small amount of chloride TiO₂ is sold by Chinese suppliers to the North American market," and "[c]hloride TiO₂ sales by suppliers other than Tronox, Cristal, Kronos, Chemours, and Venator, accounted for a 0.5% share of the total ... chloride TiO₂ sold in North America in 2016." ID 46. He further held that "it cannot be assumed that expanded chloride TiO₂ production from China in the future, if it occurs, will result in additional supply to the North American market," because China's domestic industry is likely to consume its domestic supply of TiO₂. ID 50. And he rejected Respondents' arguments that global output enhancement as a result of the proposed transaction will benefit North American customers. ID 55.

Chief Judge Chappell also found that Respondents had not "explain[ed] how, or point[ed] to evidence indicating that, improvements in performance and increased output from either the Yanbu plant or the Jazan slagger will benefit the relevant market for chloride TiO₂ in North America." ID 55. That is because "the overwhelming majority of the asserted operating synergies are related to assets outside the United States, and thus outside the relevant North America geographic market," and "[m]oreover, the customers served by Cristal's chloride TiO₂ plant in Yanbu are predominantly located in Saudi Arabia, and none of the TiO₂ grades produced at the Yanbu plant are sold in North America." ID 55. "Furthermore, ... import costs, lead times, and

other logistical and supply issues deter North American customers from importing chloride TiO₂.”
ID 55.

To summarize, like the Complaint’s allegations and Complaint Counsel’s trial evidence, Chief Judge Chappell’s Initial Decision provides no factual findings or other support for a worldwide injunction here. The only anticompetitive effects Chief Judge Chappell found to be likely as a result of the proposed transaction are limited to the market of chloride TiO₂ sales in North America and result from the combination of Respondents assets in the United States. Chief Judge Chappell’s only finding relating to the combination of the parties’ ex-U.S. assets was that the competitive effects of combining those assets are irrelevant to the analysis of the North American market.

II. THE COMMISSION THEREFORE SHOULD AMEND THE PROPOSED ORDER.

The evidence does not support a worldwide injunction. Respondents therefore respectfully request that the Commission amend the Proposed Order so that it does not prevent the possibility of a transaction outside of North America that has been reviewed and approved by eight non-U.S. competition authorities and holds the real possibility of increased production of both feedstock and TiO₂ pigment and hence, in Respondents’ view, would be strongly procompetitive.

A. The Commission Should Enter An Injunction Limited To North American Assets Rather Than The Proposed Order.

As the foregoing analysis shows, at no point during these Part 3 proceedings did Complaint Counsel allege, nor did Chief Judge Chappell find, that a worldwide injunction of Tronox’s proposed acquisition of Cristal was warranted. Yet, the Proposed Order would enjoin Tronox’s entire acquisition of Cristal *around the world*, including non-North American components for which there is no evidence to support the likelihood of anticompetitive effects in North America.

That Proposed Order exceeds the Commission's admittedly broad authority to fashion an appropriate remedy. Blocking the entire worldwide transaction goes far beyond what is necessary to ensure competition within the relevant market.

Respondents propose instead an appropriately narrowed order that would enjoin only the North American aspects of the proposed transaction, while also requiring Respondents to take no action anywhere in the world that would impair the competitive viability of Cristal's North American assets (primarily the two TiO₂ plants in Ashtabula, Ohio and the research and development facility near Baltimore, Maryland). Unlike the Proposed Order, Respondents' Proposed Order *is* reasonably related to the anticompetitive effects that Chief Judge Chappell found would likely result from the proposed transaction. Those effects are limited to the actions of North American producers acting within the North American market.

B. The Proposed Order's Requirement That Tronox Return All Cristal Confidential Information Would Inhibit Ongoing Settlement Discussions.

Settlement discussions between Respondents and staff have continued with substantial progress. Respondents have presented a credible structural remedy based on a "clean sweep" divestiture to a well-capitalized, seasoned chemical industry participant with a proven track record in other FTC remedy transactions. Complaint Counsel is investigating to ensure that the proposed remedy addresses the competitive concerns in the relevant market. This process takes time and resources, and Respondents have invested ample amounts of both in order to respond to the staff's information requests. In the midst of this effort, a prolonged government shutdown occurred which also delayed the process.

Despite those challenges, Respondents and Complaint Counsel are moving closer to ironing out all of the details required to fashion a satisfactory structural remedy. This measured

progress gives Respondents optimism that they will eventually reach a mutually-acceptable resolution with Complaint Counsel. But that process takes time. The Proposed Order, however, places another impediment in the path towards cooperative resolution.

C. The Commission Should Clarify That No Part Of The Order Applies To Respondents' Separate Agreement Regarding The Jazan Smelter.

At the very least, the Commission should clarify in its final order that no injunction applies to Respondents' separate agreement regarding the rehabilitation and future ownership of Cristal's smelter in Jazan, Saudi Arabia. Complaint Counsel was very clear in post-trial briefing that Respondents' option agreement and technical services agreement are "not even part of this proposed transaction," and therefore are beyond the scope of this case, which provided "an independent reason [Respondents'] Jazan claim should be rejected." CC Post-Trial Br. at 77-78. Chief Judge Chappell agreed with Complaint Counsel and made a specific factual finding that "Tronox's February 21, 2017 agreement for the acquisition of Cristal does not include any provisions regarding a purchase of the Jazan slagge." ID 112, F.373; *see also* ID 56 ("Respondents' assertions as to the Jazan slagge are particularly speculative, given that the Acquisition at issue in this proceeding does not even include an acquisition of the Jazan slagge.").

Yet the Proposed Order restricts only Section A of the injunction to the "Proposed Acquisition Agreement" of February 21, 2017. ID 123. The remainder of the order requires Respondents to cease and desist from *any* combination of their businesses and requires Respondents to "return *all* confidential information received, directly or indirectly, from one another," without being restricted to the "Proposed Acquisition Agreement." ID 124. Thus, Sections B, C, and D as currently drafted would plausibly restrict Respondents from continuing to perform under the separate agreements related to the Jazan smelter. Such restrictions bear no

reasonable relation to the likely anticompetitive effects that Complaint Counsel urged or that Chief Judge Chappell found in this case. Alternatively, if it is the Commission's position that the Proposed Order as written does not apply to Respondents' separate agreements regarding the Jazan smelter, then the Proposed Order is unclear and imprecise and must be modified.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Commission enter the Proposed Order attached as Exhibit A as the Final Order resolving this Part 3 proceeding.

January 28, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2019 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 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.

January 28, 2019

By: /s/ Michael F. Williams
Michael F. Williams

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**In the Matter of
Tronox Limited
a corporation,**

PUBLIC

Docket No. 9377

**National Industrialization
Company (TASNEE)
a corporation,**

**The National Titanium Dioxide
Company Limited (Cristal)
a corporation, And**

**Cristal USA Inc.
a corporation.**

REVISED PROPOSED ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. “Tronox” means Tronox Limited, its directors, officers, employees, agents, representatives, successors, and assigns; the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Tronox Limited and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Cristal” means The National Titanium Dioxide Company Limited (Cristal), its directors, officers, employees, agents, representatives, successors, and assigns; the joint ventures, subsidiaries (including Cristal USA), partnerships, divisions, groups, and affiliates controlled by The National Titanium Dioxide Company Limited (Cristal), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Cristal USA” means Cristal USA Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Cristal USA Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “TASNEE” means The National Industrialization Company (TASNEE), its directors, officers, employees, agents, representatives, successors, and assigns; the joint ventures,

subsidiaries (including Cristal), partnerships, divisions, groups, and affiliates controlled by The National Industrialization Company (TASNEE), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- E. “Cristal North American Chloride TiO₂ Production Assets” includes all of Cristal’s assets that are used for the production of chloride TiO₂ in North America, specifically including Cristal’s two chloride TiO₂ plants in Ashtabula, Ohio, the associated facilities in the Ashtabula complex, the research and development facilities located in Baltimore, Maryland that support the Ashtabula plants, and any other assets that are necessary for the operation of the Ashtabula plants.

II.

IT IS FURTHER ORDERED that:

- A. Respondent Tronox and Respondents Cristal, TASNEE, and Cristal USA shall cease and desist from taking any actions, directly or indirectly, that would (i) result in the acquisition, ownership, or control by Tronox of the Cristal North American Chloride TiO₂ Production Assets, or (ii) materially impair the competitive viability of the Cristal North American Chloride TiO₂ Production Assets.
- B. Respondents Tronox, Cristal, TASNEE and Cristal USA shall return all confidential information relating to the North American Chloride TiO₂ market received, directly or indirectly, from one another and destroy all notes relating to such information.
- C. Respondents shall submit a verified written statement within 15 days of the Order becoming final certifying compliance with the requirements of Paragraphs II.A. and II.B. relating to terminating the acquisition agreement and returning/destroying each other’s confidential information, with sufficient detail and supporting documentation to allow the Commission to determine independently that Respondents are in compliance.

IT IS SO ORDERED:

By the Commission.

Dated: January __, 2019

Donald S. Clark
Secretary

Notice of Electronic Service

I hereby certify that on January 28, 2019, I filed an electronic copy of the foregoing Respondents' Appeal of the Initial Decision, with:

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Donald Clark
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I hereby certify that on January 28, 2019, I served via E-Service an electronic copy of the foregoing Respondents' Appeal of the Initial Decision, upon:

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